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# Human Rights in the United States Courts: The Role of Lawyers

Steven M. Schneebaum\*

The efforts of lawyers who represent clients in courts of the United States have transformed the role of the international law of human rights. General statements of policy have become the kind of law dispensed by American judges in American courtrooms.

On one level, because the Bill of Rights codifies a very large and progressive view of human rights and because the Bill of Rights is part of the Constitution, which is the highest law of the land, it could be argued that in any case invoking the Bill of Rights, the law of human rights has always been treated as the rule of decision in U.S. courts. This Article does not address that kind of case. Rather, this Article considers cases that, for one reason or another, are not adequately resolved by appeals to the U.S. Constitution: cases in which the international law of human rights is expressly cited as providing the rule of decision. If there were no such cases, then it would be reasonable to ask whether human rights law is anything more than aspirational and hortatory, a statement of hope for an improved future for everyone. But situations in which international human rights law is actually the rule of decision that determines whether the plaintiff wins or the defendant wins place us on the road toward raising international human rights to the level of domestic law, which determines the actual legal rights of actual living people.

Until 1979, the question whether the treaties of the United States that have human rights elements are self-executing always framed the direct application of human rights law before U.S. courts. In the 1950s, the Supreme Court of California in *Sei Fujii v. State*<sup>1</sup> found that the human rights provisions of the United Nations Charter are not self-executing: They cannot be relied upon as generating the law of decision of a case without domestic

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1. 242 P.2d 617 (Cal. 1952).

legislative implementation.<sup>2</sup> The *Sei Fujii* court concluded that the legislature never enacted such measures.<sup>3</sup>

Human rights law will seldom be useful law in U.S. courts if its use is dependent upon the vehicle of a self-executing treaty to import treaty language into the courtroom. It will generally not be law in U.S. courts because the treaties to which the United States is a party that contain human rights elements either expressly or by implication are not self-executing. Moreover, the Congress of the United States has been slow at bringing international human rights norms, beyond those that are already parts of U.S. law by virtue of the Constitution, into American law.

In 1979, the case of *Filartiga v. Pena-Irala*<sup>4</sup> presented the following fact pattern: A young Paraguayan woman, whose brother had been tortured to death by the police of Asunción, saw the man who had allegedly committed the murder on the streets of New York City.<sup>5</sup> She went to see a lawyer and asked whether there might be any recourse against him in the U.S. courts for the murder of her brother.<sup>6</sup>

Because it has never been seriously contested, one can assume that the murder was politically motivated. Specifically, it was an attempt by the police of Asunción to strike out at the father of the boy who was killed: Joel Filartiga, a physician and artist who was also a leading opposition figure in Paraguay in the days of the Stroessner regime, which did not countenance very much opposition.

Dolly Filartiga found the Center for Constitutional Rights in New York City, whose lawyers had long dreamed of the case that would test the contours of a statute enacted in 1789. That statute, passed immediately after the adoption of the Constitution, was Section nine of the First Judiciary Act,<sup>7</sup> the very same statute that led to *Marbury v. Madison*,<sup>8</sup> in which the Supreme Court of the United States first asserted its right to find legislative enactments unconstitutional.<sup>9</sup> Section nine, now codified as 28 U.S.C. § 1350, provides

2. See *Sei Fujii v. State*, 242 P.2d 617, 621 (Cal. 1952) (stating that future legislation clearly was needed).

3. *Id.* at 622.

4. 630 F.2d 876 (2d Cir. 1980).

5. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980). Although she did not know it at the time, *Pena-Irala* was in the United States illegally.

6. See *id.* at 879 (stating that civil complaint was served on *Pena-Irala*).

7. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (1789) (codified at 28 U.S.C. § 1350 (1994)).

8. 5 U.S. (1 Cranch) 137 (1803).

9. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (finding that courts resolve conflicts between Constitution and legislative acts).

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."<sup>10</sup>

Certainly the drafters of the Alien Tort Claims Act (ATCA)<sup>11</sup> did not envisage lawsuits over torture of Paraguayans by Paraguayans in Paraguay. Between 1789 and 1979, the statute was invoked successfully only twice: first, in the 1790s, in a case that involved the slave trade,<sup>12</sup> and second, in 1960, in a child custody case from Maryland.<sup>13</sup> In the latter case, a parent had kidnaped the child to whom the other parent had custody rights through the use of a false passport.<sup>14</sup> The court held that it had jurisdiction over the subject matter because this offense was the violation of international law that the ATCA required.

In *Filartiga*, at first instance, Judge Eugene Nickerson felt that he had to defer to the Second Circuit's decision in *IIT v. Vencap Ltd.*,<sup>15</sup> which required that the plaintiff and the defendant had to be of different nationalities for international law to be implicated.<sup>16</sup> The *IIT* court described § 1350 as a "legal Lohengrin" because no one knows its true origins, and it held that the statute did not confer federal jurisdiction absent an internationally recognized delict.<sup>17</sup>

The terms of the ATCA are simple and straightforward. A tort suit is a suit for a civil wrong, for an injury. An alien is a noncitizen. And so in the case of Joel and Dolly Filartiga against Amerigo Pena-Irala, the police chief from Asunción, the first two elements of jurisdiction under the ATCA were met: The plaintiffs were aliens, and they were suing for the wrongful death of their son and brother, a tort suit alleging a violation of personal rights. But the third element required by the ATCA – that the tort must have been committed in violation of the law of nations, or of a treaty of the United States<sup>18</sup> – was the element other plaintiffs had found problematic, and it was the challenge for the *Filartiga* plaintiffs and their counsel.

