

JUDGE BORK IS WRONG: THE COVENANT IS THE LAW

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I. INTRODUCTION

In *Tel-Oren v. Libyan Arab Republic*, Judge Robert Bork suggested in a concurring opinion that the International Covenant on Civil and Political Rights¹ (Covenant) did not create a private cause of action for a victim of human rights abuse.² Bork's 1984 statement was a minor point in the opinion in which it appeared and was not of immediate significance because the United States had not ratified the Covenant.

In 1992, however, the United States did ratify the Covenant.³ Ratification confronts the courts with the question whether the Covenant has effect as domestic law. Thus, the position taken by Bork assumes a new meaning. The issue is of no small moment because the Covenant is the world's most significant treaty on rights in the civil-political realm.

An outgrowth of the Universal Declaration of Human Rights of 1948,⁴ the Covenant was two decades in the drafting at the United Nations.⁵ Since its adoption in 1966, the Covenant has been the topic of sharp controversy in the United States. As a result, it was only last year that the United States ratified the Covenant. The Covenant covers a broad spectrum of rights of the type found in the U.S. Bill of Rights and in some instances it provides even broader protection.

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1. International Covenant on Civil and Political Rights, *adopted on* Dec. 19, 1966, 999 U.N.T.S. 171 (*entered into force* March 23, 1976) [hereinafter Covenant].

2. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 818-19 & n.26 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

3. See White House Statement on Signing the International Covenant on Civil and Political Rights, 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992). See also Statement of George Bush, U.S. President (June 1, 1992) (on file with author) (President Bush stating, in part, "I . . . ratify and confirm the said Covenant, subject to the said reservations, understandings and declarations").

4. G.A. Res. 217A, U.N. GAOR, 3d Sess., pt.1 U.N. Doc. A/810 (1948).

5. G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52-60, U.N. Doc. A/6316 (1966).

If Judge Bork was correct that the Covenant does not create a private cause of action, the impact of the Covenant in U.S. law is significantly reduced because a private litigant will not be able to assert a right affirmatively. The issue of the domestic force of the Covenant is further complicated by the fact that the Senate, in a declaration accompanying its consent to ratification, suggested that the Covenant should not be deemed self-executing.⁶ The Senate's position leads in the same direction as Bork's.

This Article examines the U.S. ratification of the International Covenant on Civil and Political Rights in light of Judge Bork's position and the Senate declaration. The Article also focuses on determining the proper status of the Covenant before U.S. courts.

II. SIGNIFICANCE OF JUDICIAL ENFORCEABILITY OF THE COVENANT

The question of the domestic effect of the International Covenant on Civil and Political Rights is one of first impression for state and federal courts because the Covenant entered into force for the United States on September 8, 1992.⁷ To date no court has issued a post-ratification ruling on whether the Covenant may form the basis of a lawsuit by a person seeking to vindicate a right.

The Covenant, however, will not be entirely new territory for the courts. Judges have long referred to the Covenant as a benchmark in determining whether one right or another has entered into the unwritten body of international law known as custom.⁸ That body of law is applied by U.S. courts as part of the common law.⁹

If the Covenant creates a private cause of action, litigants seeking to enjoin government action will be able to use it as a jurisdictional base.¹⁰ Under the federal code, district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."¹¹

6. 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992).

7. The U.S. submitted its instrument of ratification June 8, 1992. The Covenant entered into force three months after this submission.

8. See *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1984) (relying on United Nations Charter to determine that torture violates international law).

9. *Paquete Habana*, 175 U.S. 677, 700 (1900).

10. See *Bodemüller v. United States*, 39 F. 437 (W.D. La. 1889).

11. 28 U.S.C. § 1331 (1988).

The Covenant contains a full complement of rights. The scope of these rights is determined through the application of the Covenant in domestic courts around the world and in the Human Rights Committee (Committee) that monitors compliance with the Covenant.¹² The Committee has forged a substantial body of case law construing Covenant guarantees. Like the federal and state constitutions in the United States, the Covenant is constantly being construed and rights interpreted.

Judge Bork's conclusion in *Tel-Oren* that the Covenant does not create a private cause of action is based on four arguments. First, Bork stated that the Covenant becomes domestic law only if Congress passes legislation implementing it in domestic law.¹³

Second, Bork stated that the Covenant contains no explicit statement that an individual has a cause of action. Judge Bork concludes that the omission means that no such cause of action exists.¹⁴ Third, Bork stated that the absence of automatic remedies under the Covenant at the international level means that there are no automatic remedies at the domestic level.¹⁵

Fourth, Bork stated that even if one could read the Covenant to create a private cause of action against the government of the state that has jurisdiction, it would not create a cause of action to challenge the actions of other states.¹⁶ The validity of Bork's four arguments is far from obvious. This Article will now consider each argument in turn.

