Florida State University Journal of Transnational Law & Policy

Volume 2 | Issue 1 Article 1

1992

International Human Rights Law in U.S. Courts

Richard B. Lillich

Follow this and additional works at: https://ir.law.fsu.edu/jtlp

Part of the International Trade Law Commons

Recommended Citation
Lillich, Richard B. (1992) "International Human Rights Law in U.S. Courts," *Florida State University Journal of Transnational Law & Policy*: Vol. 2: Iss. 1, Article 1.
Available at: https://ir.law.fsu.edu/jtlp/vol2/iss1/1

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

INTERNATIONAL HUMAN RIGHTS LAW IN U.S. COURTS

RICHARD B. LILLICH*

ALTHOUGH, as Professor Bilder rightly observes, "[i]nternational human rights law is derived from a variety of sources and involves many kinds of materials, both international and national,"[1] it is to national law that one must look first to determine the scope and content of the human rights recognized and protected in any country. Domestic courts confronted with human rights claims initially refer to national constitutions, laws, decrees, regulations, court and administrative decisions, and policy pronouncements for relevant rules of decision. Increasingly, however, domestic courts also are taking international human rights law into account in deciding cases. The purpose of this Article is to describe and give some guidance as to their past and future use of such law.

While international human rights law has had considerable impact in the courts of other countries, principally but not exclusively in Europe,[2] the focus of this Article will be on the principles and rules governing cases in federal and state courts of the United States, since U.S. courts in recent years have been in the forefront of developments

---

* Howard W. Smith Professor of Law, University of Virginia; President, Procedural Aspects of International Law Institute; and former Edward Ball Eminent Scholar Chair in International Law at The Florida State University College of Law.

1. Richard B. Bilder, *An Overview of International Human Rights Law*, *in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 6 (Hurst Hannum ed., 2d ed. 1992).

2. For an excellent country-by-country survey of the national legislation and case law of the 17 Council of Europe countries that have formally incorporated the European Convention on Human Rights, see Jorg Polakiewicz & Valerie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States Where Direct Effect is Given to the Convention* (Pts. 1 & 2), 12 HUM. RTS. L.J. 65, 125 (1991). On the impact of international human rights law in Australia, Canada, Great Britain, Hong Kong and South Africa, see M.D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUSTL. L.J. 514 (1988); John Claydon, *The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms*, 2 CONN. J. INT'L L. 349 (1987); ANDREW Z. DRZEMCZEWSKI, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW: A COMPARATIVE STUDY 177-87 (1983); Richard B. Lillich, *Sources of Human Rights Law and the Hong Kong Bill of Rights*, *in* THE HONG KONG BILL OF RIGHTS: A COMPARATIVE APPROACH 109 (Johannes Chan & Yash Ghai eds., 1993); John Dugard, *International Human-Rights Norms in Domestic Courts: Can South Africa Learn from Britain and the United States?*, *in* FIAT IUSTITIA: ESSAYS IN MEMORY OF OLIVER DENEYS SCHREINER 221 (Ellison Kahn ed., 1983).

in this area. Moreover, the problems raised in U.S. cases are generally representative of the problems courts face in many other countries. Indeed, the courts of some Commonwealth countries, having already emulated the approach of U.S. courts, may in this last decade of the twentieth century take the lead in enforcing international human rights law, both conventional and customary and both directly and indirectly, on the national level.[3]

I. A Brief Overview

Article VI, section 2, of the U.S. Constitution provides, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Under this provision (the only one in the Constitution that speaks to the relation of international law to municipal law in U.S. courts), a self-executing treaty (or a non-self-executing treaty when implemented by Congress) supersedes all inconsistent state and local laws.[4] Additionally, under the "last-in-time" rule, a self-executing treaty supersedes earlier inconsistent federal laws.[5]

The other major source of international law — customary international law — is not mentioned in the Constitution, but the Supreme Court has ruled that it is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[6] Having the same status as treaty law, it also supersedes all inconsistent state and local laws[7] and, at least in principle, all earlier inconsistent federal laws.[8]

---

3. *See, e.g.*, the courts of Canada, Hong Kong and Zimbabwe. For a recent study contrasting U.S. with British and Canadian court practice, see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1 (1992).

4. *See, e.g.*, Asakura v. Seattle, 265 U.S. 332, 341 (1924); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987) [hereinafter RESTATEMENT].

5. *See, e.g.*, Cook v. United States, 288 U.S. 102, 118-19 (1933); *see also* RESTATEMENT § 115(2) cmt. c.

6. The Paquete Habana, 175 U.S. 677, 700 (1900).

7. *See* RESTATEMENT § 115 cmt. e. Note, however, that there apparently have been no judicial decisions to this effect.

8. > [I]t has also not been authoritatively determined whether a rule of customary international law that developed after, and is inconsistent with, an earlier statute or international agreement of the United States should be given effect as the law of the United States. In regard to the law of the sea, the United States has accepted customary law that modifies earlier treaties as well as United States statutes.

RESTATEMENT §115 cmt. d.

Under the dualist approach to international law, however, subsequent federal laws will prevail domestically over both conventional and customary international law when a conflict arises.[9] Thus, the United States may breach an international obligation and become responsible internationally (as it did when Congress enacted the Byrd Amendment which, pursuant to the "last-in-time" rule, required the President to violate United Nations sanctions against Rhodesia), and yet not be answerable for such a breach in U.S. courts.[10]

II. The UN Charter in U.S. Law

The UN Charter, having been ratified by the United States, is the supreme law of the land. Article 1(3) lists among the UN's main purposes the achievement of international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Similarly, under article 55(c) the United Nations has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Finally, under article 56 all members of the United Nations "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."

Under the principles first enunciated in *Foster v. Neilson*,[11] the status of the human rights clauses of the UN Charter in U.S. law turns upon whether or not they are self-executing since "[i]t is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."[12] Going beyond the words of the human rights clauses of the UN Charter and looking for the "intent of the parties" here has proved a futile effort. "Nothing in the documents of the [San Francisco] conference," one commentator has concluded,

---

9. *See, e.g.*, The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925); *see also* Restatement § 115(1)(a) cmt. a.

10. Diggs v. Shultz, 470 F.2d 461, 465-67 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *see also* Restatement § 115(1)(b) cmt. b.

11. 27 U.S. (2 Pet.) 253, 314 (1829).

12. Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). While there is general agreement about the *effects* of a self-executing treaty, there is considerable confusion about the *criteria* to be used in determining whether a treaty is self-executing in the first place. For an excellent discussion of the problems involved, see Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and* U.S. v. Postal: *Win at Any Price?*, 74 Am. J. Int'l L. 892 (1980). *See also* Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760 (1988); *cf.* Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 Va. J. Int'l L. 627 (1986).