No treaty even arguably applied in *Filartiga*.<sup>19</sup> Therefore, the question for the court was this: If, as the complaint alleged, the defendant actually did

10. 28 U.S.C. § 1350 (1994).

11. 28 U.S.C. § 1350 (1994) (originally enacted as Judiciary Act of 1789, ch. 20, 1 Stat. 77 (1789)).

12. *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607).

13. *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 863 (D. Md. 1961).

14. *Id.* at 861.

15. 519 F.2d 1001 (2d Cir. 1975).

16. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

17. *IIT v. Vencap Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

18. 28 U.S.C. § 1350 (1994).

19. *Filartiga*, 630 F.2d at 880.

torture to death a seventeen-year-old boy because of the political views of his father, then notwithstanding the fact that both victim and perpetrator were Paraguayan and that the place where the injury occurred was Paraguay, was international law violated?<sup>20</sup>

The plaintiffs argued that international human rights law now contains a legally-enshrined prohibition against certain kinds of abuse, including torture, regardless of nationality.<sup>21</sup> According to them, the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights, and various other instruments, which are of legal significance even if they are not treaties within the meaning of Article VI of the United States Constitution, articulated this position.<sup>22</sup> They contended that virtually every legal system in the world today contains a prohibition against torture.<sup>23</sup> Furthermore, the Statute of the International Court of Justice provides that general principles recognized as law by civilized nations are a source of international law.<sup>24</sup>

Political developments in the late 1970s aided the Filartigas' arguments. The President of the United States, Jimmy Carter, had recently proclaimed before the General Assembly of the United Nations that the day was past when nations could lawfully treat their own citizens in inhuman ways without international consequences. Torture, President Carter suggested, violates international law irrespective of the nationalities of those involved.

The three elements of ATCA jurisdiction, therefore, appeared to be present, and it would have seemed to follow easily from that premise that the court had the authority to try the case. However, the United States District Court for the Eastern District of New York, in Brooklyn, where Pena-Irala was detained in an Immigration and Naturalization Service holding facility, dismissed it nonetheless. The court reluctantly concluded that, according to such binding precedent as *IIT*, a violation of international law may be found only when the actor and victim are of different nationalities.<sup>25</sup> Judge Nickerson held that his hands were tied: As a matter of law, no international law implications arise from actions by one citizen of a nation against another citizen of the same nation.<sup>26</sup>

The Filartigas appealed to the United States Court of Appeals for the Second Circuit in New York City. In a landmark opinion, Judge Kaufman

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20. *Id.* at 884-85.

21. *Id.* at 879.

22. *Id.*

23. *See id.* at 880 (stating that virtually all nations denounce torture).

24. Statute of the International Court of Justice, Article 38(1)(c).

25. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

26. *Id.*

held that the legal premise underlying the trial court's resolution of the case, if it had ever been correct, was no longer applicable.<sup>27</sup> International law in the closing decades of the twentieth century, he wrote, does include a prohibition against certain kinds of actions even when performed by nations against their own citizens.<sup>28</sup>

Judge Kaufman's resolution of *Filartiga* determined not only that international law forbids torture by states of their own citizens, but also that these legal provisions are part of the law of the United States.<sup>29</sup> This latter aspect of the decision is frequently overlooked, but it is vital to practicing lawyers: It provided the roadmap for the invocation of human rights norms in domestic cases.

The sources of international law at which the *Filartiga* court looked included conventions that at the time had been signed but not ratified by the United States. The court cited these conventions as evidence of customary international law, as well as of general principles recognized by civilized nations. Under the Vienna Convention of the Law of Treaties,<sup>30</sup> however, the fact that the United States had signed the conventions has an additional significance: A signatory is forbidden to act in a manner inconsistent with a treaty's object and purpose, even if it is not bound to its incidents.<sup>31</sup> The court therefore was correct to look at covenants of which the country was not a party, as well as international instruments and General Assembly resolutions, including the Universal Declaration, both because they are relevant to the general international obligations of the United States and because they may constitute elements of customary international law.

The Second Circuit placed particular emphasis on general principles, citing constitutions and basic laws that condemn torture.<sup>32</sup> It located customary law just as the International Court of Justice would, by identifying state practice and *opinio juris*.<sup>33</sup> *Filartiga*, therefore, does not shed modern light on the old question of whether any of the international human rights instruments are self-executing. Scholars continue to debate this issue, but judges have largely left it alone.

According to the normal method of textual analysis, however, it would appear that at least key provisions of the human rights treaties are self-execut-

27. See *id.* at 884 (stating that distinction between aliens and citizens is clearly inconsistent with current international law).

28. *Id.* at 884-85.

29. *Id.* at 885-87.

30. Vienna Convention of the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

31. *Id.* art. 18.

32. *Filartiga v. Pena-Irala*, 630 F.2d 876, 881-83 (2d Cir. 1980).

33. *Id.* at 883-84; *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

ing. Frequently, in giving its advice and consent to the President in the process of treaty ratification, the Senate expresses the view that a particular treaty, or a particular provision of a treaty, is not self-executing. However, there is no reason to assign to that expression of opinion any particular legislative force. The courts can disregard it without fear, because the views of one house of the legislature do not make laws under the Constitution, and it is treaties, not resolutions of the Senate, that are "the Supreme Law of the Land."<sup>34</sup>

The process of determining when treaties are self-executing is similar to deciding when statutes provide a private right of action. The analysis concerns the precision of the instrument's language, its identification of a target "zone of protected interests," the extent to which implementing legislation is necessary to make sense of the textual provisions, and so on.<sup>35</sup> Even without arguing that *Sei Fujii* was wrongly decided, and it may not have been, because Articles 55 and 56 of the Charter call expressly for legislative or other measures to give them content,<sup>36</sup> one could defend the proposition that such treaties as the Torture Convention are self-executing.

