Fall 2000

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The International Covenant on Civil and Political Rights: A Toothless Tiger?

Kristen D.A. Carpenter*

Great nations like great men must keep their word. When America says something, America means it, whether a treaty or an agreement or a vow made on marble steps.

— President George Bush

I. Introduction

A. Background

In late November 1996, an elderly Danish gentleman named Flemming Ralk was extradited from Germany, where he had been arrested while on a business trip and held for about nine months, to Lincolnton, Lincoln County, Georgia. He awaited trial in the Lincoln County Jail on charges of international fraud. The County detained him for sixty-six days before he was ultimately tried and acquitted. During the time Mr. Ralk was detained, thousands of miles from his Copenhagen home, the jail denied him the medical care and treatment he repeatedly requested and prevented him

* Assistant Professor of Law, Stetson University College of Law. My greatest debt of gratitude is to my husband Christopher for his tireless enthusiasm and continual encouragement surrounding this article and my studies at Yale Law School this past year. In addition, I acknowledge and thank the Honorable Guido Calabresi for his guidance and counsel and Professors William N. Eskridge, Jr. and Paul W. Kahn of Yale Law School, Dean Nancy B. Rapoport of the University of Houston Law Center, and Assistant Professor Catherine A. Rogers of the Louisiana State University, Paul M. Hebert Law Center, for reviewing and commenting on drafts of this article. The faculties of the law schools at which this article was presented, including Stetson University College of Law, the University of Washington School of Law, Nova Southeastern Law Center, and Texas Wesleyan School of Law, provided valuable comments and insight as well. Finally, I thank my colleagues and friends at Altman, Kritzer & Levick, P.C. and the late Mr. Flemming Ralk, whose courage, dignity, and determination continually inspires me.

1 Inaugural Address of 1989, in INAUGURAL ADDRESSES OF THE PRESIDENTS FROM 1789 TO 1989, S. Doc. No. 101-10, at 345, 349 (1989). It was during the Bush Administration that the International Covenant on Civil and Political Rights was ratified by and came into effect for the United States.
from communicating with his family, even over the Christmas and New Year's holidays. As a further indignity, the jail refused to issue sufficient clothing to Mr. Ralk. Instead, he was forced to gather and wear the soiled garments other inmates had discarded. Mr. Ralk suffered debilitating, permanent emotional and physical injury. He was unable to work, and his family described him as "a broken man." My colleagues at Altman, Kritzer & Levick, P.C. and I represented Mr. Ralk in the litigation that stemmed from his detention.

Because Mr. Ralk was a citizen of a foreign nation, he brought suit under both 42 U.S.C. § 1983 and the International Covenant on Civil and Political Rights. Mr. Ralk sued Lincoln County, its sheriff, and its chief jailer in the United States District Court for the Southern District of Georgia in Augusta, Georgia. The district judge assigned to the matter viewed Mr. Ralk's International Covenant claim with great concern. Early in the case, the court sought guidance from the parties as to the appropriate role for the International Covenant to play in the litigation. The court's concern was based upon one of the declarations the United States Senate attached to the Covenant during the ratification process, which stated that the Covenant was to be deemed non-self-executing, and on United States federal case law giving force to this declaration. Based upon this body of law, the court began the case with the assumption that Mr. Ralk could not bring a civil action to enforce the International Covenant. Along the same lines, the court repeatedly characterized Mr. Ralk's case as "just a simple prison case" to which it believed Mr. Ralk was attempting to attach undue significance. In conversations with his attorneys during these difficult times, Mr. Ralk, referencing specific provisions of the Covenant, asked, "Don't these promises mean anything?" This article is an attempt to answer Mr. Ralk's question.


3 Using the same argument that I present in this article, Mr. Ralk demonstrated to the court's satisfaction that he could indeed bring suit under the International Covenant, using the treaty prong of the Alien Tort Claims Act to provide the enabling legislation otherwise missing from the Covenant. See 28 U.S.C. § 1350 (1994) (hereinafter the "Act" or "ATCA"). Beginning on February 23, 2000, an Augusta, Georgia jury heard
Since the United States ratified the International Covenant on Civil and Political Rights in 1992, American courts and scholars have struggled with the proper meaning to be given the Covenant, especially in light of the Senate’s declaration that the Covenant is to be deemed non-self-executing (hereinafter the “Declaration”). This article attempts to provide a comprehensive analysis of what it means for the International Covenant to be non-self-executing, how the Covenant is currently being employed in United States courts, given this limitation, and how the courts may, consistent with the Senate’s intention, nevertheless honor the commitments the United States made to the international community when it ratified the Covenant. I present and critique the proposals of other scholars and then provide a proposal of my own. Like several other scholars, I believe part of the answer lies in using the Alien Tort Claims Act to provide a cause of action to alien plaintiffs under the Covenant. Other theorists have asserted that aliens may bring suit under the first, or “customary international law,” prong of the Act because the Covenant is part of the body of customary international law. What makes this article unique is its primary focus on the Act’s virtually ignored second, or “treaty” prong, under which I propose that aliens may bring suit directly for a treaty violation, without engaging in a limiting customary

Mr. Ralk’s case. After a three-day trial, the jury awarded Mr. Ralk $100,000. Following the verdict, the local newspaper denounced the defendants as having mismanaged the jail and called for immediate reform. See Lincoln County Disgrace, AUGUSTA CHRON. Feb. 27, 2000 (Opinion) at A4 (calling the jail’s treatment of Mr. Ralk “an inhumane abomination that disgraces not only Lincoln County, but our state and nation”); see also Sandy Hodson, Jury Says Sheriff, County Violated Rights, AUGUSTA CHRON. Feb. 25, 2000 (Metro) at B1 (reporting the outcome of the trial). The attorneys’ fees portion of the case is ongoing. Mr. Ralk’s is the only case of which I am aware in which conditions in a United States jail have been found to violate the International Covenant.

4 See discussion infra Part II, Examining What it Means for a Treaty to be Non-Self-Executing.


6 See discussion infra Part IV, Pursuing an International Covenant Claim in Light of the Non-Self-Executing Exception.


8 See discussion infra Part IV (C) (1), Using the ATCA to Bring Suit Under Customary International Law.
international law analysis that dilutes the Covenant’s effect as the supreme law of the United States.9

B. The International Covenant

The purpose of the International Covenant, as stated by the United States Senate Committee on Foreign Relations, is to guarantee “a broad spectrum of civil and political rights, rooted in basic democratic values and freedoms, to all individuals within the territory or under the jurisdiction of the States Party without distinction of any kind, such as race, gender, ethnicity, et cetera.”10 As the Committee further stated, “[t]he Covenant obligates each State Party to respect and ensure these rights, to adopt legislative or other necessary measures to give effect to these rights, and to provide an effective remedy to those whose rights are violated.”11

The United Nations General Assembly adopted the International Covenant unanimously and opened the Covenant for signature on December 19, 1966.12 The International Covenant came into force on March 23, 1976, and was registered that same day.13 There are currently 60 signatories and 144 parties to the treaty.14 On April 2, 1992, the United States Senate gave its advice and consent to the ratification of the treaty.15 The United States ratified the International Covenant on June 8, 1992, and the treaty entered into force for the United States on September 8, 1992.16 The United States attached to its ratification five reservations, five understandings, four declarations, and one proviso.17

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9 See discussion infra Part IV (C) (2), Using the ATCA to Provide Enabling Legislation for the International Covenant.


12 31 I.L.M. at 645.

13 Id.


15 31 I.L.M. at 645.

16 See id.

17 See S. EXEC. REP. NO. 102-23, at 10-21 (1992), reprinted in 31 I.L.M. 645, 653-
58. The exceptions the United States entered to the Covenant are summarized as follows:

The first reservation ensures that the International Covenant's prohibition of certain propaganda will not contravene the First Amendment. See id. at 10-11, reprinted in 31 I.L.M. at 653. The second reserves the right to impose capital punishment for crimes committed by persons aged 16 or older. See id. at 11-12, reprinted in 31 I.L.M. at 653-54. The third limits the prohibition against cruel, inhuman, or degrading treatment to the conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments. See id at 12, reprinted in 31 I.L.M. at 654. The fourth indicates that the United States will continue to impose the punishment in effect at the time of an offense, rather than giving the offender the benefit of any subsequent decrease in penalty. See id. at 12-13, reprinted in 31 I.L.M. at 654. The fifth reservation limits the extent to which the United States ensures the physical separation of juvenile and adult offenders. See id. at 13-14, reprinted in 31 I.L.M. at 654-55.

The first understanding states that the United States considers its domestic anti-discrimination and equal protection law to be consistent with the International Covenant's requirements. See id. at 14-15, reprinted in 31 I.L.M. at 655. The second indicates that, rather than undertaking the Covenant's obligation to provide a right to compensation for illegal arrest and related state misconduct, the United States will continue to provide simply a right to seek compensation. See id. at 15-16, reprinted in 31 I.L.M. at 655-56. The third clarifies that the United States believes its current detention system to comply with the Covenant's requirement that pre-trial detainees and convicted persons be separated physically, except under "exceptional circumstances." Id. at 16-17, reprinted in 31 I.L.M. at 656. The fourth attempts to show that the Covenant's right to secure counsel, right to obtain witnesses, and freedom from double jeopardy are consistent with current United States law on point. See id. at 17, reprinted in 31 I.L.M. at 656. The fifth understanding states that the Covenant's requirement that obligations be extended to the several states will be interpreted so as not to interfere with the United States' federal system. See id. at 17-18, reprinted in 31 I.L.M. at 656-57.

The first declaration, that the Covenant is to be deemed non-self-executing, is the main focus of this article. See id. at 19, reprinted in 31 I.L.M. at 657. The second states that the United States will not limit free speech and certain other rights as permitted by the Covenant and urges the other Parties to take the same position. See id. at 19-20, reprinted in 31 I.L.M. at 657-58. The third declares that the United States will accept the competence of the Human Rights Committee to hear State-to-State complaints under the Covenant. See id. at 20, reprinted in 31 I.L.M. at 658. The fourth clarifies the relationship between the Covenant and other international law as it relates to citizens' enjoyment of domestic natural wealth and resources. See id. at 20-21, reprinted in 31 I.L.M. at 658.

The single proviso, which was proposed by Senator Jesse Helms, states as follows: "Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." Id. at 24, reprinted in 31 I.L.M. at 660; see also John Quigley, The International Covenant on Civil and Political Rights and the Supremacy Clause, 42 DePaul L. Rev. 1287, 1306-07 (1993). Professor Quigley opines as follows:

The intent of the proviso... was to ensure that, even apart from those provisions to which other qualification statements were made, the United States
The application of each of these types of exceptions\(^\text{18}\) to the provisions of the Covenant is controversial. The availability of exceptions makes it possible for States to ratify treaties when they might otherwise be unable (or unwilling) to do so, given the differing obligations imposed by their own domestic law. The following are some reasons why States choose to adopt reservations:

“A State... may wish to be a party to an international agreement while at the same time not yielding on certain substantive points believed to be against its interests.”\(^\text{19}\)

“A State... may wish to be a party to an international agreement while at the same time not binding itself to certain procedural obligations, such as compulsory settlement of disputes in the form specified in a compromissory clause.”\(^\text{20}\)

“A State may wish to assure that its treaty obligations are compatible with peculiarities of its local law.”\(^\text{21}\)

\(^{18}\) I have used the term “exceptions” to describe collectively each of the four different kinds of modifications the United States has made to the Covenant. Another scholar has chosen to use the term “amendments” instead. See M. Cherif Bassiouni, Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate, 42 DePaul L. Rev. 1169, 1177 (1993). I prefer the term “exception” because “amendment” seems to imply a bilateral, contractual interaction between the “amending” Party and other States Parties that does not take place with respect to understandings, declarations, and provisos (although it may take place with respect to reservations). In addition, the term “amendment” is a term of art, and using it to describe all treaty exceptions may create confusion. See Richard W. Edwards, Jr., Reservations to Treaties, 10 Mich. J. Int’l L. 362, 380 (1989) (“Reservations and treaty amendments are not the same things. An amendment may lessen or expand obligations under a treaty, while a reservation normally seeks to reduce the burdens imposed by a treaty on the reserving party.”).

