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# U.N. Documents in U.S. Case Law\*

Paul Hellyer\*\*

*Mr. Hellyer explores the role played by U.N. documents in the opinions of United States courts. He examines the subject matter of opinions in which U.N. documents were cited, the types of documents that were cited, the purpose of the citations, the treatment received by the cited documents, and the time periods in which the citations occurred.*

¶1 Courts in the United States have cited documents of the United Nations (U.N.) in hundreds of instances, relying on them for both legal authority and factual information. Jurists generally agree that U.N. documents have a place in court opinions and their citations to U.N. documents have increased sharply in recent years. This article is intended to provide an overview of how and why these documents are used by courts. It presents statistics on U.N. document citations, together with illustrations of specific citations.

## Methodology

¶2 The statistics in this article are based on U.N. document citations I gathered by executing a full-text search in LexisNexis's database of federal and state cases.<sup>1</sup> I designed my search to retrieve citations that include a U.N. document number or sales number, which the U.N. assigns to its documents for bibliographic purposes<sup>2</sup> and which the *Bluebook* requires in U.N. document citations.<sup>3</sup> Courts frequently

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1. The search query was **(u.n. or u. n. or united nations or allcaps(un)) /3 (doc! or sales) and not notice(unpublished or "not published")**. I ran the search on February 15, 2006, updated it on July 26, 2006, and retrieved a total of 396 documents, many of which were false positives.
2. See United Nations Documentation: Research Guide, <http://lib-unique.un.org/lib/unique.nsf> (click on "U.N. Documentation Research Guide" and follow the "Document Symbols" hyperlink) (last visited Nov. 8, 2006).
3. The earliest *Bluebook* edition to cover U.N. documents was the seventh edition, published in 1947. A UNIFORM SYSTEM OF CITATION 35–37 (Columbia Law Review et al. eds., 7th ed. 1947), reprinted in 1 THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE (Robert Berring ed., 1998). Starting in 1955, the *Bluebook* used U.N. document numbers or sales numbers in its citations to U.N. documents. A UNIFORM SYSTEM OF CITATION 36–38 (Columbia Law Review et al. eds., 9th ed. 1955), reprinted in 1 THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE, *supra*. The rule requiring document or sales numbers was more clearly stated in 1958. A UNIFORM SYSTEM OF CITATION 76–77 (Columbia Law Review et al. eds., 10th ed. 1958), reprinted in 1 THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE, *supra*.

ignore this *Bluebook* rule, and so my search misses many, if not most, citations to U.N. documents, but the search does retrieve a useful sample of citations.<sup>4</sup> Since the citations I collected consist only of citations that follow the *Bluebook*, they are not a random sample of all U.N. document citations, but I have no reason to believe that citations that follow the *Bluebook* are substantively different from citations that do not.<sup>5</sup>

¶3 In selecting citations for my study, I excluded citations to treaties that are reprinted in U.N. documents. Treaties are not the subject of this article, and the distinction between treaties that are cited with U.N. document numbers and those that are not is unimportant. Moreover, since treaties are a part of United States law,<sup>6</sup> they are not comparable to the other types of documents discussed in this article. Since the U.N. Charter itself is a treaty, citations to it were also excluded.<sup>7</sup>

¶4 I counted citations in concurring and dissenting opinions, as well as citations in majority opinions, but I did not count citations in unpublished opinions. If a U.N. document was cited more than once in the same opinion for the same proposition, I counted it only the first time. I did not count any U.N. document citations in quotes from other U.S. cases, unless the citing case analyzed the U.N. document and the quoted case separately. I used no date restrictions.

¶5 Using the foregoing criteria, I counted 410 citations to U.N. documents in state and federal U.S. court opinions. The remainder of this article presents my findings in five areas:

- types of cases in which U.N. documents are cited
- types of U.N. documents that are cited
- reasons why U.N. documents are cited
- how U.N. documents are treated
- trends over time

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4. I originally planned to retrieve all citations to U.N. documents in published opinions, but soon realized this was impractical. Searching for references to the U.N. misses many relevant citations because courts frequently cite U.N. documents without mentioning the U.N. They do so by referring to the name of the specific agency within the U.N. that created the document, without informing readers that the agency is part of the U.N. For example, in *United States v. Maine*, 469 U.S. 504, 523 (1985), the United States Supreme Court cited a report from the International Law Commission and provided the citation to the commission's yearbook, but made no reference to the U.N. Only readers who know that the International Law Commission is part of the U.N. would realize that the court is relying on a U.N. document. Because there are so many U.N. agencies producing documents and because courts frequently fail to identify them as U.N. agencies, there is no practical way to devise a search that would retrieve all citations to U.N. documents.

