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New Challenges for the American Lawyer in International Human Rights

Susan L. Karamanian*

I. Introduction

Every licensed lawyer in the United States takes an oath to support or uphold the Constitution of the United States and to support or uphold the laws of the respective state in which he or she is licensed. Every lawyer licensed to practice in a federal court in the United States similarly swears to uphold the laws of the United States Constitution. No *explicit* reference is made to the obligation of a lawyer to support or uphold international law, let alone the law of international human rights.

For many practitioners and courts alike, international norms on human rights are irrelevant, for "it is *American* conceptions of decency that are dispositive."¹ Domestic lawyers, however, more often are invoking the law of international human rights in an effort to expand the protection afforded their clients' civil, criminal, social, political, and economic rights. At times, they succeed. Indeed, courts have entered substantial monetary judgments based on violations of the law of nations² or based on violations of federal statutes

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1. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989). In concluding that the Eighth Amendment does not prohibit the State from executing a person who was a juvenile at the time of the offense, Justice Scalia rejected as irrelevant to Eighth Amendment jurisprudence that three treaties, one of which the United States had ratified, explicitly prohibit the death penalty for juveniles. *See id.* at 389-90 & n.10 (Brennan, J., dissenting); *see also* *United States v. Alvarez-Machain*, 504 U.S. 655, 668-70 (1993) (concluding that forcible abduction did not violate United States-Mexico Extradition Treaty even though abduction may violate general international law principles); Jack H. Backman, *A US Exception on UN Rights*, BOSTON GLOBE, Dec. 8, 1997, at A15 ("No case involving enforcement of the Universal Declaration [of Human Rights] has gone before the U.S. Supreme Court and general legal opinion is that unless it is enacted into U.S. law, it is not enforceable in U.S. courts.").

2. *See, e.g.,* *Hilao v. Estate of Marcos*, 103 F.3d 789, 791 (9th Cir. 1996) (observing that district court entered \$750 million judgment in favor of plaintiff class in case brought under Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) (originally enacted as Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77)); *Xuncax v. Gramajo*, 886 F. Supp. 162, 197-202 (D. Mass. 1995) (entering multi-million dollar default judgment against Guatemalan Minister of Defense for, among other things, violating the Alien Tort Claims Act and the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (1994))). For

that implicate international human rights principles.³

Despite the apparent interest of some judges⁴ and the deliberate efforts of international human rights lawyers, acceptance of the Supreme Court's pronouncement in *The Paquete Habana*⁵ that "[i]nternational law is part of our law"⁶ still is not widespread. Further, even though certain domestic courts' application of international law and comparative constitutional law norms "is a step forward," little assurance can be had that these courts' decisions comport with the decisions of other tribunals, particularly those that focus on human rights, such as United Nations treaty bodies or regional human rights treaty bodies, and vice versa.⁷ The likelihood of inconsistency is magnified given that, at any moment, numerous United States courts may be reviewing cases that involve what even legal scholars admit is an evolving concept.⁸

insight into how certain United States courts determine what conduct violates international human rights law, see generally *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 116 S. Ct. 2524 (1996); *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos, Human Rights Litig.)*, 25 F.3d 1467, 1474-75 (9th Cir. 1994); and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

3. See *Flatow v. The Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (entering default judgment of more than \$250 million against Iran and various Iranian officials for state-sponsored terrorism for violations of Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (codified at 28 U.S.C.A. § 1605 (West Supp. 1998))).

4. The 1996 Judicial Conference of the United States Court of Appeals for the Second Circuit devoted a full session to international human rights. The speakers included two of the field's most preeminent scholars, Professor Louis Henkin and Professor Harold Koh, leading activists from the Lawyers Committee for Human Rights and Human Rights Watch/Asia, and a prosecutor from the War Crimes Tribunal at The Hague. The proceedings are at Judicial Conference, Second Judicial Circuit of the United States, 170 F.R.D. 201, 274-318 (1996) [hereinafter *Judicial Conference*].

5. 175 U.S. 677 (1900).

6. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The Supreme Court found that the capture of two Cuban fishing vessels by the United States was unlawful and without probable cause. *Id.*

7. See Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U. L.J. 699, 701 & n.11 (1996) (describing concern about "normative consistency" expressed by Judge Rosalyn Higgins of International Court of Justice and by Professor Philip Alston, independent expert for United Nations, that inconsistency and confusion likely will grow as standards proliferate and new treaty bodies are created).