Finally, in *Filartiga*, it was not necessary as a matter of strict logic to find treaties to be self-executing because the plaintiffs were not seeking to invoke private rights allegedly created by treaties. The point was not that Paraguay violated a treaty in the torture of Joelito Filartiga; it was that his torture and murder by Amerigo Pena-Irala were nevertheless violations of the law of nations. That is all that § 1350 requires, and it is all that Judge Kaufman ultimately held.

The federal courts of the United States are courts of special jurisdiction: A jurisdictional basis under the Constitution must be present for any case to be brought in federal court. The Constitution lists the kinds of cases that the federal judiciary may hear;<sup>37</sup> the state courts are competent otherwise. Generally, simple torts, contract breaches, divorces, and will contests do not present federal cases. No jurisdictional hook allows these matters to be brought in federal court.

The bases for bringing cases in federal, as opposed to state, court are very few. Federal jurisdiction exists if the plaintiff and the defendant are citizens of different states, or if one of them is an American and the other a foreigner, and the amount in controversy exceeds a statutory ceiling, currently \$75,000.<sup>38</sup> The other primary basis for bringing cases into federal court is that the com-

34. U.S. CONST. art. VI, cl. 2.

35. *See* *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973).

36. *See* U.N. CHARTER art. 55 (stating that United Nations will promote general human rights and freedom); U.N. CHARTER art. 56 (stating that members pledge to take actions to achieve goals of general human rights and freedom).

37. U.S. CONST. art. III, § 2, cl. 1.

38. 28 U.S.C. § 1332(a) (1994).

plaint raises a question of interpretation or application of federal law.<sup>39</sup> If a case does not come within one of those categories, it is extremely unlikely that a federal court can hear it.<sup>40</sup>

In *Filartiga*, the plaintiff and defendant were both foreigners,<sup>41</sup> so diversity jurisdiction was not present. Nor could it be said that the case "arose under" the ATCA, which does not create causes of action, but merely channels cases arising in tort into the federal courts.<sup>42</sup> Therefore, Judge Kaufman reasoned, even if the three prerequisites for § 1350 jurisdiction were present in *Filartiga*, the court could still be powerless to hear it.<sup>43</sup> For that reason, he demonstrated in his famous decision that the case did present a federal question, because it arose under international law, which is part of the law of the United States.<sup>44</sup>

Through that logic, Judge Kaufman not only established the basis for federal jurisdiction in *Filartiga*, but also laid the groundwork for subsequent developments in § 1350 jurisprudence. Judge Kaufman started from the premise that international law, whether conventional or customary, has long been recognized as part of U.S. law.<sup>45</sup> Mr. Justice Gray, as long ago as 1900, specifically so held in *The Paquete Habana*.<sup>46</sup> International law is part of the law of the United States, to be invoked whenever needed to decide a case, just like any other provision of law.<sup>47</sup>

*Filartiga* was such a case: A case in which interpretation and application of international law, and an understanding of what international law is, are vital to the determination of whether the plaintiff wins or the defendant wins, and even to the threshold question of whether the door of the courthouse is open or closed. Judge Kaufman's conclusion that customary international law is federal common law meant that deciding *Filartiga* did not create constitutional problems because, although there was no diversity of citizenship, the case did arise under federal law, and specifically, the international law of human rights.<sup>48</sup>

39. *Id.* § 1331.

40. Other exceptional categories of federal jurisdiction under the Constitution include cases involving admiralty, diplomatically protected persons, actions brought by or against the United States, and cases between states.

41. *Filartiga v. Pena-Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980).

42. *See* 28 U.S.C. § 1350 (1994) (granting jurisdiction to federal courts).

43. *Filartiga*, 630 F.2d at 887 (finding that Alien Tort Claims Act does not grant new rights, but presents opportunity for adjudication).

44. *Id.* at 887-88.

45. *Id.* at 887.

46. 175 U.S. 677 (1900).

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

48. *Filartiga v. Pena-Irala*, 630 F.2d 876, 888-89 (2d Cir. 1980).



On remand in *Filartiga*, another development followed, which was as dramatic as the Second Circuit's decision and was really quite inspiring. While Judge Kaufman had held that there was federal jurisdiction to hear this case, he did not decide the merits, as there had not yet been a trial.<sup>49</sup> The case was remanded to the Eastern District of New York for that purpose.<sup>50</sup>

By that time, Pena-Irala, who had ceased to contest his deportation, was out of the country.<sup>51</sup> According to reports, he went back to Paraguay and immediately fled from there to Brazil: Paraguay did not want him either. No defendant appeared in court, and a default judgment was taken.<sup>52</sup> The Magistrate Judge to whom that procedure was assigned required the plaintiffs to present evidence in support of their claims.<sup>53</sup> They presented witnesses who testified about what had happened and about the terrible impact of the boy's murder on them. At the end of the trial, the Magistrate Judge issued an opinion finding that there had been a wrongful death and that damages were to be awarded, but he declined to award punitive damages, as international law, he said, does not recognize that concept.<sup>54</sup> He also reduced the plaintiffs' claims for pain and suffering and other "moral damages" because he concluded that the law of Paraguay, where the incident occurred, does not recognize such awards.<sup>55</sup> He reduced the \$10 million judgment sought to approximately \$500,000.

