2004

Enforcement of International Human Rights by Domestic Courts in the United States

M. Shah Alam

Follow this and additional works at: http://digitalcommons.law.ggu.edu/annlsurvey

Recommended Citation
Available at: http://digitalcommons.law.ggu.edu/annlsurvey/vol10/iss1/3

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfisher@ggu.edu.
ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW BY DOMESTIC COURTS IN THE UNITED STATES

M. SHAH ALAM

I. INTRODUCTION

While there are sufficient norms of international law to regulate protection and promotion of human rights worldwide, these norms are not accompanied by sufficiently strong international mechanisms to enforce them in state territories. On the other hand, the potential of domestic courts to enforce international norms has remained largely unused. There exist widely divergent perceptions of the states regarding the relationship between international law and domestic law. This explains why state practice on domestic implementation of international law varies greatly.

Country specific studies reveal a very interesting picture of domestic implementation of the norms of international law, especially international human rights norms. Undoubtedly, the United States would make the most interesting and peculiar country specific case study of the problem of domestic enforcement of international human rights law.

The U.S. practice in this regard is a bundle of contradictions. While the constitutional position of domestic enforcement of international law in

---

* This is one of the articles on a related topic, materials for which were collected and worked out by the author during his stay as a Senior Fulbright Scholar at New York University School of Law in 2002. The author wishes to express his thanks to the authorities of NYU School of Law and the Fulbright Program for assistance.

** Professor of Law, Faculty of Law, University of Chittagong, Bangladesh.
the United States would seem most ideal, the practical aspects of it are not. However, the U.S. practice more than any other national jurisdiction sheds light on the complex nature of the problem of domestic enforcement of international human rights law.

The U.S. Constitution, Article VI provides that "...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\(^1\) On the other hand, the U.S. Supreme Court has ruled that customary 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."\(^2\)

Both treaties and international customs supersede all inconsistent state and local laws and also earlier inconsistent federal laws, but not the Constitution. This position is congenial to domestic enforcement of international human rights law.\(^3\) In reality, however, the legal position is marred by series of exceptions and deviations, which, in fact have become laws themselves to hide the actual legal position.

Division of treaties into self-executing and non-self-executing, and discretion of the organs of the state to declare any treaty non-self-executing has substantially narrowed constitutional scope for direct application of treaties.\(^4\) On the other hand, *Filartiga v. Pena-Irala*\(^5\) notwithstanding, the U.S. courts are often found reluctant to engage in vigorous intellectual exercises to construct customary international laws from universal state practices and apply them within their jurisdiction.

1. U.S. Const. art. VI, § 2.
2. The Paquete Habana, 175 U.S. 677, 700 (1900).
4. Treaties in the United States have been so described and divided into self-executing and non-self-executing by a decision of the U.S. Supreme Court in *Foster v. Neilson* (1829). A treaty is said to be self-executing when its provisions are directly applied within domestic jurisdiction without implementing legislation. On the other hand, non-self-executing treaty would require implementing legislation. However, terms of self-executing and non-self-executing treaties are not clear. The self-execution question has intensely complicated the issue of implementation of treaties in the United States with far reaching consequences.
5. In the landmark decision *Filartiga v. Pena-Irala* (1980), the U.S. Court of Appeals for the Second Circuit directly applied international customary law to provide relief to the victims of torture.
Moreover, whether it is treaty norm or customary norm, any attempt on the part of the judiciary to enforce international law can be blocked by later-in-time enactment by the congress. Initiatives and activities of the courts can also be squeezed by the doctrines of sovereign immunity of the state, act of the state, political question, *forum non conveniens*, and resultant deference to political branches of the government.

The U.S. contribution to the cause of human rights is undeniable. It emanates from the democratic nature of its polity. The Bill of Rights enshrined in the U.S. Constitution more than two hundred years ago still occupy a most noble position amongst an array of rights envisaged by contemporary human rights law. Since World War II the United States has played a major role in the political and legal movement that aimed not only at spreading the message of human rights worldwide, but also devising international mechanism to protect and to promote human rights. The United States as a great political and economic power has taken an interest in human rights situations in other countries and has often conditioned its aid programs by the need to improve human rights conditions in those countries.

While the U.S. domestic human rights records are commendable, direct application of international human rights instruments in the U.S. territories is not. This is a contradiction which manifests itself in poor U.S. ratification records of human rights treaties, in the sweeping reservations, understandings and declarations (RUDs) attached to ratified treaties, and in attempts to endow all treaties with non-self-executing status. This contradiction also manifests itself in the U.S. courts’ insufficient use of international treaty and customary norms to assert jurisdiction.

There are not many human rights norms found in the international instruments which are not available in the U.S. laws and customs. This


position poses little problem for the human rights treaties to be self-executing in nature, and hence enforceable by U.S. courts. Moreover, reservations, understandings, and declarations (RUDs) can always be used when there is any inconsistency with domestic laws. Yet, the executive and the legislature are apprehensive of judicial interference. Do the president and the senate fear that the courts will over-implement the international instruments?

Historically U.S. courts have acted rationally, and contributed greatly not only to constitutional development, but also to the development of human rights law, not usurping the powers and encroaching on the jurisdiction of the executive and the legislature. If anything, courts have rather demonstrated cautious restraint to use treaties and international customs as source of law. Courts have always held domestic norms in high esteem, and have been guided by the conviction that the U.S. laws attained high degree of maturity sufficient to provide for the enforcement of human rights which the international instruments seek to protect.

