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International Human Rights Law in United States Courts: A Comparative Perspective

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INTERNATIONAL HUMAN RIGHTS LAW IN UNITED STATES COURTS: A COMPARATIVE PERSPECTIVE

*Anne Bayefsky and Joan Fitzpatrick**

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INTRODUCTION

Claimants to the protection of international human rights norms have asked American courts to enforce, or at least take account of, those norms with increasing frequency and in a striking variety of contexts. The response of the courts has been largely, though not uniformly, disappointing.¹ The few modest successes have provoked a backlash among some academic commentators and policy-makers.²

The barriers that stand in the way of domestic enforcement of international human rights law often have poor foundations. Even those courts that do accept such international norms seldom offer complete bases for their reliance. At the root of the problem is the indefinite character of international law, both customary and conventional, and the lack of agreement or understanding of its proper role in the domestic legal order. Real or imagined confrontations with the political branches of government add further complications when the judiciary uses human rights norms to protect individuals. Both the specter of countermajoritarianism and the legitimacy of non-interpretive judicial review lurk in the background, often unacknowledged.

The opponents of judicial enforcement of international human rights norms ground their opposition on a rather vaguely articulated conception of democracy.³ Their concerns focus on the lack of clear

1. The key successes have been *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987), *modified*, 694 F. Supp. 707 (N.D.Cal. 1988); *Von Dardel v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990); *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D.Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

2. See, e.g., John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986); Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988); Note, *Agora: May the President Violate Customary International Law?* 80 AM. J. INT'L L. 913 (1986), 81 AM. J. INT'L L. 371 (1987); Brief for the United States as Amicus Curiae, *Trajano v. Marcos*, No. 86-2448 (9th Cir. July 10, 1989) (copy on file with *Michigan Journal of International Law*).

3. See, e.g., Trimble, *supra* note 2; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.

acquiescence in the asserted norms by the elected branches of government. In response, some commentators concede that judicial invocation of international norms for the protection of individual rights is anti-democratic but argue, nevertheless, that it is desirable.⁴ We suggest that the international law-making process through which human rights norms have evolved is consistent with republican traditions in American government and thus not outside the realm of legitimate judicial reference.

This article will catalogue the various contexts in which United States courts have agreed or refused to follow international human rights law, treating separately the larger number of cases concerning customary norms, the relatively small group of cases relating to human rights treaties, and the cases in which international norms are referenced without regard to their status as binding law. In each of these sections we will analyze areas of confusion, disagreement, or under-development in international legal doctrine that impede the productive use of human rights norms by domestic courts. We will also compare the approaches of United States courts with the attitudes taken by courts in other democracies that share a common English legal heritage. The experience of Canada and the United Kingdom indicates that greater acceptance of international human rights standards by the political branches of government, as manifested both by ratification of human rights treaties and by the adjudication of individual complaints by treaty implementation bodies, does not necessarily translate into greater and more principled acceptance of international human rights norms by domestic courts. Finally, we will confront directly the underlying factor debilitating the judicial use of international human rights law — namely, the countermajoritarian issue.

I. CUSTOMARY LAW

A. *The Basic Rule in the United States*

Customary international law involves a consistent practice in which states engage out of a sense of legal obligation.⁵ Unlike treaties, which bind only those states that ratify or accede to them, customary law binds all states that have not consistently objected to the norm

Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (concurring opinions of Bork & Robb, JJ.); *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Scalia, J.).

4. *See, e.g.*, LOUIS HENKIN, *THE AGE OF RIGHTS* 105 (1990), "To the framers, the fact that judicial review was undemocratic was not critical, indeed hardly relevant: the founders were republicans not democrats."

5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT (THIRD)].

during the process of its emergence.⁶ Because the United States has been reluctant to ratify human rights treaties, particularly those with a potential domestic impact,⁷ the nature of customary human rights law is the key issue relating to the enforceability of human rights norms in United States courts.

The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES sets forth the basic principles defining customary international law and its incorporation into the "law of the land" pursuant to Article VI of the Constitution.⁸ In the oft-quoted words of the Supreme Court in the case of *The Paquete Habana*:

6. See generally, Ted L. Stein, *The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985).

7. The United States has ratified the following human rights treaties:

Slavery Convention of 1926, *opened for signature*, September 25, 1926, 60 L.N.T.S. 253;

Protocol Amending the Slavery Convention of 1926, *opened for signature*, Dec. 7, 1953, 182 U.N.T.S. 51. The U.S. is not a party to other amendments that went into force in 1955, 212 U.N.T.S. 17;

Convention on the Political Rights of Women, *opened for signature*, Mar. 31, 1953, 193 U.N.T.S. 135;

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *opened for signature*, Sept. 7, 1956, 266 U.N.T.S. 3;

Protocol Relating to the Status of Refugees, *opened for signature*, Jan. 31, 1967, 606 U.N.T.S. 267;

Minimum Age (Sea) Convention (Revised), *opened for signature*, Oct. 24, 1936, 40 U.N.T.S. 205;

The Charter of the Organization of American States, *opened for signature*, Apr. 30, 1948, 119 U.N.T.S. 3; The Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607 (1970);

The Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature*, Dec. 11, 1948, 78 U.N.T.S. 277.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature*, Dec. 10, 1984, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1985) (signed 1988, advice and consent of the Senate given on October 2, 1990, deposit of instrument of ratification pending).

The International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407 6316 (1967) (signed 1977, advice and consent of the Senate given on April 2, 1992, instrument of ratification deposited June 8, 1992).

The United States has signed but not ratified the following human rights treaties:

The International Covenant on Economic, Social and Cultural Rights, *opened for signature*, Dec. 19, 1966, 993 U.N.T.S. 3 (signed by the United States in 1977).

The Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, Mar. 7, 1966, 660 U.N.T.S. 195 (signed by the United States in 1978).

The American Convention on Human Rights, O.A.S. Nov. 22, 1969, Treaty Series No. 36, OAS DOC. OEA/Ser.A/16 (1970) (signed by the United States in 1978).

The Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature*, March, 1, 1980, 1249 U.N.T.S. 13 (signed 1980).

8. RESTATEMENT (THIRD) §§ 102, 111-115. Michael Glennon notes that the phrase "the law of the land" is derived from the Magna Carta, in a passage concerning freedom from arbitrary arrest. Thus, human rights lie at the heart of the concept. Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?* 80 NW. U. L. REV. 321, 335 (1985).

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. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.⁹

A controlling executive act has been interpreted as an act of the President acting within constitutional authority, and also the acts of executive departments to whom that authority may be delegated.¹⁰

The United States has a "monist" system, which automatically incorporates international law into the law of the land,¹¹ as opposed to a "dualist" system which confers domestic legal effects only upon those international norms specifically transformed into domestic law. Customary international law is now widely seen as a type of federal common law (*i.e.*, non-statutory law) which would logically take precedence over contrary state law under the Supremacy Clause.¹² Moreover, a well-established interpretive principle requires courts to interpret acts of Congress to be in conformity with international law, including customary law, if at all possible.¹³

B. *The Impact of Customary International Law in United States Courts*

The impact of customary law on U.S. domestic law falls into three basic categories: (a) specific incorporation into U.S. law, particularly by the Alien Tort Claims Act, (b) directly founding a right of action, and (c) as an aid in interpretation of U.S. law, including the federal and state constitutions.

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

10. In *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986), the Eleventh Circuit held specifically that the decision of the Attorney General to detain unadmitted aliens indefinitely without hearings, pending efforts to deport, was a controlling executive act.

The decision has been criticized by the Reporter of the RESTATEMENT (THIRD), *supra* note 5, from whose Draft Restatement (Tentative Draft No. 6, § 135, Reporter's note 3) the Court had quoted. The reporter states: ". . . the President may have the power to act in disregard of international law 'when acting within his constitutional authority,' but the Court of Appeals failed to find any constitutional authority in the President to detain the aliens in question." Reporter's note 3 at 67.

11. *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

12. RESTATEMENT (THIRD) § 111(1).

13. *Id.* § 114. This basic understanding is beguilingly simple, and the complexities of the nature of customary international law will be examined later in this article. See *infra* text accompanying notes 113-67.

1. Specific Incorporation of Customary International Law by United States Law

In recent years scholarly attention has focused on cases brought under the Alien Tort Claims Act, 28 U.S.C. § 1350 (ATCA), a provision in the original Judiciary Act of 1789 which provides federal district court jurisdiction over suits by aliens involving torts committed in violation of treaties or the law of nations. The ATCA was revived in 1980 in the famous, commentary-spawning case of *Filartiga v. Pena-Irala*.¹⁴ It concerned a claim for damages brought by the survivors of a Paraguayan torture victim against the Paraguayan police chief who conducted the fatal torture. The lawsuit was brought because neither Paraguayan nor international courts were available to provide justice, as Paraguayan courts were too dominated by the dictatorship to respond effectively and no international court had jurisdiction over the claim. Public interest law firms concerned with the promotion of human rights law assisted the exiled survivors in bringing the case in federal court in New York. Jurisdiction in the United States resulted from the fortuity of the defendant torturer's physical presence in New York. The *Filartiga* plaintiffs were eventually awarded \$10,385,364 in damages.¹⁵

Filartiga inspired public interest lawyers to raise similar claims, seeking to develop human rights doctrine, document violations, instill a fear in human rights abusers of eventual accountability, and provide at least symbolic relief to individual victims to assist them in their mourning or healing process. In a case like *Filartiga*, the plaintiff is seeking direct enforcement of norms derived from customary human rights law as the basis for the recovery of money damages, generally against another individual who has used official power to deprive the victim of fundamental rights recognized in international law. As noted by Yale Law School Professor Harold Koh, these cases serve both the traditional tort aims of compensating victims and deterring wrong-doers, as well as the more abstract objective of promoting pub-

14. 630 F.2d 876 (2d Cir. 1980). The revival of the ATCA in *Filartiga* has triggered an avalanche of commentary, raising a number of puzzling and sometimes highly technical legal questions (see, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986); Rogers, *supra* note 2), some of which will be explored below.

15. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984). The issue of damages was settled by the District Court on remand, in a default judgment entered against the defendant. The District Court's decision concerning damages thoughtfully explores important choice of law issues. *Id.* at 863-65.

lic international law.¹⁶ But certain practical considerations have limited litigation under the ATCA. First, the plaintiff must be an alien;¹⁷ in addition, in the common scenario where the defendant is also an alien (usually a former official of a foreign government), the defendant must be physically present in the United States in order to be subject to personal jurisdiction.

Cases subsequent to *Filartiga* have produced mixed results and have raised some serious questions about the status of customary international law in the United States. *Tel-Oren et al. v. Libyan Arab Republic*¹⁸ concerned tortious acts arising from an armed attack on a civilian bus in Israel. The action was brought by the survivors and representatives of those who were murdered. Although the case produced no majority opinion, the entire three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit agreed that the plaintiffs' claims were not judicially enforceable. Judge Edwards endorsed the legal principles in *Filartiga*,¹⁹ but distinguished the case on the basis that terrorism by non-state actors did not violate the law of nations. Judge Bork, however, favored limiting the alien tort actions to those recognized in 1789 when the original statute was passed; this meant "[v]iolation[s] of safe-conducts; . . . [i]nfringement of the rights of ambassadors; and . . . [p]iracy."²⁰ In any other context, if the law of nations did not explicitly provide a cause of action independently of the ATCA, no cause of action would arise by virtue of the ATCA itself.²¹ And, in Judge Bork's view, "[c]urrent international human rights law, in whatever sense it may be called 'law,' . . . does not today generally provide a private right of action,"²² and it was not sufficient to show that the defendant's actions violated the substantive law of nations. Judge Robb decided the case was simply nonjusticiable on the basis that it raised a political question.²³ Though *Tel-Oren* was closely watched, the divergent approaches of the panel members and

16. Harold H. Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169 (1987).

17. 28 U.S.C. § 1350 (1988) permits suits by aliens for a tort only in violation of treaties or the law of nations. The Torture Victims Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992), signed into law on March 12, 1992, extends federal jurisdiction to civil suits against foreign officials by United States citizens alleging torture or extrajudicial killing, as defined in the Act.

18. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

19. 726 F.2d at 791.

20. *Id.* at 813 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 68, 72 quoted in 1 W. W. CROSSKEY, POLITICS AND CONSTITUTION IN THE HISTORY OF THE UNITED STATES 459 (1953)).

21. *Id.* at 816.

22. *Id.* at 819.

23. *Id.* at 823.

the unusual nature of the claims and the parties have limited its impact.

Subsequent cases suggest that *Filartiga* and Judge Edwards' approach in *Tel-Oren* will generally be followed in suits brought under the ATCA, but that issues of sovereign immunity, head of state immunity or act of state may be raised as barriers to relief. In *Forti v. Suarez-Mason*,²⁴ the case most analogous to *Filartiga*, Argentine citizens residing in the United States brought suit under the ATCA against a former Argentine general. They sought damages for torture, murder and prolonged arbitrary detention allegedly committed by police and military personnel under the general's authority and control. Judge Jensen followed *Filartiga* and Judge Edward's opinion in *Tel-Oren* and held it was "unnecessary that plaintiff establish the existence of an independent, express right of action . . . Rather, a plaintiff seeking to predicate jurisdiction on the Alien Tort Statute need only plead a 'tort . . . in violation of the law of nations.'"²⁵ The court went on to examine which of the plaintiffs' allegations constituted violations of the law of nations.²⁶ It concluded that it had jurisdiction with respect to the claims for prolonged arbitrary detention and summary execution, dismissing claims relating to causing disappearance and cruel, inhuman, and degrading treatment.²⁷ Subsequently, the court granted a motion to reconsider with respect to causing disappearance, but not with respect to cruel, inhuman, or degrading treatment.²⁸

24. 672 F. Supp. 1531 (N.D.Cal. 1987), *aff'd in part and rev'd in part*, 694 F. Supp. 707 (N.D.Cal. 1988).

25. *Id.* at 1539.

26. In the course of the judgment, the court defined certain customary norms about violations of international tort law as "universal, definable and obligatory." *Id.* at 1540. This definition led the court to conclude that torture, arbitrary detention, murder, and summary execution were violations of international customary law.

27. The Court held that causing the disappearance of an individual and cruel, inhuman and degrading treatment were not violations of customary international law. The basis of the latter conclusion was that these proposed torts lacked "universality" and "definability." *Id.* at 1543.

Here the Court was simply incorrect in stating that establishing customary international law requires uniform practice. In the words of the International Court of Justice in *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, at 98:

[t]he Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.

See also *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 104.

28. *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D.Cal. 1988). During the same period of time that these cases were heard, Argentina sought extradition of former General Suarez-Mason on charges of murder, kidnapping and forgery. The District Court certified the extradition. *Extradition of Suarez-Mason*, 694 F. Supp. 676 (N.D.Cal. 1988).

The Court in *Forti* held that "causing disappearance" is a wrong in customary international law and that the tort can be defined as "(1) abduction by state officials or their agents; followed

In both *Filartiga* and *Forti*, the particular foreign state official responsible for the human rights violations could, coincidentally, be physically found within the United States. Similar cases have been brought against exiled Philippine dictator Ferdinand Marcos, Haitian General Prosper Avril, a former Ethiopian government official, and a Guatemalan general.²⁹ Absent the fortuitous presence of the defendant, plaintiffs have occasionally attempted to sue foreign governments under the ATCA. Such suits have been unsuccessful unless the plaintiff could satisfy one of the specific exceptions codified in the Foreign Sovereign Immunities Act (FSIA),³⁰ which contains no explicit human rights or *ius cogens* exception.³¹

Early efforts to bring human rights suits against foreign sovereigns appeared promising. In *Von Dardel v. U.S.S.R.*,³² Judge Parker of the District Court for the District of Columbia considered an action brought by a half-brother and legal guardian of the Swedish diplomat Raoul Wallenberg against the Soviet Union. The action concerned the unlawful seizure of Wallenberg in 1945 and his subsequent imprisonment and possible death. The court initially held that the ATCA provided jurisdiction to consider the case: plaintiffs were aliens, the causes of action brought were in tort, and the doctrine of diplomatic immunity was an area of international law in which standards and norms were well-defined as part of the law of nations (thus satisfying even Judge Bork's historical criteria for application of the Act).³³ The U.S.S.R. chose not to defend the case and the district court entered default judgment against it, ruling that foreign sovereign immunity did

by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate," 694 F. Supp. at 711.

The Court altered in part the standard required to establish customary law and determined that the "plaintiffs need not establish unanimity among nations. Rather, they must show a general recognition among states that a specific practice is prohibited." *Id.* at 709. At the same time, the Court continued to insist that "cruel, inhuman or degrading treatment" was not a violation of customary law because it was not definable. The Court said it could not determine whether the norm encompassed, for example, purely psychological harm, or purely verbal conduct; and, even if it could theoretically make this determination, what would constitute grossly humiliating verbal conduct will vary from culture to culture.

The result is at odds with the RESTATEMENT (THIRD) § 702, and common sense, since "cruel, inhuman and degrading treatment" in international law would appear to be no less definable than the Eighth Amendment's "cruel and unusual punishment," or for that matter many other constitutional rights.

29. See *infra* notes 69-75. See also, Paul v. Avril, No. 91-0399 (S.D.Fla. filed Feb. 28, 1991); Abebe-Jira v. Nagawo, No. 90-2010 (N.D.Ga. filed Sept. 13, 1990); Xuncax v. Gramajo, No. 91-11564WD (D.Mass. filed June 6, 1991).

30. 28 U.S.C. §§ 1330, 1602-1611.

31. See Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary or Possible?* 86 PROCS. AM. SOC. INT'L L. — (forthcoming).

32. 623 F. Supp. 246 (D.D.C. 1985).

33. *Id.* at 259.

not bar the suit. When the Soviet government filed a belated limited appearance to contest the court's jurisdiction in 1989, however, Judge Robinson of the district court granted a motion to vacate the judgment and dismissed the action for lack of jurisdiction under the FSIA.³⁴ The district court found no applicable explicit exceptions in the FSIA and noted that plaintiffs appeared to have abandoned their argument that an implied exception for torts that constitute fundamental human rights violations should be recognized.³⁵

The scenario in *Siderman v. Republic of Argentina*³⁶ followed a similar though temporally more compact course at the district court level. Siderman was a torture victim of the Argentine military government who had also had valuable property confiscated. He sued the Argentine government under the ATCA. Siderman argued that sovereign immunity should not be an available defense when fundamental human rights norms have been violated, even though there is no explicit provision to that effect in the FSIA, pressing the issue that was avoided in *Von Dardel II*. After first entering a default judgment for the plaintiffs, Judge Takasugi eventually dismissed on the ground that the lack of an explicit exception in the FSIA for human rights claims based on torts committed abroad deprived the court of jurisdiction.³⁷ As in the second round of *Von Dardel*, a key event in the *Siderman* litigation was the intervention of the executive branch of the U.S. government to urge the court to reconsider the foreign government's immunity.³⁸

The U.S. Supreme Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*³⁹ reinforced the district court's belated, narrow interpretation of the FSIA in *Siderman*. Liberian corporations brought the action against Argentina under the ATCA for destruction of an oil tanker on the high seas in violation of customary norms concerning the rights of neutral shipping. The Court held that the ATCA could not be applied to violations by foreign states unless the suit fell

34. *Von Dardel v. U.S.S.R.*, 736 F. Supp. 1 (D.D.C. 1990) (*Von Dardel II*).

35. *Id.* at 3, 7 n.11. Plaintiffs unsuccessfully pressed arguments of a Soviet waiver under FSIA § 1605(a)(1), direct conflict with existing treaty obligations under § 1604, and the non-commercial tort exception under § 1605(a)(5). (The last argument was rejected because the entirety of the tort did not occur within the United States.)

36. No. CV 82-1772-RMT (C.D.Cal. March 12, 1984) *vacated*, No. CV 82-1772-RMT (C.D.Cal. March 7, 1985), *reversed*, 965 F.2d 699 (9th Cir. 1992), *cert. pending*.

37. *Id.*

38. *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (C.D.Cal) (Suggestion of Interest of the United States, filed January 24, 1985); *Von Dardel v. U.S.S.R.*, 736 F. Supp. 1, 2 (D.D.C. 1990) (statement of interest by United States Government in support of U.S.S.R. motion to vacate and dismiss).

39. 488 U.S. 428 (1989).

within one of the codified exceptions to foreign sovereign immunity in the FSIA. The Court specifically noted that the ATCA "of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states."⁴⁰ The narrow approach to the FSIA in *Amerada Hess* also became the basis for the subsequent dismissal in *Von Dardel*, even though the Court did not speak directly to the important argument that an implicit exception should be read into the FSIA for certain fundamental rights cases.⁴¹

That argument was fully considered and rejected, with apparent reluctance, by the Ninth Circuit on appeal in *Siderman*.⁴² Judge Fletcher's powerfully written opinion notes the "extraordinary consensus" that "the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*."⁴³ She acknowledges the force of plaintiffs' argument that "since sovereign immunity itself is a principle of international law, it is trumped by *jus cogens*."⁴⁴ She agrees that

[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act. A state's violation of the *jus cogens* norm prohibiting official torture therefore would not be entitled to the immunity afforded by international law.⁴⁵

While noting numerous indications in the legislative history of the FSIA of a Congressional intent to reflect existing international law doctrines of sovereign immunity in the FSIA,⁴⁶ Judge Fletcher regretted that the court could "not write on a clean slate."⁴⁷ Looking through the "prism of *Amerada Hess*,"⁴⁸ Judge Fletcher acceded to its demand for explicitness in the statutory exceptions to immunity, concluding that if *jus cogens* violations "are to be exceptions to immunity, Congress must make them so."⁴⁹

40. In coming to this conclusion the Court explicitly distinguished *Filartiga*, saying that, in that case, the Paraguayan Government was not a defendant. *Id.* at 437 n.4.

41. 736 F. Supp. at 3. See Adam C. Belsky, Mark Merva & Naomi Roht-Arriaza, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989). See also Jordan J. Paust, *Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law under the FSIA*, 8 HOUSTON J. INT'L L. 49 (1983).

42. *Siderman v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. pending.

43. *Id.* at 717.

44. *Id.* at 718.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 719. The torture claims may still go to trial based on the "implied waiver" exception of 28 U.S.C. § 1605(a)(1), based on Argentina's invocation of the jurisdiction of the Superior Court of Los Angeles County to serve José Siderman with a letter rogatory in a criminal action brought against him by Argentine military officials. This and issues concerning potential excep-

The executive and legislative branches of the U.S. Government have in recent decades favored the doctrine of "restrictive" sovereign immunity over the traditional doctrine of absolute immunity of the sovereign from suit in the courts of a foreign state.⁵⁰ Restrictive sovereign immunity generally protects foreign governments from suit in domestic courts for their governmental but not their commercial activities. Human rights violations are generally governmental rather than commercial actions, though occasionally a case may arise that successfully combines these elements. One noteworthy example is *Nelson v. Saudi Arabia*,⁵¹ where the plaintiff's recruitment within the United States established the necessary commercial activity to fit within an exception to the FSIA, though the gravamen of the suit was a claim for damages due to torture and arbitrary detention. The use of domestic courts as fora for redress of foreign human rights violations is a subject that remains little explored by the international community.⁵² In codifying the restrictive doctrine in the FSIA, Congress actually expanded the judicial role in two ways. First, it obviated the need for the courts to seek specific instruction from the State Department regarding dismissal on sovereign immunity grounds. This increases the decision-making autonomy of the judiciary. Second, it clarified the courts' power to entertain a number of suits naming foreign governments as defendants. This could both increase the caseload of the courts and expose them more frequently to delicate matters with possible foreign relations implications. One motivation for enacting the FSIA was to place these sensitive issues in the hands of the non-political judiciary,⁵³ thus relieving the executive branch from the "heat" generated by exposing a reluctant foreign sovereign to potential liability.

The U.S. Supreme Court's approach to the FSIA in *Amerada Hess* signals severe constraints on the courts to prevent recognition of implicit exceptions to foreign sovereign immunity. Judge Fletcher in *Siderman* emphasizes that the lower courts must heed not only the Court's specific holding in *Amerada Hess* but also its "formulation and

tions to the FSIA applicable to the Sidermans' claims for wrongful expropriation of property are to be considered by the District Court on remand. *Id.* at 712-13, 722.

50. See Belsky et al., *supra* note 41 at 368 n.17, 376-81.

51. 923 F.2d 1528 (11th Cir. 1991), *cert. granted*, 112 S.Ct. 2937 (1992).

52. CHRISTOPH H. SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 60 (1988) raises concerns that the practice, especially if pursued by states that do not accept mechanisms for international adjudication of human rights claims, is vulnerable to criticism as being politically motivated on the part of the forum state government. While this danger must be acknowledged, it does not appear to be present in the *Von Dardel*, *Siderman* or *Nelson* cases.

53. Belsky et al., *supra* note 41, at 397.

method of approach,"⁵⁴ which seems to prohibit the courts from adapting the scope of the FSIA to fit evolving international law doctrines and ties them instead to the specific conceptions of immunity that have engaged the attentions of Congress.⁵⁵ Perhaps because of the lack of an effective human rights lobby, Congress paid literally no attention to human rights torts in drafting the FSIA.⁵⁶

Where individual officials rather than the state itself are sued under the ATCA, additional doctrines of immunity and avoidance can stand as barriers to relief. In applying doctrines of prudential avoidance, such as act of state or political question, the courts are forced to be particularly self-conscious about their institutional role in the separation of powers. The courts have not yet comprehensively worked out the contours of the act of state doctrine, head of state immunity, or the political question doctrine in human rights cases, but none appears to present a categorical bar to litigation under the Act.

