Application of Customary International Human Rights Law in the United States: Between Theoretical Recognition and Practical Challenges

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Abstract:
This study centers on a fundamental issue in contemporary international law, concerning the effectiveness of implementing customary international human rights law in the United States, in light of its theoretical recognition of the "law of the land" without the need for transposing domestic legislation. However, practical reality reveals a profound dualism between official rights-based discourse and actual practice. This is manifested in fluctuating judicial practice that oscillated between an expansive approach that culminated in the Filartiga case (1980) and the adoption of a narrow and restrictive trend that began with Sosa (2004) and extended through the Kiobel (2013) and Jesner (2018) cases.
The article concludes that the tendency toward American exceptionalism and sovereign consideration has hollowed the doctrine of automatic incorporation out of its procedural value, turning it into a formal principle that lacks effectiveness in the face of domestic constitutional and political constraints.
Keywords: Customary International Human Rights Law, United States, American Law, Automatic Incorporation, Law of the Land.

Introduction:

Customary international law is distinguished from other sources of international law by two essential characteristics that continue to give rise to doctrinal debate. On the one hand, it represents an unwritten rule, in contrast to codified treaties; on the other hand, it is a non-voluntary rule that does not necessarily require the prior and explicit consent of States, unlike international agreements, which create obligations only upon ratification or accession.
A customary rule is neither a law issued by a central legislative authority nor does it arise from a written contractual agreement. Rather, it is the product of decentralized practices that recur in international practice, and whose legal binding force has become firmly established in the consciousness of decision-makers despite the absence of centralized enforcement mechanisms. This decentralized nature has produced a profound theoretical problem concerning the basis of the binding force of custom, which is summarized by the famous doctrinal statement: “Why does something that people have become accustomed to doing become something that ought to be done?”

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[1] Article 38, paragraph 1, subparagraph 2, of the Statute of the International Court of Justice defines international custom as "international practices accepted as law,"

[2] yet this provision has remained lacking in detailed precision and has failed to settle the doctrinal disagreements surrounding its elements, conditions, and legal nature. Nevertheless, traditional doctrine has established that two essential elements must coexist for a customary rule to arise: the first is the material element, represented by the recurrent and established international conduct or practice; and the second is the psychological element (opinio juris), represented by the belief of States and decision-makers that such conduct derives from a legal obligation and is not merely an act of international courtesy.

Historically, the Anglo-Saxon legal system is considered one of the legal systems most open to customary rules. Since the writings of the jurist "Blackstone" in the eighteenth century, the jurisprudence of its courts has settled on considering "international law as part of the law of the land," a principle that has been doctrinally and judicially established despite the ambiguity surrounding its limits and procedural content.

However, customary international law relating to human rights differs from traditional customary international law in that it aims to make individuals, alongside States, subjects of international law. Given the existence of many States that mistreat their citizens, the rules of this custom do not find a clear reflection in regular global conduct, but rely more on the writings of jurists, statements by States, and their implicit acceptance. This makes the concept of customary international human rights law more ambiguous and controversial than the traditional concept. [3]In this context, the United States, as the heir to the Anglo-Saxon tradition, emerges as an exceptional model worthy of study, as its relationship with customary international human rights law is characterized by a clear structural duality between official human rights discourse and practical application. The American judiciary established the principle of automatic incorporation, whereby customary international law is incorporated into the law of the land without the need for implementing legislation. This was expressly affirmed by the Supreme Court in The Paquete Habana (1900), when it confirmed that "international law is part of our law."

However, this theoretical foundation faced a practical retreat in human rights disputes, as judicial precedents reveal a fluctuating approach that moved from the height of openness in Filartiga v. Pena-Irala (1980), which expanded the scope of judicial jurisdiction, to a phase of cumulative restriction led by the Supreme Court in Sosa v. Alvarez-Machain (2004), Kiobel v. Royal Dutch Petroleum (2013), and Jesner v. Arab Bank (2018).

The importance of this subject lies in its intersection with a number of fundamental issues that affect the very structure of international law. The question of the extent to which the most powerful State in the international system is bound by customary international human rights law goes beyond the American framework to raise deeper questions concerning the authority of international law in the face of the political will of major powers, and concerning the extent to which the mechanism of automatic incorporation can ensure actual compliance in the face of American Exceptionalism.

Based on the foregoing, the problem of this study revolves around the following main question: "To what extent is the theoretical recognition of customary international human rights law

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effective within the American legal system through the principle of automatic incorporation, and what practical challenges prevent the full implementation of this law in reality?"

To address this problem, the descriptive and analytical approaches were adopted. Accordingly, the study is divided into two main sections: the first addresses the legal framework for incorporating customary international law into the American domestic legal system, while the second is devoted to assessing the problem of actual application and the manifestations of conflict between compliance requirements and the exceptionalist tendency.