8. See, e.g., ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 104 (1994) ("[T]he articulation of claims as human rights is part of the process of according priority to decision-making processes."); Louis Henkin, *Evolving Concepts of International Human Rights Law and the Current Consensus*, in 170 F.R.D. 275, 276 (1997). As an example of inconsistency within United States courts, compare *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (finding that federal court has jurisdiction over alien's claim for violations of law of nations), with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) ("[I]t is essential that there be an explicit grant of a cause

Within this fragile environment works a unique group of professionals, the lawyers. As the gatekeepers of justice,⁹ lawyers play an essential role. Lawyers, with specialized training and skills, have a license that enables them to appear in court to protect and promote rights. The rights at issue here are those that each individual has against the state because of his or her status as a human being. They are human rights. These rights have become of paramount importance during this century, in large part due to the deliberate efforts of lawyers, namely, international law professors, attorneys for various international human rights groups, and interested private practitioners. One international lawyer poignantly summarized the role of these lawyers: "It is somewhat paradoxical that the once-impregnable walls of the sovereign State, so carefully constructed by the jurists of the nineteenth century, are now being dismantled by the innovative and ingenious techniques of the jurists of the twentieth century."¹⁰

This paper discusses the future role of the lawyer in international human rights. Its framework is based on Professor Anthony Kronman's observation in *The Lost Lawyer: Failing Ideals of the Legal Profession* that the lawyer must be more than a professional who has the "legal know-how."¹¹ The lawyer in international human rights plays a highly public function. First and foremost, the lawyer must be devoted to the public good as defined by existing or emerging universally-accepted international norms.¹² To paraphrase Professor Henkin, we lawyers must accept international human rights for ourselves.¹³

This devotion means that the international human rights lawyer must continue to invoke universal norms in assuming the traditional and indispensable role as an advocate on behalf of a specific client in a specific dispute. He

of action before a private plaintiff be allowed to enforce principles of international law in a federal tribunal.").

9. For example, paragraph 1 of "Preamble: A Lawyer's Responsibilities" to the Texas Disciplinary Rules of Professional Conduct states: "[A lawyer is a] public citizen having special responsibility for the quality of justice. Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system." TEX. GOV'T CODE ANN. tit. 2, subpart G, app. A; art. 10, § 9 (West Supp. 1998). Similarly, the American Bar Association has recommended that each local bar association adopt "A Lawyer's Creed of Professionalism" that recognizes that a lawyer has "a devotion to the public good."

10. Symposium, *The Legal Profession and Human Rights: International Human Rights and Sovereignty of States: Role and Responsibility of Lawyers*, 21 *FORDHAM INT'L L.J.* 541, 546-47 (1997) (remarks of Fali Nariman, President, Bar Association of India; Chairman, International Commission of Jurists).

11. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 15 (1993).

12. See *id.* at 14 (stating that "the outstanding lawyer . . . is, to begin with, a devoted citizen").

13. See Louis Henkin, *Rights: American and Human*, 79 *COLUM. L. REV.* 405, 421 (1979).

or she should, however, do more or at least encourage other lawyers to do more. The lawyer must link international human rights law with the public good and exalt the cause of the public good. The lawyer should educate other lawyers, judges, and lay persons about internationally-accepted norms and urge them to use these norms in guiding these persons in their conduct and decisions. Citizens, clients, and government and nongovernment agencies should look to the international human rights lawyer for guidance and advice on the subject. In addition, the lawyer should work with other lawyers from around the world in documenting human rights abuses and monitoring enforcement in domestic and regional tribunals and in insisting that his own federal government submit to international scrutiny.

In sum, the lawyer should be "a public-spirited reformer who monitors [the] framework [of public norms] itself and leads others in campaigning for those repairs that are required to keep it responsive and fair."¹⁴ Absent a broad-based, activist approach, domestic efforts to enforce universally-recognized rights will continue to suffer from an apparent "crisis of legitimacy."¹⁵

II. The American Lawyer in International Human Rights: A Brief Overview

Lawyers who promote or defend international human rights already serve a public good, one that is defined on behalf of individuals and in terms of internationally-accepted norms. While the public good aspect may be self-evident, a brief review should reaffirm and provide a theoretical basis for this conclusion.

A. International Law and the Public Good

As Professor Henkin remarks, "international non-conventional human rights law is *jus cogens*, or is like *jus cogens*."¹⁶ *Jus cogens*, in turn, reflects "common consensus from which few dare dissent."¹⁷ Some federal courts

14. KRONMAN, *supra* note 11, at 19. In Dean Kronman's view, these qualities are elements of a "statesman," and those lawyers who possess them and certain other qualities, particularly a proper sense of judgment, fit within the nineteenth century ideal of the "lawyer-statesman." *Id.* at 11-17. For various reasons, I prefer not to equate the "lawyer-statesman" model with the ideal international human rights lawyer, although I agree, as set forth in this paper, that certain attributes of that ideal are essential for the lawyer who seeks to promote or defend international human rights.