Cautious and conservative U.S. attitude towards domestic implementation of international human rights norm is also reflected in the ideas often expressed in its political and judicial circles that human rights issues are a matter for the states to secure for their citizens, and that the treaties are not appropriate devices to provide for the protection of human rights within state territories. Human rights related treaty making power of the U.S. government has also come under question however absurd the proposition may sound in the present day world. 10

Costs of the policies of non-ratification, the making of sweeping reservations and declarations on ratified treaties, and U.S. courts’ over-cautiousness to use international human rights law are proving very high, because it passes a wrong message to the world community about U.S. human rights commitment. Despite the best intentions of the U.S. Government and the people, it cannot but have a negative impact on world human rights movement.

While the United States has made protection and promotion of human rights worldwide one of its main objectives of foreign policy, 11 its approaches towards implementing international human rights within its own jurisdiction give reasons for rising concerns, confusion and

10. THOMAS BUEGERNTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 221 (1988).
misunderstanding. This may cause substantial damage to long-term U.S. interests, for human rights issues have become markedly intertwined with the issues of democracy and development worldwide, as well as international peace and security. 12

Courts in the U.S. could perform a historic role in the promotion and protection of human rights in more than one way. Article VI, Section 2 of the U.S. Constitution and Paquete Habana as well as civil rights development in the U.S.A. provide appropriate opportunities to do it in relation to international law to make it exemplary for other countries. U.S. courts could become ideal forums for human rights deliberations drawing public attention to violations of human rights anywhere in the world by individuals and states including the U.S. thus educating public minds about human rights. This would make the U.S. Government more careful in pursuing foreign policies fraught with risks of human rights abuses. 13

II. SELF-EXECUTING AND NON-SELF-EXECUTING TREATIES IN THE UNITED STATES

While the U.S. Constitution accorded the treaties status of supreme Law of the Land, their division into self-executing and non-self-executing, and rising tendency of the Senate and the President to declare more of them non-self-executing has greatly undermined this constitutional position. This division which is not in the Constitution but came as a result of the Supreme Court’s decision in Foster v. Neilson14 (1829) made a fundamentally substantive impact on the implementation of treaties by the United States. The impact has been more acutely felt in relation to human rights treaties. The concept of self-executing and non-self-executing treaties disparages the entire constitutional scheme regarding treaties and their implementation.

Ratified treaties should be self-executing and appears to be the constitutional imperative. General wording, vagueness, lack of concreteness, mootness, and ambiguity of the intent of parties which have been put forward as arguments in Sei Fujii v. California15 (1952) for

holding Articles 55 and 56 of the UN Charter regarding human rights non-self-executing appear unconvincing, specially in view of the subsequent developments of the international human rights law.\footnote{16. RICHARD B. LILICH, AMERICAN BAR ASSOCIATION, INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS 5 (1985).}

All the provisions of a duly ratified treaty have equal force, and hence they are equally self-executing. The opposite view would be conceptually wrong. Some provisions of a treaty may be more concrete, elaborate, and unambiguous than others. Nonetheless, more general and less concrete provisions have also a message which is imperative and must be self-executing to the extent of what concretely can be made out of that message by the court.

Justiciability and judicial enforceability of the message is to be determined by the court. Judges are obligated to consider particular message subject to their own understanding of it, the understanding being conditioned by the words and spirit of the entire treaty as well as principles of international and municipal law. The degree of execution would vary with the scale of specificity or concreteness of the provisions, but the elements of self-execution ought to be present in all circumstances. The view is that if the language of a particular provision is clear and direct, it must be executed, call it self-executing or not. On the other hand, if the language is general and not direct, it would only be executed as far as interpretation of language of the text would permit. This view may be argued as closer to constitutional requirements of Article 6/2 to which any concept of implementing legislation is alien.

To make the above argument more explicit, reference can be made to \textit{Plyer v. Doe} and \textit{In re Alien Children Education Litigation}.\footnote{17. In re Alien Children Education Litigation 457 U.S. 202 (1982) (Plyer v. Doc and \textit{In re Alien Children Education Litigation} were joined by the Supreme Court for the purposes of briefing and oral argument.)} Article 47(a) of the Protocol of Buenos Aires could not be interpreted as to provide for direct right to free elementary school education of the children of undocumented aliens. This cannot be an argument of its being non-self-executing, as it was so held by the court. In fact, provisions of the Article 47(a) do not imply that right stricto sensue. However, the point is whatever can be made out of the treaty provisions after they are judicially interpreted must be self-executing. The court is to decide the extent of self-execution. The Article provides, \textit{inter alia} that:

\begin{quote}
The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure
\end{quote}
the effective exercise of the right to education, on the following bases:

a. Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State it shall be without charge.\(^1^8\)

Individual courts’ approach towards interpreting the above wordings may vary, and a particular court may not consider the right to free education arising out of the provision of the protocol applicable to the children of undocumented aliens. The other courts may decide otherwise. The point is that it does not concern the self-executing nature of the treaties. Treaties are supposed to be self-executing to the extent of their letter and spirit.