\(^{19}\) Edwards, supra note 18, at 363.

\(^{20}\) Id.

\(^{21}\) Id.
"A State may want to preclude a treaty's application to subordinate political entities in a federal system or to foreign territories for which the State would otherwise have international responsibility."22

A survey of every case decided in the United States to date under the International Covenant is attached as an appendix. The cases cited therein suggest by their own terms that at least three of the factors Edwards discusses, the first, third, and fourth, were important to the United States in its ratification of the International Covenant.

Although treaty exceptions may serve valuable purposes, the use of exceptions has recently come under fire from the United Nations, which has objected to the large number of exceptions the various States Parties have attached to the International Covenant.23 In addition, the United States has placed more exceptions than any other country on three major human rights

22 Id. Focusing specifically on reservations, the United Nations Human Rights Committee recognized similar considerations in its general comment on issues relating to reservations made upon ratification or accession to the covenant or the optional protocols thereto, or in relation to declarations under article 41 of the Covenant:

The possibility of entering reservations may encourage States which consider that they have difficulties in guaranteeing all the rights in the Covenant nonetheless to accept the generality of obligations in that instrument. Reservations may serve a useful function to enable States to adapt specific elements in their laws to the inherent rights of each person as articulated in the Covenant. However, it is desirable in principle that States accept the full range of obligations, because the human rights norms are the legal expression of the essential rights that every person is entitled to as a human being.


23 Id., ¶ 1, reprinted in 34 I.L.M. at 840-41:

As of [November 1,] 1994, 46 of the 127 States Parties to the International Covenant on Civil and Political Rights had, between them, entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations exclude the duty to provide and guarantee particular rights in the Covenant. Others are couched in more general terms, often directed to ensuring the continued paramountcy of certain domestic legal provisions. Still others are directed at the competence of the Committee. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties.
treaties it has ratified recently. Consequently, the international community and American legal scholars have subjected the United States to significant criticism.

C. Giving the Tiger Some Teeth

One of the exceptions for which the United States has been roundly criticized is a declaration providing that the International Covenant is to be deemed non-self-executing. The first part of this article analyzes what it means for a treaty to be non-self-executing. As is further discussed below, despite the Senate's relatively clear statement of what it intended the Declaration to mean, courts employ a variety of their own interpretations. In doing so, courts occasionally exclude even causes of action that

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25 See, e.g., Bassiouni, *supra* note 18, at 1173-74. Bassiouni criticizes the United States' liberal use of treaty exceptions as follows:

The Senate’s practice of de facto rewriting treaties, through reservations, declarations, understandings, and provisos, leaves the international credibility of the United States shaken and its reliability as a treaty-negotiating partner with foreign countries in doubt. United States treaty partners find themselves confronted with what amounts to new treaty provisions or limitations which were not part of their original perception of the treaty. The treaty partners have no alternative but to accept the individual treaty as amended by the United States Senate or to invoke international law to declare the reservation, proviso, or however the Senate may wish to label its amendment, as incompatible with the treaty’s substantive legal obligations.

*Id.*


27 See discussion *infra* Part II, *Examining What it Means for a Treaty to be Non-Self-Executing.*
the Declaration, on its own terms, would permit.

The second portion of the article discusses the manner in which the International Covenant is being applied in American courts currently. American courts are not truly interpreting the International Covenant, but assume its protections to be coextensive with those already provided by the American Constitution. Because of this phenomenon, American attorneys have an incentive to bring suit under the more familiar framework of 42 U.S.C. § 1983, either instead of, or in addition to, the Covenant, whenever possible. Further, unfamiliarity with the requirements of the Covenant by both attorneys and judges has been a factor in the failure of the Covenant to play a more prominent role in human rights litigation in the United States. The result is that the International Covenant is not effectively providing the protections it promises. The gap between rhetoric and reality is particularly acute in cases against non-state actors, which could not be brought under § 1983, but which may be pursued under customary international law. Moreover, conflating the requirements of the International Covenant with the constitutional standards applicable to § 1983 cases erases subtle, but important differences in the respective protections afforded by the International Covenant and the United States Constitution.

The third and final part of the article discusses four possible arguments for narrowing the gap between the International Covenant's promises and the manner in which the Covenant is employed in United States courts. The first is that the Senate's actions in attaching the Declaration were ultra vires. The second is that the Declaration is without effect because a Declaration, unlike a Reservation, is not part of a treaty and does not therefore bind the courts. Both arguments are flawed.

The final two arguments involve using the Alien Tort Claims Act in one of two ways to provide a cause of action to "alien"
plaintiffs. First, under the customary international law prong of the ATCA, there is little doubt that the provisions of the International Covenant constitute evidence of customary international law. Although some courts have allowed plaintiffs to bring International Covenant claims by demonstrating that the Covenant is part of the body of customary international law, it is less than satisfactory to consider the International Covenant, like matters of comity, opinions of scholars, and court decisions, as just one of numerous components of customary international law. When the United States ratified the Covenant, it agreed to the specific terms and conditions contained in the Covenant. Considering the International Covenant as nothing more than “some evidence” of customary international law limits the effect of the Covenant in a manner inconsistent with its status as “the supreme law of the land” and its purpose in protecting individual human rights.

Second, alien plaintiffs may employ the treaty prong of the ATCA in suits against United States defendants to provide the enabling provisions missing from the International Covenant. The United States Supreme Court has never decided either the ultimate question of whether an individual may bring suit under the International Covenant, or even the threshold question, on which my argument relies, of whether an individual may bring a private action under the ATCA.

which the term “alien” may encompass persons other than foreign citizens, such as Native Americans. See infra note 166.


33 U.S. Const. art. VI, cl. 2. Nevertheless, customary international law is the most effective vehicle currently available for alien plaintiffs to bring suit against alien defendants in United States courts. See discussion infra Part IV (C) (1), Using the ATCA to Bring Suit Under Customary International Law.

34 See discussion infra Part IV (C) (2), Using the ATCA to Provide Enabling Legislation for the International Covenant. As the discussion at Part IV (C) (2) notes, this approach has been mentioned previously by others in passing. I have not, however, seen this argument discussed elsewhere in depth.

35 At this time, United States v. Balsys, 524 U.S. 666 (1998), represents the closest the Supreme Court has come to addressing the intended effect of the Covenant on domestic law. In Balsys, the Court alludes to the existence of a dispute regarding the availability of private actions under the ATCA but expressly declines to express an opinion as to the proper outcome. Id. at 695 n.16. See infra note 125 for the lower court
II. An Examination of What it Means for a Treaty to be Non-Self-Executing

Plaintiffs bringing International Covenant claims currently face a significant hurdle, as courts uniformly give effect to the Senate's Declaration, holding the Covenant to be non-self-executing. What it means, however, for a treaty to be non-self-executing is a point upon which neither the courts nor the scholars considering the question are able to agree, despite the relatively clear language employed by the Senate in describing what it intended the Declaration to mean. Indeed, courts limit the effect of the International Covenant further than the Senate intended by employing the Declaration in a broader manner than the Senate contemplated.

In the United States Senate Committee on Foreign Relations Report on the International Covenant, the Committee provides the following statement of its intentions in recommending the Declaration: “For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.” In The Rule of Non-Inquiry and Human Rights Treaties, John Quigley comments upon the Senate Committee's Report, as follows:

The Supreme Court uses the term “self-executing” for treaty clauses that provide rights upon which an individual party may rely in court.

. . . .

When the Senate provided that the . . . [International Covenant was] not to be “self-executing,” it may have intended that the [treaty’s] provisions not be invoked before the courts under any circumstances. However, after the Senate Foreign Relations Committee approved the language that the International

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36 See, e.g., Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000); see also discussion infra notes 41-51 and accompanying text.

37 See discussion infra notes 42-44 and accompanying text.

Covenant should not be deemed "self-executing," the Committee sent a letter to the full Senate explaining that in keeping with the Covenant as self-executing, it intended only to ensure that a private cause of action not be based on the Covenant.\(^9\)

According to the Senate’s report and consistent with Quigley’s analysis, the Declaration should not, for instance, preclude a party from raising the Covenant either defensively or through an existing enabling law.\(^4\) Rather, the Declaration simply prevents a plaintiff from raising the Covenant offensively when there is no independent enabling law applicable. This interpretation of the Declaration is consistent with the expressed intent of the United States Senate in attaching the Declaration.

Some courts and scholars adopt the language of the United States Senate Committee Report, holding that the International Covenant simply creates “no private right of action.”\(^4\) Others,\(^39\)


\(^{40}\) Indeed, in the final section of this article I posit that, in actions by aliens against United States defendants, it is appropriate to use the Alien Tort Claims Act to provide the enabling legislation omitted from the Covenant’s text. See John Quigley, Judge Bork is Wrong: The Covenant is the Law, 71 Wash. U. L.Q. 1087, 1097-98 (1993) (“Even if the Covenant was found not to create a private cause of action in U.S. courts, the Covenant could nonetheless be invoked defensively by an individual against whom legal action is being taken.”). Quigley uses this asymmetry to argue that the law must be changed:

There is little sense in a distinction between affirmative and defensive use of a Covenant right. For example, if an individual may invoke a Covenant provision on nondiscrimination as a defense against some adverse governmental action, why would that same individual not be permitted to use the Covenant in affirmative litigation to protect the same right?

\(^{41}\) See, e.g., White v. Paulsen, 997 F. Supp. 1380, 1385 (E.D. Wash. 1998) (“Where Congress has not enacted authorizing legislation, a treaty gives rise to a cause of action only if it is ‘self-executing;’ i.e., if it either expressly or impliedly creates a private right of action to enforce rights described in the treaty.”) (emphasis added); (citing Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Lit.), 978 F.2d 493, 503 (9th Cir. 1992); Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283 (9th Cir. 1985)); Calderon v. Reno, 39 F. Supp. 2d 943, 956 (N.D. Ill. 1998) (“Treaties made by the U.S. are the law of the land, . . . but if not implemented by appropriate legislation they do not provide the basis for a private lawsuit unless they are intended to be self-executing.”) (emphasis added) (citing U.S. CONST. art. VI, cl. 2; Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)); Jama v.
seeming to ignore the guidance provided by the Committee Report, have adopted one of three different approaches: (1) holding that, when a treaty is not self-executing, the plaintiff lacks standing to enforce the treaty,42 (2) holding that a non-self-executing treaty is not enforceable in United States courts, or (3) holding that a non-self-executing treaty does not create privately enforceable rights43 or is not the law of the land (the Restatement view).44 Each of these three formulations leads to a harsher result United States Immigration and Naturalization Serv., 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (“Unless a treaty is self-executing, it must be implemented by legislation before it can give rise to a private right of action enforceable in a court of the United States.”) (emphasis added) (citing Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976)); see generally Sloss, supra note 24, at 144-52 for another scholar’s analysis of how courts have interpreted the term “non-self-executing”.

42 See, e.g., United States v. Thompson, 928 F.2d 1060, 1066 (11th Cir. 1991) (“We have held that a treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty.”) (emphasis added) (citing United States v. Bent-Santana, 774 F.2d 1545, 1550 (11th Cir. 1985), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990); United States v. Conroy, 589 F.2d 1258, 1268 (5th Cir. 1979)); Dickens v. Lewis, 750 F.2d 1251, 1254 (5th Cir. 1984) (“As the court concluded, individual plaintiffs do not have standing to raise any claims under the United Nations Charter and the other international obligations relied upon by Dickens.”) (emphasis added) (citing Diggs v. Richardson, 555 F.2d 848, 850 (D.C. Cir. 1977)); Kyler v. Montezuma County, No. 99-1052, 2000 WL 93996, at *1 (10th Cir. Jan. 28, 2000) (holding that the International Covenant’s provisions “do not . . . confer rights upon individual citizens and, thus, petitioner does not have standing to bring these claims”) (emphasis added) (citing Diggs, 555 F.2d at 851; Dickens, 750 F.2d at 1254).

