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## Comments

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# Comments

HANS A. LINDE\*

I am here today not because I am an expert in international human rights law, but because I am a judge who has written an opinion which refers to that source of law. I suppose I am here more in the nature of an exhibit than as a person who is going to teach you any law. You can take what I say as illustrative of what you may face in actually talking to a domestic court about international human rights law.

I commend Professor Hoffman and Ms. de la Vega on their excellent presentations. When I discuss many of the same concepts that they have already discussed from a somewhat different perspective and with greater skepticism, this should not be regarded as disagreement with their understanding of the law. Rather, I intend to offer you some insight on what you may encounter from the other side of the bench.

Out there in the world of people who have not had the good fortune to attend conferences on international human rights law, it is largely taken as an article of faith that the United States provides the best protection for human rights in the world. If there are any rights recognized in international law that are not recognized in U.S. law, people may assume that there is a good reason for that nonrecognition. On the other hand, whether or not our protection of human rights is the best, there is a strong urge to agree that it *should* be the best. These ingrained perspectives give you both an opportunity and a challenge.

You may as well assume, simply as a matter of probability, that these views also are likely to prevail among the judges you will face. If we judges have not yet decided to recognize a certain right under one of the numerous, elastic clauses that are available to courts in this country, we probably believe that there is a good reason why we haven't. A lawyer who comes to tell us that we should follow some principle because it is part of an evolving body of international human rights law has a lot of explaining to do. But we also take pride in American law as being in the lead on individual human rights. These attitudes, I think, are important in understanding what role international human rights materials can play in domestic courts.

It is potentially a powerful argument to say to a court that a right which is guaranteed by an American constitutional provision, state or federal, surely does not fall short of a standard adopted by other civilized nations.

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It is a much more difficult, and riskier, argument to tell a court that it must displace some law of a state, or of the United States, with an external international standard.

A lawyer considering the use of international human rights law in a national court, state or federal, must consider carefully whether he or she means to claim the international document as a source of standards for the proper application of the nation's own law, or as a source of legally binding obligations. A lawyer must tell a court clearly whether he or she is asserting a claim under international law, or presenting an international norm in support of a desired interpretation of our domestic law.

To point to the international standard as a goal or an achievement to be matched may prove very successful. To point to it as an external law to be obeyed may backfire. It may backfire because, unless the legally binding nature of the international source is clear and strong, opposing counsel and the court may give more time and attention to refuting the claim that the international source has binding force than to looking at the substance of the human rights in question.

The use of human rights norms as customary international law, so ably outlined by Ms. de la Vega, is undeniably appealing. Here we have documents full of more or less eloquent and powerful language, adopted in many cases by unanimous vote in the United Nations, the Organization of American States, or the European Commission on Human Rights. Eminent authorities, including Frank Newman, Louis Sohn, Louis Henkin, and Anthony D'Amato, have devoted a great deal of very able effort to showing (1) that the "pledge" made by U.N. members under article 56 of the charter to take separate as well as joint action in cooperation with the organization to promote human rights created an obligation binding on the United States, and (2) that the aggregate international bill of human rights offers an authoritative, or at least persuasive, interpretation of the article 56 obligation.

I have little problem with those separate conclusions. Assuming they are correct, nevertheless, they are insufficient to establish the direct applicability of international documents in domestic courts. Incantation of the classic formula that the law of nations is part of the law of the United States, referred to by both Professor Hoffman and Connie de la Vega, by itself is not enough to establish that even the most widely accepted norms of human rights law displace American law in American courts.

The U.N. Charter, of course, is a treaty and part of the "supreme law of the land." But the Universal Declaration on Human Rights was deliberately drafted not to be a treaty. Other human rights documents that were drafted to be treaties or covenants have not been ratified by the United States. These have been deliberate governmental decisions not to under-

take certain legal obligations, made with full attention to the choices among instruments that are designed to create one or the other legal effect.

The problem in establishing that a provision of an international document binds our courts as domestic law is that you must show a decision on the part of our government to be so bound. And you cannot show such an intention regarding any instrument other than treaties or similar formal agreements. Other declarations and draft conventions are entered into simply by presidential instructions to ambassadors. They reflect no more than a presidential decision that a certain stance in one of the international forums, or a particular speech, or a vote for a specific declaration advances the foreign policy interests of the United States. Presidents generally do not mean to make domestic law by these means. Ordinarily they take great care to reassure everyone, including the Congress, that they are not making any law binding on this country by voting for or even signing international human rights documents. Even when a President has signed a draft convention that is intended to be a proposed treaty, he or his successor often has decided not to submit the convention for the advice and consent of the Senate, or perhaps to submit it with the explicit reservation that the ratified treaty would have no domestic effect.

For instance, Dean Rusk, who worked with Eleanor Roosevelt in her efforts to have the Universal Declaration of Human Rights unanimously adopted, wrote in a recent article that it was perfectly well understood at the time that the signing of the declaration would have no legal consequences within the United States.<sup>1</sup>

The President has no delegated constitutional power to define the human rights of people in American courts by his unilateral act. Even if the duty of members of the United Nations to cooperate with the U.N. in human rights matters can be exercised by the president alone without participation by the Congress in matters within his powers, the president has not purported to make domestic law by any such agreement, as Secretary Rusk pointed out. The possibility that a president might claim such a power was the driving force behind the Bricker amendment proposed by isolationists thirty years ago and debated in Congress and among lawyers for several years.