Support for above contention may be found in the *Restatement of the Foreign Relations Law of the United States (Revised)*,\(^1^9\) which considers most treaties to be self-executing. However, the *Restatement* also makes mention of the tradition in the United States of non-self-executing treaties. It notes three categories of non-self-executing treaties. First, a treaty is non-self-executing if the text “manifests an intention that it shall not become effective as domestic” meaning that it would require the enactment of implementing legislation. Second, “if the Senate in giving consent to a treaty, or Congress by resolution requires implementing legislation” the treaty is non-self-executing. Third, a treaty is non-self-executing “if implementing legislation is constitutionally required.”\(^2^0\)

No doubt, the parties to a treaty may manifest an intention that the treaty shall not be applied other than by way of implementing legislation. But such intention must be clearly laid down in the treaty. Recourse to implementing legislation would be made only as a requirement of the clear provision of the treaty. Any other course e.g. Senate or the President declaring a treaty to be non-self-executing or making a reservation to that effect, would seem to be contrary to the Supremacy clause of the Constitution regarding treaties. Third category, that of constitutional requirement of implementing legislation, is definitely an imperative category, but it has been rightly pointed out that “it is the rare

---

19. *Id.* at 7.
case in which legislation would be said to be constitutionally required, although one can think of examples. The raising of money, for instance, requires the participation of the House of Representatives; it cannot be done merely by entering into treaty.”

There is an intense debate in the academic circles of the United State on whether treaties should be presumed to be self-executing or not. Based on historical analysis and on comparative study, Professor Yoo strongly argues that the treaties should be presumed to be non-self-executing. He contends that the presumption of non-self-execution in the United States is also supported by the concept of separation of powers. On the other hand, Professor Vazquez strongly argues that treaties are self-executing because it’s there in the constitution. Arthur Rovine also seems sympathetic to this view. He says, “Given the supremacy clause, and given our history . . . the two-thirds vote in the Senate is sufficient.”

It is useful here to recall Secretary of State Livingston who observed long back in 1833 that “Government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the Government, to carry it into complete effect, according to its terms, and on the performance of this obligation consists the due observance of good faith amongst nations.”

Given that the two-thirds vote in the Senate is required for ratification, self-execution of treaties is not likely to pose any problem to domestic legal system. This is the legislative balance the Constitution sought to establish. Theoretically it may seem uneasy, or even difficult to accept that the Supremacy Clause excludes the House of Representative from the process, even when the treaty provisions invalidate federal law. However, there are other checks and balances. In emergency or dire necessity the Congress has the option of reenactment, so it can prevail under later-in-time principle, although it may entail violation of obligations under treaty. These are all speculations and distant possibilities which may never happen in practice. Should they happen, they can be adjusted and adapted accordingly, so the principle of self-

21. Id. at 31.
24. Rovine, supra note 20, at 35.
execution could be upheld to meet more closely the requirements of the Article 6/2 of the Constitution.

While the *Fujii v. California* in 1948 made a negative impact on the treaties on the question whether they are to be considered self-executing, in *People of Siagan ex rel. Guerrera v. United States Department of Interior*26 (1974) the U.S. Court of Appeals for the Ninth Circuit adopted a more reasonable and satisfactory test for determining whether a treaty is self-executing. The court observed:

... the extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purpose 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.27

Using the above test the Court held that the UN Trusteeship Agreement over Micronesia provided the plaintiffs with “direct, affirmative, and judicially enforceable rights” to challenge the execution of a lease purportedly in violation of that agreement.

In *Diggs v. Shultz*28 the former Congressman Diggs challenged the legality of Byrd Amendment, permitting the U.S. to resume importing Chrome from former Rhodesia in violation of UN Security Council resolution No. 232. Although under later-in-time principle, the Byrd Amendment prevailed, the U.S. court of Appeals for the District of Columbia reversing the district court’s determination observed that plaintiffs had *locus standi* to bring the action. This observation was definitely supportive of the view that international resolution based on treaty obligation and the treaty provisions themselves could be directly applicable.29

26. People of Siagan v. United States Department of Interior, 502 F.2d 90 (9th Cir. 1974).
Expectations raised in human rights circles by the above two cases were not met in any considerable measure by subsequent developments in the judicial circles.

However, *Sannon v. United States,*30 *Pierre v. United States,*31 and *Coriolan v. Immigration & Naturalization Service*32 where self-executing nature of the Protocol Relating to the Status of Refugees (1967) was vigorously advocated by the Plaintiff's Counsel and never denied by the court, and *Plyer v. Doe* which was later joined with *In re Alien Children Education Litigation*33 by the Supreme Court for the purposes of briefing and oral argument to shed light on Article 47 of the Protocol of Buenos Aires, made some positive contributions towards considering treaties as self-executing.34

However, the crux of the problem in the United States now is not the attitude of the courts towards treaties to decide whether they are self-executing. The real problem seems to be non-ratification of the treaties, and when ratified, reservation or declaration to the effect that they are non-self-executing.35 *International Covenant on Civil and Political Rights, Genocide Convention, and Convention against Torture* are presumably self-executing in nature, yet there is declaration by the U.S. to the contrary to minimize their domestic impact. Four other conventions, namely, *Convention against Racial Discrimination, Convention on Elimination of All Forms of Discriminations against Women, Covenant on Economic, Social and Cultural Rights and American Convention on Human Rights,* which are awaiting ratification would seemingly meet the same fate. Numerous other international human rights instruments which have been signed by the U.S.A. may languish for years before they are ratified, if they would be ratified, or they may not be ratified at all.