When a case is assigned to a Magistrate Judge for a preliminary decision, either party is free to take an appeal to the District Judge. Accordingly, the *Filartigas* appealed to Judge Nickerson. Judge Nickerson's decision on remand<sup>56</sup> is inspiring, both as prose and as legal scholarship. He determined that the Magistrate Judge had erred in applying the law of Paraguay; the proper law in this type of case is international law because the acts complained of were wrongs under international law, and the rules of international law must therefore be the rules of decision.<sup>57</sup> To do otherwise, Judge Nickerson wrote, would be to hold that international law is "a mere set of benevolent yearnings never to be given effect."<sup>58</sup> International law is law, he

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49. *Id.*

50. *Id.*

51. *See id.* at 880 (stating that Pena-Irala returned to Paraguay).

52. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 861 (E.D.N.Y. 1984).

53. *See id.* (stating that question of damages was referred to magistrate judge).

54. *Id.* at 864.

55. *Id.*

56. *Id.* at 860.

57. *Id.* at 863.

58. *Id.*

held, and as such it is to be applied to real cases. Judge Nickerson awarded millions of dollars in damages, which obviously were never paid.<sup>59</sup>

The concept of a federal common law that is unwritten, which exists alongside the enactments of Congress, even if it is limited in scope, is not unfamiliar. One of its primary components is customary international law, which is binding both on and in the United States. Therefore, even if a case presented a human rights issue, but did not have an alien plaintiff or did not sound in tort and therefore would not satisfy the jurisdictional prerequisites of § 1350, federal jurisdiction could nevertheless be found under constitutional principles that permit the federal courts to hear cases "arising under the laws of the United States."

Since 1979, a number of other key decisions have begun to fill in the outline and the contours of human rights law as law of decision. In the years immediately following *Filartiga*, a large number of Cuban refugees reached the shores of Florida. Following an off-hand remark by the United States President to the effect that Cubans were always welcome here, Fidel Castro expelled over 100,000 of his country's citizens. This gave Castro an opportunity to discard those he considered to be the detritus of his civilization, mainly inmates of mental hospitals or jails, and those whose political views were troublesome to his regime.

When the United States Immigration and Naturalization Service (INS) processed these individuals after they came on shore, INS officials asked the refugees a series of questions, one of which was whether they had ever committed a crime. Most of the "Mariel boatlift" refugees — who were, after all, in large part prisoners — knew that the proper answer to that question was "no." Because Castro did not send prison records along with the "Marielitos," the INS could not verify the answers. But occasionally one would tell the truth. A man by the name of Fernando Rodriguez-Fernandez was one of them. He confessed that he had committed two crimes in Cuba: He stole a suitcase in a bus station, and he attempted a prison break after his conviction for the theft.<sup>60</sup>

The INS considered these to be crimes of moral turpitude and on that basis determined that Rodriguez-Fernandez was to be excluded from the United States.<sup>61</sup> Although he was detained, as irony would have it, in Fort Leavenworth in Kansas, very near the geographical center of the country, as an excluded alien, he was notionally not on United States soil at all.<sup>62</sup>

59. *See id.* at 867 (awarding total judgment of \$10,385,364).

60. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1384 (10th Cir. 1981), *aff'g* 505 F. Supp. 787 (D. Kan. 1980).

61. *Rodriguez-Fernandez*, 505 F. Supp. at 789.

62. *Id.*

After he was in Fort Leavenworth for a considerable while, with no apparent prospect for his release, lawyers acting on his behalf petitioned for a writ of habeas corpus to challenge his confinement.<sup>63</sup> They argued that he had not been convicted of a crime, that he had not been afforded due process (in fact, he had had no process at all except that which went into the determination of excludability), and that he had not received a trial in the United States.<sup>64</sup> The question presented to the court was whether the United States was violating his human rights by detaining him, potentially indefinitely, in a federal penitentiary.<sup>65</sup>

All precedent, including decisions of the Supreme Court in Cold War cases, said that an excluded alien had no rights whatsoever.<sup>66</sup> The U.S. government, therefore, found itself defending the proposition that excluded aliens were essentially not people: They had no legal rights and therefore no legal remedies. The government was unable to respond to an absurd proposition that seemed to follow from its argument: that it could do medical experimentation on excluded aliens, or that it could torture them. The United States contended that the precedents that restricted the rights of excluded aliens were binding on the United States District Court for the District of Kansas, before whom the *Rodriguez-Fernandez* case came.<sup>67</sup> On appeal to the United States Court of Appeals for the Tenth Circuit in Denver, sitting in the very same court building in which the Timothy McVeigh trial was to take place years later, the government reiterated the argument that the court's hands were tied under the system of *stare decisis* that rules in this country.<sup>68</sup> Courts, it said, have to obey the law as laid down by higher courts, meaning that the Tenth Circuit was bound to conclude that this man, an excluded alien, was without rights that could be enforced against the government.

A very wise judge in Kansas, who had probably never encountered an international law case before in his career, said that the government's position was clearly inconsistent with the character of the United States.<sup>69</sup> It was impossible to conclude, he held, that a human being, physically present within the borders of the United States, is literally without legal rights.<sup>70</sup> He said that any logic that leads to such an impossible conclusion must have a flawed

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63. *Id.* at 788.

64. *Id.* at 790.

65. *Id.*

66. *See, e.g.,* *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) (finding that excluded alien is entitled only to process that Congress affords).

67. *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787, 794 (D. Kan. 1980).

68. *See Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) (stating that linchpin of government case was Supreme Court opinion).

69. *Rodriguez-Fernandez*, 505 F. Supp. at 795, 799.

70. *Id.* at 799.

premise, and therefore, that the premises should be reexamined.<sup>71</sup> Every human being has a core of human rights just by virtue of being human.<sup>72</sup> There could be no derogation from the *jus cogens* norms that protect those rights.