The act of state doctrine first arose in the 1897 case of *Underhill v. Hernandez*⁵⁷ in which the U.S. Supreme Court said: ". . . the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." The Court applied this principle to a suit for damages for assault and detention by a foreign military commander, a scenario that would involve human rights abuses if it arose today. In the subsequent case of *Banco Nacional de Cuba v. Sabbatino*⁵⁸ the Court held that "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government."⁵⁹ In *Dunhill of London v. Republic of Cuba*⁶⁰ the Court limited the act of state doctrine to formal acts of sovereign authority, such as a decree, statute, or statement by someone with authority to exercise sovereign power.⁶¹ Summing up this line of cases, the RESTATEMENT suggests:

54. 965 F.2d at 719.

55. See *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir. 1985) (rejecting implied waiver of sovereign immunity through ratification of U.N. Charter and signing of Helsinki Final Act); *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987) (rejecting noncommercial tort exception for injuries suffered through denial of medical treatment in South Africa to injured black American).

56. See 28 U.S.C. §§ 1330, 1602-1611. Where foreign governments commit human rights torts within the territory of the United States, foreign sovereign immunity is not a bar to suit. See, e.g., *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (assassination of journalist by agents of the Republic of China in California); *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980) (assassination of former diplomat by Chilean agents in Washington, D.C.).

57. 168 U.S. 250, 252 (1897).

58. 376 U.S. 398, 428 (1964).

59. The reach of the *Sabbatino* decision, in its context of the taking of property, was altered by subsequent acts of Congress.

60. 425 U.S. 682 (1976).

61. *Id.* at 693-95.

Whether a particular act of a foreign state not involving expropriation comes under the act of state doctrine depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government.⁶²

Because accusations of human rights abuse are particularly damaging to a state's reputation, this focus on "propriety" and "motives" could erect a sizeable act of state barrier to human rights litigation.

The accuracy of the RESTATEMENT's formulation is cast in doubt, however, by the U.S. Supreme Court's latest consideration of the doctrine. In *W.S. Kirkpatrick v. Environmental Tectonics Corp.*,⁶³ a case involving bribery of a foreign official in procurement of a government contract, the Court rejected the argument that potential embarrassment of foreign governments is alone a sufficient basis for dismissal of litigation under the act of state doctrine. A unanimous Court ruled:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid.⁶⁴

If those acts are not "valid" by reason of their contravention of international human rights norms, then the fact that the state will be embarrassed by revelation of the illegality in a U.S. court would not be sufficient reason to invoke the prudential act of state doctrine to bar suit.

The implications of *Kirkpatrick* for litigation under the ATCA are still unclear, however. In *Kirkpatrick*, it was irrelevant whether the corruptly procured contract was legally valid in Nigeria or not; the act of bribery (arranged within the United States by American citizens) was independently actionable under United States law.⁶⁵ In a torture case under the ATCA, the issue ought to be simply whether the act occurred; the violation of the law of nations would occur regardless of the possible domestic legality of the act. Exposure of official torture may embarrass a foreign government, but not in a different sense than the embarrassment of the corrupt Nigerian government in *Kirkpatrick*.⁶⁶ Thus, the U.S. Supreme Court's recent clarification of the lim-

62. RESTATEMENT (THIRD) § 443, Comment c.

63. 493 U.S. 400 (1990).

64. *Id.* at 409.

65. 493 U.S. at 402. The suit was brought under the Robinson Patman Act, 49 Stat. 1526, 15 U.S.C. § 13, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968, and the New Jersey Anti-Racketeering Act, N.J. Stat. Ann. §§ 2C:41-1 - 2C:41-6.2 (West 1982).

66. See also *Liu v. Republic of China*, 892 F.2d 1419, 1434 (9th Cir. 1989), cert. dismissed,

its of the act of state doctrine may be helpful to litigants under the ATCA. However, lawsuits under the ATCA differ from the *Kirkpatrick* scenario in one potentially important respect. In order to make out a claim, the alien plaintiff must prove that the tortious act violated the law of nations. No issue of *international* illegality was germane in *Kirkpatrick*, which was governed by legislatively enacted U.S. law. The courts' sensitivity to majoritarian values thus might impede extension of the *Kirkpatrick* approach to human rights cases.

Suits under the ATCA operate on the premise that the tortious act was unlawful in the country where committed, under either universal principles of customary law or under a treaty binding on that state. In *Underhill*, the U.S. Supreme Court took care to distinguish claims against combatant groups that made out a case of piracy, suggesting that the scope of non-actionable conduct in war would not extend that far.⁶⁷ The Court specifically noted that Hernandez' detention of Underhill had a governmental purpose (to maintain water service to the community) and was not motivated by any type of malice.⁶⁸

Several courts have explored the applicability of the act of state doctrine in suits brought against former dictator Ferdinand Marcos. Some of these suits have raised human rights issues while others have concerned the disposition of assets. At the appellate level, the act of state doctrine has not been a serious barrier to the adjudication of claims against Marcos. However, district courts have invoked the act of state doctrine as a basis for dismissing human rights claims against Marcos. In *Guinto v. Marcos*,⁶⁹ Philippine citizens residing in California brought an action under the ATCA alleging violations of freedom of speech. The District Court for the Southern District of California found that the ATCA did not apply because denial of free speech did not amount to a violation of the law of nations, and further held in *obiter dictum* that the act of state doctrine would bar the claim. The court pointed out that the claim was directed to actions of Marcos in his capacity as President, specifically allegations of a systematic policy of suppressing free speech. In the court's view, the act of state doctrine prevented judicial review of the official acts or policies of a for-

1990 U.S. LEXIS 3863 (potential embarrassment of Taiwan government not sufficient basis for act of state doctrine, where validity of rulings by Taiwan criminal courts not in issue).

67. *Underhill v. Hernandez*, 168 U.S. 250, 254 (1897). See also *Linder v. Calero Portocarrero*, 963 F.2d 332, 337 (1992), in which the Eleventh Circuit noted that *Underhill* stands only for the proposition that "acts of *legitimate warfare* cannot be made the basis for individual liability" [emphasis supplied].

68. 168 U.S. at 254.

69. 654 F. Supp. 276 (S.D. Cal. 1986).

eign state.⁷⁰

District judges in both Hawaii and the Southern District of California relied on the act of state doctrine to dismiss claims in five separate lawsuits alleging that Marcos had committed human rights violations including summary execution, torture and arbitrary detention.⁷¹ In a consolidated appeal, *Trajano et al. v. Marcos*,⁷² the Ninth Circuit reversed these decisions in a brief unpublished opinion, noting that neither the U.S. Government nor the current Philippine Government objected to the suits going forward.

Two earlier decisions by the Second Circuit and the Ninth Circuit in cases concerning Marcos assets presaged the Ninth Circuit's rejection of the act of state defense in *Trajano*. The Second Circuit⁷³ upheld a preliminary injunction granted to the Republic of the Philippines barring the former president and others from transferring properties in the United States which were allegedly purchased with monies wrongfully taken from the Republic. The court found the act of state doctrine inapplicable because the acts in question were private as opposed to public acts of the sovereign. The Court stated that even illegal public acts of the sovereign may take advantage of the act of state doctrine, at least if there exists a "certain amount of formality." The applicability of the doctrine was weakened because Marcos was no longer in power and the plaintiff was the state itself.⁷⁴

The decision of the Ninth Circuit in the *Republic of the Philippines v. Marcos* involved an attempt by Marcos to rely on the act of state doctrine to bar a claim under the Racketeer Influenced and Corrupt Organizations Act.⁷⁵ The claim alleged that the Marcoses engaged in fraud and the transportation of stolen property from the Philippines into the United States. The Ninth Circuit held that, while it is not inconceivable, a deposed leader will find it difficult to deploy the act of state defense. The court refused to allow the defense in the context of

70. *Id.* at 280.

71. *Clemente v. Marcos*, No. CV-86-1449-SW (N.D.Cal. filed March 20, 1986); *Ortigas v. Marcos*, No. CV-86-975-SW (N.D.Cal. filed March 4, 1986); *Hilao v. Marcos*, No. CV-86-390-HMF (D. Haw. filed June 3, 1986); *Sison v. Marcos*, No. CV-86-225-HMF (D. Haw. filed March 26, 1986); *Trajano v. Marcos*, No. CV-86-207-HMF (D. Haw. filed March 20, 1986).

72. C.A. Nos. 86-2448, 86-15039, 86-2449, 86-2496, 87-1706, 87-1707 (9th Cir. July 10, 1989). On May 13, 1991, District Judge Manuel Real entered a default judgment of over \$4 million (actual and punitive damages) against Marcos' daughter Imee Marcos-Manotoc for the torture and murder of Archimedes Trajano, following his arrest in 1977 by Marcos-Manotoc's security agents. In re Ferdinand E. Marcos Human Rights Litigation, MDL No. 840, Civ. 86-0207 (D. Haw. filed Sept. 13, 1991), *appeal pending*, No. 91-15891 (9th Cir.).

73. *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986).

74. *Id.* at 359.

75. *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989).

a challenge by his own country.⁷⁶

The criminal case against Manuel Noriega produced a somewhat similar ruling in which the court rejected an act of state defense to prosecution because Noriega's allegedly criminal acts in providing protection to drug traffickers were perceived as being private rather than public.⁷⁷ Moreover, the court suggested that, since the act of state doctrine emerges from separation of powers concerns, it will be unavailing in any suit where the U.S. Government is plaintiff.⁷⁸ In *Filartiga*, the court held the act of state doctrine inapplicable for similar reasons: "We doubt whether action by a state official in violation of the Constitution and Laws of the Republic of Paraguay, and wholly unratified by that Nation's government, could properly be characterized as an act of state."⁷⁹ Many other human rights cases will likely fit the *Filartiga* scenario.

Overall, it would appear that the act of state doctrine can be extended to apply to alleged violations of international human rights law, whether the claims arise under the ATCA or otherwise, but the court must be able to characterize such acts as genuine acts of state. They must be public acts of the sovereign and not purely private acts; they must involve a certain amount of formality; they may include official acts or policies of the head of a foreign state even where such policies violate international human rights law. But they will be less likely to cover the acts of a deposed leader when the plaintiff is either the deposed leader's government or the U.S. government, and the acts of police officials in violation of their own national law.⁸⁰

Future application of the doctrine should avoid defining an act of state so broadly as to in effect prohibit all claims of violations of international human rights law. As pointed out by Judge Edwards in *Tel-Oren*,⁸¹ there are few violations of international human rights law that

76. 862 F.2d at 1360-61.

77. *United States v. Noriega*, 746 F. Supp. 1506, 1521-23 (S.D. Fla. 1990).

78. *Id.* at 1523. The Court did note that the United States Executive's position on the availability of the act of state defense to a criminal defendant is not binding on the courts.

79. *Filartiga v. Pena-Irala*, 630 F.2d at 889. The act of state doctrine was also rejected in *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987), *modified on other grounds*, 694 F. Supp. 707 (N.D.Cal. 1988).

80. A somewhat different issue was presented when several leaders of the Nicaraguan *contras* attempted to assert an act of state defense in a suit brought under 28 U.S.C. § 1331 by the survivors of Benjamin Linder, an American engineer tortured and murdered by *contra* forces in Nicaragua. *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1469 n.8 (S.D. Fla. 1990), *rev'd on other grounds*, 963 F.2d 332 (11th Cir. 1992). The District Court held that defendants could not raise the act of state defense since they did not represent a government recognized by the United States. A claim of foreign sovereign immunity by the Palestine Liberation Organization was rejected on similar grounds in *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44 (2d Cir. 1991).

81. *Tel-Oren et al v. Libyan Arab Republic* 726 F.2d at 792 n.22.

do not involve a state actor. But if the act of state doctrine concomitantly covers any act of an individual done while acting in some official position, claims involving violations of international human rights law would generally fail. Therefore, courts must ensure that the same criteria for satisfying the law of nations requirement of the ATCA do not necessarily bring the act of state doctrine into play.⁸²

2. Founding a Right of Action

The second function of customary international human rights law in U.S. courts is the direct founding of a right of action or the provision of a defense to domestic criminal prosecution. Because these cases typically involve challenges under international law to the legality of actions by U.S. officials (in contrast to the foreign defendants in ATCA suits), they may provoke even more acute concerns for the separation of powers.

Perhaps the best example of attempted direct enforcement of customary human rights law against U.S. officials was the effort by various "Marielitos," Cubans who fled to the United States in the 1980 Mariel boat lift, to invoke the customary international norm against arbitrary detention to obtain release from federal penitentiaries in which they were being indefinitely detained.⁸³ Some Marielitos with criminal records or mental disease were held in maximum security federal prisons (Leavenworth and Atlanta), theoretically for the rest of their lives, because U.S. authorities found them "excludable" and chose to detain them pending their removal, while no other country, including Cuba, would admit them.

These Marielitos found themselves in a peculiar lacuna in U.S. law, a twilight zone where they were without any legal rights, entirely within the control of the administrative officials who held them in custody. As "excludable" aliens, under the fiction of the entry doctrine they were regarded as not within the United States and thus not protected by the Constitution in their dealings with immigration offi-

82. Another potential barrier to ATCA suits against alien defendants is diplomatic immunity. *Aidi v. Yaron*, 672 F. Supp. 516 (D.D.C. 1987) (suit raising claims under the Vienna Convention and the Diplomatic Relations Act against Israeli diplomat who had been army commander during Sabra and Shatila massacre). Thus, foreign officials temporarily present in the United States on diplomatic passports may be immune from suit for human rights violations.

83. See *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom.*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986); *Alvarez-Mendez v. Stock*, 746 F. Supp. 1006 (C.D. Cal. 1990), *aff'd*, 941 F.2d 956 (9th Cir. 1991); *Tartabull v. Thornburgh*, 755 F. Supp. 145 (E.D. La. 1990); *Barrios v. Thornburgh*, 754 F. Supp. 1536 (W.D. Okla. 1990).

cial.⁸⁴ Statutes, regulations, and other possible sources of domestic law also did not clearly provide them with relevant protection.⁸⁵

The Marielito cases thus provided a classic instance for resort to international human rights law in domestic courts. As another commentator has noted,⁸⁶ the potential for domestic application of international human rights law is greatest in countries with strong (though not perfect) domestic standards for protection of individual rights and independent judiciaries. *Habeas corpus* is readily available to confined persons in the United States, and since federal judges have life tenure and are politically independent, the judiciary has a strong tradition of supporting individuals alleging government violations of fundamental rights.⁸⁷ Because the United States had failed to ratify the key human rights treaties, and, in any case, the implementation mechanisms of these treaties are weak,⁸⁸ Marielitos turned to the domestic courts for redress.⁸⁹

In *Rodriguez-Fernandez v. Wilkinson*,⁹⁰ the district court granted a writ of *habeas corpus* to a Marielito, finding the direct source of this

84. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1950). See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987).

85. *Garcia-Mir v. Meese*, *supra* note 82 (reversing district court judgment based on creation of a special immigration classification for Marielitos and statements by President Carter).

86. Alan Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. TORONTO L.J. 219, 220-21 (1985).

87. See 42 U.S.C. § 1983 (1989); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

88. Advocates for the Marielitos did invoke the petition process of the Inter-American Commission of Human Rights in April 1987. See Inter-American Court of Human Rights, THE LAW GROUP DOCKET, Summer 1988, at 5.

89. The converse situation can be observed in the United Kingdom. The United Kingdom is a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which establishes an unusually effective implementation mechanism under which almost all the states parties, including the United Kingdom, permit the right of individual petition. The United Kingdom adopts the "dualist" approach to treaty law, however, not permitting individuals to litigate claims based on treaties unless Parliament has specifically incorporated the treaty into domestic law, which has not been done with respect to the European Convention on Human Rights. As a consequence, the United Kingdom finds itself a surprisingly frequent respondent in human rights cases before the Council of Europe's human rights enforcement bodies in Strasbourg. Of the number of cases which have been referred to the European Court of Human Rights between 1959 and September 1992 (379) the greatest number from one state came from the United Kingdom (47). In this period, of the 219 judgments of the European Court which found at least one violation of the European Convention, the second highest number (30) concerned the United Kingdom. Twenty-five states are currently parties to the European Convention. Jean-Bernard Marie, *International Instruments Relating to Human Rights*, 13 HUM. RTS. L.J. 55, 60 (1992). Many of the human rights litigants suing the United Kingdom presumably would prefer to pursue their claims in local courts, but the non-enforceability of the treaty (compounded perhaps by the lack of a written bill of rights in the United Kingdom) channels them into the international forum. See *infra* notes 271-375 and accompanying text.

90. 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

remedy in the customary international prohibition of arbitrary detention. In the court's words:

even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law. Petitioner's continued, indeterminate detention on restrictive status in a maximum security prison, without having been convicted of a crime in this country or a determination having been made that he is a risk to security or likely to abscond, is unlawful; and as such amounts to an abuse of discretion on the part of the Attorney General and his delegates.⁹¹

The district court's judgment in *Rodriguez-Fernandez* is one of the strongest examples of direct enforcement of international human rights norms against U.S. officials.

In *Soroa-Gonzales v. Civiletti*,⁹² the district court addressed the question whether detention of the alien "directly violated international human rights law" or "whether an alien in petitioner's position is entitled under U.S. law to invoke international human rights principles to challenge the legality of his detention"⁹³ only in *obiter dictum*. The court postulated that the petitioner's continued incarceration amounted to "arbitrary detention" in violation of provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights.⁹⁴ The court seemed to be suggesting that these norms expressed customary international law and gave rise to a cause of action or permitted the petitioner to challenge the legality of his detention.⁹⁵

On appeal of several consolidated Marielito cases, the Eleventh

91. *Id.* at 798.

92. 515 F. Supp. 1049 (N.D. Ga. 1981).

93. *Id.* at 1061 n.18.

94. *Id.*

95. The same court in *Fernandez-Roque v. Smith*, 567 F. Supp. 1115 (N.D. Ga. 1983), also addressed the argument that petitioners' "continued detention violates principles of international law, as derived from the practices of nations and various international instruments." *Id.* at 1122, n.2. The court stated in *obiter* that ". . . [T]he various international law principles proscribing prolonged, arbitrary detention of persons are binding on this country and require the same sort of procedural safeguards as the Court has determined below are mandated by the Constitution of the United States. See Universal Declaration of Human Rights . . . The American Convention on Human Rights . . . International Covenant on Civil and Political Rights . . . United Nations Protocol Relating to the Status of Refugees . . ." *Id.* The Court provided no reason why these different sources were "binding" on the United States and would have given rise to a remedy in United States courts.

This case was reversed on appeal, although the Eleventh Circuit stated specifically that it expressed no opinion as to the merits of the argument that customary international law precluded continued detention. *Fernandez-Roque v. Smith*, 734 F.2d 576 (11th Cir. 1984). That issue was later decided adversely to plaintiffs in *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986).

Circuit in *Garcia-Mir v. Meese*⁹⁶ rejected the argument that petitioners had an actionable claim based on international law. Writing for the panel, Judge Johnson reasoned that a customary human rights norm (*i.e.*, the prohibition on indefinite detention without charge or trial) could not be invoked by a victim in a U.S. court if an executive branch official (at least one as high-ranking as the Attorney General), had acted contrary to the norm.⁹⁷ Even a judicial decision not to apply the norm would be "controlling."⁹⁸ Judge Johnson saw "an obligation of the courts to avoid any ruling that would 'inhibit the flexibility of the political branches of government to respond to changing world conditions. . . .'"⁹⁹ The problem of the "controlling" act is explored further below.¹⁰⁰

Somewhat similar issues were implicated in *Ishtyaq v. Nelson*,¹⁰¹ in which the district court held that Afghan and Iranian refugees had not been unlawfully detained. The court addressed the argument that "their detention violates general principles of customary international law,"¹⁰² without reference to the ATCA. The court held that

[w]hile international law is a part of the laws of the United States that federal courts are bound to ascertain and apply in appropriate cases even the principles of law to which petitioners have referred the court, assuming *arguendo* that they rise to the level of general principles of customary international law to be applied in American courts do not compel the conclusion that petitioners' detention is unlawful.¹⁰³

This was because the detention was found to be neither arbitrary nor indefinite.¹⁰⁴ Nevertheless, *Ishtyaq* is significant because the court was prepared to ask whether customary international law was violated in the context of a claim of a right of action arising directly from customary international law.¹⁰⁵

96. 788 F.2d 1446 (11th Cir. 1986).

97. *Id.* at 1453-55.

98. *Id.* at 1455.

99. *Id.* (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)).

100. *See infra* text accompanying notes 155-61.

101. 627 F. Supp. 13 (E.D.N.Y. 1983).

102. *Id.* at 27.

103. *Id.* (citations omitted).

104. In two cases brought by Marielitos, district courts ruled that under the Cuban Review Plan, 8 C.F.R. §§ 212.12-212.14, renewed detention of formerly paroled Marielitos who have committed criminal offenses in the United States while on parole is neither arbitrary nor indefinite. *Alvarez-Mendez v. Stock*, 746 F. Supp. 1006 (C.D. Cal. 1990); *Barrios v. Thornburgh*, 754 F. Supp. 1536 (W.D. Okla. 1990). In a more sweeping decision, another District Court followed the reasoning of the 11th Circuit in *Garcia-Mir* in ruling that detained Marielitos cannot raise claims under international law. *Tartabull v. Thornburgh*, 755 F. Supp. 145 (E.D. La. 1990).

105. In an interesting dissent in a case concerning injuries to a United States serviceman from unconsented medical experimentation, Judge Gibbons of the Third Circuit cited the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights,

Litigants have attempted to invoke international human rights law to challenge actions of the U.S. government in more visibly "political" cases as well,¹⁰⁶ unintentionally shoring up the specter of judicial interference in the conduct of foreign policy that is so unnerving to opponents of human rights litigation. Courts have generally invoked doctrines of avoidance to refuse adjudication where there might be a risk of touching upon U.S. foreign policy.¹⁰⁷ A distinct line of "political" cases comprises those in which international law has been raised as a defense to criminal charges. These cases range from demonstrations against nuclear weapons,¹⁰⁸ to sanctuary for Central Americans

the Geneva Conventions of 1949, the Declaration Against Torture and the Nuremberg Code, to find an apparent customary norm. *Jaffee v. United States*, 663 F.2d 1226, 1249-50 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982). Judge Gibbons asserted that, in light of these international standards, "[a] fortiori" the conduct is in violation of the constitution and laws of the United States and of the state where the acts occurred, and that the courts have an obligation to supply a remedy for the tort. *Id.*

106. See *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), *aff'd on other grounds*, 770 F.2d 202 (D.C. Cir. 1985); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988); *Chaser Shipping Corp. v. United States*, 649 F. Supp. 736 (S.D.N.Y. 1986), *aff'd*, 819 F.2d 1129 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Meyer v. United States*, 1987 U.S. Dist. LEXIS 935 (N.D. Ill. 1987). These cases resemble the extensive, persistent, but ultimately ineffective attempts to use the courts to restrain the executive during the Vietnam War. (See generally Louis Henkin, *Viet-Nam in the Courts of the United States: "Political Questions"*, 63 AM. J. INT'L L. 284 (1969); *Mora v. McNamara*, 389 U.S. 934 (1967)). The courts have been generally unreceptive to lawsuits directly challenging the foreign policy-making and military discretion of the political branches. *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd* 755 F.2d 34 (2d Cir. 1985). See Mark Gibney, *Human Rights and Human Consequences: A Critical Analysis of Sanchez-Espinoza v. Reagan*, 10 LOY. L.A. INT'L & COMP. L.J. 299 (1988) and Mark Gibney, *Suing for Death, Suffering, and Peace*, 12 HUM. RTS. Q. 415 (1990). Indeed, in a recent case seeking damages for victims of the United States bombing of Libya in 1986, based in part on allegations of war crimes under customary international law, the District of Columbia Circuit not only upheld dismissals based on sovereign immunity but also ordered Rule 11 sanctions against plaintiffs' lawyers for filing a frivolous suit. *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990). See Anthony D'Amato, *The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya*, 84 AM. J. INT'L L. 705 (1990).

107. The political question doctrine has been applied to dismiss a tort suit filed under 28 U.S.C. § 1331 by the survivors of a U.S. citizen allegedly tortured and murdered by Nicaraguan *contras*, on the grounds that no judicially manageable standards exist to determine if such acts are tortious and there was a risk of interference with foreign policy. *Linder v. Calero Portocarrero*, 747 F. Supp. 1452 (S.D. Fla. 1990), *rev'd in part*, 963 F.2d 332 (11th Cir. 1992). The Eleventh Circuit held that Florida tort law provided sufficiently definable standards of liability and that there is "no foreign civil war exception to the right to sue for tortious conduct that violates the fundamental norms of the customary laws of war." 963 F.2d at 336. A lawsuit by Panamanian companies under the FTCA and the ATCA was dismissed on sovereign immunity and political question grounds. *Industria Panificadora, S.A. v. United States*, 763 F. Supp. 1154 (D.D.C. 1991). Plaintiffs sought damages for injury to their property arising out of the U.S. invasion of Panama and the breakdown of police services.

108. See, e.g., *United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985); *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987); *United States v. May*, 622 F.2d 1000, 1009 (9th Cir. 1980), *cert. denied*, 449 U.S. 984 (1980); *United States v. Montgomery*, 772 F.2d 733, 737-38 (11th Cir. 1985); *United States v. Brodhead*, 714 F. Supp. 593 (D.Mass. 1989).

fleeing civil war,¹⁰⁹ to draft resistance,¹¹⁰ to non-payment of taxes.¹¹¹ Courts have uniformly rejected the Nuremberg defense in civil disobedience cases, and prosecutors are successfully making increasing use of motions in limine to exclude all mention of international law. One of the most intriguing but unresolved (indeed, barely discussed) issues to emerge from these cases is whether the invocation of the political question doctrine to exclude a defense under international law should also operate to deprive the court of jurisdiction over the prosecution itself.¹¹²

3. An Aid to Interpretation of United States Law

U.S. courts have used customary international human rights law on rather rare occasions to interpret U.S. law, both statutory and constitutional. The introduction of international law in this manner is usually not prefaced by any justification. Nevertheless, this approach is consistent with the well-established principle of interpretation that domestic law should be construed to avoid a violation of international obligations. As Chief Justice Marshall stated in *Murray v. The Schooner Charming Betsy*:¹¹³ "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ."