U.S. reluctance to treaty ratification, ratification with reservation or declaration and U.S. courts' restrained attitude towards the question of self-execution of treaties—all indicate a conservative trend, which does not correspond to the constitutional spirit, for Article 6/2 of the

31. *Pierre v. United States, 525 F.2d 933 (5th Cir. 1976).*
32. *Coriolan v. Immigration & Naturalization Service, 559 F.2d. 993, 996-97 (5th Cir. 1977).*
33. *See In re Alien Children Education Litigation 457 U.S. 202 (1982).*
34. *See Lillich, supra note 16, at 8-9.*
Constitution envisages and contemplates that treaties are to be directly applied.

III. ON THE QUESTION OF CONSTITUTIONALITY OF HUMAN RIGHTS TREATIES

While there is little theoretical disagreement on the status of treaties in the U.S. Constitution, there have always been attempts not only to qualify the process of domestic implementation of treaties, but also to narrow down the sphere of federal treaty power. This is to a great extent explained by the immense impact the supremacy provision of the treaty clause of the Constitution is capable of making on the domestic legal system. Over-cautious or even fearful of such impact, which is often overexaggerated, all branches of the government have often resorted to measures in order to minimize the effect of the constitutional position of the treaties. Foster v. Nielson on self and non-self-executing nature of treaties is only one of them. In doing so, they have pursued policies acting in a way, not always in harmony with the vision and mission of the Constitution.

True, there may be instances when liberal interpretation of Art. 6/2 may create opportunities for treaties to intrude upon the power of the legislature. But there are sufficient constitutional safeguards, tradition of judicial restraint in the U.S.A. and later-in-time principle of operation of treaty or domestic law, which would allay any fear of such intrusion. Nonetheless, there have been serious attempts in the past to exclude human right treaties from the purview of treaty power of the federal government. This is notwithstanding the fact that Missouri v. Holland (1920) strongly reaffirmed the wide range of the treaty power to say that the federal treaty power in the Constitution is a separate and independent power having no subject matter limit, i.e. not limited by the 10th amendment.

Opponents of wide treaty power especially those who consider human rights treaties an intrusion upon both state and federal legislative power sought to find constitutional arguments to exclude human right treaties from the treaty power. They argued that individual rights (human rights) are a matter strictly between the state and its citizens. No outside
interference is logically or legally permissible. Hence provisions of treaties ought not to dictate the relationship between the state and its citizens. Treaties are to regulate international matters. Since human rights are the concerns of the state and citizens, they are automatically to be excluded. Moreover, the argument goes, those issues of human rights which are exclusively within the jurisdiction of the federating units i.e. the states, can in no way be regulated by treaties. To obviate Missouri v. Holland, attempts were made in Congress to enforce the Bricker amendment without success, but not without revealing a formidable opposition against including human rights treaties within federal treaty power. 39

Before proceeding further in our deliberations to analyze the lengths and breadths of treaty power of the United States, we are obliged to accept that the post-world war II international developments have elevated the human rights matters to one of great international concerns, which need to be dealt with by concerted international efforts, possible only by way of undertaking firm international commitments. Since the states (federal units) have not been given treaty power, any benefit of the treaties can accrue to them only by way of federal treaty making power.

Although Missouri v. Holland was a land-mark decision which entrenched wide range of federal treaty power indicating possibility to include human rights and issues falling within state (federal unit) jurisdiction, academic attempts to investigate and constitutionally justify reasons for such inclusion are not very frequent. One such attempt has been very competently made by Professor David Golove of New York University School of Law. 40 His main contention is that protection and promotion of national interests provide the permissible reasons for entering into human rights treaties.

The object is not to change domestic law by treaty, nor to interfere with state jurisdiction through federal treaty power, but to advance national interests by treaties which require participation of other countries and which, therefore, cannot be achieved by mere legislation of the Congress. Golove takes a universal approach to human rights and argues that it is one such area which needs international cooperation to pursue national goals. For the U.S. the consideration of how much the international

39. See supra note 36.
40. Professor David Golove made a comprehensive and illuminating analysis of the issue in his draft paper titled Reasons and Treaties: Human Rights Treaties and the U.S. Constitution presented at a colloquium on Globalization and its Discontents held at the New York University School of Law on March 25, 2002. His views have been summarized in the present essay.
human rights instruments would contribute to development of human rights at home, but more importantly is the improvement of human rights abroad. This is more likely to be achieved by U.S. active participation in those instruments, paving the way for better securing of U.S. national interests in various ways. He argues that improved human rights situations in other countries will make them better partners in bilateral and multilateral cooperation in various fields. Improved human rights situations make the countries less aggressive, economically more prospective and politically more acceptable, meaning that U.S.A. have more to invest in those countries for mutual gains, and less to spend in terms of giving aid, or containing them if they are militarily or otherwise aggressive.

Inducing other countries to binding international agreement entails compromises, and may involve costs in terms of imposing international standards on domestic law. The aim, Golove continues to argue, is not to enact domestic law which is the exclusive jurisdiction of the legislature, but to attain certain national objectives which can only be done by way of treaty-making, which is primarily an executive function. Two-third Senate majority is a formidable check on executive treaty power. It’s a minority veto in the Senate to secure protection of the jurisdiction of the states. The founding fathers of the Constitution foresaw gradual expansion of issues of international concern which affect the interests of the United States as an independent and sovereign state as well as the interests of the individual states as federating units. The Constitution entitled the federal government to protect those interests by treaty-power.