15. See Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 HARV. HUM. RTS. J. 15, 24 (1996).

16. Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 38 & n.28 (1996) (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987) [hereinafter RESTATEMENT]).

17. *Id.* at 38. In a similar vein, the International Court of Justice has written that these norms, which include "principles and rules concerning the basic rights of the human person,"

have recognized in human rights cases that *jus cogens* means, as the Vienna Convention on the Law of Treaties said, "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted."¹⁸

Jus cogens norms reflect the international community's fundamental values; they are not based on the consent of states.¹⁹ They are so fundamental that they prevail over and invalidate international agreements and other rules of international law that conflict with them.²⁰ They can be modified or derogated only by a subsequent *jus cogens* norm.²¹ Norms of *jus cogens* by definition reflect the public good.

Customary international law that does not rise to the esteem level of *jus cogens*, nevertheless, also is founded on principles of the public good. Customary international law arises from "a general and consistent practice of states followed by them from a sense of legal obligation."²² It is "international custom, as evidence of a general practice accepted as law."²³ In ascertaining and administering customary international law, courts resort "to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators."²⁴ International law is to be interpreted as it has evolved and as it exists among the nations of the world today.²⁵

are the concern of all states; "they are obligations *erga omnes*." *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4, 32 (Feb. 5).

18. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (citing Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332, 8 I.L.M. 679), *cert. denied*, 507 U.S. 1017 (1993); *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) (same); *National Coalition Gov't of Burma v. UNOCAL, Inc.*, 176 F.R.D. 329, 345 n.18 (C.D. Cal. 1997) (same).

19. David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332, 351 (1988).

20. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987).

21. *Id.*

22. *Id.* § 102(2).

23. Statute of International Court of Justice, art. 38(1), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 (1945).

24. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). Furthermore,

jurists and commentators . . . by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 880-81 (quoting *The Paquete Habana*, 175 U.S. at 700).

25. *Id.* at 881.

Prime evidence of the customs and usages of civilized nations are human rights treaties and resolutions.²⁶ Foremost among these are the United Nations Charter²⁷ and the Universal Declaration of Human Rights of 1948.²⁸ The Charter, which "heralded also the birth of international human rights,"²⁹ and which in large part was written by lawyers, provides in article 1, paragraph 3 that the United Nations is "[t]o achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all."³⁰ Article 55(c) provides for "universal respect for, and observance of, human rights and fundamental freedoms for all."³¹ The Universal Declaration is "the first comprehensive statement enumerating the basic rights of the individual to be promulgated by a universal international organization."³² It proclaims, among other things, that all human beings (1) "are born free and equal in dignity and rights,"³³ (2) have civil and political rights, including the right to life, liberty, and security of person, the prohibition against slavery, torture, and cruel, inhuman, or degrading treatment, the right to be free from arbitrary arrest, detention, or exile, and the right to privacy, freedom of speech, religion, and assembly;³⁴ and (3) have economic, social, and cultural rights, including the right to work and to an education.³⁵

Federal courts frequently cite both the U.N. Charter and the Universal Declaration in defining the law of nations.³⁶ They also have cited the American Convention on Human Rights,³⁷ the International Covenant on Civil and

26. See Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 857 (1989).

27. U.N. CHARTER, reprinted in INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 10.1 (Richard B. Lillich ed., 2d ed. 1990) [hereinafter INSTRUMENTS].

28. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

29. Henkin, *supra* note 16, at 34.

30. U.N. CHARTER art. 1(3), reprinted in INSTRUMENTS, *supra* note 27, at 10.2.

31. *Id.* art. 55(c), reprinted in INSTRUMENTS, *supra* note 27, at 10.5. Article 56 provides that Member States "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56, reprinted in INSTRUMENTS, *supra* note 27, at 10.5.

32. Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 6 (1988). Professor Buergenthal also notes that the Universal Declaration "ranks with the Magna Carta, the French Declaration of the Rights of Man, and the American Declaration of Independence as a milestone in mankind's struggle for freedom and human dignity." *Id.*; see Henkin, *supra* note 16, at 40 n.31 (stating that Universal Declaration "is perhaps the most important document, excepting only the U.N. Charter").

33. Universal Declaration of Human Rights, *supra* note 28, art. 1.

34. *Id.* arts. 3-5, 9, 12, 18-20.

35. *Id.* arts. 23, 26.

36. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 879-83 (2d Cir. 1980).

37. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144

Political Rights,³⁸ the Convention for the Protection of Human Rights and Fundamental Freedoms,³⁹ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁰ for the conclusion that the prohibition against official torture is a norm of customary international law.⁴¹ Federal courts have adopted a similar analysis of the Convention on the Prevention and Punishment of the Crime of Genocide⁴² for the proposition that "the proscription of genocide has applied equally to state and non-state actors."⁴³ Indeed, "through their repeated reference to the Charter and the Universal Declaration" and other conventions, courts in the United States and abroad have contributed "to the incremental formation of a practice that has now ripened into customary law of international human rights."⁴⁴

B. Lawyers Promoting the Public Good

Lawyers who represent clients before tribunals seeking relief for violations of customary international law, or who otherwise participate in support of amici curiae or as expert witnesses, are promoting the public good. The same holds true for lawyers who prudently urge the tribunal to follow international human rights law in construing the Constitution or statutes of the United States. Lawyers seek to enforce established norms that reflect fundamental values of the international community in each of these instances. Without enforcement of these universally-recognized rights, the law of human rights merely would be a set of principles without much consequence.⁴⁵

U.N.T.S. 144 (entered into force July 18, 1978).

38. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

39. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Council of Europe, 213 U.N.T.S. 222.

40. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027.

41. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 716-17 (9th Cir. 1992).

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

43. *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

44. Francesco Francioni, *An International Bill of Rights: Why It Matters, How It Can Be Used*, 32 TEX. INT'L L.J. 471, 474 & n.21 (1997) (citing Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 12 (1982)).

45. Jerome J. Shestack, Immediate Past President of the American Bar Association and former Ambassador to the United Nations Commission on Human Rights, has noted, "In a democratic system where judicial independence prevails, enforcement of legal rules through the courts is the principal safeguard of human rights in the international arena." Jerome J. Shestack, *The Legal Profession and Human Rights: Globalization of Human Rights Law*, 21 FORDHAM INT'L L.J. 558, 564 (1997).

The seminal case in the United States federal courts, *Filartiga v. Pena-Irala*,⁴⁶ exemplifies this point. In *Filartiga*, the plaintiffs, two citizens of Paraguay, sued a Paraguayan official for torturing their son/brother.⁴⁷ They alleged jurisdiction under the Alien Tort Claims Act,⁴⁸ which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁴⁹ The plaintiffs claimed that torture violated the "law of nations," or established norms of the international law of human rights.⁵⁰ The district court dismissed the case because the "law of nations" did not concern acts of a Paraguayan official against another Paraguayan citizen.⁵¹ In reversing the district court's dismissal, the Second Circuit analyzed various sources of customary international law⁵² and concluded that "official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."⁵³ Judge Kaufman, writing for the panel, also noted that "international law confers fundamental rights upon all people vis-a-vis their own governments."⁵⁴

While Judge Kaufman's detailed examination of the sources of international law and the conclusions he reached based on his examination have proven to be of lasting importance, his concluding paragraph of the opinion is equally compelling. In particular, Judge Kaufman noted that after World War II, civilized nations "banded together to prescribe acceptable norms of international behavior . . . to recognize that respect for fundamental human rights is in their *individual and collective* interest."⁵⁵ The torturer, like the pirate and slave trader before him, had become "*hostis humani generis*, an enemy of all mankind."⁵⁶

46. 630 F.2d 876 (2d Cir. 1980).

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

48. *Id.* at 879.

49. Alien Tort Claims Act, 28 U.S.C. § 1350 (1994).

50. *Filartiga*, 630 F.2d at 879.

51. *Id.* at 880.

52. *Id.* at 881-84 (discussing United Nations Charter, Universal Declaration, Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975), American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 144 (entered into force July 18, 1978), International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, and Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Council of Europe, art. 3, 213 U.N.T.S. 222 (*semble*)).

53. *Id.* at 884.

54. *Id.* at 885.

55. *Id.* at 890 (emphasis added).

56. *Id.*

Filartiga opened the doors of the United States courthouses to other alien tort claims based on violations of the "law of nations." After *Filartiga*, federal courts have concluded that torture, murder, genocide, and slavery violate *jus cogens* norms of the international community.⁵⁷ Those who commit these intolerable, inhumane acts are now recognized as the "enemy of all mankind."