"indicates that the framers even considered the direct legal impact of the human rights clauses on the domestic law of the members."[13] With relatively few countries having adopted the doctrine of self-executing treaties,[14] this state of affairs is not surprising. For this and other reasons, the "intent of the parties" is irrelevant to the question of self-execution, a fact acknowledged by the *Restatement (Third) of the Foreign Relations Law of the United States*, which observes that "[i]n the absence of special agreement, it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, *the intention of the United States determines whether an agreement is to be self-executing in the United States* or should await implementation by legislation or appropriate executive or administrative action."[15]

In any event, U.S. courts have held repeatedly that the human rights clauses of the UN Charter are non-self-executing, and hence they vest no enforceable rights in individuals. The leading case is *Sei Fujii v. State*,[16] in which an intermediary appellate court in California struck down a provision of the state's Alien Land Law, under which land transferred to an alien not eligible for citizenship escheated to California; the court reasoned that the racially motivated statute was contrary to the nondiscrimination provisions found in article 55(c) of the UN Charter. The California Supreme Court, while affirming the judgment, did so exclusively on the ground that the statute violated the equal protection clause of the fourteenth amendment. It rejected the lower court's reasoning, observing that there was nothing in articles 55 and 56

> to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.
>
> [Article 55 and 56] lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification . . . .

---

13. Bernhard Schluter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CALIF. L. REV. 110, 130 (1973). *See generally* John Huston, *Human Rights Enforcement Issues of the United Nations Conference on International Organization*, 53 IOWA L. REV. 272 (1967).

14. Among them are Argentina, Austria, Belgium, Cyprus, Egypt, France, Germany, Greece, Italy, Japan, Luxembourg, Malta, Mexico, The Netherlands, Spain, Switzerland, Turkey, and the European Community. Memorandum Submitted by Dean Norman Redlich on Behalf of Freedom House, *reprinted in*, *Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 291, 293 n.23 (1979).

15. RESTATEMENT § 111(4) cmt. h (emphasis added).

16. 217 P.2d 481 (Cal. Dist. Ct. App. 1950), *aff'd*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

> . . . .
>
> The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the Alien Land Law.[17]

The notion that even the norm of nondiscrimination found in article 55(c) does not provide a rule of law for U.S. courts has been followed uniformly in subsequent cases. For instance, it was echoed in *Diggs v. Dent*, where the U.S. District Court for the District of Columbia ruled that, while the Charter imposed "definite" international obligations on the United States,

> treaties do not generally confer upon citizens rights which they may enforce in the courts. It is only when a treaty is "self-executing" that individuals derive enforceable rights from the treaty, without further legislative or executive action . . . . The provisions of the Charter of the United Nations are not self-executing and do not vest any of the plaintiffs with any legal rights which they may assert in this court.[18]

The U.S. Court of Appeals for the District of Columbia affirmed, stating that even if the Charter imposed a binding obligation on the United States, "that obligation does not confer rights on the citizens of the United States that are enforceable in court in the absence of implementing legislation."[19] More recent decisions dismiss self-executing arguments in similar summary fashion.[20]

---

17. Sei Fujii, 38 Cal. 2d at 722, 724-25, 242 P.2d at 621, 622. For an earlier and generally overlooked case in which the Supreme Court of Michigan had used similar reasoning to reach the same conclusion, see Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947), *rev'd sub nom.*, Shelley v. Kraemer, 334 U.S. 1 (1948).

18. Civil No. 74-1292 (D.D.C. May 14, 1975), *reprinted in* 14 I.L.M. 797, 804 (1975), *aff'd sub nom.*, Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976). For an excellent critique of the district court's decision, see Joseph R. Barnes, Note, *Courts Lack of Subject Matter Jurisdiction to Adjudicate Claims Arising Out of United Nations Security Council Resolutions*, 24 KAN. L. REV. 395 (1976).

19. 555 F.2d at 850 (citations omitted). For commentary on *Diggs* by counsel who filed an amicus brief on appeal arguing that the human rights clauses of the UN Charter were self-executing, see Frank C. Newman & Kathryn J. Burke, *Diggs v. Richardson: International Human Rights in U.S. Courts*, 34 NAT'L LAW. GUILD PRAC. 52 (1977). Later the lead counsel candidly admitted that filing the brief was a mistake, since "the case set a terrible precedent. . . . The holding may well have been the result of the *amicus* brief." *Proceedings: Conference on International Human Rights Law in State and Federal Courts*, 17 U.S.F. L. REV. 2, 9 (1982) (Keynote Address by Justice Frank Newman: Important International Human Rights Documents, Cases and Materials).

20. *See, e.g.*, Frolova v. U.S.S.R., 761 F.2d 370, 374 (7th Cir. 1985).

Needless to say, *Fujii*'s finding that the human rights clauses of the UN Charter are non-self-executing has been roundly criticized by legal commentators over the years. Since the decision in *Fujii* was not appealed to the U.S. Supreme Court, and the Court has not addressed the question in cases arising over the past four decades, it remains an open one for the country as a whole. Nevertheless, despite the arguments that can be marshalled in favor of self-execution[21] and the occasional wishful assertions by commentators professing to believe that "[i]t is unlikely that [*Fujii*] . . . would be decided the same way today,"[22] it is extremely doubtful, to say the least, that the present Supreme Court would cast aside the unanimous view of the lower state and federal courts and suddenly hold the UN Charter's human rights clauses to be self-executing were it presented with the question.

One often overlooked federal court decision concerning the enforceability of international law in U.S. courts, however, conceivably could pave the way for the eventual rejection of the *Fujii* rationale by the Supreme Court. In 1974, in *Saipan ex rel. Guerrero v. United States Department of Interior*, the U.S. Court of Appeals for the Ninth Circuit adopted a more enlightened test for determining whether a treaty is self-executing. In holding that the UN Trusteeship Agreement over Micronesia provided the plaintiffs with "direct, affirmative, and judicially enforceable rights" to challenge the execution of a lease purportedly in violation of that agreement, the court of appeals noted:

> [t]he extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[23]

---

21. See the four arguments developed in Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 377-80 (1985).

22. Schluter, *supra* note 13, at 162 n.291.

23. 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (citing MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE (1967)). Significantly, the court of appeals noted that "the substantive rights guaranteed through the Trusteeship Agreement are not precisely defined. However, we do not believe that the agreement is too vague for judicial enforcement. Its language is no more general than such terms as 'due process of law,' 'seaworthiness,' 'equal protection of the law,' 'good faith,' or 'restraint of trade,' which courts interpret every day." *Id.* at 99.