5. In the course of collecting citations, I came across citations to U.N. documents that had no document or sales number, but I did not include them in my statistics, knowing that I would not have a valid sample if I added citations that happened to catch my eye. But in addition to presenting statistics, this article also discusses specific citations to U.N. documents, some of which do not have a U.N. document or sales number.

6. U.S. CONST. art. VI.

7. In choosing to exclude the U.N. Charter from my study, I do not mean to diminish its importance. It is almost certainly the single most frequently cited U.N. document. As of 1995, it had already been cited in U.S. court opinions more than two-hundred fifty times. Jo L. Southard, *Human Rights Provisions of the U.N. Charter: The History in U.S. Courts*, 1 ILSA J. & COMP. L. 41, 45 (1995).

### Types of Cases in Which U.N. Documents Are Cited

¶6 As shown in table 1, citations to U.N. documents are not distributed randomly among all types of cases. The majority of the citations I gathered appeared in cases dealing with international civil rights, immigration, or borders, as discussed in further detail later. Since these types of cases do not make up anything close to a majority of United States case law, they have a highly disproportionate share of U.N. document citations. Nonetheless, the citations are not confined to just a few types of cases. Nearly a third of the citations appeared in cases that I could only classify as “other” because their subject matter was so varied.

**Table 1**

*Types of Cases in Which U.N. Documents Are Cited*

Subject Matter of Case	Percentage of U.N. Doc. Citations
International Civil Rights	28%
Immigration	18%
Criminal	9%
Borders	7%
Domestic Civil Rights	6%
Other	32%

¶7 The cases I classified under “international civil rights” involve civil rights violations taking place outside the United States. (I classified violations or alleged violations taking place in the United States under “domestic civil rights.”) *Filartiga v. Pena-Irala*,<sup>8</sup> a 1980 case from the U.S. Court of Appeals for the Second Circuit, is a good example of the type of international civil rights case in which courts rely on U.N. documents. In *Filartiga*, the plaintiffs sued a former Paraguayan official living in the United States for allegedly torturing and killing their relative in Paraguay.<sup>9</sup> The court considered whether it had jurisdiction over the case pursuant to the Alien Tort Statute, which gives federal courts original jurisdiction over all civil actions in which an alien sues for a tort committed in violation of “the law of nations.”<sup>10</sup> The key question in the case was whether the law of nations prohibited torture. Relying on an early United States Supreme Court opinion, the court held that “the law of nations ‘may be ascertained by consulting . . . the general usage and practice of nations.’”<sup>11</sup> To determine the general usage and practice of nations,

8. 630 F.2d 876 (2d Cir. 1980).

9. *Id.* at 878.

10. *Id.* at 880 (citing 28 U.S.C. § 1350).

11. *Id.* at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

the court looked to several international authorities, giving particular attention to two resolutions passed by the U.N. General Assembly, the Universal Declaration of Human Rights (UDHR)<sup>12</sup> and the Declaration on the Protection of All Persons From Being Subjected to Torture, the latter of which the court described as “particularly relevant” and quoted in full.<sup>13</sup> Both resolutions expressly prohibit torture. Interestingly, the court cited no U.S. case law in support of its conclusion that torture violated the law of nations; to the contrary, it relied on international authority to disapprove dictum in an earlier Second Circuit opinion that a nation’s torture of its own citizens is *not* a violation of international law.<sup>14</sup> *Filartiga* established a precedent for suing foreign officials and governments in U.S. courts for human rights violations,<sup>15</sup> and many more cases of a similar nature followed. Twenty-eight percent of the citations I counted came from international civil rights cases, more than from any other specific category.

