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# Application of International Human Rights Law in State and Federal Courts

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# Application of International Human Rights Law in State and Federal Courts

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## INTRODUCTION

In recent years, attention has focused on international human rights law, but without much substantive discussion of what this law is, and how it can be used in federal and state courts to protect human rights within and outside the United States. In an attempt to fill that information gap for practicing lawyers who are interested in utilizing international human rights law, this Article examines past uses of international human rights law in federal and state courts and analyzes its present status, with the purpose of promoting more extensive use of international human rights law by United States lawyers.

Use of international law in state and federal courts has traditionally been limited to the application and enforcement of treaties to which the United States is a party. Because the United States has ratified few human rights treaties, protection of human rights in this manner has proven difficult. Recent federal and state court decisions, however, provide promising precedents for additional applications of human rights law. Two significant developments can be identified: Federal courts have held that allegations of violations of customary international law may state a cause of action; and, federal and state courts have relied upon international human rights laws and standards to define and expand individual rights. This Article addresses the developments in these cases and in cases involving direct application of human rights treaties.

## I. OVERVIEW

### A. *The Basic Documents of International Human Rights Law*

Substantive international human rights law is codified in international instruments drafted by governments acting within their capacity as member states of international governmental organizations. The organizations

that issue instruments bearing directly on human rights in the United States are the United Nations, the Organization of American States (OAS), the International Labor Organization (ILO), and the United Nations Educational, Scientific and Cultural Organization (UNESCO), which is an organization independent of the United Nations.

More than forty documents of the United Nations and OAS are considered human rights instruments. Some are treaties, and others are declarations, the differences in legal effects are discussed in Part II of this Article. Some cover a broad range of rights, e.g., the Universal Declaration of Human Rights, while others detail the content of one right or a group of rights, e.g., the Convention on the Political Rights of Women.

The following instruments contain the core of international human rights law and are the focus of this Article:

1. The Charter of the United Nations.<sup>1</sup>
2. The International Bill of Human Rights, consisting of four instruments:
  - a. The Universal Declaration of Human Rights (Universal Declaration);<sup>2</sup>
  - b. The International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>3</sup>
  - c. The International Covenant on Civil and Political Rights (ICCPR);<sup>4</sup>
  - d. The Optional Protocol to the ICCPR (Optional Protocol).<sup>5</sup>
3. The American Convention on Human Rights (American Convention).<sup>6</sup>

In addition to these basic instruments, lawyers should be aware of the dozens of other instruments that could be used to advance an argument for the protection of human rights in federal and state courts.<sup>7</sup>

1. U.N. CHARTER arts. 55, 56.

2. G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948) [hereinafter cited as Universal Declaration].

3. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967) [hereinafter cited as ICESCR].

4. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) [hereinafter cited as ICCPR].

5. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1967) [hereinafter cited as Optional Protocol].

6. American Convention on Human Rights, *done* Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, O.A.S. Off. Rec. OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 2 (1970), *reprinted in* 9 I.L.M. 673 (1970) [hereinafter cited as American Convention].

7. *See, e.g.*, Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR Supp. (No. 34) at 88, U.N. Doc. A/10034 (1975); Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975) [hereinafter cited as Declaration on Torture]; Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971); Protocol Relating to the Status of Refugees, *done* Dec. 16, 1966, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; Convention on the

*B. The Greater Protections Afforded by International Human Rights Law*

International human rights law often provides greater protections to individuals and minority groups than domestic law.<sup>8</sup> Numerous international provisions relating to criminal justice may provide greater protection than do federal and state laws.<sup>9</sup> For example, the double jeopardy prohibition in international law may apply to successive state and federal prosecutions permitted by the United States Constitution. Under international law, a criminal offender is entitled to any legislated reduction in penalty even though enacted after commission of the crime. Additionally, the international law guarantee of humane treatment in public institutions, including prisons and probably mental institutions, reaches further than the eighth amendment. Other international provisions, generally not part of federal and state laws, require compensation for victims of unlawful arrest or detention and the separation in detention facilities of accused detainees from convicted detainees, and of juveniles from adults.

International prohibitions against many forms of discrimination are more explicit and more extensive than federal and state prohibitions.<sup>10</sup> Internationally prohibited discriminations include, in addition to those set forth in federal and state laws, those based on political or other opinions, national or social origin, property, birth or other status. International law specifically forbids the unequal treatment of men and women and urges that mothers receive special protections for a reasonable time before and

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Elimination of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter cited as Convention on Discrimination]; Declaration on the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); Standard Minimum Rules for the Treatment of Prisoners, First U.N. Congress on the Prevention of Crime and the Treatment of Offenders Annex I.A at 67, U.N. Doc. A/CONF/6/1 (1955) [hereinafter cited as Standard Minimum Rules]; Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135; Convention on the Status of Refugees, *done* July 28, 1951, 19 U.S.T. 6223, T.I.A.S. No. 6577, 189 U.N.T.S. 150; Convention on the Prevention and Punishment of the Crime of Genocide, *done* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter cited as Genocide Convention].

8. Although practitioners are probably more interested in those areas in which international human rights law provides greater protection of individual rights than domestic law, the similarities between international human rights law and federal and state laws are worthy of mention. The civil and political rights guaranteed by the International Bill of Human Rights closely parallel those guaranteed by the United States Bill of Rights, including, for example, freedom of expression, right of association, freedom of thought and religion, protections for persons in the criminal justice process, and due process in all judicial proceedings. Few of the economic, social, and cultural rights set forth in the international instruments as goals to be realized progressively to the maximum of each signatory's resources are guaranteed by federal or state constitutions; however, federal and state laws and regulations increasingly recognize the rights of access to such basic needs as adequate food, health, education, housing, and the means to a decent living.

9. For a discussion of the greater protection offered by international provisions, see *infra* Part IV.

10. For a discussion of international prohibitions against discrimination, see *infra* text accompanying notes 247-62.

after childbirth, including paid leaves or leaves with adequate social security benefits. The nondiscrimination provisions of international law afford greater protections to aliens and to illegitimate children than the provisions of the United States Constitution. One convention explicitly declares that limited affirmative action measures are not to be deemed discriminatory and, in fact, may be required when necessary to ensure the equal enjoyment of human rights.<sup>11</sup>

### C. *Three Uses for International Human Rights Law*

International human rights law may be applied by federal and state courts in three ways. Probably the most promising use of international human rights law is for guidance in interpreting federal and state civil liberties and civil rights laws. Courts may refer to international law in determining the intended content of federal and state laws in the same way that they refer to legislative history. This use of international human rights law is discussed in part IV. Second, under article VI of the United States Constitution, human rights provisions of treaties ratified by the United States have the same status and effect as federal law. Human rights provisions that are internationally accepted as authoritative interpretations of treaties ratified by the United States may be applied pursuant to the same rules of construction applicable to ratified treaty provisions. Part II discusses this use of international human rights law. Third, human rights provisions that are internationally accepted as legally binding are part of the body of customary international law that courts may apply as part of or in a manner analogous to United States common law. This use of international human rights law is discussed in part III.

## II. DIRECT ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS TREATY LAW

### A. *Treaties and Their Effect*

A treaty is an international agreement to which governments become parties by ratification in accordance with their own constitutional or statutory provisions. The United States ratifies a treaty by signature of the President and the advice and consent of two-thirds of the Senate.<sup>12</sup> Under United States Constitution article VI, clause 2 of section 2, a ratified treaty is part of the supreme law of the land—of equal dignity with federal statutes. Conflicts between treaty provisions and existing United States law are resolved according to three rules. First, a treaty may not infringe upon the provisions of the United States Constitution.<sup>13</sup> Second, if a treaty and

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11. Convention on Discrimination, *supra* note 7.

12. U.S. CONST. art. II, § 2, cl. 2.

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

a federal statute conflict, the most recent prevails.<sup>14</sup> Third, if a treaty and state law conflict, the treaty controls.<sup>15</sup> A well-established rule provides, however, that courts should endeavor to construe a treaty and a statute on the same subject in order to give effect to both.<sup>16</sup> When possible, courts construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."<sup>17</sup>

Although the Constitution states simply that treaties are the law of the land, courts have developed the doctrine of "self-executing treaties" to qualify that rule.<sup>18</sup> The doctrine, discussed in greater detail in section B, allows courts to enforce only those treaty provisions that are capable of judicial application without implementing legislation. Opponents of the national use of international human rights law argue that in the absence of implementing legislation, the provisions of human rights treaties are too vague to permit judicial enforcement.<sup>19</sup> International human rights experts, on the other hand, point out that many of the international human rights provisions are no vaguer than, and at least as capable of judicial enforcement as, the Bill of Rights.<sup>20</sup>

The United States is party to the United Nations Charter, but is not party to most other treaties that form the basic core of human rights law. Although President Carter in 1977 did sign the ICESCR,<sup>21</sup> the ICCPR<sup>22</sup> (but not the Optional Protocol), and the American Convention,<sup>23</sup> the Senate has not given advice and consent to the treaties. Also signed but not ratified are the Racial Discrimination Convention<sup>24</sup> and the Genocide Convention.<sup>25</sup> These five signed treaties remain in the Senate for consideration. The only multilateral human rights treaties to which the United

14. Reid v. Covert, 354 U.S. at 18 n.34.

15. Zschernig v. Miller, 389 U.S. 429, 440-41 (1968); Clark v. Allen, 331 U.S. 503, 508 (1947). See also Missouri v. Holland, 252 U.S. 416, 433-35 (1920), in which the Court concluded that the validity of a treaty was not undermined by a possible infringement on states' rights under the tenth amendment unless it violated an express prohibition of the Constitution.

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

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

18. Foster v. Neilsen, 27 U.S. (2 Pet.) 253, 314 (1829).

19. Oliver, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 HOFSTRA L. REV. 411 (1981).

20. See, e.g., Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 652 (1951); Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT'L L. 62, 78 (1951). For a discussion of these two views, see R. LILlich & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 53-122 (1979). See also, Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81, 86-88 (1981); Paust, *Litigating Human Rights in U.S. Courts*, 4 HOUS. J. INT'L L. 137, 143-44 (1981).

21. ICESCR, *supra* note 3.

22. ICCPR, *supra* note 4.

23. American Convention, *supra* note 6.

24. Convention on Discrimination, *supra* note 7.

25. Genocide Convention, *supra* note 7.

States is a party, other than the United Nations Charter, are three conventions on slavery,<sup>26</sup> the Protocol Relating to the Status of Refugees,<sup>27</sup> and the Convention on the Political Rights of Women.<sup>28</sup>

The remainder of part II discusses the duties created by the United Nations Charter and how the issue of self-execution affects the enforcement of those duties in federal and state courts. The duties created under the UDHR, the ICESCR, and the ICCPR will be discussed in the context of using the three documents as authoritative interpretations of basic United Nations Charter obligations. Part II concludes with a discussion of the OAS Charter and the human rights duties created thereunder.