To the extent that a right by definition entails a remedy and that they are the obverse and the reverse of the same definitional coin, the *Rodriguez-Fernandez* holding meant that even excluded aliens may come before a United States federal court to complain that they have certain rights and that the United States government is violating those rights. The Reagan Administration's Department of Justice did not want such a blunt decision to go in the books, under which a federal court would actually order the freeing of a detained alien under these circumstances. The Tenth Circuit issued a very well-written, powerful decision, but the courts stopped short of actually ordering that Rodriguez-Fernandez be released. Ninety days later, the Justice Department "voluntarily" released him.<sup>73</sup>

The days following the case that came to be reported under the name *Rodriguez-Fernandez v. Wilkinson* were very heady days for human rights lawyers. It looked as if a whole revolution had occurred between *Filartiga* and *Rodriguez-Fernandez*. Within two years, United States judges had woken up, the scales had fallen from their eyes, and suddenly they were aware of a new source of law and a new source of protection for individuals in the international law of human rights.

Legal systems, however, do not change like that: They evolve much more glacially, and this area was to be no exception. Throughout the 1980s, some of the more optimistic claims for human rights law underwent a gradual erosion. Events in Central America, and especially the activities of the United States in Nicaragua, caused human rights activists to assume extreme positions in attempting to concoct international human rights theories that would, they thought, enable judges to overturn aspects of U.S. foreign policy as unconstitutional or illegal. In one case, plaintiffs' counsel told a federal judge that U.S. policy in Nicaragua was inconsistent with binding norms of international law that forbid war.<sup>74</sup> Advocates in the human rights movement actually appeared to believe that an American judge, wearing a black robe, in a courtroom at 3rd Street and Constitution Avenue in Washington, or in the federal building in Hammond, Indiana, or Cedar Rapids, Iowa, would pick up his or her gavel and pronounce the words, "Because the United Nations

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71. *Id.* at 798.

72. *Id.* at 799.

73. *Free at Last*, MIAMI HERALD, Aug. 10, 1981, at 1.

74. *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 598 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

Charter forbids war, the plaintiff has adequately demonstrated to my satisfaction that U.S. foreign policy of supporting the *contras* in Nicaragua is illegal, and I hereby enjoin it. Call the next case!"

Such a result was and is inconceivable: It was never going to happen, partly because human rights activists did not properly focus our youthful exuberance and partly because the cases were just not powerful cases. One case in particular stands out as marking a real problem for the emergence of human rights law as the law of decision in domestic litigation: *Tel-Oren v. Libyan Arab Republic*.<sup>75</sup>

The *Tel-Oren* plaintiffs were the surviving victims and the representatives of those killed in the bombing of a bus in the north of Israel, allegedly by the Palestine Liberation Organization (PLO).<sup>76</sup> They brought their action under the ATCA, alleging that terrorism is a violation of the law of nations.<sup>77</sup> The plaintiffs filed suit in the United States District Court for the District of Columbia against the following four defendants: the PLO, the government of Libya, the National Association of Arab Americans, and the Palestine Information Office.<sup>78</sup> The last two defendants are American lobbying organizations that have headquarters in Washington. They send out leaflets and go to cocktail parties on the Hill and argue for their point of view on legislative and executive policy. The government of Libya is, of course, a sovereign entity, which, whether one likes it or not, has certain rights in the courts, including the right of sovereign immunity. The PLO is without legal personality, at least under the laws of the United States.

*Tel-Oren* was, therefore, a difficult case from the beginning, and it should have been dismissed summarily simply because the only two defendants who could actually be forced to appear before the court were, at best, remotely connected with the substance of the case. Furthermore, the two defendants who may have been responsible for what happened, the PLO and Libya, were not before the court. The case could and should have been resolved on that basis. But it was not.

*Tel-Oren* was dismissed in the district court on the grounds that the norms of international law on which the plaintiffs relied are not "self-executing."<sup>79</sup> Specifically, according to Judge Joyce Hens Green, unless the norm of international law that forbids terrorism, assuming such a norm can be demonstrated, also includes the agreement of nations that it can be enforced

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75. 726 F.2d 774 (D.C. Cir. 1984).

76. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984) (per curiam), *aff'g* 517 F. Supp. 542 (D.D.C. 1981).

77. *Id.*

78. *Tel-Oren*, 517 F. Supp. at 544.

79. *Id.* at 549, 551.

through private actions in municipal courts, then the plaintiff has no legal right to assert.<sup>80</sup>

Judge Green's decision was plainly inconsistent with the Second Circuit's opinion in *Filartiga*. The principle that the international law of human rights may not be used as the law of decision in a case unless the relevant international norm itself provides for a private right of action – an explicit provision that a norm can be enforced in the courts – entails logically that international human rights law is not law at all. Not even the prohibition against torture in *Filartiga* was found to contain a license for private rights of action. Because it derives from custom and not text, there is nothing in the norm condemning torture that has, after a hypothetical Article X, paragraph 1, "Nations are forbidden to torture anyone including their own citizens," a paragraph 2 that says, "This provision shall be enforceable in any domestic court with personal jurisdiction over a torturer." Customary international law simply does not develop or operate in that manner.

The decision of the United States Court of Appeals for the D.C. Circuit was per curiam, and three separate, passionate, and highly divergent opinions of Judges Edwards, Bork, and Robb followed the decision.<sup>81</sup> The divisions among the judges, as well as the complexities in the *Tel-Oren* facts, weakened the case's authoritativeness. But *Tel-Oren* did demonstrate that human rights activists could not take a sound understanding of international law among U.S. judges for granted. Promoting the international law of human rights as the law of decision in U.S. courtrooms was going to require no small amount of effort, including that of educating the judiciary. Some human rights advocates attempted to take that stricture seriously. They have been somewhat successful on two fronts: the judicial, and the legislative.