¶8 Immigration is another area of law that attracts a disproportionate share of U.N. document citations. Eighteen percent of the citations I counted came from immigration cases, many of which involved claims for asylum. For example, in *Mohammed v. Gonzales*,<sup>16</sup> the Ninth Circuit relied in part on a U.N. report and two General Assembly resolutions to hold that the alien was likely to be entitled to asylum because the female genital mutilation she had suffered in her home country rose to the level of persecution under asylum law.<sup>17</sup> The court also cited two documents from the U.N. High Commissioner for Refugees (UNCHR) in support of its holding that women constitute a “particular social group” for purposes of asylum law<sup>18</sup> and a World Health Organization report on the medical consequences of female genital mutilation.<sup>19</sup> Unlike the *Filartiga* court, the *Mohammed* court used the U.N. documents merely to supplement U.S. case law and statutory authority. The court’s conclusions would have been well supported without the use of international documents.

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12. *Id.* at 882 (citing Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948)).
  13. *Id.* at 882 n.11 (quoting G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/1034 (Dec. 9, 1975)).
  14. *Id.* at 884 (disapproving *Dreyfus v. Von Frick*, 534 F.2d 24, 31 (2d Cir. 1976)).
  15. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366–68 (1991).
  16. 400 F.3d 785 (9th Cir. 2005).
  17. *Id.* at 795 (citing Comm. on the Elimination of All Forms of Discrimination Against Women, *Report of the Committee on the Elimination of All Forms of Discrimination Against Women* ¶ 438, General Recommendation No. 14, U.N. Doc. A/45/38 (June 6, 1990); Declaration on the Elimination of Violence Against Women, G.A. Res. 104, art. 2(a), U.N. GAOR, 48th Sess., Supp. No. 38, U.N. Doc. A/RES/48/104 (1993); G.A. Res. 128, at 2, U.N. GAOR, 56th Sess., Supp. 49, U.N. Doc. A/RES/56/128 (2001)).
  18. *Id.* at 798 (citing UNHCR, *Guidelines on International Protection: Membership of a Particular Social Group*, at 4, U.N. Doc. HCR/GIP/02/02 (May 7, 2002); UNHCR, *Guidelines on International Protection: Gender-Related Persecution*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002)).
  19. *Id.* at 799–800 (citing WORLD HEALTH ORG., *FEMALE GENITAL MUTILATION: AN OVERVIEW* 14–15 (1998)). The World Health Organization is a U.N. agency, but the court does not identify it as such.

¶9 The border cases typically involve the borders of U.S. states. The U.N. has developed standards for resolving border disputes between nations, and U.S. courts have found these standards instructive in determining state borders. In *United States v. Louisiana*,<sup>20</sup> the United States Supreme Court had to determine the ownership of the Mississippi Sound, a body of water south of mainland Alabama and Mississippi. The Court was construing a federal statute, the Submerged Lands Act of 1953,<sup>21</sup> but the statute left the key term “inland waters” undefined.<sup>22</sup> In the absence of a definition from Congress, the Court relied in part on standards set forth in a U.N. study to decide that the Sound constituted “inland waters” and therefore belonged to the states and not the federal government.<sup>23</sup> The Court described the study as “authoritative,”<sup>24</sup> cited it several times in its opinion, and relied on the same study the following year in a similar case.<sup>25</sup> Seven percent of the citations I found came from border cases.

¶10 Nine percent of the citations appear in criminal cases, many of which involve alien defendants and international law. For example, in *United States v. Benitez*,<sup>26</sup> a federal district court considered whether, under the International Covenant on Civil and Political Rights, the United States could prosecute extradited Colombian defendants for the same offense for which they had been convicted and incarcerated in Colombia; relying on a report from the U.N. Human Rights Committee, the court ruled that they could be prosecuted again in the United States.<sup>27</sup> The Human Rights Committee had been created by the International Covenant on Civil and Political Rights,<sup>28</sup> and therefore its documents were particularly relevant.

¶11 Domestic civil rights cases (i.e., cases involving the civil rights of United States citizens and alien residents, but excluding cases dealing with immigration) make up a larger proportion of U.S. case law than do international civil rights cases, but they account for a much smaller number of U.N. document citations. Only 6% of the U.N. document citations I counted came from domestic civil rights cases. Courts are much less likely to cite U.N. documents when considering alleged civil rights violations by the United States government, as opposed to alleged violations by foreign governments.

¶12 Finally, U.N. document citations were far more likely to be seen in federal court opinions than in state court opinions. Although the search was run in a database combining state and federal case law (in which state court opinions make up the majority of the content), 95% of the citations came from federal cases.