## B. *United Nations Charter*

### 1. Human Rights Duties and Obligations

The United Nations Charter is a treaty that was signed on June 26, 1945, in San Francisco at the conclusion of the United Nations Conference on International Organization and came into force on October 24, 1945. The United States and every other member of the United Nations have agreed to be bound by its provisions.

The United Nations Charter is the supreme international document providing for the protection and promotion of human rights. Its most significant human rights clauses are contained in articles 55 and 56. Article 55 provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Article 56 provides that "[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." When applying these clauses, the first question that arises is whether the word "pledge" imposes on governments the legal obligation to respect and observe human rights. Discussions by the drafters of the Charter show that the use of the word "pledge" was by no means accidental.<sup>29</sup> In its ordinary meaning, "pledge" connotes an obligation, and the International Court of Justice in one opinion found that its use imposes a legal obligation:

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26. Convention on Abolition of Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3; Protocol to Slavery Convention, *done* Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51; Convention on Slavery, *done* Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 551.

27. Protocol Relating to the Status of Refugees, *supra* note 7.

28. Convention on the Political Rights of Women, *supra* note 7.

29. See Summary Report of Fourteenth Meeting of Committee II/3, Doc. 684, II/3/38, 10 U.N.C.I.O. Doc. 127, 130 (1945) (statement of the Delegate of Australia); Summary Report of Fifteenth Meeting of Committee II/3, Doc. 699, II/3/40, 10 U.N.C.I.O. Doc. 139 (1945); Summary Report of Seventeenth Meeting of Committee II/3, Doc. 747, II/3/46, 10 U.N.C.I.O. Doc. 160 (1945) [hereinafter cited as Summary Reports of Committee II/3].



Under the Charter of the United Nations, [South Africa] had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.<sup>30</sup>

The great jurist Egon Schwelb discussed the importance of this paragraph from the *Namibia* opinion and related clauses in the Charter:

When the Court speaks [in paragraphs 130 and 131] of "conformity with the international obligations assumed . . . under the Charter," [and] . . . when it finds that certain actions "constitute a denial of fundamental human rights" and classifies them as "a flagrant violation of the purposes and principles of the Charter," it leaves no doubt that, in its view, the Charter does impose on the Members of the United Nations legal obligations in the human rights field.

. . . .

The Court speaks of a violation of the purposes and principles of the Charter [set out in articles 1 and 2]. . . . When the Court finds that South Africa's policy constitutes a flagrant violation of the purposes and principles of the Charter, it clearly does not intend to convey the idea that only Article 1(3) [referring to respect for human rights and fundamental freedoms] has been violated. This follows from the fact that the Court refers to the pledge of Member States which is contained in Chapter IX (Article 56) of the Charter. What is meant is a violation of the relevant provisions of the Charter, *i.e.*, its human rights clauses, as a whole.<sup>31</sup>

The United Nations Secretary General also relied on the *Namibia* opinion<sup>32</sup> when he declared that article 56 imposes a legal obligation to respect the human rights provision of article 55(c): "[T]he prohibition of distinctions made in the enjoyment of human rights and fundamental freedoms on the grounds of race, sex, language or religion, has never been contested. . . ."<sup>33</sup> The pledge in article 56 calls for joint action, separate action, and cooperation with the United Nations. The drafters rejected a text

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30. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 57 (Advisory Opinion of June 21) [hereinafter cited as Advisory Opinion on Namibia].

31. Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 348-49 (1972). It should be noted that the prohibition against racial, sexual, linguistic, and religious discrimination is mentioned throughout the Charter, *e.g.*, arts. 1(3), 13(1), and 76(c).

32. Advisory Opinion on Namibia, 1971 I.C.J. at 16.

33. International Instruments and National Standards Relating to the Status of Women, Study of Existing Conventions, Report of the Secretary-General, Economic and

that merely provided for a pledge "to cooperate" with the organization.<sup>34</sup> Because these clauses create an affirmative obligation to promote human rights, a violation of the obligation is a violation of the law of the land that should be enforceable in federal and state courts. Under the doctrine of self-executing treaties, however, courts may enforce only those treaty clauses that are capable of judicial application without implementing legislation. This Article in the next section discusses the self-executing treaty doctrine and its application to articles 55 and 56 of the Charter.

In a number of cases United States courts have made references to the Charter:<sup>35</sup>

(1) *Oyama v. California*<sup>36</sup>

A concurring opinion noted that the California Alien Land Law stands as a barrier to the pledge by the United States, through ratification of the Charter, to promote respect for and observance of human rights and fundamental freedoms without distinction as to race, sex, language, and religion.<sup>37</sup> Further, the California law stands as an obstacle to "the free accomplishment of [United States] policy in the international field."<sup>38</sup>

(2) *Hurd v. Hodge*<sup>39</sup>

A dissenting opinion noted that the Charter provides that the United Nations shall promote respect and observance for human rights, and that all Members pledge to take joint and separate action for that purpose. The opinion also noted a Canadian court's reliance on the Charter in ruling that racial covenants are contrary to public policy and stated that continuation of such covenants would offset both adherence of the United States and other member states to the Charter and the United States "desire for international good will and cooperation."<sup>40</sup>

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Social Council, U.N. Doc. E/CN.6/552, at 8 (1972). See also the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 122, U.N. Doc. A/8028 (1970) (human rights obligations comprise a "duty" of states); *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 4, 33 (Judgment of Feb. 5); Paust, *Litigating Human Rights in U.S. Courts*, *supra* note 20, at 142-43.

34. Summary Reports of Committee II/3, *supra* note 29.

35. See also *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66-67 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir. 1975); *United States v. Herrera*, 504 F.2d 859, 860 (5th Cir. 1974); *United States v. Toscanino*, 500 F.2d 267, 277-78 (2d Cir. 1974).

36. 332 U.S. 633 (1948).

37. *Id.* at 673 (Murphy, J., concurring).

38. *Id.* at 649-50 (Black, J., concurring).

39. 162 F.2d 233 (D.C. Cir. 1947).

40. *Id.* at 245 (Edgerton, J., dissenting).

(3) *Namba v. McCourt*<sup>41</sup>

The majority opinion relied in part on the obligations of the United States to the principles of articles 55(c) and 56 of the Charter in striking down Oregon's Alien Land Law.

(4) *Pauling v. McElroy*<sup>42</sup>

The court held that there is no conflict between the Atomic Energy Act and the human rights provisions of the Charter and that, in a conflict, the Atomic Energy Act would prevail as the supreme law of the land. The court also asserted that the provisions of the Charter are not self-executing and do not vest individuals with legal rights.<sup>43</sup>

(5) *Rice v. Sioux City Memorial Park Cemetery, Inc.*<sup>44</sup>

The Court stated that there is no basis for inferring that the Court's previously divided decision concerning racially restrictive covenants for burial plots reflected a diversity of opinion on whether the language of the Charter constituted a limitation on the rights of states and persons otherwise reserved to them under the United States Constitution.<sup>45</sup> The Court recognized, however, that the Charter is an exercise of the treaty-making power under the Constitution. Because the Court determined that recently enacted Iowa legislation controlled the case, it did not decide the relevance of the Charter.

(6) *Katzenbach v. Morgan*<sup>46</sup>

The Court expressed no opinion on whether a clause of the Voting Rights Act allowing ballots in languages other than English could be sustained as a measure to discharge certain United States treaty obligations under the Charter.<sup>47</sup>

(7) *People of Saipan v. United States Department of Interior*<sup>48</sup>

A concurring opinion<sup>49</sup> found that the Charter is not self-executing and does not create rights that are justiciable between individual litigants. The opinion cited *Pauling*<sup>50</sup> as a straightforward holding that the Charter is not self-executing and *Hitai v. Immigration and Naturalization Service*<sup>51</sup> as

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41. 185 Or. 579, 204 P.2d 569 (1949).

42. 164 F. Supp. 390 (D.D.C. 1958), *aff'd per curiam on other grounds*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960).

43. 164 F. Supp. at 393. In accord on the latter point is *Dreyfus v. Von Fink*, 534 F.2d 24, 30 (2d Cir. 1976).

44. 349 U.S. 70 (1955).

45. *Id.* at 73.

46. 384 U.S. 641 (1966).

47. *Id.* at 646 n.5.

48. 502 F.2d 90 (9th Cir.), *cert. denied*, 420 U.S. 1003 (1974).

49. 502 F.2d at 100-02 (Trask, J., concurring).

50. 164 F. Supp. at 390.

51. 343 F.2d 466 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

holding that the Charter is a compact between sovereign nations and not between individuals.

(8) *Boyer v. Garrett*<sup>52</sup>

Plaintiffs relied on the Charter in arguing for the prohibition of racial discrimination in athletic facilities. The court refused to consider the Charter and found that the Charter is of no broader scope than the fourteenth amendment.

(9) *Camp v. Recreation Board for District of Columbia*<sup>53</sup>

The court found that there was no merit in plaintiffs' contention that segregated playground facilities contravene the Charter.<sup>54</sup>

(10) *Lareau v. Manson*<sup>55</sup>

In formulating a standard for determining when prison conditions constitute overcrowding and violate the due process rights of pretrial detainees, the court cited the obligations under articles 55 and 56 of the Charter and the United Nations Standard Minimum Rules for the Treatment of Prisoners.<sup>56</sup>

(11) *Hanoch Tel-Oren v. Libyan Arab Republic*<sup>57</sup>

In dismissing plaintiffs' claims alleging tortious acts, the court held that the plaintiffs did not meet all the elements for a cause of action based on violations of international human rights law and brought under the Alien Tort Claims Act.<sup>58</sup> The court also held that to confer federal jurisdiction a treaty must contain a specific provision permitting a private cause of action.<sup>59</sup>

## 2. The Self-Executing Treaty Doctrine

The critical issue that must be considered is whether clauses of a ratified treaty are self-executing. A self-executing clause specifies duties that directly confer rights by operation of the Supremacy Clause of the United States Constitution.<sup>60</sup> If a clause is self-executing, individuals may challenge—in federal or state courts—violations of those rights by government or government officials.<sup>61</sup>

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52. 183 F.2d 582 (4th Cir. 1950).

53. 101 F. Supp. 10 (D.D.C. 1952).

54. *Id.* at 13.

55. 507 F. Supp. 1177 (D. Conn. 1980), *modified*, 651 F.2d 96 (2d Cir. 1981).

56. *Id.* at 1187 n.9 (construing Standard Minimum Rules *supra* note 7).

57. 517 F. Supp. 542 (D.D.C. 1981).

58. 28 U.S.C. § 1350 (1976).

59. See discussion *infra* note 74 and part III.

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

61. See OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, PUB. NO. 8809, DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW 65 (1974); L. SOHN & T.