43 See, e.g., Igartua de la Rosa v. United States, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (“Appellants’ contention that their right to vote in the presidential election is secured by Article 25 of the International Covenant on Civil and Political Rights . . . is without merit. Even if Article 25 could be read to imply such a right, Articles 1 through 27 of the Covenant were not self-executing, . . . and could not therefore give rise to privately enforceable rights under United States law.”) (emphasis added); Dreyfus, 534 F.2d at 30 (“It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights.”) (emphasis added) (citations omitted); In re Extradition of Cheung, 968 F. Supp. 791, 803 (D. Conn. 1997) (citing Dreyfus, 534 F.2d at 30, for the same holding, adding that this treaty was “ratified with the express proviso that [it is] not self-executing . . . Since Congress has not enacted any implementing legislation, Cheung may not rely on them to avoid extradition”).

than would the Senate Committee’s approach, as each incorrectly suggests that a party cannot raise the International Covenant either defensively or using an existing federal statute such as the ATCA to provide the necessary enabling provisions.

Adding further confusion to International Covenant jurisprudence, some courts combine more than one definition while giving the mistaken impression that they are conveying a single meaning. The court in *Jama v. United States Immigration and Naturalization Service*, for instance, in the same paragraph first incorrectly suggests that “non-self-executing” means that no rights have been created that private parties may enforce and then correctly states that the phrase means simply that no private right of action has been created. Not having a right “enforceable by private parties” suggests that the rights created in the treaty may not be raised by individuals even defensively, while not having a “private right of action” implies that a plaintiff may bring suit under another, enabling, cause of action.

The court in *Hawkins v. Comparet-Cassani* confuses the relevant analysis, as well. In granting the defendant’s motion to dismiss, the court first holds that “treaties are only enforceable in United States courts if either the treaty is self-executing or the Legislature passes legislation implementing the provisions of a treaty.” In the same opinion, the court later holds that “non-self-executing treaties do not create a private right of action under which the plaintiff can successfully state a claim.” As clarified above, the enforceability of a treaty and the availability of a private right of action under a treaty are altogether separate

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45 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (“In order for a treaty to confer rights enforceable by private parties it must be self-executing, that is, a treaty which requires no legislation to make it operative. . . . Unless a treaty is self-executing, it must be implemented by legislation before it can give rise to a private right of action enforceable in a court of the United States.”) (emphasis added) (citing Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); Dreyfus, 534 F.2d at 30).


47 Id. at 1256-57 (emphasis added).

48 Id. at 1257 (emphasis added).
matters.\textsuperscript{49} Further, in \emph{Ralk v. Lincoln County}, the court compounds an earlier United States Court of Appeals for the Eleventh Circuit misconstruction of the Declaration as meaning that an individual lacks standing to bring suit under the treaty.\textsuperscript{50} The \emph{Ralk} court describes this earlier, mistaken Eleventh Circuit holding as being “consistent with the Bush Administration’s [correct] understanding of the term ‘not self-executing’” as meaning that the Covenant “will not create a private cause of action in U.S. courts.”\textsuperscript{51}

The definition of non-self-executing a court employs is critically important and can mean the difference between a petitioner’s life and death. Two recent United States District Court cases, \emph{In re Extradition of Cheung} and \emph{Maria v. McElroy} illustrate this point, each case involves an alien’s attempt to raise the International Covenant defensively to avoid deportation.\textsuperscript{52} In the \emph{Cheung} case, because the court holds that the International Covenant does not “prescribe rules by which private rights may be determined,” it prevents the petitioner from raising the Covenant defensively and ultimately denies all relief.\textsuperscript{53} In the \emph{Maria} case, by contrast, the court holds that, “[a]lthough the ICCPR is non-self-executing, . . . it is an international obligation of the United States

\textsuperscript{49} Similar issues are presented in United States v. Bent-Santana, 774 F.2d 1545 (11th Cir. 1985). The \emph{Bent-Santana} court holds that “it is a settled principle of both public international law and American constitutional law that unless a treaty or intergovernmental agreement is ‘self-executing’—that is, unless it expressly creates privately enforceable rights—an individual citizen does not have standing to protest when one nation does not follow the terms of such agreement.” \emph{Id.} at 1550 (citing Foster v. Neilson, 27 U.S. (2 Pet.) 253, 313-14 (1829); Dreyfus, 534 F2d at'29-30); see also Sloss, supra note 24, at 149-51 (analyzing the \emph{Bent-Santana} court’s interpretation of the term “non-self-executing”). In doing so, the court conflates the “no privately enforceable rights” and “no standing” formulations. Both are incorrect in light of the Senate’s clear explanation of how it intended the Declaration to function.

\textsuperscript{50} 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000).

\textsuperscript{51} \emph{Id.} (citing United States v. Thompson, 928 F. 2d 1060, 1066 (11th Cir. 1991); \textsc{Senate Comm. on Foreign Relations, Report on the Int’l Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 19 (1992), reprinted in 31 I.L.M. 645, 657).}


\textsuperscript{53} 968 F. Supp. at 803 n.17 (citing Dreyfus, 534 F.2d at 29-30).
and constitutes a law of the land.” Having so held, the court grants the petition for writ of habeas corpus, finding that the deportation would violate the International Covenant. The Maria court’s holding is consistent with the plain meaning of the United States Senate declaration, while the Cheung court distorts the Declaration.

III. Current Application of the International Covenant in United States Courts

In its representations to the United Nations, the United States claims that the International Covenant generally imposes few obligations beyond those that the United States Constitution already states. Indeed, the United Nations Human Rights

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54 68 F. Supp. 2d at 231-32 (citation omitted).

55 Id. at 234 (holding that “[t]he fact that the ICCPR creates no private right of action does not eliminate the obligations of the United States and all of its branches of government”).


The rights guaranteed by the Covenant are similar to those guaranteed by the U.S. Constitution and the Bill of Rights.

The overwhelming majority of the provisions of the Covenant are compatible with existing U.S. domestic law.

In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution and laws, both state and federal. Consequently, the United States can accept the majority of the Covenant’s obligations and undertakings without qualification.

Id. at 2, 4, 10, reprinted in 31 I.L.M. at 649, 650, 653. The representations of the United States are echoed in the legal scholarship on the International Covenant. Professor Neier notes as follows:

This lack of interest in the Covenant reflected the view that the protection of liberty within the United States would not be noticeably affected by international agreements, regardless of whether the United States became a party to them. The ACLU, and other organizations concerned with civil rights and liberties, then and now, considered that the liberties of Americans have depended largely on the Constitution of the United States...

Aryeh Neier, Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1233,
Committee criticizes the compliance of the United States with the Covenant, on these very grounds.\(^5\) The United Nations also recently issued a Comment relating more generally to the issues of treaty compliance and the use of treaty exceptions.\(^5\)

Courts take the matter further than is supported by the Senate Committee Report, often proceeding on the assumption that the International Covenant imposes no obligations beyond those already imposed by the United States Constitution. Although the court’s holding in *Ralk v. Lincoln County* allows a private action to be brought under the International Covenant, the court limits the scope of the protection provided by the International Covenant to be coextensive with United States domestic law.\(^5\) It is likely that the decision of the court is predicated on the dearth of United

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58 See General Comment Adopted Under Article 40 On Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant on the Optional Protocols, or in Relation to Declarations Under Article 41 of the Covenant, ( U.N. GAOR, Hum. Rts. Comm., 52d Sess., 1382d mtg., ¶ 21, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in 34 I.L.M. 839, 846 ("[I]nterpretive declarations or reservations [should not] seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.").

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States case law interpreting the International Covenant. The *Ralk* case arises under both 42 U.S.C. § 1983 and Articles 7 and 10 of the International Covenant. Noting the reservation of the United States to Article 7 (limiting the definition of “cruel, inhuman, and degrading treatment” to include only that conduct already prohibited by the Fifth, Eighth, and Fourteenth Amendments), the court holds that the plaintiff’s claims under Article 10 (regarding “inherent human dignity”) “should be measured by the same well-honed standards that our Constitution requires,” notwithstanding the fact that *no reservation was entered to Article 10 to limit its effect to what domestic law already required* (indeed, no reservation whatsoever was entered to that provision). The *Ralk* court, taking note of a reservation to one Article of the Covenant, then applies that same limitation to an unrelated Article to which no reservation was entered. In so holding, the court dismisses Article 10 as “nebulous” and “open-ended,” perhaps because the Article was unfamiliar to the court or because current United States case law does not provide a clear standard of proof for International Covenant claims. The court then expresses its understanding that the Covenant was intended to provide no rights beyond those already protected by domestic law with the statement that this “reading... is entirely consistent with our domestic law, as the President intended.” The discussion below

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60 Id. at 1381-82 (holding that, “[w]hile it is conceivable that Article 10 requires some higher degree of medical care than that required by our Constitution, the Court finds no reasonable basis for such a conclusion”).

61 Id. at 1382.

62 Id. (emphasis added) (holding that “[t]he Court... is very skeptical of charting out a new course in the realm of human rights when our great constitutional tradition has already cleared a well-worn path”); see also Inupiat Cmty. v. United States, 746 F.2d 570, 571-72 (9th Cir. 1984) (in a case involving a Native American community’s attempts to use the Covenant to enjoin oil development in Alaska, holding that, “[a]ssuming these international understandings are applicable, appellants point to no provision... that could be interpreted as imposing upon the United States a greater obligation to protect the subsistence culture of the Natives than that imposed upon the United States by federal domestic law...”); Crow v. Gullet, 706 F.2d 856, 858 (8th Cir. 1983) (in a case involving allegations that state officials were improperly restricting access to traditional Native American religious ceremonial grounds, holding that, “even assuming that... the International Covenant on Civil and Political Rights applied to the state in this case, these provisions did not establish any legal rights or causes of action beyond those recognized under the first amendment”). Both of these cases are of
shows why the *Ralk* court and others that have similarly limited the Covenant's reach to those matters already covered by the United States Constitution have misinterpreted the requirements of the Covenant. 63

Since United States courts do not truly interpret the International Covenant, but rather simply assume its provisions extend no further than those rights already protected by the United States Constitution, attorneys have an incentive to bring suit under 42 U.S.C. § 1983, an area of well-established precedent, whenever possible. 64 The result of this phenomenon is that the International

particular interest to me in light of the argument I make, *infra* at note 166, for extending the coverage of the Alien Tort Claims Act to include Native Americans. Specifically, I propose that the International Covenant be applied when an ATCA claim is available, to Native Americans.

At the same time, however, at least one recent district court opinion acknowledges that the International Covenant may impose obligations beyond those already imposed by domestic law. See *Maria v. McElroy*, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) ("[T]he ICCPR prevents a nation from separating families in a manner that, while in accordance with its domestic law, is nonetheless unreasonable and in conflict with the underlying provisions of the ICCPR.") (emphasis added). I am hopeful that other courts will follow the lead of the United States District Court for the Eastern District of New York.

63 One source of the courts' frequent misunderstanding of the International Covenant may be unfamiliarity with the requirements of the Covenant. Indeed, the United Nations Human Rights Committee has raised this ignorance as a concern. See *Comments on United States of America*, U.N. GADR, Hum. Rts. Comm., 53d Sess., 1413th mtg., ¶ 15, U.N. Doc. CCPR/C/79/Add.50, (1995) ("The Committee regrets that members of the Judiciary both at the federal, state and local levels have not been fully made aware of the obligations undertaken by the State party under the Covenant, and that judicial continuing education programmes do not include knowledge of the Covenant and discussion or its implementation.").

64 Of the twenty-seven International Covenant cases I studied, only six were decided in favor of the plaintiff on International Covenant grounds. Interestingly, most of these cases (twenty-three) were brought against United States defendants; only three of these, however, compared with three of the four cases brought against foreign defendants, were decided in favor of the plaintiff on International Covenant grounds. See Appendix for one way in which the cases may be organized for analysis. As the Appendix shows, even though more cases have been brought against United States defendants than against foreign defendants under the International Covenant, the chances of success appear appreciably higher for claims against foreign defendants. These statistics seem to demonstrate United States courts' uneasiness in applying the International Covenant to United States citizens, particularly when the claims involve action by the United States government. *But cf.* *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) ("[I]nternational law confers fundamental rights upon all people vis-à-vis
Covenant is not effectively providing the protections it intended; a § 1983 claim does not result in protection equal to that of the International Covenant, if the Covenant is fully implemented. Two areas in which this failing is particularly obvious are the respective state action requirements of both § 1983 and the International Covenant, and those areas in which the International Covenant protects rights not expressly recognized in the Constitution.

