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INTEGRATING INTERNATIONAL HUMAN RIGHTS LAW INTO DOMESTIC LAW— U.S. EXPERIENCE*

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I have been asked to discuss recent United States experience concerning the impact of international human rights law upon domestic law. In judging the relevance of United States experience, certain things should be kept in mind: (1) United States experience is thus far very limited; (2) the Bill of Rights to the United States Constitution and a variety of special statutes already provide a very broad basis of protection for human rights in United States domestic law; (3) the United States Constitution and constitutional doctrine have unique features, including the doctrine of self-executing treaties and special doctrines concerning the appropriate division of powers between the federal and state governments and among the various branches of the federal government; (4) the United States, while a party to the United Nations Charter, has not as yet ratified any major human rights treaty; and (5) the attitude of the United States Government, of the courts, and of the public in general, toward the international human rights concept is still evolving and ambivalent.

Looking first at the issue of incorporation, United States courts are likely to look to international law in deciding cases coming before them in several kinds of situations:

1. Under Article VI of the United States Constitution, treaties are the "supreme law of the land." Consequently, a

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United States court will directly apply a rule provided in what it regards as a "self-executing" treaty without any necessity for further statutory implementation. However, if the court decides that the treaty or treaty provision is *not* self-executing, it will *not* directly apply the rule, absent implementing legislation. In determining whether a treaty or treaty provision is to be interpreted as self-executing, the courts will look at various factors, including the nature of the treaty or treaty provision, whether the provision establishes individual rights which are capable of judicial interpretation and enforcement without further implementing legislation, the language of the treaty and apparent intent of the parties, and so forth.

2. As clearly established by the Supreme Court's 1900 decision in *The Paquete Habana*,¹ United States courts will treat rules of customary international law as part of "the law of the land" and will apply these rules as appropriate in cases coming before them, at least in the absence of contrary legislation or executive policy.
3. Domestic legislation may in some cases expressly or impliedly refer to or direct United States courts to apply international rules, definitions, or standards, and courts will of course have to look to international law to implement these statutory directives.
4. Even where United States courts do not regard a particular rule of international law as directly incorporated into domestic law, they may nevertheless look to international law for expressions of government policies or interests, widely-accepted standards, or experience relevant to their decisions. In particular, the courts recognize the existence of United States international obligations to other nations under treaties and customary international law, and, if possible, will seek to interpret ambiguous statutes or reach decisions in ways which are consistent, rather than in conflict, with such international obligations.

To what extent, have the United States courts, on any of these bases, looked to international human rights law in deciding cases before them?

There has been relatively little scope for arguments that international human rights treaty rules have been directly incorporated into United States domestic law since, as indicated, the United States is party to very few of these treaties. For example, the United States has

1. 175 U.S. 677 (1900).

not as yet ratified either the Race Convention, the Covenant on Civil and Political Rights, or the American Convention on Human Rights.

I am aware of only one case in which a United States court has held a human rights-type obligation in a treaty to be "self-executing" and thus directly applicable without the need for implementing legislation—the 1974 decision of the United States Court of Appeals for the Ninth Circuit in *People of Saipan ex Rel. Guerrero v. United States Department of Interior*.² That case involved a challenge by certain Micronesian citizens to a lease executed by the United States High Commissioner for the Trust Territory of the Pacific permitting an airline to construct and operate a hotel on public lands in Saipan. The plaintiffs argued that the lease violated the provisions of the United States-United Nations Trusteeship Agreement under which the United States held the Trust Territories, which *inter alia* obligated the United States to promote the economic advancement of the inhabitants and protect them against the loss of their land and resources. The Court held that the Trusteeship Agreement was self-executing and constituted a source of rights enforceable by individuals in a domestic court. While the decision is interesting, the nature of the agreement and context are rather special and I have some question as to its precedential value in more typical human rights contexts.

Most of the cases have gone the other way. The leading case is *Sei Fujii v. State*,³ in which plaintiffs challenged the constitutionality of certain California laws discriminating against the ownership of lands by aliens ineligible for citizenship (principally Japanese and Chinese aliens), on the grounds *inter alia*, that these laws were contrary to the human rights provisions of the United Nations Charter. This contention initially met with success in a lower California court, which in 1950 held the Charter provisions to be self-executing.⁴ However, in 1952, this decision was reversed on appeal by the California Supreme Court, which expressly held the human rights provisions of the Charter to be non-self-executing, but went on to strike down the laws as violative of the "equal protection" clause of the United States Constitution.⁵ The decision was not appealed to the United States Supreme Court, which has as yet not spoken on this question.