Section One: The Legal Framework for the Incorporation of Customary International Law into the American Legal System

The mere classification of customary international law as an official source of international law is not sufficient to determine its legal effects and position within the domestic legal system of the United States. It is therefore necessary to answer two distinct procedural questions: the first concerns how customary international law is incorporated into the American legal system, which will be the subject of the first subsection; while the second concerns the procedural mechanisms through which this custom may be invoked before American courts, which will be addressed in the second subsection.

Subsection One: The Mechanism for Incorporating Customary International Law into American Law

The American legal system, as a successor to the Anglo-Saxon tradition, is based on an established principle according to which customary international law is automatically incorporated into domestic law once it is formed at the international level, without the need for implementing national legislation. This will be addressed in the first sub-subsection by considering customary international law as part of the law of the land, followed by an examination of its status in the second sub-subsection, and finally, the extent to which obtaining authorization from Congress is necessary for its application.

Sub-subsection One: Customary International Law as Part of the Law of the Land

The prevailing international legal doctrine, in interpreting the applicability of customary international law within the American legal system, traces it back to its historical origins in English Common Law, where customary international rules were incorporated into colonial law as an integral part of that law. This principle continued to be applied after the independence of the United States in 1776 and the ratification of its Constitution in 1789,[4] and this adaptation is based on the legal doctrine established by the English jurist "William Blackstone" in his statement: "The law of nations is entirely incorporated into the common law, and holds its place as part of the law of the land."[5]

According to this approach, Anglo-Saxon legal scholarship distinguishes between two legal approaches: the principle of automatic incorporation (Automatic Incorporation), and the principle of legislative transformation (transformation), which requires the enactment of an explicit domestic legislative provision in order to confer binding national force upon the international rule. By contrast, the principle of automatic incorporation provides for the application of international custom within the domestic legal system as soon as its material and psychological elements are fulfilled, thereby becoming an effective part of the "Law of the Land" (Law of the Land) before national courts.

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The U.S. Constitution does not contain an explicit provision regulating the legal value of international custom, as provided for international treaties in Article VI thereof, or what is known as the Supremacy Clause,[6] as the only constitutional reference to the Law of Nations is limited to Article I, Section 8, which granted Congress the "power to define and punish ... Offences against the Law of Nations." This silence has raised questions as to whether the Supremacy Clause (Article VI), or the laws which the President is required to execute pursuant to Article II, or the cases heard by federal courts under Article III of the Constitution, may apply to customary rules of international law. On this basis, prevailing legal scholarship has established that the absence of an explicit provision does not mean the exclusion of international custom; rather, this is because the Founding Fathers considered the State's obligation to abide by it to be a matter of course, given that it fell within the concepts of General Common Law that predated the establishment of the federal union and was automatically binding upon it.[7]

The famous case of The Paquete Habana (1900) constitutes the most prominent judicial application of this principle. The facts of the dispute may be summarized as follows: American warships seized two unarmed Cuban fishing vessels La Lola and The Paquete Habana as war prizes during the Spanish-American War. The owners of the two vessels challenged the legality of the seizure, relying on the established international custom prohibiting the capture of unarmed coastal fishing vessels during wartime. The U.S. Supreme Court ordered the return of the two vessels with compensation, basing its judgment on what has since become one of the most frequently cited statements in legal scholarship. The Court stated in its reasoning that: "International law is part of our law, and must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination, where there is no treaty, and no controlling executive or legislative act or judicial decision." Since the issuance of this judgment, the Supreme Court's jurisprudence has consistently regarded international custom as enforceable domestic law.[8]

Subsection Two: The Status of International Custom in U.S. Law (The Issue of Hierarchical Ranking)

The recognition of the principle of automatic incorporation raises a fundamental legal issue concerning the legal characterization of international custom: is it federal law binding upon all courts, or does it fall within the category of state laws whose application varies according to the judicial jurisdictions concerned?

The practical importance of this distinction lies in the scope of judicial interpretation and uniformity. While considering it as local law (state law) entails that each state independently interprets and applies it, considering it as federal law subjects all courts to a uniform and binding interpretation.[9]

In Banco Nacional de Cuba v. Sabbatino (1964), the Supreme Court held that federal courts have exclusive jurisdiction over disputes arising from the foreign relations of the United States,[10] a principle adopted by the Restatement (Third) of the Foreign Relations Law of the United States in Chapter Three through an explicit provision stating that: "International law is the law of the United States but it has the character of federal law."[11]

With regard to the status of international custom vis-à-vis federal law, the prevailing doctrinal and judicial approach characterizes customary rules as equivalent to laws enacted by Congress, thereby subjecting them to the temporal conflict rule known as the "Last in Time Rule."