III. WHETHER THE COVENANT MUST BE IMPLEMENTED LEGISLATIVELY

First, Bork states that treaties like the International Covenant on Civil and Political Rights "expressly oblige states to enact implementing legislation, thus impliedly denying a private cause of action."¹⁷ He refers explicitly to Article 2 as the provision that requires states to enact implementing legislation.¹⁸

In this argument, Bork utilizes the principle long accepted in U.S. courts that if a treaty or a treaty provision contemplates legislative action for its

12. Covenant, *supra* note 1, art. 28 (establishing the Human Rights Committee).

13. *Tel-Oren*, 726 F.2d at 819 n.26.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Tel-Oren*, 726 F.2d at 818.

18. *Id.* at 818-19.

implementation, then there is no contemplation that the treaty or the treaty provision acts on its own accord to enter into domestic law.¹⁹ The contemplation is rather that each state party will enact legislation that will put the provision into domestic law, in this case, legislation that would specify that the courts should entertain causes of action based on the Covenant.

The difficulty in Bork's reasoning, however, is that Article 2 is not such a provision. Its purpose is to ensure that states provide remedies for violations of the Covenant. Article 2, to be sure, does contemplate the possibility of legislation if it is necessary in a particular state to put the Covenant into force as domestic law. Article 2(2) provides:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.²⁰

From the standpoint of Article 2, however, it is irrelevant whether a state enacts legislation to provide that a violation may be remedied by a private cause of action, or whether the courts simply entertain private causes of action by virtue of the state's ratification of the Covenant. Some delegates at the drafting conference said that there was no need for a provision like Article 2 because it was "obvious that if the States undertook to abide by the covenant, they would have to provide for effective remedies against infringements."²¹ Such provision of remedies could come through legislation, or action by the courts, but it would not necessarily have to come through legislation.

Treaties are the "law of the land" under the Constitution's Supremacy Clause, which specifies that "the Judges in every State shall be bound thereby."²² The courts have not held all treaty provisions judicially enforceable, but if a treaty is capable of judicial enforcement, the courts must permit a private litigant to rely upon it as the basis for a cause of action.²³ According to the *Restatement (Third) Foreign Relations Law of*

19. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

20. Covenant, *supra* note 1, art. 2(2).

21. E/CN.4/SR.125, at 4 (F), *quoted in* MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 64 (1987).

22. U.S. CONST. art. VI.

23. *Foster & Elam*, 27 U.S. (2 Pet.) at 314 ("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 the legislature,

the United States, "agreements that can be readily given effect by executive or judicial bodies, federal or State, without further legislation, are deemed self-executing, unless a contrary intention is manifest."²⁴ By "self-executing," the *Restatement* refers to the Supreme Court's concept that certain treaty provisions automatically enter domestic law.²⁵

The Covenant's provisions guaranteeing rights are the type of treaty provision that U.S. courts have traditionally found self-executing.²⁶ The drafters intend these provisions to create rights that inure to the benefit of the parties who are asserting them.

The courts said that while the Supremacy Clause makes treaties the "law of the land," some treaty provisions read as obligations to take future action that in turn will bring about the contemplated result. In *Foster & Elam v. Neilson*,²⁷ the Supreme Court examined a treaty in which Spain ceded Florida to the United States. The treaty required the United States to respect land grants previously made in the territory by Spain. It said that the Spanish grants "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his catholic majesty."²⁸ In the Court's reading of this provision, the United States obligated itself to enact legislation to ensure that the U.S. would respect the titles of Spanish grantees. "[W]hen the terms of the stipulation import a contract," the Court said, "when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."²⁹ Thus, the Court said that a Spanish grantee could not sue on the basis of the treaty to confirm his title.

However, in a subsequent case, *United States v. Percheman*,³⁰ involving the same treaty, the Supreme Court reversed itself after the Spanish text of the treaty was brought to its attention. Whereas the English text read that

whenever it operates of itself without the aid of any legislative provision.")

24. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporter's note 5 (1987).

25. *Foster & Elam*, 27 U.S. (2 Pet.) at 314; *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 87-89 (1833).

26. John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287 (1993).

27. 27 U.S. (2 Pet.) 253 (1829).

28. *Id.* at 314.

29. *Id.*

30. 32 U.S. (7 Pet.) 51 (1833).

the Spanish grants "shall be ratified," the Spanish text said that the grants "shall remain ratified."³¹ The Court noted the general rule in international law that when territory is ceded land titles are not affected. The Court concluded that the provision meant that Spanish titles were to continue in force without the need for legislation.³² Thus, a Spanish grantee could sue to confirm his title and the courts would apply the treaty as law.

