

Comments

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I wholeheartedly agree with Professor Hoffman that the most promising use of international human rights law is as an aid in interpreting federal and state civil liberties and civil rights laws. As I and other members of Human Rights Advocates point out in an article published in the *Texas International Law Journal*,¹ from which much of my talk today is drawn, judges may invoke international law in much the same way and for the same reasons that they refer to legislative history.

I. Areas of Application

I would like to add to Professor Hoffman's list of areas in which it may be useful to use international law to provide additional protections to California residents. First, the Universal Declaration of Human Rights, article 5 and the International Covenant on Civil and Political Rights, article 7 both provide: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This protection is much broader than the prohibition against cruel and unusual punishment and covers persons being detained for treatment such as those who are being held in mental institutions.

Second, in addition to more explicit prohibitions against discrimination, there are specific provisions covering rights of women which would be helpful in expanding women's rights. For example, article 10(2) of the International Covenant on Economic Social and Cultural Rights states:

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.

There are also some provisions that may be helpful in dealing with juvenile justice cases. As an example, article 10(2)(B) of the International Covenant on Civil and Political Rights could have been cited in arguing against proposed legislation to lower the age that juveniles in California may be tried as adults from fourteen to sixteen.

There may be many more areas to add to this list. These can only be developed as people read the international documents and become familiar with their provisions.

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¹Burke, Coliver, de la Vega, and Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 2910328 (1983).

In addition to using human rights law as an interpretive device, certain provisions may be invoked as arguably binding on state and federal courts either as treaty law or customary law. It is to these two uses that I shall address my remarks.

II. Use of Treaties

A. *Rules of Construction*

A treaty becomes the supreme law of the land, of equal dignity with federal statutes, upon signature of the president and the advice and consent of two-thirds of the Senate.² Courts should attempt to construe a treaty and a statute on the same subject so as to give effect to both.³ In particular, courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."⁴ However, where irreconcilable conflicts between treaty provisions and other United States laws do arise, they are to be resolved pursuant to well-established rules. First, a treaty may not infringe upon the provisions of the U.S. Constitution.⁵ Second, if a treaty and a federal statute conflict, the most recent prevails.⁶ And third, if a treaty and state law conflict, the treaty controls.⁷

B. *Self-Executing Treaties*

Once you determine that the U.S. is party to a treaty that arguably controls an issue in your case, the next question to tackle is whether the treaty is self-executing. Only a self-executing treaty is judicially enforceable without implementing legislation.⁸ Various tests have been developed to assist in the determination of whether or not a treaty is self-executing. One test asks whether the treaty "operates of itself, without the aid of any legislative provision."⁹ A second looks to the "intent of the parties" reflected in the treaty's words, and, if the words are unclear, in the circumstances surrounding the treaty's execution.¹⁰ Professor Riesenfeld has proposed a three-step inquiry that would establish a treaty provision to be self-executing if (1) the treaty concerns the rights or duties of individuals; (2) neither the U.S. nor other parties retain discretion to determine if and when to give the words of

²U.S. CONST., art. II § 2, cl.2.

³Whitney v. Robertson, 124 U.S. 190, 194 (1888).

⁴Asakura v. City of Seattle, 265 U.S. 332, 342 (1924).

⁵Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion).

⁶Reid v. Covert, 354 U.S. at 18 n.134.

⁷Zschernig v. Miller, 389 U.S. 429, 440-41 (1968); Missouri v. Holland, 252 U.S. 416, 433-35.

⁸Foster v. Neilson, 27 U.S. (2 pet.) 253, 253 (1829).

⁹*Id.*

¹⁰Cook v. United States, 288 U.S. 102, 119 (1933).

the treaty domestic effect; and (3) no congressional action is required to fulfill the provision's obligations.¹¹

For example, article 7 of the International Covenant on Civil and Political Rights¹² that I mentioned before provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The U.S. is not a party to this treaty although it was signed by President Carter. If the U.S. were a party to the treaty, a strong argument could be made that article 7 is self-executing: it confers rights on individuals; from its language, it appears that it was intended to be given immediate domestic effect; and it does not call for any specific legislative action that would be a prerequisite to its enforcement.