Under this test, a strong case can be made that articles 55 and 56 are self-executing. While, as noted above, it appears impossible to ascertain the "intent of the parties" to the UN Charter in this regard, it is clear that under article 1(3) one of the major "purposes" of the Charter is to "[promote] and [encourage] respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Since "alternative enforcement methods" to protect these rights often are unavailable on the international level or, if available, lack effectiveness, continuing to construe the UN Charter's human rights clauses as non-self-executing on the domestic level seriously weakens enforcement of internationally recognized human rights. Therefore, under the *Saipan* test, an enlightened Court conceivably could reject *Fujii* and conclude that the Charter grants individuals at least a hard core of judicially enforceable human rights.

Despite the encouragement engendered by the approach and the language of *Saipan*, here, as elsewhere in the law, one must beware of the wish becoming the parent of the thought. True, the human rights clauses of the UN Charter, at least insofar as the basic nondiscrimination norm contained in article 55(c) is concerned, certainly would seem to be self-executing under either the traditional (properly interpreted) or more recent *Saipan* tests. Moreover, weighty support for such an interpretation may be found in section 111(3)-(4) of the *Restatement (Third) of the Foreign Relations Law of the United States*, which finds a presumption that most treaties are self-executing.[24] Yet, unlike some of his more activist colleagues, the writer does not believe it an opportune time to orchestrate a test case given the present composition of the Supreme Court. Furthermore, in view of the hesitant attitude most lower court judges display toward international law in general, it seems unlikely that one of them will take the lead and hold that the human rights clauses of the UN Charter are self-executing even with respect to the basic nondiscrimination norm contained in article 55(c).[25] Self-executing arguments are available for invocation in appropriate cases today, but in all likelihood the judiciary will have to experience much more international human rights law consciousness-raising before *Fujii* and its progeny are rejected and the UN Charter's human rights clauses are given direct effect in U.S. courts.

III. Other Human Rights Treaties in U.S. Law

The United States has an exceptionally poor record of ratifying international human rights treaties. Although it finally ratified the Gen-

---

24. Restatement § 111(3)-(4) rep. note 5; *accord*, Paust, *supra* note 12, at 773-75.

25. Even the most liberal and enlightened judges continue to hold the Charter's human rights clauses to be non-self-executing. *See, e.g.*, Lareau v. Manson, 507 F. Supp. 1177, 1187-88 n.9 (D. Conn. 1980), *aff'd in part & modified & remanded in part*, 651 F.2d 96 (2d Cir. 1981).

ocide Convention in 1989,[26] the International Covenant on Civil and Political Rights in 1992,[27] and soon may ratify the Torture Convention,[28] no action has been taken on the three other human rights treaties (the International Covenant on Economic, Social and Cultural Rights,[29] the International Convention on the Elimination of All Forms of Racial Discrimination,[30] and the American Convention on Human Rights[31]) submitted to the Senate by President Carter in 1978, nor on the Convention on the Elimination of All Forms of Discrimination Against Women[32] which he signed and submitted to the Senate in 1980. Moreover, the United States has not even signed the recently adopted Convention on the Rights of the Child[33] and the International Convention on the Protection of the Rights of All Migrant Workers and Their Families.[34] Nevertheless, in addition to the UN Charter and the International Covenant, it is a party to twelve international human rights instruments[35] at least two of which have been invoked in U.S. courts on the ground that they contain self-executing provisions.

Most litigation has centered around the Protocol Relating to the Status of Refugees,[36] which the United States ratified in 1968 and which incorporates by reference the provisions of the Refugee Con-

26. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) (entered into force for U.S. Feb. 23, 1989).

27. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (entered into force for U.S. Sept. 8, 1992).

28. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc A/39/51 (entered into force June 26, 1987). It has received the Senate's advice and consent and awaits ratification by the President. 136 Cong. Rec. S17486-92 (daily ed. Oct. 27, 1990).

29. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

30. International Covenant on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

31. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, *reprinted in* 9 I.L.M. 673 (1970) (entered into force July 18, 1978).

32. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

33. Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 44 U.N. GAOR Supp. (No. 49) at 165, U.N. Doc. A/44/736 (entered into force Sept. 2, 1990).

34. International Convention on the Protection of the Rights of All Migrant Workers and Their Families, 30 I.L.M. 1517 (1991) (opened for signature May 2, 1991). As of November 25, 1991, the Convention had been signed by Mexico and Morocco, and acceded to by Egypt.

35. *See* INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 20.1-130.22 (Richard B. Lillich ed., 2d ed. 1990). This looseleaf service also lists, *inter alia*, all U.S. federal and state court cases discussing or citing the 49 principal international human rights instruments of special interest to the United States.

36. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) (entered into force for U.S. Nov. 1, 1968).

vention of 1951.[37] This treaty clearly offered refugees seeking asylum in the United States more protection than that afforded them by pre-1980 U.S. statute law.[38] Therefore, being last-in-time, the Protocol would have prevailed over the statute to the benefit of the refugee if it were deemed self-executing. Yet, despite its apparent self-executing character and the obvious differences in language between the Protocol and the statute, the Board of Immigration Appeals (BIA) initially maintained that the Protocol required no change in the standards applied to refugees.[39]

Counsel for numerous refugees successfully challenged this view of the Protocol in a series of cases. In *Sannon v. United States*,[40] for instance, they argued, and the U.S. District Court for the Southern District of Florida held, that a regulation issued by the Attorney General regarding the procedure a refugee must follow to obtain asylum either had been misconstrued or was invalid under the Protocol. Without explicitly deciding whether or not the protocol was self-executing, the district court ruled that the interpretation of the regulation urged by the Attorney General found "no justification in the Protocol, in logic or in fairness,"[41] and in so ruling noted that "were it not for the Protocol, petitioners would have no grounds for objecting to their exclusion."[42] Similarly, in *Pierre v. United States* the U.S. Court of Appeals for the Fifth Circuit held that a statutory provision prohibiting certain aliens from entering the United States was not applicable to appellants since such application "would render the [Protocol] meaningless as a practical matter . . . ."[43] Many other cases, none of which

---

37. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

38. Immigration and Nationality Act of 1952, Pub. L. No. 414, ch. 477, § 243(h), 66 Stat. 163, 214 (1952) (current version of Act at 8 U.S.C. §§ 1101-1503 (1988)). *See* David Carliner, *The Implementation of Human Rights Under the U.S. Immigration Law*, *in* INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE 133, 139-40 (James Tuttle ed. 1978).