A. State Action

To establish a violation of rights protected under customary international law including, but not limited to, the International Covenant, it is not always necessary to prove that a state actor was involved in the conduct giving rise to the litigation. The United States Court of Appeals for the Second Circuit addresses precisely this issue in the recent case of *Kadic v. Karadzic*. In *Kadic*, the court holds that "[w]e do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Kadic* and several other recent cases that have held similarly stem from the frequently cited concurring opinion of Judge Harry T. Edwards in *Tel-Oren v. Libyan Arab Republic*, in which he states that there are a "handful of crimes to which the law of nations attributes individual

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65 70 F.3d 232 (2d Cir. 1995).

66 Id. at 239. The *Kadic* court notes that piracy, slave trade, genocide, and certain war crimes are actionable when they are committed by individuals. See id. at 239-40 (citations omitted); see also *Restatement (Third) of the Foreign Relations Law of the United States*, supra note 44, Vol. 1, pt. II, Introductory Note ("Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide."); Doe v. Unocal Corp., 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (holding that forced labor, also known as slave trading, is actionable when done by private actors); Nat'l Coalition Gov't v. Unocal, Inc., 176 F.R.D. 329, 348-49 (C.D. Cal. 1997) (same holding); Beanal v. Freeport-McMoran, Inc., 969 F. Supp. 362, 371 n.5 (E.D. La. 1997) (citing *Kadic*, 70 F.3d at 244, for the proposition that genocide may be found without proof of state action); Jama v. United States Immigration and Naturalization Serv., 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (citing *Kadic*, 70 F.3d at 239-40, for the proposition that, "[d]epending on the nature of the offense, an ATCA claim may be brought against private individuals as well as state actors").
responsibility." Although Judge Edwards names only the crimes of slavery and piracy, the recent opinion of the United States District Court for the District of New Jersey speaks more broadly on the subject, stating that "[n]o logical reason exists for allowing private individuals and corporations to escape liability for universally condemned violations of international law merely because they were not acting under color of law."

By far the most expansive list of international law violations for which no state action is required is suggested in the recent case of Doe v. Islamic Salvation Front. In that case, the court holds that "crimes against humanity, war crimes, hijacking, summary execution, rape, mutilation, sexual slavery, murder," piracy, slave trade, kidnapping, and cruel treatment and torture are all "proscribed by international law against both state and private actors." The court bases its holding on both the broad language of Common Article 3 of the Geneva Convention, which addresses many of these acts, and the Kadic court's holding that "offenses of universal concern" [are] capable of being committed by private actors. In summary, although it remains unclear exactly which violations of international law may be alleged against both private and state actors, it is uncontroversial that some such subset of violations exists. It is equally uncontroversial that, when the same facts are alleged that might have supported any item in this subset, a plaintiff who brings suit under §1983 will lose if she is unable to prove state action.

B. Constitutional Gaps

Despite the many exceptions the Senate attached to the ratification of the International Covenant by the United States, the

68 See id. at 794.
69 Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 445 (D.N.J. 1999). Despite its broad rhetoric, however, the court ultimately decides the case on more conventional grounds, finding that the plaintiff has alleged facts sufficient to demonstrate state action.
71 Id. at 5, 7-8.
72 Id. at 7 (citing Kadic, 70 F.3d at 240).
Covenant requires more comprehensive protection for some human rights than is required by the text of the United States Constitution. The following are some of the areas in which the International Covenant protects rights not expressly recognized by the Constitution:

“The Covenant protects ethnic and linguistic minorities, including the right of the latter to use their own language. The U.S. Constitution is silent.”

“The Covenant protects the right of privacy in the family, home, or correspondence. The U.S. Constitution is silent except with respect to the home.”

“The Covenant prohibits medical or scientific experimentation without consent by the subject. The U.S. Constitution is silent.”

“The Covenant requires that a defendant must be informed [of his legal rights and the charges against him] in a language which he understands and have free assistance of an interpreter in court. The U.S. Constitution is silent.”

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74 I differentiate between the text of the United States Constitution and the interpretative case law that has emerged surrounding the Constitution. Like Neier, I believe the Covenant's express recognition of many rights currently protected in the United States only by judicial decisions interpreting the Constitution provides an important additional measure of security for those rights that are not yet so firmly established as to be virtually unabrogable. See Neier, supra note 56, at 1236-37 (1993).

75 Neier, supra note 56, at 1237 (footnote omitted). Neier's point is that there are rights recognized in the United States but not protected by the express language of the Constitution. He argues that, to the extent these protections are available, "it is as a consequence of judicial decisions interpreting the U.S. Constitution or as a result of state constitutional or federal and state statutory provisions." Id. Neier believes that, even as a non-self-executing treaty, the International Covenant is valuable because it expressly recognizes these and the other rights discussed in this section. See id. He believes that courts are likely, over time, to "shap[e] their decisions to conform to international standards to which the United States has now proclaimed its adherence." Id. I have omitted many of Neier's examples that pertain to matters (such as the prohibition against sex discrimination) that, while not recognized in the express language of the Constitution, are nevertheless sufficiently well-established by interpretive case law that their abrogation by subsequent courts seems extremely unlikely. Indeed, Neier acknowledges this point. See id. at 1238 (noting that "it seems unlikely that the courts will turn their backs on the line of judicial decisions of the past two decades that prohibit sex discrimination").

76 Id. at 1237 (footnote omitted).

77 Id. (footnote omitted).

78 Id. at 1238 (footnote omitted).
"The Covenant requires equality of the rights of spouses [as to decisions made regarding the marriage.] The U.S. Constitution is silent."\(^79\)

"The Covenant requires the availability of commutation of a death sentence. The U.S. Constitution is silent except with regard to federal offenses."\(^80\)

"The Covenant . . . take[s] a more expansive view than U.S. law on the presumption of [a criminal defendant's] innocence [with regard to affirmative defenses]."\(^81\)

The International Covenant "prohibit[s] . . . the execution of pregnant women, [while] sixteen states in this country still have laws which would permit such executions."\(^82\)

Because a number of gaps exist between the International Covenant and United States domestic law, the assumption of the courts that the two are equivalent results in the courts' effectively both writing out, as the Ralk court did, those portions of the International Covenant that protect rights not expressly recognized in the United States Constitution and their relying totally on interpretive case law to protect those rights.

IV. Pursuing an International Covenant Claim in Light of the Non-Self-Executing Exception

I have examined below four different means of bringing a successful International Covenant claim in light of the non-self-execute-
executing declaration, ordering the arguments from least persuasive to most persuasive. Previous scholars have presented the first three arguments, while the last is my own argument, originally inspired by the opinion of the United States Court of Appeals for the Eleventh Circuit in Abebe-Jiri v. Negewo\textsuperscript{83} and now affirmed by the United States District Court for the Southern District of Georgia in Ralk v. Lincoln County.\textsuperscript{84} First, some scholars argue that the Senate’s Declaration was ultra vires.\textsuperscript{85} Second, others attempt to show that the Declaration, while not ultra vires, is without legal effect because, a declaration unlike a reservation is not part of the treaty and therefore should not bind the courts.\textsuperscript{86} Third and fourth are arguments for using the Alien Tort Claims Act in one of two ways to provide a cause of action under the International Covenant: (1) under the Act’s customary international law prong,\textsuperscript{87} or (2) under the Act’s treaty prong.\textsuperscript{88} The two prongs of the ATCA, taken together, constitute the best approach to International Covenant claims available under current law.

A. Claiming the Senate’s Declaration Is Ultra Vires

One way to avoid the non-self-executing declaration is to argue, first, that the Senate had no power to declare the treaty non-self-executing (as this declaration is within the proper realm of the Judiciary, rather than the Legislature) and, second, that the International Covenant is the type of treaty courts traditionally have found to be self-executing. As is discussed below, this argument enjoys some popularity among scholars but has not found support in existing United States case law. The difficulty with this theory is that the President, as the treaty-maker for the

\textsuperscript{83} 72 F.3d 844 (11th Cir. 1996), cert. denied, 519 U.S. 830 (1996).
\textsuperscript{84} 81 F. Supp. 2d 1372 (S.D. Ga. 2000).
\textsuperscript{85} See discussion infra Part IV (A), Claiming the Senate's Declaration is Ultra Vires.
\textsuperscript{86} See discussion infra Part IV (B), Claiming the Senate Declaration is of No Effect.
\textsuperscript{87} See discussion infra Part IV (C) (1), Using the ATCA to Bring Suit Under Customary International Law.
\textsuperscript{88} See discussion infra Part IV (C) (2), Using the ATCA to Provide Enabling Legislation for the International Covenant.
nation, has the authority to negotiate the terms of a treaty. The Senate, as part of the advice and consent process, has the authority to condition its consent upon exceptions such as the non-self-executing declaration. The President may then either accept or reject the conditions upon which the Senate has predicated its consent. Once the treaty has been ratified, courts have the authority to determine whether the treaty is to be deemed self-executing. In doing so, however, the courts give controlling weight to expressions of the treaty-maker's intent, such as a non-self-executing declaration.

In *The Rule of Non-Inquiry and Human Rights Treaties*, Professor John Quigley states that, "[u]nder established precedent, the courts, rather than the Senate, decide whether a treaty provision is self-executing." He goes on to state that "U.S. courts routinely hold rights provisions in treaties to be self-executing." Despite Professor Quigley's support of this theory, none of the treaties involved in the cases he cites in support of these two statements contains a declaration that it is to be deemed non-self-executing. Professor Quigley acknowledges that the current Restatement runs counter to his theory, but he maintains that the Restatement view is unjustified:

[T]he Restatement of the Foreign Relations Law of the United

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90 See *id.* at 496.

91 See *id.*

92 See *id.* at 496-98; *see also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1892) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of legislature, whenever it operates of itself without the aid of any legislative provision."); *overruled in part on other grounds* by United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).


94 Quigley, *supra* note 39, at 1231 (citing *Foster*, 27 U.S. at 314; Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985) (involving the United Nations Charter)).

95 Quigley, *supra* note 39, at 1236 (citing United States v. Calderon-Medina, 591 F.2d 529, 531 (9th Cir. 1979) (involving the Vienna Convention on Consular Relations); United States v. Rauscher, 119 U.S. 407, 427-29 (1886) (involving the extradition treaty between the United States and Great Britain)).
States maintains that a Senate reservation or understanding of non-self execution binds the courts. The Restatement view might seem justified based on the rationale that a greater power includes a lesser power. The Constitution, however, in giving the Senate the power of consent to treaties, did not contemplate any power of imposing a condition. The Constitution granted the President the power to negotiate treaties, and the Senate the power to give advice and to grant (or withhold) consent. The import of this provision is that the Senate may make suggestions to the President (the advice function) and then may say "yea" or "nay" to the treaty (the consent function). While a President who ignores the Senate's advice runs the risk that the Senate may withhold consent, the Constitution does not contemplate a power in the Senate to impose terms not contained in the treaty as negotiated by the President. The Senate enjoys a veto power, not a power of revision.

96 Restatement (Third) of the Foreign Relations Law of the United States provides in relevant part as follows, with regard to non-self-executing treaties:

Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation. An international agreement of the United States is "non-self-executing" if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or if implementing legislation is constitutionally required.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (1987); see also id. at § 111, cmt. c ("Some international agreements of the United States are non-self-executing and will not be applied as law by the courts until they are implemented by necessary legislation."). Comment d to § 303 provides as follows:

The Senate often has given its consent subject to conditions. Sometimes the Senate consents only on the basis of a particular understanding of the meaning of the treaty, or on condition that the United States obtain a modification of its terms or enter a reservation to it... The Senate may also give its consent on conditions that do not require change in the treaty but relate to its domestic application, e.g., that the treaty shall not be self-executing...; or that agreements or appointments made in implementation of the treaty shall require the Senate's advice and consent.

Id. at § 303 comment d (citations omitted).