Courts have used various tests to determine whether a clause is self-executing. One test ascertains whether the treaty "operates of itself, without the aid of any legislative provision."<sup>62</sup> Another test ascertains the "intent of the parties" reflected in the treaty's words and, when the words are unclear, in the circumstances surrounding the treaty's execution.<sup>63</sup> Recent cases, however, have noted the limited value of the *Foster* test, and courts have begun to look beyond the intent-of-the-negotiators test.<sup>64</sup> The following three-step inquiry has been formulated by Stefan Riesenfeld, a leading scholar:<sup>65</sup> a) Whether the rights and duties of individuals are involved; b) whether the United States and other parties retain discretion to determine whether and when to fulfill the obligation to give the words of the treaty domestic effect; and c) whether congressional action is required to fulfill the treaty obligation.

Whether or not a clause is self-executing depends, therefore, on what obligations the clause creates. If the obligation is merely to negotiate a supplementary contract or to seek legislative action, the clause is not self-executing. Examples of clauses that are not self-executing include articles 43(3) and 45 of the United Nations Charter, which create duties to negotiate supplementary contracts and seek legislative action. Simply because a provision requires future negotiation or legislative action does not, however, render it nonself-executing if the provision also creates specific obligations or proscribes certain acts. For example, articles 25, 100, and 105 of the United Nations Charter have been interpreted as self-executing because they require governments to perform or to refrain from certain acts, even though the same articles also require governments to negotiate supplementary contracts and seek legislative action.<sup>66</sup>

Article 56 of the Charter, the major human rights clause in international law, is another example of a provision that does not merely require future

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BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973).

62. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 254 (1829).

63. See *Cook v. United States*, 288 U.S. 102, 119 (1933); *Jones v. Meehan*, 175 U.S. 1, 10-23 (1899); *Heong v. United States*, 112 U.S. 536, 539-43 (1884); *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 65-68 (1833); *Foster v. Neilson*, 27 U.S. (2 Pet.) at 310-16; cf. *Neilson v. Johnson*, 279 U.S. 47, 52 (1929) (unclear meanings should be resolved by reference to the parties' negotiations and diplomatic correspondence).

64. See, e.g., *United States v. Postal*, 589 F.2d 862, 876-77 (5th Cir. 1979), cert. denied, 444 U.S. 832 (1980).

65. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971). See Riesenfeld, *The Doctrine of Self-Executing Treaties and United States v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980); Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CAL. L. REV. 643, 652-53 (1937). See generally Riesenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community*, 67 AM. J. INT'L L. 504 (1973); Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 U. MINN. L. REV. 35, 66-72 (1978).

66. See *Keeney v. United States*, 218 F.2d 843 (D.C. Cir. 1954).

agreements. The International Court of Justice ruled in its 1971 *Namibia* opinion that South Africa's apartheid policy in Namibia violated the pledge contained in article 56. The Court reaches this conclusion despite the fact that South Africa had taken no steps to incorporate the pledge into its domestic law. Nothing in the opinion suggests that article 56 requires South Africa and other governments to negotiate supplemental agreements or to seek legislative action. Although international law does not contain a self-executing doctrine, the Court's opinion may be cited for the proposition that the obligations imposed by articles 55 and 56 are binding without further action.<sup>67</sup>

*Sei Fujii v. California*<sup>68</sup> is an oft cited case in which the California Supreme Court considered whether articles 55 and 56 of the Charter are self-executing. The court held that an alien land law was invalid on the ground that it violated the fourteenth amendment. Unfortunately, in doing so, the court first rejected the argument that the law was also a violation of articles 55 and 56 of the Charter. It found that those provisions were not self-executing.<sup>69</sup> Although this statement is frequently cited for the proposition that articles of the Charter are not self-executing, the statement was dictum and, therefore, is of dubious precedential value, even in California.<sup>70</sup>

The honorary editor in chief of the American Journal of International Law observed some years ago that *Fujii* "was not appealed to the Supreme Court of the United States, so the point remains unsettled for the country as a whole."<sup>71</sup> Federal judges have cited the dictum in *Fujii* in various opinions—in one district court case, it may have been crucial,<sup>72</sup> and two courts of appeals mentioned it cryptically.<sup>73</sup> In no case, federal or state, were its premises reexamined.<sup>74</sup>

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67. Advisory Opinion on Namibia, 1971 I.C.J. at 16. For a discussion of the relation of the self-executing doctrine to international law see Wright, *supra* note 20.

68. 38 Cal. 2d 718, 242 P.2d 617 (1952).

69. *Id.* at 724-25, 242 P.2d at 622.

70. See *People v. Mimirani*, 30 Cal. 3d 375, 388 n.1, 636 P.2d 1130, 1138 n.1, 178 Cal. Rptr. 792, 800 n.1 (1981).

71. Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INT'L L. 57, 72 (1954).

72. *Camacho v. Rogers*, 199 F. Supp. 155, 158 (S.D.N.Y. 1961).

73. *Hitai v. Immigration & Naturalization Serv.*, 343 F.2d 466, 468 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965); *Vlissidis v. Anadell*, 262 F.2d 398, 400 (7th Cir. 1959).

74. *In re Rice v. Sioux City Memorial Park Cemetery, Inc.*, 245 Iowa 147, 157-58, 60 N.W.2d 110, 116-17 (1953) (holding the United Nations Charter has no application to the private conduct of individual citizens of the United States), *cited in Camacho v. Rogers*, 199 F. Supp. at 158 (holding article 55 of the United Nations Charter is not self-executing). See *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73 (1955). On rehearing, the Court dismissed certiorari as improvidently granted and vacated its previous order of affirmance. The Court stated that although it was evenly divided in its previous opinion, this reflected no diversity of opinion on the issue of the nonapplicability of the Charter. *Id.*

The recent case of *Hanoeh Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), is an example of a court expressing the need for a treaty to provide explicitly for a

At present, *Fujii* seems archaic. According to one writer, "[i]t is unlikely that *Fujii* . . . would be decided the same way today."<sup>75</sup> Indeed, the issue of whether provisions of the Charter are self-executing must be reexamined in light of more recent decisions. The following question should be answered: Does the Charter obligation (or other treaty provision) require parties to refrain from violating human rights, to enact laws, or to meet both these duties? The *Fujii* court correctly observed that "future legislative action by several nations would be required to accomplish the [Charter's] declared objectives . . . ."<sup>76</sup> The court incorrectly concluded, however, that those objectives were to be achieved *solely* by legislative action and that "[t]he provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack . . . mandatory quality and definiteness. . . . [T]hey are framed as a promise of future action. . . ."<sup>77</sup>

The following points support an argument that the court's decision was incorrect. First, not only did the International Court of Justice's *Namibia* opinion imply the contrary in 1971,<sup>78</sup> but almost every other United Nations organ and agency has rejected the California court's analysis. Second, the United States Government has rejected the analysis when arguing before the International Court of Justice.<sup>79</sup>

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private cause of action in order to base jurisdiction on international human rights law in United States courts, without addressing specifically the language of the treaties themselves. The cases cited by the court to support the argument that various treaties are not self-executing likewise do not consider the language of the treaty, nor do they cite any other authority. See, e.g., *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960), *cited in Hanoch Tel-Oren*, 517 F. Supp. at 547. In *Hanoch Tel-Oren*, the court, in a single paragraph without citation or reference to the Charter itself, found three separate provisions of the Charter were nonself-executing. *Id.*

The opinion does refer to the possibility of an implied private right of action under a treaty. The opinion does not consider, however, the particular provisions to determine whether the language requires additional legislation for implementation. If the language does not, a private cause of action may be implied. *Id.*

75. Schlüter, *The Domestic Status of the Human Rights Clauses of the United Nations Charter*, 61 CAL. L. REV. 110, 162 n.291 (1973). *Cf. id.* at 163 (referring to the western approach to social change: "The legal approach may fail in countries whose judiciary is not a relatively independent and socially innovative power, receptive to new impulses from international law.").

76. 38 Cal. 2d at 722, 242 P.2d at 621.

77. *Id.* at 724, 242 P.2d at 621-22.

78. Advisory Opinion on *Namibia*, 1971 I.C.J. at 16.

79. Legal Consequences for States of the Continued Presence of South Africa in *Namibia* (South West Africa) notwithstanding Security Council Resolution 276, 1970 I.C.J. Pleadings 843, 852-56 (written statement of the United States Government). See also *id.* at 75, 108-10 (written statement of the Security-General of the United Nations). For a more detailed discussion of this issue, see Loudon, *The Domestic Application of International Human Rights Law: Evolving the Species*, 5 HASTINGS INT'L & COMP. L. REV. 161, 190 (1981).

### 3. Authoritative Interpretation: The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (Universal Declaration)<sup>80</sup> was unanimously adopted by resolution in the United Nations General Assembly on December 10, 1948. The Universal Declaration was viewed by many as a first step in the formulation of an International Bill of Human Rights that would have both legal and moral force. Since 1948 the impact of the Universal Declaration has been felt in three main areas. It has been invoked as a standard, and its clauses have been incorporated in decisions by United Nations organs and agencies; in international treaties; and in national constitutions, national legislation, and court decisions.<sup>81</sup> Its thrust has been reaffirmed, and violations of its clauses have been denounced in several United Nations and General Assembly resolutions.<sup>82</sup>

The Universal Declaration is not a treaty and cannot be considered the law of the land. Two arguments, however, support the notion that the Universal Declaration has legal effect in federal and state courts. The first argument is that the Universal Declaration has become part of the customary law of nations.<sup>83</sup> The second argument is that the Universal Declaration constitutes an authoritative interpretation of the United Nations Charter. Judge Tanaka, who dissented in the *South West Africa* case, endorsed this idea when he stated that "the Universal Declaration of Human Rights . . . although not binding in itself, constitutes evidence of the interpretation and application of the relevant Charter provisions . . ."<sup>84</sup> Because the obligations created by articles 55 and 56 of the Charter lacked clarity, the meaning of "human rights and fundamental freedoms" required further definition. The Universal Declaration was a notable first step by the international community toward defining what rights and freedoms to promote and protect. By specifying those human rights and freedoms, the Universal Declaration interprets and implements the Charter obligations. Therefore, it may be argued that as an interpretation of the Charter, the Universal Declaration should be used in federal and state courts.

80. Universal Declaration, *supra* note 2.

81. See Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 1959 AM. SOC'Y INT'L L. PROC. 217.

82. See E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY: THE ROOTS AND GROWTH OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, 38-39 (1964). See, e.g., Efforts and Measures for Securing the Implementation and the Enjoyment by Youth of Human Rights, G.A. Res. 37/49, U.N. Doc. —, at — (1982); The Question of Aging, G.A. Res. 37/51, U.N. Doc. —, at — (1982); Declaration on the Participation of Women in Promoting International Peace and Co-operation, G.A. Res. 37/63, U.N. Doc. —, at — (1982); Measures to Improve the Situation and Ensure the Human Rights and Dignity of All Migrant Workers, G.A. Res. 37/170, U.N. Doc. —, at — (1982).

83. This argument is discussed *infra* part III.

84. *South West Africa (Ethiopia v. S. Afr., Liberia v. S. Afr.)*, 1966 I.C.J. 6, 293 (Judgment of July 18) (Tanaka, J., dissenting).