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However, the cumulative and unwritten nature of international custom creates practical difficulties in determining precisely the date on which a customary rule crystallized, making the application of this rule dependent upon the judicial assessment in each individual case.[12]

In order to avoid establishing a conflict, the principle of "consistent interpretation," established in the Supreme Court's jurisprudence in Schooner Charming Betsy (1804), constitutes a binding guiding principle for the courts, requiring them to interpret ambiguous or potentially applicable legislative provisions in a manner consistent with the rules of international custom before resorting to establishing a conflict.[13] An analysis of The Paquete Habana demonstrates that customary rules, despite their automatic incorporation, occupy a lower rank than international treaties, executive decisions, legislative provisions, and judicial precedents.[14]

With regard to the status of international custom vis-à-vis measures issued by the executive authority, Justice "Marshall" in Brown v. United States held that the President alone could not violate a customary rule of international law without explicit legislative authorization, whereas this authority was vested in Congress and the President when acting jointly.[15] This was also the approach adopted by Justice "Story" in the same case, by affirming that the President had no authority to override the established laws of war among civilized nations.[16]

However, subsequent judicial developments, particularly since the issuance of Curtiss-Wright in 1936, which held that the President is the sole organ of the state in international relations, led to an expansion of the discretionary scope of the executive authority in its interpretation and construction of customary rules,[17] which gave rise to legal issues and conflicts of jurisdiction whose features became clearly apparent in the executive measures adopted following the events of September 11, 2001.

Subsection Three: The Extent to Which Congressional Authorization Is Necessary for the Application of International Custom

Legal scholarship in the United States is divided with regard to the legal characterization of international custom into two approaches. The first approach considers international custom to be part of federal common law, thereby granting federal courts automatic authority to apply it once its existence has been established, without the need for an explicit legislative provision enacted by Congress, based on judicial precedents, particularly The Paquete Habana. Conversely, the second approach, formulated by Professors Jack Goldsmith and Curtis Bradley in 1997, holds that the judicial principle established in Erie Railroad v. Tompkins in 1938 eliminated the philosophical basis for the application of custom, given that it expressly established that federal courts lacked the authority to create independent general rules of law. From this perspective, the enforceability of any legal rule following the Erie precedent remains conditional upon its issuance by a competent legislative authority, which makes the application of international custom by the judiciary, in the absence of an express law enacted by Congress, subject to a challenge on grounds of illegality.[18]

The Supreme Court's judgment in Sosa v. Alvarez-Machain in 2004 provided a partial solution to this doctrinal disagreement, as the Court expressly rejected making the application of international custom conditional upon prior authorization by Congress, affirming that the application of customary rules by the courts does not constitute the creation of a new cause of action, but rather reflects the original position. At the same time, the Court significantly narrowed the scope of application, requiring that judicial claims concern the violation of a

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customary rule characterized as specific, binding, and widely accepted, while requiring the plaintiff to provide conclusive grounds before the judiciary applies custom in private disputes. The judgment also reaffirmed the absolute authority of Congress to completely and at any time prohibit the national judiciary from relying upon the Law of Nations.[19]

This debate is further supplemented by the argument advanced by a group of legal scholars concerning the extension of the technical classification of international treaties to customary rules, distinguishing between self-executing customary rules (Self-Executing Custom) and non-self-executing customary rules (Non-Self-Executing Custom). According to this approach, customary rules relating to rights inherent to human beings, such as the prohibition of indefinite arbitrary detention, acquire direct effect from which individuals benefit and are applied by virtue of their own force, whereas rules governing diplomatic matters and reciprocal governmental practices lack such automatic effect, making their implementation contingent upon the enactment of a national legislative provision incorporating them.[20]

Second Section: Judicial Mechanisms for the Application of International Human Rights Customary Law: The ATS as a Model

If the influence of the legal scholarship and case law examined in the first section has established the substantive value of international custom within the American legal framework, the practical effectiveness of this incorporation remains contingent upon the existence of a procedural mechanism enabling interested parties to litigate and invoke it before national courts.

Here, the central importance of the Alien Tort Statute (ATS), enacted by Congress in 1789, emerges as the principal legislative instrument for incorporating the Law of Nations and giving it procedural effectiveness within the judicial environment of the United States.

First Subsection: The Alien Tort Statute (ATS): Text and Basis

Federal courts have subject-matter jurisdiction to hear civil actions arising from serious violations of international law pursuant to the Alien Tort Statute (ATS), brought by aliens in respect of damages resulting from violations of the Law of Nations or international treaties ratified by the United States. This jurisdiction is characterized by a transnational feature, as the provision does not require the territoriality of the wrongful act, that is, it does not require the acts to have occurred on U.S. territory, nor does it link the exercise of personal jurisdiction to the nationality of the defendant, meaning that the defendant is not required to be a U.S. citizen.[21]

This statute was enacted out of the desire of the American legislator to avert international responsibility for the emerging federal state, by providing local judicial remedies to prevent individual customary violations from turning into diplomatic disputes.[22]

From a structural perspective, the ATS is characterized as a purely procedural provision, granting abstract judicial jurisdiction without creating substantive rights. It does not, by itself, create a "cause of action"; rather, its role is limited to serving as a regulatory framework that accommodates rights derived directly from established international custom.