This principle was applied, for instance, in *Von Dardel I*¹¹⁴ in which the court stated: "[t]he Foreign Sovereign Immunities Act, like every federal statute, should be interpreted in such a way as to be con-

109. Memorandum of Points and Authorities in Opposition to the Government's Motion in Limine and In Support of Defendants' Motion to Dismiss, *United States v. Socorro de Aguilar*, No. 85-008-PHX-ECH (D.Ariz. filed March 28, 1985); *United States v. Aguilar*, 871 F.2d 1436 (9th Cir. 1989).

110. *Mora v. McNamara*, 389 U.S. 934 (1967); *Mitchell v. United States*, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967); *United States v. Sisson*, 399 U.S. 267 (1970). See Anthony D'Amato, Harvey L. Gould and Larry D. Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CAL. L. REV. 1055 (1969).

111. See, e.g., *First v. Commissioner*, 547 F.2d 45 (7th Cir. 1976); *Graves v. Commissioner* 698 F.2d 1219 (6th Cir. 1982); *Lull v. Commissioner*, 602 F.2d 1166 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); *United States v. Malinowski*, 472 F.2d 850 (3d Cir. 1973); *Autenrieth v. Cullen*, 418 F.2d 586 (9th Cir. 1969), *cert. denied*, 397 U.S. 1036. Such claims may be regarded as so frivolous as to subject the taxpayer to additional sanctions. *Randall v. Commissioner*, 733 F.2d 1565, 1568 (11th Cir. 1984).

112. See *United States v. Sisson*, 297 F. Supp. 902, 904 (D. Mass. 1969), *appeal dismissed*, 399 U.S. 267 (1970). When Manuel Noriega attempted to dismiss the narcotics prosecution against him on grounds that his presence in court had been obtained by shocking means in violation of the "norms of humanity," the District Court ruled that this defense was barred by the political question doctrine since courts are unable to determine if a certain war is immoral. *United States v. Noriega*, 746 F. Supp. 1506, 1539 (S.D. Fla. 1990).

113. 6 U.S. 137, 143, 2 Cranch 64 (1804).

114. 623 F. Supp. 246 (D.D.C. 1985), *vacated* 736 F. Supp. 1 (D.D.C. 1990).

sistent with the law of nations.”¹¹⁵ The initial decision held that the statute should be read as not extending sovereign immunity to clear violations of universally recognized principles of international law, but in *Von Dardel II* the court interpreted the FSIA as being comprehensive and exclusive, leaving no room for an implied exception.¹¹⁶

In *Lareau v. Manson*,¹¹⁷ the court cited standards for the treatment of prisoners embodied in international instruments as an aid to interpreting the Eighth and Fourteenth Amendments of the Constitution. The questions at issue were whether certain conditions of confinement for pre-trial detainees amounted to “punishment” without due process and whether, for sentenced inmates, their punishment was “cruel and unusual.” Earlier cases had determined that the Eighth Amendment’s ban on cruel and unusual punishment in the prison context proscribed penalties which transgress “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”¹¹⁸ The district court used the United Nations Standard Minimum Rules for the Treatment of Prisoners¹¹⁹ to apply this language in the context of prison overcrowding. The Rules were described as “. . . establishing standards for decent and humane conduct by all nations”¹²⁰ or as constitut[ing] an authoritative international statement of basic norms of human dignity and of certain practices which are repugnant to the conscience of mankind. The standards embodied in this statement are relevant to the “canons of decency and fairness which express the notions of justice” embodied in the Due Process Clause.¹²¹

The court described the status of the Rules in international law as “expressions of the obligations to the international community of the member states of the United Nations and as part of the body of international law (including customary international law) concerning human rights.”¹²² It also suggested that the relevance of the Standard

115. *Id.* at 253.

116. 736 F. Supp. at 3.

117. 507 F. Supp. 1177 (D. Conn. 1980), *aff’d in part and modified in part*, 651 F.2d 96 (2d Cir. 1981).

118. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

119. These standards were adopted by the Economic and Social Council of the United Nations. *Recommendations for the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Economic and Social Council, 24th Sess., Res. No. 663c, U.N. Doc. E/3048 (1957). The Economic and Social Council amended these rules in its resolution *Extension of the Standard Minimum Rules for the Treatment of Prisoners to persons arrested or imprisoned without charge*, U.N. Economic and Social Council, 62nd Sess., Res. No. 2-076, U.N. Doc. E/5988 (1997).

120. *Lareau v. Manson*, 507 F. Supp. 1177, 1192-93 (D. Conn. 1980).

121. *Id.* at 1188 n.9.

122. *Id.* at 1188 (citation omitted).

Minimum Rules was supported by their resemblance to provisions of the Universal Declaration of Human Rights, which some regard as having the status of customary international law.¹²³

On appeal, *Lareau v. Manson* was affirmed in part, and modified and remanded in part, on other grounds.¹²⁴ The Second Circuit concluded that "under the totality of these circumstances, subjecting the sentenced inmates in the HCCC to the combination of double-bunking and overcrowded dayrooms violates their constitutional rights. . . ."¹²⁵ Although the court did not refer to the Standard Minimum Rules as customary law,¹²⁶ it did cite a U.S. Supreme Court reference to the Standard Minimum Rules "as one of many manifestations of 'contemporary standards of decency'"¹²⁷ and found that the "various guidelines [including the Standard Minimum Rules] illustrate the glaring disparity . . . between the conditions in the HCCC and the conditions widely thought by knowledgeable bodies to be essential."¹²⁸

This approach of looking to customary law for guidance in construing domestic law, while not directly enforcing the customary norm as an independent source of law, was followed by the Tenth Circuit on the appeal in *Rodriguez-Fernandez v. Wilkinson*.¹²⁹ The court decided that the Immigration and Naturalization Act did not permit indefinite detention of an excludable alien, who, after a period of time during which expulsion could not be accomplished, was entitled to release.¹³⁰ The court came to this conclusion after identifying "international law

123. *Id.* at 1193.

124. 651 F.2d 96 (2d Cir. 1981).

125. *Id.* at 108.

126. The Second Circuit noted that defendants themselves had adopted the Standard Minimum Rules as the preamble to the Administrative Directives of the Connecticut Department of Corrections. 651 F.2d at 106.

127. *Id.* at 107 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)).

128. *Id.*

129. 654 F.2d 1382 (10th Cir. 1981).

130. In addition to the statutory ground, the Court also found there were "constitutional problems" relating to the due process guarantees of the Fifth Amendment. It came to this conclusion after stating:

[T]he Supreme Court has expanded the constitutional protection owed aliens apart from the right to enter or stay in this country. Due process is not a static concept, it undergoes evolutionary change to take into account accepted current notions of fairness. It seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention.

Id. at 1388 (citations omitted).

However, the issue of whether the Fifth Amendment does provide in some circumstances for release of excludable aliens who cannot be expelled was not decided in the most recent Supreme Court case on the subject. See *Jean v. Nelson*, 472 U.S. 846 (1985). Another court of appeal has disagreed with the *Rodriguez-Fernandez* suggestion that constitutional protection may exist. See *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984). The latter case found that an earlier Supreme Court case should be interpreted as giving a negative answer. (*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)).

principles," although it did not expressly state that the prohibition of arbitrary detention was a principle of customary international law. The court did, however, explicitly point out that its construction of the statute ". . . is consistent with accepted international law principles that individuals are entitled to be free of arbitrary imprisonment."¹³¹ In the court's view, "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment. See Universal Declaration of Human Rights . . . [and] The American Convention on Human Rights. . . ." ¹³² The attention paid to international norms in construing the scope of governmental powers in the immigration field was specifically justified by the fact that the power to regulate immigration is derived partly from customary international rules concerning sovereignty.¹³³

Seeking to interpret the statutory term "conscience" as not limited to a purely religious context, Judge Heaney of the Eighth Circuit turned, *inter alia*, to the Nuremberg principles and to Articles 1 and

131. 654 F.2d at 1390.

132. *Id.* at 1388. At the same time, however, the Eleventh Circuit has avoided the use of international law in circumstances similar to *Rodriguez-Fernandez*. Although the Court has repeated the rule that "[t]o the extent possible, courts must construe American law so as to avoid violating principles of public international law," it has operated inconsistently with its spirit. *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986). The Court endeavored first to seek "controlling executive, legislative or judicial acts" which would deny the relevance of public international law. It subsequently found that an earlier decision of the same court, which decided there was no relevant international law and that an indefinitely incarcerated alien could not challenge continued detention, constituted a controlling judicial act. *Id.* at 1455.

The Court's previous decision that there was no relevant international law was based on its consideration of international practice relating to arbitrary detention without asking whether *indefinite* detention was a violation of international law. It did not consider whether indefinite detention was encompassed within the meaning of arbitrary detention in international law. It found only that the detention there was not a violation of any prohibition in international law, stating ". . . amici have pointed to no evidence . . . that suggest[s] that it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law," *Jean v. Nelson* 727 F.2d 957, 964 n.4. (11th Cir. 1984).

The conclusion in *Garcia-Mir* that their earlier case of *Jean v. Nelson* constituted a controlling judicial act can be criticized on the basis that the Supreme Court had issued a decision in this very case, *Jean v. Nelson*, 472 U.S. 846, 854-56 (1985), which held only that the parole decision for an excludable alien after unsuccessful efforts to deport must be based on non-discriminatory reasons. The Court of Appeals failed completely to ask whether the general deportation statute (8 U.S.C.A. § 1227(a), (c) (1985)) could be construed consistently with international law.

The Eleventh Circuit has also disagreed with the result in *Rodriguez-Fernandez*. *Fernandez-Roque v. Smith*, 734 F.2d 576 (1984). In this case, the Eleventh Circuit expressed no opinion on the merits of the argument that international law precluded continued detention. *Id.* at 582 n.10. They held that the government had statutory authority to detain aliens indefinitely where exclusion was not practicable. *Id.* at 580.

The Fourth Circuit has also avoided the result in *Rodriguez-Fernandez*. *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982). In this case, the Fourth Circuit explicitly distinguished *Rodriguez-Fernandez* and stated it was not holding that it was incorrectly decided. However, the result in *Palma* was not consistent with *Rodriguez-Fernandez* since the Court held that the Immigration and Nationality Act granted the Attorney General implicit authority to detain rather than parole an excluded alien who cannot be returned to his own country. 676 F.2d at 104-05.

133. 654 F.2d at 1388.

18 of the Universal Declaration of Human Rights.¹³⁴ His aim was to construe a provision of the naturalization laws so as to avoid a potential claim of unconstitutional establishment of religion.¹³⁵ The international references functioned as relatively peripheral sources for an imputed legislative intent.

Where claims fitting the real *Charming Betsy* paradigm have been raised, however, the courts have sometimes been remarkably unreceptive. Participants in the Sanctuary movement, which sought to shelter Central American asylum seekers, argued that the immigration laws should be construed so as to be consistent with a customary international norm of temporary refuge for civilians fleeing internal armed conflict, which emerged largely after the passage of the Refugee Act of 1980.¹³⁶ Yet, in criminal prosecutions,¹³⁷ civil suits,¹³⁸ and deportation proceedings,¹³⁹ the Refugee Act was construed to exclude the norm regardless of whether this placed the United States in breach of its obligations under customary law. No clear evidence of congressional intent to abrogate the norm was required.

The cases which can clearly be said to use customary international law as an aid to interpretation of U.S. law are few. Those courts which do make use of international law sources as an aid to interpretation usually (a) do not tend to justify its introduction by references to the principle of consistency with international obligations, nor (b) concern themselves with establishing the binding quality of the source by proving that it is truly customary international law. This tendency impedes the development of clear and consistent principles concerning the interpretive relevance and importance of customary human rights norms in U.S. law.

C. *Problems in the Use of Customary Law in United States Courts*

With an independent judiciary frequently restraining illegal conduct by government agents and with a well-developed constitutional and statutory law for the protection of fundamental rights, one might assume that there would be little debate over the extension of such protection. However, opposition is still quite strong. U.S. courts gen-

134. *In re Naturalization of Weitzman*, 426 F.2d 439 (8th Cir. 1970) (per curiam).

135. The naturalization oath includes a promise to bear arms to defend the United States, but an exception is made for conscientious objectors.

136. See Deborah Perluss and Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L. L. 551 (1986) for a general discussion of the customary law of temporary refuge.

137. *United States v. Aguilar*, 871 F.2d 1436, 1454 (9th Cir. 1989).

138. *American Baptist Churches v. Meese*, 712 F. Supp. 756, 771-73 (N.D. Cal. 1989).

139. *In re Medina*, 19 I. & N. Dec. 734 (B.I.A. 1988).

erally manifest a deep reluctance to embrace international human rights law and to use it as an effective tool to redress abuses. This reluctance is born partly of unfamiliarity and perhaps a degree of intellectual laziness, but it also appears to stem from concerns about institutional competence and deference to the political branches.¹⁴⁰ Although courts tend to give superficial reasons for their refusal to enforce customary human rights norms, this tendency may be a product of the ambiguities which surround the concept of customary international law.

One difficulty concerns the problem of identifying customary law. The sources of international law are well established¹⁴¹ as is the procedure for determining the existence of an international norm.¹⁴² But a

140. See, e.g., *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1462 (S.D.Fla. 1990), *rev'd in part*, 963 F.2d 332 (11th Cir. 1992). In that case, the District Court complained:

[W]e would be required to fashion basically out of whole cloth a set of standards from some combination of Florida tort law, customary international law, the Geneva Conventions, and perhaps a multitude of other possible sources. In the absence of some instruction from the legislative branch to do so, we are unprepared and ill-equipped to enter the thicket attendant to fashioning such an amalgamation of standards.

141. RESTATEMENT (THIRD) §§ 102-03 (1987).

142. *Id.* §§ 111-13.

In *The Paquete Habana*, 175 U.S. 677 (1900), the Supreme Court found that coastal fishing vessels peaceably pursuing their calling are exempt from capture as a prize of war, noting that "as evidence of [customs of civilized nations] . . . the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *Id.* at 700.

In a case on piracy, the Supreme Court set out the framework for finding customary law: "What the law of nations on this subject is, 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 recognising and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820).

Contemporary cases have followed these suggestions and referred to many different sources to establish norms of customary international human rights law. In *Filartiga*, the Court considered the following sources of customary international law: (a) affidavits of a number of distinguished international legal scholars, (b) treaties ratified by the United States (such as the United Nations Charter), (c) declarations of the United Nations General Assembly (the Universal Declaration of Human Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture), (d) human rights treaties which the United States had not ratified (the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights), (e) national constitutions, (f) United States reports by the State Department concerning human rights in other countries, and (g) a decision of an international court, the European Court of Human Rights. 630 F.2d at 881-885.

In *Forti*, the District Court referred to similar sources and, in addition, referred to a General Assembly Resolution of the Organization of American States and decisions of other United States courts. The Court looked at affidavits from eight renowned international law scholars, United Nations General Assembly resolutions and the Universal Declaration of Human Rights, unratified treaties (the Covenant on Civil and Political Rights and the American Convention on Human Rights), the RESTATEMENT (THIRD), and decisions of United States courts. 672 F. Supp. at 1542.

In *Rodriguez-Fernandez*, the District Court considered the same kinds of sources and added stated views of members of Congress, stated views of the Executive Department, and an international arbitral award. The District Court also considered the following sources as indicative of this customary international law: the United Nations Charter, Universal Declaration of Human Rights, a decision of the International Court of Justice, The American Convention on Human

glance at these relevant sources indicates their complexity, multiplicity, and unfamiliarity to most judges. It will no doubt often be difficult to canvass all the relevant sources and draw a reliable conclusion as to whether a customary norm exists and, if so, whether it influences the outcome of the case.

The essence of the existence of a customary norm is the actual practice of states, undertaken out of a sense of legal obligation. But with a world of over 170 nations and no central documentation center, efforts to canvass state practice are likely to be fragmentary. Even the International Court of Justice, a body of long-experienced and sophisticated international jurists, seems to fall into the habit of turning to more easily accessible sources, particularly "norm-creating" treaties and resolutions of international bodies.¹⁴³

Some commentators have criticized the tendency to rely upon (sometimes unratified) treaties and United Nations resolutions as evidence of state practice.¹⁴⁴ Reliance upon the "teachings of the most highly qualified publicists"¹⁴⁵ can provoke an even more negative response. While some courts patiently and receptively take affidavit or oral testimony from international law experts about the scope of customary norms, the average judge may respond with the exasperation of Judge Robb of the Court of Appeals for the District of Columbia Circuit:

Rights, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights. 505 F. Supp. at 796-98.

Many cases have also added the RESTATEMENT (THIRD) to the list of appropriate indicators of customary international human rights law.

In *Tel-Oren*, Judge Edwards stated that guidance in the identification of violations of the law of nations could be found in the list in the Tentative Draft of the Restatement of the Law of Foreign Relations (Revised) (section 702, Tent. Draft No. 3, 1982). He did not find it necessary to decide whether all norms listed ((a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) systematic racial discrimination; (g) consistent patterns of gross violations of internationally recognized human rights) constituted violations of the law of nations. 726 F.2d at 781. The Fifth Circuit has also cited the Tentative Draft of the Restatement (section 702, Tent. Draft No. 6, 1985). *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (1985). In this case, the Court found that "[a]t present, the taking of a state of its national's property does not contravene the international law of minimum human rights." *Id.* See also *Forti v. Suarez-Mason*, 672 F. Supp. at 1541-42.

143. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). In that case, the ICJ found a customary norm against the use or threat of force, derived from Article 2(4) of the United Nations Charter and resolutions of the United Nations and the Organization of American States.

144. See Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101 (1987); Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146 (1987) (both critical of the ICJ's failure to deal adequately with actual state practice concerning the use of force); See also Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1 (1988).

145. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38, ¶ 1(d).

Courts ought not to serve as debating clubs for professors willing to argue over what is or what is not an accepted violation of the law of nations. . . . Plaintiffs would troop to court marshalling their "experts" behind them. Defendants would quickly organize their own platoons of authorities. The typical judge or jury would be swamped in citations to various distinguished journals of international legal studies, but would be left with little more than a numbing sense of how varied is the world of public international "law."¹⁴⁶

Skepticism about the legitimacy of international law can thus impair the courts' willingness to undertake the sometimes onerous law-finding task set out in foundational cases such as *United States v. Smith*.¹⁴⁷

Furthermore, there is a surprising amount of uncertainty concerning the nature of customary norms as "law." Three disputed issues help illuminate this uncertainty: (1) whether the "last in time" rule applies to customary norms; (2) whether the political branches of the U.S. government have a "right" to violate customary law; and (3) what it means to describe customary international law as federal common law.

The "last in time" rule provides that, as far as domestic consequences are concerned, statutes and treaties are on the same plane of authority. Thus, a later statute will override an earlier treaty which is irreconcilable with the statute.¹⁴⁸ Similarly, a later treaty (at least one that is self-executing) will override an earlier inconsistent statute in its domestic legal effects. Early drafts of the new RESTATEMENT asserted that, since it was equivalent to a treaty, a newly evolved norm of customary law would likewise override a prior inconsistent statute.¹⁴⁹ This assertion provoked a storm of criticism.¹⁵⁰ In the end, the RESTATEMENT authors modified their position.¹⁵¹

146. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 827.

147. *See supra* note 142.

148. RESTATEMENT (THIRD) § 115.

149. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(1) (Tent. Draft No. 1, 1980):

A rule of international law or a provision of an agreement that becomes effective as law in the United States supersedes any inconsistent law of the several states of the United States, as well as any inconsistent preexisting provision in the law of the United States.

150. *See* Jack Goldklang, Remarks at the Annual Meeting of the American Society of International Law (Apr. 25-27, 1985) in *Proceedings of the 79th Annual Meeting of the American Society of International Law* at 73-78. (1987).

151. The final draft of the RESTATEMENT (THIRD) § 115(2) provides that "[a] provision of a treaty of the United States that becomes effective as a law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States." The effect of a later-evolved rule of customary law is treated in an inconclusive discussion in Reporter's note 4 to § 115. *See also* Steinhardt, *infra* note 376, at 1160-61 n.257, 258 (citing *Reston v. FCC*, 492 F. Supp. 697 (D.D.C. 1980), and *Beattie v. United States*, 592 F. Supp. 780, 781 n. 3 (D.D.C.), *aff'd*, 756 F.2d 91 (D.C. Cir. 1984), two cases in which statutes were interpreted in light of later-ratified treaties).

Several principal sources of this criticism may be identified. One source was the concern that democratic accountability would be threatened where emerging customary norms have the power to trump existing positive law adopted by a popularly elected legislature. While under the "last in time" rule, Congress need only adopt a clearly contrary statute to trump the new international norm, the burden of inertia is placed on those displeased by trends in customary law development. A second difficulty with the original RESTATEMENT proposal is that to apply the "last in time" rule, a judge must know the effective dates of the statute, treaty, or customary norm. It is extremely difficult to pinpoint the "effective date" of a customary norm since norms emerge from the practice of states and the shadowy evolution of *opinio juris* (the sense that conforming practice is compelled by legal obligation).

Theorists of customary law have noted the inherent paradox that, during the period in which a norm is evolving, conforming practice may to a degree anticipate *opinio juris*.¹⁵² It may be impossible to locate the precise point in time when practice becomes consistent enough and legal obligation becomes perceived enough to produce the necessary quantum of proof that the norm has ripened into existence.¹⁵³ Judge Jensen in *Forti v. Suarez-Mason* first rejected plaintiffs' arguments that forced "disappearance" contravened specific human rights norms, but altered his ruling after being provided additional information.¹⁵⁴ The difficulty in determining *whether* a norm has ripened underlines the difficulty that would plague an effort to put a precise date on the point of ripening.

The relationship between customary law and acts of the President¹⁵⁵ or other executive officials has also divided scholars. Non-compliance with customary law by executive branch officials was precisely the issue addressed by the U.S. Supreme Court in 1900 in *The Paquete Habana*, which upheld the rights of victims to recover compensation for their loss when their coastal fishing vessel was seized and

152. As Professor D'Amato puts it, "How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?" ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 66 (1971).

153. Moreover, the means by which states transform customary law is to violate existing norms, under a claim that an altered norm would be more appropriate, hoping to attract enough approval and imitative practice that the legal landscape alters. Non-conforming practice may thus transform or abrogate existing norms. Alternatively, if other nations disapprove and fail to imitate the new behavior, the non-conforming state will simply have breached the existing norm.

154. 694 F. Supp. 707, 709 (N.D. Cal. 1988).

155. See *Agora: May the President Violate Customary International Law?*, 80 AM.J. INT'L L. 913 (1986) (Professors Charney, Glennon, and Henkin); 81 AM.J. INT'L L. 371 (1987) (Professors Kings, D'Amato, and Paust) [hereinafter *Agora*].

condemned by United States Navy officials in violation of the customary laws of war.¹⁵⁶ More recent actions challenging executive acts under customary human rights law have failed for a variety of reasons.¹⁵⁷ In many of these cases, jurisdictional doctrines of avoidance permitted the court to avoid direct confrontation of the effect of executive violation on the domestic enforceability of customary norms. The Eleventh Circuit, however, chose to address the issue and gave a very broad reading to a passage of ambiguous dictum in *The Paquete Habana*, holding that a decision of an executive branch official (at least one as high as the Attorney General) was a controlling executive act.¹⁵⁸

After stating that customary law is the law of the land and must be enforced by domestic courts where issues of rights are properly presented, Justice Grey in *The Paquete Habana* went on to condition this obligation with the following passage:

For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.¹⁵⁹

It is not at all clear what Justice Grey meant by this reference to a "controlling" act, since in that case the lower level officials had seized the vessel contrary to the President's directions to follow customary law. There is no agreed reading of *The Paquete Habana* dictum and international scholars differ sharply over the effect to be given by courts to non-conformity by U.S. officials to international norms.¹⁶⁰ The *Garcia-Mir* decision gave preclusive effect to executive failure to conform to international law even without clear evidence of a conscious decision to repudiate the norm. Such a decision seriously undermines the status of customary norms as law to which U.S. officials can be held accountable in domestic courts. Though spoken in a context of subsequent inconsistent legislation, the Court of Appeals for

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

157. The dismissal in *Sanchez-Espinoza v. Regan*, 568 F. Supp 596 (D.D.C. 1983), was affirmed on sovereign immunity grounds. *Sanchez-Espinoza v. Regan*, 770 F.2d 202 (D.C. Cir. 1985). The arguments of the Sanctuary workers were rejected on grounds that the Refugee Act of 1980 excluded the customary norm of temporary refuge. *U.S. v. Socorro de Aguilar*, No. 85-008-PHX-ECH (D. Ariz.) The Marielitos' international claims were rejected in *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986). The challenge to the interdiction at sea of Haitian asylum-seekers was rejected on standing grounds in *Haitian Refugee Center v. Gracey*, 809 F.2d 794 (D.C. Cir. 1987).

158. *Garcia-Mir v. Meese*, 788 F.2d at 1446.

159. 175 U.S. at 700.

160. See *Agora*, supra note 155; Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?* 80 Nw. U. L. REV. 321, 335 (1985); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1206 (1988).

the District of Columbia Circuit in a 1988 decision made an equally bold pronouncement: "no enactment of Congress can be challenged on the ground that it violates customary international law."¹⁶¹

A third difficulty concerns the identification of customary international law as a species of "federal common law." Being both non-statutory and a recognized component of the "law of the land,"¹⁶² customary norms logically seem analogous to other types of federal common law.¹⁶³ Unlike other species of common law, judges do not make customary international law but simply find and apply it.¹⁶⁴ The finding process, however, can be labyrinthine.¹⁶⁵

Looking at customary international law as common law raises some questions.¹⁶⁶ To assert that a simple breach of a customary norm by an executive official or an inconsistent judicial decision will render the norm domestically unenforceable is to speak of a type of law far *less* powerful than ordinary common law. "Law" which disappears, whenever those to whom its commands are addressed choose to breach it, presents a startling challenge to ordinary understanding.¹⁶⁷

D. *A Comparative Analysis*

The status of customary law in Canada and the United Kingdom is identical to its status in the United States. All abide by an adoption theory of customary law, which provides that customary international law is part of the law of the land.¹⁶⁸ Yet while the other two democra-

161. *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 939 (D.C. Cir. 1988).