Several cases in United States courts have referred to the Universal Declaration:

(1) *American Federation of Labor v. American Sash & Door Co.*<sup>85</sup>

The Supreme Court upheld an Arizona constitutional amendment that prohibited union, closed-shop arrangements. A concurring opinion<sup>86</sup> referred to article 20(2) of the Universal Declaration, which provides that "[n]o one may be compelled to belong to an association."<sup>87</sup>

(2) *Wilson v. Hacker*<sup>88</sup>

The plaintiff, a bar owner, sought an injunction against union picketing. One union excluded female members, and the plaintiff contended that an agreement to hire only union members would force her to fire all female employees. The court ruled for the plaintiff and cited the Universal Declaration's prohibition against distinctions based on sex as "indicative of the spirit of our times."<sup>89</sup>

(3) *Cramer v. Tyars*<sup>90</sup>

The court found that the trial court's decision requiring testimony from a person who was alleged to be mentally retarded and a danger to himself or others was not harmless beyond all reasonable doubt. The testimony was given in a commitment proceeding regarding behavior that allegedly involved assaults. A dissenting opinion<sup>91</sup> found that the questioning, to which the defendant responded with wild claims of attacks and illustrated with swinging and punching motions, was cruel and degrading and violated article 5 of the Universal Declaration, which provides that "[n]o one shall be subjected to cruel, inhuman or degrading treatment. . . ."<sup>92</sup>

(4) *Bixby v. Pierno*<sup>93</sup>

The court cited the Universal Declaration in support of its assertion that the right to practice one's trade or profession is a fundamental right.<sup>94</sup>

(5) *City of Santa Barbara v. Adamson*<sup>95</sup>

The court held that an ordinance drawing a distinction between related and unrelated persons violated the California Constitution's right of

85. 335 U.S. 538 (1948).

86. *Id.* at 549 n.5 (Frankfurter, J., concurring).

87. Universal Declaration, *supra* note 2, art. 20(2).

88. 200 Misc. 124, 101 N.Y.S.2d 461 (Sup. Ct. 1950).

89. *Id.* at 135, 101 N.Y.S.2d at 473.

90. 23 Cal. 3d 131, 588 P.2d 793, 151 Cal. Rptr. 653 (1979).

91. *Id.* at 151 n.1, 588 P.2d at 805, 151 Cal. Rptr. at 665 (Newman, J., dissenting).

92. Universal Declaration, *supra* note 2, art. 5.

93. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

94. *Id.* at 143 n.9, 481 P.2d at 251 n.9, 93 Cal. Rptr. at 243 n.9.

95. 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980).

privacy provisions. The court referred to articles 12, 16(3), 17(1), and 29(2) of the Universal Declaration.<sup>96</sup>

(6) *Filartiga v. Peña-Irala*<sup>97</sup>

The court held that torture perpetrated under the color of official authority violates universally accepted norms of the international law of human rights. The court used the Universal Declaration as evidence of customary international law.

(7) *In re Alien Children Education Litigation*<sup>98</sup>

The court held that a Texas statute prohibiting the use of state funds to educate noncitizens or persons not lawfully admitted to the United States violated the equal protection clause of the United States Constitution. The court also held that a state statute does not interfere with the United States obligations under the United Nations Charter as interpreted by the Universal Declaration.<sup>99</sup>

96. *Id.* at 130 n.2, 610 P.2d at 439 n.2, 164 Cal. Rptr. at 542 n.2.

97. 630 F.2d 876 (2d Cir. 1980). The court discussed the Universal Declaration as an "authoritative statement of the international community." *Id.* at 882-83. *Filartiga* is further discussed *infra* part III.

98. 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd*, No. 80-1807 (5th Cir. Feb. 23, 1981), *aff'd sub nom* Plyler v. Doe, 102 S. Ct. 2382 (1982).

99. The reasoning relied upon by the court to reach this conclusion is questionable. The court did not deal with the issue whether articles 55 and 56 are self-executing. Rather, it discussed whether the Universal Declaration establishes rights with which individual states cannot interfere. Although this sounds like a self-executing argument, in fact it is not applicable to the Universal Declaration because the Universal Declaration is not a treaty, but is an authoritative interpretation of a treaty. The first issue addressed should be whether the treaty is self-executing.

Furthermore, the court did not specifically deal with the meaning of article 26(1) which clearly states that "[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages." Universal Declaration, *supra* note 2, art. 26(1). Although legislation may be required to define the right, once education is provided, no additional legislation is required to establish that "everyone" has the right to education and that it shall be free.

The court, however, preferred not to deal with the meaning of the language of article 26. Rather, it referred to other articles of the Universal Declaration and concluded that while these all "represent standards toward which all societies should strive, . . ." it does not mean that "the State of Texas intrudes into foreign relations if it denies a person the right to education." *In re Alien Children*, 501 F. Supp. at 593.

The court's discussion of article 47 of the OAS Charter, as amended by the 1967 Protocol of Buenos Aires, is more complete because it deals with the language of the provision. After looking at the language, the court concluded that although it could be implied from some of the language that there was an intention to create judicially enforceable rights, the article taken as a whole requires implementing legislation to be given effect. *Id.* at 590. Compare the language of article 47(a) of the Universal Declaration: "Elementary education, compulsory for children of school age, shall also be offered to all others who can benefit from it. When provided by the State *it shall be without charge* . . ." (emphasis added) with article 47(b): "Middle-level education shall be extended progressively to as much of the population as possible. . . ." Universal Declaration, *supra* note 2, arts. 47(a), 47(b).

Clearly, no further legislation is required to establish that elementary education provided

(8) *Fernandez v. Wilkinson*<sup>100</sup>

The court held that the indeterminate detention of a Cuban refugee who was not convicted of a crime in the United States and who was not determined to be a security risk violated customary international law. The court used the Universal Declaration as an example of customary international law.

(9) *American National Insurance Co. v. Fair Employment & Housing Commission*<sup>101</sup>

The court cited article 2 of the Universal Declaration as an example of an illustrative rather than restrictive definition of prohibited discrimination.<sup>102</sup>

## 4. Authoritative Interpretation: The International Covenants on Human Rights

The two International Covenants on Human Rights—the Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>103</sup> and the Covenant on Civil and Political Rights (ICCPR)<sup>104</sup>—are, like the Universal Declaration, considered by many to constitute an authoritative interpretation of the human rights clauses of the United Nations Charter.<sup>105</sup> The Covenants were approved by the United Nations General Assembly in 1966, and in 1976 entered into force as legally binding multilateral treaties when ratified by the required thirty-five countries. At present, more than sixty countries have become parties. The United States is not among them. President Carter signed the Covenants in October 1977 but the Senate has not yet given its consent.<sup>106</sup>

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by the state shall be free. The *In re Alien Children* court, however, decided that if the whole provision is not self-executing, the court could not give effect to those parts that are. The court could have decided to the contrary, but it at least considered the language of article 47 of the Universal Declaration in reaching its conclusion, which it did not do in dealing with the United Nations Charter and article 26 of the Universal Declaration.

100. 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom. on other grounds*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

101. 32 Cal. 3d 603, — P.2d —, — Cal. Rptr. — (1982).

102. *Id.* at 608 n.4, — P.2d at — n.4, — Cal. Rptr. at — n.4.

103. ICESCR, *supra* note 3.

104. ICCPR, *supra* note 4.

105. Sohn, *A Short History of United Nations Documents on Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 38, 169 (1968).

106. The ICESCR establishes goals that ratifying governments agree to realize progressively to the full extent of their available resources. Although the ICESCR specifies that the goals are evolving standards, it can be argued that governments are bound by them much as governments in the United States are bound by evolving standards of due process. Numerous examples of the evolving standards of due process exist—for instance, fair hearing requirements that protect public employees' liberty and property interests in their

To determine the present obligation of the United States under the Covenants, it is necessary to analyze the status of a treaty signed by the President, but not consented to by the Senate. Article 18 of the Vienna Convention on the Law of Treaties provides that "[A] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty or . . . expressed its consent to be bound by the treaty. . . ." <sup>107</sup> The United States is not a party to the Vienna Convention but the Convention nevertheless may be used as an expression of the international community's view on treaty obligations. Therefore, it can be argued that, by signing the Covenants, the United States has at least agreed to refrain from acts calculated to frustrate the purpose of the treaties. Furthermore, the United States has expressed in other agreements a view of what its duties are with respect to the Covenants. In the Helsinki Accords, for example, the United States as a party has pledged to "fulfill [its] obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which [it] may be bound."<sup>108</sup>

The Covenants, like the Universal Declaration, may be used as part of the customary law of nations<sup>109</sup> or as authoritative interpretations of the United Nations Charter. The argument for the latter use is parallel to that dealing with the Universal Declaration. The Covenants comprise the second half of the formulation of an International Bill of Human Rights and

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jobs. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Skelly v. State Personnel Board*, 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14 (1975).

The ICCPR guarantees fundamental civil liberties, due process, equal protection, and the peoples' right to self-determination and control of their natural resources. Attached to the ICCPR is the Optional Protocol, *supra* note 5, which enables citizens of ratifying countries to file charges against their countries for serious violations of civil and political rights. Complaints are filed with the Human Rights Committee, which was established under the ICCPR for this purpose. The Optional Protocol provides a final appeal for individuals who, for whatever reasons, have exhausted the available domestic remedies without obtaining justice. President Carter did not sign the Optional Protocol, and therefore it was not presented for the Senate's consent.

The ICCPR and the ICESCR are necessarily interrelated. A government cannot guarantee one set of rights without being committed to the protection and realization of the other. *See* ICCPR, *supra* note 4, preamble; ICESCR, *supra* note 3, preamble.

107. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, *reprinted in* 8 I.L.M. 679 (1969). The Treaty entered into force on January 27, 1980, and thirty-five countries were parties to the Treaty as of December 1980. The United States signed the Treaty in 1970, but has not ratified it. The United States, however, has used provisions of the Treaty on some occasions. *See, e.g.*, a letter from the Legal Advisor of the Department of State, Roberts B. Owen, to Adlai E. Stevenson dated September 12, 1980 which states: "While the United States has not yet ratified the Vienna Convention on the Law of Treaties, we consistently apply those of its terms which constitute a codification of customary international law." Nash, *Contemporary Practice of the United States Relating to International Law*, 75 AM. J. INT'L L. 142, 147 (1981).

108. Helsinki Accords *done* Aug. 1, 1975, art. 1(a)(VII). U.S. DEP'T. OF STATE, PUB. NO. 8826, *reprinted in* 14 I.L.M. 1292, 1295 (1975). *See generally* HUMAN RIGHTS INTERNATIONAL LAW AND THE HELSINKI ACCORD (Buergenthal ed. 1977).

109. For a discussion of the Covenants' use in customary international law, see *infra* part III.

define even more specifically than the Universal Declaration the obligations created by articles 55 and 56 of the Charter.<sup>110</sup> Therefore, it is submitted that the Covenants may be used in federal and state courts as interpretations of the Charter.