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20. 470 U.S. 93 (1985).

21. Ch. 65, 67 Stat. 29 (codified as amended in scattered sections of 10 U.S.C. and 43 U.S.C.).

22. 470 U.S. at 98.

23. *Id.* at 102, 105–06, 110, 114 (citing U.N. Secretariat, Office of Legal Affairs, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc. A/CN.4/143 (Mar. 9, 1962)).

24. *Id.* at 102.

25. *United States v. Maine*, 475 U.S. 89, 94 (1986).

26. 28 F. Supp. 2d 1361 (S.D. Fla. 1998).

27. *Id.* at 1364 (citing U.N. Human Rights Comm., *Report of the Human Rights Committee*, U.N. Doc. A/43/40 (Sept. 28, 1988)).

28. *Id.*

### Types of U.N. Documents That Are Cited

¶13 Table 2 shows the different types of U.N. documents that appeared in the citations I counted. Slightly more than half of the documents are resolutions. Most of these resolutions are from the Security Council or the General Assembly, but a few come from other U.N. bodies, such as the Economic and Social Council (ECOSOC). The Security Council wields the real power in the U.N. Only the Security Council may pass resolutions that are binding on U.N. members,<sup>29</sup> and while the General Assembly has been dominated by the Third World for the past several decades, the Security Council reflects the will of the world's major powers.<sup>30</sup> In view of this, one might expect U.S. courts to pay particular attention to Security Council resolutions, but in fact, I counted far more citations to General Assembly resolutions than to those of Security Council resolutions.<sup>31</sup>

**Table 2**

*Types of U.N. Documents That Are Cited*

Type of Document	Percentage of U.N. Doc. Citations
Resolution	53%
Report	19%
Meeting Records	11%
Statement	5%
Draft/Model Law	3%
Handbook/Guidelines	2%
Other	7%

¶14 One General Assembly resolution, the UDHR, appears sixty-three times in the citations I counted, accounting for 15% of all citations. The UDHR, adopted in 1948, is an extension and interpretation of the human rights provisions of the U.N. Charter.<sup>32</sup> The UDHR is an ambitious document, going far beyond the rights enumerated in the United States Constitution. In addition to familiar rights such as

29. U.N. Charter art. 25.

30. Each U.N. member, regardless of its population or economic output, receives one vote in the General Assembly, and no member has a veto. U.N. Charter art. 18. As more countries gained independence and joined the U.N. in the 1950s and 1960s, the Third World came to control a majority of votes in the General Assembly. By contrast, five major countries (the United States, Russia, the United Kingdom, France, and China) have veto power in the Security Council. U.N. Charter arts. 23, 27.

31. I counted 36 citations to Security Council resolutions and 163 citations to General Assembly resolutions.

32. Southard, *supra* note 7, at 46; JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 3 (1999).

free speech and assembly, it declares a right to work, a right to rest and leisure, and a right to medical care.<sup>33</sup> I did not come across any examples of U.S. courts using the UDHR to expand the civil rights of United States citizens, but I saw many citations to it in the context of immigration cases<sup>34</sup> and international civil rights.<sup>35</sup>

¶15 After resolutions, reports are the second most common type of U.N. document citation I counted; they make up 19% of the citations.<sup>36</sup> The reports come from a wide variety of U.N. agencies, including many from the International Law Commission<sup>37</sup> and ECOSOC's Human Rights Commission.<sup>38</sup> Some of the reports cited by the courts are factual, while others (particularly those of the International Law Commission) provide legal analysis or serve as *travaux préparatoires*. Statements of a political nature can be found in some reports,<sup>39</sup> but are generally not cited by the courts.

¶16 Meeting records, consisting of minutes or transcripts, account for 11% of the citations and are usually cited as *travaux préparatoires* to interpret treaties drafted by the U.N. For example, in *Sale v. Haitian Centers Council*,<sup>40</sup> the United States Supreme Court considered whether the Convention Relating to the Status of Refugees allows the United States to intercept Haitian refugees at sea and return them to Haiti without determining eligibility for asylum. Using U.N. documents, the Court examined comments made by delegates during two of the convention's negotiating sessions and concluded that the convention did not apply to refugees who had not yet entered the host country.<sup>41</sup> In a dissenting opinion, Justice Blackmun argued that the comments relied upon by the majority went against the plain language of the convention and cited the records of two other meetings

33. Universal Declaration of Human Rights, *supra* note 12, arts. 23–25.

34. *See, e.g.*, *Perkovic v. I.N.S.*, 33 F.3d 615, 622 (6th Cir. 1994); *Wong v. Ilchert*, 998 F.2d 661, 663 (9th Cir. 1993); *Cerrillo-Perez v. I.N.S.*, 809 F.2d 1419, 1423 (9th Cir. 1987).

35. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996); *Filatiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

36. The U.N. documents I included in the reports category were titled “report” or “study” or otherwise referred to as such by the U.N. Sometimes the nature of the document was not clear from the court's citation, but could be determined by retrieving the document or checking other sources.

37. *See, e.g.*, *United States v. Louisiana*, 470 U.S. 93, 102, 105–06, 110, 114 (1985); *Power Authority of N.Y. v. Fed. Power Comm'n*, 247 F.2d 538, 541 (D.C. Cir. 1957); *Tabion v. Mufti*, 877 F. Supp. 285, 289, 291 (E.D. Va. 1995).

38. *See, e.g.*, *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 292 (1st Cir. 2005).

39. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, ¶¶ 104–34, U.N. Doc. E/CN.4/2001/121 (calling for international observers in the West Bank and Gaza Strip, an end to curfews, monetary compensation for victims of unlawful violence, and other measures), *cited for other purposes* in *Ungar*, 402 F.3d at 292.

40. 509 U.S. 155 (1993).

41. *Id.* at 184–87 (quoting Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth Meeting, U.N. Doc. A/CONF.2/SR.16, 6 (July 11, 1951); Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Thirty-fifth Meeting, at 21–22, U.N. Doc. A/CONF.2/SR.35 (July 25, 1951)).



in support of his position that the United States was not in compliance with the convention.<sup>42</sup>

¶17 Other types of documents include statements (position statements issued by the U.N. other than resolutions), which accounted for 5% of the citations; draft or model laws, which accounted for 3%; and handbooks and guidelines, which accounted for 2%. I grouped 7% of the citations under the heading “other” because the nature of the cited documents was ambiguous or the document type occurred too infrequently to warrant a separate category.

¶18 Those interested in reading the full text of the documents cited by the courts can find many of them free of charge on the U.N.’s Web site.<sup>43</sup> But the site is far from comprehensive and many legal professionals will have no convenient source for documents that are not available on that site.<sup>44</sup>

### Reasons Why U.N. Documents Are Cited

¶19 I identified three general reasons why U.N. documents are cited in court opinions: for legal authority, for factual information, or as *travaux préparatoires*. I felt that the third category was necessary because the distinction between legal authority and factual information was often unclear in the context of *travaux préparatoires*.<sup>45</sup>

¶20 As shown by table 3, courts generally cite to U.N. documents as legal authority: 65% of the citations fall under this category. However, not all U.N. documents that are cited as legal authority are actually followed. This category

**Table 3**

#### *Reasons Why U.N. Documents Are Cited*

Reason Why Document Is Cited	Percentage of U.N. Doc. Citations
Legal Authority	65%
<i>Travaux Préparatoires</i>	18%
Factual Information	16%

42. *Id.* at 195–96 (Blackmun, J., dissenting) (quoting U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twenty-First Meeting, at 4–5, U.N. Doc. E/AC.32/SR.21 (1950); U.N. Econ. & Soc. Council [ECOSOC], Ad Hoc Committee on Statelessness and Related Problems, Summary Record of the Twentieth Meeting, ¶¶ 54–55, U.N. Doc. E/AC.32/SR.20 (1950)).

43. U.N. documents are available on the U.N.’s Web site through the Official Document System (<http://documents.un.org>) and the U.N. Bibliographic Information System (UNBISnet) (<http://unbisnet.un.org>).

44. Neither LexisNexis, Westlaw, nor any other widely available legal database offers a good selection of U.N. documents, and only large libraries would have U.N. documents in print or microform.

45. Even when *travaux préparatoires* were clearly cited as legal authority, it was often impossible to say whether they received negative or positive treatment (see *infra* pp. 16–22), since courts generally do not pass judgment on this type of authority.

includes citations that are evaluated as legal authority, but criticized, distinguished from the case at hand, or otherwise not followed.