In the mid-1980s, at the strong urging of various non-governmental organizations (NGOs), Congress passed the Torture Victims Protection Act of 1991 (TVPA),<sup>82</sup> which locks the result in *Filartiga* into statutory law. The TVPA provides that victims of torture in foreign countries may bring tort cases against their abusers over whom the courts of the United States have personal jurisdiction.<sup>83</sup> It provides a statute of limitations, lays down procedures for service of process, and resolves other technical issues that might otherwise bar a potential torture victim plaintiff's cause of action.<sup>84</sup> But it is limited to state-sponsored or state-endorsed torture: It does not assist victims

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80. *Id.* at 549.

81. *Tel-Oren*, 726 F.2d at 775.

82. Pub. L. No. 102-256, 106 Stat. 73 (Mar. 12, 1992) (codified at 28 U.S.C. § 1350 note (1994)).

83. *Id.*

84. *Id.*

of apartheid, disappearance, or female genital mutilation,<sup>85</sup> whose human rights abuse cases might someday come before the courts.

Some human rights lawyers, including this author, thought that the legislative initiative to enact the TVPA was counterproductive and had absolutely no chance of success. They thought that having Jesse Helms and others denouncing it on the floor of the Senate not only would kill the bill, but would be the death knell for the *Filartiga* holding itself. They imagined that the speeches that Helms and others would give, condemning the interference of foreigners in our American judiciary, would be cited in every domestic case involving the international law of human rights forever. But they were wrong: The bill passed. The President signed it. Progress was therefore made on the legislative front.

At the same time, one of the lessons of *Filartiga* actually came to be internalized by the judiciary. During the oral argument, one of the judges asked counsel representing the *Filartigas* the following question: Because the defendant apparently does not have much money, what was the point of this high-profile case, other than getting your name in the newspapers? Peter Weiss answered that the point was to send a message that the United States is not a haven for people like Pena-Irala. People who torture are not welcome here, and if they come here, they will be pursued by their victims, who will use the full arsenal of the United States judicial process to defend and to vindicate their rights.<sup>86</sup>

Weiss's prediction turned out to be accurate. Ferdinand Marcos came to the United States and was sued.<sup>87</sup> He and his estate had to go through a full-blown trial in the United States District Court for the District of Hawaii, in which witness after witness took the stand and testified about torture and mistreatment at the hands of Ferdinand Marcos. A judgment was entered against the Marcos estate and, this time, there is a real prospect not only that they will have some kind of psychological closure, but that human rights abuse victims will be compensated by their tormentors with real dollars.<sup>88</sup>

The recent decision of the Second Circuit involving Radovan Karadzic<sup>89</sup> also constitutes an important part of the good news. The plaintiffs were

85. *Id.*

86. At oral argument, a similarly troublesome question was asked of the defendant's counsel: Why make such an issue out of jurisdiction in the federal courthouse when no question existed that jurisdiction over the defendant would have been proper in the state supreme court, just across Foley Square in lower Manhattan? The court pointed out that, to assert jurisdiction in state court, all the *Filartigas* needed was a live defendant who was properly served and a proper allegation that the defendant had done something wrong.

87. *In re Estate of Ferdinand E. Marcos Litigation*, 978 F.2d 493, 495 (9th Cir. 1992).

88. *Id.* at 503 (affirming judgment).

89. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

people generally who claimed to have been subjected to ethnic cleansing in Bosnia, and women who claimed to have been the victims specifically of systematic rape and other sexual violence.<sup>90</sup> Both groups sued Karadzic personally for the campaign of human rights violations of which he was the architect.<sup>91</sup> He was served with process in the lobby of the Hotel Inter-Continental on East 48th Street in New York City.<sup>92</sup>

The plaintiffs brought suit against Karadzic in the United States District Court for the Southern District of New York in Manhattan under the ATCA and also the TVPA.<sup>93</sup> The plaintiffs made the same arguments that the plaintiffs made in *Filartiga*: They were aliens, their case was one in tort, and the actions that injured them constituted violations of international law.<sup>94</sup>

At the threshold, it was necessary to determine whether or not Karadzic was properly served.<sup>95</sup> Apparently, the process server attempted to hand Karadzic the papers, but they fell at his feet after his security guards intervened.<sup>96</sup> He claimed not only that the service was ineffective, but also that he was entitled to diplomatic immunity, not least because he was in New York in connection with official business at the United Nations.<sup>97</sup> In any event, it was resolved that the service was effective.<sup>98</sup>

Karadzic did not attempt to argue that the horrible events alleged in the complaint had not happened. Presented by Ramsey Clark, a former Attorney General of the United States and the son of a Supreme Court justice, Karadzic's argument was much cleverer than that. Karadzic contended that he is not bound by international law.<sup>99</sup> International law, he argued, is not simply a set of abstract normative propositions. In order to understand what international law is, one has to know to whom it is addressed. Torture, after all, is an internationally cognizable wrong only by virtue of who is doing it. Purely private acts do not fall within the scope of international law.<sup>100</sup> So, if one should have the misfortune to be gunned down on the streets of Washington, or to be blown up in a federal office building in Oklahoma City, however

90. *Id.* at 236-37.

91. *Id.* at 237.

92. *Id.* at 246.

93. *Doe v. Karadzic*, 866 F. Supp. 734, 738 (S.D.N.Y. 1994).