162. Phillip Trimble has argued that customary international law is not really a part of the law of the land, dismissing or distinguishing the long line of precedent to the contrary. *See supra* note 2.

163. RESTATEMENT (THIRD) § 111, cmt. d and Reporter's note 3. *See generally*, KENNETH RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* 76-82 (1990).

164. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984).

165. *See* Judge Edwards' lengthy opinion in *Tel-Oren* finding that terrorism did not yet constitute a violation of international law and Judge Jensen's alteration of his views on "disappearance" in *Forti*. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 774; *Forti v. Suarez-Mason*, 672 F. Supp at 1531.

166. In *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1460-61 (S.D. Fla. 1990), *rev'd in part*, 963 F.2d 332 (11th Cir. 1992), the District Court stated that "The fact that the law of nations is part of United States common law does not dictate that this claim 'arises under' the 'laws of the United States'. . . Rights under international common law belong to sovereign nations, not to individuals."

167. The assertion, rejected in the final version of the Restatement, that a later evolved customary norm will override an earlier statute (RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 135(1) (Tent. Draft No. 1, 1980)), would mean a species of law very different and far more powerful than domestic common law.

168. *Buvot v. Barbut*, Cas. T. Talbot 281 (1737); *Triquet v. Bath*, 3 Burr. 478, 97 E.R. 936

cies are basically monist, it is virtually impossible to identify any instances in which customary international law has played a determinant, or even mildly significant, role in human rights litigation.

1. Canada

In theory, customary law can be used by Canadian courts in two ways: (a) as founding a right of action, and (b) to assist in interpreting constitutional and statutory law, including law concerning human rights. There are no examples of the former possibility, although the constitutional Charter of Rights and Freedoms¹⁶⁹ explicitly states that it should not be construed as denying the existence of other rights and freedoms in Canada. Hence, customary human rights law may in theory help to fill in the gaps.

The second possible use has been more explicitly recognized by the Supreme Court of Canada. In general, there is a presumption at common law that Parliament and the legislatures do not intend to act in breach of international law binding upon Canada, both customary and conventional. Concomitantly, there is a principle of construction that Canadian law should be interpreted as consistently with international law as possible.¹⁷⁰ The Supreme Court of Canada has not articulated this presumption or rule of construction explicitly in the human rights context, or in particular, in the context of interpreting the Charter of Rights and Freedoms. Nevertheless, the court has expressly acknowledged the usefulness and relevance of customary law in Charter interpretation.

(1764); *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977] 1 All E.R. 881 at 889-900 (C.A.); *In re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioner's Residences* [1943] S.C.R. 208; [1943] 2 D.L.R. 481 (Can.); *In re Exemption of U.S. Forces from Canadian Criminal Law* [1943] S.C.R. 483 [1943] 4 D.L.R. 11 (Can.); *In re Regina and Palacios* [1984] 7 D.L.R.(4th) 112 (Ont.C.A.).

In Canada, commentators disagree whether the provinces may effectively legislate in violation of norms of customary international law. See G. V. LaForest, *May the Provinces Legislate in Violation of International Law?* (1961), 39 CAN. BAR REV. 78; Ronald St. J. MacDonald, *The Relationship Between International Law and Domestic Law in Canada*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 88, 119 (Ronald St. J. Macdonald et al, eds. 1974).

In Australia, another federal nation, there is no consensus as to whether customary international law has the status of federal or state law. M.D. Kirby, *The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms*, 62 AUST. L.J. 514 (1988) (citing *Chow Hung Ching v. The King*, 77 C.L.R. 449, 462, 477 (1948)(Austl.) and *Polites v. The Commonwealth*, 70 C.L.R. 60, 80 (1945) (Austl.), both of which recognize the interpretive relevance of customary international law but appear to adopt a "transformation" approach to its direct enforceability).

169. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the Charter].

170. See *Bloxam v. Favre*, [1883], 8 P.D. 101, 107 (Eng.); *In re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioner's Residences*, [1943] 2 D.L.R. 481, 502 (Can.); *The Ship North v. The King* (1906), 37 S.C.R. 385, 398 (Can. 1906).

The Charter includes a general limitation clause applying to all substantive rights and freedoms in section 1, and substantive rights and freedoms in the following sections. In order to satisfy section 1, limitations must constitute a pressing and substantial governmental objective and meet a requirement of proportionality between that objective and the means used to attain it. Speaking for the majority in *Slaight Communications Inc. v. Davidson*,¹⁷¹ Chief Justice Dickson said:

Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s.1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in *customary international law* or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.¹⁷²

At the same time, there are no examples of cases in which a customary human right actually served the function which the court, in theory, has permitted.

2. United Kingdom

British cases take an adoption approach to the relationship between customary international law and domestic law; that is, they consider customary law to be part of the law of the land without an act of transformation.¹⁷³ British courts have never required express adoption of customary law by statute, nor express acceptance of the customary rule by the United Kingdom itself. However, customary law must yield to conflicting statute law¹⁷⁴ and conflicting well-established rules of the common law.¹⁷⁵

In the United Kingdom, brief reference to the Universal Declaration of Human Rights has sometimes been made, often joined with a reference to the parallel article of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In a case concerning retrospective criminal legislation, the reference to the international norms simply reinforced an already strong argument on statutory interpretation.¹⁷⁶ A similar case challenging a change in pa-

171. [1989] 1 S.C.R. 1038 (Can.).

172. *Id.* at 1056-57 (emphasis added).

173. *See supra* note 168.

174. *Mortensen v. Peters* (1906), 14 Scots L.T.R. 227 (H.C.J. 1906).

175. *Chung Chi Cheung v. The King*, 1939 App. Cas. 160, 168 (P.C. 1938) (appeal taken from H.K.).

176. *Waddington v. Miah*, [1974] 1 W.L.R. 683, 694 (Eng.). (Lord Reid observed that "it is

role rules was unsuccessful, but both the majority and dissenting opinions in the Queen's Bench Division took note of the provisions of the Universal Declaration (and the European Convention) prohibiting retrospective punishment.¹⁷⁷ More significantly, the norms contained in the Standard Minimum Rules for the Treatment of Prisoners were recognized as reflecting an enforceable minimum, but again no violation was found.¹⁷⁸ Several cases in the Privy Council have looked to the Universal Declaration to interpret constitutions of Commonwealth states, but this can be explained not so much as a recognition that the Universal Declaration reflects binding customary law as an awareness that these constitutions were modelled in part on its provisions.¹⁷⁹ During a period antedating the adoption of domestic anti-discrimination law, a plaintiff argued that she had an enforceable claim for compensation for the denial of a promotion on the basis of sex, citing the Universal Declaration as well as other international instruments. She met with a ruling that the Universal Declaration and other resolutions of the United Nations General Assembly would not become law until enacted by Parliament.¹⁸⁰

Outside of the human rights context, "[t]he occasions in which rules of customary international law fall [sic.] to be applied by English courts are relatively few. . . . Most of them are to do with immunities of foreign States and governments and of diplomatic agents or with territorial waters."¹⁸¹ Thus, when enforced at all by English courts, customary law tends to arise in a defensive context, often in litigation between private parties rather than as a challenge to action by U.K. officials. Thus, there is little useful precedent for the use of customary law to found a cause of action or to restrain the discretion of Parliament or of U.K. administrative officials.

For example, in *The Queen v. Secretary of State for the Home Department, Ex parte Thakrar*,¹⁸² a British passport holder born in Uganda to Indian parents invoked international law in challenging his

hardly credible that any government department would promote or that Parliament would pass retrospective criminal legislation.".)

177. *Findlay v. Secretary of State* [1984] 3 All E.R. 801 (Eng. C.A.) No mention is made of the Universal Declaration or the European Convention in the opinions of the Court of Appeal or House of Lords.

178. *Williams v. Home Office (No. 2)* [1981] 1 All E.R. 1211 (Eng. Q.B.).

179. See, e.g., *Attorney Gen. v. Antigua Times Ltd.*, [1975] 3 All E.R. 81 (Eng. P.C.); *Minister of Home Affairs v. Fisher* [1980] App. Cas. 319 (P.C. 1979) (appeal taken from Berm.); *Haw Tua Tau v. Public Prosecutor* [1982] App. Cas. 136, (P.C. 1981) (appeal taken from Sing.).

180. *Amies v. Inner London Educ. Auth.*, [1977] 2 All E.R. 100 (Eng. Emp. App. Trib.).

181. J. G. Collier, *Is International Law Really Part of the Law of England?* 38 INT'L & COMP. L.Q. 924, 933 (1989).

182. [1974] Q.B. 684 (D.C.).

exclusion by U.K. immigration authorities. Significantly, his challenge took the form of an affirmative suit for a writ of certiorari, mandamus, or habeas corpus, directed toward the immigration authorities. His counsel invoked "international law" to the effect that a duty is imposed on a country to accept a national who is expelled from another country.¹⁸³ While not questioning the existence of such a norm, the court held that the Immigration Act of 1971 was "a comprehensive provision, and that no rights such as those claimed for an expellee have survived that Act to exist independently."¹⁸⁴ Had the case rested there, it would merely represent an application of the "last in time" rule under which a later inconsistent statute will be treated by domestic courts as overriding an earlier customary norm.¹⁸⁵

However, on review in the court of appeal, Lord Denning went much further in rejecting Thakrar's claim. He postulated not only that the United Kingdom takes a dualist rather than a monist approach to customary law¹⁸⁶ but also that international law governs only relations between states, not relations between an individual and a state.¹⁸⁷ The latter assertion would deprive international human rights law of any application in the United Kingdom.¹⁸⁸

Only three years later, however, in a non-human rights context (foreign sovereign immunity for commercial activities), Lord Denning issued the influential judgment in *Trendtex Trading Corporation v. Central Bank of Nigeria*,¹⁸⁹ which not only endorses a monist approach to customary law but also stresses the dynamic nature of customary norms:

Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court, as to what was the ruling of international law 50 or 60 years ago — is not binding on this court today. International law knows no rule of stare decisis.¹⁹⁰

183. *Id.* at 686 (citing OPPENHEIM'S INTERNATIONAL LAW 645, 694-95 (8th ed. 1955)).

184. *Id.* at 692 (opinion of Lord Widgery).

185. See *supra* text accompanying notes 148-54.

186. See [1974] Q.B. 684, 701 (C.A.).

187. *Id.* at 702.

188. Such a view was rejected by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (1980) (rejecting *Dreyfus v. Von Finck* 534 F.2d 24, 30 (2d. Cir), *cert denied*, 429 U.S. 835 (1976)). Oddly, in the recent *Noriega* case, Judge Hoeveler cites *Dreyfus* for this proposition in rejecting Noriega's arguments based on the international norm prohibiting the aggressive use of force. *United States v. Noriega*, 746 F. Supp. 1506, 1534 (S.D. Fla. 1990).

189. [1977] Q.B. 529 (C.A.).

190. *Id.* at 554.

There is little reason to expect, however, that these words will appear in any English case concerning customary human rights norms.¹⁹¹

3. Conclusion

There are virtually no cases in which customary international human rights law, standing alone, appears to supply the rule of decision or to found a cause of action in the courts of Canada or the United Kingdom. Several factors may help explain this pattern. First, these two democracies have ratified comprehensive major human rights treaties, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (in the case of the United Kingdom),¹⁹² the International Covenant on Civil and Political Rights (both),¹⁹³ the International Covenant on Economic, Social and Cultural Rights (both),¹⁹⁴ and others.¹⁹⁵ When international human rights norms are invoked by courts or litigants in these countries, the tendency is to cite provisions in the treaties without making any effort to prove that the treaty norms are expressive of binding customary norms.¹⁹⁶ This is done despite the fact that neither country recognizes a doctrine of self-executing treaties¹⁹⁷ and none of these treaties has actually been fully implemented in domestic law.¹⁹⁸

Second, customary human rights law occupies a somewhat uneasy position in nations committed to basic democratic values but lacking a written bill of rights (a description fitting the United Kingdom and Australia). On the one hand, those who support the following proposition might be expected to embrace customary human rights law with enthusiasm: "If society is tolerant and rational, it does not need a Bill

191. Collier criticizes Lord Denning for result-oriented decisionmaking in his *Trendtex* change of heart, *supra* note 181, at 933.

192. European Convention for the Protection of Human Rights and Fundamental Freedoms, No. 4, 1950, 213 U.N.T.S. 221.

193. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL; STATUS AS AT 31 DECEMBER 1990, at 130, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991). For full text, see International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, 999 U.N.T.S. 171, 1057 U.N.T.S. 407.

194. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL; STATUS AS AT 31 DECEMBER 1990, at 120, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991). For full text, see International Covenant on Economic, Social and Cultural Rights, *opened for signature*, Dec. 19, 1986, 993 U.N.T.S. 3.

195. *E.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, March 7, 1966, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180, *opened for signature*, Dec. 18, 1979.

196. *See infra* notes 242-44.

197. *See infra* note 242.

198. *See infra* note 243.

of Rights. If it is not, no Bill of Rights will preserve it."¹⁹⁹ The inherent indefiniteness and elusiveness of customary human rights law should not loom as obstacles to those who postulate that unwritten laws are more protective of rights than those reduced to codifications.²⁰⁰

Moreover, a frank recognition that judges are law-givers and not simply law-apppliers is practically inescapable in a common law country lacking a domestic bill of rights.²⁰¹ A number of the more interesting English cases in which human rights norms were involved do not involve legislation, but instead require striking a balance between individual common law rights and common law duties or governmental powers.²⁰² In a case where virtually all law is uncodified and judge-made, it is difficult to credit an objection to incorporation of customary human rights norms on the ground of indefiniteness, lack of status as democratically-enacted positive law, or the like.

Of course, it is not just concern for the limits of the human capacity for precise and thorough articulation that explains the persistent failure, despite repeated attempts, to adopt a written bill of rights in the United Kingdom.²⁰³ Far more powerful has been the tradition of parliamentary supremacy, which on its surface seems an especially undiluted strain of majoritarianism. It should be noted that deference to parliamentary supremacy is joined to the theory of residuary rights and recognizes that persons possess complete freedom until either a parliamentary majority or the courts in evolving common law rules of liability prohibit certain types of behavior.²⁰⁴ Where traditional common law rights are alleged to be overridden, the courts characteristically employ strict doctrines of statutory interpretation that place the burden on the parliament to be clear and candid about its rights-restrictive aims. As a result, courts are by no means insignificant actors

199. PETER H. BAILEY, HUMAN RIGHTS, AUSTRALIA IN AN INTERNATIONAL CONTEXT 56 (1990) (quoting Sir Harry Gibbs).

200. See, e.g., discussion in Bailey, *supra* note 199, at 45-78; Anthony Lester, *Fundamental Rights in the United Kingdom: The Law and the British Constitution*, 2 HUM. RTS. REV. 49, 51 (1976-77); T. R. S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*, 44 CAMBRIDGE L.J. 111, 134-35 (1985):

Nor is it certain that the enactment of a formal bill of rights as part of English law (at least in the absence of a full power of judicial review of legislation) would achieve better protection of traditional liberties. There is in fact no reason why it should. A common law presumption which commands the loyalty of the judges is as powerful an instrument for interpreting legislation so as to safeguard individual liberties as an enacted bill of rights.

201. Lord Reid, *The Judge as Lawmaker*, 12 SOC'Y PUB. TCHRS. L.J. 22 (1972) (notion that judges declare rather than make law is archaic fairy tale).

202. E.g., Attorney Gen. v. B.B.C. [1981] A.C. 303 (appeal taken from Q.B.); Attorney Gen. v. Guardian Newspapers, Ltd. [1988] 2 W.L.R. 805.

203. See LESLIE SCARMAN, ENGLISH LAW — THE NEW DIMENSION 10-21 (The Hamlyn Lectures, No. 26, 1974); Allan, *supra* note 200.

204. Allan, *supra* note 200 at 116-21, 133-41.

for the protection of fundamental rights within a system of parliamentary supremacy.²⁰⁵

Use of customary international human rights law would not in any measure broaden the discretion or scope of review the courts already possess, though it would turn their search for sources of value in a different direction. One factor explaining the courts' failure to rely on customary international human rights law may be simple parochialism.²⁰⁶ The persistence of a formalist faith in the objectivity of the judicial process may also reinforce a tendency to turn to exclusively domestic sources, primarily earlier judicial decisions, for guidance.

This pattern of approaches to customary human rights law makes

205. Both parliamentary supremacy and the tradition of the independence of the courts emerged from the same historical struggle against concentration of power in an autocratic executive. Lester, *supra* note 200, at 50; George Winterton, *The British Grundnorm: Parliamentary Supremacy Re-Examined*, 92 L.Q. REV. 591, 595 (1976). Confinement of executive power and simultaneous preservation of traditional liberties are assumed to flow from commitment to the rule of law, which in turn rests on the dual supports of parliamentary supremacy and judicial review of executive action. As for the latter, English courts have elaborated doctrines of "natural justice". Winterton links the doctrine of natural justice to theories of inalienable rights:

For centuries, and certainly at the time of the 1688 revolution, the concept of practically 'inalienable' personal liberties has been a very strong feature of the British constitution: it is implicit in the British concept of the Rule of Law, and has led to the doctrine of natural justice in administrative law, as well as the rules for interpreting statutes so as not to threaten individual liberty.

Id. at 599 (footnotes omitted).

The English courts have also elaborated strict approaches to statutory interpretation, especially in defining the scope of delegated administrative powers, that have often served a powerful protective function in human rights cases. See Jeffrey Jowell & Anthony Lester, *Beyond "Wednesbury": Substantive Principles of Administrative Law*, 1987 PUB. LAW 363. See also Allan, *supra* note 200, at 117-25, 127, 131. The courts appear to possess very wide discretion in identifying the "traditional" rights whose protection demands strict construction of governmental powers:

Properly articulated and developed, the basic constitutional principle of the rule of law provides a powerful breakwater, if not an impenetrable dam, against encroachment on important rights and liberties by means of statutory authority. Nor can the scope of the principle be limited to those liberties and interests — chiefly liberty of the person and property interests — which have received the most assiduous judicial attention in the past. The traditional political liberties, especially freedoms of speech and assembly, which constitute important features of modern bills of rights, fall equally naturally within its compass. There is nothing in the *residual* nature of common law conceptions of freedom and human rights which precludes their restatement and development to meet new demands. The picture, often presented, of a set of traditional common law freedoms being inexorably eroded by the march of restrictive legislation is hardly accurate. It supposes that the rights and freedoms recognised by the common law consist simply in whatever remains once the ambit of common law and statutory limitations have been determined - in abstraction, as it were, from the historical attachment of the common law to individual freedom. . . . In a real sense, judicial interpretation of statutory provisions completes the process of enactment by articulating their scope against a background of traditional common law notions of justice and fairness. The very process of setting the ambit and limitations of statutory provisions which infringe the liberties of the citizen is itself strongly colored by the strength of the court's attachment to those same liberties.

Id. at 133 (footnotes omitted).

206. See, e.g., Home Office v. Harman [1983] 1 A.C. 280, 299-300, 302-03, H.L.(E.) (opinion of Lord Diplock) (uniqueness of British system of open trial demands unique rules on confidentiality of discovered material).

the minimal successes in U.S. courts seem advanced by comparison. Much of the difference can be explained by the tendency of Canadian and British courts and litigants to refer to provisions of ratified treaties when making any reference to international human rights. This tendency is ironic in that, in monist systems such as Canada and the United Kingdom, customary law theoretically is part of the law of the land, unlike the ratified but unimplemented treaties that receive more frequent citation. In all three systems, a later contrary statute would clearly control over customary law. Indeed, it may be true for courts in all three systems that any clearly contrary statute will control, whether or not later enacted.²⁰⁷

One characteristic shared by all the systems may explain a failure to ground a decision on customary human rights law. This feature is the court's correct assessment that international norms lack sufficient precision or relevance to compel a particular result.²⁰⁸ This holds true regardless of the system's monism or dualism and regardless of whether fundamental rights have been codified or entrenched in domestic law.

II. CONVENTIONAL INTERNATIONAL LAW

A. *The Basic Rule in the United States*

The rule governing the relationship between treaties and domestic law is set out in the United States Constitution. Article VI, Clause 2 states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

In other words, conventional international law which is binding upon the United States is part of the law of the land. In Article II, Section

207. The controversy over the effect of a later-evolved customary norm on a prior inconsistent statute in the United States has been noted above. *See supra* notes 149-51 and accompanying text. In Canada and the United Kingdom, human rights norms have been invoked almost exclusively for interpretive purposes, and the issue has not received attention. The interpretive significance of unimplemented — or non-self-executing — treaties ratified *after* the passage of the relevant statute has received little attention. *See* Steinhardt, *supra* note 151. Certainly, defining public policy consistently with the nation's international obligations, wherever possible, is important whatever the date of treaty ratification or time of evolution of the customary rule.

208. *See, e.g.*, the principle of family unity in the United Nations Declaration on the Rights of the Child, found not determinative of Australian deportation policy concerning alien parents of citizen infants. *Kioa v. West*, 159 C.L.R. 550, 570-71 (1985) (Austl.).

2, the U.S. Constitution sets out the following requirements for a treaty to be binding:

He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;

Hence, ratification is made difficult at the same time that its domestic implications may be very significant.

B. *The Self-Executing Caveat in the United States*

The rule that treaties are part of the law of the land has been held by the courts, however, to be subject to a caveat. The Supreme Court has drawn a distinction between self-executing and non-self-executing treaties. Only treaties which are self-executing, or which are intended to take effect in United States law, will in fact be interpreted and applied in United States courts.²⁰⁹ In *Foster v. Neilson*, the Supreme Court stated:

Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, wherever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court.²¹⁰

Two of the few major human rights treaties that have been ratified by the United States, the Convention on the Prevention and Punishment of the Crime of Genocide and the International Covenant on Civil and Political Rights, were subject to declarations of non-self-execution.²¹¹ Similar declarations of non-self-execution have been proposed for other human rights treaties.²¹²

209. The incoherence of the test for distinguishing between self-executing and non-self-executing treaties and its fundamental inconsistency with the Framers' intent to establish treaties as the law of the land is thoroughly explored in Carlos Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992). Vázquez urges the courts to apply doctrines of justiciability that govern the assertion of rights derived from statutes or the Constitution to cases involving private rights derived from treaties.

210. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

211. Implementing legislation was later adopted for the Genocide Convention. Genocide Convention Implementation Act of 1987, Pub. Law No. 100-606, 102 Stat. 3045 (1988).

212. The Senate gave its advice and consent to the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment subject to a declaration of non-self-execution. See 136 Cong. Rec. S17486-92 (daily ed. Oct. 27, 1990). Ratification is contingent upon passage of implementing legislation.

C. *Who Can Implement International Conventions in the United States*

The Constitution also speaks to the question of which governmental authority in the federal system can implement international conventions. Article I, Clause 18 states that the Congress shall have power

To make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Consequently, it is the Congress which has the power to enact legislation to implement a treaty that has been properly made by the President with the consent of the Senate. Congress may enact a law pursuant to a treaty, which could not have been enacted in the absence of the treaty.²¹³ But courts will not enforce treaties that violate the Constitution²¹⁴ and will give precedence to a later statute over a conflicting treaty provision.²¹⁵ Invocation of treaty rights may be further complicated by a decision of the President to abrogate the treaty or simply to ignore its commands.²¹⁶ Thus, although there is wide assent to the notion that treaties are the "law of the land," the actual enforceability of treaties in United States courts is a complex and sometimes opaque matter.

D. *Methods of Using Conventional International Law in United States Courts*

1. Interpretation Favoring Consistency with International Law

In the case of ratified conventions, whether or not self-executing, domestic law should be construed in such a way as to avoid a violation of the international obligations of the United States.²¹⁷ In the words of the U.S. Supreme Court in *MacLeod v. United States*:

The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate

213. *Missouri v. Holland*, 252 U.S. 416 (1920).

214. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957).

215. *United States v. Dion*, 476 U.S. 734, 738 (1986); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 446 U.S. 243, 252 (1984); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889); Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L. L. 393 (1988).

216. Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 934-36 (1986).

217. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law.²¹⁸

Similarly, in the words of the RESTATEMENT (THIRD): "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."²¹⁹ The potential power of this interpretive principle is illustrated by the Second Circuit's invalidation of the draconian tightening of the Haitian interdiction program in May 1992, when President Bush ordered Haitian asylum-seekers to be returned to Haiti without any screening of their asylum claims.²²⁰ While the court rests its decision primarily on the plain language of the statute,²²¹ its extended discussion of the identical obligation not to interdict and summarily refoule asylum-seekers under Article 33.1 of the United Nations Convention relating to the Status of Refugees²²² serves as strong, if implicit, support for its reading of the statute.²²³

2. The Issue of Implementation

Ratified conventions which are not self-executing may play a role in domestic litigation through implementing legislation. In this case, it is the implementing legislation which is the source of municipal rights; however, the convention itself may function as an interpretive aid. For example, the United Nations Protocol relating to the Status of Refugees provides that the signatories are to adopt laws and regulations to ensure the application of the Protocol. U.S. courts have found that the Refugee Act of 1980 was designed in part to give effect to the Protocol²²⁴ and have relied on the Protocol and the *travaux preparatoires* in interpreting the Refugee Act.²²⁵

While the influence of international human rights law would increase if domestic legislation was more frequently designed to imple-

218. *Macleod v. United States*, 229 U.S. 416, 434 (1913).