While the *Sei Fujii* decision has been much criticized by international human rights advocates, its conclusion that the human rights provision of the United Nations Charter are non-self-executing has

2. 502 F.2d 90 (9th Cir. 1974), *cert. denied* 420 U.S. 1003 (1974).

3. 38 Cal. 2d 718, 242 P.2d 617 (1952).

4. 97 Cal. App. 154, 217 P.2d 481 (1950).

5. 242 P.2d 617.

been followed in several subsequent cases in the federal courts.⁶ In several other recent cases involving claims that the denial of free public education to illegal alien children violated provisions of the amended Charter of the Organization of American States, the federal courts have held that these provisions are not self-executing either.⁷

As regards the direct incorporation of customary international human rights law into United States domestic law, experience has again been sparse. The most relevant case is *Rodriguez-Fernandez v. Wilkinson*,⁸ a December, 1980, decision of the Kansas Federal District Court. The case involved a habeas corpus petition by a Cuban who came to the United States in June 1980, as part of the so-called "Freedom Flotilla," seeking admission as a refugee. At the time Rodriguez left Cuba, he was serving a sentence for attempted burglary and had prior convictions for theft; on this basis, the Immigration authorities determined he was an excludable alien and ordered him deported to Cuba. Upon Cuba's refusal to accept him, he was detained, pending deportation to Cuba, in a maximum security federal penitentiary at Fort Leavenworth, Kansas. He sought release on the grounds that his continued indefinite detention under these circumstances violated prohibitions against arbitrary imprisonment in both the United States Constitution and customary international human rights law.

The District Court found that, since Rodriguez had not been admitted into and was not, therefore, technically "within" the United States, he was not entitled to constitutional protection against arbitrary imprisonment. (The Court reluctantly constructed certain previous Supreme Court opinions as seeming to require this holding). However, the Court, clearly seeking some basis for relief, went on to hold that the customary international law of human rights, as evidenced by a variety of international agreements, declarations, and other sources, accorded everyone the right to be free from arbitrary detention or imprisonment; that this rule was part of "the law of the land;" and that, consequently, it provided a basis upon which the court could order the prisoner's release, which it did. To lawyers interested in using international human rights standards to broaden domestic human rights protections, this was a pathbreaking and exciting decision. It suggested that individuals within the United States could invoke not only the rights expressly guaranteed by the Constitution, but also such additional protections as

6. See, e.g., *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961); *Hitai v. Immigration and Naturalization Services*, 343 F.2d 466 (2d Cir. 1965).

7. *In re Alien Children Educ. Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980); *Doe v. Plyler*, 628 F.2d 448 (5th Cir. 1980).

8. 505 F. Supp. 787 (D. Kan. 1980).

might be regarded by the courts as part of customary international human rights law.

On appeal, the United States Court of Appeals for the Tenth Circuit, in a July 1981 decision, affirmed the order that Rodriguez be released.⁹ However, its decision was based on the ground that domestic law required such a result, rather than on an invocation and incorporation of international human rights standards. Distinguishing the previous opinions that had troubled the District Court, the Court of Appeals held that an excluded alien within the United States was in fact entitled to constitutional protections from arbitrary punishment or imprisonment and that, in order to avoid serious constitutional questions, the immigration statute must be construed to require the petitioner's release. The Court of Appeals did not directly address the lower court's ruling that the customary international law of human rights prohibiting arbitrary detention was incorporated into the domestic law of the United States and furnished an independent and additional basis for its decision. However, the Court of Appeals did note that its construction of the immigration statute as requiring the petitioner's release was "consistent with accepted international law principles that individuals are entitled to be free of arbitrary imprisonment." In buttressing its interpretation of the immigration statute, it also commented:

Due process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness. Finally, we note that in upholding the plenary powers of Congress over exclusion and deportation of aliens, the Supreme Court has sought support in international law principles. . . . It seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.¹⁰

The leading example of a case in which the court has looked to the customary international law of human rights because a statute has expressly or impliedly directed the court to do so is the important 1980 decision of the United States Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*.¹¹ This case was a wrongful death action brought in the Federal District Court in New York by two Paraguayan nationals, the father and sister of the deceased, Joelito Filartiga, against another Paraguayan national who had formerly been a police officer in

9. 654 F.2d 1382 (10th Cir. 1981).

10. *Id.* at 1388, citing the Universal Declaration on Human Rights and the American Convention on Human Rights.