Professor Golove seeks to strengthen his theory of national interests and permissible reasons for entering into human rights treaties by more idealistic arguments of cosmopolitan moral concern, and mutual commitment and moral community, meaning that human rights issues anywhere are a concern everywhere. We are mutually committed to resolve these issues, if we want to build up a moral community of nations, Golove insists. As for human rights issues, we witness a gradual but steady evolution of a global legislative process from which no state can alienate itself. This is the imperative of modern development of international human rights law.

The U.S. Constitution has remained over the years a uniquely sacred document, a constant source of inspiration, strength and stability for the polity and the society it has been discovered and rediscovered again and again by way of interpretation to justify laws accommodating changing values of the society. It has rarely failed in its interpretation to progressively move the society. It would, therefore, seem peculiar, if not
incomprehensible, when constitutional argument is put forward against the application of any international human rights standard domestically. There are very few international human rights norms which are not reflected in the U.S. domestic law. Some of them may be directly applied. Some would qualify for domestic application by progressive interpretation of existing domestic law. International norms which would contradict domestic laws can be brought under RUDs clause, not to impede general application of international instruments within domestic legal system. Even if certain international norms would supersede domestic norms under last-in-time principle, costs of such supersession could be favorably compared to the costs of negative international impact which non-ratification or ratification with sweeping RUDs, or non-application of international instruments would entail.

Paul Hoffman and Nadine Strossen would argue:

If the United States had ratified the ICCPR without limitations on its rights-enhancing provisions, it would have expanded the rights of Americans in the following significant respects: prohibiting the execution of juvenile offenders and of pregnant women; incorporating international standards of cruel, inhuman, or degrading treatment and punishment into U.S. law; requiring the retroactive imposition of lighter criminal penalties; affording compensation for unlawful arrests and for convictions resulting from the miscarriage of justice; and requiring jails and prisons to separate juvenile from adult offenders and defendants awaiting trial from those who had already been convicted.

None of these more protective human rights standards would have had a huge impact on the United States law and practice; however, these are significant protections accepted by United States treaty partners and the international community. There is no compelling reason why the United States should not give full effect to these international obligations.

Since treaty norms are constitutionally considered laws of the land, greater reliance ought to be put on the courts for their application. Whether private rights of action can arise out of an international

41. Rogers, supra note 9.
42. Hoffman and Strossen, supra note 8, at 492.
agreement can also be decided by the courts. Court would presumably decide such issues on the basis of individual cases; and the court has in fact decided such questions in Refugee cases. 43

Nature and extent of implementation of international instruments is greatly influenced and even predetermined by the policies the United States pursues in relation to such implementation, and the U.S. policies seem more conservative than liberal. While there seems nothing wrong with international human rights law, U.S. policies conservatively influence its application. 44 This may be explained by various factors e.g., more familiarity with one’s own laws and apparent ease with which they can be interpreted and applied; national ego and tendency to consider one’s own laws superior in quality to anything external, and hence the desire to safeguard one’s own; uncertainty to apply anything from outside; apprehension that the judiciary would gain more power in applying treaties directly; and the legislative fear that it may be bypassed.

IV. CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS

As customary norms of international law are regarded in the United States as part of the law of the land, potentially the U.S. Courts have great opportunities to apply international law of human rights directly. 45 However, these opportunities have not been realized in expected measure in practice. This is explained not so much by lack of understanding and recognition of the customary norms of international law by U.S. courts, as it is by lack of their enthusiasm to apply them. Yet, the U.S. courts have decided cases which indicate the power the courts can marshal to give justice based on customary norms.

To underline U.S. recognition of some definitely existing international norms of human rights, the often cited document is the U.S. memorial to the International Court of Justice in the Hostages Case. 46 Arguing about the nature and scope of fundamental human rights, the memorial observed:

It has been [contended] that no such standard can or should exist, but such force as that position may have had gradually diminished as recognition of the existence

---

43. See supra notes 30, 31 and 32.
44. Forsythe, supra note 7, 21-48.
of certain fundamental human rights has spread throughout the international community. The existence of such fundamental rights for all human beings, nationals and aliens alike, and the existence of a corresponding duty on the part of every state to respect and observe them, are now reflected, inter alia, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the International Covenant of Civil and Political Rights.... In view of the Universal contemporary recognition that such fundamental human rights exist . . . . Iran's obligation to provide "the most constant protection and security" to United States nationals in Iran include an obligation to observe those rights.47

The memorial cited Articles 3, 5, 7, 9, 12 and 13 of the Declaration, and Articles 7, 9, 10 and 12 of the UN Covenant on Civil and Political Rights, as evidence of the fundamental human rights to which all individuals are entitled and which all states must guarantee. These articles cover, respectively, the prohibition of torture and cruel, inhuman or degrading treatment or punishment; the right to liberty and security of person and the prohibition of arbitrary arrest and detention; the right to privacy and the right to freedom of movement.