39. *See* In re Dunar, 14 I. & N. Dec. 310 (1973). It is difficult to determine from the Board's interim decision whether it reached this conclusion because it regarded the Protocol to be non-self-executing or because, assuming the Protocol to be self-executing, it viewed its provisions to require no more protection than the statute.

40. 427 F. Supp. 1270 (S.D. Fla. 1977), *vacated & remanded mem.*, 566 F.2d 104 (5th Cir. 1978); *see also* Sannon v. United States, 460 F. Supp. 458 (S.D. Fla. 1978) (same case on remand).

41. 427 F. Supp. at 1276.

42. *Id.* at 1274.

43. 525 F.2d 933, 935 (5th Cir. 1976). *But see* Pierre v. United States, 547 F.2d 1281, 1287-89 (5th Cir.), *vacated & remanded mem.*, 434 U.S. 962 (1977) (statutory provision consistent with Protocol).

explicitly held the Protocol to be self-executing, saw U.S. courts either applying the Protocol in last-in-time fashion or otherwise assuming *sub silentio* that it was self-executing.[44]

The upshot of these cases was that Congress, in the Refugee Act of 1980, rewrote the statutory provisions in question to bring them into conformity with the international obligations of the United States under the Protocol.[45] While subsequent lower court cases differ on whether or not the Protocol is self-executing,[46] they routinely treat it as a "policy backdrop" against which the Act should be construed.[47] Moreover, the Supreme Court has taken a somewhat similar approach.[48] Thus, although one might have thought that under the last-in-time rule, the Protocol, even if self-executing, would have lost its bite after the Act took effect in 1980, it still continues to be invoked and taken into account.[49] The net result is that significant progress has been made in upgrading the law applied by the United States in refugee matters, progress that has been achieved by using international human rights law contained in an arguably self-executing treaty.

The second international human rights instrument that has been argued to contain a self-executing provision is the OAS Charter as amended by the Protocol of Buenos Aires.[50] In *Plyler v. Doe*,[51] the

---

44. *See, e.g.*, the cases cited in Lillich, *supra* note 21, at 387-88 nn.100-101.

45. Refugee Act of 1980, Pub. L. No. 96-212 §§ 201(a) 203(e), 94 Stat. 102, 102-03, 107 (codified as amended at 8 U.S.C. §§ 1101(a)(42), 1253(h) (1988)). *See generally* David A. Martin, *The Refugee Act of 1980: Its Past and Future, in* TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91 (Michigan Yearbook of International Legal Studies ed., 1982).

46. *Compare* Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) (non-self-executing) *with* Fernandez-Roque v. Smith, 539 F. Supp. 925, 935 n.25 (N.D. Ga. 1982) (probably self-executing).

47. *See, e.g.*, Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1038 n.35 (5th Cir. Unit B 1982); *see also* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 365 n.15 (C.D. Cal. 1982) ("Whether or not the Protocol is self-executing, plaintiffs are clearly entitled to rely on it as persuasive authority and to urge the Court to construe the Refugee Act of 1980 consistently with the Protocol's provisions."); Haitian Council, Inc. v. McNary, 969 F.2d 1350, 1363-66 (2d Cir. 1992) (extensively discussing and relying upon the Protocol).

48. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 424, 432-33, 436-41 (1987); INS v. Stevic, 467 U.S. 407, 428 n.22 (1984). The question of whether or not the Protocol is self-executing was squarely before the Supreme Court in Jean v. Nelson, 472 U.S. 846 (1985). *See* Brief of Amici Curiae, The Procedural Aspects of International Law Institute, The International Human Rights Law Group, The International League for Human Rights, and The Center for Constitutional Rights at 27-43, Jean v. Nelson (No. 84-5240). The Court decided the case without reaching the question. The question is again before the Court in the *McNary* case, *supra* note 47, where the Supreme Court recently granted certiorari. McNary v. Haitian Council, Inc., 113 S. Ct. 52 (1992).

49. See the numerous recent cases citing the Protocol collected in Lillich, *supra* note 35, at 110.14-17. *See also* the *McNary* case, *supra* note 47.

50. Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), opened for signature Feb. 27, 1967, 21 U.S.T. 607 (entered into force Feb. 27, 1970).

51. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), *aff'd*, 457 U.S. 202 (1982).

lower federal courts and eventually the Supreme Court struck down a state statute used to deny free elementary school education to the children of undocumented aliens as violative of the equal protection clause of the fourteenth amendment. The plaintiffs had contended that the statute also ran afoul of the right to education found in article 47(a) of the Protocol.[52] The U.S. District Court for the Eastern District of Texas sidestepped the self-executing question; however, to support its alternative federal preemption holding, it invoked "[t]he federal government's commitment to expanding educational opportunity . . . evidenced in the Protocol of Buenos Aires . . . ."[53] On appeal, the U.S. Court of Appeals for the Fifth Circuit not only was unreceptive to the argument that article 47(a) was self-executing, but, after noting in dictum that the Protocol of Buenos Aires "has never been considered self-executing," actually reversed the district court's alternative holding on the ground that article 47(a) "does not indicate a clear commitment to educating children illegally in the country."[54]

The Supreme Court, even had it addressed arguments beyond the equal protection clause, thus would have found some muddled discussion of the issue, followed by a holding that article 47(a) was non-self-executing, in the related case of *In re Alien Children Educ. Litig.*, which the Court had joined with *Plyler* for purposes of briefing and oral argument.[55] There, directly faced with the argument that article 47(a) was self-executing, the U.S. District Court for the Southern District of Texas concluded that the article "was not intended to be self-executing; it was 'not addressed to the judicial branch of our government.'"[56] The district court initially acknowledged that an interpreta-

---

52. *Id,* at 592. The Protocol of Buenos Aires states:

> The Member States will exert the greatest efforts, in accordance with their constitutional processes, to ensure the effective exercise of the right to education, on the following bases:
>
> a. Elementary education, compulsory for children of school age, shall also be afforded to all others who can benefit from it. When provided by the State it shall be without charge . . . .

Supra note 50, at art. 47(a).

53. 458 F. Supp. at 592.

54. 628 F.2d at 453, 454.

55. 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd unreported mem.*, (5th Cir. 1981), *aff'd sub nom.*, Plyler v. Doe, 457 U.S. 202 (1982). In the interest of full disclosure, it should be recorded that this writer testified as an expert witness on international law for the plaintiffs, arguing, *inter alia*, that article 47(a) was self-executing. Texas called as its expert witness Professor Covey T. Oliver, whose contrary views may be found in Covey T. Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 HOFSTRA L. REV. 411, 422-30 (1981). *But see generally* Steven M. Schneebaum, *International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver*, 4 HOUS. J. INT'L L. 65 (1981).