On the other hand, article 11(2) of the International Covenant on Economic, Social and Cultural Rights provides an example of a provision that probably would not be found to be wholly self-executing. Article 11(2) declares that "The states party to the present covenant, recognizing the fundamental right of everyone to be free from hunger, shall take individually and through international cooperation, the measures, including specific programs, which are needed." While the article would establish as fundamental the right to be free from hunger, and therefore, arguably, could be invoked to prohibit a state party from actively interfering with that right, the provision calling for specific programs would not be self-executing since its implementation would require congressional action. Similarly, any treaty provision that requires congressional appropriation of funds would not be self-executing.

The United Nations Charter and the Treaty on Refugees are the only significant human rights treaties that the U.S. has ratified. The U.N. Charter's most important human rights clauses are contained in articles 55 and 56. Article 55 provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 provides that "[a]ll members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55."

Extensive debate has focused on whether article 56 is self-executing. In a frequently cited 1952 opinion, *Sei Fujii v. California*,¹³ the California Supreme Court rejected the argument that articles 55 and 56 are self-executing. The statement is dictum, and in any event, scholars have noted

¹¹Riesenfeld, "The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment," 65 AM. J. INT'L L. 548, 550 (1971).

¹²Supp. No. 16 at 52. G.A. Res. 2200, 21 U.N. GAOR.

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

that, in light of the evolving nature of international human rights law, the question would likely be settled differently today.¹⁴

C. Nature of Rights and Obligations

Once you have proved to the court's satisfaction that the treaty provision you are seeking to have enforced is self-executing, you will have to establish the nature of the rights and obligations created by that provision. Certainly, neither article 55 nor 56 is very specific. Arguably, the International Bill of Human Rights—in particular, the Universal Declaration of Human Rights—provides an authoritative interpretation of articles 55 and 56.¹⁵ In any event, whether authoritative or not, the instruments which comprise the International Bill of Human Rights provide the best guidelines available as to how to interpret the charter's human rights clauses.

I have a few cautionary points to make concerning the use of the above outlined argument. First, cases in which the argument is made must be chosen carefully. As Professor Hoffman noted, we do not want to make bad precedent. Even were we to be victorious in California, any decision that depended upon the application of treaty law would be reviewable by the federal courts.

Second, although it has been suggested that the various instruments that comprise the International Bill of Human Rights may be used to interpret the obligations and rights created by articles 55 and 56, in practice, it is likely to be extremely difficult to persuade a court that these rights include any economic, social or cultural rights not already recognized in U.S. law.

Article 2 of the Covenant on Economic, Social and Cultural Rights states that each state party undertakes to take steps to the maximum of its available resources with a view towards progressively achieving the realization of the rights enumerated in the covenant. The inclusion of the term "progressively achieving" has been interpreted by commentators to impose no immediately binding obligations. However, it may credibly be argued that the term does proscribe backsliding, that is, abolishing rights, and programs that had the effect of implementing those rights, once established. For example, where cutbacks in programs that provide basic services to disabled people result in significant deterioration of their rights to food, shelter, education, medical care or human dignity, an argument may be made that such cutbacks violate the provision requiring progressive achievement.

¹⁴See, e.g., Schlueter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CAL. L. REV. 110, 162n. 291 (1973). See also 19 TEX. INT'L L.J., *supra* n.1, at 303-04.

¹⁵18 TEX. INT'L L.J., *supra* n.1, at 305-08, and cases cited thereat.

III. Use of Customary International Law

International human rights law may also be enforced through customary international law. It is an accepted principle that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."¹⁶

Courts face two major issues when considering whether they may apply customary international law to protect individual rights: whether customary international law may be invoked by an individual in a federal or state court, and how to establish that a particular right is protected by customary international law.