The federal judiciary settled this constitutional characterization in Filartiga v. Pena-Irala in 1980, holding that the statute fell within the scope of Article III of the U.S. Constitution, on the basis that actions arising from violations of the Law of Nations are closely connected with the foreign relations of the United States, thereby requiring the extension of federal judicial

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jurisdiction to address their consequences,[23] a position subsequently upheld by the Supreme Court in Sosa in 2004.[24]

Second Subsection: The Height of Judicial Openness (Filartiga v. Pena-Irala, 1980)

The facts of this case may be summarized as follows: citizens of Paraguay (a father and his daughter) brought an action under the ATS against a former security official in Paraguay, accusing him of causing the death of their son and brother as a result of torture. At that time, the United States was not a party to any international convention against torture, which made establishing the existence of a binding customary rule the substantive issue at the center of the adjudication of the dispute. The Second Circuit Court of Appeals therefore overturned the first-instance judgment holding that it lacked jurisdiction, ruling that "international custom forms an integral part of federal common law."[25]

In establishing the customary rule prohibiting torture, the court relied on a fourfold synthetic methodology: the Charter, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights as an instrument revealing an established international obligation, and the condemnation of torture in international practice, in addition to the legislation of comparative jurisdictions.

The court concluded that official torture practiced by state authorities constitutes a violation of the Law of Nations, regardless of whether it is applied to aliens or citizens.[26]

The methodological significance of this judgment lies in the fact that it provided a realistic formulation for establishing custom based on the positive and concrete practices of states, rather than on the assumptions of abstract natural law. This enabled it to overcome the philosophical obstacle imposed by the Erie precedent.

While the Erie case prohibited federal courts from creating a floating common law that did not emanate from a legislative authority possessing sovereignty, the court here succeeded in establishing that the prohibition of torture is not a moral principle arising from the conscience of the judge, but rather a positive legal rule formulated by the collective will of the international community. Accordingly, the role of the federal judge shifted from creating law to identifying the reality of the practices of the international community, thereby conferring legal legitimacy upon the application of custom under the framework of the ATS.[27]

Third Subsection: Narrowing the Scope of Application (Sosa v. Alvarez-Machain, 2004)

The facts of this judicial precedent may be summarized as follows: in 1990, the U.S. Drug Enforcement Administration (DEA) arranged a cross-border kidnapping operation targeting the Mexican physician Humberto Alvarez-Machain in his homeland, with the assistance of a network of Mexican nationals, including José Sosa. The purpose of this operation was to bring him before the U.S. courts for trial in connection with the killing of a federal security agent.[28]

Following the issuance of a judgment acquitting him for lack of sufficient evidence, Alvarez-Machain brought a dual action, suing the federal government under the Federal Tort Claims Act (FTCA), while suing Sosa and the parties involved in the kidnapping operation on the basis of the Alien Tort Statute (ATS).[29]

Before the Supreme Court, Sosa argued that the ATS could not be applied to seek judicial compensation except pursuant to an express legislative authorization from Congress. This was the same doctrinal position on which Judge Bork based his opinion in Tel-Oren v. Libyan Arab Republic in 1984. However, the Supreme Court rejected this restrictive interpretation, affirming

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the possibility of applying international custom without the need for express legislative authorization from Congress.[30]

However, in balancing the matter, the Court dismissed the substance of the claim on the basis of the plaintiff's inability to establish the existence of an established customary rule prohibiting one-day transboundary arbitrary detention by official authorities outside their territory according to the judicial standards required. Thus, in Sosa, the Supreme Court established a dual normative approach: it upheld the principle of the automatic incorporation of international custom at the theoretical level, while, at the same time, establishing highly stringent and restrictive substantive conditions for its practical application through the procedures governing such application.[31]

Fourth Subsection: The Retreat from Openness toward International Custom (Kiobel, 2013, and Jesner, 2018)

The federal judiciary introduced a new condition concerning the geographical connection of the dispute to the United States following Kiobel v. Royal Dutch Petroleum Co. in 2013. The facts of the case may be summarized as follows: Nigerian citizens brought an action against Dutch and British oil companies under the ATS, accusing them of complicity with the Nigerian military regime in committing serious human rights violations in the territory of Ogoniland. In this case, the Supreme Court recognized the Presumption Against Extraterritoriality with respect to the provisions of U.S. law, including the ATS, requiring, for the exercise of judicial jurisdiction, that the facts of the dispute sufficiently touch upon and concern U.S. territory so as to rebut this presumption.[32]

The practical effect of this case was to exclude many transnational human rights claims, on the ground that they concerned violations committed outside U.S. territory between foreign parties, which are known as "Foreign Cubed" disputes.