97 Quigley, supra note 39, at 1233 (footnote omitted); see also Quigley, supra note 81, at 63-64. Professor Quigley states as follows:

The Senate declaration has uncertain legal status. It is neither an Act of
Congress, having the force of federal law, nor a reservation to the Covenant, having all the authority of treaty law under the Supremacy Clause. The declaration has effect only insofar as it bears upon a judicial appraisal of the Covenant's force. This appraisal is not a fait accompli; it is not clear how much weight the Senate's declaration will carry with the courts.

Quigley, supra note 81, at 63-64 (footnotes omitted). Accord Quigley, supra note 17, at 1298. Professor Quigley makes the following argument:

The Senate, by including this "declaration" on non-self-execution, has implicitly asserted a power to determine that treaty provisions are not self-executing. However, this is a function normally exercised by the courts, which decide whether a particular treaty, or a particular treaty provision, is one that grants rights enforceable before the court.

Quigley, supra note 17, at 1298. It is possible to make a corollary argument that the non-self-executing declaration is the sort of declaration that the United Nations has indicated is invalid. The United Nations Human Rights Committee has demonstrated, through its statements on point, that it does not consider all reservations and declarations to be valid. See General Comment Adopted Under Article 40 On Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant on the Optional Protocols, or in Relation to Declarations Under Article 41 of the Covenant, U.N. GAOR, Hum. Rts. Comm., 52d. Sess., 1382d mtg., ¶¶ 9, 11, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in 34 I.L.M. 839, 842-43:

[A] State [may not] reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant . . . . The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. . . . Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy.

Id. To the extent that the Declaration "reserve[s] an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant," it would therefore be invalid. Id. In addition, a strong argument could be made that providing implementation of the Covenant is "an important supportive guarantee[,]" operating at the national level and thus "essential to its structure and purpose" and not subject to derogation. Id.

Indeed, it is possible to take this argument even further, claiming that no exceptions to the International Covenant are appropriate. See William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party? 21 Brook. J. INT'L L. 277, 291 (1995) (stating that "[a]n argument can be made that all of the Covenant's substantive provisions are essential to its 'object and purpose,' and that, as a consequence, reservation to any provision is illegal"). Although the exception with which this article is concerned is a declaration, rather than a reservation, similar reasoning should hold in this context. In addition, should the declaration be proven to operate as a reservation, it will be interpreted as such. See infra note 110.
Professor Quigley’s viewpoint is echoed by Professors Stefan Riesenfeld and Frederick Abbott:

We believe that the Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to the ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate’s declaration is not law. The Senate does not have the power to make law outside the treaty instrument.98

Despite these early predictions just after the ratification of the International Covenant, the Senate Declaration carries controlling weight with the courts. Such weighting is the correct result in that, contrary to the assertions of Quigley, Riesenfeld, and Abbott, the United States Senate has the power to condition its consent to a treaty upon the entry of exceptions to the treaty.99 The President and the Senate work together in the treaty-making process, each having a separate role.100 Although only the President negotiates the treaty, the Senate has several options in performing its function


99 See The Constitution of the United States of America: Analysis and Interpretation, supra note 89, at 496 (analyzing U.S. Const. art. II, § 2, cl. 2); see also Power Auth. v. Fed. Power Comm’n, 247 F.2d 538, 541 (D.C. Cir. 1957) (“Unquestionably the Senate may condition its consent to a treaty upon a variation of its terms.”); Recent Case, Power Authority v. F.P.C., 71 Harv. L. Rev. 368, 369 (1957) (“Article II of the Constitution provides that the Senate must advise and consent to the making of treaties by the President, but says nothing about reservations. It has always been assumed, however, that the Senate may give its consent subject to such conditions as it may attach.”) (footnote omitted).

100 See The Constitution of the United States of America: Analysis and Interpretation, supra note 89, at 496.
of providing advice and consent. The Senate may give its unconditional consent to a proposed treaty, it may refuse consent, or it may condition its consent upon the entry of one or more exceptions to the treaty. The President may, in turn, accept any conditions the Senate requires or may abandon the negotiations.

Aside from my disagreement with the first part of Professor Quigley’s argument, if a court found the Senate’s Declaration to be ultra vires, the court would then need to determine whether the International Covenant is the type of treaty that courts consistently find to be self-executing. The Ninth Circuit has developed a four-part test, now employed nationwide, that considers the following factors in determining whether a treaty is self-executing:

- the purposes of the treaty and the objectives of its creators;
- the existence of domestic procedures and institutions appropriate for direct implementation;
- the availability and feasibility of alternative enforcement methods; and
- the immediate and long-range social consequences of self or non-self-execution.

"[I]n applying this test, the Ninth Circuit has found ‘that it is the first factor that is critical to determine whether an executive agreement (or treaty) is self-executing, while the other factors are most relevant to determine the extent to which the agreement is self-executing.’"105

Each court that has considered the Saipan test in the International Covenant context has determined that the United States Senate declaration, as the best evidence of the parties'
intent, controls the issue and precludes further analysis. This assumption seems to follow logically from the fact that the President, the treaty-maker for the nation, acquiesced in the Declaration, such that it seems appropriate to assume that the Declaration reflects his intention that the treaty be non-self-executing. Whether, however, the President, declared by the Constitution to be the "treaty-maker" for the nation, is also properly to be considered the "creator" of the treaty for the purposes of analyzing the treaty under the terms provided in \textit{Saipan}, is beyond the scope of this article.\footnote{Assuming, for the purposes of argument, that the United Nations, rather than the President of the United States, could be deemed the "creator" of the treaty for \textit{Saipan} purposes, one could use the following language from United States v. Benitez, 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998), to argue that the United Nations intended the treaty to be self-executing:}

Professor Quigley argues that, under the \textit{Saipan} test, courts should deem the International Covenant self-executing:

First, the obvious purpose of a treaty provision granting a particular human right is that the contracting parties afford all persons that right. Second, certain domestic procedures and institutions are appropriate for direct implementation—namely, the courts. Third, methods of enforcement other than domestic courts are weak. Fourth, the immediate and long-range social consequences of non-self-execution are serious because the individuals may be subjected to onerous deprivations of rights.\footnote{Quigley, \textit{supra} note 39, at 1236-37; see also Quigley, \textit{supra} note 17, at 1301. Professor Quigley further argues as follows:}

\begin{quote}
The intent of the ICCPR is to provide international protection for the civil and political rights of the individual, as well as economic, social, and cultural rights. . . . By its language, the ICCPR does not purport to regulate affairs between nations. Rather, the ICCPR is an international agreement prescribing how each state party is to treat individuals within its jurisdiction. . . . In addition, . . . the Human Rights Committee . . . states that the ICCPR is not a mere exchange of obligations between states, but rather, a human rights treaty which is "for the benefit of persons within their jurisdiction." . . . The Committee Comment further declares, "The intention of the Covenant is that the rights contained therein should be ensured to all those under a State's [sic] party's jurisdiction."
\end{quote}

\textit{Id.} at 1363-64. The \textit{Benitez} court clearly found the intent of the United Nations was to create rights that would be enforceable by individuals. This analysis is supported by several recent United Nations pronouncements suggesting that the U.N. may have intended all international human rights treaties to be self-executing. \textit{See supra} note 97.
The difficulty with this argument, as indicated above, is that the Saipan test directs courts to consider the intent of the treaty-maker as controlling. With regard to the International Covenant, it seems clear that the President, as the treaty-maker for the nation, intended that the treaty be non-self-executing. Thus, it seems unlikely that a court will accept the argument that the Senate’s declaration is ultra vires.

B. Claiming the Senate Declaration is of No Effect

A second possible approach to avoiding the non-self-executing declaration is to argue that the Senate’s act, while not ultra vires, is nevertheless without legal effect because the Declaration is not part of the treaty and therefore should not bind the courts. Those scholars presenting this argument assert that this approach is consistent with the reasoning of Power Authority v. Federal Power Commission, a case in which the United States Court of Appeals for the District of Columbia Circuit holds that a Senate reservation to a treaty operates as a declaration, despite its label, and is therefore without legal effect insofar as the exception purports to modify the United States’ international obligations. Importantly, the Power Authority case involves a reservation, rather than a declaration. As is discussed below, because Senate mislabeled the non-self-executing exception to the International Covenant a declaration, rather than a reservation, reasoning such as that presented by the Power Authority court actually militates against the conclusion that the exception is of no effect.

The International Covenant on Civil and Political Rights falls into the category of treaties that the courts have called “self-executing.” The parties clearly intend that the various rights guaranteed should inure to the benefit of individual persons. That, to be sure, is the only reason for a treaty on human rights. A human rights treaty confers rights on individuals. It is not merely a promise by States to promote rights, but a promise to protect rights in the concrete, in any situation where they are jeopardized.

Quigley, supra note 17, at 1301.

108 See supra notes 104-05 and accompanying text.


110 It is important to note that the parties’ description of a given provision as a reservation or a declaration will not be controlling. See Richard D. Glick, Environmental
The Power Authority case concerns a reservation to the 1950 treaty between the United States and Canada regarding Niagara Falls.\footnote{See generally Power Auth., 247 F.2d at 540.} Under the reservation in question, the United States retains the right to enact domestic legislation in the future concerning the disposition of the water on the United States’ side of the Falls.\footnote{See id.}

As an initial matter, the Power Authority court holds as follows:

The parties agree that, if the reservation to the 1950 treaty is not “Law of the Land,” the [lower court] order should be set aside. Since the reservation did not have the concurrence of the House of Representatives, it is not “Law of the Land” by way of legislation. The question is whether it became “Law of the

\begin{footnotesize}
\textit{Justice in the United States: Implications of the International Covenant on Civil and Political Rights, 19 HARV. ENVTL. L. REV. 69, 101-02 n.152 (1995) ("The characterization of a given statement as a reservation, declaration, or understanding is not important; a statement will be considered as a ‘reservation’ if it purports to function as one.") (citing RESTATEMENT, supra note 44, at § 313, cmt. g). Comment g provides as follows:}

When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state’s legal obligation. Sometimes, however, a declaration purports to be an “understanding,” an interpretation of the agreement in a particular respect. Such an interpretive declaration is not a reservation if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.


It is not always easy to distinguish a reservation from a declaration as to a State’s understanding of the interpretation of a provision, or from a statement of policy. Regard will be had to the intention of the State, rather than the form of the instrument. If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State’s understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

\textit{Id. (footnote omitted).}
\end{footnotesize}
In finding that the reservation was not "Law of the Land," the court rejects the following argument:

[T]he reservation is an effective part of the treaty because (1) it was a condition of the Senate’s consent to the ratification of the treaty; (2) the condition was sanctioned by the President, was "accepted" by Canada, and was included in the exchange of ratifications; and (3) it "thus became a part of the Treaty."

In rejecting this argument, the court holds as follows:

[T]he reservation... made no change in the treaty. It was merely an expression of domestic policy which the Senate attached to its consent. It was not a counter-offer requiring Canadian acceptance before the treaty could become effective. That Canada did "accept" the reservation does not change its character. The Canadian acceptance, moreover, was not so much an acceptance as a disclaimer of interest. It is of some significance in this regard that the Canadian Government, although it had submitted the original treaty to the Parliament for its approval, found it unnecessary to resubmit the treaty to Parliament after the reservation was inserted. Also significant is the fact that the President ratified the treaty with the reservation without even waiting for Canada to "accept."

In contrast, the court holds, "A true reservation which becomes a part of a treaty is one which alters 'the effect of the treaty in so far as it may apply in the relations of the State with the other State or States which may be parties to the treaty.'" Applying the reasoning of the Power Authority Court to the International Covenant, the Senate should have labeled the non-self-executing exception a reservation, rather than a declaration. From this

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113 See id.
114 Id.
115 Id. at 541.
116 Id. (citation omitted).
117 Other scholars similarly question the Senate's labeling of the various exceptions it imposed on the International Covenant. See Bassiouni, supra note 18, at 1174-75.