219. RESTATEMENT (THIRD) § 114.

220. *Haitian Centers Council v. McNary*, No. 92-6144, 1992 U.S. App. LEXIS 17372 (2d Cir. July 29, 1992).

221. Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1) (1988).

222. 189 U.N.T.S. 150, 176 (1954). The United States is bound to this provision pursuant to the 1967 Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, 6225.

223. The Court chose not to reach the issue of whether Article 33.1 is self-executing, finding the issue to be "largely academic, since § 243(h)(1) provides coextensive protection." *Haitian Centers Council*, *supra* note 220, at 57.

224. *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

225. See *Bertrand v. Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982); *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1406 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987); *Ishtyaq v. Nelson*, 627 F. Supp. 13, 27 (E.D.N.Y. 1983).

ment a ratified treaty, discerning such intention may be controversial. For example, it has been argued that the human rights provisions of the United Nations Charter are implemented by United States civil rights legislation. In *Spieß v. C. Itoh & Co. (America), Inc.*, the Fifth Circuit rejected the argument that Title VII of the Civil Rights Act was enacted to implement the Charter and therefore invalidated antecedent treaty obligations which permitted discrimination in employment.²²⁶

3. The Issue of Whether the Convention is Self-Executing

In order to use ratified human rights treaties of the United States more directly, as sources of rights rather than merely as aids to interpretation, the treaties must be self-executing. Again, there are very few human rights treaties of which this question can be asked.

In particular, courts have asked whether the United Nations Charter and its provisions relating to the observation of human rights and fundamental freedoms are self-executing. The answer has been largely negative. In *Sei Fujii v. State*²²⁷ the Supreme Court of California held that the provisions of the United Nations Charter relating to the observance of human rights and fundamental freedoms were not self-executing and did not create rights and duties in individuals. The decision has been followed a number of times.²²⁸ In the court's words:

A treaty, however, does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts.²²⁹

The element of indefiniteness or contingency upon future legislative action that figured in *Foster v. Neilson*²³⁰ might fairly be said to characterize the Charter's article 56 obligation to take joint and separate action to promote respect for human rights but seems less fairly ap-

226. 643 F.2d 353, 363 (5th Cir. 1981).

227. 242 P.2d 617 (1952).

228. *Frolova v. U.S.S.R.*, 761 F.2d 370, 374 (7th Cir. 1985); *Dickens v. Lewis*, 750 F.2d 1251 (5th Cir. 1984); *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965); *Weir v. Broadnax*, No. 89 Civ. 7446, 1990 U.S. Dist. LEXIS 15795 at *22 (S.D.N.Y. 1990) (finding the Charter non-self-executing in a case concerning race discrimination in public employment under the precedents of the 2d Circuit and because "[n]o nation state in the annals of recorded history has done as much as the United States in protecting and furthering the rights of minorities."); *Davis v. District Director, Immigration and Naturalization Service*, 481 F. Supp. 1178, 1183 n.7 (D.D.C.1979).

229. 242 P.2d at 620.

230. 27 U.S. (2 Pet.) 253 (1829).

plied to the Charter's repudiation of race discrimination.²³¹

Other cases have negatively determined the self-executing nature of additional provisions of the United Nations Charter and other human rights or humanitarian treaties. In *Committee of U.S. Citizens Living in Nicaragua v. Reagan*,²³² the provisions of the United Nations Charter relating to enforcement of decisions of the International Court of Justice were held to be not self-executing. Judge Bork in *Tel-Oren*, speaking only for himself in a concurring opinion, found that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,²³³ the Hague Conventions on the Laws and Customs of War on Land, the Geneva Convention Relative to the Treatment of Prisoners of War, and the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, although ratified by the United States, were not self-executing.²³⁴ A similar result was reached in *Handel v. Artukovic*,²³⁵ concerning the domestic enforceability of the Geneva Convention of 1929.

However, in the narcotics prosecution of General Manuel Noriega, the government conceded the applicability of the prisoner of war provisions of the Third Geneva Convention of 1949.²³⁶ The district court examined the treaty in substantive detail in order to determine whether any of its provisions had been breached and, if so, whether such breach deprived the court of criminal jurisdiction over Noriega.²³⁷

A long line of extradition cases since *United States v. Rauscher*²³⁸ has found extradition treaties to be self-executing, so as to permit defendants prosecuted in breach of such treaties to challenge the court's jurisdiction. Habeas corpus relief is available to persons whose extra-

231. U.N. CHARTER art. 1, ¶ 3.

232. 859 F.2d 929, 937-38 (D.C. Cir. 1988).

233. The same was held in *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978).

234. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 808-10.

235. 601 F. Supp. 1421 (D. Cal. 1985).

236. *United States v. Noriega*, 746 F. Supp. at 1525.

237. *Id.* at 1525-29 (Articles 22, 82, 84, 85, 87, 99, 118, and 119). The court found that prosecution was consistent with the treaty provisions.

238. 119 U.S. 407 (1886). See also *U.S. v. Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *remanded*, — U.S. —, 112 S.Ct. 2986 (1992), which held that a person kidnapped by U.S. agents in a foreign state with which the U.S. has an extradition treaty may successfully raise the breach of the extradition treaty to defeat jurisdiction over him in a criminal prosecution, if the foreign state formally protests the breach. A similar ruling was made in *U.S. v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991), *rev'd on other grounds*, — U.S. —, 112 S.Ct. 2188 (1992). The Supreme Court held in *Alvarez-Machain* that abduction did not violate the U.S.-Mexico extradition treaty, and so did not reach the issue of *Alvarez-Machain's* standing to complain of the breach.

dition is sought by foreign governments. It permits claims to be raised under treaty provisions, such as a political offense exception.²³⁹ Treaties limiting the scope of extraterritorial jurisdiction over criminal offenses have likewise been found to be self-executing,²⁴⁰ permitting individuals to obtain a dismissal of proceedings brought against them in U.S. courts.

E. *The United States Situation - Conclusion*

Since ratification of treaties in the United States requires the advice and consent of two-thirds of the Senate, the process is politically difficult. But this difficulty is coupled with the fact that ratification has potentially profound domestic consequences, namely, that a self-executing treaty will immediately have internal effect. This may partially explain why the United States has failed to ratify most of the major human rights conventions. Consequently, those wishing to introduce international human rights law into domestic courts either by way of an appeal to the principle of conformity with international obligations, or as a direct and autonomous source of domestic rights, turn more frequently to customary international law.

F. *A Comparative Analysis*

The status of conventional international law in Canada and the United Kingdom is different than it is in the United States. Both abide by a transformation theory of conventional law, which provides that ratified treaties will not be part of the law of the land without an explicit act of transformation or incorporation by legislative bodies.²⁴¹ Both have ratified many more human rights treaties than the United States. At the same time, however, they have generally taken only limited steps to incorporate them into domestic law.²⁴²

239. See, e.g., *Matter of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

240. See, e.g., *Cook v. United States*, 288 U.S. 102 (1933); *Ford v. United States* 273 U.S. 593 (1927).

241. *The Parlement Belge*, 4 P.D. 129 (C.A. 1879), *rev'd on other grounds*, 5 P.D. 197 (C.A. 1880); *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*, [1977], 1 All E.R. 881, 889-900 (Eng. C.A.); *In re Arrow River and Tributaries Slide & Boom Co. Ltd.*, [1932] 2 D.L.R. 250, [1932] S.C.R. 495 (Can.). Whether the statute must explicitly state its character as implementing legislation is not clear from the cases. Compare *MacDonald v. Vapour*, [1976] 66 D.L.R.3d 1, 1977 S.C.R. 134 (Can.) (requiring explicit statement in legislation that would displace traditional provincial authority) with *The Crown v. Crown Zellerbach Canada Ltd.*, [1988] 49 D.L.R.4th 161, [1988] 1 S.C.R. 401 (Can.) (no express declaration, but Act refers to treaty).

242. See David Feldman, *Influences on Judicial Reasoning* 1, 22, in *THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP OF THE EUROPEAN COMMUNITIES AND THE RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (M. P. Furmston et al., eds. 1982).

The consequences are a frequent absence of adequate domestic remedies for breach and, where individual complaint mechanisms under the treaty have been accepted by the state, a real risk that the state will be found to be in breach of its treaty obligations by an international

Concern about the separation of powers underlies this dualist approach. Because a treaty is ratified by executive prerogative, the courts are concerned with protecting the authority of parliament from any attempt by the executive to change the law simply by use of the prerogative.²⁴³ In Canada, for example, concerns about preserving the powers of the constituent units of the federation raise additional delicate issues of power-sharing.

1. Canada

The situation in Canada is the most interesting because, like the United States, Canada now enjoys a constitutional charter of rights that is judicially enforceable to restrain executive action and to override inconsistent legislation. Unlike the U.S. Bill of Rights, however, provisions of the Charter of Rights and Freedoms can be violated by legislation clearly expressing such an intended result.²⁴⁴ Also, unlike the U.S. Bill of Rights, the Charter is of recent origin and many of its articles consciously model those of the human rights treaties Canada has ratified, especially the Covenant on Civil and Political Rights.²⁴⁵

The drafting history of the Charter reveals that close attention was paid to certain rights in international instruments.²⁴⁶ Thus, in Canada "original intent" interpretivism would supply very strong legitimacy

implementing body. See *supra* note 89 (noting the frequency with which the United Kingdom has been the respondent government in applications to the European Commission on Human Rights); Lester, *supra* note 200, at 61. Canada has ratified the Optional Protocol to the Covenant on Civil and Political Rights, but the United Kingdom has not. The frequent embarrassments suffered by the United Kingdom in Strasbourg seem to have had only mild influence in stimulating a desire to implement the European Convention in domestic law. *Id.* at 63-64; R. Kerridge, *Incorporation of the European Convention on Human Rights into United Kingdom Domestic Law*, in *THE EFFECT ON ENGLISH DOMESTIC LAW*, *supra* at 247-82.

243. See Collier, *supra* note 181, at 925; *Koowarta v. Bjelke-Petersen*, 39 A.L.R. 417 (1982); Attorney Gen. of Canada v. Attorney Gen. of Ontario, [1937] 1 D.L.R. 673, 678 (P.C.) (Labour Conventions Case).

244. Canadian Charter of Rights and Freedoms, Canada Act, 1982, sched. B, s. 33 (Gr. Brit.).

245. See ANNE F. BAYEFESKY, *INTERNATIONAL HUMAN RIGHTS LAW: USE IN CANADIAN CHARTER OF RIGHTS AND FREEDOMS LITIGATION* 34-38 (1992). Note that during the period of Charter drafting (1968 to 1982), Canada became a party to a number of major human rights treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination (1970), the International Covenant on Civil and Political Rights (1976), the International Covenant on Economic, Social and Cultural Rights (1976), and the Convention on the Elimination of All Forms of Discrimination Against Women (1982).

246. In addition to the treaties ratified by Canada, references are made in the Charter's drafting history to the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Universal Declaration of Human Rights. See, e.g., Barry Strayer, Statement to Canadian Special Joint Committee on the Constitution, in Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *MINUTES OF PROC. & EVIDENCE*, June 11, 1970, at 13; E.g., Otto E. Lang, *Constitutional Reform: Canadian Charter of Rights and Freedoms*, in *1 CANADA'S CONSTITUTION ACT 1982 AND AMENDMENTS: A DOCUMENTARY HISTORY* 499 (Anne F. Bayefsky ed. 1989).

and even necessity for resort to the treaties in construing the Charter.²⁴⁷ The same approach in the United States would seem to give the least scope to human rights treaties in constitutional interpretation. Yet, Canadian practice is uneven.

Canada adheres to an interpretive principle analogous to the *Charming Betsy*²⁴⁸ in U.S. law.²⁴⁹ This principle or common law presumption in favor of an interpretation consistent with international obligations applies to ratified treaties regardless of whether they have been implemented. In theory, it might be supposed that where there has been a deliberate legislative effort to implement a treaty, the courts will be more inclined to turn for recourse to the underlying treaty for interpretive assistance. In practice, in the non-human rights context, Canadian courts have tended to stress the importance of finding an ambiguity in the Canadian law to justify any reference to a treaty, although it appears that the ambiguity requirement is more likely to be met in the case of an implemented treaty. However, in the context of the Charter of Rights and Freedoms, the Supreme Court of Canada has neither stressed any ambiguity requirement nor differentiated between the usefulness of implemented and unimplemented treaty obligations. In fact, the Supreme Court of Canada has not even addressed the issue of whether Canada's human rights treaties have been implemented by the Charter. The consequence has been the proliferation of references to international human rights law since the Charter was enacted in 1982.²⁵⁰ Eighteen such cases emanate from the Supreme Court of Canada.²⁵¹

The strongest statement of a majority of the Supreme Court of Canada on the usefulness of international human rights law in interpreting the Charter was made in *Slaight Communications Inc. v. Davidson*. Chief Justice Dickson said:

Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights* . . . it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public*

247. A specific preambular reference to the Universal Declaration and the Covenant on Civil and Political Rights, however, appears to have been deliberately deleted (Meeting of Officials on the Constitution; Jan. 11-12, 1979, Doc. No. 840-153/031, at 2 (Can.)), although no Canadian court has ever made reference to this fact. See BAYESKY, *supra* note 245, at 36-37.

248. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

249. *Daniels v. White*, [1968] S.C.R. 517, 541, 2 D.L.R.(3d) 1, 23; *Nat'l Corn Growers Ass'n v. Canadian Import Tribunal*, [1990] 2 S.C.R. 1324, 74 D.L.R.(4th) 449.

250. Between 1982 and July 1992 there have been approximately 101 decisions of Canadian courts which refer to international human rights treaties ratified by Canada; about half of these references could be said to actually support the decision made.

251. In ten of the opinions, the reference could be described as supporting the outcome. On seven occasions, the reference was made in the context of a dissenting opinion in which its use could be described as supportive.

Service Employee Relations Act (Alta.) . . . I had occasion to say . . . The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of the 'full benefit of the *Charter's* protection'. I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. Given the dual function of s.1 . . . Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s.1 objectives which may justify restrictions upon those rights. Furthermore, . . . the fact that a value has the status of an international human right. . . under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.²⁵²

This statement goes beyond the mere suggestion that international law may be used, to an admonition that it *should* be used, at least to ensure that the Charter of Rights and Freedoms provides protection as great as that afforded by Canada's international legal obligations. This remark has been repeated in a number of subsequent majority decisions of the Supreme Court of Canada.²⁵³ For example, later cases have used conventional law to which Canada is a party to give "a high degree of importance"²⁵⁴ to a challenged law's objective, and hence to bolster the justifiability of restrictions upon individual rights.

One of the strongest examples of a treaty provision shaping the outcome of a Charter case is *The Queen v. Brydges*,²⁵⁵ in which the Supreme Court held that the failure to inform an indigent criminal suspect of his right to appointed counsel violated Charter section 10(b). While section 10(b) made no specific mention of appointed counsel, Article 14(3)(d) of the Covenant on Civil and Political Rights did. After citing the Covenant provision, Justice Lamer reasoned:

All of this is to reinforce the view that the right to retain and instruct counsel, in modern Canadian society, has come to mean more than the right to retain a lawyer privately. It now also means the right to have access to counsel free of charge where the accused meets certain financial criteria set up by the provincial Legal Aid plan, and the right to have access to immediate, although temporary, advice from duty counsel irrespective of financial status. These considerations, therefore, lead me to the conclusion that as part of the information component of s.10(b) of the *Charter*, a detainee should be informed of the existence and availability of the applicable systems of duty counsel and Legal Aid in the juris-

252. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1056-57, 59 D.L.R.(4th) 416 at 427-28.

253. *The Queen v. Keegstra* [1990], 3 S.C.R. 697, 749-58; *Taylor v. Canadian Human Rights Comm'n*, 75 D.L.R. (4th) 577 (1991).

254. *The Queen v. Keegstra*, 1 C.R. (4th) at 750.

255. [1990] 1 S.C.R. 190.

diction, in order to give the detainee a full understanding of the right to retain and instruct counsel.²⁵⁶

The specificity of the international norm enhanced its persuasive power in *Brydges*, though the use of the term "reinforce" should be noted. The opinion also failed to provide a clear rationale for this reference to the Covenant, such as whether the Charter drafters were presumed to seek consistency with the Covenant.²⁵⁷

The Canadian courts do not always take their cues from international instruments in interpreting the Charter. Where a Charter provision directly contradicts a treaty provision, the former prevails.²⁵⁸ For example, *The Queen v. Milne* concerned the statutory reduction of penalties for a criminal offense following the defendant's conviction.²⁵⁹ While article 15 of the Covenant on Civil and Political Rights provides that offenders should benefit from any post-conviction reduction in penalties, Charter section 11(i) specifically limits such benefits to reductions occurring between the time of the offense and defendant's sentencing.²⁶⁰ As under the *Charming Betsy* principle, such an irreconcilable conflict required the Supreme Court of Canada to give effect to the domestic norm, regardless of either the status of section 11(i) as a constitutional provision or its being later in time.²⁶¹

But the Supreme Court of Canada has also refused to advert to Canada's international obligations in interpreting the Charter even where there is no irreconcilable conflict. Two examples will illustrate this problem. *Reference Re Public Service Employee Relations Act* established that the right of association under Charter section 2(d) does not include the right of nonessential public employees to strike without alluding to international norms in the majority opinions.²⁶² Similarly, no reference was made to Canada's international obligations when the Supreme Court of Canada determined that Charter section 2(d) also did not embrace a right of collective bargaining.²⁶³ The *Pub-*

256. *Id.* at 215.

257. *Id.*

258. Similarly, in the United States, the courts will not give effect to a treaty provision that would violate an individual's constitutional rights. *Reid v. Covert*, 354 U.S. 1 (1956).

259. [1987] 2 S.C.R. 512.

260. *Id.* at 527.

261. *See, e.g.*, *In re Warren*, 35 C.R.3d 173, 177 (Ont. H.C. 1983), for a statement of the basic interpretive principle in Canadian law, which includes a presumed intent by Parliament not to act in violation of its international obligations.

262. [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 (1987). Chief Justice Dickson, however, discussed international norms in his dissent. [1987] 1 S.C.R. 313, 348-50, 38 D.L.R. (4th) 161, 184-85 (1987).

263. *Professional Inst. of the Pub. Serv. of Canada v. Northwest Territories*, 72 D.L.R. (4th) 1 (S.C.C. 1990).

lic Service Employees case is particularly striking, because the International Labor Organization Freedom of Association Committee had drawn Canada's attention to the fact that the same Alberta no-strike legislation contravened I.L.O. Convention No. 87, which Canada has ratified.²⁶⁴

Furthermore, despite a drafting history that indicates close attention to international treaty definitions of equality, the Supreme Court of Canada rendered three judgments interpreting Charter section 15 without any assistance from international norms.²⁶⁵ One crucial issue in these cases was whether the equality right was open-ended (unlimited as to the class of person entitled to invoke it) or whether it was strictly limited to classes of persons either enumerated in section 15 or analogous to the enumerated classes. The court resolved the issue in favor of the latter approach. This occurred despite an ambiguous text and a contrary drafting history drawing heavily on international standards.²⁶⁶

The inconsistencies in interpretive methodology that mark the Canadian cases, and the fact that, even in the strongest cases, international norms are cited to "reinforce" rather than to channel the court's decision, justify a conclusion that Canadian jurisprudence to date has been result-oriented. Yet, a consistent and principled basis for the use of international norms in Charter interpretation is available. As formulated by one provincial court of appeal, it operates along these lines:

Both a textual comparison and a review of the evidence before the Special Joint Committee of the Senate and House of Commons on the Constitution, 1981-82, confirm that the International Covenant on Civil and Political Rights was an important source of the terms chosen. Since Canada ratified that covenant in 1976, with the unanimous consent of

264. *Public Service Employees v. Alberta*, No. 1247/Alberta (ILO Committee on Freedom of Association, No. 11-15, 1985), reported in 241st Report of the Committee on Freedom of Association, ILO Governing Body, 231st Sess., at 28, ILO Doc. GB/10/13 (1985).

265. *Law Society of British Columbia v. Andrews & Kinerly* [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 (S.C.C. 1990); *In re Validity of Section 32 and 34 of the Workers' Compensation Act*, 1983, [1989] 1 S.C.R. 922, 56 D.L.R. (4th) 765 (S.C.C. 1989); *Turpin v. The Crown*, [1989] 1 S.C.R. 1296; Anne F. Bayefsky, *A Case Comment on the First Three Equality Rights Cases Under the Canadian Charter of Rights and Freedoms: Andrews, Workers' Compensation Reference, Turpin*, 1 SUP. CT. REV. 503 (1990).

266. See, e.g., Hon. Jean Chretien, Minister of Justice, Statement to the Special Joint Committee on the Constitution, January 12, 1981, in Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Minutes of Proceedings and Evidence, No. 36, at 14-15 ("[T]he amendment. . . does not list certain grounds of discrimination to the exclusion of all others. Rather, it is open-ended. . ."). The language of Section 15(1) as enacted reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

the federal and provincial governments, the covenant constitutes an obligation upon Canada under international law, by art. 2 thereof, to implement its provisions within this country. Although our constitutional tradition is not that a ratified treaty is self-executing within our territory, but must be implemented by the domestic constitutional process . . . nevertheless, unless the domestic law is clearly to the contrary, it should be interpreted in conformity with our international obligations. Therefore, art. 18 of the covenant is pertinent to our considerations of the definition of freedom of conscience and religion under the Charter.²⁶⁷

Instead, while the legitimacy of introducing international legal obligations of Canada into problems of interpreting Canadian law is established, the impact of these international laws generally depends on the proclivities of a result-oriented decisionmaker rather than on their inherent usefulness in the interpretative problem at hand.²⁶⁸

2. United Kingdom

A treaty is only part of the law of the United Kingdom if it is implemented by legislation.²⁶⁹ Where possible, however, domestic legislation is construed in conformity with international law.²⁷⁰ Not surprisingly, the prevalence of the "transformation" doctrine has reduced to the vanishing point the cases where unimplemented human rights treaty obligations formed the independent basis for a cause of action.

In the *Malone* case, for example, a victim of warrantless wiretapping in the U.K. attempted to sue for violation of a right of privacy under article 8 of the European Convention.²⁷¹ Article 8 had been precisely defined in the wiretapping context to require elaborate safeguards spelled out in domestic law.²⁷² Surprisingly, however, investigative wiretapping was largely unregulated in English law. Indeed, despite the supposed tradition of residuary rights, the government argued that it possessed an inherent right to engage in electronic eaves-

267. *The Queen v. Videoflicks*, 14 D.L.R. (4th) 10, 35-36 (Ont.C.A. 1984).

268. There are also cases in which international human rights norms provide direction to the judge's definition of community values where vague and open-ended concepts of public policy are at issue. For example, in *Canada Trust Co. v. Ontario Human Rights Comm'n*, 74 O.R.2d 481 (Ont.C.A. 1990), the Ontario Court of Appeal voided restrictions on the basis of race, sex, and religion in a scholarship founded in 1923. Public policy was defined by reference to three human rights treaties ratified by Canada (the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women).

269. *The Parlement Belge*, 4 P.D. 129 (1879), *rev'd on other grounds*, 5 P.D. 197 (1880).

270. *Salomon v. Comm'rs of Customs and Excise*, [1967] 2 Q.B. 116, 143 (Diplock, L.J.); *Garland v. British Eng'g Ltd.*, [1982] 2 All. E.R. 402 (construing Sex Discrimination Act 1975 consistently with art. 119 of the EEC Treaty, in a case where the Court of Justice of the European Communities had given an interpretation of art. 119 on reference from the House of Lords, pursuant to art. 177 of the EEC Treaty).

271. *Malone v. Comm'r of Police of the Metropolis (Malone No. 2)*, [1979] 1 All E.R. 620.

272. *Klass v. Federal Republic of Germany*, 28 Eur. Ct. H.R. (sec. A) ¶¶ 39-60 (1978).

dropping and opening of correspondence so long as there was no legislative proscription and it did not commit any act, such as a physical trespass, that would constitute a tort if engaged in by a private actor.²⁷³ The Vice-Chancellor accepted this argument:

[I]f such tapping can be carried out without committing any breach of the law, it requires no authorization by statute or common law; it can lawfully be done simply because there is nothing to make it unlawful.²⁷⁴

Thus, nothing in domestic law appeared to constrain the government's conduct.

As to Malone's efforts to establish that the wiretapping violated an enforceable right to privacy, the Vice-Chancellor first noted that Malone could not enforce the Convention directly because it was not part of the law of England, never having been implemented by Parliament.²⁷⁵ Then the Vice-Chancellor found that the Convention could not be used as an authoritative guide to interpret the arguably unclear English common law on the subject:

I see the greatest difficulty in the common law framing the safeguards required. . . . Various institutions or offices would have to be brought into being to exercise various defined functions. The more complex and indefinite the subject-matter the greater the difficulty in the court doing what is really appropriate, and only appropriate, for the legislature to do. Furthermore, I find it hard to see what there is in the present case to require the English courts to struggle with such a problem. Give full rein to the Convention, and it is clear that when the object of the surveillance is the detection of crime, the question is not whether there ought to be a general prohibition of all surveillance, but in what circumstances, and subject to what conditions and restrictions, it ought to be permitted. It is these circumstances, conditions and restrictions which are at the centre of this case; and yet it is they which are the least suitable for determination by judicial decision. . . . Any regulation of so complex a matter as telephone tapping is essentially a matter for Parliament, not the courts; and neither the Convention nor the *Klass* case can, I think, play any proper part in deciding the issue before me.²⁷⁶

Malone illustrates how the very precision of the international norm, which logically would seem to enhance its value as a guide to domestic rights enforcement, and which would make it a powerful factor in framing the outcome, seems instead to repel domestic courts concerned about the separation of powers.²⁷⁷

273. See Feldman, *supra* note 242, at 23-25.

274. *Malone*, *supra* note 271, at 649.