¶21 Citations to documents for factual information make up 16% of the total. With these citations, courts were using U.N. documents to provide factual context to their opinions or, in some cases, were using them to establish facts that were decisive to the outcome of the case. For example, in *Turner v. United States*,<sup>46</sup> the United States Supreme Court considered whether the defendant's conviction for possession of illegally imported heroin was proper without any direct evidence of the heroin's importation. The Court relied in part on a U.N. report to establish that all heroin in the United States is imported and thereby inferred that the defendant's heroin was imported.<sup>47</sup> In all the instances I saw, the reliance on U.N. documents for factual information was noncontroversial. I did not encounter any cases in which the admissibility of a U.N. document was considered.<sup>48</sup>

¶22 Citations to documents used as *travaux préparatoires* account for 18% of the total. These documents are usually meeting records, but also include reports or drafts. I created a fourth category labeled "not determined" for citations I was unable to classify, but this category accounted for less than 1% of the citations.<sup>49</sup>

### How U.N. Documents Are Treated

¶23 Considering the troubled relationship between the United Nations, on the one hand, and the United States legislative and executive branches, on the other, one might be surprised to learn that the use of U.N. documents by the judicial branch has been largely noncontroversial. Although I found many instances in which jurists disagreed on the interpretation or relevancy of U.N. documents, there seems to be no question that U.N. documents are appropriate for citation in at least some situations. With a few exceptions, courts that cite to U.N. documents do not find it necessary to defend or explain their choice of authority, and I found no instance in which a jurist suggested that U.N. documents are not citable.

¶24 This is not to say that courts follow U.N. documents blindly. Just as with any other form of authority, courts sometimes decline to follow U.N. documents. Table 4 shows the treatment given to U.N. document citations that were used as legal authority.<sup>50</sup> Seventy-two percent of the citations were followed, i.e., the

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46. 396 U.S. 398 (1970).

47. *Id.* at 410–11 (citing U.N. Comm'n on Narcotic Drugs, Report of the Eighteenth Session, at 15, U.N. Doc. E/CN.7/455 (1963)).

48. In *United States v. M'Biye*, 655 F.2d 1240 (D.C. Cir. 1981), the United States Court of Appeals held that the U.N. is a "public office or agency" under Federal Rule of Evidence 803(10) and accordingly admitted into evidence an affidavit signed by a U.N. official, but the affidavit in that case was not published by the U.N. and thus was not what I would consider a U.N. document.

49. The percentage rounded off to 0% and thus does not appear in table 3.

50. I did not determine the treatment of U.N. documents that were cited for factual information or as *travaux préparatoires*. In those situations, the courts typically do not apply the same sort of critical analysis as they do with legal authority.

Table 4

*How U.N. Documents Are Treated*

Treatment	Percentage of U.N. Doc. Citations
Followed	72%
Not Followed	28%

citing opinion applied and followed the point of law as set forth in the document.<sup>51</sup> Twenty-eight percent of the citations were not followed, meaning that the citing opinion found the citation to be irrelevant, unpersuasive, or both. Citations that were not followed appeared in court opinions usually because they had been cited by a party or by another jurist in the same case. Generally, courts that chose not to follow U.N. documents simply found them to be inapplicable or less persuasive than some other authority. Among all the cases I examined, I found only two instances in which U.N. documents were described in a distinctly negative way.

¶25 In one of those cases, *Tel-Oren v. Libyan Arab Republic*,<sup>52</sup> victims and survivors of a terrorist attack in Israel sued Libya, the Palestine Liberation Organization, and other defendants. A three-judge panel of the D.C. Circuit United States Court of Appeals unanimously agreed that the case should be dismissed, but since they could not agree on the reasoning, each judge wrote a separate concurring opinion. Two of the judges disagreed on the value of U.N. documents. In the course of his argument, Judge Bork asserted that terrorism does not violate the law of nations because there is no universal agreement on the legitimacy of terrorism. In support of his position, he wrote: "To witness the split one need only look at documents of the United Nations. They demonstrate that to some states acts of terrorism, in particular those with political motives, are legitimate acts of aggression and therefore immune from condemnation."<sup>53</sup> This prompted the following response from Judge Robb: "I [do not] doubt for a moment that the attack on the Haifa highway amounts to barbarity in naked and unforgivable form. No diplomatic posturing as represented in sheaves of United Nations documents—no matter how high the pile might reach—could convince me otherwise."<sup>54</sup>

¶26 In the other case, *Flores v. Southern Peru Copper Corp.*,<sup>55</sup> Peruvian plaintiffs sued a United States company for injuries allegedly suffered as a result of pollution from the company's Peruvian operations. The plaintiffs argued that the

51. In the case of concurring or dissenting opinions, the citation is "followed" if the author of the opinion followed it, regardless of whether it was followed by the majority opinion.