The memorial’s focus was not the self or non-self-executing nature of the relevant provisions of the UN Charter or the ICCPR but the conviction that these provisions along with similar provisions of UDHR have become customary norms of international law to which U.S. totally subscribe, and are bound to apply them directly as law of the land. However, the U.S. courts are generally hesitant and reluctant to apply customary law of human rights directly. Professors Anne Bayefsky and Joan Fitzpatrick write:

United States courts generally manifest a deep reluctance to embrace international human rights law and to use it as an effective tool to redress abuses. This reluctance is born partly of unfamiliarity and perhaps a degree of intellectual laziness, but it also appears to stem from

47. Cited in Hoffman and Strossen, supra note 8, at 484.
concerns about institutional competence and deference to the political branches.\textsuperscript{48}

As with other two organs of the state, the U.S. courts' attitude towards invoking customary international human rights law is also characterized by over-cautiousness, extra-ordinary attachment to their own laws which they consider sufficient to meet the requirements of international human rights law, and by taking of a liberal view of various doctrines i.e. political question, acts of state, sovereign immunity, forum non conveniens, non-justiciability, to defer issues to political branches.

Moreover, it is not always easy to establish beyond reasonable doubt that certain norm has become customary norm to be regarded as law. The amount of minimum judicial activism or intellectual exercise which is necessary to prove custom as law, is not always found in the minds and hearts of the judges. This explains why there are not many international custom based judicial decisions in the U.S.A., in spite of the fact that international customary law is part of the law of the land. However, \textit{Filartiga} and \textit{Fernandez} provided great promises of setting new trends.

In \textit{Filartiga v. Pena-Irala}\textsuperscript{49} the U.S. court of Appeal for the Second Circuit gave relief to the plaintiffs basing its decision on customary international law. The plaintiffs who were of Paraguayan origin, one of them at that time living permanently in New York, filed a suit in a federal district court against another citizen of Paraguay, then on a visit to U.S.A, for the torture and death of their son and brother basing their claim on the Alien Tort Statute (ATS) of 1789, which says that “the district 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.”\textsuperscript{50}

The question before the court was whether or not torture violated the law of nations, i.e., customary international law as then existing. The district court dismissed the complaint, which was reversed by the appellate court. The Court of Appeals for the Second Circuit was of the opinion that the ATS created implied cause of action for violation of customary international human rights standards holding “an act of torture committed by a state official against one held in detention violates established norms of international law of human rights, and hence the

\textsuperscript{48} Cited in Id.
\textsuperscript{49} Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980).
\textsuperscript{50} Cited in Lillich, supra note 16, at 12.
law of nations." The Court cited many international instruments including specially Article 5 of UDHR to conclude that torture was outlawed by the law of nations. Additionally, the Court also referred to modern municipal laws and works of jurists to support its view. The Court used huge materials to provide proof that opinio juris necessary for customs to be recognized as law was overwhelmingly in favor of torture being prohibited by the law of nations, and hence subject to prosecution. In conclusion, the Court stated that "the prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."

The decision in Filartiga was thought to be capable of leading to far reaching consequences, and raised expectations that the courts would increasingly resort to customary international norms to provide justice to the victims of violation of human rights, citizens or aliens. Expectations, however, did not materialize in significant measure. Judge Kaufman who was mainly responsible for the landmark decision in Filartiga cautioned later in an article that the decision's purpose and sphere of application was relatively narrow. He observed that it should not be misread or exaggerated to support sweeping assertions that all (or even most) international human rights norms found in the UDHR or international human rights treaties have ripened into customary international law enforceable in the U.S. courts.

These cautious or even pessimistic statements proved more than what they actually meant to caution. Barring few instances which again involved foreign plaintiffs and defendants, and torture as cause of action, Filartiga could not generate much momentum for customary international law as a dynamic source of law. No doubt that torture has been established beyond reasonable doubt as prohibited under customary international law, but that the Filartiga was expected to explore other breaches of human rights based on customary law has not materialized. Following Filartiga, several such cases involving torture and compensation were, in fact, successfully instituted in the courts of U.S.A. Of them, Marcos litigation merits special mention. The case consolidated five separate civil suits filed in three different judicial districts, all alleging various forms of human rights abuses under Ferdinand Marcos's

51. Id. at 13.
52. Id. .
reign in Philippines. All five cases were dismissed by the district courts on the basis of the Act of State doctrine, which the Ninth Circuit reversed and consolidated the cases for trial.55

On the other hand, when similar cases involved U.S. officials, the judiciary was reluctant, and decided negatively to award relief. In Sanchez-Espinoza v. Reagan56 involving high U.S. officials including the then President Ronald Reagan, the district court dismissed the plaintiffs' suit on the basis of political question doctrine. In Nejad v. United States,57 Koohi v. U.S.,58 In re Union Carbide Corp. Gas Plant Disaster59 in Bhopal, the courts decided not to assert jurisdiction basing their decision either on political question doctrine, or sovereign immunity, or forum non conveniens. Of them Union Carbide, which involved 20000 people dead and more than 200,000 injured, was very significant, indicating court's bias for big business.60

Writing on the U.S. courts' attitude in litigation involving U.S. government officials and private companies, Mark Gibney observes:

\[
\ldots \text{while American Courts have been very good at protecting the human rights of a very small and select group of foreign plaintiffs (those alleging human rights violations by foreign state actors over whom personal jurisdiction has been obtained), U.S. courts have not been willing to consider the possibility of attempting to make whole those harmed by American actors. Until this happens, it is not possible to claim that American Courts are staunch defenders of human rights.}\] 61