56. 501 F. Supp. at 590 (quoting Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976)).

tion of article 47(a) "in accordance with the ordinary meaning" of the text[57] left "no doubt" that it was "sufficiently direct to imply the intention to create affirmative and judicially enforceable rights."[58] Yet, purporting to examine the article "as a whole," it found language that it thought pointed in the opposite direction and ultimately reached a conclusion not only contrary to its initial impression, but also completely at odds with the plain meaning of article 47(a) of the Protocol.[59]

Aside from the Refugees Protocol, the Protocol of Buenos Aires, and now the Civil and Political Covenant, none of the handful of international human rights instruments ratified by the United States appear to lend themselves to self-executing arguments.[60] Moreover, all five of the major human rights treaties sent to the Senate by President Carter were submitted with a recommendation that, in giving its advice and consent to the particular treaty, the Senate adopt a declaration stating that the treaty's substantive provisions are non-self-executing.[61] Precedent for such declarations actually was established recently, pursuant to a similar recommendation by President Bush, when the Senate, in giving its advice and consent to the treaty, attached a non-self-executing declaration to the Civil and Political Covenant.[62] While the legal effect of such declarations has been questioned, in all likelihood they will be given effect by U.S. courts.[63]

57. The traditional treaty interpretation test as confirmed by RESTATEMENT § 325(1).

58. 501 F. Supp. at 590.

59. *Id.* Perhaps the influence of *Fujii*, which the court cited, was too strong for it to resist. In any event, since the Supreme Court in *Plyler* did not pass upon the question, U.S. courts are without authoritative guidance on whether or not article 47(a) of Protocol of Buenos Aires is self-executing. As in the case of articles 55 and 56 of the UN Charter, however, it is highly unlikely that the present Supreme Court would hold article 47(a) of the Protocol to be self-executing if it were squarely faced with the question. *Compare supra* text accompanying notes 21-22.

60. *See, e.g.*, Handel v. Artukovic, 601 F. Supp. 1421, 1424-26 (C.D. Cal. 1985) (holding two law of war conventions to be non-self-executing).

61. Message of the President Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOC. Nos. C, D, E & F, 95th Cong., 2d Sess. viii, xi, xv, xviii (1978); Message of the President Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, S. EXEC. DOC. No. R, 96th Cong., 2d Sess. ix (1980).

62. S. REP. No. 23, 102d Cong., 2d Sess. 23 (1992); 138 CONG. REC. S4784 (daily ed. Apr. 2, 1992).

63. For the views of various international lawyers to this effect, see *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. (1979), at 278 (Schachter), 288 (Henkin), 294 (Redlich), 315 (Owen), and 348-49 (Lillich). For recent articles — sparked by the U.S. ratification of the Civil and Political Covenant — questioning the validity as well as the wisdom of such declarations, see Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515, 526-32 (1991); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L.

Thus one must conclude, however reluctantly, that international human rights law flowing from treaties seems destined to have relatively little direct (as opposed to indirect) impact upon U.S. law in the next few decades.

IV. Customary International Human Rights Law in U.S. Law

The above pessimistic assessment of the role of international human rights treaties in U.S. law contrasts with this writer's slightly more optimistic outlook about the potential effect of customary international human rights law. This cautious optimism stems from the different manner in which treaties and customary international law are received into U.S. law. Although article VI, section 2 of the Constitution makes treaties "the supreme Law of the Land," the Unites States always can avoid or lessen the domestic impact of human rights treaties by failing to ratify them or, alternatively, by ratifying them subject to non-self-executing declarations. However, customary international law, at least where the United States has not persistently objected to a particular norm during the process of its formation, *ipso facto* becomes supreme federal law and hence may regulate activities, relations, or interests within the United States.[64] Thus, the potential impact of customary international human rights law in the United States is substantial.

As in the days of *The Paquete Habana*, U.S. courts determine the content of customary international law in large measure by reference to state practice,[65] although widely ratified human rights treaties also may contribute to the creation and clarification of specific human rights recognized under customary international law.[66] In addition, resolutions of international organizations, such as the Universal Decla-

---

Rev. 571, 603-09, 631-32 (1991); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-execution of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. (forthcoming 1993).

64. *See* The Paquete Habana, 175 U.S. 677 (1980); *see also* Restatement § 111(1)-(3) cmts. c, d & rep. notes 2, 3.

65. *See generally* Anthony A. D'Amato, The Concept of Custom in International Law (1971); Clive Parry, The Sources and Evidences of International Law (1965). State practice includes, *inter alia*, "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states . . . ." Restatement § 102(2) cmt. b.

66. On the role of treaties in the creation of the customary international law of human rights, compare Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 Vand. J. Transnat'l L. 1 (1988) (treaties are relatively unimportant) with Anthony A. D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, *id.* at 457 (treaties are especially important).

ration of Human Rights,[67] national and international judicial and arbitral decisions,[68] and the opinions of prominent scholars,[69] also may contribute to the establishment of a customary norm. All these sources of customary international law were drawn upon by the U.S. Court of Appeals for the Second Circuit to support its eloquent and path-breaking decision in *Filartiga v. Pena-Irala*,[70] which has done as much to assist the development of international human rights law in the United States as *Fujii* did to retard it.

In *Filartiga*, two Paraguayan plaintiffs brought an action against another citizen of Paraguay for the torture and death of their son and brother. The plaintiffs based their claim on the Alien Tort Act, a federal statute dating back to the Judiciary Act of 1789, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[71] Because the United States at the time had not ratified a treaty prohibiting torture upon which the plaintiffs could rely, jurisdiction under the statute turned upon whether torture violated "the law of nations," i.e., customary international law.

The U.S. District Court for the Eastern District of New York, in an unreported decision, believed itself constrained by precedent to dismiss the complaint on the ground that "'the law of nations,' as employed in Section 1350, [excludes] that law which governs a state's treatment of its own citizens."[72] In short, it ruled that torture of a Paraguayan in Paraguay by fellow citizens did not violate customary international law. On appeal, the U.S. Court of Appeals for the Second Circuit reversed and held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of

67. G.A. Res. 217A, U.N. Doc A/180, at 71 (1948); *see* RESTATEMENT § 103 cmt. c & rep. note 2.

68. RESTATEMENT § 103(2)(a)-(b).

69. *Id.* § 103 rep. note 1. These opinions may be ascertained not only from their writings, but also from their affidavits or expert testimony in a particular case. *Id.* § 113(2) cmt. c & rep. note 1; *see, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 879 & n.4 (2d Cir. 1980) (affidavits) and Fernandez-Roque v. Smith, 622 F. Supp 887, 902 (N.D. Ga. 1985), *rev'd in part & aff'd in part & dismissed as moot in part sub nom.*, Garcia-Mir v. Meese, 788 F.2d 1446, (11th Cir.), *cert. denied*, 479 U.S. 889 (1986) (expert testimony).