The case of Jesner v. Arab Bank, PLC in 2018 completed the course of restriction. The facts of this case concerned a compensation action brought by foreign nationals who had fallen victim to armed attacks in the Middle East against the Jordanian Arab Bank, accusing it of facilitating the financing of the terrorist organization through its New York branch.

The Supreme Court completed this course of restriction in this judgment by excluding foreign corporations from the scope of civil liability under the ATS, arguing that extending liability rules to include legal persons constitutes a policy choice requiring explicit legislative intervention by Congress. This judicial approach has been subject to strong academic criticism because it creates an absurd equation, as the economic power and field influence of multinational corporations make them a major actor in committing contemporary human rights violations. Accordingly, excluding them from the scope of the ATS leads to stripping this procedural instrument of most of its practical value in protection.[33]

This restrictive judicial course is also connected to what happened to the Torture Victim Protection Act (TVPA) of 1991, which was enacted primarily to provide an explicit right to bring an action for torture and extrajudicial killing. However, it was itself restricted following Mohamad v. Palestinian Authority in 2012. The facts of that case concerned the killing of a naturalized American citizen of Palestinian origin following his torture in the prisons of the Palestinian Authority, which led his family to sue the Palestinian Authority and the Palestine Liberation Organization under the TVPA. However, the Supreme Court ruled to exclude legal

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entities and organizations from the scope of litigation, interpreting the term "individual" contained in the statutory text as referring exclusively to natural persons and not legal persons, thereby completely closing the avenue for civil actions against institutions and corporations under this Act.[34]

Chapter Two: Problems of Effective Application between Compliance and Exceptionalism

The transition from the sphere of the theoretical foundation of mechanisms of incorporation to practical reality reveals a clear functional disparity between the United States' initial normative recognition of international human rights custom and actual U.S. practice. This structural discrepancy is manifested through two parallel approaches: the first identifies the areas of conformity and instances of judicial compliance with certain established customary rules in the first section, while the second examines the manifestations of conflict and exception in the second section.

First Section: Areas of Compliance and Conformity

The conformity between U.S. law and international human rights custom is manifested in specific areas in which federal laws and courts adhere to international standards. These include the prohibition of torture and cruel treatment in the first subsection, fair trial guarantees and defendants' rights in the second subsection, and, finally, the prohibition of genocide and crimes against humanity.

First Subsection: The Prohibition of Torture and Cruel Treatment in U.S. Legislative Provisions

The prohibition of torture constitutes the clearest area of conformity between the U.S. system and international human rights custom, as legislative and judicial efforts have combined to establish this obligation. From a legislative perspective, Congress enacted the Torture Victim Protection Act (TVPA) in 1991, which criminalizes official torture and grants its victims an explicit right to bring actions and seek compensation before U.S. courts. This was followed by the United States' ratification in 1994 of the Convention against Torture (CAT), subject to restrictive reservations.[35] At the judicial level, federal circuits have repeatedly affirmed, beginning with Filartiga and extending to Sosa, that the prohibition of torture practiced by official authorities constitutes a peremptory customary rule automatically incorporated into federal common law, as it satisfies the requirements of specificity and universality and is accepted by the international community as an established legal obligation.

However, this compliance, which appears comprehensive in its texts, faces substantial criticism in its practical environment, as actual practice has emptied it of its comprehensiveness through two successive restrictions. The first is represented by the United States' formulation of broad reservations upon ratifying the Convention against Torture, particularly its declaration that the provisions of the Convention are "non-self-executing," meaning that they may not be invoked directly before the courts without intermediary domestic legislation, together with its requirement that its international obligations not exceed those recognized by the U.S. Constitution in its provisions concerning cruel and unusual punishment. The second challenge was manifested in practice during the period following September 11, 2001, when the practices of security agencies and the adoption by the U.S. administration of what were then known as the "torture memos," used to justify advanced interrogation methods such as waterboarding,

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demonstrated the fragility of this international obligation and its immediate retreat in the face of national security considerations and federal political necessities.

Second Subsection: Protection of Defendants' Rights and Fair Trial Guarantees

The field of fair trial guarantees and defendants' rights represents one of the most significant areas of intersection and agreement between the U.S. system and the rules of international human rights custom. This agreement is not limited to a mere normative convergence, but extends to a structural application of protective procedural concepts. The federal Constitution, particularly through the Fifth and Sixth Amendments, which form part of the Bill of Rights, guarantees a set of procedural safeguards that objectively correspond to those established by international custom and human rights instruments. These include the defendant's right to the assistance of counsel and effective legal assistance, the right to a public and impartial trial before a jury, protection against the risk of double conviction for the same offense, and the ability to confront and examine prosecution witnesses judicially.