94. *Id.* at 739.

95. *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

96. *Id.* at 246.

97. *Id.* at 247.

98. *Id.*

99. *Doe v. Karadzic*, 866 F. Supp. 734, 740-41 (S.D.N.Y. 1994).

100. *See id.* (stating that only state actors come within purview of § 1350).



dreadful that might be, no violation of international law has occurred. Torture is different from mere thuggery, which may be criminal by all means, but it is criminal only under municipal law.

Karadzic's argument was an interesting position for an individual who considered himself to be the head of state of the so-called Republika Srpska, the Bosnian Serb entity. An obvious inconsistency exists between Karadzic's contention that service on him was improper because he was a diplomatically-protected person attending a meeting of the United Nations in his official capacity and the argument that he is not a subject of international law, but rather a private actor.

Nevertheless, Judge Peter Leisure of the United States District Court for the Southern District of New York agreed with Karadzic's position, and he held that to be bound by international law, one must have international legal personality.<sup>101</sup> For an individual, international legal personality depends upon the actual or at least apparent authority to act on behalf of, in connection with, or under the umbrella of a state. Concluding that Karadzic's Republika Srpska is not a state, *inter alia*, because it is not widely recognized, Judge Leisure held that the acts were simply those of a gang of outlaws, just like a gang on the streets of Washington or Los Angeles or in the hills of Burma.<sup>102</sup> What happened to these plaintiffs may have been terrible and appalling, said Judge Leisure, and the acts themselves may have violated every norm of civilized conduct known, but there are no logically compelled international legal implications of even outrageous misconduct unless it was committed by or on behalf of an international legal person.<sup>103</sup>

The United States Court of Appeals for the Second Circuit reversed, holding that the plaintiffs had adequately pleaded a cause of action against Radovan Karadzic.<sup>104</sup> The Second Circuit held that there is no presumption that international law imposes obligations only on states and not on individuals, much less on groups organized under arms for the purpose of taking political power.<sup>105</sup> Situations in which international law bound individuals have always existed – piracy, abduction of ambassadors, and the trade in

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101. *See id.* at 741 (finding that § 1350 does not redress acts of torture engaged in by private individuals).

102. *See id.* (finding that Karadzic's faction did not act under color of any state law).

103. *Id.* at 740-41.

104. *Kadic v. Karadzic*, 70 F.3d 232, 247 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). The case in New York is civil in nature, and therefore it has no preclusive effect concerning the possibility of a subsequent criminal prosecution of Karadzic before the Tribunal in The Hague.

105. *See id.* at 239 (holding that certain conduct violates international law whether undertaken by state or private actors).

slaves—are all international offenses that only individuals can commit.<sup>106</sup> The addition to this list of new internationally-cognizable offenses that can be committed only by individuals in the late twentieth century is merely building on what has always been the law. Human rights abuses of at least certain types, when committed by individuals in circumstances that otherwise give rise to international implications—not on the streets of Detroit, for example, but on the streets of Sarajevo, where there are foreign armies and where international politics is being waged—are sufficient to create violations of international dimension out of what would otherwise be acts of simple criminality.

The Supreme Court of the United States declined to review the decision, and it therefore stands as law, albeit only of the Second Circuit (New York, Vermont, and Connecticut).<sup>107</sup> The Second Circuit, however, is a very authoritative one, and it is the Second Circuit, after all, that began this trend toward the use of human rights norms as the law of decision in U.S. courtrooms in *Filartiga*. There is reason to hope, therefore, that *Doe v. Karadzic* is the wave of the future.

Positive developments have emerged even since the *Karadzic* decision. International human rights scholars have begun to turn their attention to a potentially fruitful area, both to remedy and to deter violations: attempting to hold private American corporations that joint-venture with repressive regimes liable for the foreseeable human consequences of their activities. In a current case in California, for example, a group of Burmese victims of human rights abuses has filed suit under the ATCA and the TVPA against UNOCAL, which apparently has a joint venture with the governing junta in Burma, almost universally condemned for its illegality and brutality, to construct a natural gas pipeline.<sup>108</sup> The plaintiffs claim to represent various classes of people who they allege were abused in connection with carrying out the joint venture's objectives: people who were forced into slavery or portage, who were uprooted from their homes, whose villages were destroyed, and who were raped and killed.<sup>109</sup>

Sovereign immunity almost certainly prevents a suit against the government of Burma in such a case. A government has not been the defendant in any of the successful human rights cases. Under current law, sovereign immunity means that governments are simply not amenable to the jurisdiction of the courts unless certain enumerated exceptions apply.<sup>110</sup> The degree to

106. *Id.*

107. *See Karadzic v. Kadic*, 518 U.S. 1005, 1005 (1996) (denying certiorari).

108. *Doe v. UNOCAL Corp.*, 963 F. Supp. 880, 883-84 (C.D. Cal. 1997).

109. *Id.* at 883.

110. 28 U.S.C. § 1605 (1994); *Argentine Republic v. Amerada-Hess Shipping*, 488 U.S. 428, 439 (1989) (finding that immunity applies unless case comes within enumerated exception).

which conduct was reprehensible, however, is not sufficient to create an exception.

There may be no judicial remedy against the Burmese governing junta for whatever might have happened on that pipeline, however, a remedy against the junta's American business partner could be possible. The common law decrees that if one participant in a joint pursuit commits a tort in the course of pursuing the shared objective, both are liable because they were engaged in a common venture. The argument in *UNOCAL* is that an immune defendant and a nonimmune defendant conspired together, and the nonimmune defendant can be sued and is liable. The federal trial court in California denied UNOCAL's motion to dismiss,<sup>111</sup> and this case is proceeding.