52. 726 F.2d 774 (D.C. Cir. 1984).

53. *Id.* at 795 (Bork, J., dissenting). Judge Bork went on to quote from G.A. Res. 3103 (XXVIII), U.N. Doc. A/RES/3103 (Dec. 12, 1973).

54. *Id.* at 823 (Robb, J., concurring).

55. *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

defendant's conduct violated customary international law because, among other things, it violated human rights asserted by the UDHR and a U.N. declaration on the environment. The UDHR provision cited by the plaintiffs stated that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family,"<sup>56</sup> while the other declaration stated that "human beings are . . . entitled to a healthy and productive life in harmony with nature."<sup>57</sup> The Second Circuit declined to apply these U.N. documents because they were too "vague and amorphous."<sup>58</sup> The court explained that the documents "express virtuous goals understandably expressed at a level of abstraction needed to secure the adherence of States that disagree on many of the particulars regarding how actually to achieve them."<sup>59</sup> Like Judge Robb's "diplomatic posturing" remark in *Tel-Oren*, this language from *Flores* portrays the U.N. documents in question as insincere and ineffective, in much the same way that many United States politicians portray the U.N. as a whole. But in court opinions, this attitude is the exception, not the rule.

¶27 As illustrated by the many examples discussed earlier, courts have routinely found U.N. documents to be relevant and persuasive. But have courts ever found them to be more than merely persuasive? In view of the fact that Security Council resolutions can be binding on U.N. members,<sup>60</sup> I looked for any instances in which a jurist treated a Security Council resolution—or any other U.N. document—as binding authority. While I found no examples of a court expressly stating that it was bound by a U.N. document, I did find one instance in which a court appeared to treat U.N. documents as more than mere persuasive authority.

¶28 Contrary to my expectations, this instance did not involve a Security Council resolution, but rather two General Assembly resolutions. In *Filartiga*, the Second Circuit stressed the importance of the UDHR and the Declaration on the Protection of All Persons from Being Subjected to Torture. The court quoted from a U.N. memorandum that described U.N. declarations as "formal and solemn instrument[s], suitable for rare occasions when principles of great and lasting importance are being enunciated . . . [that] may by custom become recognized as laying down rules *binding* upon the States."<sup>61</sup> The court further stated that "several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law."<sup>62</sup>

56. Universal Declaration of Human Rights, *supra* note 12, art. 25.

57. United Nations Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, Principle 1, U.N. Doc. A/CONF.151/26.

58. *Flores*, 414 F.3d at 254.

59. *Id.*

60. U.N. Charter art 25.

61. *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (quoting U.N. Secretariat, Office of Legal Affairs, Memorandum, U.N. Doc. E/CN.4/1/610 (1962)) (emphasis added).

62. *Id.* (citing M.G. Kaladharan Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816–17 (1978); Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention*, INT'L & COMP. L.Q., Supp. Publ. No. 11, at 15 (1965)).

¶29 Nonetheless, I hesitate to conclude that *Filartiga* held that the declarations are binding authority. While the court quoted and cited the above statements approvingly, it fell short of expressly adopting them, and its discussion of them was merely dictum since the binding or nonbinding nature of U.N. declarations made no difference to the outcome of the case. Moreover, the language quoted and cited by *Filartiga* does not say that courts can be bound by U.N. documents; the alternative interpretation is that the political branches of nations can be bound by U.N. documents and may direct their courts to follow them, but may also, if they choose, violate their “binding” obligations without interference from the courts.