The American judiciary, at its various levels, has consistently interpreted these guarantees in a manner compatible with international standards and the requirements of the development of international custom, relying in many of its rulings on the concept of due process as a flexible framework for accommodating contemporary universal humanitarian standards. This consistent judicial interpretation contributes to avoiding conflict between national and international rules, thereby establishing continuing practical conformity that enhances the credibility of the U.S. judicial system in international forums and presents it as automatically committed to defense rights. However, this exemplary conformity remains subject to the traditional limits of conflict, particularly when these guarantees encounter exceptional procedural restrictions relating to military trials or transnational terrorism cases, which place the correspondence between constitutional rights and international customary obligations under the test of actual application.

Third Subsection: The Prohibition of Genocide and Crimes against Humanity

The prohibition of genocide and crimes against humanity embodies an integrated model of conformity between the U.S. legal system and international human rights custom. The United States ratified the Convention on the Prevention of the Crime of Genocide in 1988, and this was immediately followed by Congress's enactment of the Genocide Conventions Implementation Act to criminalize such conduct and establish its penalties within federal criminal law.[36] At the judicial level, the crime of genocide and many violations classified as crimes against humanity constitute the essence of peremptory customary rules satisfying the criteria established in Sosa in terms of universality, acceptance, specificity, and precision. This enables individuals to invoke them and seek civil compensation for them before federal courts under the Alien Tort Statute (ATS), provided that the action satisfies the required territorial and geographical conditions.

The judicial application of international custom was clearly demonstrated in Presbyterian Church of Sudan v. Talisman Energy, Inc. in 2009, a case that revealed the tendency of U.S. courts to apply the customary prohibition of genocide automatically, without the need for detailed legislative mediation. At the same time, however, it established strict and restrictive criteria for determining the liability of third parties or complicit legal entities. The court required, in order to establish civil liability for a customary violation, proof of the standard of dual criminal intent, which requires not only that the defendant have knowledge of the

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genocidal practices committed by the principal perpetrator, but also that the defendant provide effective assistance with the intention of facilitating the commission of the crime. This dual approach reflects the desire of the U.S. judiciary to maintain complete theoretical conformity with the peremptory international custom relating to genocide crimes, while imposing highly stringent procedural and substantive restraints in its actual application in order to avoid opening the door widely to transnational tort liability claims against major corporations.[37]

Second Section: Areas of Conflict and Manifestations of Exceptionalism

In contrast, the conflict between U.S. practice and international custom becomes apparent in areas where the United States gives precedence to its national sovereignty and national security considerations over its international obligations, thereby establishing clear features of exceptionalism in its legislative and judicial conduct. To examine the manifestations of this conflict, this section has been divided into three subsections. The first subsection addresses the Guantánamo detentions as the most difficult test of the extent of compliance with international custom; the second concerns the death penalty; while the final subsection examines the policy of mass surveillance and the right to digital privacy as an emerging customary rule.

First Subsection: Guantánamo Detentions

The U.S. security policies following the attacks of September 11, 2001, constituted the most complex environment for testing the extent to which national sovereign interpretations are compatible with international human rights custom and international humanitarian law. The U.S. executive authority at the time quickly formulated exceptional definitional approaches to international obligations, which became clearly manifested in the presidential decision issued by President George W. Bush, who concluded that the Geneva Conventions relating to prisoners of war did not apply to detainees accused of belonging to transnational terrorist networks, and that international custom did not require the United States to treat them with the same protections afforded to lawful combatants. Instead, they were classified as "unlawful enemy combatants" in order to justify depriving them of the minimum guarantees of humane treatment and fair trial, under the cover of a continuing governmental claim that these measures did not constitute a violation of international custom, but were merely an "application-based interpretation" of its content in a manner compatible with the nature of contemporary non-international armed conflicts, although many critics considered otherwise.[38]

Numerous judicial actions were brought before U.S. courts, particularly under the Alien Tort Statute (ATS), in which the plaintiffs argued that the practice of prolonged arbitrary detention without trial and the deprivation of the right to a fair trial constituted a flagrant violation of the "Law of Nations," such as Rasul v. Bush in 2004,[39] concerning the challenge to the legality of arbitrary detention, as well as Rasul v. Rumsfeld (2004–2009), relating to financial compensation for damages resulting from arbitrary detention. In the latter case, the British plaintiff, "Rasul Shafiq," argued against the Secretary of Defense, Donald Rumsfeld, that his arbitrary detention at Guantánamo constituted a violation of the Law of Nations. When the U.S. administration invoked the lack of jurisdiction of the federal courts on the grounds that the Guantánamo detention facility was located in Cuba, outside the direct territorial sovereignty of the United States, the detainees challenged jurisdiction, relying on the state's effective and exclusive control over the base.[40]

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Although the Supreme Court recognized, on the procedural level, the right of foreign detainees to challenge the legality of their detention judicially through a petition for Habeas Corpus, the course of compensation and claims of liability under the ATS encountered the barrier of immunity and sovereign privileges of defense officials, whose conduct was characterized as official action falling within the scope of their discretionary and legitimate duties to protect national security.