The U.S. Congress, however, showed keen appreciation of the developments by enacting in 1992 Torture Victim Protection Act (TVPA). It and expands the coverage of ATS. But the TVPA is focused

---

59. In re Union Carbide Corp. Gas Plant Disaster, 809 F. 2d 195 (2nd cir.)
60. Gibney, supra note 55, at 183-184.
61. Id. at 186.
on torture and summary execution committed by foreign officials abroad.\textsuperscript{62}

Rodriguez-Fernandez \textit{v.} Wilkinson\textsuperscript{63} involved more direct use of customary norm of international law by U.S. courts. A federal district court in Kansas granted a writ of \textit{habeas corpus} to a Cuban who the Immigration and Naturalization Service had determined was ineligible for admission into the U.S., and who pending his deportation was detained in the U.S. Penitentiary at Leavenworth, Kansas. Counsel for the plaintiff Fernandez argued that his client’s continued confinement, without bail and without having been charged with a crime in the United States, violated his constitutional rights under the Fifth and Eighth Amendments.

However, the court found that Fernandez as an ‘excludable’ alien could not be protected by the U.S. Constitution, or any domestic law, notwithstanding that his detention was \textit{prima facie} arbitrary. The court regretted that “in the case of unadmitted aliens detained on our soil, but legally deemed to be outside our borders, the machinery of domestic law utterly fails to operate to assure protection.”\textsuperscript{64}

Nevertheless, the district court ordered his release on the basis of customary international law. The court held that “customary international law secures to petitioner the right to be free of arbitrary detention.”\textsuperscript{65} adding further that:

Our review of the sources from which customary international law derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law.

\textit{Fernandez} was a significant step forward in independent and direct use by the courts of customary international law as basis of its decision.\textsuperscript{66} On appeal, the U.S. Court of Appeals for the Tenth Circuit upheld the decision of the lower court, but on a different ground or rationale,
thereby undermining the *ratio decidendi* of the district court. The court construed the Immigration and Naturalization Act as not permitting indefinite detention of an excludable alien. However, in *obiter dicta* the court noted that it was proper "to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment." Citing relevant international instruments the Court referred to customary international law to support its construction of the Statute. In short, the court interpreted and applied domestic law illuminated by international law.

It is not insignificant that while the court of appeal upheld district court's decision, it decided, unlike the latter, not to consider customary international law as source of law. The appellate courts understanding of and sympathy for the customary international is clear, yet the court was unable to base its decision directly on international law. It yet again is explained by the general attitude of the courts similar to other organs of the state, which is characterized by reluctance, over-cautiousness and conservatism in applying international law within domestic legal system.

In *In re Alien Children Education Litigation*, the district court demonstrated similar attitude. In both cases, the courts (trial and appeal) recognized the contents and importance of customary international law, but based their decisions on domestic law, the decision that could have been taken on the basis of customary international law, as it was so advocated for. However, the influence of international law is clear, which itself is a progressive development in the implementation of international law in state territories.

It may be hoped that with numerous mentions of or references to international law when such mention or reference is supportive of particular construction of domestic law, and sometimes with use of international law as source of law with no risk of its being in conflict with national law, the psychological barrier against direct application of international human rights law would be overcome.

---

V. INTERPRETATIVE VALUE OF INTERNATIONAL HUMAN RIGHTS LAW

While the U.S. Courts have not shown much enthusiasm in directly applying international human rights law by regarding a particular treaty self-executing when the decision to determine the self-execution is dependent on court’s decision, or while the courts have not actively relied on customary international law for deciding cases, they have frequently cited international human rights standards and principles to illuminate constitutional and statutory norms. Given the traditional conservative and cautious attitude of the U.S. organs and agencies in applying international human rights law with the practice of construing domestic law when necessary in the light of international law is indeed an encouraging development. The picture becomes all the more welcoming for the enforcement of international human rights law when one remembers that “an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.”

To quote Professor Richard B. Lillich,

Far more likely than a court’s holding that the human rights clauses of the UN Charter are self-executing – far more likely even than a court’s holding that a particular article of the Universal Declaration now reflects customary international law – is the possibility that a court will regard international human rights law as infusing U.S. constitutional and statutory standards with its normative content. This ‘indirect incorporation’ of both conventional and customary international human rights law is an exceptionally interesting and promising approach warranting greater attention than it has received of late.

Oyama v. California (1948) is one of the major cases decided more than half a century ago, which indicates great interpretative value of international norm. Striking down a portion of the California Alien Land Law as contrary to the Fourteenth Amendment, two justices of the Supreme Court Justice Murphy and Justice Rutledge in a concurring

70. Murray v. Schooner Charming Betsy, 6 U.S. 92 (Cranch) 64, 118 (1804).
72. 332 U.S. 633 (1948).
opinion remarked that the statute's "inconsistency with [Article 55(3)] the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."  

Two concurring justices, Justice Black and Justice Douglas wondered "how could the U.S. be faithful to its international pledge, if the state laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced."  Similarly in *Namba v. McCourt* (1949) the Supreme Court of Oregon referred to Art. 55 of the UN Charter, in support of its decision that the Oregon Alien Land Law was violative of the equal protection clause of the Fourteenth Amendment. In both the cases the court recognized the significance of international law, based its decision on domestic law, giving the latter an interpretation enlightened by the former.