In line with *Percheman*, courts have typically held rights provisions in treaties to be self-executing. Extradition treaties typically impose certain requirements for an extradition, such as allowing extradition only for certain offenses. U.S. courts have routinely considered such provisions as according rights to a potential extraditee which he can assert on the basis of the treaty.³³ Courts have similarly read treaties limiting the seizure of vessels off the U.S. coast to accord rights that an accused criminal can assert to set aside the seizure and thus defeat a prosecution.³⁴ A court has held that a treaty giving citizens of another state the right to be informed, upon arrest, of their right under a consular treaty to contact a consul can be invoked by the arrestee to defeat the arrest.³⁵

The Ninth Circuit, in *Saipan v. United States Department of the Interior*,³⁶ considered the self-executing character of a clause in the trusteeship treaty for Saipan which protected residents' land and resources.³⁷ After the Saipan government approved the construction of a hotel, a group of residents objected on environmental grounds.³⁸ The court found that one purpose of the treaty was to protect the environment of Saipan and that the residents were the intended beneficiaries.³⁹ The court determined that the treaty provision was self-executing, meaning that the residents could sue to challenge the hotel construction.⁴⁰

31. *Id.* at 88.

32. *Id.* at 88-89.

33. *See, e.g.,* *United States v. Rauscher*, 119 U.S. 407 (1886).

34. *See* *Cook v. United States*, 288 U.S. 102, 120-22 (1933).

35. *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979), *appeal after remand sub nom.* *United States v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980) (finding a deportation order invalid for failure to inform detainee of right to contact consul, as guaranteed by treaty and by Immigration and Naturalization Service regulation requiring compliance with treaty).

36. *Saipan v. United States Dep't of the Interior*, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975).

37. *Id.* at 97.

38. *Id.* at 93.

39. *Id.* at 97.

40. *Id.* at 98.

The Ninth Circuit gave a list of factors it found relevant to deciding whether the provision was 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."⁴¹

These four factors, if applied to the Covenant, lead to the conclusion that it too is self-executing, at least regarding its provisions guaranteeing rights to individuals. First, the purpose of a treaty provision that an individual should enjoy, for example, freedom of conscience, is that the individual enjoy that right. Thus, the purpose of the provision is served by permitting affirmative litigation if the right is in jeopardy.

Second, domestic procedures, namely litigation in state or federal courts, are available and feasible as a means of enforcing Covenant-guaranteed rights. Third, alternative enforcement methods are few because international procedures for enforcement of the Covenant are weak.⁴²

Fourth, the consequences of non-self-execution are serious because it puts the United States out of the mainstream of international rights enforcement. Most other states that are parties to the Covenant permit invocation of the Covenant affirmatively in their courts. If litigants cannot hold the United States to the Covenant's standards, the U.S. risks falling below those standards.

Of the four factors listed by the court in *Saipan*, the first is the most significant, namely, whether the parties intended that the rights provisions of the Covenant should be usable by a litigant as a basis for a cause of action. If one analyzes the specific rights guaranteed by the Covenant, it becomes clear that the rights are of that type.

For example, a Covenant right to a fair judicial hearing⁴³ or to privacy⁴⁴ is clearly aimed at creating for every individual a corresponding right. There is no reason for agreeing by treaty to a right to a fair judicial hearing, or to privacy, unless the parties contemplated that individuals

41. *Saipan*, 502 F.2d at 97.

42. The United States has filed a declaration allowing other states parties to the Covenant to file a complaint against it before the Human Rights Committee. 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992). However, no state has ever filed against another state. The United States has not ratified the Optional Protocol that permits individuals to file a complaint with the Committee. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter *Optional Protocol*].

43. Covenant, *supra* note 1, art. 14.

44. *Id.* at art. 17.

should have such rights and that they should be able to enforce them in court if necessary.

The Covenant recites that each state party “undertakes to respect and to ensure to all individuals . . . the rights recognized in the present Covenant.”⁴⁵ The implication is that a state party must allow individuals legal recourse if rights are infringed.⁴⁶

IV. WHETHER THE OMISSION OF A STATEMENT THAT INDIVIDUALS MAY SUE PRECLUDES SUCH A RIGHT

Judge Bork also argued that the Covenant creates no private cause of action because it does not explicitly create a private cause of action. “[T]he covenant does not itself say individuals can sue; rather, it leaves to states the fulfillment of an obligation to create private rights of action.”⁴⁷

Bork correctly stated that the Covenant does not specify that individuals have a cause of action to vindicate Covenant-guaranteed rights. However, treaties in the past have not contained such a specification. The United States Supreme Court has not held this omission to bar an individual cause of action for a right guaranteed by a treaty. In *Percheman*, for example, the treaty between Spain and the United States contained no provision stating that a Spanish grantee could sue in a U.S. court for recognition of his Spanish land grant.⁴⁸ Nonetheless, the Court permitted such a suit.⁴⁹ The Court, without addressing the issue explicitly, derived a cause of action because the treaty gave the grantee a right.⁵⁰

Moreover, the Covenant, unlike the U.S.-Spain treaty, does address the issue of domestic enforcement and suggests that a cause of action exists. Article 2 requires each state party “[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”⁵¹ Article 2 further requires each state party “[t]o 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

45. *Id.* at art. 2(1).

46. *See infra* notes 51-52 and accompanying text (discussing remaining provisions of art. 2).

47. *Tel-Oren*, 726 F.2d at 819 n.26.

48. 32 U.S. (7 Pet.) at 88.

49. *Id.*

50. *Id.* at 89.