275. *Id.* at 647.

276. *Id.* at 647-49.

277. See *Stanford v. Kentucky*, 492 U.S. 361 (1989), in which a divided U.S. Supreme Court refused to impose an age limit of 18 on eligibility for capital punishment, under the Cruel and Unusual Punishment Clause of the Eighth Amendment. Federalism concerns figured heavily in the plurality opinion by Justice Scalia.

In addition, *Malone* accepts an essentially unwritten government power to intrude on privacy. This result is ironic because the triumphs of the residuary rights theory and of the independence of the English judiciary included the 18th century warrant cases. These cases subjected governmental authority to search private premises to judicial supervision and restraint.²⁷⁸ *Malone* eventually vindicated his claim with a successful application to the European Commission and the European Court of Human Rights, which found that the vague English standards contravened the strict requirements of article 8.²⁷⁹

The United Kingdom's lack of a written constitution, coupled with a residuary rights tradition, often leads to consideration of fundamental rights in the form of defining and developing the common law rather than textual interpretation. A number of U.K. cases concerning freedom of expression provide useful insights into the difficulties and potential for human rights treaty provisions to shape the definition of residuary rights in a meaningful way. Strikingly, the asserted government authority to invade or restrict the claimed rights in several of the cases was based primarily on uncodified common law doctrines of contempt, confidentiality, and libel. The relevant background included a well-known judgment by the European Court of Human Rights in *The Sunday Times v. The United Kingdom*,²⁸⁰ finding a violation of article 10 of the European Convention on Freedom of Expression, in the application of the English common law doctrine of contempt.

The *Sunday Times* judgment was fresh in memory when *Attorney General v. British Broadcasting Co.*²⁸¹ arose. It concerned the issue of whether a local valuation court was a "court" with contempt powers, enabling it to enjoin the broadcast of a program dealing with pending litigation. The House of Lords held that the tribunal in question was not a "court." The opinions of Lord Scarman and Lord Fraser reflected the problematic role of international norms in shaping this decision.

The European Court's *Sunday Times* judgment lent the *BBC* case

278. Feldman, *supra* note 242, at 24-25; Allan, *supra* note 200, at 115-16; Entick v. Carrington, 2 Wils 275 (1765); Wilkes v. Lord Halifax, 2 Wils 151 (1763).

279. *Malone v. United Kingdom*, 2 Eur. Ct. H.R. (ser. A) (1984). Characteristically, however, the European Court failed to address *Malone's* claim that the absence of domestic remedies for the violation of his privacy rights itself constituted a violation of article 13 of the European Convention, which mandates effective domestic remedies for breaches of the treaty. In the Court's view, article 13 does not require incorporation of the treaty into domestic law, but leaves the manner of implementation to the discretion of the Convention's state parties.

280. 30 Eur. Ct. H.R. (ser. A) (1979).

281. 1981 App. Cas. 303 (H.L.) [hereinafter *BBC*].

“an enhanced importance,” in Lord Scarman’s view.²⁸² While he emphasized that neither the Convention nor the European Court’s judgment formed part of English law, and that the earlier House of Lords decision in the *Sunday Times* controversy²⁸³ “is the law”²⁸⁴ until overruled by the House of Lords, he also noted the “presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations.”²⁸⁵ Significantly, the specific common law nature of the issues presented appeared to lend force to this interpretive presumption:

If the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the country’s international obligation to observe the Convention as interpreted by the Court of Human Rights.²⁸⁶

As to the question of whether the specific tribunal was a “court,” Lord Scarman saw the positive answer of the lower courts as an “extension” of the power to restrain expression by use of the contempt power.²⁸⁷ Subjecting this “extension” to the “pressing social need” standard articulated by the European Court for restrictions on expression, Lord Scarman did not find adequate proof of such need.²⁸⁸ Thus, the authoritative interpretation of the Convention by the European Court had a palpable shaping influence upon Lord Scarman’s analysis. It is possible however, that Lord Scarman would have found objectionable the specific restraint involved in the *BBC* case without reference to the Convention.²⁸⁹

While agreeing with Lord Scarman, Lord Fraser took a much more guarded approach to the Convention. He accepted that English courts “should have regard to” Convention norms “where our domestic law is not firmly settled,” but stressed that “the Convention does not form part of our law.”²⁹⁰ The undesirable expansion of potential restraints on expression through a broadened definition of “court” in Lord Fraser’s view, “would have great weight with an English court without reference to the Convention, and it is reinforced by the Convention.”²⁹¹ Lord Fraser’s ambivalence is far from unique.

282. *Id.* at 354.

283. *Att’y Gen. v. Times Newspapers*, 1974 App. Cas. 273.

284. [1981] App. Cas. at 354.

285. *Id.*

286. *Id.*

287. *Id.* at 362.

288. *Id.*

289. Lord Scarman discusses in general terms the disfavored status of prior restraints on expression.

290. *Id.* at 352.

291. *Id.* at 353.

In *Home Office v. Harman*,²⁹² the right of free expression collided with common law rules on the confidentiality of material obtained through discovery. While representing a prisoner in litigation against the Home Office, Harman (a solicitor) obtained six documents concerning prison conditions, despite objections by the defense that the documents were confidential and sensitive. After these documents had been read in open court during the opening statement of her colleague, Harman permitted a reporter to examine the documents in Harman's office as part of the reporter's research for an article critical of Home Office practices. The Home Office then successfully sought an order holding Harman in contempt of court for disclosure of the discovered documents. Harman's appeal was later dismissed both by the Court of Appeal and by the House of Lords (in a 3-2 decision).²⁹³

Lord Diplock's opinion rejecting Harman's appeal expressly repudiates the interpretative relevance of the Convention:

[This case] is *not* about freedom of speech, freedom of the press, openness of justice or documents coming into "the public domain"; nor, with all respect to those of your Lordships who think the contrary, does it in my opinion call for consideration of any of those human rights and fundamental freedoms . . . in the European Convention on Human Rights

. . . .

What this case *is* about is an aspect of the law of discovery of documents in civil actions in the High Court.²⁹⁴

Lord Diplock repeatedly stresses the uniqueness of the English system of discovery and open trial in rejecting the Convention as a benchmark.²⁹⁵ Counsel for the government made the more modest point that the Convention could not provide conclusive guidance because the case involved a *clash* of rights protected by the Convention: free expression versus the privacy of litigants compelled to reveal confidences through discovery.²⁹⁶ Lord Diplock's hostility to the Convention as a source of values appears to go far beyond this, despite the fact that the case concededly involved judicial balancing, without statutory guidance, of various elements of "public policy."²⁹⁷

292. [1983] App. Cas. 280.

293. *Id.* A subsequent application by Harman to the European Commission on Human Rights became the subject of a friendly settlement with the Government. See, EUROPEAN COMMISSION OF HUMAN RIGHTS, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, SUPPLEMENT 1987, at 104 (1988).

294. [1983] App. Cas. at 299.

295. *Id.* at 299-300, 302-303 (noting that the majority of states parties to the European Convention are civil law countries). Lord Diplock was no more eager to hear counsel's arguments based on American law. *Id.* at 292.

296. *Id.* at 297.

297. *Id.* at 306.

Lord Scarman's dissent in *Harman* embellishes upon the approach he had previously taken in *BBC* and other cases.²⁹⁸ That the case called on the Court to fashion a new rule out of "policy and principle" heightened the relevance of the Convention as a source of values.²⁹⁹ Asserting that the residuary right to freedom of communication emerged in English law when Parliament failed to renew the licensing law in 1694, Lord Scarman argued that this freedom was presently "recognised by the common law and required by the European Convention to be secured to everyone within the United Kingdom."³⁰⁰ This ambiguous passage appears to be the closest that Lord Scarman has come in implying an obligation on the part of the courts to take autonomous action to supply domestic remedies for Convention breaches in the absence of adequate legislative implementation. He even refers to interpretation in light of the Convention as "the true path forward."³⁰¹ Yet Lord Scarman concedes that the Convention is not "decisive" but only "powerfully persuasive" in *Harman's* appeal.³⁰² As in the *BBC* case, he finds useful guidance in the "pressing social need" framework for analysis, finding no social benefit in sanctioning lawyers for disclosure of documents already read out in open court.³⁰³ For Lord Scarman, the Convention "reinforces conclusions which we draw independently from our own legal principles."³⁰⁴

The phrase "our own" contrasts U.K. legal principles with those of the Convention. This occurs despite the fact that the interpretive power of the Convention is supposedly based upon its special status as a binding (though not legislatively implemented) obligation of the United Kingdom. Lord Scarman also couples his discussion of the Convention with an analysis of American law³⁰⁵ and quotations from Milton.³⁰⁶ All of this raises doubts about the primacy of the Convention in guiding development of residuary rights, even in Lord Scarman's mind.

In *The Queen v. Chief Magistrate, ex parte Choudhury*, the Court appeared to give far more weight to the Convention as an interpretive

298. See, e.g., *Whitehouse v. Lemon* [1979] App. Cas. 617, 665 (common law of blasphemous libel); *In re F (A Minor)*, [1977] Fam. 58, 93 (freedom to impart information).

299. [1983] 1 App. Cas. at 311.

300. *Id.* at 315.

301. *Id.* at 316.

302. *Id.* at 318.

303. *Id.* at 317.

304. *Id.* at 318.

305. *Id.* at 311, 317-18.

306. *Id.* at 311.

guide to the common law.³⁰⁷ This case arguably involved a much greater clash of rights than *Harman*. Choudhury sought summonses for blasphemous libel and seditious libel against Salman Rushdie, author of *The Satanic Verses*.³⁰⁸ The court held that the magistrate's denial of the summonses was proper because the common law offense of blasphemous libel applied only to attacks on the Christian religion, and indeed only to those Christian beliefs and institutions that form part of the established Church.³⁰⁹ Choudhury asserted that such a construction of the common law would discriminate on the basis of religion contrary to articles 9 and 14 of the Convention.

The Court's rejection of the religious discrimination claim rested in part on the clarity of the common law,³¹⁰ and thus might be seen as a refusal to endorse Choudhury's Convention-based argument. However, *Choudhury* actually grants unusually heavy weight to the Convention in shaping the issues for decision. First, the Court carefully considered the Convention's meaning and determined that articles 9 and 14 were not actually violated by the common law rule.³¹¹ Further, the Court noted that an extension of the common law in the manner urged by Choudhury might violate the ban on retroactive criminal laws under article 7, as well as restrict freedom of expression under article 10, without the pressing social need demanded by the European Court in the *Sunday Times* case.³¹² Thus, the Court gave serious consideration to conformity with the Convention in interpreting the common law, even in the absence of ambiguity, and defined the clash of rights embedded in the controversy largely in terms of Convention standards.

The *Spycatcher*³¹³ cases in the English courts required the balanc-

307. [1991] 1 All E.R. 306 (Q.B. 1990). Leave to appeal was denied. *Id.* at 323.

308. Choudhury asserted that the novel blasphemed Islam and raised widespread discontent and disaffection in the United Kingdom, constituting seditious libel. *Id.* at 308.

309. Thus, scurrilous attacks upon the Pope or upon beliefs not held by the official Church of England cannot constitute blasphemous libel under the common law. *Id.* at 317-18.

310. Relevant precedent included *The Crown v. Lemon*, [1979] 1 All E.R. 898, 1979 A.C. 617, in which blasphemous libel was held to be a still viable offense. In that case, Lord Scarman urged that Parliament broaden the offense to reflect the greater religious pluralism of the United Kingdom, but he joined in approving application in the meantime to a gay magazine that allegedly blasphemed Christianity by publishing poems concerning Christ. [1979] 1 All E.R. at 921-28.

311. The Court accepted barrister Anthony Lester's argument that the European Commission had not seen the Christianity-specific nature of the blasphemy law as a violation of the Convention and that the right to religious liberty did not include the right to force the state to punish blasphemers. [1991] 1 All E.R. at 321.

312. *Id.*

313. See PETER WRIGHT, *SPYCATCHER* (1987). In June 1986, the British Government sued to restrain the *Guardian* and the *Observer* newspapers from publishing information about Wright's allegations of illegal and improper behavior within MI5, the British Security Service, of

ing of freedom of expression and freedom of the press against the public interest in national security and the maintenance of confidentiality by former employees with privileged information. The Convention was raised as a point of reference³¹⁴ with some success, though to different degrees in the different phases of the litigation. As in the contempt of court cases, a balance had to be struck between residuary common law rights of free expression and statutorily undefined governmental power.³¹⁵ While planned publication in Australia of Wright's book about his experiences in the British secret service was being litigated in the Australian courts, the *Guardian* and the *Observer* published outlines of the book's allegations. In July 1986, the Crown obtained interlocutory injunctions against these two newspapers, affirmed by the Court of Appeal.³¹⁶ While the House of Lords granted leave to appeal, this appeal was still pending in April 1987 when the *Independent* published extracts and summaries of the book's contents. The Crown then commenced contempt proceedings against the *Independent*, while the *Guardian* and the *Observer* sought to discharge the 1986 injunctions in light of the changed circumstances.³¹⁷

Vice-Chancellor Browne-Wilkinson, without mentioning international human rights norms, rejected the Crown's application for a contempt citation against the *Independent*,³¹⁸ holding that non-parties to an injunction not in collusion with the parties could not be guilty of

which Wright was a former employee. The Crown had sued Wright in Australia, where he resided, to restrain publication of his memoirs. Publication in the United States, however, could not effectively be restrained. See the procedural history set forth in *Attorney Gen. v. Guardian Newspapers Ltd.*, [1988] 2 W.L.R. 805 (C.A.).

The saga continued in Strasbourg, as the European Commission of Human Rights found the United Kingdom in violation of article 10 of the European Convention with respect to the temporary and interlocutory injunctions. *Times Newspapers and Andrew Neil v. United Kingdom*, App. No. 13166/87 (Report of the Commission, July 12, 1990); *Observer v. United Kingdom*, App. No. 13585/88 (Report of the Commission, July 12, 1990). The European Court of Human Rights, in a unanimous decision, also found a violation of article 10. *Observer v. United Kingdom*, 217 Eur. Ct. H.R. (Ser. A) (1991) (judgment of Nov. 26, 1991); *Sunday Times v. United Kingdom*, 216 Eur. Ct. H.R. (Ser. A) (1991) (judgment of Nov. 26, 1991).

314. *Attorney Gen. v. Guardian Newspapers Ltd.*, [1988] 2 W.L.R. 805, 835 (C.A.).

315. The Government based its claims upon Wright's duty of confidentiality, not upon the Official Secrets Act, its potential copyright over the material, or even its inherent power to restrain disclosure of security-sensitive information. See *Guardian Newspapers*, [1988] 2 W.L.R. at 867-68 (opinion of Sir John Donaldson, M.R.). Scott, J. noted the non-statutory character of the issues: "It is open to Parliament, if it wishes, to impose guidelines . . . Parliament has not. And so it is for the courts to strike the balance." *Id.* at 837. Lord Justice Bingham also stated:

Many would think it desirable for Parliament to lay down rules for resolving clashes of this kind, touching as they do on fundamental interests and rights. But Parliament has not done so. The courts must therefore resolve the issue according to principles derived from the decided cases.

Id. at 902.

316. *Attorney Gen. v. Newspaper Publishing*, [1987] 3 All E.R. 276, 279-80 (C.A.).

317. *Id.* at 287.

318. *Id.* at 279-89.

contempt. While this order was pending in the Court of Appeal, plans were announced for publishing the book in the United States, and in July 1987 the *Times* began a serialization. Then the Crown began contempt proceedings against the *Times*, and the Vice-Chancellor turned to the request to discharge the interlocutory injunctions against the *Guardian* and the *Observer* in light of the publication of the book in the United States and its availability to purchasers in the United Kingdom through irregular channels.³¹⁹ Again, without citing international norms, the Vice-Chancellor held that in light of the destruction of the material's confidentiality, the interlocutory injunctions should be discharged and that the *Times* could not be held in contempt of an injunction that did not exist.³²⁰

The European Convention played only a tangential role in the Court of Appeal's decision in the *Independent* contempt case³²¹ and received no mention in its review of the interlocutory injunctions and contempt citation of the *Times*.³²² However, the 3-2 majority in the House of Lords which upheld the interlocutory injunctions paid significant attention to the Convention. In particular, the opinion of Lord Templeman frames the issues as if the Convention had been fully incorporated into U.K. law:

[T]his appeal involves a conflict between the right of the public to be protected by the security service and the right of the public to be supplied with full information by the press. *This appeal therefore involves consideration of the European Convention on Human Rights . . .* [emphasis added].³²³

After citing the interpretation of article 10 by the European Court in the *Sunday Times* case, Lord Templeman stated:

The question is therefore whether the interference with freedom of expression . . . was . . . necessary in a democratic society in the interests of national security, for protecting the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary . . .³²⁴

Lord Templeman further remarked that the injunctions are "necessary in terms of the convention" and "satisfy the tests of the

319. Attorney Gen. v. Guardian Newspapers, Ltd., [1987] 1 W.L.R. 1248, 1255-56.

320. *Id.* at 1270.

321. Lloyd, L.J. noted that a 1981 amendment to the contempt statute, adopted to conform to the European Court's judgment in *Sunday Times*, required proof of intent to interfere with the course of justice. Attorney Gen. v. Newspaper Publishing, [1987] 3 All E.R. 276, 310. Leave to appeal to the House of Lords was denied.

322. Attorney Gen. v. Guardian Newspapers Ltd., [1987] 3 All E.R. 316, 333-42.

323. *Id.* at 355.

324. *Id.* at 356.

convention.”³²⁵

The dissent of Lord Bridge includes an unusually candid examination of the unincorporated status of the Convention. Lord Bridge observes that he had not previously been a proponent of explicit incorporation of the Convention, having “confidence in the capacity of the common law to safeguard the fundamental freedoms essential to a free society[,] . . . [m]y confidence is seriously undermined by your Lordships’ decision.”³²⁶ Finding the continuance of the injunctions against the two newspapers to be “ridiculous” in light of the wide availability of the book itself, Lord Bridge predicts that the government “will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion in the free world.”³²⁷ Lord Bridge thus implies that Lord Templeman and the majority have not in fact applied the genuine Convention standard, though he does not assert that it is legally binding.

When the trial on the permanent injunctions occurred, Judge Scott found Lester’s Convention-based arguments to be “well-founded.”³²⁸ The common law nature of the issues provided a convincing rationale for resort to the Convention’s guidance:

The courts, in adjudicating on disputes as to the relative weight and requirements of different public interests ought, in my judgment, to endeavor to strike the balance in a manner that is consistent with the treaty obligations accepted by the government, the guardian of the public interest in national security.³²⁹

Thus, the status of the Convention as a binding obligation on the government, voluntarily ratified by it, appears to invest its provisions with a special status in defining the community’s values, to which the court in a common law case must give meaning and effect. From Convention article 10 and its interpretation by the European Court, Justice Scott derived the criteria of “pressing social need” and proportionality between the restrictions on expression and the asserted national security interests.³³⁰ The foreign publication and wide dissemination of the contents of *Spycatcher* thus fatally undermined the government’s case

325. *Id.* at 357. Lord Brandon, concurring, noted that an exception for national security was expressly recognized in article 10(2) though he also noted that “its provisions have not been incorporated into our domestic law.” *Id.* at 348.

326. *Id.* at 346.

327. *Id.* at 347. This prediction proved accurate, as the European Court of Human Rights unanimously found a violation of article 10 in the House of Lords’ continuance of the injunction after United States publication. See *supra* note 313.

328. Attorney Gen. v. Guardian Newspapers Ltd., [1988] 2 W.L.R. 805, 849.

329. *Id.*

330. *Id.* at 851.

for a permanent injunction against the three British newspapers, as their restraint would do little if anything to protect confidentiality or national security.³³¹

On review in the Court of Appeal, a similar analysis prevailed. Sir John Donaldson, M.R., placed the Convention in the context of residuary rights theory, though without recognizing the Convention standard to be so distinct as to really shape the outcome in an unexpected direction:

The starting point of our domestic law is that every citizen has a right to do what he likes, unless restrained by the common law, including the law of contract, or by statute. . . . The substantive right to freedom of expression contained in article 10 is subsumed in our domestic law in this universal basic freedom of action. Thereafter, both under our domestic law and under the Convention, the courts have the power and the duty to assess the "pressing social need" for the maintenance of confidentiality "proportionate to the legitimate aim pursued" against the basic right to freedom of expression and all other relevant factors. In so doing they are free to apply a margin of appreciation based upon local knowledge of the needs of the society to which they belong. For my part I can detect no inconsistency between our domestic law and the Convention.³³²

Lord Justice Bingham agreed³³³ and noted that the Convention could have particular force where "the common law were unclear,"³³⁴ adding with a note of national pride:

I should be very sorry to conclude that the common law protection of free speech fell below the norm agreed among states party to the European Convention, but it was not contended before us that this was so.³³⁵

With respect to the permanent injunction phase of the *Spycatcher* litigation, therefore, the European Convention appears to have exercised some interpretive influence over the courts' application of the common law.

Despite the lifting of the injunctions, *The Times* was held to have been in contempt for serializing *Spycatcher* while the interlocutory injunctions were in effect.³³⁶ On appeal to the House of Lords, Convention norms of freedom of expression played a modest role at best.

331. *Id.* at 864. Scott, J. held, however, that Wright was still bound by the obligations of confidentiality and that *The Sunday Times* could be required to make an accounting for its profits from the serialization. *Id.* at 863.

332. *Id.* at 869 (citation omitted).

333. *See also id.* at 892 (opinion of Dillon, L.J.) (law of England consistent with article 10 of European Convention).

334. *See id.* at 907.

335. *Id.* at 908.

336. The *Times* was ordered to pay a fine of £50,000 (vacated by the Court of Appeal) and the Attorney General's costs for the appeals. *Attorney Gen. v. Times Newspapers Ltd.*, [1991] 2 All E.R. 398, 401-02. The European Court of Human Rights by a vote of fourteen to ten found no violation of article 10 with respect to the issuance of the interlocutory injunctions against the

Lord Oliver simply noted that having held that the interlocutory injunctions did not contravene article 10 in the 1987 litigation, a contempt citation "which is a necessary consequence of maintaining the injunctions" could not be deemed a breach.³³⁷ Thus, while the *Spycatcher* cases give positive evidence of judicial receptivity to the Convention as a source to define residuary rights, the amorphous nature of the balancing test applied there (and the perceived lack of inconsistency with existing domestic law) does not clearly establish that the courts of the United Kingdom are committed to the Convention standards in all common law cases.

Reversing a trial judge who gave "short shrift" to treaty-based arguments, in *Derbyshire County Council v. Times Newspapers, Ltd.*³³⁸ the Court of Appeal gave strikingly great weight to article 10 of the European Convention and article 19 of the Covenant on Civil and Political Rights³³⁹ in dismissing a local government's common law libel suit concerning newspaper articles criticizing alleged mismanagement of pension funds. The unratified status of the treaties did not prevent their use in interpreting the common law, especially where the latter is unclear:

Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law . . . [W]here the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our law should not involve a breach of article 10.³⁴⁰

The precision of the "pressing social need" framework for determining the legitimacy of restraints on expression under article 10 of the European Convention³⁴¹ strongly influenced the approach and conclusion of the Court of Appeal that libel actions by local government bodies created unacceptable risks of stifling public debate.

Observer and the *Guardian* and their maintenance up to July 1987, when *SPYCATCHER* was published in the United States. See *supra* note 315.

337. *Id.* at 421.

338. *Derbyshire County Council v. Times Newspapers, Ltd.*, [1992] 3 W.L.R. 28, 35.

339. Balcombe, L.J. noted that reported U.K. decisions had referred only to article 10 of the European Convention, but he "conceive[d] that the same arguments mutatis mutandis must apply to article 19." 3 W.L.R. at 42.

340. *Id.* at 43, 44 (Balcombe, L.J.).

341. Balcombe, L.J. noted that earlier U.K. cases had revealed that "article 10 does not establish any novel proposition under English law," but rather is generally consistent with common law principles. *Id.* at 43. But since article 10 "states the right to freedom of expression and the qualifications of that right in precise terms," the right-balancing analysis required by the case should proceed within the framework of article 10. *Id.* The European Court of Human Rights in *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) (1986) held that prosecution for criminal defamation against a magazine publishing articles critical of the Austrian chancellor violated article 10. The *Lingens* case is noted by Balcombe, L.J. in *Derbyshire County Council*, 3 W.L.R. at 43, and Butler-Sloss, L.J., 3 W.L.R. at 50.

Indeed, the series of freedom of expression cases in U.K. courts citing article 10 appears to have evolved, in the eyes of the *Derbyshire County Council* judges, into a mandatory interpretive approach where the common law is ambiguous. Lord Justice Gibson states that since the right of governmental councils to sue in common law libel is unclear, "this court *must*, in so deciding, have regard to the principles stated in the Convention and in particular to article 10."³⁴² Lord Justice Butler-Sloss observes that "where there is an ambiguity, or the law is otherwise unclear or so far undeclared by an appellate court, the English court is not only entitled but, in my judgment, obliged to consider the implications of article 10."³⁴³ It will be interesting to see whether the House of Lords and other U.K. courts will regard themselves as similarly bound in the future.

The emphasis upon a threshold showing of ambiguity in the common law might appear to limit the impact of *Derbyshire County Council*. Whether the common law is actually unclear is open to question. While the House of Lords had never spoken definitively on the subject, several lower court decisions had refused to exclude corporations, including municipal corporations, from the capacity to sue for libel.³⁴⁴ A more powerful role for the treaty norms is suggested in Lord Justice Balcombe's reference to *The Queen v. Chief Magistrate ex parte Choudhury*,³⁴⁵ where the European Convention influenced the analysis of a well-established common law rule, and his assertion that even where the common law is not ambiguous the English courts should "consider whether the United Kingdom is in breach of article 10."³⁴⁶ Most intriguing is Lord Justice Balcombe's suggestion that by conforming the common law to the demands of article 10, the courts could spare the United Kingdom from condemnation by the Strasbourg bodies and relieve pressure on Parliament for statutory reforms to eliminate the violation:

This court is in a position to define the extent of this common law tort in such a way as not to require a positive amendment of the law by Parlia-

342. *Id.* at 60 (emphasis added).