Lawyers are indispensable to judicial enforcement of international human rights. In claims under the Alien Tort Claims Act, for example, American lawyers have served as counsel to various foreign plaintiffs. Many of the plaintiffs' attorneys are affiliated with groups such as the Center for Constitutional Rights and International Human Rights Clinic, which are committed to promoting international human rights. Lawyers also have served as counsel for amici curiae, including leading nongovernmental human rights organizations such as Amnesty International, the International League for Human Rights, the Lawyers' Committee for International Human Rights, the International Human Rights Law Groups, and Human Rights Watch. These groups have been at the forefront of the legal effort to implement human rights standards and "in marshaling public opinion against human rights abuses."⁵⁸

Not to be forgotten are the lawyers for the United States government. In *Filartiga*, then-Assistant Attorney General Drew Days submitted an amicus curiae brief on behalf of the United States that confirmed "the universal abhorrence with which torture is viewed."⁵⁹ *Kadic v. Karadzic*⁶⁰ involved claims of torture, summary execution, acts of genocide, and war crimes under the Alien Tort Claims Act and the Torture Victim Protection Act of 1991 against Radovan Karadzic, the self-proclaimed president of an unrecognized Bosnian-Serb entity.⁶¹ The Legal Adviser to the United States Department of State and the United States Solicitor General submitted a "Statement of Interest" that "expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits."⁶²

Lawyers are also involved as expert witnesses in defining the law of nations.⁶³ In *Filartiga* for example, four distinguished international legal scholars submitted affidavits that "the law of nations prohibits absolutely the

57. See *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995).

58. See, e.g., Shestack, *supra* note 45, at 561 (discussing specifically role of International League for Human Rights, International Commission of Jurists, and Amnesty International).

59. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (citing and quoting from Memorandum of United States as *Amicus Curiae*).

60. 70 F.3d 232 (2d Cir. 1995).

61. *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

62. *Id.* at 250.

63. See *supra* note 24 (citing *Filartiga*).

use of torture.⁶⁴ Law professors also play an important role to the extent that, in determining international law, courts refer to their learned treatises and books. We also should be mindful that some lawyers are judges. Federal judges are enforcing universally-accepted human rights in cases in which a federal statute, such as the Alien Tort Claims Act, prescribes application of the "law of nations." Certain judges look more frequently to international human rights law in analyzing what may appear to be routine domestic disputes. In other words, they are incorporating international human rights law into United States constitutional and statutory standards.

In *Alabama v. Engler*⁶⁵ for example, the Sixth Circuit concluded that it was required under the Constitution to extradite an inmate from Michigan to Alabama, even though Alabama uses the chain gang and one of its state senators recently had declared that slavery was "good for blacks."⁶⁶ Judge Jones commented that "I only wish, however, that penal institutions will soon shed rather than irrationally embrace socially vindictive policies and procedures soundly condemned as violations of international human rights norms."⁶⁷ Another example may be found in *Lipscomb v. Simmons*⁶⁸ in which the court struck down as violative of the Fourteenth Amendment Oregon's practice of declaring that foster children who lived with relatives were ineligible to receive state funds because it denied the children the right to choose to live with family members.⁶⁹ The court stated that the right to associate with family members is fundamental, citing the Universal Declaration, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.⁷⁰ In a habeas case, *Caballero v. Caplinger*,⁷¹ a federal district court held that a federal statute allowing indefinite detention of an alien without the opportunity to have a bond hearing violated the Eighth Amend-

64. *Filartiga*, 630 F.2d at 879 & n.4 (referring to affidavits of Richard Falk, Albert G. Milbank Professor of International Law and Practice at Princeton University and former Vice President of American Society of International Law; Thomas M. Franck, Professor of International Law at New York University, Director of New York University Center for International Studies, and current President of American Society of International Law; Richard Lillich, Howard W. Smith Professor of Law at University of Virginia School of Law; and Myres MacDougal, Sterling Professor of Law at Yale Law School and past President of American Society of International Law).

65. 85 F.3d 1205 (6th Cir. 1996).

66. *Alabama v. Engler*, 85 F.3d 1205, 1210 (6th Cir. 1996) (Jones, J., concurring).

67. *Id.* (Jones, J., concurring).

68. 884 F.2d 1242 (9th Cir. 1989).

69. *Lipscomb v. Simmons*, 884 F.2d 1242, 1248-50 (9th Cir. 1989).

70. *Id.* at 1244 n.1.

71. 914 F. Supp. 1374 (E.D. La. 1996).

ment.⁷² In support, Judge Berrigan cited the United Nations Charter, the Universal Declaration of Human Rights, and various conventions as representing "the collective consciousness of the international community, creating a hope if not an expectation of adherence."⁷³

III. Toward a Broader, More Activist Approach for the American Lawyer in Recognizing and Enforcing International Human Rights

All lawyers are acting in the public good in promoting and defending international human rights. As a result of their work, certain United States courts have risen above the shield of sovereignty and have applied international law in recognizing specific universal human rights and in imposing remedies for violations of these human rights.⁷⁴ But few United States courts have done so. Furthermore, the "well-established, universally recognized norms of international law" that have received judicial acknowledgment are few in number.

Lawyers need to continue to do what they do best in promoting the rule of law; in other words, they should be advocates. They must, however, expand and intensify their efforts on all fronts, and this means going beyond judicial tribunals. Furthermore, they need to become more organized, methodical, and efficient in the process.