51. Covenant, *supra* note 1, art. 2(3)(a).

competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."⁵²

This provision, though hardly a model of clarity, indicates that individuals are to be accorded whatever remedies the legal system of the particular state provides to vindicate their rights. The phrase, which calls for the development of "the possibilities of judicial remedy," shows a preference for judicial remedy, but leaves the state to allow the individual to seek enforcement by legislative or administrative remedies.

In the United States, such legislative remedies exist only by private bill, a procedure which is not likely to provide redress in many instances. Administrative remedies are limited as well. Lawsuits are the only readily available mechanisms for vindication of rights. Thus, if the United States is to carry out the mandate of Article 2 under procedures currently available in U.S. law, courts must entertain suits filed by individuals alleging a violation of their Covenant-guaranteed rights.

V. WHETHER THE ABSENCE OF AUTOMATIC REMEDIES AT THE INTERNATIONAL LEVEL MEANS THAT THERE ARE NO SUCH REMEDIES AT THE DOMESTIC LEVEL

As an additional argument for the proposition that there is no cause of action under the Covenant, Bork asserts that on the international plane a state party is not subject to suit unless it consents to be sued. Mere adherence to the Covenant does not constitute consent. He states that Article 41 of the Covenant establishes a procedure whereby one state party may file a complaint against another state party before a Human Rights Committee.⁵³ He further notes that a state party is subject to the Human Rights Committee's jurisdiction only if it files a special declaration under Article 41 signifying its consent.⁵⁴

Bork also refers to the Covenant's Optional Protocol,⁵⁵ whereby states may agree to allow individuals to file complaints against them before the Committee.⁵⁶ States parties to the Covenant may choose whether or not to adhere to the Optional Protocol.⁵⁷ Bork notes that here, as with inter-

52. *Id.* at art. 2(3)(b).

53. *Tel-Oren*, 726 F.2d at 819 n.26. Bork states, incorrectly, that the Committee is established by Article 41. In fact, it is established by Article 28.

54. *Id.*

55. Optional Protocol, *supra* note 42.

56. *Tel-Oren*, 726 F.2d at 819 n.26.

57. *Id.*

state complaints, the state is subject to the procedure only if it makes that choice.⁵⁸

On this basis, Bork argues that states are not subject to enforcement of the Covenant against them in domestic courts because if states were subject to such enforcement, they would have no additional expression of consent beyond their adherence to the Covenant.⁵⁹

This logic is weak. The fact that the procedures before the Human Rights Committee are at the option of the states parties does not mean that domestic enforcement is optional as well. There is simply no link between the two.⁶⁰

VI. WHETHER RIGHTS AGAINST OTHER STATES CAN BE VINDICATED

Bork used this as a reason to conclude that there is no private cause of action under the Covenant. His statement reads:

The International Covenant on Civil and Political Rights directs states to provide a forum for private vindication of rights under the Covenant. That provision, however, should not be taken to suggest the Covenant grants or recognizes a private right of action in municipal courts in a case like this. First, the Covenant directs states to provide forums only for the vindication of rights against themselves, not for the vindication of rights against other states. It is only the latter that raises all the political, foreign relations problems that lie behind international law's general rule against private causes of action; thus, even if the Covenant suggests recognition of a private cause of action for the former, it does not do so for the latter.⁶¹

Bork's reasoning here is also weak. Conceivably, there might be a reason not to recognize a private cause of action in domestic courts against a *foreign* state because of considerations of sovereign immunity⁶² or difficulties of enforcement of judgments. However, that would bear no relevance to the question whether a state must allow its courts to entertain

58. *Id.*

59. *Id.* at 819.

60. Bork does not press this argument as strongly as the others. He states merely that "[i]t is worth noting" that the international remedies are optional. *Id.* at 819 n.26.

61. *Id.*

62. *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992) (holding that sovereign immunity barred suit against Argentina for acts by Argentine officials in Argentina unless, as the court found, Argentina had waived its immunity), *cert. denied*, 113 S. Ct. 1812 (1993). *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993). In *Nelson*, the Court held that sovereign immunity barred a suit against Saudi Arabia for alleged torture by Saudi police. The alleged torture occurred in Saudi Arabia where the plaintiff, a U.S. citizen, had been recruited to work. The plaintiff asserted that the activity fell within the commercial activity exception because he was employed in Saudi Arabia.

suits brought against itself. Thus, Bork's point does not go to the issue of suits in a state's courts against that state.