343. *Id.* at 33.

344. Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & T. 87, 90 (1859); Saloman v. Saloman and Co., Ltd., [1987] A.C. 22 (H.L.(E)); Mayor of Manchester v. Williams [1891] 1 Q.B. 94; Bognor Regis Urban Dist. Council v. Campion [1972] 2 Q.B. 169; South Hetton Coal Co. v. North-Eastern News Ass'n, [1894] 1 Q.B. 133 (Eng. C.A.); National Union of General and Municipal Workers v. Gillian [1946] 1 K.B. 81. The holding in *Bognor Regis* that municipal corporations could sue for defamation had been followed in Canada. City of Prince George v. British Columbia Television Sys., [1978] 85 D.L.R. (3d) 755. The rule in the United States was to the contrary, because of the chilling effect on free speech. See, e.g. City of Chicago v. Tribune Co., 307 Ill. 595, 139 N.E. 86 (S.Ct. Ill. 1923).

345. [1991] 1 All E.R. 306 (Q.B. 1990).

346. [1992] 3 W.L.R. 28, 44.

ment. In my judgment we both can and should consider the effect of article 10.³⁴⁷

Thus, the availability of later remedies in Strasbourg, rather than encouraging English courts to ignore European Convention norms, can create pressure on domestic courts to avoid future embarrassment by incorporating those norms through a generous approach to the interpretive principle.

Where the case concerns statutory construction, the United Kingdom (like the other two systems) also supposedly adheres to a variant of the *Charming Betsy* interpretive principle³⁴⁸ under which the courts strive to reconcile statutory meaning with the nation's international obligations, including those contained in ratified but unimplemented treaties. The underlying premise is in part an imputed intent of the legislature (a presumption that the legislators do not wish to place the nation in breach of its international obligations unless they clearly so state) and, perhaps to a lesser extent, a sense of obligation on the part of the court to apply domestic law consistently with the public values of the nation as expressed in its international obligations. Different styles of statutory interpretation affect this process, however. A disinclination to search for meaning beyond the face of the statute³⁴⁹ may give rise to rules requiring a facial ambiguity prior to referring to international obligations for guidance.

In *Brind v. Secretary of State for the Home Dep't*,³⁵⁰ the interpretive principle was asserted without success. The case concerned a challenge by journalists to the Secretary's ban on broadcasting interviews with representatives of groups such as Sinn Fein without dubbing their voices. The regulation was intended to deprive terrorists of a platform for their views without actually depriving the public of information. The House of Lords considered the statute that conferred discretion to the Secretary to regulate broadcasting. Lord Ackner found no ambiguity in the statute, and further objected that requiring this undefined discretion to be exercised in conformity with the European Convention "inevitably would result in incorporating the Convention into English domestic law by the back door."³⁵¹ In even stronger language, Lord Bridge of Harwich noted:

347. Derbyshire City Council, 3 W.L.R. at 44.

348. See *Salomon v. Comm'rs of Customs and Excise*, [1967] 2 Q.B. 116.

349. Allan characterizes this "plain meaning" approach as one protective of individual liberties, in that the legislature is strictly held to the statutory word and the citizen receives clear warning that previously unregulated behavior has now come within the ambit of the legislature's proscription. Allan, *supra* note 200, at 117-23.

350. [1991] 1 All E.R. 720 (H.L.).

351. *Id.* at 734-35.

When Parliament has been content for so long to leave those who complain that their convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function.³⁵²

While Lord Templeman agreed with the result, his approach arguably gave greater weight to the Convention-based arguments. He noted that the Convention, as interpreted by the European Court of Human Rights, requires that restrictions on freedom of expression be "necessary and proportionate," factors he found satisfied in the case.³⁵³

Had the House of Lords applied the "pressing social need" standard in the *Brind* case as stringently as Lord Scarman employed it in the *BBC* case and his *Harman* dissent, or as the Court of Appeal applied it in *Derbyshire County Council*, for instance, it seems inescapable that the regulation would have been voided. The benefits derived from dubbing the voices of interviewed terrorist suspects can be marginal at best. Thus, *Brind* represents a failed opportunity for the Convention to play a genuinely outcome-determinative role in domestic litigation in the United Kingdom.

In other cases, however, residuary rights have exerted their force through narrow interpretations of the statutorily delegated powers of executive officials. A good illustration of this process is *Raymond v. Honey*,³⁵⁴ in which the House of Lords held that prison authorities lacked power to interfere with a prisoner's right of access to court. The opinion emphasized that "under English Law, a convicted prisoner . . . retains all civil rights which are not taken away expressly or by necessary implication . . ." ³⁵⁵ Noting that amendments to the prison rules had been made following the European Court of Human Rights' finding of a violation of article 6 of the Convention in the somewhat analogous *Golder* case,³⁵⁶ the House of Lords found the au-

352. *Id.* at 723. Yet while rejecting the guidance of the Convention, Lord Bridge would have the judiciary exercise a "secondary judgment" over the Secretary's discretion without "the advantages nor the disadvantages of any comparable code. . ." *Id.*

See also *The Queen v. General Medical Council*, [1990] 1 All E.R. 489, 504-07 (C.A. 1989), in which the Court of Appeal rejected a "pressing social need" analysis of restrictions on advertising by physicians, on the ground that this would "impute to Parliament an intention to import the convention into domestic law by the back door when it has quite clearly refrained from doing so by the front door." *Id.* at 505 (Gibson, L.J.).

353. [1991] 1 All E.R. at 726.

354. [1983] 1 App. Cas. 1 (1982).

355. *Id.* at 10 (opinion of Lord Wilberforce). See also *id.* at 14 (opinion of Lord Bridge of Harwich).

356. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) (1974). See [1983] 1 App. Cas. at 10, 12 (opinion of Lord Wilberforce); *Id.* at 15 (opinion of Lord Bridge of Harwich).

thorities' interference with Raymond's correspondence with the courts to be contempt. Similarly, in another case involving contempt, Lord Bridge stated:

Since the European Convention on Human Rights is no part of our municipal law, we cannot resort to the decision of the European Court of Human Rights [in the *Sunday Times* case] as direct authority, but the 1981 Act, or any point on which any doubt arises as to its construction, may be presumed to have been intended to avoid future conflicts between the law of contempt of court in the United Kingdom and the obligations of the United Kingdom under the convention.³⁵⁷

Thus, the interpretive principle appears to have added power in the construction of statutes enacted to cure violations of the European Convention.

One consequence of *Spycatcher* litigation was the Official Secrets Act of 1989,³⁵⁸ which imposed an obligation of confidentiality on former members of the secret service and a ban on publication by others where the disclosures were likely to be damaging to the nation. In a case involving another set of memoirs, whose disclosure the Crown conceded would not harm national security, an injunction against the *Scotsman* was denied, with Lord Templeman relying on the new statute for guidance. He noted:

[I]t is for Parliament to determine the restraints on freedom of expression which are necessary in a democratic society If that guidance is inconsistent with the requirements of the convention then that will be a matter for the convention authorities and for the United Kingdom government. It will not be a matter for the courts.³⁵⁹

Occasionally, in reluctantly enforcing existing domestic law, U.K. jurists suggest reform by Parliament, using the Convention as a model.³⁶⁰

Reference to human rights standards in defining the scope of authority of immigration officials has been especially frequent, perhaps because alien litigants have a greater inclination to invoke international norms. Lord Denning of the United Kingdom has been criticized for the inconsistency in his approach,³⁶¹ at first holding that immigration authorities were bound to construe their powers in light of the United Kingdom's treaty obligations,³⁶² and going even further to suggest that statutory provisions conflicting with the European

357. *In re Lonrho*, [1989] 2 All E.R. 1100, 1116.

358. Official Secrets Act, 1989, ch. 6 (Eng.).

359. *Lord Advocate v. Scotsman Publications Ltd.*, [1989] 2 All E.R. 852, 859.

360. *E.g.*, *Gleaves v. Deakin*, [1979] 2 All E.R. 497, 498-99 (opinion of Lord Diplock).

361. Lester, *supra* note 200, at 62-63.

362. *The Queen v. Secretary of State for the Home Dep't*, [1976] 1 Q.B. 198, 207 (C.A. 1975).

Convention would be invalid.³⁶³ He soon retreated, however, holding that immigration officials could not reasonably be expected to exercise their discretion with the provisions of the Convention in mind.³⁶⁴ This pattern of inconsistent approaches by a single (and influential) jurist illustrates the lack of a principled or consistent application of the few basic rules governing the effect of international human rights obligations on U.K. domestic law.

Where courts are called upon to resolve cases upon the basis of vague and open-ended concepts of public policy, one might expect greater receptivity to international human rights norms to provide direction to the judge's definition of community values. In a case in the U.K., however, concerning a 1936 will imposing forfeiture upon heirs who became Roman Catholic, the House of Lords preferred a more freewheeling discussion of public policy and found little guidance in the European Convention's protection of religious freedom.³⁶⁵ Similarly, in construing the "best interests of the child"³⁶⁶ in a parental termination case, the House of Lords found interpretive arguments based on a parent's right of access under article 8 of the European Convention³⁶⁷ to be more confusing than helpful:

[T]he description of those familial rights and privileges enjoyed by parents in relations to their children as "fundamental" or "basic" does nothing, in my judgment, to clarify either the nature or the extent of the concept which it is sought to describe. . . . Whatever the position of the parent may be as a matter of law — and it matters not whether he or she is described as having a "right" in law or a "claim" by the law of nature or as a matter of common sense — it is perfectly clear that any "right" vested in him or her must yield to the dictates of the welfare of the child.³⁶⁸

Thus, the fact that the issue is one over which the court has substantial

363. *Birdi v. Secretary of State for Home Affairs*, 119 Sol. J. 322 (Eng. C.A. 1975).

364. *The Queen v. Chief Immigration Officer, Heathrow Airport, ex parte Solomat Bibi*, [1976] 3 All E.R. 843.

365. *Blathwayt v. Cawley* (Baron), [1976] App. Cas. 397. Lord Wilberforce discounted the pertinence of the European Convention on grounds that it did not clearly resolve the inherent conflict of rights (religious freedom versus the right to property) and on the ground that the will predated the Convention. *Id.* at 426. See also argument of Counsel at 407-08.

366. This standard emanates both from statute and the common law. In re K.D., [1988] 2 W.L.R. 398, 400 (opinion of Lord Templeman).

367. *The Crown v. United Kingdom*, (Case 6/1986/104/152 (Eur. Ct. H.R.)) *The Times* (London), July 9, 1987, at 42. The European Court of Human Rights had found a violation of the European Convention in the procedures available to a parent whose rights of access was terminated. See [1988] 2 W.L.R. at 410.

368. [1988] 2 W.L.P. at 412-14 (opinion of Lord Oliver). See also *Science Research Council v. Nassé*, 1980 A.C. 1028, 1068 (Article 6 right to a fair hearing under European Convention does not determine whether alleged discrimination victims have rights to discovery of personnel files of other, promoted employees).

discretion to define public values does not necessarily lead to an enhanced role for the values codified in human rights treaties.

Unlike the United States, the United Kingdom not only has ratified major human rights treaties, but also has accepted optional mechanisms for international dispute resolution of individual complaints.³⁶⁹ Many of the cases discussed above concerning interpretive reliance upon treaties have considered decisions of the treaty implementation bodies in addition to the treaty text in order to provide a more precise meaning or an analytic framework.³⁷⁰ These references do not reflect any developed understanding that domestic courts occupy a position of inferiority to the interpretive authority of the treaty implementation bodies. Rather, this appears to be an issue which has not really been confronted with any thoroughness.

For example, in the *BBC* case, Lord Scarman describes the modest role played by European Court judgments under the interpretive approach:

[N]either the Convention nor the European Court's decision in *The Sunday Times* case is part of our law Yet there is a presumption . . . that our municipal law will be consistent with our international obligations If the issue should ultimately be . . . a question of legal policy, we must have regard to the country's international obligation to observe the Convention as interpreted by the Court of Human Rights.³⁷¹

Lord Fraser, while noting that European Court judgments might be instructive where domestic law was unsettled, cautioned that the European Court might have an imbalanced perspective on competing claims of public policy because of its institutional role in promoting freedom of expression.³⁷²

An example of the much greater deference which could be paid to the European Court can be taken from the lower court judgment in the *Spycatcher* case:

[Counsel for the Government] submitted that the judgment of the European Court of Human Rights did not bind an English court as to the manner in which paragraph 2 of article 10 should be construed or applied. But if it is right to take into account the government's treaty obligations under article 10, the article must, in my view, be given a meaning and effect consistent with the rulings of the court established by the

369. The United Kingdom ratified the European Convention on March 8, 1951, although the Convention did not come into force until September 3, 1953. The United Kingdom accepted the article 25 rights to individual petition on January 14, 1966.

370. See, e.g., *BBC*, 1981 A.C. 303. See also, *Schering Chemicals Ltd. v. Falkman*, 1982 Q.B. 1, [1981] 2 All E.R. 331, [1981] 2 W.L.R. 848 (Denning, M.R.); *Hone v. Maze Prison Board of Visitors*, [1988] 1 All E.R. 321, 327-29 (opinion of Lord Goff).

371. [1981] A.C. at 354.

372. *Id.* at 352.

treaty to supervise its application.³⁷³

On appeal, however, Sir John Donaldson, M.R., hinted at potential divergencies suggesting that in relying on the Convention to interpret domestic law, English courts "are free to apply 'a margin of appreciation' based upon local knowledge of the needs of the society to which they belong."³⁷⁴

3. Conclusion

Technically, the limited implementation of human rights treaties by Canada and the United Kingdom, combined with a transformation theory of the relationship between treaty and domestic law, suggests that the legal situation in those countries does not differ markedly from that of the United States. However, ratified but unimplemented treaties have given rise to a substantial number of cases relying on treaty provisions for interpretive purposes in both Canada and the United Kingdom. The treaties have been cited as relevant for the interpretation of statutes, the common law and, in Canada, the Charter of Rights and Freedoms. While the number of Canadian and British cases making reference to human rights treaty obligations is impressive, a close examination of this jurisprudence reveals that only very rarely do the treaties appear to shape the outcome of a case, rather than serve as reinforcement for a decision premised on some alternate ground. Also numerous are cases in which the relevance of human rights treaties is denied or in which no mention is made of apparently relevant treaty provisions.

The experience of these two democracies indicates that greater receptiveness to international human rights standards on the part of the political branches of government, as manifested by the ratification of human rights treaties and the acceptance of the adjudication of individual complaints by treaty implementation bodies, does not necessarily translate into greater and more principled receptiveness to international human rights norms by domestic courts. On the one hand, the existence of ratified treaties appears to diminish the perceived relevance of customary human rights norms and to augment the frequency of citation to human rights treaties. However, a close examination of the manner in which the treaties are cited reveals that the influence of human rights norms on domestic courts is modest indeed.

As in the United States, practice is uneven and the courts have not

373. Attorney Gen. v. Guardian Newspapers, Ltd. (No. 2), [1988] 2 W.L.R. 805, 851.

374. *Id.* at 869.

found the domestic enforceability of international human rights norms to be a subject deserving of systematic and principled explication. Even in the interpretation of the Canadian Charter of Rights and Freedoms, where an "original intent" approach would grant a significant role to international norms (both ratified and unratified), judges have generally referred to international norms only to reinforce decisions and have ignored them when inconvenient.

III. NON-BINDING INTERNATIONAL LAW

Perhaps the most frequent use of international human rights law by United States courts involves norms not technically binding upon the United States. Such norms are introduced as interpretive aids to be applied to U.S. law. In these cases, the international norms are neither identified as having the status of customary law nor taken from ratified treaties. Thus, the principle of interpretation which requires courts to interpret domestic law in conformity with international obligations is technically inoperative here. Arguably, the courts adopting this approach are engaged, perhaps not entirely consciously, in a species of "public values" interpretation.³⁷⁵

A. *In the United States Supreme Court*

In *Trop v. Dulles*,³⁷⁶ a plurality of the Supreme Court held that a statutory loss of nationality for military desertion violated the Eighth Amendment's prohibition of cruel and unusual punishment.³⁷⁷ The court found that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁷⁸ In determining what constituted those standards of decency, the Court considered the views of "the international community of democracies" and the fact that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."³⁷⁹

In *Estelle v. Gamble*,³⁸⁰ the Supreme Court interpreted the Eighth Amendment in the context of medical care to prisoners. In determin-

375. See Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

376. 356 U.S. 86 (1957).

377. The Nationality Act provided that a citizen shall lose his nationality by deserting the military in time of war if convicted thereof and subsequently dismissed or dishonorably discharged from the service.

378. 356 U.S. at 101 (plurality opinion).

379. *Id.* at 102.

380. 429 U.S. 97 (1976).

ing that deliberate indifference to serious medical needs of prisoners is proscribed by the Eighth Amendment, the Court noted "contemporary standards of decency" were evidenced by the Standard Minimum Rules for the Treatment of Prisoners.³⁸¹

In *Coker v. Georgia*,³⁸² a majority of the U.S. Supreme Court held that the sentence of death for the crime of rape of an adult woman was excessive punishment forbidden by the Eighth Amendment.³⁸³ The judgment recalled the plurality's concern in *Trop v. Dulles* to consider "the climate of international opinion concerning the acceptability of a particular punishment." The majority went on to note the laws of other national jurisdictions in this context, although the judgment did not specifically cite international law.³⁸⁴

In *Enmund v. Florida*,³⁸⁵ a plurality of the Court held that the Eighth Amendment did not permit the imposition of the death penalty on a defendant who aids and abets a felony in the course of which a murder is committed by others, where the defendant himself did not kill, attempt, or intend to kill. The judgment reiterated that "[t]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is 'not irrelevant'.³⁸⁶ Similar to its decision in *Coker*, here the Court referred to legislation in other national jurisdictions, although not to international law.³⁸⁷

In *United States v. Stanley*,³⁸⁸ the Supreme Court reaffirmed the unavailability of remedies for servicemen used in experiments to test the mind-altering properties of LSD. The suits foundered on the *Feres* doctrine,³⁸⁹ which is premised on fears that compensation for service injuries would involve potentially harmful judicial meddling in the internal operations of the armed services. In her partial dissent, Justice O'Connor expressed the view that Stanley's claim escaped the preclusion of *Feres* by involving "conduct . . . so far beyond the bounds of human decency that as a matter of law it simply cannot be considered

381. *Id.* at 103-04 n.8.

382. 433 U.S. 584 (1977).

383. The Court astonishingly noted of the victim that "Mrs. Carver was unharmed." *Id.* at 587.

384. *Id.* at 596 n.10: "It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue."

385. 458 U.S. 782 (1982).

386. *Id.* at 796 n.22 (quoting *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977)).

387. The opinion referred to rules in England, India, other Commonwealth countries, and Western Europe.

388. 483 U.S. 669 (1987).

389. *Feres v. United States*, 340 U.S. 135 (1950).

a part of the military mission."³⁹⁰ She defined the bounds of decency by reference to the prohibition of nonconsensual medical experimentation announced at Nuremberg and suggested that "our Constitution's promise of due process of law guarantees this much."³⁹¹

In *Thompson v. Oklahoma*,³⁹² four members of the Supreme Court held that the Eighth and Fourteenth Amendments prohibited execution of a person who was under sixteen years of age at the time of the offense. A fifth member of the Court, Justice O'Connor, filed a concurring opinion and three members dissented. In this case, the defendant was convicted of first-degree murder for an offense committed at age fifteen. In reaching the conclusion that the "evolving standards of decency that mark the progress of a maturing society" would be offended if the defendant were executed, the four justices referred to both the views of other nations and the norms of international law. In their words,

[t]he conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading members of the Western European community . . . In addition, three major human rights treaties explicitly prohibit juvenile death penalties . . . the International Covenant on Civil and Political Rights . . . (signed but not ratified by the United States). . . the American Convention on Human Rights . . . (signed but not ratified by the United States) . . . the Geneva Convention Relative to the Protection of Civilian Persons in Time of War . . . (ratified by the United States).³⁹³

Justice O'Connor cited the Geneva Convention Relative to the Protection of Civilian Persons in Time of War in concluding that the legislatures did not consider the fact that interaction between their capital punishment statutes and their juvenile offender statutes could, in theory, lead to executions for crimes committed before the age of sixteen.³⁹⁴ No member of the Court suggested that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War was self-executing. In addition, the Court expressly noted that the other treaties were unratified.

However, in *Stanford v. Kentucky*³⁹⁵ and *Wilkins v. Missouri*,³⁹⁶ a

390. 483 U.S. at 709 (O'Connor, J., concurring and dissenting).

391. *Id.* at 710.

392. 487 U.S. 815 (1988).

393. *Id.* at 830, 831 n.34 (footnote omitted).

394. *Id.* at 851-52 (O'Connor, concurring). She chose not to decide if such executions violated the Eighth Amendment and societal standards of decency.

395. 492 U.S. 361 (1989).

396. *Id.*

plurality of the U.S. Supreme Court held that the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age did not violate evolving standards of decency and thus did not constitute cruel and unusual punishment under the Eighth Amendment. Four members of the plurality joined in an opinion which expressly disagreed with the approach to the relevance of international law and the laws of other nations which was taken by four justices in the dissenting opinion. Justice Scalia wrote for the plurality:

[P]etitioners are left to argue that their punishment is contrary to the "evolving standards of decency that mark the progress of a maturing society." . . . In determining what standards have "evolved," however, we have looked . . . to . . . conceptions of decency of modern American society as a whole . . . We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant [The practices of other nations] cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.³⁹⁷

The plurality reduced Eighth Amendment proportionality analysis to a simple head count of state statutes, refusing to find a sentencing practice unconstitutional unless a very high percentage of state legislatures had clearly repudiated it.

Justices Brennan, Marshall, Blackmun, and Stevens dissented. Relying on foreign laws and international treaties, they stated:

Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. . . . In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties.³⁹⁸

The dissenters then noted the provisions of the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and a General Assembly Resolution.³⁹⁹ The plurality essentially ignored the treaty provisions.⁴⁰⁰ Taking the series of Eighth Amendment cases together, the judgment of the four members of the plurality in *Stanford* is clearly out of step with the earlier opinions.

397. *Id.* at 369 n.1 (citations omitted).

398. *Id.* at 389-90 (Brennan, J., dissenting) (citations omitted) (footnotes omitted).

399. *Id.* at 390 n.10.

400. *See* *Burger v. Kemp*, 483 U.S. 776, 789 n.7 (1987), in which the majority ignored international law in the context of juvenile execution.

B. *In United States Lower Courts*

Lower courts have also made use of non-binding international law as an interpretative aid in a variety of contexts. *New Hampshire v. Robert H.*⁴⁰¹ involved an action to terminate parental rights in which the Supreme Court of New Hampshire interpreted a section of the New Hampshire Constitution which stated that “[a]ll men have certain natural, essential, and inherent rights — among which are, the enjoying and defending life and liberty; . . . and . . . seeking and obtaining happiness.”⁴⁰² The court noted:

On an international level, the United Nations Covenant on Civil and Political Rights holds that “the family is the natural and fundamental unit of society and the State.” Art. 23, s. 1 (1966). Likewise the United Nations Covenant on Economic, Social and Cultural Rights recognizes that the “widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . .” Art. 10, s. 1 (1966). The family and the rights of parents over it are held to be natural, essential and inherent rights within the meaning of New Hampshire Constitution, part I, article 2.⁴⁰³

The court went on to require that the state provide more stringent proof of the necessity of terminating parental rights. Neither of the two treaties to which the court referred had been ratified by the United States.

In *Sterling v. Cupp*,⁴⁰⁴ the Supreme Court of Oregon interpreted a section of the State Constitution protecting anyone arrested or jailed against treatment with “unnecessary rigor.” The court found that this provision prohibited a search by female corrections officers of male prisoners which involved touching of intimate body areas, even through clothing, unless the immediate circumstances necessitated it. In reaching this conclusion, the court cited various international law sources as “contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in [the Oregon Constitution].”⁴⁰⁵ Specifically, the court cited the Universal Declaration of Human Rights, the United Nations Charter, the International Covenant of Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the Standard Minimum Rules for the

401. 393 A.2d 1387 (N.H. 1978).

402. N.H. CONST. part I, art. 2.

403. *State v. Robert H.*, 393 A.2d at 1389 (N.H. 1978).

404. 625 P.2d 123 (Or. 1981).

405. *Id.* at 131.

Treatment of Prisoners.⁴⁰⁶ The court did not attempt to justify its references to these norms. In addition, it failed to identify their status as customary law or ratified treaty law.

In *Lareau v. Manson*,⁴⁰⁷ the Second Circuit used the United Nations Standard Minimum Rules for the Treatment of Prisoners as an aid to the interpretation of the Eighth Amendment. They referred to the Rules' specification of minimum cell space per inmate.⁴⁰⁸

In *Boehm v. Superior Court*,⁴⁰⁹ an intermediate California court construed provisions of the Welfare and Institutions Code to mean that general welfare assistance payments should include provision for the basic necessities of clothing, transportation, and medical care, where not otherwise provided. In the court's view, the County of Merced acted arbitrarily and capriciously in reducing the welfare payments to provide only for food and shelter. The statute prescribed a duty to support all incompetent, poor, indigent persons⁴¹⁰ and stated that the purpose of this provision was, among other purposes, to "encourage self-respect . . . [and] self-reliance."⁴¹¹ In interpreting the statute, the court quoted from the Universal Declaration of Human Rights, article 25(1), which states in part that "[e]veryone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . ."⁴¹² In light of this article, the court reasoned that human dignity required minimum subsistence allowances for clothing, transportation, and medical care, and that such allowances were essential to encourage self-respect and self-reliance in a humane manner.⁴¹³ The court did not attempt to identify the Universal Declaration as customary law nor did it give any reason for considering it.