70. *See supra* note 69.

71. Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76 (1789) (current version at 28 U.S.C. § 1350 (1988)). For an excellent article on the history and continued importance of the Act, see Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

72. 630 F.2d at 880.

nations."[73] Basing its decision upon an extensive examination of the sources from which customary international law is derived, Chief Judge Kaufman reached the conclusion that "official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[74]

Important as *Filartiga* is in establishing that torture violates customary international law, the case is even more significant in demonstrating to lawyers how other international human rights law violations might be remedied in U.S. courts, at least in cases where the victims are aliens.[75] Thus, it is not surprising that the case generated considerable international human rights law litigation during the 1980s. Such litigation, however, should be carefully and conservatively crafted to avoid potential backlashes.[76] As Judge Kaufman cautioned in a subsequent commentary, *Filartiga*'s holding that torture is a violation of customary international law for Alien Tort Act purposes is a relatively narrow one;[77] it should not be misread or exaggerated to support

73. *Id.* At the time of the act in question the defendant was Inspector General of Police in Ascuncion, Paraguay. *Id.* at 878.

74. *Id.* at 884. The sources of customary international law invoked in *Filartiga* are reviewed and critiqued in Lillich, *supra* note 21, at 398-400.

75. U.S. citizens of course cannot avail themselves of the Alien Tort Act. *See supra* text at note 71. Legislation to extend the Act's coverage to them was introduced in Congress in the 1980s but was opposed by the Reagan and Bush administrations on various grounds. *Compare* Richard B. Lillich, *The United States Constitution and International Human Rights Law,* 3 HARV. HUM. RTS. J. 53, 71 n.127 (1990) *with* David P. Stewart, *The Torture Convention and the Reception of International Criminal Law within the United States,* 15 NOVA L. REV. 449, 458-60 (1991). Recently, Congress passed and President Bush signed the Torture Victims' Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), which permits U.S. citizens as well as aliens to sue for recovery of damages from individuals who, under actual or apparent authority or color of law of any foreign nation, have engaged in torture or extrajudicial killing. This Act is a limited, if welcome, effort to accord U.S. citizens equal rights with aliens in the enforcement of international human rights law.

76. A misguided attempt to establish that acts of "international terrorism" violated customary international law, and hence were actionable under the Alien Tort Act as construed in *Filartiga,* afforded former Judge Bork the opportunity to attack the fundamental premises of that decision in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied,* 470 U.S. 1003 (1985). Judge Bork argued, *inter alia,* that international human rights law could be invoked under the Alien Tort Act only in those rare instances in which the treaty provision or customary international law norms explicitly granted individuals a "cause of action." *Id,* at 801. For criticism of this approach, which as a practical matter would restrict such lawsuits to situations involving at most a handful of self-executing treaties, see Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations Is Seriously Mistaken,* 79 AM. J. INT'L L. 92 (1985). *See generally* Steven M. Schneebaum, *The Enforceability of Customary Norms of Public International Law,* 8 BROOK. J. INT'L L. 289, 300-07 (1982).

77. Irving R. Kaufman, *A Legal Remedy for International Torture?,* N.Y. TIMES, Nov. 9, 1980, § 6 (Magazine) at 44, 52.

sweeping assertions that all (or even most) of the international human rights norms found in the Universal Declaration or in the major human rights treaties have ripened into customary international law enforceable in U.S. courts.

A core list of human rights that arguably have achieved customary international law status may be found in Section 702 of the *Restatement (Third) of the Foreign Relations Law of the United States.* Of the rights listed, United States courts to date have held that torture, prolonged arbitrary detention, and "causing the disappearance" of individuals are prohibited by customary international law.[78] Somewhat surprisingly, the prohibition of cruel, inhuman, or degrading treatment or punishment has been deemed not to have achieved customary status.[79] Human rights not found in Section 702 uniformly have been denied such status. They include the right to education, the right to property, and the right of free speech.[80] Arguments that other human rights now are part of customary international law can be expected to be made with increasing frequency.[81]

In addition to its use in actions brought under the Alien Tort Act and now the Torture Victims' Protection Act, customary international human rights law has been invoked in other contexts as well. Nearly as significant jurisprudentially as *Filartiga*, perhaps, was the decision of the U.S. District Court for the District of Kansas in *Fernandez v. Wilkinson*,[82] which considered whether the continued detention of a Cuban who had arrived in the United States in 1980 as part of the "freedom flotilla" violated U.S. or customary international law. After finding that the plaintiff's unique status as an "excludable" alien meant that he could not avail himself of constitutional or statutory protection, the District Court nevertheless ordered his release:

---

78. *See* Filartiga, 630 F.2d at 884 (torture); Fernandez-Roque, 622 F. Supp. at 903 (N.D. Ga. 1985), *rev'd in part & aff'd in part & dismissed as moot in part sub nom.*, Garcia-Mir v. Meese, 788 F.2d 1446, 1453 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986) (prolonged arbitrary detention); Forti v. Suarez-Mason, 694 F. Supp. 707, 711 (N.D. Cal. 1988) (causing the disappearance of individuals).

79. *See* Forti, 694 F. Supp. at 712 (misconstruing this writer's affidavit to support the holding).

80. *See* In re Alien Children Educ. Litig., 501 F. Supp. at 596, *aff'd unreported mem.*, (5th Cir. 1981), *aff'd sub nom.*, Plyler v. Doe, 457 U.S. 202 (1982) (education); De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1397 (5th Cir. 1985) (property); Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (free speech).

81. For a somewhat strident critique of such arguments, see Brunno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1992).

82. 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom.*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

> Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial as a violation of international law.[83]

However, the full impact of this dramatic holding to the effect that international human rights law could be used to secure individual human rights not protected by the U.S. Constitution was short-lived. On appeal, the U.S. Court of Appeals for the Tenth Circuit, while affirming the District Court, based its holding on U.S. statutory provisions rather than on customary international law. The Court of Appeals nevertheless found it proper "to consider international law principles for notions of fairness as to [the] propriety of holding aliens in detention," and noted that its interpretation of the relevant statute was "consistent with accepted international law principles that individuals are entitled to be free of arbitrary imprisonment."[84]

That a customary international law norm of prohibiting prolonged arbitrary detention exists and may be applied by U.S. courts in an appropriate case can be seen from the various holdings in *Garcia-Mir v. Meese*,[85] a more recent case also concerning "excludable" Cuban aliens. There the U.S. District Court for the Northern District of Georgia observed that "[e]ven the government admits that [the] customary international law of human rights contains at least a general principle prohibiting prolonged arbitrary detention."[86] The government, however, then proceeded to argue, under the Supreme Court's caveats to its oft-quoted holding in *The Paquete Habana*,[87] that there existed both legislation and a "controlling executive act" that pro-

---

83. *Id.* at 798.

