

PROBLEMS OF COGNITION AND INTERPRETATION IN APPLYING NORMS OF CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS IN UNITED STATES COURTS

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The problems related to the application of human rights norms of international law as the rule of decision in United States courts are, in several ways, more difficult for courts to resolve than are those involving treaty-based norms. The differences are usefully sketched in Professor Lillich's balanced presentation to the American Society of International Law in 1980,¹ and contrasted, by inference, in my reluctant criticism of efforts to rely upon the Charter of the Organization of American States² as the basis for enforcing the rights of children who happen to be illegal aliens to free public education in Texas.³

The cases discussed in this symposium, dealing with indefinite detention of "excluded aliens" in federal prisons⁴ and the Second Circuit Court of Appeals decision⁵ that torture is an international crime under customary international law within the meaning of a federal statute,

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1. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, AM. SOC'Y INT'L L. PROC. 20 (1980).

2. Charter of the Organization of American States, Dec. 13, 1951, U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3.

3. 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 (1981). Briefs *amici* and arguments sought to convince federal judges that the denial of free tuition to the children of "illegal" aliens in Texas violated the supreme treaty law of the land as found in the O.A.S. Charter as amended. Brief for International Civil Rights Group of Washington, D.C., *Doe v. Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd* 628 F.2d 448 (5th Cir. 1980). Federal foreign affairs pre-emption based upon the Carter human rights policy was also asserted. *Id.* The cases were eventually decided in favor of the alien schoolchildren by the Fifth Circuit on the equal protection ground, the human rights arguments having been rejected by the Court of Appeals, as they had been by Judge Seals in the "Consolidated Cases;" see Oliver, *supra* at 425-30. Unless revived by the Supreme Court, where the case is now docketed, the outcome in this instance of attempted use of human rights law directly, instead of the Constitution, will end up no better than did the 1948 effort in *Shelley v. Kramer*, 334 U.S. 1 (1947); see Oliver, *supra* at 412-18, & nn. 4-5. *infra*.

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

5. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

reveal two basic problems under analysis. First, how is customary international law to be established today, in a world of more than one hundred fifty sovereign states, whose votes in the United Nations and respective national laws and practices do not always coincide? Secondly, when in the United States does a putative rule of customary international law contradict federal positive law, and when does it guide its application and interpretation?

In *Filartiga*⁶ (torture) and the *Rodriquez-Fernandez* district court decision⁷ (indefinite detention) two uncertainties were raised as to "what the [international customary] law is." One is the problem of what is to be taken as proof of the requisite *consentio juris* in the world community of states. The other is to discern the content of the customary law norm asserted as applicable. The two problems are unavoidably interrelated.

If all types of physical or psychological pressure to "sing" are "torture," which would give the norm a very broad content, then the supposed *consentio juris* is put into doubt by the domestically legal actual practices of a large number of states. Even if "torture" is construed to be limited to the most brutal forms of infliction of pain and suffering, there lurks the grim reality that many states, as Amnesty International reports reveal, use it in routine criminal and security investigations. There is no gainsaying the investigative efficiency of cowing prisoners, as centuries of practice have demonstrated.

The United States has chosen to prohibit self-incrimination by constitutions. However, we should not think that this reflects a consensus of international practice prohibiting all forms of inducements to "talk." In *Filartiga*, the "torture" found to violate customary international law, and thus trigger the provisions of the first Judiciary Act, giving the district courts jurisdiction over aliens' suits ". . . for a tort only in violation of the law of nations . . .,"⁸ involved killing the victim, apparently intentionally. Thus, if the greater offense includes the lesser, the unjustified killing was the true *corpus delicti*. Judge Kaufman's opinion states that the complaint filed was for ". . . wrongfully causing [the victim's] death by torture."⁹ Nonetheless, the opinion focuses almost exclusively on torture, not wrongful death. What would

6. *Id.*

7. *Fernandez v. Wilkinson*, 505 F. Supp. at 790. The district judge found no possibility of relief for the petitioner under federal constitutional, statutory, or administrative law but issued the writ of habeas corpus against the federal executive under customary international law, without dealing with the question of possible conflict, *vel non*, between federal law and international law as to the indefinite detention of an "excluded alien."

8. Judiciary Act of 1789, ch. 20, § 9(b), 28 U.S.C. § 1350 (1976), cited in *Filartiga v. Pena-Irala*, 630 F.2d at 878.

9. *Id.* at 879.

the court have decided if the victim had suffered a series of beatings, electric shocks, and deportation? Would it have found that a clearly established rule of customary international law had been breached by Paraguay, considering Judge Kaufman's recognition "that a rule to command the 'general assent of civilized nations' to become binding upon them all is a stringent one?"¹⁰ The court, in no uncertain terms, finds that "to be free from official torture"¹¹ is a rule of customary international law. The case thus could well serve as an exercise in first-year law study of distinguishing judicial rumblings from the precise rule of decision. It also stands as a warning to judges trying to do too much beyond the operative facts of the case at bar, however laudable and normal personal hatreds of the ugly and brutal may be.

Unresolved variables also bedevil this case. Is there evidence that all forms of pressure on a prisoner are "torture" under international customary law? If not, where is the line? Is "torture" anything that creates such fear in a prisoner as to cause him (grim jest) to "assist" the police? Interpretations of the law of human rights conventions applicable to small groups of states do not give the answer to these questions. Nor do United Nations resolutions. Thus, as is almost always the case with fleshing out the substantive meaning of rules of customary international law, precision is extremely difficult; the lines between the licit and the illicit are very hard to discern from the actual practices of states.