11. 630 F.2d 876 (2d Cir. 1980).

Asuncion. The plaintiffs alleged that the defendant had tortured and caused the death of Joelito while he was detained in a Paraguayan prison, allegedly in retaliation for his father's political opposition to the regime. Both the plaintiffs and defendants had entered the United States on visitors' visas. The plaintiffs based their contention that the federal court had subject-matter jurisdiction over the action principally on the federal Alien Tort Statute, 28 U.S.C. § 1350, which gives the Federal District Courts jurisdiction over "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." Since no treaty was alleged to be applicable, jurisdiction required the court's determination that torture violated the law of nations. The District Court dismissed the suit for lack of jurisdiction. However, on appeal, the United States Court of Appeals for the Second Circuit sustained federal jurisdiction under the statute, holding 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 nations." In reaching the conclusion that torture by an official violates customary international law, the court examined a broad body of evidence, including human rights treaties and declarations, various national constitutions, official United States statements, and expert testimony. Although the court, in my opinion, was not faced with the question of direct incorporation, it reaffirmed *The Paquete Habana* doctrine, declaring that customary international law—including what the court expressly recognized as the evolving international law of human rights—would in appropriate cases be directly applied by the courts as "the law of the land." The case was not appealed further.

Filartiga has been hailed as a breakthrough by human rights advocates and is certainly an interesting and significant decision. Clearly, it demonstrates an encouraging judicial sensitivity to international human rights concepts and will be useful in a variety of ways to lawyers and others concerned with human rights. However, the case, essentially one of statutory interpretation, concerned alleged violations of human rights by Paraguayan officials against Paraguayans in Paraguay rather than by American officials against persons in the United States. It leaves many questions unanswered, including the following: whether the courts will be willing to hold that practices other than such widely-aborred practices as torture violate customary law (for example, would the court assert jurisdiction under the statute over a tort claim based on apartheid); the substantive law applicable to a civil suit of this type based on a tort in a foreign country; the application of the *forum conveniens* doctrine. I have some question whether United States courts

will prove very receptive to the idea that they should furnish a forum for suits by foreigners to vindicate alleged violations of human rights abroad, or indeed whether this is an effective way of promoting human rights in other countries.

Finally, in situations where courts have not regarded international human rights standards as constitutionally or statutorily incorporated into domestic law, or as customary law to be considered as "the law of the land," have they nevertheless been prepared to look to these international standards for assistance in interpreting or applying domestic law? Experience in this respect has been more encouraging and it is possible to cite a number of cases where international human rights norms appear to have influenced United States court decisions. For one thing, the courts have clearly been sensitive to the possible embarrassment that might be caused the United States Government by any interpretation seeming to conflict with international standards; when these standards have been called to the courts' attention, they have generally tried to reach consistent interpretations. Moreover, the courts have found such standards useful evidence of public policy or prevailing attitudes, even apart from the pressures to avoid foreign policy embarrassment.

For example, as early as 1948, in the case of *Oyama v. California*¹² in which the United States Supreme Court struck down certain features of the California Alien Land Law (other than those raised in *Sei Fujii*) as violative of the Constitution's equal protection clause, four of the justices noted in a concurring opinion that this conclusion was also consistent with the human rights provisions of the United Nations Charter. As previously indicated, the Court of Appeals in *Rodriguez-Fernandez* expressly buttressed its interpretation of the Constitution as protecting excluded aliens against arbitrary detention by indicating the consistency of its holding with international human rights norms. In the recent case of *Lareau v. Manson*,¹³ a federal District Court in Connecticut, in holding that overcrowding in a federal correctional center violated the Eighth Amendment, referred to such international instruments as the United Nations Standard Minimum Rules on Prisons, the

12. 332 U.S. 633 (1948). Justice Black commented: "[h]ow can this nation be faithful to this international pledge [in the U.N. Charter to human rights without racial distinction] if state laws which bar land ownership and occupancy by aliens are permitted to be enforced?" *Id.* at 649-50. And Justice Murphy stated: "[T]he Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its 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." *Id.* at 673.

13. 507 F. Supp. 1177 (D. Conn. 1980). Judge Cabranes noted that the United Nations Minimum Rules for the Treatment of Prisoners "constitute an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind" and "are relevant to the 'canons of decency and fairness which express the notions of justice' embodied in the Due Process Clause." *Id.* at 1188, n.9.