A. Organizing and Educating Lawyers

In a recent law review article, two economists argue very persuasively that changes in the law occur, in part, not because of judges' preferences or even because of the preference of the litigants, but because of the preferences of lawyers.⁷⁵ The law will "come to favor organized interest groups."⁷⁶ When

72. *Caballero v. Caplinger*, 914 F. Supp. 1374, 1380 (E.D. La. 1996).

73. *Id.* at 1379. Professor Lillich has observed that "[t]his 'indirect incorporation' of both conventional and customary international human rights law is an exceptionally promising approach warranting even great attention and increased use in the future." Lillich, *supra* note 26, at 859-60. He also noted that this approach is not new; 40 years ago, Professor Schacter stated that "[i]t would be unrealistic to ignore the influence . . . of the Charter as a factor in resolving constitutional issues which hitherto have been in doubt." *Id.* at 860 n.48 (quoting Oscar Schacter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 658 (1951)).

74. See *supra* notes 36-73 and accompanying text (describing *Filartiga* and other cases citing international law sources). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 805 (D.C. Cir. 1984) (Bork, J., concurring) (stating that it would violate separation of powers for plaintiff to have standing to sue for violation of international law).

75. See generally Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994).

76. *Id.* at 825.

no other organized parties with strong interests rise to the front in a specific matter, the law should tend to favor the interests of the lawyers.⁷⁷

Organized bar associations and other collections of lawyers, whether they be international, national, or regional in scope, either are, or have the potential to be, powerful interest groups. Indeed, it was nongovernmental human rights organizations, such as the International Commission of Jurists, a group of lawyers and judges "with a mission to develop the rule of law in the human rights area" that led the charge against human rights abuses.⁷⁸ During the mid- and late-1970s, the International Bar Association, the American Bar Association, and the Union of Advocates "started to endorse human rights treaties and monitor human rights abuses and send observers to trials of human rights advocates."⁷⁹ The Lawyers Committee "report[ed] on and help[ed] redress human rights abuses."⁸⁰ These organizations have "become a significant non-governmental force" because they have access to lawyers, as a whole, and to government leaders.⁸¹

But as one observer properly notes, "[t]he struggle to secure fundamental human rights is ultimately a local struggle."⁸² All of the work of international and national bar associations could be for naught if lawyers at the local level are not involved. State bar associations, and possibly county bar associations, should have sections that at least address international human rights issues. Law schools also should hold classes and conduct seminars on the subject and offer practitioners continuing legal education on international human rights.

Finding interested lawyers at the local level should not be too difficult. In particular, criminal defense attorneys would be a good starting point. For example, a federal statute enacted within the last fifteen years permits pretrial seizure of an accused's assets when those assets are proven to be the product of criminal activity.⁸³ The federal government has applied this statute to seize defense attorney's fees.⁸⁴ An argument could be made, however, that the fee seizure statute violates international human rights law because it effectively deprives the defendant of the benefits of the presumption of innocence.⁸⁵

77. *Id.*

78. Shestack, *supra* note 45, at 561.

79. *Id.* at 562.

80. *Id.*

81. *Id.* at 562-63.

82. Thomas, *supra* note 15, at 16.

83. 21 U.S.C. § 853(a) (1994).

84. *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

85. See Richard J. Wilson, *Using International Human Rights Law and Machinery in Defending Borderless Crime Cases*, 20 FORDHAM INT'L L.J. 1606, 1610-14 (1997) (citing Universal Declaration and various other international conventions and declarations, including Basic Principles on the Role of Lawyers adopted by Eighth United Nations Congress on the

Similarly, for those criminal defense attorneys who work in one of the thirty-eight states in the United States that imposes capital punishment, an understanding of the role of various international conventions and declarations and of the opportunity to file claims before regional tribunals, such as the Inter-American Commission on Human Rights, is becoming more important now that state and federal habeas review processes are being streamlined.⁸⁶

The evolving law of international human rights also is relevant to the work of many private civil attorneys. For example, in *National Coalition Government of Burma v. Unocal*,⁸⁷ the plaintiffs alleged that Unocal was liable under the Alien Tort Claims Act for alleged human rights abuses occurring at a gas pipeline project in Burma.⁸⁸ Unocal moved to dismiss on the grounds that it was not a state actor as required for liability under the Alien Tort Claims Act.⁸⁹ The court held that plaintiffs' pleading of a joint venture relationship between Burma and Unocal was sufficient to state a claim because "Unocal may have been 'a willful participant in joint action with the State or its agents.'"⁹⁰ If Unocal ultimately is held liable under a joint-venture theory, no doubt more plaintiffs' attorneys will be looking for creative ways to sue solvent multinational corporations for international human rights abuses.⁹¹

Prevention of Crime and the Treatment of Offenders (United Nations, *Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August-September 1990, U.N. Doc. A/CONF.144/28 (Oct. 5, 1990)), which provides in article 16 that "Governments shall ensure that lawyers . . . shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.").