It is clear that U.S. courts feel freer to refer to international human rights law in domestic litigation not as source of law, but as supporting its domestic law contention. In practice, the courts have often referred to UDHR and the Charter. Academics and scholars have also stressed the importance of interpretative use of international human rights law in domestic litigation.

Surveying the interpretive use of customary international human rights norms by U.S. courts, Professor Jordan Paust of University of Houston Law Center wrote in 1982 that "most of the Supreme Court Justices throughout United States constitutional history have recognized that human rights can provide useful content for the identification, clarification and supplementation of constitutional or statutory norms."  He also noted that the Supreme Court's interpretive use of customary international human rights norms has been steadily increasing. Court's increasing familiarity with and reference to international law to inform domestic law are likely to prepare the ground for more direct application of international human rights law, both treaty and customary.

On the other hand, Professor Bayefsky and Fitzpatrick expressing skepticism about the above prospect wrote:

> Those courts which do make use of international law sources as an aid to interpretation usually (a) do not tend

---

74. *Cited in Id.*
75. *Namba v. Court, 185 Ore. 579, 204 P.2d 569 (1949).*
76. *Cited in Hoffman and Strossen, supra* note 8, at 488.
to justify its introduction by references to the principle of consistency with international obligations, nor (b) concern themselves with establishing the binding quality of the source by proving that it is truly customary international law. This tendency impedes the development of clear and consistent principles concerning the interpretive relevance and importance of customary human rights norms in U.S. law.\footnote{77}

Paul L. Hoffman and Nadime Strossen regret that while the Supreme Court in \textit{Thompson v. Oklahoma}\footnote{78} in 1988 invoked international human rights standards to conclude that juvenile death penalty constituted cruel and unusual punishment in violation of Eighth Amendment, and held that a death sentence imposed on an offender who was fifteen years old at the time of committing the offence violated the Eighth Amendment, the same court later in \textit{Stanford v. Kentucky}\footnote{79} (1989) held different opinion to conclude that the Eight Amendment does not bar the imposition of the death penalty on someone who was 16 or 17 years old at the time of committing the crime in question.\footnote{80}

Justice Antonin Scalia wrote:

\begin{quote}
We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various \textit{amici} that the sentencing practices of other countries are relevant. While "practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident but rather so implicit in the concept of ordered liberty that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.\footnote{81}
\end{quote}

Supreme Court’s judgment in any particular case may be disappointing, but the U.S. courts in general do rely on interpretive value of international human rights norms. Richard B. Lillich suggested that

\begin{itemize}
\item \textit{Cited in Id.}
\item 492 U.S. 361 (1989).
\item Hoffman and Strossen, \textit{supra} note 8, at 489-490.
\end{itemize}
considering the generally cautious and rather conservative and reluctant attitude of the U.S. courts, at least at that stage, interpretative use of international human rights norms is more advisable of way of enforcing those norms.\(^8\)\(^2\) He expressed apprehension that too much advocating and pursuing the cause of direct application of treaty or customary norms, or taking of any radical decision as it so happened with district court in *Sei Fujii*, may turn out to be counter-productive. He suggested rather a slow and step by step approach towards invoking international human rights in domestic courts, first as illuminating domestic law, and then, where appropriate and situation more permissive, as direct source of law. He believed progress in direct application of international human rights law by domestic court is more likely to be achieved by this calculative lawyering than by vehement advocacy for direct application.

VI. CONCLUSION

The relevant provisions in the U.S. Constitution are congenial to domestic enforcement of international human rights law. However, government policies in the United States have not been very responsive to these provisions; rather the organs of the government have always taken a conservative view of the constitutional position.

In view of the Bill of Rights constitutionally guaranteed to the U.S. citizens, and U.S. contribution towards the cause of human rights worldwide, and their readiness to promote and protect human rights abroad, it is difficult to understand why the U.S. government is reluctant to ratify international human rights instruments, or ratify them with numerous reservations, understandings and declarations (RUDs). Wide power of the executive to declare any treaty non-self-executing has also squeezed the scope of direct application of treaties as envisaged by the Constitution. All these send a wrong message to the international community regarding U.S. position on human rights.

Moreover, the U.S. courts’ general attitude to consider treaties more as non-self-executing rather than self-executing when they are called upon to decide on such questions and a general reluctance to refer to international customs as sources of law is significant. The U.S. as a major power and promoter of human rights cannot pursue such policy without having negative impact on other countries.

On the other hand, treaty clauses of the U.S. Constitution and *Paquete Habana* ruling on customary norm of international law as part of the law

of the land accompanied by constitutional proclamation of Bill of Rights provide the most ideal situation of domestic enforcement of international human rights law in the U.S.A. The U.S. courts have on occasion’s revealed great potential of courts to apply norms of international law.

There are very few international human rights norms which are not available within U.S. domestic legal system. This makes the possibility of any conflict between domestic and international law insignificantly small. A shift in U.S. policy on implementation of international human rights instruments could go a long way to influence and promote domestic enforcement of international human rights law in other national jurisdictions. A policy shift would also further enhance interpretative use of international human rights norms by U.S. courts, which they do to illuminate domestic law, to prepare the ground for substantial use of international norms as source of law to be directly applied by U.S. courts.