Universal Declaration on Human Rights, and the International Covenant of Civil and Political Rights, as evidence of "evolving standards of decency" basic to the prohibition against cruel and unusual punishment. In the recent case of *Sterling v. Cupp*,¹⁴ the Oregon Supreme Court, in holding that the use of women guards to oversee male prisoners could in certain circumstances violate the dignity of the prisoners in violation of provisions of the Oregon Constitution prohibiting cruel or degrading punishment, referred to the United Nations Standard Minimum Rules, the European Convention on Human Rights, and the Universal Declaration as "contemporary expressions of the same concern with minimizing needlessly harsh, degrading or dehumanizing treatment of prisoners" as was expressed in the Oregon Constitution. Even in the *Sei Fujii* case, the California Supreme Court, while denying direct application to the human rights provisions of the Charter, nevertheless proceeded to strike down the Alien Land Law as a violation of the "equal protection" clause of the United States Constitution. Similarly, in *Doe v. Plyler*,¹⁵ the United States Court of Appeals for the Fifth Circuit, while holding the education provisions of the amended Organization of American States Charter to be non-self-executing, nevertheless struck down discriminatory Texas legislation as a violation of the "equal protection" clause of the Constitution.

What conclusions can be drawn from this experience? I think it is unlikely that we will see much direct incorporation of international human rights standards into domestic United States law.

The treaty route seems particularly unpromising. Thus far, the United States has ratified very few human rights treaties, and the courts have been generally reluctant to treat these treaties as self-executing. While arguments can be made that the human rights provisions of the United Nations Charter should be regarded as self-executing (probably better arguments than when *Sei Fujii* was decided), I am doubtful that the United States Supreme Court, particularly as presently constituted, would overrule the *Sei Fujii* position. While the Carter Administration submitted the Race Convention, Human Rights Covenants, and American Convention to the United States Senate for consideration, ratification of these treaties in the near future is very unlikely. Moreover, the Carter Administration made clear, through an extensive list of proposed reservations and otherwise, its intent that these treaties be regarded as non-self-executing and that any broadening of domestic law

14. 290 Or. 611, 625 P.2d 123, 131, n.21 (1981).

15. See note 7, *supra*.

be accomplished only through specific implementing legislation. The Reagan Administration is not likely to take a less conservative view.

As to the likelihood of direct incorporation of customary international human rights standards into domestic law, my guess, despite *Filartiga* and the District Court's opinion in *Rodriguez-Fernandez*, is that the courts will again take a generally conservative position. Plaintiffs and courts are unlikely to feel a need to turn to international standards for the protection of "core" civil and political rights, which are already broadly protected under existing domestic law. Thus, plaintiffs are more likely to invoke international standards in an effort to achieve protection for more peripheral and less generally accepted types of alleged rights. But claims of this type will probably be internationally as well as domestically controversial, and it may not be easy to persuade a court that an alleged customary international norm exists. Moreover, more subtle factors of national pride may exert some influence. Americans are proud of their human rights traditions and tend to regard their system of human rights protection as better than that of most countries. A United States court may be reluctant to expressly find that United States domestic law protecting human rights has significant "gaps" which it can fill only by drawing on international law sources, or that the United States has something to learn in this regard from other nations.

This, however, does not mean that international human rights standards may not significantly influence United States domestic law in other important, though less direct, ways. *Filartiga* and *Rodriguez-Fernandez*—and, indeed, as I will shortly mention, the United States Congress through legislation—have clearly recognized the existence of customary international human rights standards, and, as indicated, the courts, under settled doctrines of construction, will seek to interpret domestic statutes consistently with such norms. More broadly, the courts can be expected to be hesitant in reaching decisions which may open the United States to international criticism or suggest that the United States is less respectful of human rights than are other countries. Certainly, in many of the cases in which international human rights norms have been invoked—*Oyama*, *Sei Fujii*, *Rodriguez-Fernandez*, *Plyler*, *Larue*—consistent interpretations have in fact been achieved. Moreover, apart from any concern for international embarrassment, recent experience suggests that the courts may be more willing to look to international human rights experience for help in judging domestic policy and standards and in buttressing more liberal interpretations of domestic law. As indicated, *Rodriguez-Fernandez*, *Sterling*, and *Larue* suggest this tendency. If this is the case and international human rights law

influences domestic law only indirectly, rather than directly, this would seem no reason for disappointment. What is important is the final result—that domestic human rights protections at least equal international standards. How the courts achieve that result—whether by express incorporation or through the more subtle influence of international standards on domestic law—appears less important.