Whether the Covenants are used now as authoritative interpretations of the Charter or directly as treaties when ratified, their precise language must be examined to determine whether a particular obligation is self-executing and therefore confers private rights. An examination of the Covenants reveals the obligation to "undertake," to "promote," and to "ensure" the proper protection and enforcement of the rights enumerated in the Covenants. A few provisions, however, envision that rights will be given effect through further action of the parties. Article 11(2) of the ICESCR, for example, states that:

[t]he States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>111</sup>

Although this article establishes the right to be free from hunger, it also envisions the use of further measures to promote various aspects of the right. Because these measures would probably require further legislation, these subsections are not self-executing. Other provisions likewise contain language mentioning "special measures" that must be taken,<sup>112</sup> "steps to be taken,"<sup>113</sup> or laws that must be passed.<sup>114</sup> To the extent that further legislation is required for implementation, these subsections are not self-executing.

Some provisions require no further action by governments to confer rights on individuals. For example, the ICCPR provides that "[N]o one shall be subjected to torture or to cruel, inhuman or degrading treatment

110. See, e.g., article 5 of the Universal Declaration, *supra* note 2, which states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." See also article 7 of the ICCPR, *supra* note 4, which states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

111. ICESCR, *supra* note 3, art. 11(2).

112. *Id.* art. 10(3).

113. *Id.* arts. 12(2), 15.

114. ICCPR, *supra* note 4, art. 20.

or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."<sup>115</sup> Clearly, no further legislation is required to prohibit these acts. The following United States cases referred to the Covenants:

(1) *People v. Levins*<sup>116</sup>

A concurring opinion referred to article 9(4) of the ICCPR as supporting the right to a post-indictment preliminary hearing.<sup>117</sup>

(2) *New Hampshire v. Robert H.*<sup>118</sup>

The court invoked articles of both Covenants as determinative of an international consensus on the recognition and protection of the family unit as "the natural and fundamental unit of society . . . ."<sup>119</sup>

(3) *Fernandez v. Wilkinson*<sup>120</sup>

The court cited various articles of the ICCPR as indications of customs and usages of civilized nations.

(4) *Filartiga v. Peña-Irala*<sup>121</sup>

The court referred to article 7 of the ICCPR as an example of the universal prohibition against torture.

### C. *The Charter of the Organization of American States*

#### 1. Human Rights Duties and Obligations

Membership in the Organization of American States (OAS) is open to all states in the Western Hemisphere. There are presently twenty-five active members.<sup>122</sup> The OAS Charter<sup>123</sup> was ratified as a treaty by the United States Senate following its adoption by the Ninth International Conference of American States in Bogotá in 1948. The Charter entered into force on December 13, 1951.

The principal human rights provisions of the original Charter are contained in articles 3 and 16. Article 3 proclaims that all individuals of the

115. *Id.* art. 7.

116. 22 Cal. 3d 620, 586 P.2d 939, 150 Cal. Rptr. 458 (1978).

117. *Id.* at 625, 586 P.2d at 942, 150 Cal. Rptr. at 461 (Newman, J., concurring).

118. 118 N.H. 713, 393 A.2d 1387 (1978).

119. *Id.* at 716, 393 A.2d at 1389.

120. 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom. on other grounds*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981). See *supra* text accompanying note 100; see also *infra* text accompanying notes 179-97.

121. 630 F.2d 876 (2d Cir. 1980). See *supra* text accompanying note 97; see also *infra* text accompanying notes 150-78.

122. Cuba is officially a member state but has been excluded from participation in the OAS since 1962.

123. Charter of the Organization of American States, *done* Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

American states are accorded fundamental rights without distinction as to race, nationality, creed, or sex and that member states must be politically organized as representative democracies. Article 16 declares that each state has the right to its own cultural, political, and economic development, respecting, at the same time, individual human rights and "the principles of universal morality."

At the Third Special Inter-American Conference in 1967, the OAS membership adopted as an amendment to the Charter the Protocol of Buenos Aires (Protocol).<sup>124</sup> The Protocol was ratified by the United States Senate and entered into force on February 27, 1970. The Protocol substantially revises the Charter and elaborates on the economic, social, and cultural rights alluded to in the Charter. For example, the Protocol enumerates the right to employment; just salaries; decent health and occupational conditions; free association among labor and management; and education, including free, mandatory primary schooling. The uncertain legal effect of the Charter raises the question whether the Charter mandates legally binding norms or merely proclaims broad principles. In a 1960 opinion the Inter-American Juridical Committee wrote that the human rights articles are as much a legal obligation as any other part of the Charter.<sup>125</sup> In United States jurisprudence, however, the legal status of the Charter has had a checkered history.

## 2. Legal Effect—Self-Executing?

In *United States v. Toscanino*,<sup>126</sup> the United States Court of Appeals for the Second Circuit relied in part on provisions of the OAS Charter. The defendant, an Argentine national taken into custody by United States narcotics agents in Uruguay, alleged that the action violated, among other things, article 17 of the OAS Charter, which proclaims that the territory of member states is inviolable. The court ruled that article 17 affirms a long-standing principle of international law and upheld Toscanino's defense.<sup>127</sup>

The human rights provisions of the Charter and the Protocol have also

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124. Protocol of Buenos Aires, *done* Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 6 I.L.M. 310.

125. Inter-American Juridical Committee, *Study of the Juridical Relationship Between Respect for Human Rights and the Exercise of Democracy*, 13-14 (Pan American Union: Washington, D.C., May 1960).

126. 500 F.2d 267 (2d Cir. 1974).

127. *Id.* at 277-78. In a subsequent case with similar facts, the Second Circuit confined its holding to cases in which the alleged violation of territorial inviolability has been protested by a Charter signatory. In other words, the provision in question is designed to protect the sovereignty of states. Individual rights are derivative of states' rights. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975). Presumably, a cause of action that relies on a Charter provision which refers to individual rights would withstand the court's objection. The defendant's argument in *Toscanino* has been rejected or distinguished by the Fifth Circuit. *See, e.g., United States v. Quesada*, 512 F.2d 1043, 1045 (5th Cir. 1975); *United States v. Herrera*, 504 F.2d 859, 860 (5th Cir. 1974).

been invoked in United States district court decisions. In *Doe v. Plyler*,<sup>128</sup> a case involving the education of children of undocumented aliens, the court recognized that article 47 of the Charter, as amended, was partial evidence of the United States Government's commitment to expanding educational opportunities for all children.<sup>129</sup> The court failed, however, to classify the Charter as "law" or "policy."

In *In re Alien Children*,<sup>130</sup> a case based on almost identical facts, another district court refused to grant article 47 supremacy over state law. The court held that article 47 is not a self-executing treaty provision.<sup>131</sup> Relying on *Saipan v. United States Department of the Interior*,<sup>132</sup> the court ruled that the treaty language must evidence the compacting parties' intention to confer rights or obligations on the citizenry of their respective nations. If the language is uncertain, the court may look, in the words of *Fujii*, "to the circumstances surrounding its execution."<sup>133</sup>

The reasoning of *In re Alien Children* is open to attack on several grounds. The requirement of self-execution has generated many legal opinions and scholarly commentaries, and the analysis of whether article 47 is self-executing can hardly be confined to the two criteria articulated by the court. At the very least, the three-step Riesenfeld inquiry<sup>134</sup> should also be made. Indeed, the "surrounding circumstances" criterion alone is an ambiguous concept. Moreover, the precedential value of *Fujii* on which the court relied has been questioned by present-day jurists.<sup>135</sup> Even if these two criteria were acknowledged to be determinative of self-executing treaties, room remains to question the court's construction of the language of article 47.<sup>136</sup> In fact, the court conceded that article 47, even if not self-executing, "demonstrates a federal commitment to education which [the United States has] affirmed to the international community."<sup>137</sup>

### 3. Other OAS Human Rights Accords

Two other OAS human rights accords are possibly applicable to litigation in United States forums. The American Declaration of the Rights and

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128. 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), 102 S. Ct. 2382 (1982).

129. 458 F. Supp. at 592.

130. 501 F. Supp. at 544. See discussion *supra* accompanying notes 98-99.

131. *Id.* at 590. Plaintiffs also argued that the Charter and other international human rights instruments manifest a federal foreign policy that was usurped by the state statute in question. The court rejected this argument owing, in part, to the absence of either a self-executing treaty provision or federal implementing legislation. *Id.* at 591.

132. 502 F.2d 90 (9th Cir. 1974).

133. 501 F. Supp. at 590.

134. See *supra* text accompanying note 65.

135. For a discussion of the precedential value of *Fujii*, see *supra* text accompanying notes 68-79.

136. See *supra* note 99.

137. *In re Alien Children*, 501 F. Supp. at 591.



Duties of Man (American Declaration),<sup>138</sup> adopted at the same time as the Charter, enumerates a number of individual rights. In addition to the freedoms guaranteed by the United States Bill of Rights, the American Declaration includes the rights to education, employment, cultural participation, leisure time, social security, health care, free movement, establishment of a family, and privacy. The American Declaration does not have treaty or convention status, and there is some question of whether it has acquired the force of customary inter-American human rights law. The statements in *Filartiga v. Peña-Irala*<sup>139</sup> concerning the binding nature of the Universal Declaration, however, provide a basis for the argument that the American Declaration is part of inter-American customary law. Regardless of its status in customary law, one commentator referred to the American Declaration as "a document of great importance, of moral force . . . [and] a 'sacred' instrument of ideals which the member states of the OAS should respect."<sup>140</sup>

The OAS adopted the American Convention on Human Rights (American Convention)<sup>141</sup> at the 1969 Inter-American Specialized Conference on Human Rights in San Jose. The American Convention, which entered into force in 1978, complements the American Declaration in scope, detail, and enforcement mechanism and emphasizes political and civil rights. The American Convention reiterates themes and principles of the American Declaration, the Universal Declaration,<sup>142</sup> the International Covenants,<sup>143</sup> and the European Convention.<sup>144</sup> Article 2 of the American Convention provides that the civil and political rights and freedoms enumerated in the American Convention, which are not already insured by a state party, should be adopted through necessary legislation or other measures. The United States understanding of this article is that the Convention is not self-executing. A state has the choice of either relying solely on domestic law to implement the articles of the treaty or incorporating the American Convention's provisions as domestic law.<sup>145</sup> One United States court has cited article 5 of the American Convention as evidence of an "international consensus" on the use of torture.<sup>146</sup>

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138. American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States Mar. 30-May 2, 1948, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965).

139. 630 F.2d 876, 883 (2d Cir. 1980).