Beyond this, however, there is no reason that individuals should not be permitted to file suit against a foreign state under the Covenant. Article 2 draws no such distinction. It broadly refers to the need for effective remedies for any person whose rights under the Covenant are in question. To be sure, the primary target of suits filed by individuals is likely to be the state in whose courts the suits are brought. However, no limitation is drawn in Article 2.⁶³

Human rights law creates obligations for states not only toward the individuals whose rights are at issue, but also toward other states. This latter obligation is expressed in the concept of obligation *erga omnes*. States are deemed to have an interest in the protection of rights by other states on the theory that a just and stable international community is premised on the observance of rights by all states.⁶⁴ Thus, there is no impropriety in a state making its courts available to suits by individuals suing foreign states for violation of Covenant-guaranteed rights.⁶⁵

States are normally exempted from being sued in foreign courts by the doctrine of sovereign immunity. However, immunity can be waived, and Article 2 may constitute such a waiver. Because Article 2 contemplates judicial enforcement, states parties adhering to the Covenant indicate that they anticipate the possibility that they may be sued in domestic courts for violation of Covenant-guaranteed rights.⁶⁶

VII. DEFENSIVE INVOCATION OF THE COVENANT

The preceding discussion overstates the significance of the Bork analysis in one respect. Even if the analysis was correct, it would not preclude all use of the Covenant in litigation. 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

63. *Cf. Denegri v. Chile*, No. 86-3085, 1992 U.S. Dist. LEXIS 4233, at *8 (D.D.C. April 3, 1992). In *Denegri*, the plaintiff sought to sue Chile for human rights violations and asserted that Chile waived immunity by adhering to the Covenant. The court concluded that the Covenant does not provide a cause of action against foreign states in U.S. courts. The court did not, however, discuss Article 2 or any specific articles of the Covenant.

64. THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 178-189 (1984). *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 33 (Feb. 5).

65. *See* 28 U.S.C. § 1330 (1988) (providing for jurisdiction in federal courts for actions against a foreign state).

66. *See supra* note 63.

action is being taken. Thus, even if, to revert to the prior example, an individual were not permitted to sue to enforce the privacy right guaranteed by the Covenant, an individual could invoke the Covenant's privacy provision as a defense to a criminal charge. For example, a defendant criminally charged with sodomy could invoke the Covenant's privacy provision.

Judge Bork, in his *Tel-Oren* concurring opinion, was addressing solely the question of affirmative use of human rights norms and whether a private cause of action existed for that purpose. He did not address the question of defensive use of human rights norms. It is more likely that individuals will seek to rely on the Covenant from a defensive posture.⁶⁷ This is particularly true with regard to the extensive array of rights provided by the Covenant for criminal trials.⁶⁸ Although many of the rights protected by the Covenant are also protected under United States law, in certain instances their scope may be broader under the Covenant.⁶⁹

It will be the rare instance in which an individual sues to enforce Covenant rights related to a criminal prosecution. More typically a person who is charged with or has been convicted of a crime will claim that a right guaranteed by the Covenant has been violated. In a Kentucky case,

67. For example, the courts have allowed persons under deportation orders to use the definition of refugee found in the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 entered into force Oct. 4, 1967. Because the Protocol aimed at ensuring rights to individuals, the courts have found it directly applicable. See, e.g., *Cariolan v. Immigration & Naturalization Serv.*, 559 F.2d 993, 996-97 (5th Cir. 1977); *Kashani v. Immigration & Naturalization Serv.*, 547 F.2d 376, 379 (7th Cir. 1977).

68. The Covenant guarantees a fair hearing, Covenant, *supra* note 1, art. 14(1); openness of court proceedings, *id.*; a presumption of innocence, *id.* at art. 14(2); a right to be informed in detail of the charges, *id.* at art. 14(3)(a); an opportunity to prepare a defense, *id.* at art. 14(3)(b); a speedy trial, *id.* at art. 14(3)(c); a right to defend at the trial in person or through counsel of choice, including free counsel where required, *id.* at art. 14(3)(d); a right to cross-examine prosecution witnesses and to compel the attendance of defense witnesses, *id.* at art. 14(3)(e); assistance without charge of an interpreter if required, *id.* at art. 14(3)(f); protection against self-incrimination, 39/40 (1984); special proceedings for juveniles, 6 (¶16), U.N. Doc. A/39/40 (1984); a right to appeal a conviction, Covenant, *supra* note 1, art. 14(5); compensation for punishment under a false conviction, *id.* at art. 14(6); protection against double jeopardy (7.3), U.N. Doc. A/43/40 (1988); prosecution only for an act that was an offense at the time committed, Covenant, *supra* note 1, art. 15(1); protection against a penalty heavier than that in force at the time of the act, *id.*; a guarantee of a lighter penalty if, following sentencing, the legislature reduces the penalty for the offense, *id.*; and a guarantee to equal protection of the laws, *id.* at art. 26.