Certainly, international human rights law can play a more influential role in domestic law only if practitioners and judges become more aware and understanding of it. It is worth noting that public interest lawyers familiar with international human rights law participated as *amici* in both the *Filartiga* and *Rodriguez-Fernandez* cases, and that both the *Larue* and *Sterling* opinions were written by judges with a long background in international law and a deep sensitivity to human rights concerns. This means, as Professor Claydon has suggested, that those interested in increasing the influence of international human rights law must find ways to more broadly inform and educate the bar and bench in this respect. A number of groups in the United States are already pursuing this goal.

Let me conclude by touching briefly on United States experience concerning some other ways in which international human rights law may affect domestic law. One way, is by directly influencing legislation concerning the protection of human rights, either domestically or abroad. As far as I am aware, international human rights law has thus far led to no significant United States legislation designed to expand the domestic protection of human rights, although it has had a minor influence; for example, the 1980 Refugee Act takes its definition of “refugee” directly from the Protocol on the Status of Refugees. However, if the United States ratifies the major human rights treaties presently pending before the Senate, the executive branch has indicated that it will seek certain limited implementing legislation to bring United States domestic law into full conformity with these treaties.

On the other hand, international human rights concepts have spurred enactment of a considerable body of legislation designed to dissociate the United States from repressive regimes abroad and to promote respect for human rights in other countries. The most interesting example is section 502B of the Foreign Assistance Act, which provides that, absent extraordinary circumstances, “no security assistance may be provided to any government which engages in a consistent pattern of gross violations of internationally recognized human rights.” The section further defines the term “internationally recognized human rights” as including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges or trial, and other

flagrant denial of the right to life, liberty, or the security of the person.¹⁶ Section 502B is capable of being read as an express congressional recognition of at least certain "core" civil rights as binding customary law, and this and related congressional legislation and resolutions could be used to evidence a strong present congressional policy favoring the international human rights concept. However, as you know, debate continues in the United States as to the appropriate role of human rights considerations in United States foreign policy, and this legislation remains controversial.

International human rights issues have also been raised in a variety of cases in which individuals or groups opposing alleged human rights violations by particular foreign nations have brought actions before courts or other agencies seeking decisions which would have the effect of obstructing economic relations with such nations, thus placing pressure on them to cease such violations. South Africa has been the most frequent target. Thus far, however, the courts have proved reluctant to support such efforts, principally out of concern that intrusion by state agencies or the federal courts in such questions might embarrass foreign relations or interfere with federal executive and congressional control over foreign affairs. The courts have tended to view the issues involved as essentially "political questions" rather than judicial ones. For example, in the 1977 case of *New York Times v. City of New York Commission*,¹⁷ the New York Court of Appeals vacated, partly on these grounds, an order by the New York City Human Rights Commission ordering the *N.Y. Times* to stop carrying advertisements seeking employees in South Africa, which advertisements had been found by the Commission to discriminate in violation of New York City's policy. In the 1972 case of *Diggs v. Schultz*,¹⁸ the United States Court of Appeals for the District of Columbia refused to order restrictions on the import of chrome from Rhodesia, despite the fact that such importation was contrary to a United Nations Security Council embargo and thus in violation of United States Charter obligations, on the grounds that subsequent congressional legislation specifically authorizing the importation of chrome from Rhodesia overrode United States international obligations and was binding on the United States courts. And in the 1976 case of *Diggs v. Richardson*,¹⁹ the same court refused to prohibit the United States government from engaging in negotiations with

16. See generally, the legislation collected in R. Lillich, *Legislation Relating to U.S. Foreign Policy* (International Human Rights Law Group, Washington, D.C., 1980).

17. 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977).

18. 470 F.2d 461 (D.C. Cir. 1972).

19. 555 F.2d 848 (D.C. Cir. 1976).

South Africa regarding the importation of fur seals from Namibia, despite the fact that a United Nations Security Council resolution prohibited dealings with South Africa respecting Namibia, on the grounds that the resolution was not self-executing and that the issue involved a "political question" in which it was inappropriate for the court to interfere.

This, such as it is, is United States experience. One lesson may be that nationalism runs deep, that the international human rights concept is still very new, and that international human rights law is, at best, likely to affect domestic law only subtly, peripherally, and slowly. But another lesson may be that international human rights standards can, in particular cases such as *Filartiga* and *Rodriguez*, in fact make a difference, and that lawyers concerned with broadening the domestic protection of human rights can sometimes make effective use of international norms in seeking to achieve their goals.