140. L. LEBLANC, *THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS* 18 (1977).

141. American Convention, *supra* note 6.

142. Universal Declaration, *supra* note 2.

143. ICCPR, *supra* note 4; ICESCR, *supra* note 3.

144. European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter cited as European Convention].

145. INTER-AMERICAN SPECIALIZED CONFERENCE ON HUMAN RIGHTS, ACTA DE LA SEGUNDA SESION PLENARIA (SUMMARY) Doc. 86, 85 (1969), *cited in* L. LEBLANC, *supra* note 140, at 21 n.42.

146. *Filartiga v. Peña-Irala*, 630 F.2d 876, 883-84 (2d Cir. 1980).

### III. ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW AS CUSTOMARY LAW

International human rights may also be enforced through customary international law. It is an accepted principle that customary international law is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."<sup>147</sup> The 1980 draft of the Restatement of the Foreign Relations Law of the United States states that customary law has the same status as treaty law; it supersedes inconsistent state and local laws and prior, inconsistent federal laws.<sup>148</sup> The question whether customary international law includes protection of individual rights has been addressed in a precedent-setting 1980 opinion by the Second Circuit<sup>149</sup> and in other recent federal cases. Those courts that have acknowledged an obligation to enforce international human rights through customary law have accepted the international consensus that customary international law evolves and changes. Other courts have closed their eyes to the developments in the international law of individual rights.

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

*Filartiga v. Peña-Irala*<sup>150</sup> is the leading case concerning the enforcement of human rights through customary law. In *Filartiga*, two Paraguayan citizens brought an action in New York against a former police official from Paraguay for wrongfully causing the death by torture of Joelito Filartiga in Paraguay. The defendant resided in the United States and was served with a summons and complaint following his arrest for overstaying his visa. The plaintiffs claimed jurisdiction under 28 U.S.C. § 1331 (federal question) and under the Alien Tort Claims Act,<sup>151</sup> which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a

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

148. RESTATEMENT (REVISED) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 102, 131(l), 135(l) (Tent. Draft 1980). For a criticism of this statement, see Goldklang, *Customary International Law and United States Law*, 22 INTERNATIONAL PRACTITIONERS' NOTEBOOK 16-17 (1983). *But see* quote from Legal Advisor regarding the United States use of the provisions of the Vienna Convention on the Law of Treaties which constitute codification of customary international law cited *supra* note 107. For a general discussion of this issue see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 221-23 (1972).

149. *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

150. *Id.*

151. Alien Tort Claims Act, 28 U.S.C. § 1350 (1976). The Act is seldom invoked and only rarely invoked successfully. *See, e.g.*, *Bolchos v. Darrell*, 3 Fed. Cas. 810 (D.S.C. 1795),

treaty of the United States." The district court had dismissed for want of jurisdiction;<sup>152</sup> in reversing, the Second Circuit held that official torture violates the law of nations and that the exercise of federal jurisdiction over the plaintiffs' action was consistent with the Constitution.<sup>153</sup>

The *Filartiga* court's ruling in favor of jurisdiction under the Alien Tort Claims Act was based on its understanding of "modern international law."<sup>154</sup> The court recognized that subjects once considered solely matters of domestic jurisdiction can in time become subjects of new rules of customary international law.<sup>155</sup> Thus, the court concluded that official torture is now prohibited in customary international law, just as piracy and slave trade have been prohibited since an earlier era.<sup>156</sup> It stated that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."<sup>157</sup>

To determine whether a prohibition against torture is currently part of customary international law, the *Filartiga* court applied the traditional analysis enunciated in *United States v. Smith*:<sup>158</sup> "The law of nations . . . may be ascertained by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>159</sup> For "the works of jurists" the court in *Filartiga* relied on affidavits of four "distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture."<sup>160</sup> For "judicial opinions" the court consulted only a 1978 decision of the European Court of Human Rights<sup>161</sup> that interpreted the European Convention's prohibition against torture.<sup>162</sup>

Most important, the *Filartiga* court relied on "the usage of nations," which it found was evidenced in several ways. First, the court found that articles 55 and 56 of the United Nations Charter clearly establish that "in

cited in *Filartiga*, 630 F.2d at 887 n.21. The Act was used successfully in *Bolchos* in a suit to determine title to slaves on board an enemy vessel.

The Alien Tort Statute treats only one kind of jurisdiction in dealing with human rights violations that arise in other countries. Another kind of jurisdiction may be obtained under the Foreign Sovereign Immunities Act of 1976. For a recent discussion of this statute in the context of human rights issues see, Comment, *The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist*, 17 U.S.F.L. REV. 71 (1982).

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

153. *Id.* at 887.

154. *Id.* at 884-85.

155. *Id.* at 889.

156. *Id.* at 890.

157. *Id.* at 881.

158. 18 U.S. (5 Wheat.) 153 (1820). See also *The Paquette Habana*, 175 U.S. at 700.

159. 18 U.S. (5 Wheat.) at 160-61.

160. 630 F.2d at 879.

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

162. See 630 F.2d at 884 n.16.

this modern age a state's treatment of its own citizens is a matter of international concern."<sup>163</sup> Second, the court looked to the Universal Declaration<sup>164</sup> and the Declaration on Torture<sup>165</sup> to determine whether international human rights include a right to be free from torture. Both Declarations were unanimously adopted as resolutions by the United Nations General Assembly. The *Filartiga* court cited the Declarations for their contributions, in some undefined way, to customary law.<sup>166</sup> Although the court quoted several authorities on the precise legal effect of a United Nations declaration, it did not choose among the various theories and thus did not decide whether a declaration is binding in full as part of customary international law; an expression of expectations that becomes binding by custom only to the extent that this is justified by state practice; or an authoritative statement of the international community that does not quite fit into the binding, non-binding dichotomy.<sup>167</sup> Third, the court looked for "the modern usage and practice of nations" in the express prohibitions against torture in three multilateral treaties<sup>168</sup>—the ICCPR,<sup>169</sup> the American Convention,<sup>170</sup> and the European Convention.<sup>171</sup> Fourth, the court noted the existence of antitorture proscriptions in the laws of many nations and the general renunciation of torture by all nations. It added that "the fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."<sup>172</sup> Finally, the court looked to the "usage and practice" of the United States in particular, referring to a Department of State report that "[t]here now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens."<sup>173</sup> It relied also on an amicus curiae brief submitted by the Department of State and the Department of Justice.<sup>174</sup>

The court of appeals agreed that these sources showed that the law of nations includes a prohibition against official torture. The court remanded to the district court with the comment that its decision on jurisdiction under the Alien Tort Claims Act did not preclude the lower court from

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163. *Id.* at 881.

164. Universal Declaration, *supra* note 2.

165. Declaration on Torture, *supra* note 7.

166. 630 F.2d at 883-84.

167. *Id.* at 883.

168. *Id.* at 883-84.

169. ICCPR, *supra* note 4.

170. American Convention, *supra* note 6.

171. European Convention, *supra* note 144.

172. 630 F.2d at 884 n.15.

173. *Id.* at 884, *citing* HOUSE COMM. ON FOREIGN AFFAIRS AND SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 2D SESS., DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS FOR 1979 (Joint Comm. Print 1980).

174. 630 F.2d at 884.

deciding to apply Paraguayan law,<sup>175</sup> dismissing on grounds of forum non conveniens,<sup>176</sup> or declaring the suit barred by the act of state doctrine.<sup>177</sup>

Six months after the *Filartiga* decision, two federal district courts decided detention cases by relying in part or entirely on customary international law.<sup>178</sup> *Fernandez v. Wilkinson*<sup>179</sup> held that the indefinite detention of a Cuban refugee violated international law. Fernandez was convicted of crimes in Cuba before arriving in the United States in the 1980 "freedom flotilla." The Immigration and Naturalization Service deemed Fernandez an excludable alien and ordered him held in a maximum security prison pending deportation. The time for deportation was undetermined because no country was willing to receive Fernandez. Kansas Legal Services entered the case as amicus curiae and argued that arbitrary and indefinite detention is prohibited by customary international law and is an abuse of discretion on the part of the Attorney General.

In determining whether international law includes this prohibition, the *Fernandez* court looked for "evidence of a wide practice by states."<sup>180</sup> Following the lead of *Filartiga*, the court relied on the general human rights obligations in the United Nations Charter and the specific prohibitions against arbitrary detention contained in the Universal Declaration<sup>181</sup> and in the three major multilateral treaties defining civil and political rights—the ICCPR,<sup>182</sup> the American Convention,<sup>183</sup> and the European Convention.<sup>184</sup> The court also considered writings of scholars and jurists that indicate that the standards of the Universal Declaration are part of customary law.<sup>185</sup> For judicial opinions, the court turned to one international arbitration case concerning arbitrary and prolonged detention of a foreigner,<sup>186</sup> and referred to United States cases condemning arbitrary detention.<sup>187</sup> Finally, the court found further evidence, in United States foreign aid statutes and in statements by members of the United States Congress and the executive branch, that recognizes an international legal right to freedom from arbitrary detention.<sup>188</sup>

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175. *Id.* at 889 n.25.

176. *Id.* at 890.

177. *Id.* at 889-90.

178. *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980); *aff'd sub nom. on other grounds*, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981); *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980), *modified*, 651 F.2d 96 (2d Cir. 1981).

179. 505 F. Supp. 787.

180. *Id.* at 795.

181. Universal Declaration, *supra* note 2.

182. ICCPR, *supra* note 4.

183. American Convention, *supra* note 6.

184. European Convention, *supra* note 144.

185. 505 F. Supp. at 796.

186. *Id.* at 798 *citing* Case of Madame Julien Chevreau (Fr. v. Gr. Brit.) arbitrated and decided at the Hague (June 4, 1931).

187. 505 F. Supp. at 798. The court referred to several United States cases, including *Leng May Ma v. Barber*, 357 U.S. 185 (1957) and *Calder v. Bull*, 3 U.S. (1 Dall.) 386 (1798).

188. 505 F. Supp. at 799.

The *Fernandez* court concluded that arbitrary detention violates international law, which, as stated in *The Paquete Habana*<sup>189</sup> and *Filartiga*,<sup>190</sup> must be applied by federal courts in appropriate cases. Because the court had already determined that Fernandez was not protected by United States law from arbitrary detention in these circumstances, the court applied customary international law. Finding that indeterminate detention in a maximum security prison violated customary international law, the court held that the detention constituted an abuse of discretion by the Attorney General and ordered the petitioner released.<sup>191</sup>

*Fernandez* was affirmed on appeal, but on United States statutory grounds.<sup>192</sup> The court of appeals, however, cited "accepted international law principles" to support its construction of the Immigration and Nationality Act.<sup>193</sup> In dicta, the court said that Fernandez's detention also violated the United States Constitution and considered international law principles in its interpretation of the Constitution.<sup>194</sup> Citing the arbitrary arrest provisions of the Universal Declaration<sup>195</sup> and the American Convention,<sup>196</sup> the court of appeals declared that "no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."<sup>197</sup>

In *Lareau v. Manson*,<sup>198</sup> international standards for treatment of prisoners were cited primarily as an aid in interpreting the eighth amendment<sup>199</sup> and as "part of the body of international human rights principles establishing standards for decent and humane conduct by all nations."<sup>200</sup> The court discussed in lengthy footnotes,<sup>201</sup> however, other possible legal effects of the United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules).<sup>202</sup> The court hinted that the Standard Minimum Rules might constitute customary law even though they are contained in an Economic and Security Council resolution rather than in a treaty or a General Assembly declaration.<sup>203</sup> The court also suggested that the Rules are relevant to litigation in United States courts to explain

189. 175 U.S. 677 (1900).