86. See *id.* at 1614-20. See generally WILLIAM A. SCHABAS, *ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* (2d ed. 1997).

87. 176 F.R.D. 329 (C.D. Cal. 1997).

88. *National Coalition Gov't of Burma v. Unocal*, 176 F.R.D. 329, 334-35 (C.D. Cal. 1997).

89. *Id.* at 335.

90. *Id.* at 348 (quoting *Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989)).

91. *But see* *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 384 (E.D. La. 1997) (dismissing plaintiff's claims for cultural genocide, human rights violations, and international environmental torts). In *Beanal*, an Indonesian citizen filed a class action lawsuit against Freeport-McMoRan and a related entity under the Alien Tort Claims Act and the Torture Victim Protection Act. *Id.* at 366. Plaintiff alleged that Freeport violated the law of nations, namely that it engaged in environmental torts, human rights abuses, and cultural genocide. *Id.* The claims arose from Freeport's operation of an open pit copper, gold, and silver mine in Irian Jaya, Indonesia. *Id.* Plaintiff alleged that Freeport's security guards "in conjunction with third parties" engaged in arbitrary arrest and detention, torture, surveillance, and destruction of property that caused severe physical pain and suffering. *Id.* at 369. Plaintiff also alleged that Freeport engaged in "cultural genocide" through the "deliberate, contrived and planned cultural demise of the Amungme culture," of which plaintiff is a member. *Id.* The district court

Federal judges also should receive training in the law of international human rights. The session at the 1996 Judicial Conference of the Second Circuit devoted to international human rights⁹² was enlightening as evidenced by the follow-up questions and comments.⁹³ A similar session for judges in all of the other ten federal circuits could perhaps make the federal judiciary "familiar with the law of nations," so that they may feel more "comfortable navigating by it."⁹⁴

B. Educating the Public

Lawyers should educate the general public about universal human rights norms as part of their civic obligations. They should express concern when human rights are violated and not be deterred if their statements possibly could be construed to interfere improperly with the affairs of the State.⁹⁵ They should advise the public about the need for the United States to subject itself

dismissed the complaint without prejudice under Federal Rule of Civil Procedure 12(b)(6). *Id.* at 384. It first concluded that, under *Kadic*, certain of the alleged acts violated the law of nations, regardless of whether they were committed by a state or private actor (for example, genocide), whereas other conduct violated the law of nations only if committed by a state actor (for example, murder and torture). *Id.* at 371. The district court found that plaintiff had not pleaded genocide because it did not plead that Freeport committed acts with the intent to destroy the Amungme group, as opposed to its culture. *Id.* at 372-73. The court also dismissed the claims requiring state conduct on the grounds that plaintiff had not pleaded that Freeport acted under color of state law. *Id.* at 374, 380. Moreover, it dismissed plaintiff's claim under the Torture Victim Protection Act on the grounds that that statute does not apply to a corporation. *Id.* at 381-82. Finally, the court ruled that plaintiff's international environmental torts claims "do not constitute international torts for which there is universal consensus in the international community as to their binding status and their content." *Id.* at 384. After the original dismissal, plaintiff filed two other amended complaints, both of which were dismissed and the latter of which was dismissed with prejudice. *Beanal v. Freeport-McMoRan, Inc.*, Civ. No. 96-1474 (E.D. La. Mar. 3, 1998). The case is on appeal to the United States Court of Appeals for the Fifth Circuit.

92. See *supra* note 4 (describing conference).

93. Judicial Conference, *supra* note 4, 170 F.R.D. at 312-14. For example, Judge Jacobs asked whether if Canada enacted a law comparable to the Alien Tort Claims Act, a judgment could be entered and enforced against the Governor of Texas for violating international norms, including torture, for holding prisoners on Texas's death row. *Id.* at 312. Judge Laval asked if state actors who participate in the death process could be held accountable if an international criminal tribunal is ever established that would have jurisdiction over all crimes against humanity. *Id.* at 314.

94. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (observing that Supreme Court "enforces some principles of international law and some of its obligations some of the time" and reasoning that it appears this is so because of Court's concern about separation of powers and judicial competence and because modern jurists lack diplomatic experience of early Justices).