Human rights enthusiasts understandably welcome any theory that promises to promote human rights without too much scrutiny of its implications. But the trouble with theory is that it always extends beyond the immediate case. We have learned to be cautious about unilateral executive power to act in domestic affairs, say, to settle a labor dispute by seizing the steel industry. Why should the executive have more domestic power by

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<sup>1</sup>Rusk, D., *A Comment on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 311 (1981)—Ed.

agreeing with other governments, say, to assure equal employment rights in the steel industry? If the president can make human rights law for the United States by having an ambassador make a speech, negotiate a declaration, or cast a vote in the General Assembly, can he make other kinds of American law by the same means? Could he, for instance, act on his own to override the property law of the states and transfer property from one claimant to another?

The Supreme Court's case law actually shows this ambivalence. The *Belmont*<sup>2</sup> and *Pink*<sup>3</sup> decisions around 1940 held that President Roosevelt could change the law governing bank deposits in New York in the course of agreeing to recognize the Soviet government in 1933. By taking an assignment of Soviet claims to Russian assets in New York, the president apparently could deprive other Russians, perhaps White Russian refugees living in Paris or in Shanghai, of whatever property they had under New York law. The argument that this took private property without just compensation was met with the answer that "our Constitution . . . has no extraterritorial operation, unless in respect of our own citizens."<sup>4</sup> The Litvinov assignment may have been good foreign policy, but it sheds another light on making domestic human rights law by executive foreign policy declarations, in or out of the United Nations.

I would be concerned if the president, by making a speech or signing a declaration or even a proposed convention could, for instance, commit states to expend money to assure certain educational or other rights, in derogation of the states' own laws. Such a shift of the taxing power from the states to the president would represent a major restructuring of the constitutional allocation of power. I have no doubt that the United States could commit itself to expend money by ratification of a treaty. But this is far from empowering a court to mandate a state to spend money in order to help the United States achieve some general treaty goal, even at the wish of the national executive. That depends on the issue, addressed by Ms. de la Vega, when a treaty is designed to be self-executing.

In short, if you are to succeed with your argument that a provision of human rights law is law in a domestic court, you must be able to show that the national lawmakers, by treaty or otherwise, intended this effect. This, at least, is the kind of skeptical reaction that a lawyer is likely to meet if he or she tries to convince a court to apply purely declaratory international human rights documents as legally binding on the court. But often there is no need to take on that burden.

If instead, you argue that a court should look to international instruments to assist it in interpreting a domestic statute or constitution, then you are

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<sup>2</sup>U.S. v. Belmont, 301 U.S. 324 (1937)—Ed.

<sup>3</sup>U.S. v. Pink, 315 U.S. 203 (1942)—Ed.

<sup>4</sup>U.S. v. Belmont, 301 U.S. 324 (1937)—Ed.

asking the court to do what it is empowered to do and using international law in the process. Moreover, an advocate wishing to invoke international human rights norms reasonably could argue that an applicable domestic law already contains the protections that the claimant contends, but that, if the court were not to accept this view, then the court might well find itself running afoul of national policy as expressed by the United States government through its participation in international human rights activities and declarations.<sup>5</sup>

As I said at the outset, Americans, and especially the legal profession, are prepared to believe that our own bills of rights, state or federal, embody just about any human right worth mentioning. Those bills of rights also contain clauses that some courts have considered elastic enough to stretch over a lot of territory. So if a court is persuaded of the merits of a particular human rights claim, the court almost certainly can recognize that claim under a clause of a state constitution or of the federal constitution without venturing onto the thin ice of making doubtful precedents about the domestic effects of executive declarations in international forums.

I venture a guess that arguments invoking international human rights standards would have the greatest chance of success in matters where the claim invokes an issue of international interest, or where other countries and international agencies have had greater experience than has the United States. Examples may include the treatment of aliens, the legal status and rights of diverse racial, ethnic, linguistic, religious and nationality groups, and the treatment of detained persons.<sup>6</sup>

In conclusion, I want to leave you with a theme that for twenty years has been a favorite of Frank Newman's and mine, and that Paul Hoffman also mentioned; namely, that it is a grave mistake to think that courts are the only forums in which human rights law is made or developed. The harder, less immediately rewarding, but more important pursuit of international human rights, as of other policies, occurs not in the courts, but in persuading those responsible for policymaking, in the Congress, the State Department, and the White House that Americans care about human rights abroad as well as at home. The fact that so many of you have turned out for Southwestern's conference is impressive evidence of the continuing interest in our human rights policies.

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<sup>5</sup>*Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968) *reh. denied* 390 U.S. 974, 88 S. Ct. 1018, 19 L. Ed. 2d. 1196 (1968)—Ed.

<sup>6</sup>*Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981)—Ed.