¶30 In the 1970s, the United States Court of Appeals for the D.C. Circuit decided two cases in which the United States government violated U.N. Security Council resolutions that were supposed to be binding on U.N. members, and in both cases, the court declined to enforce the resolutions. The first case, *Diggs v. Shultz*,<sup>63</sup> involved a conflict between a Security Council resolution and federal legislation. The resolution imposed an embargo on Rhodesia, but Congress subsequently passed a law permitting certain trade with Rhodesia that plainly violated the embargo.<sup>64</sup> The court held that it could not strike down the law because Congress has the privilege of overriding treaty obligations. While the plaintiffs did not dispute this rule of law, they argued that Congress had to follow Security Council resolutions unless it wished to withdraw from the U.N. altogether; but the court rejected that argument, ruling that Congress did not have to follow the U.N. Charter on an “all-or-nothing” basis.<sup>65</sup>

¶31 In the second case, *Diggs v. Richardson*,<sup>66</sup> the Commerce Department violated a Security Council resolution that banned certain travel to South Africa. Since no congressional action was involved, the reasoning in *Diggs v. Shultz* did not apply, but still the court refused to enforce the resolution, this time reasoning that the travel ban, as it was written, was not self-executing and did not vest rights in individuals.<sup>67</sup> The court did not consider whether a Security Council resolution could ever be self-executing, thus leaving open the possibility that a court might some day use a Security Council resolution to restrict action by the executive branch. But this day may never come, in part because the scenario in these two D.C. Circuit cases is a rare one: the United States usually gets around Security Council resolutions by vetoing them, rather than by violating them.<sup>68</sup>

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63. 470 F.2d 461 (D.C. Cir. 1972).

64. *Id.* at 463.

65. *Id.* at 466.

66. 555 F.2d 848 (D.C. Cir. 1976).

67. *Id.* at 850–51 (D.C. Cir. 1976). This holding seemed to be at odds with *Diggs v. Shultz*, which held that the embargo on Rhodesia did confer standing on individual citizens. *Shultz*, 470 F.2d at 464–65. But *Diggs v. Richardson* did not expressly disapprove the holding in *Diggs v. Shultz*, leaving the impression that the Security Council resolutions in the two cases were somehow different.

68. See Louis Henkin, *Resolutions of International Organizations in American Courts*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 199, 210 (Frits Kalshoven et al. eds., 1980) (predicting that United States compliance with resolutions of international organizations “will remain a political, not a judicial, decision”).

¶32 As for the UDHR and other General Assembly resolutions—which the United States cannot veto—the mainstream point of view is that they are not binding on courts. In *Sosa v. Alvarez-Machain*, the Supreme Court held that the UDHR has “moral authority” but “does not of its own force impose obligations as a matter of international law.”<sup>69</sup> This statement is not necessarily inconsistent with *Filartiga*, but it does preclude any radical interpretation of *Filartiga*’s references to the UDHR as “binding” authority.<sup>70</sup>

### Trends Over Time

¶33 As shown by table 5, there has been a sharp increase in recent years in citations to U.N. documents. During the five-year period from 2001 through 2005, I counted 156 citations, which is more than in the previous fifteen years combined. Part of the increase in citations is no doubt due to the general increase in the number and length of published cases, but that reason alone cannot explain the high number of citations in recent years. Either the courts are handling more cases of an international nature or are becoming more receptive to U.N. documents, or both.

**Table 5**

*U.N. Document Citations 1951–2005*

Time Period	Number of U.N. Doc. Citations
1951–1955	4
1956–1960	8
1961–1965	14
1966–1970	15
1971–1975	10
1976–1980	20
1981–1985	51
1986–1990	30
1991–1995	55
1996–2000	35
2001–2005	156

69. 542 U.S. 692, 734 (2004).

70. See Gregory J. Kerwin, Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L. J. 876, 898–99 (1983) (arguing that General Assembly resolutions should not constitute independent, authoritative sources of international law).

### Conclusion

¶34 U.N. documents have a small but interesting role in U.S. court opinions. They appear in a wide variety of contexts, but are most likely to be seen in cases involving international civil rights, borders, or immigration. General Assembly resolutions are cited more often than any other specific type of U.N. document; the General Assembly's UDHR is a particular favorite. Courts usually cite U.N. documents as legal authority, but also cite them for factual information or as *travaux préparatoires*. The courts often decline to follow the documents they cite, but they rarely criticize them. In recent years, citations to U.N. documents have increased sharply, but it remains to be seen whether this is an aberration or the start of a long-term trend.