If the Senate intended all of these labels to be deemed equivalent to "reservations," why did it use other terms? Could it be that the Senate's intent has been to create purposeful confusion between international legal obligations and national implementation? How will judges acting pursuant to Article VI of
point, applying the holding of the Power Authority court to the non-self-executing exception actually results in the finding that the exception is effective. A declaration, by definition, does not modify the international obligations of a State but merely expresses the State’s own domestic policy. To understand why the non-self-executing exception modifies the obligations of the United States under international law and must therefore be the Constitution be bound by such language, if at all? The ICCPR will surely be the subject of litigation in U.S. courts. In that event, how will courts interpret these different labels and their contents? The “cluttering” of treaties promotes neither legislative clarity nor judicial economy.

In the case of treaties whose import is to create national legal rights, the dichotomy between the international and domestic legal significance of a “reservation” or the like becomes more troublesome. In Article 2, the ICCPR establishes certain legal and administrative obligations by conferring on individuals certain legal and administrative rights. How can these rights be internationally binding yet nationally unenforceable? Unfortunately, the Senate’s reservations, understandings, and provisos attached to the ICCPR create this precise result.

Bassiouni, supra note 18, at 1174-75. Accord Quigley, supra note 40, at 1102.

Under the Covenant, the Senate’s declaration on self-execution does implicate the rights of other states parties. Under Article 2, they have a right to expect that the United States will permit domestic enforcement of Covenant-guaranteed rights. If the United States fails to do that, the rights of the other states parties are violated. This fact makes the Senate’s declaration on self-execution of the Covenant closer to a reservation than was true of the Senate statement regarding electrical power under the U.S.-Canada treaty.

Quigley, supra note 40, at 1102 (footnote omitted); see also Glick, supra note 110, at 106 n.172.

The Netherlands entered a statement declaring that the understandings and declarations of the United States [to the International Covenant] were not reservations, do not modify the obligations of the United States, and do not limit the competence of the Human Rights Committee to apply its interpretation of Articles 2(1) and 26 [of the Covenant] to the United States. . . . States who want to enter reservations should be forced to call them reservations and not be allowed the political benefit of disguising them as understandings.

Glick, supra note 110, at 106 n.172 (citation omitted). But see Comments on United States of America, U.N. GAOR, Hum. Rs. Comm., 53d Sess., 1413th mtg., ¶ 12, U.N. Doc. CCPR/C/79/Add.50 (1995) (“The Committee . . . notes with satisfaction the assurances of the government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States.”).
considered a reservation, rather than a declaration, consider the following: in ratifying the International Covenant, the United States made certain specific promises to the international community, arguably including the promise to provide a neutral forum for the resolution of disputes arising under the International Covenant. When a foreign citizen seeks to bring suit under the

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118 For the purposes of this argument, I put aside the fact that, if the non-self-executing exception is a reservation, rather than a declaration, then it was not made in accordance with the appropriate procedure and may therefore be ineffective for that reason. Importantly, however, even if the exception is deemed ineffective as a reservation, the United States remains bound by the International Covenant. See Quigley, supra note 17, at 1302 ("International law follows a rule comparable to the ultra vires rule in corporation law to protect other States Parties. Under this rule, a state is bound by a treaty despite an internal defect in the process leading to its adherence, unless the defect was obvious and fundamental."); see also Power Auth., 247 F.2d at 543-44 (citations omitted).

It is argued that, since the reservation was a condition to the Senate’s consent to the treaty, to deny effect to the condition vitiates the consent and thus invalidates the whole treaty. That argument, we think, was disposed of by the Supreme Court in New York Indians v. United States, 170 U.S. 1, 18 (1898). . . . That case involved a treaty with certain Indian tribes. The Senate in its resolution of consent to the treaty, had attached certain amendments and declared that “the treaty shall have no force or effect whatever . . . nor shall it be understood that the senate have assented to any of the contracts connected with it until the same, with the amendments herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of said tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto.” . . . The amendments which the Senate attached to its resolution consenting to the treaty, as the Supreme Court recognized, were not communicated to the Indian tribes. The Court concluded that the amendments were not part of the treaty. It nevertheless treated the Senate’s consent as effective to make the treaty valid and operative.

Power Auth., 247 F.2d at 543-44 (citations omitted).

119 See International Covenant on Civil and Political Rights, adopted Dec. 9, 1966, 999 U.N.T.S. 171, 174, reprinted in 6 I.L.M. 368, 369, which provides as follows:

Each State Party to the present Covenant undertakes:

To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative, or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
International Covenant in a United States court against a proper defendant over whom the court has personal jurisdiction and the court invokes the non-self-executing exception to prevent her from doing so, the so-called Declaration affects the United States' performance of its international obligations, just as a declaration is definitionally unable to do.

I conclude that reasoning such as that presented by the Power Authority court actually leads to the opposite result than that for which it is normally cited in this context. The Power Authority holding, properly applied, supports the conclusion that the non-self-executing exception is a reservation, rather than a declaration and, as such, must be given legal effect.

C. Using the Alien Tort Claims Act

When the plaintiff is not a United States citizen, the Alien Tort Claims Act may be used one of two ways, consistent with the non-self-executing declaration, to bring suit under the International Covenant. First, the Act may be used to bring suit for a violation of customary international law. Second, the ATCA may be used to bring suit for a treaty violation. The first approach is presented by other scholars. Although I believe it to be a flawed argument, this approach remains the best available option for alien plaintiffs to bring suit against alien defendants in United States Courts. Notwithstanding the availability of this approach, I argue that the second approach is preferable to allow alien plaintiffs to sue United States defendants.

The Alien Tort Claims Act provides as follows: "The district

To ensure that the competent authorities shall enforce such remedies when granted.

Id.

120 See discussion infra Part IV (C) (1), Using the ATCA to Bring Suit Under Customary International Law.

121 See discussion infra Part IV (C) (2), Using the ATCA to Provide Enabling Legislation for the International Covenant.

courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It is not necessary for the plaintiff to show that relief is unavailable under domestic law to proceed under the ATCA. It is common, for instance, to plead under both 42 U.S.C. §1983 and the International Covenant (through the ATCA) in a single case, when both are available.

In addition, the majority view is as follows:

"It is unnecessary that plaintiffs establish the existence of an independent, express right of action [to invoke the ATCA], since the law of nations clearly does not create or define civil actions, and to require such an explicit grant under international law would effectively nullify that portion of the statute which confers jurisdiction over tort suits involving the law of nations... Rather, a plaintiff seeking to predicate jurisdiction on the Alien Tort Statute need only plead a "tort... in violation of the law of nations."


\[124\] See Jama v. United States Immigration and Naturalization Serv., 22 F. Supp. 2d 353, 364 (D.N.J. 1998) ("There is nothing in the ATCA which limits its application to situations where there is no relief available under domestic law.").

\[125\] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D. Cal. 1987) (citation omitted). There remains, however, a split of authority among the United States Circuit Courts of Appeals as to whether a private cause of action exists under the ATCA. Indeed, each of the cases standing for the proposition that no private cause of action exists under the International Covenant comes from a circuit in which the availability of a private cause of action under the ATCA either has been rejected or has not been addressed at the Circuit Court of Appeals level. See, e.g., Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. 1984); White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998).

The Igartua de la Rosa decision, for example, stands for the proposition that an individual may not bring suit under the International Covenant. See 32 F.3d at 10. The opinion does not, however, address whether an International Covenant claim might be brought under the ATCA. Indeed, I have been able to identify no case from the United States Court of Appeals for the First Circuit addressing the existence of a private right of action under the ATCA. The United States District Court for the District of Massachusetts, however, has not only found a private right of action under the ATCA, but has also allowed an individual to recover civil damages under the ATCA for violations of the Covenant. See Xuncax v. Gramajo, 886 F. Supp. 162, 179, 184-85 (D. Mass. 1995) ( awarding compensatory and punitive damages for torture and arbitrary
An area of considerable confusion is the extent to which the status of the United States as a party to a given treaty should be relevant to claims brought under the Alien Tort Claims Act. The treaty prong of the ATCA should be employed only in an action against a United States defendant, as the treaty prong applies only to "a treaty of the United States," and whether the United States is a party to any given treaty has no apparent relevance to an action brought against a foreign actor for action that occurred outside the United States. Conversely, when the treaty prong of the ATCA is employed in an action against a United States defendant, it is appropriate to consider whether the United States is a party to the treaty under which the action is being brought.

Likewise, it is appropriate to bring suit against a foreign actor for action occurring abroad only under the customary international law prong of the ATCA. When an action is brought under this second prong of the Act, whether the United States is a party to a given treaty would seem to be one factor in, but not the controlling factor in determining, whether that treaty’s provisions may be considered part of customary international law. Indeed, as is discussed below, treaties not yet ratified by the United States are often raised against United States defendants using this very approach.

Some courts manage this analysis correctly. Many opinions detention under the ATCA, on the grounds that several of the plaintiffs’ claims “constitute fully recognized violations of international law,” including the International Covenant.

Along the same lines, many courts have cited Judge Robert Bork’s concurring opinion in Tel-Oren, 726 F.2d at 799-823, for the proposition that no private right of action exists under the International Covenant. In his concurrence, Judge Bork states not only that no private cause of action exists under the Covenant, but also that no private cause of action exists under the ATCA. See id.; see also White, 997 F. Supp. at 1383. The White court relied upon the opinion in Tel-Oren to reach its decision that no private right of action exists under the International Covenant and did not address the ATCA. See White, 997 F. Supp. at 1383.


127 See discussion infra Part IV (C) (1), Using the ATCA to Bring Suit Under Customary International Law.

128 See, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1979) (holding that, "where the lex loci delicti commissi is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred. . . . Here, where . . . the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are
in this area, however, do not follow this pattern. Rather, when suit is brought against foreign citizens in United States courts for conduct occurring abroad under the customary international law prong of the ATCA, the courts often undertake an exhaustive analysis of the United States’ obligations under whatever treaty is being claimed to represent customary international law.\(^\text{129}\) Again, I

consistent with the foreign law, state court jurisdiction would be proper”) (citations and footnote omitted). The court goes on to hold as follows:

Should the district court decide that the [choice of law] analysis requires it to apply Paraguayan law, our courts will not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred.

\(^{id.}\) at 889 (footnote omitted). See also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (D.C. Cir. 1984) (Edwards, J., concurring) (“Here, as in Filartiga, the action at issue undoubtedly violated the law of the nation in which it occurred (in this case, the law of Israel.”) (citing Filartiga, 630 F.2d at 889)); Xuncax, 886 F. Supp. at 187 (“The fact that the parameters of a norm otherwise recognized under international law are tied in this country to constitutional interpretation, . . . does not compel the conclusion that no aspect of the norm can qualify as international law. Where American constitutional law and international law overlap, the voice of this country as part of the consensus rendering the proposition in question a rule of international law is simply embodied in domestic constitutional directives.”).

\(^{129}\) See, e.g., Abebe-Jiri v. Negewo, No. 1:90-CV-2010-GET, 1993 WL 814303, at *4 (N.D. Ga. Aug. 20, 1993). Although what is alleged in the Abebe-Jiri case is a series of wrongful acts on the part of an Ethiopian citizen, the court undertakes an analysis only of the United States’ own obligations under the Torture Convention, the treaty relevant to that case, in reaching its decision to hold the defendant liable thereunder. See id. (“In October 1990 the Senate gave its advice and consent to this Convention with the reservation that the United States considers itself bound by Article 16 of the Convention regarding cruel, inhuman, and degrading treatment or punishment to the extent that this term has the same meaning as the kind of cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, or Fourteenth Amendment of the United States Constitution.”); see also Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. TREATY Doc. No. 100-20 (1988), reprinted in 23 I.L.M. 1027.

In addition, the concurring opinion by Judge Robert Bork in Tel-Oren creates similar confusion. 26 F.2d at 808-09. Although the action was brought against a non-United States defendant, Bork’s opinion focuses on the fact that, although numerous treaties are cited, the United States is a party only to a fraction of those under which suit has been brought. Bork goes on to state that, “[o]f the five treaties in force, none provides a private right of action.” \(^{id.}\) at 809 (Bork, J., concurring).

The parties often, similarly, focus on the international obligations of the United States. See Filartiga, 630 F.2d at 880 n.7 (2d Cir. 1979) (citing the plaintiffs’ theory that, although they are proceeding primarily under customary international law (and even
argue that the United States’ own interpretation of its international law obligations is of only limited importance in determining what the law of nations requires.