190. 630 F.2d 876 (2d Cir. 1980). See discussion *supra* accompanying notes 150-78.

191. 505 F. Supp. at 798.

192. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

193. *Id.* at 1390.

194. *Id.* at 1388 (construing Immigration and Nationality Act, 8 U.S.C. §§ 1182, 1223, 1252 (1976 & Supp. V. 1981)).

195. Universal Declaration, *supra* note 2, art. 9.

196. American Convention, *supra* note 6, art. 9.

197. 654 F.2d at 1388.

198. 507 F. Supp. 1177 (D. Conn. 1980). For a detailed discussion of this issue, see *infra* part IV.

199. 507 F. Supp. at 1187-89.

200. 507 F. Supp. at 1192-93.

201. *Id.* at 1187-89 n.9, 1193 nn.18, 19.

202. Standard Minimum Rules, *supra* note 7.

203. 507 F. Supp. at 1188 n.9.

the meaning of provisions of the ICCPR and the Universal Declaration that are or may be part of customary law.<sup>204</sup>

In *Sorca-Gonzales v. Civiletti*,<sup>205</sup> a case similar to *Fernandez*, the court ordered the release of an indefinitely detained, excludable alien from Cuba. The court based its decision on domestic law and refused to adopt the petitioner's argument that the domestic legal principles should be construed with the aid of international human rights law. Without citation to authority the court questioned whether an alien in the petitioner's position is entitled to invoke international human rights principles. The court stated, however, that if required to decide the international law issue, it would find that petitioner's detention violated the Universal Declaration, the American Convention, and the ICCPR.<sup>206</sup>

In *Verlinden B.V. v. Central Bank of Nigeria*,<sup>207</sup> an action by a foreign corporation against a foreign sovereign, the court noted the *Filartiga* holding on jurisdiction under the Alien Tort Claims Act, but distinguished it on the ground that, although physical torture violates the law of nations, the commercial acts at issue in *Verlinden* did not.<sup>208</sup>

In contrast, two district courts have disagreed with the *Filartiga* line of cases and have refused to apply international human rights law on the ground that customary international law cannot be enforced by an individual. In *In re Alien Children Education Litigation*,<sup>209</sup> the court acknowledged that customary international law must be applied as federal law, but refused to recognize that customary international law provides rights enforceable by an individual. The court stated that individual rights in customary international law could be invoked only by a nation against another nation in an international tribunal. In *Hanoch Tel-Oren*,<sup>210</sup> the court used the term "law of nations generally" rather than "customary law."<sup>211</sup> Without discussing the content of the law of nations, the court stated that the plaintiffs had not demonstrated the existence of a specific right to a private claim under the law of nations<sup>212</sup> and had failed to establish jurisdiction under the Alien Tort Claims Act.<sup>213</sup> Thus, the court directly contradicted *Filartiga*.

The difference between the two cases above and the *Filartiga* line is that the latter acknowledges the post-World War II developments that have expanded international law to encompass certain rights of individuals in

204. *Id.* at 1193 n.18.

205. 515 F. Supp. 1049 (N.D. Ga. 1981).

206. *Id.* at 1061 n.18.

207. 647 F.2d 320 (2d Cir. 1981), *rev'd*, No. 81-920 (U.S. May 23, 1983).

208. *Id.* at 325 n.16.

209. 501 F. Supp. 544 (S.D. Tex. 1980), *aff'd*, No. 80-1807 (5th Cir. Feb. 23, 1981), *aff'd sub nom*, *Plyler v. Doe*, 102 S. Ct. 2382 (1982).

210. 517 F. Supp. 542 (D.D.C. 1981).

211. 517 F. Supp. at 546.

212. *Id.* at 547-48.

213. *Id.* at 549.

respect to their own governments. In addition, the *Hanoch Tel-Oren* decision expresses the fear sometimes reflected in other international law decisions that enforcement of international law may impermissibly interfere with foreign affairs and international relations. By contrast, *Filartiga* was decided by a court educated in modern international law, which recognized its constitutional authority and responsibility to apply that law in appropriate cases.

The developing case law offers some general rules concerning the enforcement of customary international human rights law in United States courts. First, the weight of authority favors an individual's right to invoke international human rights standards as customary international law that a court must apply as a part of federal law. Second, the standards contained in the Universal Declaration<sup>214</sup> and the major multilateral human rights treaties<sup>215</sup> are either part of customary international law or are the most important evidence of the content of customary international human rights law. Third, other evidence particularly helpful in establishing customary law includes modern scholarly writing stating that various international human rights documents are part of customary law and supporting statements by United States government officials. Judicial opinions are not helpful because few international tribunals issue decisions on human rights upon the complaint of an individual.

Recent decisions also raise questions about the use of customary international human rights law in United States courts. First, in spite of the expansive language of *Filartiga* and other cases indicating that the Universal Declaration, various treaties, and other international documents constitute or reflect customary law, it is possible that not all provisions in those documents would be accepted as binding in a United States court. Some basis must be found for distinguishing among the types of documents with reference to such factors as age, nature, and usage.<sup>216</sup> Distinctions must also be made among the provisions within a document.<sup>217</sup> *Filartiga* hints that its broad statements in favor of application of the international documents may in fact be limited in practice. For example, *Filartiga* compares the torturer to a slave trader and a pirate, "an enemy of all mankind."<sup>218</sup> Second, although *Filartiga* possibly paves the way for application of the norms of international human rights treaties as customary international law, the court also comments gratuitously regarding the direct enforcement

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214. Universal Declaration, *supra* note 2.

215. American Convention, *supra* note 6; ICCPR, *supra* note 4; ICESCR, *supra* note 3; European Convention, *supra* note 144.

216. For example, compare the Universal Declaration, *supra* note 2, with a more recent General Assembly declaration or a treaty.

217. For example, compare article 5 of the Universal Declaration, *supra* note 2, with article 26(3), which provides that "parents have a prior right to choose the kind of education that shall be given to their children."

218. 630 F.2d at 890.



of human rights treaties as the law of the land. The *Filartiga* court expressly, and without analysis, deems nonself-executing the OAS Charter and articles 55 and 56 of the United Nations Charter.<sup>219</sup> Third, the effects of the *Filartiga* holding that jurisdiction can be exercised over human rights violations under the Alien Tort Claims Act may be emasculated by the court's comments concerning choice of law, forum non conveniens, and the act of state doctrine.<sup>220</sup>

#### IV. USING INTERNATIONAL HUMAN RIGHTS LAW TO HELP EXPAND HUMAN RIGHTS UNDER STATE AND FEDERAL LAW

Perhaps the most successful use of international human rights law in state and federal courts has been its assistance in defining rights under state and federal law.<sup>221</sup> This use has been particularly prevalent in prison cases, but there are many other areas in which international human rights instruments may be used to help interpret rights and protections under United States law. Part IV reviews the cases that have used international human rights instruments in this way and makes suggestions for their possible future use. The standards for protection of human rights in the United States should not be weaker than the standards of international law. Otherwise, the United States will lag behind the rest of the world in protecting human rights. To avoid this result, federal and state courts can use internationally recognized standards to interpret the protections afforded by domestic constitutions, statutes, and other laws. For example, the concepts of equal protection and due process should not mean less in United States courts than under international norms. The courts should use internationally recognized norms to interpret national law to include comparable rights and protections.

##### A. Recent Cases

###### 1. Prisoners and Other Institutionalized Persons

The protection of prisoners' rights is the first area in which international human rights law provides helpful guidelines. In *Lareau v. Manson*,<sup>222</sup> a

219. *Id.* at 881-82 n.9.

220. These and other issues have been addressed in many scholarly commentaries. See, e.g., Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1 (1981); Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53 (1981); Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39 (1981); Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13 (1981); Note, *Torture as a Tort in Violation of International Law: Filartiga v. Peña-Irala*, 33 STAN. L. REV. 353, 357 (1981); Paust, *supra* note 20; Schneebaum, *International Law as Guarantor of Judicially Enforceable Rights: A Reply to Professor Oliver*, 4 HOUS. J. INT'L L. 65 (1981).

221. See Christenson, *supra* note 220; Paust, *supra* note 20.

222. 507 F. Supp. 1177 (D. Conn. 1980), *modified*, 651 F.2d 96 (2d Cir. 1981). See *supra* text accompanying notes 198-204.

case concerning the detention of pretrial detainees, the court used the Standard Minimum Rules<sup>223</sup> to determine what conditions constitute overcrowding.<sup>224</sup> In addition to noting that Connecticut had adopted the Standard Minimum Rules, the court stated that those standards are also important as "obligations to the international community of the member states of the United Nations."<sup>225</sup> Although the court did not base its decision solely on these international standards, the standards were useful in determining when overcrowding exists.

The Oregon Supreme Court in *Sterling v. Cupp*<sup>226</sup> similarly used the Charter of the United Nations, the Universal Declaration, and the ICCPR as examples of principles governing the treatment of prisoners. In upholding an injunction against patdowns of prisoners' sexual areas by guards of the opposite sex unless there are special circumstances that warrant it, the court cited the pledge under articles 55 and 56 of the Charter to promote universal respect for, and observance of, human rights, and the obligations under article 5 of the Universal Declaration<sup>227</sup> and articles 7 and 10 of the ICCPR<sup>228</sup> as expressions of the "concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners."<sup>229</sup> The court also referred to the European Convention, the American Convention, and the Standard Minimum Rules.

One of the most useful provisions applicable to confined persons is the prohibition of not only "torture," but also "cruel, inhuman or degrading treatment or punishment."<sup>230</sup> First, the phrase "cruel, inhuman or degrading" proscribes much more conduct than the eighth amendment prohibition against "cruel and unusual punishment." Second, the phrase "treatment or punishment" makes the prohibition applicable to nonpunishment cases. This prohibition is particularly important with respect to mental institutions because it has been held that the eighth amendment is not applicable to noncriminal penalties.<sup>231</sup>

Furthermore, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities is considering a draft of Principles for the Protection of Persons Suffering from Mental Disorders.<sup>232</sup> Those principles will articulate specific protections for persons in mental institutions just as the Standard Minimum Rules provide protections for persons confined in prisons. The Standard Minimum Rules have been

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223. Standard Minimum Rules, *supra* note 7.

224. 507 F. Supp. at 1187 n.9.

225. *Id.* at 1188 n.9.

226. 290 Or. 611, 625 P.2d 123 (1981).