In Hamdan v. Rumsfeld in 2006, the Supreme Court expressly held that the system of exceptional military commissions established by the executive authority to try Guantánamo detainees violated the basic procedural guarantees established under Common Article 3 of the four Geneva Conventions, which prohibits trials that do not provide the judicial guarantees recognized as valid by civilized peoples. The Court therefore based its judgment on the convention ratified by the United States as an applicable treaty rather than on abstract custom, thereby avoiding direct confrontation with the security-based interpretations of the executive authority. This judicial maneuver revealed an entrenched institutional pattern in which, when customary rights conflict with national security requirements, the federal judiciary prefers to resort to explicit treaty rules codified nationally, thereby avoiding the philosophical confrontation concerning the application of international custom in areas of military and executive sovereignty.[41]

The Guantánamo experience embodies the deeper pattern of American exceptionalism in confronting international human rights custom through the creation of a specific legal theory that claims to interpret custom rather than violate it. This was summarized by the scholar Julien Ku when he stated: "The government's interpretation of international custom in a manner contrary to international consensus not only creates an internal conflict, but its effects extend to the international level, undermining what remains of the credibility of the American human rights position."[42]

Second Subsection: The Death Penalty in the Face of International Custom

The death penalty and its methods of implementation in the United States represent a striking example of American exceptionalism in the face of contemporary trends in international human rights custom. While the international community and its institutions are increasingly moving toward the abolition or suspension of this penalty, on the grounds that it constitutes an infringement upon the inherent right to life, the United States continues to retain it in a number of states and at the federal level.

The Supreme Court addressed this issue in Roper v. Simmons in 2005, which examined the constitutionality of imposing the death penalty on offenders who committed their crimes while under the age of eighteen. Justice Anthony Kennedy relied on the "evolving standards of decency" to interpret the scope of the constitutional prohibition of cruel and unusual punishments contained in the Eighth Amendment, referring to two foundations: an internal one, represented by the existence of a national consensus against executing minors, embodied in the explicit or practical prohibition of this penalty in forty-seven U.S. states; and a second, external and inferential foundation, represented by the global trend opposing this practice, as evidenced by the small number of states that had continued to execute juveniles since 1990, in addition to the fact that the United States and Somalia were, at that time, the only two states that had not ratified the Convention on the Rights of the Child (CRC).[43]

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However, this reliance on international standards provoked an objection from the renowned Justice Scalia, who issued a dissenting opinion, firmly rejecting the subjection of the constitutional Bill of Rights to the provisions and interpretations of international courts or the comparative legislation of other states. He considered that the federal judiciary was required to examine the historical purposes of the U.S. Constitution and its own traditions, rather than what other states considered appropriate. This clearly reflects American exceptionalism at the judicial level, which raises the question of whether there exists an established international custom absolutely prohibiting the death penalty that imposes a legal obligation on the United States externally.[44]

The answer to this question distinguishes between two levels. The first concerns the prohibition of the execution of certain vulnerable groups, such as juveniles and persons with intellectual disabilities, a matter that was settled by the Supreme Court in Atkins v. Virginia in 2008, where there exists, within this scope, uniform international conduct and binding legal conviction (Opinio Juris), which almost elevates this rule to the status of established general custom that precludes exception and reservation.[45] The second level concerns the total and comprehensive prohibition of the death penalty itself. Although the international conscience is strongly moving in this direction, it cannot currently be conclusively established that a general and binding universal customary rule prohibiting the death penalty absolutely has crystallized, given the continued actual practice of many major actors in the international system, such as China, India, and the United States itself, which prevents the fulfillment of the criterion of general and consistent state practice necessary to assert the emergence of an established international custom in this regard.

The duality of the United States appears in the fact that it represents the only Western democratic state that continues to apply this penalty, while at the same time objecting to the practices of other states on the grounds that they violate international human rights standards. Even when it ratified the "International Covenant on Civil and Political Rights" in 1992, it attached reservations to its ratification restricting the application of Article 7 concerning the prohibition of cruel and inhuman punishments, declaring that it was bound by it only to the extent permitted by the U.S. Constitution. This approach, namely ratification with reservations, constitutes a systematic mechanism for evading international obligations while maintaining the image of a state engaged in the international human rights system.