UNOCAL's lawyers will have some serious problems. Even if they are confident that they can file powerful motions to dismiss and for summary judgment, they are still going to have to take depositions, to produce documentary evidence, and to show all of their books and records in connection with the building of the pipeline. Moreover, a resolution to the effect that a private actor can be held jointly responsible with a government that abuses human rights is, in any event, a major development of human rights law.

Yet, for all the good news about the use of human rights law in American courtrooms, there is still no progress in bringing the techniques and the content of international law to bear on the most egregious human rights violations committed by the United States itself on a systematic basis. Challenges founded in the emerging respect for the international law of human rights have not been successful.

In the least defensible systematic abuse of human rights in the United States—the use of the death penalty—absolutely no inroads from international human rights law have permitted. Several years ago, the Supreme Court, in one of the last times it removed an entire class of people from death row, held that it was unconstitutional to execute someone who was under the age of sixteen at the time of commission of the crime. The Court struck down an Oklahoma law that permitted the execution of juveniles,<sup>112</sup> but in so doing went out of its way to ignore all the friends of the Court who had argued that international law provides an independent but compelling basis to forbid that kind of state action. The Supreme Court held that the execution of juveniles was inconsistent only with U.S. domestic constitutional law making not even a passing reference to the international authorities. The Supreme Court

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111. *UNOCAL Corp.*, 963 F. Supp. at 897.

112. *See* *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (finding that imposition of death penalty for acts committed by person under age 16 violates Eighth Amendment of Constitution). *But see* *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (finding that imposition of death penalty on persons age 16 or above did not violate Constitution).

foreclosed any hope that the Court would ever expand the prohibition beyond that sixteen-year-old age limit.<sup>113</sup>

Another area in which international human rights law was dramatically held not to have any relevance to evaluation of conduct of the United States involved the kidnaping (the government prefers the locution "irregular rendition") of a fugitive from Mexico: *United States v. Alvarez-Machain*.<sup>114</sup> In that case, representatives of the United States Drug Enforcement Administration (DEA) entered the territory of Mexico, a country with which we have an extradition treaty, captured someone suspected of killing a DEA agent and abducted him into the United States, where he was brought before the United States District Court for the Central District of California to stand trial.<sup>115</sup> He challenged the ability of the court to try him on the grounds that his appearance was obtained illegally, but he failed.<sup>116</sup> The court held that it did not matter why or how he came to be there, and it rejected the claim that his presence was procured only by way of a violation of international law and that therefore the trial could not lawfully proceed.<sup>117</sup>

In the Supreme Court of the United States, six out of nine justices agreed with the district court. They found that although the U.S.-Mexico Extradition Treaty (the Treaty) provides procedures for extraditing suspected criminals, nothing in the Treaty says that those procedures are exclusive.<sup>118</sup> The United States, reasoned the Court, retains the power to do whatever is not expressly forbidden, and the victim of this international abduction has absolutely no right to insist that the Treaty's provisions be honored.<sup>119</sup> The irony in this case is that when Alvarez-Machain was finally tried, he was acquitted. The precedent, however, endures as another example of a double standard in the use of human rights law in the courts, with the United States not held accountable under the same rules applicable to other nations.

Considerable improvement over the last twenty years in the use of international human rights law in the courts of the United States has occurred. Judges increasingly take notice of international law arguments in broader

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113. *Thompson*, 487 U.S. at 838. Most recently, the Supreme Court of the United States and the governor of Virginia both denied the relevance of international law to death penalty decisions, even those involving foreigners. See *Breard v. Greene*, 118 S. Ct. 1352 (1998) (per curiam); International Court of Justice, Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), 37 I.L.M. 810 (Interim Protection Order of Apr. 9, 1998).

114. 504 U.S. 655 (1992).

115. *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

116. *Id.* at 658.

117. *Id.* at 657.

118. *Id.* at 664.

119. *Id.* at 668-69.

contexts, for example, in evaluating prison conditions: They have been invoked in cases alleging that conditions of detention constitute cruel and unusual punishment. The courts will look to conventions that the United States has signed, whether or not they are self-executing, at least to assist in the definition of acceptable standards. However, in the final analysis, courts appear particularly reluctant to order changes to U.S. government policy, or even to criticize it very aggressively, based on developments in international law.

This is understandable when considered in its domestic, political context. Senator Dole ran for President two years ago, campaigning against the GATT as an erosion of U.S. sovereignty. It is hardly surprising that U.S. courts would say that they "do not want our laws made by foreigners." A cynical, negative conclusion would suggest that this is a familiar pattern: The United States is the great champion of international law in the world, so long as it is winning, but the moment it stands to have its conduct condemned, it changes the rules.<sup>120</sup> As the world's only superpower, the United States is probably uniquely situated to do that.

All in all, this cynicism is not merited. It is surely true that the United States, and its judiciary in particular, can be a beacon of hope for those whose rights are abused abroad, when the abusers seek to enjoy the benefits that their presence, or their business, in this country can bring. But certainly one has to temper one's optimism about the future of international human rights law in the courts of the United States until judges and political leaders accept the notion that, in the international legal order, the United States is subject to the laws and cannot make, repeal, or ignore elements of that body of law on its own initiative or for its own domestic or political reasons.

To become a worthy subject of international law was an important objective of the founders of this country. To remain so, and not to claim to be above the law, is a goal to which the American public, their heirs, might usefully dedicate themselves.

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120. An obvious illustration of this point is the purported withdrawal of the United States from the compulsory jurisdiction of the International Court of Justice in a futile effort to avoid losing the judgment in the *Nicaragua* case.