The *Rodriguez-Fernandez* case¹² is one in which a putative rule of customary international law is sought to be turned against official conduct in the federal executive branch, which itself claims to be acting under constitutional (separation of powers) and statutory (provisions of federal immigration law) authority, as judicially interpreted by the Supreme Court.

Filartiga did not involve such internal legal aspects. Rather, a minor latino state was being told that it had violated customary international law, and the violation was one of death by official torture. While potential foreign affairs interests of the executive, usually protected by the Act of State Doctrine, were avoided by the *Filartiga* court,¹³ there was no possible way to avoid the executive's interests and contentions

10. *Id.* at 881.

11. *Id.*

12. The writer, a somewhat venerable Hispanist, looks with favor on what to him is a new practice for dealing in English with the hispanophone custom of putting the governing patronymic in the middle of the name. Señor Rodriguez (and defendant Pena *supra* note 5) are thus saved from loss in English of their "operative" surnames. I doubt the Royal Spanish Academy of the Language has approved the hyphen for use in Spanish.

13. *Filartiga v. Pena-Irala*, 630 F.2d at 889.

related to separation of powers in *Rodriguez-Fernandez*.¹⁴ The writ of habeas corpus sought would run against those in the federal executive branch who detained the prisoner.

In the latter case, the district court had interesting alternatives in support of the writ. One was to apply the Bill of Rights directly, invalidating all contrary statutory and administrative rules by piercing the outrageous fiction that an alien in an American prison is not legally within the country, and if not within the country, is not entitled to constitutional protection against United States officials.¹⁵ Another was to construe the relevant federal legislation in favor of the prisoner.¹⁶ A third was to find and apply a rule of customary international law against indefinite detention prior to any conviction in the United States in a prison normally used for convicted offenders. The third course involves picking a path through a judicial mine field. Although customary international law is the law of the land, it is subordinated to unequivocal federal positive law which is not unconstitutional by municipal standards.¹⁷

The district judge chose the third course, opting against reforming the domestic constitutional law in order to innovate by directly applying putative international law. The court above him rejected this innovation,¹⁸ but in doing so showed that it was influenced in its interpretation of the domestic statutory and regulatory law by the likelihood that customary international law might contain a norm against such treatment as that accorded *Rodriguez-Fernandez* and other "excluded" Cubans confined in the United States. A dissenting circuit judge would have denied the writ and upheld executive authority under the circumstances of the instant case.¹⁹

A unifying factor as to judicial conduct in both the *Filartiga* case and the *Rodriguez-Fernandez* case is the vigor with which law-oriented

14. The Circuit Court opinion refers, 654 F.2d at 1385, to the intervention of the Reagan Administration against compliance with the order of the district judge. The text mentions only the fact of executive branch concerns related to executive branch responsibilities and does not argue for executive branch finality in this connection.

15. *Fernandez v. Wilkinson*, 505 F. Supp. at 790.

16. *Id.* at 791.

17. *Id.* at 795-798.

18. The majority opinion, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, is somewhat elusive in this regard, saying that it disposed of the case by construing the statutes to require the petitioner's release and that even an "excluded" alien cannot be "punished" without having been given the substantive and procedural protection of the Fifth Amendment. *Id.* at 1387. Then, in developing Due Process as a non-static concept, the majority considers "international law principles for notions of fairness. . . ." *Id.* at 1388.

19. The dissenting judge differs with his colleagues on the thrust of the statutes and purportedly speaking for *tota curia* says: "Like the majority of the panel, I agree that the present controversy should be resolved on the basis of domestic law, as opposed to international law, which was the basis of the trial court's release order. . . ." *Id.* at 1390.

human rights activists sought to convince the judges that certain applicable norms of customary international law were established in the *opinio juris* of the nations of the world and that these asserted specific norms, *e.g.*, all official torture, all indefinite detention, should be the direct bases of decision, although alternative bases of decision, leading to the same "good" results, were available. Thus, in a broad sense, the same phenomenon as that of urging an inappropriate treaty obligation, as was done in the *In Re Alien Children Education Litigation*,²⁰ is evident here.²¹

Such conduct raises legitimate questions of social choice: what is the primary object of the exercise—to win freedom for the victim by the most effective and certain means at hand or to seize an opportunity to propagandize human rights as international law? For the lawyers, there is free choice, so long as they observe their duty to be candid with the court.²² Judges in the United States must also resolve this issue for themselves; but in doing so, they ought to be cautious not to become human rights activists themselves, to the detriment of the development of human rights protections under the Constitution.

Under the customary international law approach, as this brief analysis shows, there are many more limitations upon the honest application of effective norms than there are on the judicial power to "make" personal rights under the Bill of Rights. Further, under our system, it is more fitting for the political branches to state United States viewpoints on human rights internationally than for the courts to do so unnecessarily. It does not follow that situations for the legitimate direct application of scientifically established norms of customary international law on human rights cannot exist; assertions as to such international norms always have validity as sociological and ethical variables to be incorporated in the interpretation of the Bill of Rights.

20. *In re Alien Children Education Litigation*, 501 F. Supp. 544 (S.D. Tex. 1980).

21. *Cf.* Oliver, *supra* note 3.

22. *Id.* Obviously counsel owe a duty to cite all the authorities, doing their best to distinguish or reduce the impact of those against them. In this regard there is a vast difference between political rhetoric and advocacy in court. It would be interesting to know whether the district and circuit court judges in *Filartiga* and *Rodriguez-Fernandez* had the benefit of counter-briefs *amici* by experts about international law not classifiable as human rights "activists," yet not anti-human rights. A major trouble with activism is that counter-vailing values tend to be short-changed by the activist-advocates.