84. 654 F.2d at 1388, 1390. *But see* Jean v. Nelson, 727 F.2d 957, 964 n.4, 974-75 (11th Cir. 1984) (en banc), *aff'd*, 472 U.S. 846 (1985) (court specifically declined to follow the Tenth Circuit's reasoning in *Rodriguez-Fernandez*). The Supreme Court has not resolved this split between the circuits.

85. 788 F.2d 1446.

86. 622 F. Supp. at 902. *See* Supplemental Brief in Support of Motion for Denial of Habeas Corpus on the Issues of International Law at 2, *Fernandez-Roque* (Nos. C81-1084A, C81-938A). "International law does include a general principle against 'prolonged arbitrary detention'." The Supplemental Brief later contends that this general principle is "not a rule of law . . . ." *Id.* at 3.

87. 175 U.S. at 677. Immediately following its holding, see *supra* text at note 6, the Court added the following important caveats: "For this purpose [the application of international law by U.S. courts,] where there is no treaty, *and no controlling executive or legislative act or judicial decision*, resort must be had to the customs and usages of civilized nations . . . ." *Id.* at 700 (emphasis added).

vided a rule of decision, which made resorting to customary international law inappropriate.[88] The District Court accepted the contention that a controlling executive act effectively preempts customary international law, holding that under the Constitution

> the President has the authority to ignore our country's obligations arising under customary international law, and plaintiffs have failed to establish that the Attorney General does not share in that power when he directs the detention of unadmitted aliens. Accordingly, customary international law offers plaintiffs no relief in this forum.[89]

The U.S. Court of Appeals for the Eleventh Circuit, after advancing the extraordinary view that the President possesses the power "to disregard international law in the service of domestic needs,"[90] concluded that the Attorney General's "executive acts here evident constitute a sufficient basis for affirming the trial court's finding that international law does not control."[91]

The above reasoning, recently followed by the U.S. Court of Appeals for the Ninth Circuit in *Alvarez-Mendez v. Stock*,[92] has been criticized, and rightly so, for misreading *The Paquete Habana*.[93] If it is eventually adopted by the Supreme Court, it will have a chilling effect on the use of international human rights law in U.S. courts, especially in those (rare, one hopes) cases where the Executive Branch

---

88. Defendants' Reply Memorandum in Opposition to Habeas Corpus Petition at 17-20, *Fernandez-Roque* (Nos. C81-1084A, C81-938A). "[T]he necessary corollary to the rule announced in *Paquete Habana* is that the political and judicial organs of the United States have the power, based upon a statute or a 'controlling executive act', to disregard international law." *Id.* at 19.

89. 622 F. Supp. at 903-04.

90. 788 F.2d at 1455. As Prof. Henkin correctly asserts, "[t]here is no such principle. The President cannot disregard international law 'in service of domestic needs' any more than he can disregard any other law." Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 936 (1986).

91. 788 F.2d at 1455.

92. 941 F.2d 956 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 127 (1992).

93. Prof. Henkin, for example, believes that "*Garcia-Mir* misinterpreted and misapplied *The Paquete Habana*," since the controlling executive act in question was not one undertaken by the President "in the exercise of his constitutional authority." Henkin, *supra* note 90, at 936. While acknowledging that "an act within the President's constitutional authority as sole organ or as commander-in-chief is controlling and will not be enjoined even if it violates a treaty or principle of law," he points out that "[t]here was no suggestion that the President ordered the detention in the exercise of [such] independent constitutional authority . . . ." *Id.* at 936, 937. "Only such presidential acts," he concludes, "would constitute 'controlling executive acts' permitting disregard of international law as the law of this land. In the absence of such controlling acts, the court should have required the Attorney General to take care that international law be faithfully executed." *Id.* at 937.

is willing to take, identify, and rely upon acts that it has taken that are contrary to such law.

V. USING INTERNATIONAL HUMAN RIGHTS LAW TO INFUSE U.S. CONSTITUTIONAL AND STATUTORY STANDARDS

With prospects for the successful direct invocation of the UN Charter or other international human rights treaties in U.S. courts remote at present, and with opportunities for the similar invocation of customary international law limited by the chilling effect of *Garcia-Mir* and the growing unreceptiveness of many federal judges,[94] increased attention has been paid to the argument that international human rights law could be used more effectively by infusing its normative content into U.S. constitutional and statutory standards. Over the years, a sizeable number of federal and state courts have looked to the UN Charter, the Universal Declaration, and other international human rights instruments for assistance in determining the content and contours of various rights guaranteed by U.S. law. This "indirect incorporation" of international human rights law continues to be a promising approach warranting greater attention and increased use by human rights advocates.[95]

A Supreme Court case from the immediate postwar period illustrates how the UN Charter has been and may be invoked in this fashion. In *Oyama v. California*, two Justices of the Court, concurring in

---

94. One commentator recently remarked that "conservative Reagan administration appointees with unparalleled hostility to human rights claims now dominate the federal bench." Howard Tolley Jr., *Interest Groups Litigation to Enforce Human Rights: Confronting Judicial Restraint*, *in* WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS 123, 142 (Mark Gibney ed., 1991).

95. This approach is not a new idea. Forty years ago Prof. Schachter astutely observed that "[i]t would be unrealistic to ignore the influence . . . of the Charter as a factor in resolving constitutional issues which have hitherto been in doubt." Oscar Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 658 (1951). For an excellent survey and analysis of the post-World War II civil rights cases wherein private parties, organizations such as the ACLU, and even the U.S. government used this approach, with far more effect than is general recognized, see Bert B. Lockwood Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

Scholarly support for it is found in the numerous articles gathered in *id.* at 901 n.1 and in the Committee on Human Rights report, *Human Rights Law, the U.S. Constitution and Methods of Judicial Incorporation*, *in* PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 1983-84, 56, 59 n.8. By far the most thoughtful attempt to develop an adequate theory of indirect incorporation of international human rights norms into the process of constitutional interpretation may be found in Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983). The best recent article, by the President of the ACLU, is Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990).

a decision striking down a portion of the California Alien Land Law as contrary to the fourteenth amendment, remarked that the statute's "inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."[96] How could the United States "be faithful to [its] international pledge," two other concurring Justices inquired, "if state law which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?"[97] While none of the four Justices asserted that under the Supremacy Clause the Charter provisions automatically invalidated the inconsistent state law, they reasoned, as a U.S. District Court judge later concluded, that "the fact that an article of the United Nations Charter is incongruent with a state law is an argument against the validity of such law."[98]

The same approach can be taken using the Universal Declaration. Although it has been invoked frequently in direct fashion to help customary international human rights law — *Filartiga* and *Fernandez* being the leading cases — the Declaration's principal usefulness has been and most likely will remain that of assisting United States courts indirectly. Numerous litigants and judges already have invoked the Declaration precisely for this purpose.[99] It is probable that its provisions, like the human rights clauses of the UN Charter, will have their greatest impact on United States law in coming years by influencing the approach U.S. courts take in interpreting constitutional and statutory standards.