69. See John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 HARV. HUM. RTS. J. 59 (1993).

Commonwealth v. Hawes,⁷⁰ a person extradited to the United States argued that he could be tried only for the offense on which extradition had been granted. Under the relevant extradition treaty, the extradited person enjoyed such a right.⁷¹ The Kentucky Court of Appeals found:

When it is provided by treaty that . . . certain limitations . . . shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."⁷²

The U.S. Senate appears to have followed the distinction between offensive and defensive use when it considered the question of the Covenant's effect in domestic law. The Senate, charged under the Constitution with the task of giving consent to treaties that the President seeks to ratify,⁷³ considered the Covenant at the request of President George Bush.⁷⁴ The Senate, following consideration in the Foreign Relations Committee, adopted a resolution of consent.⁷⁵ At Bush's suggestion, the Committee, and later the full Senate, appended to the resolution of consent a statement denominated "declaration" stating that Articles 1 to 27 of the Covenant, namely, all the Covenant's provisions guaranteeing rights, should not be deemed self-executing.⁷⁶

The meaning of this phrase is not immediately obvious. By saying that the Covenant was not self-executing, the Senate could have meant that the Covenant was not to be invoked before courts in any way. On the other hand, the Senate could have meant only that the Covenant may not be invoked affirmatively. The Foreign Relations Committee indicated that the

70. *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697 (1878).

71. *Id.* at 699.

72. *Id.* at 702-03 (holding that an individual on trial after being extradited from a foreign state could insist that he be tried only for the offense on which extradition was sought). See also *United States v. Rauscher*, 119 U.S. 407, 427-28 (1886) (characterizing the quoted statement in *Hawes* as "very able").

73. U.S. CONST. art. II, § 2.

74. U.S. Senate, Committee on Foreign Relations, *Report* (to accompany Executive E, 95-2), *International Covenant on Civil and Political Rights* (1992), at 25, reprinted in 31 INT'L LEG. MAT., 648, 660 (1992) (text of letter of George Bush to Senator Pell, Chairman, Committee on Foreign Relations, Aug. 8, 1991). *Bush Urges Senate to Ratify U.N. Civil Rights Covenant*, Reuters AM cycle, Sept. 10, 1991, available in LEXIS, Nexis Library, Curmt file.

75. 138 CONG. REC. S4783-84 (daily ed. Apr. 2, 1992).

76. *Id.* at S4784.

latter was its purpose. "The intent," it said in its explanation of the provision, "is to clarify that the Covenant will not create a private cause of action in U.S. courts."⁷⁷ The Committee apparently did not mean to preclude defensive invocation.⁷⁸

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?

VIII. THE LEGAL EFFECT OF THE SENATE'S DECLARATION

Moreover, it is not clear whether the Senate's declaration about self-execution is relevant to a court. Under established precedent, courts decide whether a treaty provision is self-executing.⁷⁹ No case has reached the courts in which such a Senate provision was at issue.

The *Restatement (Third) Foreign Relations Law of the United States* takes the view that such a declaration binds the courts. Its authors reason:

Since the President can make a treaty only with the advice and consent of the Senate, he must give effect to conditions imposed by the Senate on its consent. The President generally includes a verbatim recitation of any proposed reservation, statement of understanding, or other declaration relevant to the application or interpretation of the treaty contained in the Senate resolution of consent, both in the instrument notifying the other state or the depositary of United States ratification or accession and in the proclamation of the treaty.⁸⁰

President Bush did include the Senate's declaration, along with other qualifying statements adopted by the Senate, when he filed the U.S. ratification of the Covenant with the Secretary-General of the United Nations.⁸¹

The *Restatement* view has never been tested judicially. Its reasoning is attractive; because the President needs the Senate's consent, the Senate may

77. U.S. Senate, Committee on Foreign Relations, *Report* (to accompany Executive E, 95-2), at 19, reprinted in 31 INT'L LEG. MAT. at 657.

78. Cf. An Act to Implement the United States-Canada Free-Trade Agreement, Pub. Law No. 100-449, § 102, 102 Stat. 1851 (1988) (providing, "No person . . . shall . . . have any cause of action or defense under the Agreement"; thus, when Congress wants to preclude defensive use of a treaty it does so explicitly).

79. *Foster & Elam*, 27 U.S. (2 Pet.) at 314-15; *Percheman*, 32 U.S. (7 Pet.) at 87-89.

80. RESTATEMENT, *supra* note 24, § 314, cmt. b.

81. See *supra* note 3.

impose conditions. The greater power to reject the treaty might seem to include a lesser power to require a specific change. However, this approach would create serious problems if implemented with respect to the Covenant. As indicated above, if the courts were to follow the declaration and thus reject private causes of action based on the Covenant, they would put the United States in violation of Article 2.⁸² The *Restatement* authors did not address the situation in which a Senate condition runs counter to an obligation of the treaty to which the Senate gave its consent.

Beyond that circumstance, the question also arises as to the status of a Senate condition. Under the Constitution, the Senate's role is limited to advising the President about the treaty and giving its consent. The Constitution does not contemplate a direct Senate role in writing treaty language. Certainly, the Senate could inform the President that it will refuse to give consent unless the treaty is changed in a particular fashion. However, this is far short of a right on the part of the Senate to draft language that in effect becomes part of the treaty, at least as the treaty is to be implemented in U.S. courts.