A. *Invocation by Individuals*

In the leading case of *Filartiga v. Pena-Irala*,¹⁷ two Paraguayan citizens brought an action in New York against a former police official from Paraguay for the wrongful death by torture in Paraguay of a member of their family. The plaintiffs claimed jurisdiction under 28 USC section 1331 (federal question) and under the Alien Tort Claims Act,¹⁸ 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." In ruling that the district court did have jurisdiction to hear the case, the Second Circuit found that official torture is now prohibited in customary international law, just as piracy and slave trading have been prohibited since an earlier era. The Second Circuit declared that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."¹⁹

B. *Establishing Protectable Rights*

To determine whether a prohibition against torture is currently part of customary international law, the *Filartiga* court applied the traditional analysis enunciated in *United States v. Smith*²⁰: "The law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."²¹ For the "works of jurists" the *Filartiga* court relied on affidavits of four "distinguished international scholars" who stated unanimously that the law of nations abso-

¹⁶*The Paquete Habana*, 175 U.S. 677, 700 (1900). See 18 TEX. INT'L L.J., supra n.1, at 315.

¹⁷630 F.2d 876 (2nd Cir. 1980).

¹⁸28 U.S.C. § 1350.

¹⁹*Id.* at 881.

²⁰18 U.S. (5 Wheat.) 153 (1820). See also *The Paquete Habana*, 175 U.S. at 700.

²¹*Id.* at 160-61.

lutely prohibits the use of torture. For "judicial opinions" the court cited only a 1978 decision of the European Court of Human Rights that interpreted the European convention's prohibition against torture.²²

Most importantly, the court relied on "the usage of nations" which it found to be evidenced in several ways. First, it found evidence of the existence of a right to be free from torture in articles 55 and 56 of the U.N. Charter, the Universal Declaration of Human Rights²³ and the U.N. Declaration on Torture.²⁴ Second, it looked to express language in three multilateral treaties (the International Covenant on Civil and Political Rights,²⁵ the American Convention²⁶ and the European Convention),²⁷ and to anti-torture prescriptions in the laws of many nations and general condemnation of torture by all nations as indicative of "the modern usage and practice of nations." The court added that "the fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."²⁸ Finally, the court relied on a Justice Department memorandum, and on a State Department report finding that "there now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens."²⁹

I have described the *Filartiga* brief at such length because it provides a clear example of how customary international law may be applied in domestic courts. Commentators have noted that several jurisdictional issues not raised in *Filartiga* may limit its precedential value. Nevertheless, it is ground-breaking in its recognition of the power of customary international law to confer judicially enforceable rights on individuals, and on clarifying the manner in which customary international human rights law is to be ascertained in U.S. courts. It is an exciting case; its applicability to other actions is being tested in several currently pending cases.

Other recent cases that have mentioned the possible applicability of customary international law in conferring rights on individuals, while, however, relying on international law only as an interpretive device, include *Rodriguez v. Wilkinson*³⁰ and *Lareau v. Manson*.³¹

²²*Ireland v. U.K.*, (1978) Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Eur. Ct. of Human Rights).

²³G.A. Res. 217A, U.N. Doc. A/810 (1948) (adopted unanimously).

²⁴Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34), U.N. Doc. A/10034 (1975).

²⁵See note 12, *supra*, 654 F.2d 1382 (10th Cir. 1981).

²⁶American Convention on Human Rights, *done* November 22, 1969, O.A.S.T.S. N. 36 at 1 (1970), *reprinted* in 9 I.L.M. 673 (1970) and R. LILLICH AND F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* (1979).

²⁷European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* November 4, 1950, Europ. T.S. N. 5, *reprinted* in R. LILLICH AND F. NEWMAN, *id.*

²⁸630 F.2d at 884, n.15.

²⁹*Id.* at 884.

³⁰654 F.2d 1382 (10th Cir. 1981).

³¹507 F. Supp. 1177 (D. Conn. 1980), *modified* 651 F.2d 96 (2d Cir. 1981).

There are several difficulties in urging that international law be applied either as treaty law or customary international law. All I have attempted to do here is to outline how the arguments may be made. I expect that Judge Linde will explore these difficulties at greater length.