One possible explanation for this phenomenon is that the courts may believe the United States, through its ratification of the treaty in question, now has an obligation to provide a neutral forum for violations of the treaty, and that this obligation makes the United States’ status as a party to the treaty relevant to the court’s analysis. Indeed, many of the cases in which ATCA claims are brought against foreign citizens for actions occurring abroad speak of the importance of the United States’ role as a neutral forum.\textsuperscript{130} Certainly, acting as a neutral forum is an important function that American courts do and should serve.\textsuperscript{131} This

\textsuperscript{130} See, e.g., Filartiga, 630 F.2d at 879-80 (noting that, while the Defendant had claimed “that Paraguayan law provides a full and adequate remedy for the wrong alleged, . . . Dr. Filartiga has not commenced such an action, . . . believing that further resort to the courts of his own country would be futile”) (footnote omitted); Denegri v. Republic of Chile, No. 86-3085, 1992 WL 91941, at *1 (D.D.C. April 6, 1992) (“The families of [the torture victims] brought criminal charges in the Santiago civilian courts. . . . However, plaintiffs state that because of the Pinochet regime’s legal system it would be impossible to ever obtain justice in that country.”) (citation omitted); Xuncax, 886 F. Supp. at 169, 178 (D. Mass. 1995) (noting the plaintiffs’ claims that they “have been exiled from their native country” and have, without apparent success, attempted to pursue the matter in a Guatemalan court).

\textsuperscript{131} “Under the law of nations, states are obliged to make civil courts of justice accessible for claims of foreign subjects against individuals within the state’s territory.” \textit{Tel-Oren}, 726 F.2d at 783 (D.C. Cir. 1984) (citing J.L. \textsc{Oppenheim}, \textsc{International Law} § 165a, at 366 (H. Lauterpacht ed., 8th ed. 1955)).

If the court’s decision constitutes a denial of justice, . . . or if it appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state. A private act, committed by an individual against an individual, might thereby escalate into an international confrontation. \textit{Tel-Oren}, 726 F.2d at 783 (citation omitted) (citing J.L. \textsc{Brierly}, \textsc{The Law of Nations} 284-91 (4th ed. 1963)).

The language of the International Covenant itself lends further support to this proposition. Article 2.1 provides as follows:

\begin{quote}
Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion,
\end{quote}
consideration, however, may easily cloud the relevant analysis outlined above. Specifically, it is important to remember that, although the courts of the United States may be available under certain circumstances to individuals who have been wronged elsewhere, such individuals cannot become possessed of greater substantive rights by bringing suit in the United States than they would have under the law of the country where the wrong occurred.  

1. Using the ATCA to Bring Suit Under Customary International Law

When either the United States is not a party to a treaty upon which the plaintiffs wish to rely, or the United States is a party, but the treaty is not self-executing, plaintiffs may use such treaties as bases for suits under customary international law, using the Alien Tort Claims Act to provide a jurisdictional basis for the suit. This approach, though flawed, remains the best option
under current law for aliens suing other aliens under the International Covenant in United States courts for wrongful acts occurring outside the United States.

At least one court, however, holds that a plaintiff may not rely upon customary international law when there is a treaty in effect that may cover the same issues. In the case of In re Extradition of Cheung, the court first rejects the defendant’s attempt to avoid extradition on treaty grounds, finding that the International Covenant and the Covenant Against Torture are non-self-executing.\(^{134}\) Second, the court rejects the customary international law argument as well, holding that, “[o]nly ‘where there is no treaty, and no controlling executive or legislative act or judicial decision’ will resort be made to customary international law.”\(^{135}\) The Cheung case illustrates why using customary international law to assert violations of the International Covenant is not sufficient. In that case, the court holds that, “[s]ince there is a treaty that provides for the conditions under which a relator may contest extradition, customary international law will not apply.”\(^{136}\) If the Covenant had been raised under the treaty prong, as I argue is the preferable approach when it is available, a proper analysis would have required that the Cheung court consider both the extradition treaty and the International Covenant, each in light of the other, rather than simply ignoring the Covenant.

To establish a claim under § 1350 using customary international law, three substantive elements must be established: “(1) an alien [must] sue[] (2) for a tort (3) committed in violation customary international law.”); Filartiga, 630 F.2d at 880 n.7 (holding that Plaintiffs “primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather than independent sources of law”). Personal jurisdiction plays an important role in limiting those cases that ultimately are brought in United States courts. Several of the cases cited above involve foreign plaintiffs and defendants who came to the United States, sometimes many years after the events giving rise to the litigation, to live and work.

\(^{134}\) 968 F. Supp. 791, 803 n.17 (D. Conn. 1997) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

\(^{135}\) Cheung, 968 F. Supp. at 803 n.17. The Cheung court, in reaching its holding, cites the venerable United States Supreme Court decision in The Paquete Habana. See id. (citing 175 U.S. 677, 700 (1900)); see also discussion infra note 142 and accompanying text.

\(^{136}\) Cheung, 968 F. Supp. at 803 n.17.
of the law of nations." The court must also "determine whether the alleged conduct sets forth a violation of the law of nations... first, whether there is an applicable norm of international law and, second, whether it has been violated." Determining whether there is an applicable norm of international law requires courts to determine what constitutes customary international law (which is sometimes called the law of nations). Courts have defined the sources of customary international law in a number of different ways. According to the Restatement, "customary international law results from a general


138 Id. (citing Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995)); Martinez v. City of Los Angeles, 141 F.3d 1373, 1383 (9th Cir. 1997) (citing the same test, quoting Trajano v. Marcos (In re Estate of Ferdinand E. Marcos Human Rights Litig.), 978 F.2d 493, 502 (9th Cir. 1992)).

139 It is important to distinguish customary international law and "the law of nations" from jus cogens norms of international law, which are also mentioned in a number of cases in this area. Unlike customary international law and the law of nations, which are based upon the agreement of nations to be bound by certain principles, jus cogens norms are not predicated upon consent. Rather, "[j]us cogens norms of international law comprise the body of laws that are considered so fundamental that they are binding on all nations whether the nations have consented to them or not." Hawkins v. Comparat-Cassani, 33 F. Supp. 2d 1244, 1255 (C.D. Cal. 1999) (citation omitted). Thus, near-global acceptance of certain norms binds even those nations that have not consented to them. See Nat'l Coalition Gov't v. Unocal, Inc., 176 F.R.D. 329, 345 n.18 (C.D. Cal. 1997) (quoting Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992): The Court noted in National Coalition as follows:

As defined in the Vienna convention on the Law of Treaties, a jus cogens norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.... While jus cogens and customary international law are related, they differ in one important respect. Customary international law, like international law defined by treaties and other international agreements, rests on the consent of states." Id. See also Hawkins, 33 F. Supp. 2d at 1255 (citing Siderman, 965 F.2d at 714-15) ("To determine the scope of jus cogens international law, courts look to several different sources including treaties, state practice, legal decisions, and works of noted jurists."); cf. Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d. Cir. 1980) (in the customary international law context, holding that "[t]he requirement that a rule command 'the general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law").
and consistent practice of states which is followed by them from a sense of legal obligation.”

The Restatement provides as follows, with regard to the sources of international law:

In determining whether a rule has become international law, substantial weight is accorded to
judgments and opinions of international judicial and arbitral tribunals;
judgments and opinions of national judicial tribunals;
the writings of scholars; [and]
pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.\textsuperscript{141}

Perhaps the most-cited formulation of what constitutes customary international law, however, is found in \textit{The Paquete Habana}, which states as follows:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.\textsuperscript{142}

Other courts have employed similar formulations.\textsuperscript{143}


\textsuperscript{141} \textit{Restatement}, \textit{supra} note 44, at § 103 (2).

\textsuperscript{142} 175 U.S. 677, 700 (1900) (citation omitted).

\textsuperscript{143} \textit{See, e.g., Jama}, 22 F. Supp. 2d at 362 (“Highly relevant to the inquiry whether
Applying the formulas used by the courts in this section, for a litigant to establish that the provisions of the International Covenant upon which he has relied constitute customary international law, it will be helpful to refer not only to the existence of the treaty, but also to other sources in which the same or similar provisions are treated as binding, such as judicial opinions, law review articles, other international law instruments, and international custom. Because determining what constitutes customary international law requires a court to consider the collective weight of many sources and does not contemplate the court’s relying upon a single item such the International Covenant, using the International Covenant to prove a violation of customary international law is a flawed approach. As the result the court reached in the case of In re Extradition of Cheung illustrates, a treaty is less effective than it should be when it is applied as customary international law. The United States, in ratifying the international law confers a fundamental right upon all people are treaties (such as the United Nations Charter), internationally or regionally adopted covenants or declarations of human rights and foreign policy goals of the United States and other countries in the field of human rights."; Xuncax, 886 F. Supp. at 184 (stating that "courts are guided by 'the usage of nations, judicial opinions and the works of jurists' as 'the sources from which customary international law is derived'") (citing Filartiga, 630 F.2d at 884); Jean v. Nelson, 727 F.2d 957, 964 (11th Cir. 1984) (holding that "diplomatic protests, international arbitrations, and court decisions" are other ways to establish customary international law); In re Extradition of Demjanjuk, 603 F. Supp. 1468, 1477 n.5 (N.D. Ohio 1985) ("'International law' develops from a number of sources, including treaties and conventions, international declarations and charters, and the customs and usages of civilized nations.") (citations omitted); Martinez, 141 F.3d at 1383-84 (9th Cir. 1997) ("For guidance regarding the norms of international law, courts may look to court decisions, the work of jurists and the usage of nations.") (citing Siderman, 965 F.2d at 714-15); Nat'l Coalition Gov't, 176 F.R.D. at 345 ("The norms of the law of nations are found by consulting juridical writings on public law, considering the general practice of nations, and referring to judicial decisions recognizing and enforcing international law.") (citing Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995)).

As an aside, however, at least one court has found that the absence of case law on point may actually help support an argument that a certain standard is part of customary international law. See Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 424 (2d Cir. 1987). In finding that "it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law," the court held that "the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas." Id.

International Covenant, made a very specific set of promises to the international community. For these specific promises now to be diluted by being considered as simply some evidence of customary international law, weakens the Covenant in a manner that is inconsistent with its status as the “supreme Law of the Land” and a major international human rights treaty. In addition, because at least one court rejects a litigant’s attempt to present an International Covenant claim under customary international law, given the existence of another treaty on point, using the Covenant in this manner is not only inappropriate, but also risky. Since no cause of action is available in United States courts under the ATCA’s treaty prong for actions against non-United States actors, however, bringing suit under the customary international law prong remains the best approach available for such actions under current law.

2. Using the ATCA to Provide Enabling Legislation for the International Covenant.

The final approach to the non-self-executing problem is to use the treaty prong of the Alien Tort Claims Act to bring an International Covenant claim. This approach is available only for claims by alien plaintiffs against United States defendants. The essence of this argument is that the Alien Tort Claims Act may provide the enabling legislation that was omitted from the International Covenant. The United States District Court for the Southern District of Georgia recently approved this argument, which is inspired in part by the United States Court of Appeals for


148 One court’s opinion and one treatise make reference to the possibility of making the argument I present in this section. I have not, however, seen it explored or explained at any length. See Jama, 22 F. Supp. 2d at 365. (“It is plaintiffs’ position that the ATCA constitutes the implementing legislation with respect to ICCPR and read together ICCPR and ATCA constitute a waiver of sovereign immunity under ATCA.”). The Jama court decides the case before it, however, on sovereign immunity grounds and does not address the “implementing legislation” argument. See id; see also Stephens & Ratner, supra note 123, at 58-60 (1996).

the Eleventh Circuit's opinion in *Abebe-Jiri v. Negewo*.

Although the Eleventh Circuit's opinion in *Abebe-Jiri* provides almost no analysis of the court's holding, the court allows the Alien Tort Claims Act to provide the enabling legislation to support the plaintiff's International Covenant claim.