In particular, a Senate condition concerning a treaty's effect as domestic law is questionable. Until recently, the Senate had shied from such efforts.⁸³ No one has challenged the role of the courts in deciding this question with respect to a particular treaty provision.⁸⁴

An additional reason to doubt the validity of the Senate declaration is that although the declaration was intended by the Senate to be communicated to the Secretary-General, and thus to the other states parties, and it was so communicated by President Bush, it was not written as part of the treaty. Under international law, that which is binding as a "treaty" includes only the text of the treaty and any reservations made to that text.⁸⁵ Under the Supremacy Clause, only a "treaty" becomes the "law of the land." A declaration contained in a Senate resolution of consent is not a "treaty."⁸⁶ Moreover, the Senate's declaration is not an act of Congress because the

82. See *supra* notes 19-20 and accompanying text.

83. See Covey T. Oliver, *Treaties, the Senate and the Constitution: Some Current Questions*, 51 AM. J. INT'L L. 606, 609 (1957).

84. See *id.*

85. VIENNA CONVENTION ON THE LAW OF TREATIES, adopted May 23, 1969, entered into force Jan. 27, 1980, U.N. Doc. A/CONF.39/27 (1969). See *id.* at art. 2(1)(a) (defining "treaty" as an agreement in either a single instrument or two or more related instruments); art. 2(1)(d) (defining reservation as a statement by a state purporting to modify the effect of the treaty); arts. 19-23 (stating procedure on reservations).

86. U.S. CONST. art. VI.

House of Representatives played no role in its adoption. Thus, it would not appear to be anything more than a non-binding expression of Senate preference on the matter.

This issue has come before the courts only once. In *Power Authority of New York v. Federal Power Commission*,⁸⁷ the Senate in its resolution of consent to a bilateral treaty with Canada on electrical power generation stated that the United States' share of the power to be generated would be allocated within the United States only by an act of Congress.⁸⁸ The court held, however, that this statement by the Senate was of no effect because it was not a reservation, and hence not part of the treaty.⁸⁹

A major reason the court said that the statement did not constitute a reservation was that it did not alter the legal relationship between Canada and the United States. It related, rather, solely to how the United States might use the electrical power it would gain under the treaty. Under the Covenant, the Senate's declaration on self-execution does implicate the rights of the other states parties. Under Article 2, they have a right to expect that the United States will permit domestic enforcement of Covenant-guaranteed rights.⁹⁰ 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. Other states parties may consider the declaration a reservation even though it is not denominated as such by the Senate or the President.

If the declaration is a reservation, then, in the sense of the Supremacy Clause, it would be part of the treaty. Nevertheless, the reservation might be invalid for violating Article 2. However, a court would be hard pressed to decide that the declaration is a reservation if the President and the Senate state that it is not.

IX. THE COVENANT AS DOMESTIC LAW BY VIRTUE OF BEING CUSTOMARY LAW

One final implication of Judge Bork's view that the Covenant creates no private cause of action relates to the Covenant's status as customary law.

87. 247 F.2d 538 (D.C. Cir.) *vacated sub nom.* American Pub. Power Ass'n v. Power Auth. of New York, 355 U.S. 64 (1957).

88. *Id.* at 539.

89. *Id.* at 543-44.

90. *See supra* notes 20-21 and accompanying text.

Even if no private cause of action exists under the Covenant, the Covenant may nonetheless be applicable as customary law and applied as such by the courts. Customary law is the unwritten body of international law based on the practice of states.⁹¹

Customary international law is part of the law of the United States, accepted into domestic law on the rationale that in England the customary law of nations constituted part of the common law.⁹² Many of the major postulates of human rights law as found in treaties have entered into customary law. The *Restatement* lists as acts prohibited by customary law: genocide, slavery, murder, causing disappearance, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of rights.⁹³ The *Restatement* authors added that this list "is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future."⁹⁴

There is reason to conclude that many rights not listed by the *Restatement* have entered customary law, but the matter is one for court determination. For a potential plaintiff, customary law is a less solid base for suit than a treaty. Rights provided under customary law may, according to one view, be disregarded by the executive.⁹⁵ Customary law is difficult to determine and apply because the courts must search the practices of states around the world to determine whether the right exists, and if it does, its precise scope.⁹⁶

Federal statutes do not specifically provide for jurisdiction in federal courts where violations of customary law are alleged.⁹⁷ Thus, litigants are left to claim jurisdiction under the general federal jurisdiction rubric, 28

91. International Court of Justice Statute, art. 38(1)(b).

92. See *Paquete Habana*, 175 U.S. at 700.

93. RESTATEMENT, *supra* note 24, § 702.

94. *Id.* § 702 cmt. a.

95. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986) (citing U.S. Supreme Court language in *Paquete Habana* that customary law is binding on the courts only in the absence of a controlling executive decision). But see Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987).

96. MERON, *supra* note 64, at 119. See, e.g., *Filartiga*, 630 F.2d at 881-85, for the court's analysis to determine whether torture was prohibited by customary law.

97. See 28 U.S.C. § 1331 (1988) (referring to the Constitution, laws, and treaties of the United States).

U.S.C. § 1331, by asserting that customary law is federal common law.⁹⁸ Nonetheless, if a court refuses to apply the Covenant as such, customary law remains a viable argument for a plaintiff to establish both jurisdiction and a cause of action.