Third Subsection: Digital Mass Surveillance and the Right to Privacy (Exceptionalism in the Face of Emerging Custom)

The comprehensive electronic surveillance policies implemented by the United States constitute a complex field of conflict that reveals the nature of the interaction between national security exceptionalism and the development of customary international law. This issue requires a precise distinction between two normative levels: the first concerns the right to privacy as a general and established customary rule that has been recognized for decades in international declarations and instruments, such as Article 17 of the International Covenant on Civil and Political Rights; while the second concerns the prohibition of cross-border mass surveillance as a specific obligation that is still undergoing normative formation and has not yet acquired sufficient stability to satisfy the criteria established by the Sosa precedent.

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The contradictory structure of the U.S. position became evident following the leaks by Edward Snowden formerly a contractor and employee of the Central Intelligence Agency (CIA) and the National Security Agency (NSA) to the press in 2013, which exposed the enormous scope of the NSA's programs, foremost among them the PRISM program based on Section 702 of the Foreign Intelligence Surveillance Act (FISA), which permits the interception of foreigners' communications without prior judicial authorization. These leaks revealed a clear duality in U.S. positions. In December 2013,[46] the United Nations General Assembly, in its Resolution 68/167,[47] and with apparent U.S. approval, condemned arbitrary and mass surveillance as a serious interference that violates the rights to privacy and freedom of expression. More precisely, the United States initially worked to limit the scope of the resolution and weaken its wording, then approved it after amendments. This pattern embodies the mechanism of American exceptionalism in practice, namely participation in the formulation of international standards while incorporating loopholes that subsequently enable it to evade them.

In April 2024, the U.S. Congress expanded surveillance powers under Section 702, rejecting the addition of a requirement for a judicial warrant to access Americans' communications, while disregarding reports of the United Nations High Commissioner for Human Rights that considered U.S. mass surveillance programs to constitute a serious violation of an established rule of international law, referring to Article 17 of the International Covenant.[48]

To confront international condemnation, the U.S. government invokes three main arguments. The first is based on a narrow geographical interpretation of its international obligations, by claiming that the scope of the International Covenant on Civil and Political Rights is confined to its geographical territory and does not protect foreigners abroad. This claim conflicts with the decisions of United Nations committees affirming that the protection of human rights applies to everyone subject to the state's authority and effective control, regardless of their location. The second argument is based on the justification of absolute necessity and considerations of national security and counterterrorism. However, this argument lacks practical credibility, following the inability of official U.S. assessment reports to establish a single case in which mass surveillance succeeded in preventing an imminent and actual terrorist threat. The third argument appears in the successive U.S. administrations' assertion that their practice does not constitute a violation of the right to privacy, but rather a particular interpretation of the scope of this right. This unilateral approach strips international protective rules of their actual substance.

The deeper impact of this American exceptionalism lies in the fact that it obstructs the emergence of international custom in the digital sphere as a whole. The insistence of a central state such as the United States on pursuing comprehensive digital surveillance hinders the fulfillment of the material element represented by general and continuous state practice, while providing other international powers with political and legal cover to legitimize similar practices. Ultimately, this leads to distorting and freezing the dynamism of the international human rights system and its inability to adapt to the challenges of the digital age.

Conclusion

In conclusion, it becomes clear that the relationship of the United States of America with customary international human rights law is not merely a temporary contradiction that can be remedied through temporary decisions, but rather a relationship characterized by a profound

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structural duality. Theoretically, the United States has adopted the principle of automatic incorporation of international custom into its legal system, based on a longstanding judicial legacy established by the Supreme Court since The Paquete Habana. Nevertheless, such incorporation remains conditional upon its not conflicting with any domestic legislation or executive decision, which transforms international law from a fundamental source of justice into a subsidiary option that is always subject to the supremacy of domestic laws.

This retreat is clearly manifested in the judicial trajectory extending from Filartiga in 1980 to Jesner in 2018, as this trajectory traces a downward trend demonstrating how U.S. courts have narrowed the application of the Alien Tort Statute (ATS), transforming it from an effective instrument for sanctioning human rights violations into a rarely used mechanism. This judicial restriction is accompanied by clear selectivity in adherence to international custom. While Washington demonstrates a high degree of conformity with standards concerning the prevention of genocide and guarantees of fair trial, it comes into sharp conflict with customary international human rights law in other areas, such as the Guantánamo detention facility, the death penalty, and the policy of mass surveillance. This discrepancy confirms that the U.S. judiciary incorporates international custom only to the extent permitted by the executive and legislative branches.

On this basis, it can be said that the idea of American exceptionalism represents the most prominent structural obstacle to full compliance with human rights. It operates at three interconnected levels: recognition of international custom in theory while undermining it judicially; adoption of the global human rights discourse while refusing to submit to international monitoring mechanisms; and, finally, active participation in the formulation of United Nations standards while refraining from ratifying the treaties that protect them.

Accordingly, the future of this relationship remains contingent upon the vitality of civil society in filling the judicial vacuum, and upon the extent to which U.S. administrations recognize that their practices not only reflect their image, but also directly contribute to shaping and guiding international custom itself.

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