At the lower court level in *Abebe-Jiri v. Negewo*, the United States District Court for the Northern District of Georgia addresses civil claims by two Canadian citizens and one Ethiopian citizen against an Ethiopian political official. These claims are based upon cruel and inhumane treatment and torture the plaintiffs and their families suffered during the "Red Terror" in Ethiopia in 1977 and 1978. The plaintiffs' claims are brought under the ATCA. In evaluating the plaintiffs' ATCA claim, the court holds as follows:

The Alien Tort Statute... provides for subject matter jurisdiction in cases brought by aliens for "torts committed in violation of the law of nations." In this case, the wrongs claimed by plaintiffs are torts under international law... The evidence... establishes that each of the plaintiffs was subjected to cruel, inhuman and degrading treatment or punishment. The prohibition against such treatment is found in all of the major human rights treaties, including the International Covenant on Civil and Political Rights.

Having found violations by the defendants of the International Covenant and the Convention on Torture, both instruments to which the United States is a party, the court awards plaintiffs both compensatory and punitive damages on their ATCA claim.

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150 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996). Notably, the Eleventh Circuit is among those circuits that have found a private right of action under the ATCA. See supra note 125 (explaining why this background is critical to the analysis on which this article rests).

151 See *Abebe-Jiri*, 72 F.3d at 848. Because, however, the *Abebe-Jiri* case involves a suit against a foreign citizen, I acknowledge that the correct approach in that case would have been to bring suit under the customary international law prong of the ATCA. See 28 U.S.C. § 1350 (1994).


153 See id. at *1.

154 See id. at *4.

155 Id.

156 Id.
The Eleventh Circuit has now affirmed the District Court’s holding.\(^{157}\) The Eleventh Circuit specifically rejects the defendant’s argument that no private right of action exists under the ATCA.\(^{158}\) The court holds that “the Alien Tort Claims Act confers both a forum and a private right of action to aliens alleging a violation of international law.”\(^{159}\) Although the court’s opinion includes much of the language traditionally associated with a customary international law analysis, the court does not allow the plaintiff’s International Covenant claim under the first, or “customary international law” prong of the ATCA, but rather, under the second, or “treaty” prong of the Act. The Eleventh Circuit does not engage in the traditional customary international law analysis, in affirming the plaintiff’s International Covenant claim. Indeed, rather than employing the \textit{Beanal} test for a customary international law claim, which is described above, or taking into account judicial opinions, scholarly works, and other treaties, for example, the court simply relies upon the two international law instruments, the International Covenant and the Torture Convention, in reaching its decision.\(^{160}\) Such a direct approach is not contemplated by the normal customary international law analysis, and this fact compels the conclusion that the court proceeded under the ATCA’s treaty prong, instead. The United States District Court for the Southern District of Georgia recently affirmed this interpretation of the \textit{Abebe-Jiri} decision.\(^{161}\)

For reasons untenable, the treaty prong of the Alien Tort Claims Act has been largely ignored:

The ATCA permits suits for torts in violation of the “law of nations” \textit{and} for torts in violation of “a treaty of the United States.” The recent cases from \textit{Filartiga} forward have relied

\(^{157}\) \textit{Abebe-Jiri}, 72 F.3d at 848.

\(^{158}\) \textit{Id.}

\(^{159}\) \textit{Id.}

\(^{160}\) See \textit{id.} at 845; see \textit{generally} \textit{Beanal} v. Freeport-McMoran, Inc., 969 F. Supp. 362, 370 (E.D. La. 1997); see also discussion \textit{supra} notes 137-38 (demonstrating the traditional customary international law analysis).

\(^{161}\) See \textit{Ralk} v. Lincoln County, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000) (“On the basis of the Eleventh Circuit’s \textit{Abebe-Jiri} decision, it appears to the Court that [the plaintiff] could bring a claim under the Alien Tort Claims Act for violations of the ICCPR.”).
almost entirely upon demonstrating that the torts sued upon violate the law of nations, even though many of the torts that violate customary international law also violate treaties and conventions to which the United States is a party. The reluctance to argue that torts violate the treaty provision of the ATCA has forced plaintiffs to engage in the much more complex exercise of demonstrating violations of the law of nations. . . .

The paucity of § 1350 cases brought as violations of treaties reflects U.S. judicial hostility to enforcing treaties at the behest of private parties.\(^{162}\)

The most logical reading of the treaty prong of the Alien Tort Claims Act is that it presents an additional and valid, approach to employing the International Covenant in light of the non-self-execution declaration. One argument for enforcing, rather than ignoring, this part of the Act is that the treaty prong language, if it is interpreted otherwise, will be rendered a nullity. Because the historical approach of the United States to statutory interpretation generally requires a reader to assume that no part of a statute is a nullity, this approach compels United States courts to consider the appropriate meaning of the treaty prong.\(^{163}\) The most reasonable meaning of this prong is that it provides a second means by which claims may be brought for the violation of non-self-executing international treaties:

Despite the courts' restrictive view of treaty enforcement, §1350 does present the litigator with valid arguments to avoid the "self-executing" requirement. The argument begins with the premise that no language in § 1350 should be read as a nullity or as redundant: the treaty branch of the statute, therefore, was included for a purpose. Since "self-executing" treaties can be enforced under the "arising under" jurisdiction of § 1331, the treaty provision of § 1350 would serve no purpose if it were limited to such "self-executing" treaties and would, in effect, be deleted from the statute. Therefore, in order to give meaning to the treaty provision of the ATCA, it must be read as allowing


\(^{163}\) See Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) ("There is a fundamental principle of statutory construction that a statute should not be construed so as to render any part of it 'inoperative or superfluous, void or insignificant. . . .'") (citation omitted).
enforcement of some treaties that are not self-executing.164

When it is available, the treaty prong of the Alien Tort Claims Act is the best way, under current law, for alien plaintiffs to bring suit under the International Covenant. This approach is preferable to the customary international law approach because it avoids inappropriate dilution of the promises of the Covenant and avoids the problem, illustrated by the Cheung holding, of ignoring the Covenant when another treaty exists on point.165 As explained above, the treaty prong is available only in actions by alien plaintiffs against United States defendants.166

164 STEPHENS & RATNER, supra note 123, at 59-60 (footnotes omitted).


166 See 28 U.S.C. § 1350 (1994). If the Alien Tort Claims Act may indeed be used to bring suit on behalf of "alien" plaintiffs, one interesting question is who may be deemed an "alien" within the meaning of the Act. Can, for instance, the Act be used to allow Native Americans to bring suit under the International Covenant?

Historically, American courts "labeled the indigenous population as 'aliens and foreigners,' notwithstanding that Euro-Americans entered the country, more recently, as immigrants." Guadalupe T. Luna, Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked" Knife, 4 MICH. J. RACE & L. 39, n.162 (1998) (citing Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 419-20 (1856), superseded by U.S. CONST. amends. XIII, XIV); see also Jonathan C. Drimmer, The Nephews of Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States, 9 GEO. IMMIGR. L.J. 667, 690 (1995) (citing Dred Scott, 60 U.S. at 404, for the proposition that "Native Americans were aliens who could only become citizens through federal naturalization procedures"). "[U]nlike other children of aliens born on United States soil who formed a birthright compact with the national community regardless of their parentage, Native Americans, like Asian-Americans, could not be birthright citizens." Drimmer, supra, at 691.

Although Congress passed the Dawes Act in 1924, granting birthright citizenship to Native Americans, it has been said that Native Americans still are not recognized as Fourteenth Amendment Citizens, but rather as "statutory citizens" who enjoy somewhat fewer rights and privileges than "Constitutional citizens." See 8 U.S.C. § 1401 (1994); Anna Williams Shavers, A Century of Developing Citizenship Law and the Nebraska Influence: A Centennial Essay, 70 NEB. L. REV. 462, 515 (1991) ("There are consequences attached to the method of acquiring citizenship, resulting disparate (sic) treatment. Any category of statutory citizenship is subject to amendment or even repeal."). It is, for example, unclear whether a statutory citizen is eligible to be President. See id. at 515 ("The Supreme Court has stated that 'naturalized' citizens are ineligible for the Presidency. Therefore, if statutory citizens are considered to be naturalized citizens, rather than birth-right citizens, they would not be eligible for the presidency.") (footnote omitted).

Along the same lines, the United States recognizes two doctrines of birthright
3. An Argument of Last Resort—Using the Covenant to Interpret Existing Domestic Law

Finally, even if a party is unsuccessful in using the arguments this article has presented to bring suit under the International Covenant, she should be able to use the International Covenant to interpret existing domestic law. Even before the International Covenant was ratified, American courts employed the Covenant in

[Text continues with detailed legal arguments and citations, not fully transcribed here due to length and complexity.]
this manner. In the case of *Lipscomb v. Simmons*, for example, the court used the International Covenant, which the United States had not yet then ratified, to find a violation of the constitutional right to associate with family members. Along the same lines, in *Thompson v. Oklahoma*, the Supreme Court used the International Covenant to find that execution of the juvenile defendant would be unconstitutional. With this possibility in mind, even if a litigant is unsuccessful in raising her International Covenant claim directly, the court should consider the Covenant in interpreting domestic law. Although United States courts have effectively written out those portions of the International Covenant that might impose protections beyond those already provided by the United States Constitution, it is ironic to note that the International Covenant has, for many years and even prior to the United States’ ratification of the treaty, been used quietly to expand the Constitution.

V. Conclusion

The United States’ issuance of a valid declaration that the International Covenant on Civil and Political Rights is to be

167 884 F.2d 1242, 1244 n.1 (9th Cir. 1989) (holding that “[t]his right is so fundamental that it has been recognized in the . . . International Covenant on Civil and Political Rights, . . . among other international human rights agreements”).

deemed non-self-executing precludes an across-the-board application of the Covenant in United States courts at this time. Indeed, perhaps the best long-term solution is a political one, in which Senators are urged to allow treaties to provide the rights and protections they promise, by either declaring that they are to be self-executing or by refraining from declaring that they are not and permitting the courts to decide this issue. In the meantime, the task remains to determine what effect the Covenant may appropriately have in United States courts today. Currently, consistent with both the Senate Declaration and the body of case law that has developed in this area, the Alien Tort Claims Act may be used to provide alien plaintiffs with a cause of action under the International Covenant.\footnote{American plaintiffs, unfortunately, must continue to bring suit under 42 U.S.C. § 1983, with all of its limitations. \textit{See generally} 42 U.S.C. § 1983 (1994).} When suit is brought against alien defendants, it should be approached under the customary international law prong of the Act; when suit is brought against United States defendants, the treaty prong of the Act should be employed. One possible area in which this approach, though insufficient to provide a global solution, may be expanded is by further exploring the extent to which plaintiffs other than foreign citizens, such as Native Americans, might fall within the Act's definition of "alien." Ultimately, I hope that by showing that the best use of the International Covenant at this time is an incomplete solution that compromises the intent of the treaty, this article will encourage reform in the United States' flawed treaty-making process to effectuate fairer and more humane results in the future.
Appendix

Analysis of International Covenant Caselaw to Date

I. Twenty-Three Cases Against American Defendants:

A. Five decided on other grounds:


B. Three held that the International Covenant provides no more protection than the United States Constitution:

Inupiat Cmty. v. United States, 746 F.2d 570, 571-72 (9th Cir. 1984); Crow v. Gullet, 706 F.2d 856, 858 (8th Cir. 1983); Ralk v. Lincoln County, 81 F. Supp. 2d 1372, 1382-83 (S.D. Ga. 2000).

C. Eight rejected the claim due to the Non-Self-Executing Declaration:


D. Two used the International Covenant to construe constitutional rights:

Thompson v. Oklahoma, 487 U.S. 815, 831 (1988); Lipscomb
v. Simmons, 884 F.2d 1242, 1244 (9th Cir. 1989).

_F. Two used the International Covenant as part of customary international law, under the Alien Tort Claims Act:_


_G. One used the International Covenant defensively without requiring enabling legislation:_


_H. Two found no conflict between the International Covenant and domestic law:_


**II. Four Cases Against Non-U.S. Defendants:**

_A. One involved a suit against a foreign nation (and thus raised a different set of issues not relevant to this article):_


_B. Two used the International Covenant, under the Alien Tort Claims Act, to raise issues of customary international law:_


_C. One used the International Covenant under the treaty prong of the Alien Tort Claims Act:_

Abebe-Jiri v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).