X. THE COVENANT AS A MEANS OF CONSTRUING OTHER RIGHTS

One final manner in which the Covenant could still be effective as U.S. law even absent a finding that it can form the basis of a cause of action is its possible application in construing rights in state or federal constitutional law. Thus, a person suing to establish a right and relying on a state or federal constitutional norm could refer to a Covenant provision in order to determine the scope of that right.⁹⁹ In this way, the litigant would not be using the Covenant as the base for a cause of action. Rather, the cause of action would be based on the federal or state constitutional norm.

Judge Bork's view would not be inconsistent with this manner of using the Covenant. It is a fashion in which the Covenant is likely to be used with some frequency. Typically a litigant asserting a right in affirmative litigation in a state or federal court will have some provision of the federal or relevant state constitution to use in support. Thus, there would be no need to use the Covenant to gain the court's jurisdiction. The Covenant has been used this way in the United Kingdom.¹⁰⁰ The Covenant has also been used in this fashion in the United States, even prior to its ratification, as litigants have tried to reinforce their constitutional claims with reference to international standards.¹⁰¹

XI. CONCLUSION

The ratification by the United States of the International Covenant on Civil and Political Rights opens a range of questions for state and federal courts. To date, if the scholarly literature and bar publications are an indication, lawyers are largely unaware of the Covenant and of its potential

98. *Filartiga*, 630 F.2d at 879 (plaintiffs claimed jurisdiction under both 28 U.S.C. § 1331 and the Alien Tort Claims Act, 28 U.S.C. § 1350, because plaintiffs were aliens; court found jurisdiction under 28 U.S.C. § 1350 and did not rule on plaintiffs' claim of jurisdiction under 28 U.S.C. § 1331).

99. See Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 408-12 (1985).

100. *Derbyshire County Council v. Times Newspaper Ltd.*, 3 All E.R. 65, 3 W.L.R. 28 (C.A.) (1992) (opinion of Butler-Sloss, LJ).

101. Jordan Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DE PAUL L. REV. 1257 (1993).

uses to establish rights for clients. As lawyers begin to press the Covenant in litigation, however, courts will be required to determine its applicability. The courts will be called upon to formulate a position when litigants invoke a Covenant norm defensively or affirmatively, either by itself or in conjunction with a constitutional norm. The courts' reaction could range from a total rejection of any reliance on the Covenant to admitting causes of action based on the Covenant alone.

It may well be that for a period of time the courts will vary widely in their use of the Covenant. Such has been the experience in other states that have ratified it. Some judges may use the Covenant broadly, while others may shy from it.

In one aspect, the problem will be one of legal research. Few lawyers in the United States are familiar with the sources in which case law construing the Covenant is found. The Covenant has already been used by courts in this country and will continue to be used, so that the usual research techniques will turn up relevant information. However, the interpretation of the Covenant is developed by courts of other states of the world whose case law is less accessible to U.S. lawyers.

The case law is also developed by the Human Rights Committee whose opinions are published in annual collections by the United Nations.¹⁰² These collections are typically available only in libraries with a collection of United Nations materials, such as U.N. depository libraries. Lawyers may need to go outside the usual law libraries to find this material.

Only when the bar becomes familiar with the Covenant's coverage and the methods of researching Covenant-based rights will the Covenant begin to affect the contours of rights available to the public in the United States. If Judge Bork's view of the Covenant's domestic applicability were

102. Each annual collection is titled *Report of the Human Rights Committee* and is published as a document of the U.N. General Assembly. In recent years it has been designated as Supplement No. 40 and bears a U.N. document number that reads similar to the following cite: U.N. Doc. A/39/40 (1984). "A" indicates a document of the General Assembly, as opposed to some other U.N. organ. The first number indicates the session of the General Assembly, starting from the U.N.'s founding. The numeral "40" refers to the document as Supplement No. 40. The texts of selected decisions of the Committee are published in *Human Rights Law Journal* (International Institute of Human Rights, Strasbourg). A useful research tool is MANFRED NOWAK, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, A COMMENTARY* (Kehl, Strasbourg/Arlington 1993) (an article by article commentary on the Covenant). See also DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE—ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1991); TORKEL OPSAHL, *THE HUMAN RIGHTS COMMITTEE, IN THE UNITED NATIONS AND HUMAN RIGHTS—A CRITICAL APPRAISAL* 369 (Philip Alston ed. 1992).

followed, that impact would still be significant although not nearly as significant as under a broader reading of applicability.

If the courts follow the Supremacy Clause and give a proper interpretation to the norms involved in determining the issue, they will reject Judge Bork's view of the Covenant. Courts will apply the Covenant whenever it contains relevant rights, whether the litigant invokes the Covenant norm offensively or defensively, and whether in conjunction with a constitutional norm or by itself. The ratification of the Covenant by the United States is a historic milestone by any measure. It remains up to the bar and the courts to determine precisely how historic that milestone will be.