95. See Hans Corell, *The United Nations and the Legal Community in Promotion of Human Rights*, 21 FORDHAM INT'L L.J. 519, 524 (1997).

to monitoring so that it could "be said to truly follow the ideas of the protection of human rights and can also speak with much more legitimacy when [it] address[es] human rights concerns or violations in other States."⁹⁶ As one United Nations official remarks:

Irrespective of where we serve in the legal community, however, we all have a special responsibility to advance human rights. We are privileged because we have had the opportunity of studying the role of human rights in society under the rule of law. We have an obligation to share this knowledge with others. For a genuine observation of human rights, it is important that this knowledge also be spread to the grass roots.⁹⁷

C. Litigation

When appropriate, lawyers should continue to assert claims based on international human rights norms. As the *Filartiga* court recognized, standards of international law are "evolving," and the courts should apply the international law in effect when the issue is raised.⁹⁸ Thus, the lawyer needs to keep abreast of all of the new developments from whatever possible sources, including new conventions, declarations, and cases.

Lawyers should act deliberately in identifying those norms that are sufficiently specific, universal, and obligatory to meet the test of *Filartiga*. For example, the Ninth Circuit in *Hilao v. Estate of Marcos*⁹⁹ held that while "cruel, inhuman, or degrading treatment" is a universally-recognized norm under international law, it is not sufficiently specific to allow a claim for its violation under the Alien Tort Claims Act.¹⁰⁰ But the district court in *Xuncax v. Gramajo*¹⁰¹ found that torture, ransacking of homes, and bombings qualify as specific examples of "cruel, inhuman or degrading" activity in violation of international law.¹⁰² Clearly, over the next few years, parties will litigate the scope of "cruel, inhuman or degrading."¹⁰³

96. *Id.* at 525.

97. *Id.* at 528-29.

98. *See supra* note 25 and accompanying text (citing *Filartiga*).

99. 103 F.3d 767 (9th Cir. 1996).

100. *Hilao v. Estate of Marcos*, 103 F.3d 767, 795 (9th Cir. 1996).

101. 886 F. Supp. 162 (D. Mass. 1995).

102. *Xuncax v. Gramajo*, 886 F. Supp. 162, 187 (D. Mass. 1995).

103. Another example of the area in which more litigation is likely is "international environmental torts." *See Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 383 (E.D. La. 1997) (discussing *Aguinda v. Texaco, Inc.*, No. 93 CIV. 7527 (VLB), 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994); *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668, 670 (S.D.N.Y. 1991); I PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW: FRAMEWORKS, STANDARDS AND IMPLEMENTATION 183-86 (Philippe Sands ed., 1995)).

Further, lawyers should be mindful of the Torture Victim Protection Act, which now provides a federal cause of action for official torture and extrajudicial killing.¹⁰⁴ But they should also realize that the Torture Victim Protection Act requires a showing that the individuals who have committed torture or extrajudicial killing must have acted "under actual or apparent authority, or color of law, of any foreign nation."¹⁰⁵

It is likely that Congress will enact new laws that require courts to examine international human rights principles. For example, the Antiterrorism and Effective Death Penalty Act of 1996¹⁰⁶ may prompt important decisions on issues such as exemption from the sovereign immunity doctrine and state-sponsored terrorism.

At all times, though, the lawyer should examine each case from the perspective of relevant international human rights principles and, when appropriate, attempt to incorporate those principles into the analysis. As the late Professor Lillich wrote, using the "'indirect incorporation' approach seems to be a sensible strategy for human rights lawyers and a wise policy for U.S. courts concerned with developing the promising relationship between the U.S. Constitution and international human rights law."¹⁰⁷

IV. Conclusion

Professor Kronman reminds us that lawyers should aspire to serve the public good, to be devoted citizens committed to the spirit of the law. As such, we must be advocates for international human rights. And we must do more.

On the day Justice Blackmun announced his retirement from the Supreme Court, he just happened to be giving the keynote address at the Annual Meeting of the American Society of International Law. That day also coincided with Professor Henkin's retirement as President of the Society. Justice Blackmun's concluding statement was a simple reminder to everyone of the work that remains: "I look forward to the day when the majority of the Supreme Court will inform almost all of its decisions almost all of the time with a decent respect to the opinions of mankind."¹⁰⁸ For that day to ever come, we as lawyers must assume our solemn responsibilities on behalf of all of mankind.

104. See *supra* note 61 and accompanying text (discussing claims in *Kadic*).

105. *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (quoting Torture Victim Protection Act of 1991 § 2(a), Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (1994))), *cert. denied*, 116 S. Ct. 2524 (1996).

106. See *supra* note 3 (discussing case finding violation of Act).

107. Lillich, *supra* note 26, at 860 (footnote omitted).

108. Blackmun, *supra* note 94, at 49.