In *Cerrillo-Perez v. Immigration and Naturalization Service*,⁴¹⁴ the Ninth Circuit interpreted the Immigration and Nationality Act⁴¹⁵ which provides that the Attorney General has the discretion to suspend deportation if an alien "is a person whose deportation would . . . result in extreme hardship to the alien or to his spouse, parent or

406. *Id.* at 131 n.21.

407. 651 F.2d 96 (2d Cir. 1981).

408. *Id.* at 107.

409. 223 Cal. Rptr. 716 (Cal. App. 5th Dist. 1986).

410. CAL. WELF. & INST. CODE § 17000 (West 1991).

411. *Id.* at § 10000.

412. G.A. Res. 217 (III) A, U.N. Doc. A/810 (1948).

413. 223 Cal. Rptr. at 721.

414. 809 F.2d 1419 (9th Cir. 1987).

415. 8 U.S.C. § 1254 (a)(1) (1988).

child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."⁴¹⁶ The court held that this provision required consideration of the hardship to alien parents and their citizen children of separation upon their parents' deportation. In reaching this conclusion, the court referred to a U.S. Supreme Court case which held that the Constitution protects the sanctity of the family and added:

[T]he preservation of family unity is recognized as a critical factor in admitting refugees to a country . . . Equally important, it is universally recognized that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state." . . . It is against this background that the BIA [Board of Immigration Appeals] must examine the eligibility of an alien to remain in this country when . . . deportation might result in the break-up of a family . . .⁴¹⁷

Reference to the Universal Declaration of Human Rights served to support the court's interpretation of the statute, without any reference to the international law status of the Declaration.

In *Paula v. Kelly*,⁴¹⁸ the Supreme Court of Appeals of West Virginia interpreted the state constitution's requirement of a "thorough and efficient system of free schools"⁴¹⁹ to mean that education is a fundamental, constitutional right. In coming to this conclusion they referred to the Universal Declaration of Human Rights "which appears to proclaim education to be a fundamental right of everyone, at least on this planet."⁴²⁰ The court subsequently decided that the state constitution's equal protection guarantees were violated by any discriminatory classification in the state's education financing system unless the state could demonstrate some compelling interest to justify the unequal classification.

In *In re Barbara White on Habeas Corpus*,⁴²¹ a California intermediate court considered a condition of probation that prohibited a person convicted of soliciting an act of prostitution from travelling within certain areas. The court interpreted the Penal Code,⁴²² which provided that a court could impose "reasonable" conditions upon granting probation. In determining that the conditions which had been imposed were unreasonable,⁴²³ the court stated that the right to inter-

416. *Id.*

417. 809 F.2d at 1423 (citations omitted).

418. 255 S.E.2d 859 (W. Va. 1979).

419. W. VA. CONST. art. XII, § 1.

420. 255 S.E.2d at 864 n.5.

421. 158 Cal. Rptr. 562 (Cal. Ct. App. 1979).

422. CAL. PENAL CODE § 1203.1 (West Supp. 1992).

423. 158 Cal. Rptr. at 566.

state travel was a basic, constitutionally-protected human right and that it could be extended to the right to travel within a state.⁴²⁴ In reaching this conclusion, the court referred to international standards. In its words,

[i]n spite of totalitarian member states not following this democratic concept in practice the right is even recognized at the international level. See Article 13, Sec. 1, the Universal Declaration of Human Rights (1948) "Everyone has the right to freedom of movement and residence within the borders of each state."⁴²⁵

The specificity and pertinence of the international norm to the issues in the case overcame the court's apparent skepticism about the latent hypocrisy in international standards. However, the court did not elaborate on the reasons for which the Universal Declaration should be considered.

In *Detainees of the Brooklyn House of Detention for Men v. Malcolm*,⁴²⁶ the Second Circuit held that constitutional rights of due process and equal protection of pretrial detainees were violated by double celling in a cell with forty square feet of floor space. In reaching this conclusion, the court referred to the Standard Minimum Rules for the Treatment of Prisoners, "which recommended that each inmate have an individual cell."⁴²⁷

In *Lipscomb v. Simmons*,⁴²⁸ the Ninth Circuit considered a state statutory scheme by which foster children living with relatives did not receive state funds, while children living with strangers received such funds. The court held that the scheme violated the due process clause of the Fourteenth Amendment. The court came to this conclusion by articulating the principle of a constitutional right to associate with family members and then a right of extended family members to live together. The result was supported by reference to provisions concerning the family in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.⁴²⁹ No mention was made of the status of these instruments in United States law.

424. *Id.* at 567.

425. *Id.* at 567 n.4.

426. 520 F.2d 392, 399 (2d Cir. 1975).

427. *Id.* at 396. In another case decided shortly thereafter, the same court referred to the Standard Minimum Rules for the Treatment of Prisoners and the provisions relating to hygienic clothing and bedding in deciding that requiring prisoners to strip before exchanging their linen raised no constitutional claim. *Morgan v. LaVallee*, 526 F.2d 221, 225 n.8 (2d Cir. 1975).

428. 884 F.2d 1242 (9th Cir. 1989).

429. *Id.* at 1244 n.1.

There are many other examples in which international standards have been used to assist in the interpretation of United States law without any effort to justify recourse to such norms or to consider whether or not they are binding upon the United States.⁴³⁰

C. *A Comparative Analysis*

The use of non-binding international human rights law or material by domestic courts is largely a Canadian phenomenon.⁴³¹ Since the enactment of the constitutional Charter of Rights and Freedoms in 1982, there has been a rapid proliferation of cases — about 152 between 1982 and July 1992 — referring to international law to which Canada is not a party.⁴³² This has occurred virtually without judicial explanation. The common law presumption of promoting Canada's adherence to its international obligations is irrelevant. Approximately 80 percent of these cases refer to the European Convention on Human Rights, to which Canada is not a party, and the corresponding jurisprudence of the European Commission and Court of Human Rights. The remainder includes references, for example, to non-treaties such as the Universal Declaration of Human Rights and the U.N. Standard Minimum Rules for the Treatment of Prisoners.

These references are justifiable for a variety of reasons. An analogy to Canadian courts' traditional use of non-binding sources of law from other jurisdictions (such as the United States) is appropriate for the purpose of formulating informed responses to domestic legal questions. Also, section 1 of the Charter, the general limitation clause, contains a specific reference to the requirements of a free and democratic society, which invites comparison with the legal responses of other free and democratic societies. Although the drafting history and actual provisions of the European Convention on Human Rights are closely related to those of the Covenant on Civil and Political Rights (the latter to which Canada is a party), unique jurisprudence is associated with the European Convention and not the Covenant.⁴³³

430. See, e.g., *United States v. Williams*, 480 F. Supp. 482, 486 n.3. (D. Mass. 1979); *Zemel v. Rusk*, 381 U.S. 1, 14 n.13 (1965) (reference to Universal Declaration of Human Rights to support general principles on right to travel); *City of Santa Barbara v. Adamson*, 164 Cal. Rptr. 539, 542 n.2 (1980) (citing Universal Declaration).

431. See *supra* notes 177-80 on U.K. cases citing either the Universal Declaration of Human Rights or the Standard Minimum Rules on the Treatment of Prisoners.

432. In over half these cases, the reference could be said to support the decision made. Thirty-one of the 152 cases emanated from the Supreme Court of Canada; in fifteen opinions the reference supported the majority decision. On eleven occasions, the reference was made in the context of a dissenting opinion in which its use could be described as supportive.

433. The European Convention on Human Rights is interpreted by the European Commission on Human Rights, which renders decisions on the merits only after closed hearings. The

However, such legitimizing principles have rarely been articulated by Canadian courts, with the consequence that use of this non-binding law, while frequent, is unpredictable and uneven. In some cases, the reference to non-binding international law supports the outcome. For example, in *The Queen v. Rahey*,⁴³⁴ Judge La Forest, concurring with the judgment, pointed out that Charter Section 11(b), the right to be tried within a reasonable time, referred to a period of time ending with a decision from the trial and was not merely a right to be brought to trial. In reaching this decision he stated:

Some support for this conclusion may be found in the decision of the European Court of Human Rights in *Wemhoff*. . . [which] concluded . . . that the protection offered by . . . [such a right] extended to "the whole of the proceedings before the court, not just their beginning."⁴³⁵

The European Court's decision was therefore used to support his view, without any justification for its introduction.

Likewise, in *Tremblay v. Daigle*,⁴³⁶ the Supreme Court of Canada held that a fetus does not have a right to life under the Quebec Charter of Human Rights and Freedoms,⁴³⁷ nor does it have rights in private law. Therefore, a father had no legal right based on an interest in the fetus to support an injunction restraining an abortion. In coming to this conclusion the Court referred to a similar result in the European Commission on Human Rights case of *Paton v. United Kingdom*.⁴³⁸ That case determined that a British court decision stating that a fetus must be born alive in order to enjoy rights was compatible with the Convention. Again, no effort was made to justify consideration of this case.

However, on other occasions well-established jurisprudence under the European Convention on Human Rights has been completely ignored. This is perhaps most obvious in the context of defining the right arising in Charter section 11(b): to be tried within a reasonable time. The European Court has said that a calculation of delay can include time prior to the formal "charge" after which the situation of

European Court of Human Rights presides in a manner more closely related to that of a Canadian or American court and has issued almost 400 judgments. The Human Rights Committee, on the other hand, which interprets the Civil and Political Covenant, conducts no hearings and decides all cases from a series of correspondences between the government, the individual and the Committee. The portion of its substantive decisions which concern its findings on the law (rather than a recitation of the facts) tend to be perfunctory.

434. [1987] 1 S.C.R. 588.

435. *Id.* at 633.

436. [1989] 2 S.C.R. 530.

437. R.S.Q., ch. C-12 (1977) (Can.).

438. App. No. 8416/78, 3 Eur. H.R. Rep. 408 (1980) (Commission report).

the suspect has been substantially affected.⁴³⁹ In marked contrast, the majority of the Supreme Court of Canada in *The Queen v. Kalanj*⁴⁴⁰ held that pre-information delay was not relevant to determining whether a person had been tried within a reasonable time. This was despite the fact that some eight months earlier the two accused had been arrested (and released), told that charges would be raised against them and prohibited from leaving the area. The European Court of Human Rights would have considered the clock to start at this point, where the accused had clearly been substantially affected. The result-oriented nature of the references which are made to European sources and other non-binding instruments is clearly apparent.

In only one case did the Supreme Court of Canada provide a reason for referring to the European Convention on Human Rights. It occurred in the context of evaluating the Charter general limitation clause s.1 and the justifiability of a proposed limitation upon freedom of expression by hate propaganda provisions of the Criminal Code. Chief Justice Dickson, speaking for the majority in *The Queen v. Keegstra*,⁴⁴¹ stated that the language of the European Convention, in the context of a limitation upon the freedom of expression, bore a "significant resemblance to that of section 1 of the Charter."⁴⁴² None of the other opinions of the U.S. Supreme Court which cited non-binding international law to support an interpretation of the Charter gave any justification for such reliance. Reference to such sources, therefore, seems to be completely haphazard. Dissenting opinions often refer to international sources in support of their conclusions, just as majority opinions do. In other words, such international law is invoked where it supports a conclusion already determined. If it suggests a contrary result, it is ignored.

IV. THE COUNTERMAJORITARIAN SPECTER

Although many judges disinclined to enforce international human rights law rely on a fairly simplistic concept of institutional competence (difficulty in finding and understanding the relevant legal materials, fear of provoking the ire of foreign or domestic officials), the principles of majoritarian democracy can also serve as justification for the abnegation of a judicial role. The extensive debate over the legiti-

439. *Corigliano v. Italy*, 57 Eur. Ct. H.R. (ser. A) at ¶ 34 (1982); *Foti v. Italy*, 56 Eur. Ct. H.R. (ser. A) at ¶ 52 (1982); *Eckle v. Federal Republic of Germany*, 51 Eur. Ct. H.R. (ser. A) at ¶ 73 (1982); *Deweere v. Belgium*, 35 Eur. Ct. H.R. (ser. A) (1980) at ¶ 46.

440. [1989] 1 S.C.R. 1594.

441. [1990] 3 S.C.R. 697.

442. *Id.* at 177.

macy of judicial "activism" and judicial review has frequently portrayed the judiciary as a countermajoritarian body with only suspect legitimacy.⁴⁴³ While there is a strong tradition supporting the judiciary's prime function of protecting the fundamental rights of the individual against the excesses of unchecked majoritarianism,⁴⁴⁴ a measurable trend toward deference to majority political choices, even in matters vital to human dignity, may be emerging.⁴⁴⁵ When the claimed fundamental rights have their source in international law, the judicial impulse to defer to the political branches is likely to be strong. It is no coincidence, for example, that Judge Bork, famous for his trenchant critiques of noninterpretive judicial review, has played a prominent role in counseling an extremely narrow approach to the ATCA.⁴⁴⁶ Many judges share Bork's reluctance to adjudicate human rights cases without clearer signals from the political branches. Relative institutional competence is an underlying concern in cases raising the act of state and political question doctrines, with a strong emphasis upon the imponderables of foreign affairs and the need for a single voice by the American government.⁴⁴⁷

The judicial hesitancy reflected in these doctrines of avoidance invites a comparison to American judicial attitudes in the late eighteenth century toward claims derived from international law.⁴⁴⁸ The duty to enforce international law in domestic courts was firmly accepted at the time of the drafting of the Constitution, and numerous cases were adjudicated, especially "prize" cases involving disputes over shipping in wartime.⁴⁴⁹ Courts of the late eighteenth and early nineteenth centu-

443. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

444. Cf. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

445. *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986).

446. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

447. For an analysis of this "one-voice" concern, see Ralph G. Steinhardt, *Human Rights Litigation and the "One-Voice" Orthodoxy in Foreign Affairs*, in *WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* (Mark Gibney ed., 1991).

448. See generally KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM* (1990).

449. THE FEDERALIST NO. 3, at 62 (John Jay) (Hamilton, ed. 1864):

The wisdom of the convention in committing such questions [concerning "treaties and articles of treaties, as well as the laws of nations"] to the jurisdiction and judgment of courts appointed by, and responsible only to one national government, cannot be too much commended.

Cases containing statements asserting the enforceability of the "law of nations" include *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895); *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795). Some revisionist commentators have argued that the 18th Century "law of nations" contained many norms which are now either obsolete (e.g., prize

ries adjudicated cases involving international law as ordinary matters within their judicial competence. Although they did not require close instruction from the political branches, they did not perceive their roles as "activist."⁴⁵⁰ They identified a role for the judiciary in the domestic and the world legal orders that allowed courts to find and apply international norms when litigants presented such claims.⁴⁵¹

Some scholars, such as Stewart Jay, have suggested that changed historical circumstances, particularly the transformation of the United States into a major world power, have eliminated or reduced the imperative to provide domestic judicial remedies for international law violations.⁴⁵² Whether the courts conscientiously could abandon a role assigned to them by the Framers for such pragmatic reasons is doubtful.⁴⁵³ A view sometimes propounded by executive branch officials is that the nation's current prominence makes domestic adjudication of international law peculiarly unwise because of the likely visibility of the cases and the danger that the pronouncements of our independent judiciary will be confused with the policy of the political branches in foreign affairs. For example, the United States Justice Department argued in the Marcos torture cases that the ATCA should be restricted by judicial interpretation to what it saw as a bare minimum of unavoidable cases; that is, where denial of judicial relief might itself breach an international obligation.⁴⁵⁴ An example would be the protection of foreign officials against assault on United States soil. This point of view seems to be premised on an assumption that human rights issues are generally too complex, too confidential, and too essentially political to be trusted to the judiciary.

Interpretivists today almost uniformly concede the legitimacy of judicial review where "the people" have clearly spoken in the entrenched constitutional text. But as Louis Henkin notes, that text has "genetic defects,"⁴⁵⁵ and speaks at best ambiguously to many issues of

law) or have been absorbed into domestic maritime or admiralty law. Trimble, *supra* note 2; Weisburd, *supra* note 160. The point of these authors appears to be that the United States should have (and always had) a "dualist" system for incorporating customary law, to prevent the courts from enforcing customary law on behalf of individuals contrary to the expediency of the political branches. *Id.*; Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 476-79 (1989).

450. See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989).

451. *Id.*

452. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819 (1989).

453. For a thorough explication of the Framers' intent, see Vásquez, *supra* note 209.

454. Brief for the United States as Amicus Curiae, *Trajano v. Marcos*, (No. 86-2448) (9th Cir. July 10, 1989) (copy on file with *Michigan Journal of International Law*).

455. HENKIN, *supra* note 4, at 110.

fundamental rights. Developing a convincing rationale for attributing the present body of international human rights law to the "people" might overcome the claim that its enforcement is countermajoritarian. Addressing this issue requires the problem of domestic use of international human rights law to be broken down according to its component parts: (1) the direct and interpretive uses of customary norms; (2) the direct and interpretive uses of ratified treaties, self-executing and not; and (3) interpretive use of international standards without regard to their status as international law. The degree of prior majoritarian endorsement of the international norms and the degree of their intrusion into the domestic legal order varies in these different situations.

With respect to customary norms which have been codified by the legislature, one might assume there could be no objection to their enforceability as being anti-democratic. However, as in many other contexts where statutes or constitutional texts must be interpreted, the passage of time between codification and occasion for enforcement creates ambiguities that demand interpretive skill. An excellent example is the "law of nations" referred to by the ATCA. In *Tel-Oren*, Judge Bork suggests that commitment to democratic values mandates that a re-imagined 1789 meaning be imposed, like an historical straitjacket, on this statutory term.⁴⁵⁶ The Second Circuit in *Filartiga* ruled that faithfulness to the legislative command counselled giving the flexible phrase an historically evolving meaning.⁴⁵⁷ Neither approach is self-evidently more deferential to the law-making hegemony of the legislative branch, because whether a fixed or evolving meaning was intended by the 1789 drafters cannot be determined with certainty.⁴⁵⁸ Strict textualists fond of a plain meaning approach should favor the broader meaning.

With respect to the direct enforcement of domestically uncodified customary norms, the countermajoritarian objection seems to counsel more clearly against enforceability. As Phillip Trimble notes, these norms have not passed through the crucible of the domestic legislative process and thus have never received the positive *imprimatur* of democratically elected domestic law-makers.⁴⁵⁹

But if one assumes, as Trimble does not,⁴⁶⁰ that domestic courts

456. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 812-16 (D.C. Cir. 1984) *cert. denied*, 470 U.S. 1003 (1985).

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

458. See Randall, *supra* note 448, at 50-52.

459. Trimble, *supra* note 2, at 717-18.

460. *Id.* at 712-13.

are competent to determine whether or not an asserted customary norm exists, commitment to majoritarianism would require no more than deference to clear legislative commands to breach the norm. A proper judicial respect for the legislative branch has long been regarded as requiring that an intent to conform to customary international norms be imputed to the legislature,⁴⁶¹ even though available evidence may indicate nothing but glaring legislative ignorance. To presume instead that mere failure to codify the specific norm gives evidence of a legislative intent to repudiate an international legal obligation, as did the District Court in *American Baptist Churches v. Meese*,⁴⁶² shows a lack of respect for the integrity of a coordinate branch.

But generous application of the *Charming Betsy* interpretive principle may not really tell us, for example, whether the Marielitos should have received *habeas corpus* relief premised on executive violations of customary human rights law. Since state and federal executive officials will be on the receiving end of most of the non-statutory claims for relief premised on customary international norms, the issue boils down to the legitimacy of judicial creativity in crafting remedies where the right emanates from a non-domestic and uncodified source.

A similar issue of the legitimacy of judicial creativity is raised in the context of resort to customary human rights law for interpretive purposes. Taking as an example the Eighth Amendment jurisprudence interpreting the phrase "cruel and unusual punishment," how does resort to proven norms of customary human rights law compare with other potential modes of review of the constitutional command?

Constitutional norms respecting most significant issues of individual rights are inescapably indeterminate. Judicial review poses a risk of judicial arrogance and even oppression, which can be checked only by the cumbersome process of constitutional amendment. All theorists of constitutional interpretation seek to prove that their postulated interpretive framework is most true to the constitutional enterprise and is bounded and determinate enough not to leave the judges free to impose their personal values.

As a source of meaning for unclear domestic texts, the norms of customary human rights law have several attractive characteristics. Perhaps the most distinctive aspect of customary international law is the extremely decentralized and "democratic" process by which it is made: all states may participate. Furthermore, though the relevant

461. Steinhardt, *supra* note 375.

462. 712 F. Supp. 756 (N.D. Cal. 1989).

practice in finding customary international law often involves actions of governments, this is not exclusively true. Particularly in the human rights field, non-governmental organizations have been extremely influential in exposing abuses and articulating norms, such as the prohibition on torture.

Compared to interpretive approaches that rely on abstract political or moral philosophy, reference to customary human rights norms has the advantage of being grounded in the articulated values of a real historical community. Discussing the interpretive theories of Michael Perry and Ronald Dworkin, Mark Tushnet has observed:

The appeal to community values is a contemporary version of the republican tradition. It is attractive because it explicitly assumes that adjudication should be based on values, and the republican tradition also insisted on the importance of civic values in our governance. It is attractive as well because it implicitly assumes both that those values should be historically grounded in the experience of actual communities — another republican theme — and that we live in a society, valued by conservatives and radicals alike, in which people have unalienated relationships and self-understandings, in short, that we live in a community.⁴⁶³

Turning to international human rights norms to define values involves a broad definition of the relevant “community,” but there is no self-evident reason why a parochial approach should be preferred.

The majoritarian criticism of judicial review for the protection of individual rights is also subject to criticism on grounds that, as Michael Perry puts it, the people have two different needs or expectations — one to express their interests through electorally accountable law-makers, and one to struggle to be better human beings than present laws and democratic institutions may allow or reflect. Judicial review does and ought to provide moral guidance, which legislators sometimes cannot give.⁴⁶⁴ The issue for legitimizing customary international human rights norms will not be one of majoritarianism, but one of justice.

While the justice of customary human rights law cannot be guaranteed, its likelihood of providing either correct answers or harmless options can more readily be assured. First, customary international human rights law is very restricted in its scope. It requires a significant degree of generality among nations to generate such a norm, and it is extremely improbable that such a norm will be created where the United States dissents.⁴⁶⁵ Second, in any case, customary interna-

463. MARK TUSHNET, *RED, WHITE AND BLUE* 145 (1988).

464. MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 101-02 (1982). See also HENKIN, *supra* note 4.

465. See *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark);

tional human rights law does not bind a United States court in the face of inconsistent constitutional or subsequent statutory law; in other words, it is without overriding or transcendent authority. Within these limits, United States society is a potential beneficiary, in the context of constitutional or statutory indeterminacy, of a general collective wisdom.

In the case of ratified treaties, the countermajoritarian difficulty takes on a different aspect. Ratified self-executing treaties have received the *imprimatur* of actors in the politically accountable branches of government, and the constitutional Framers spoke clearly in Article VI as to the status of such treaties as enforceable "law." However, there seem to be few indisputably self-executing human rights treaties ratified by the United States. For non-self-executing treaties, the existence of implementing legislation adopted within the constitutional framework lays to rest any possible objection to the treaty's non-democratic origin. But at the same time the implementing legislation, rather than the treaty, supplies the rule of decision.

With respect to interpretive use of ratified treaties, the *Charming Betsy* principle⁴⁶⁶ is grounded in deference to an imputed legislative intent. Where the imputation is false, the legislature need only correct the court's error by clear statement of repudiation of the treaty's obligations. Thus, there is no real countermajoritarian problem, only an issue as to where the risks of inertia should be placed.⁴⁶⁷

With respect to interpretive uses of human rights norms without regard to their status as binding law, international standards have legitimacy within the republican tradition as expressive of community values. Reference to certain international documents, such as the Standard Minimum Rules for the Treatment of Prisoners, which are the careful product of serious and open discussion among informed experts from diverse cultures is preferable to the *ad hoc* articulation of values by an individual judge. Denial of all relief to human rights victims until the preoccupied legislature lays down a specific rule also lacks appeal.

The actual pattern of judicial reasoning in the cases in which non-binding international norms have been used as interpretative aids does raise some cause for concern. If human rights norms are not actually

Federal Republic of Germany v. Netherlands), 1969 I.C.J. 3 ¶¶ 73-74 (Feb. 29, 1969). According to this case, customary law requires the consent of the major states affected by the rule and, certainly, the consent, in this context, of the primary representatives of the major legal systems. Thus, customary human rights law is unlikely to be discordant with indigenous community values.

466. See Steinhardt, *supra* note 375.

467. *Id.* at 1185.

shaping the decisions by providing a more objective source of community values, but are simply being used as make-weight arguments premised solely on personal values, then the critics of non-interpretive review may have some cause for complaint. The legitimacy of reference to international human rights norms in interpreting domestic law is reinforced when those norms are grounded in an actual international consensus, where they are themselves meaningfully precise, and where they appear to exert a real channelling influence on the judge's interpretive discretion.

CONCLUSION

Overall, despite traditionally monist doctrines of customary law and the provision for self-executing treaties in Article VI, American courts generally avoid the application of international human rights norms or rely on the norms for reinforcement of results actually premised on some alternative source of values. Only in a few rare cases, primarily under the ATCA, does international human rights law appear to be the driving force supplying the rule of decision. Customary international human rights norms have counted for very little in Canadian and U.K. jurisprudence, despite equally monist traditions. While human rights treaties have figured much more largely in Canadian and U.K. cases, there are again few decisions in which the treaty norms really appeared determinate of the outcome. To the extent that these courts avoid international human rights norms out of fears of counter-majoritarianism, those fears are unjustified.