Furthermore, in addition to the UN Charter and the Universal Declaration, numerous other international human rights instruments afford similar opportunities. As mentioned above, no United States court has held explicitly that the Refugee Protocol is self-executing, yet, as the U.S. Court of Appeals for the Fifth Circuit has written, "[t]he obligations of the United States as set forth in the Protocol have informed the asylum policy of the United States as expressed in 8 U.S.C. § 1253(h)."[100] So, too, the UN Standard Minimum Rules for the Treatment of Prisoners[101] helped the U.S. District Court for the District of Connecticut to define precisely what constituted over-

96. 332 U.S. 633, 673 (1948) (Murphy, J. & Rutledge, J., concurring).

97. *Id.* at 650 (Black J., & Douglas, J., concurring).

98. United States v. Gonzalez Vargas, 370 F. Supp. 908, 914-15 (D.P.R. 1974), *vacated*, 558 F.2d 631 (1st Cir. 1977).

99. The cases are collected in Lillich, *supra* note 35, at 440.7-10.

100. Haitian Refugee Ctr. v. Smith, 676 F.2d 1023, 1028 n.8 (5th Cir. Unit B 1982); *accord*, Haitian Ctr. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992).

101. Adopted E.S.C. Res. 663(C), 24 U.N. ESCOR Supp. (No.1) at 11, U.N. Doc. E/3048 (1957), *reprinted in* Lillich, *supra* note 35, at 450.1-.19.

crowded prison conditions for eighth amendment purposes.[102] Moreover, the "evolving standards of decency" test for ascertaining the contemporary level of human rights protection afforded by the Constitution's various amendments, first articulated by the Supreme Court in 1958 in *Trop v. Dulles*,[103] where several UN studies were utilized for comparative purposes, was reaffirmed by the Court in 1976 in *Estelle v. Gamble*,[104] where the Court took note of the UN Standard Minimum Rules.

While the past decade has seen the Supreme Court make less use of international human rights instruments for such purposes, both the plurality opinion and Justice O'Connor's concurring opinion in *Thompson v. Oklahoma*[105] confirm the Court's continued commitment to take such instruments into account in determining constitutional standards.[106] Since, as a distinguished barrister/scholar from Great Britain concluded several years ago, the United States with its woeful human rights treaty ratification record "remains sadly isolated from [the direct impact of] the rapidly developing corpus of international human rights law,"[107] taking advantage of this "indirect incorporation" approach seems to be a sensible strategy for human rights lawyers and a wise policy for U.S. courts concerned with developing the promising relationship between U.S. constitutional and statutory law and international rights law.[108]

---

102. Lareau v. Manson, 507 F. Supp. 1177 (D. Conn. 1980) (Cabranes, J.), *aff'd in part & modified & remanded in part*, 651 F.2d 96 (2d Cir. 1981). The Supreme Court subsequently held that "double-bunking," prohibited by article 9(1) of the UN Standard Minimum Rules, to which the Court did not refer, did not violate the eighth amendment. Rhodes v. Chapman, 452 U.S. 337 (1981). It earlier had held that the "double-bunking" of pre-trial detainees was compatible with the fifth amendment. Bell v. Wolfish, 441 U.S. 520 (1979).

103. 356 U.S. 86, 101 (1958).

104. 429 U.S. 97, 102 (1976).

105. 487 U.S. 815 (1988).

106. *Id.* at 831 n.34 (plurality opinion) and 851 (O'Connor, J., concurring). The plurality opinion, written by Justice Stevens, reaffirms "the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Id.* at 830 n.31. Justice Scalia, in a dissent joined by Chief Justice Rhenquist and Justice White, disagreed, arguing that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." *Id.* at 868 n.4. Justice Scalia subsequently reiterated this view *in haec verba* in his plurality opinion in Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).

107. Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 539 (1988).

108. At the very least, through the application of the well-established principle of statutory interpretation that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804), international human rights norms should have some impact in statutory construction cases. *See* RESTATEMENT § 114. Courts in Great Britain have followed this rule of construction when faced with arguments based upon the European Convention. *See* Jermey

VI. CONCLUSION

The use of domestic courts to enforce international human rights law, whether directly or indirectly, is an important and challenging area of human rights advocacy. To the extent that international human rights law cannot be invoked directly and is not incorporated indirectly into domestic law, the United States — or any other country similarly situated — will suffer from this self-imposed jurisprudence deprivation. This fact, plus the vast array of international human rights norms now available for use, "make it imperative that we not turn completely inward in judicial attitude in ways that deny the rich traditions of the rule of law beyond our borders."[109] Human rights advocates have made considerable progress during the last twenty years by raising international human rights legal issues in domestic courts, and with imaginative ideas, thorough research, sound judgement, and skillful advocacy — in other words, with good lawyering — further gains await the making.

McBride & L. Neville Brown, *The United Kingdom, the European Community and the European Convention on Human Rights*, 1981 Y.B. EUR. L. 167, 177.

International human rights law may serve as an aid to statutory construction or to infuse domestic law on the state as well as federal level. It has been suggested that it may be preferable to use it in this way on the state level, rather than to argue that it is binding law, because

> a California decision which adopts a human rights norm to interpret California law cannot be reviewed by the U.S. Supreme Court; it is insulated from Supreme Court review because there is an "independent state ground" for decision. If, however, a California court adopts international human rights law as a matter of treaty or customary law, then a federal issue may be created. Litigators, particularly in California, may wish to avoid that result, even to the point of using law that arguably has treaty or customary law status merely for its interpretive value.

Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61, 63 (1984). For other advantages that may accrue from resorting to state rather than federal court whenever possible, see Joan Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741 (1985); Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Court*, 18 TEX. INT'L L.J. 291 (1983).

109. Christenson, *supra* note 95, at 35.