227. Universal Declaration, *supra* note 2, art. 5.

228. ICCPR, *supra* note 4, arts. 7, 10.

229. 290 Or. at n.21, 625 P.2d at 131 n.21.

230. *See* ICCPR, *supra* note 4, art. 7; Universal Declaration, *supra* note 2, art. 5.

231. *Ingraham v. Wright*, 430 U.S. 651 (1971).

232. Draft Body of Principles for the Protection of Persons Suffering from Mental Disorders, U.N. Doc. E/CN.4/Sub. 2/NGO.81.

adopted by several states in the United States; the Principles for the Protection of Persons Suffering from Mental Disorders could similarly be adopted and used in national tribunals.<sup>233</sup>

Two California decisions have suggested that international human rights standards should be utilized in the protection of mentally incompetent persons. In *Conservatorship of Hofferber*,<sup>234</sup> Justice Newman mentioned the concern of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities with the treatment of persons detained on the grounds of mental illness<sup>235</sup> in support of his conclusion that "the state has compelling interests in public safety and inhumane treatment of the mentally disturbed."<sup>236</sup> Disagreeing with the majority decision in *Cramer v. Tyars*,<sup>237</sup> Justice Newman noted that requiring a mentally retarded person to testify in a trial can be cruel and degrading, in violation of article 5 of the Universal Declaration.<sup>238</sup>

Lawyers concerned with prison practices should note in particular the protection in article 7 of the ICCPR, which states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."<sup>239</sup>

## 2. Education

Education cases constitute the second area in which international human rights law has been used. For example, in *Doe v. Plyler*,<sup>240</sup> the court cited article 47 of the Protocol of Buenos Aires<sup>241</sup> as an indication of the United States commitment to expanding educational opportunity.<sup>242</sup> The court cited the Protocol to support its holding that a Texas statute entitling only United States citizens or lawfully admitted aliens to attend public schools free of charge violates the equal protection clause of the fourteenth amendment.

In *Tayyari v. New Mexico State University*,<sup>243</sup> the court cited an affidavit by David Newsom, Department of State Undersecretary for Political Affairs, referring to the United States policy of support for the development of international human rights standards as expressed in the Universal Declaration and the ICESCR.<sup>244</sup> The affidavit mentioned the

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233. See HERR, *Rights into Action: Protecting Human Rights of the Mentally Handicapped*, 26 CATH. U.L. REV. 203, 210-15 (1977).

234. 28 Cal. 3d 161, 616 P.2d 836, 167 Cal. Rptr. 854 (1980).

235. *Id.* at 172 n.9, 616 P.2d at 844 n.9, 167 Cal. Rptr. at 862 n.9.

236. *Id.* at 171, 616 P.2d at 844, 167 Cal. Rptr. at 862.

237. 23 Cal. 3d 131, 588 P.2d 793, 151 Cal. Rptr. 653 (1979).

238. *Id.* at 151, 588 P.2d at 805, 151 Cal. Rptr. at 665 (Newman, J., dissenting).

239. ICCPR, *supra* note 4, art. 7.

240. 458 F. Supp. 569, 592, (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), 102 S. Ct. 2382 (1982).

241. Protocol of Buenos Aires, *supra* note 124.

242. 458 F. Supp. at 592.

243. 495 F. Supp. 1365 (D.N.M. 1980).

244. *Id.* at 1378-79.

provisions requiring equal access for all to higher education without discrimination on the basis of national origin or other status<sup>245</sup> and concluded that "[t]he introduction of such discrimination by law within a jurisdiction of the United States would be damaging to United States efforts to promote the widest realization internationally of human rights goals and standards."<sup>246</sup> The court cited the provisions of the affidavit to support its conclusion that a motion passed by the Regents of New Mexico State University that would deny admission or readmission of Iranian students violated the equal protection clause of the United States Constitution. The court struck down the motion on the grounds that it discriminated both on the basis of alienage and national origin.

### *B. Suggestions for Future Use*

There are many areas in which international human rights law provides broader protections than national law. The remainder of this Article provides examples of areas in which human rights standards can be used to interpret state and federal law to afford greater protection of human rights.

#### 1. Protections Against Discrimination

International prohibitions against discrimination are sometimes more explicit and more extensive than those in federal and state law. The Universal Declaration and the ICCPR require protection of rights "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>247</sup> A comparison of this language with statutes prohibiting discrimination in the United States reveals that the international protections are much broader. For example, in California the Unruh Civil Rights Act<sup>248</sup> prohibits discrimination on the basis of "sex, race, color, religion, ancestry, or national origin." This list of prohibited kinds of discrimination has been held to be illustrative rather than restrictive,<sup>249</sup> and the statute presumably could encompass additional prohibitions against

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245. See article 26(1) of the Universal Declaration, which states that "[e]veryone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and *higher education shall be equally accessible to all on the basis of merit*" (emphasis added). Universal Declaration, *supra* note 2, art. 26(1). See also article 13(2)(c) of the ICESCR, which provides: "Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education[.]" ICESCR, *supra* note 3, art. 13(2)(c).

246. *Tayyari*, 495 F. Supp. at 1379.

247. ICCPR, *supra* note 4, art. 2(2); Universal Declaration, *supra* note 2, art. 2. See also article 2(2) of the ICESCR, *supra* note 3, which contains nearly identical language.

248. Cal. Civ. Code § 51 (1974).

249. *In re Cox*, 3 Cal. 3d 205, 216, 474 P.2d 992, 999, 90 Cal. Rptr. 24, 31 (1970). See

discrimination on the broader bases of "language, . . . political or other opinion, . . . social origin, property, birth or other status." The international documents could, therefore, be used to interpret the Unruh Civil Rights Act to include the additional prohibitions.<sup>250</sup>

The prohibitions against discrimination on the basis of sex are more explicit in the international documents. Although the United States Supreme Court has struck down a number of statutes that discriminate on the basis of gender, the Court's less-than-strict scrutiny standard has led it to uphold various statutes that distinguish between men and women in granting benefits and employment opportunities.<sup>251</sup> The ICESCR, however, specifically forbids the unequal treatment of men and women.<sup>252</sup> Furthermore, article 10(2) of the ICESCR provides that special protections should be afforded mothers for a reasonable time before and after childbirth, including paid leaves from employment or leaves with adequate social security benefits. Although the passage of the Equal Rights Amendment (ERA)<sup>253</sup> would have accorded women in the United States

also *Am. Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n*, 32 Cal. 3d 603, 608 n.4, — P.2d — n.4, — Cal. Rptr. — n.4 (1982).

250. The rights of physically disabled persons may be an area in which the prohibition against discrimination on the basis of any status would be useful. *See, e.g.*, *March v. Edwards Theatres Circuit, Inc.*, 64 Cal. App. 3d Supp. 881, 134 Cal. Rptr. 844 (1976), in which the court refused to apply California Civil Code § 51 to a case involving a physically handicapped plaintiff. The court based its decision on the fact that another section of the Code applied specifically to the physically handicapped and that both sections allow for reasonable regulations by business facilities. Because a private cause of action was not allowed, however, the court's holding treated a physically handicapped person differently from persons discriminated against on the basis of other characteristics. International norms might have been useful in arguing that the California statute should allow the physically handicapped plaintiff the same rights to a cause of action as persons subjected to other types of discrimination. *See Am. Nat'l Ins. Co. v. Fair Employment & Hous. Comm'n*, in which the court utilized pronouncements of the Advisory Committee for the International Year of Disabled Persons in defining "physical handicap." *Id.* at 609 n.5, — P.2d at — n.5, — Cal. Rptr. at — n.5.

251. *See, e.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Radice v. New York*, 264 U.S. 292 (1924).

252. *See, e.g.*, article 3 of the ICESCR, which states that "[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant" (emphasis added). ICESCR, *supra* note 3, art. 3. *See also* article 7, which states that:

The State Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (emphasis added).

*See also* ICCPR, *supra* note 4, art. 3.

253. 14 U.S.C.A. § 446 (West Supp. 1982). The June 30, 1982 deadline for the ERA's ratification passed without ratification by a sufficient number of state legislatures. The ERA has been reintroduced twice since that time.

many of these additional protections and rights, the international standards may be used to interpret both present United States law and the language of future statute's similar to the ERA.<sup>254</sup>

It may also be argued that the ICCPR and the ICESCR afford greater protections to aliens. Recent cases in federal courts have clarified that not all discrimination against aliens violates the Constitution.<sup>255</sup> The nondiscrimination provisions of the ICCPR, the ICESCR, and the Universal Declaration make it clear that there can be no unjustifiable discrimination on the basis of national origin, birth, or other status.<sup>256</sup> These prohibitions may encompass discrimination against undocumented workers,<sup>257</sup> and illegitimate children may have greater protection under the ICCPR and the ICESCR than under the United States Constitution.<sup>258</sup>

One additional instrument of particular importance is the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>259</sup> It explicitly provides that certain affirmative action measures are not to be deemed racial discrimination and, in fact, may be required.<sup>260</sup> The Convention evidences and defines the strong worldwide consensus on the difficult issues troubling our courts. The international community's approach should at least be persuasive and may indeed be directly applicable in United States courts and agencies.<sup>261</sup> The ICCPR at least arguably protects the individual not only against government action, but also against persons acting in their official capacity.<sup>262</sup>

## 2. Criminal Justice

Several international provisions relating to criminal justice may provide greater protection than United States law, and state and federal law should

254. For a detailed analysis of this issue, see Comment, *The Covenant on Civil and Political Rights as the Law of the Land*, 25 VILL. L. REV. 119, 130-33 (1979-80).

255. For a discussion of these cases, see *id.* at 133-34.

256. See, e.g., ICCPR, *supra* note 4, art. 2; ICESCR, *supra* note 3, art. 2; Universal Declaration, *supra* note 2, art. 2.

257. See ICCPR, *supra* note 4, art. 26. But compare *id.* arts. 13, 14, which appear to provide different standards governing proceedings for the expulsion of aliens.

258. See Comment, *supra* note 254, at 134.

259. Convention on Discrimination, *supra* note 7. As of December 1980, 106 countries were party to this treaty. The United States signed the treaty on September 28, 1966, but has not ratified it.

260. *Id.* arts. 1(4), 2(2).

261. In addition to the basic human rights instruments discussed above, lawyers should be aware of the dozens of other documents further defining the content of human rights. See the partial list of United Nations human rights treaties and declarations, *supra* note 7. The International Labor Organization and the United Nations Economic and Social Council have also adopted many human rights instruments.

262. Article 2 of the ICCPR states in relevant part that "[e]ach State Party to the present Covenant undertakes . . . [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . ." ICCPR, *supra* note 4, art. 2.

be interpreted to encompass these greater protections. First, the double jeopardy prohibition<sup>263</sup> in international law probably proscribes successive state and federal prosecutions permitted by the United States Constitution.<sup>264</sup> The international law double jeopardy prohibition could be used as a general principle to support an interpretation of domestic law even when the international law itself is not directly applied. Second, the ICCPR and the American Convention require that a criminal offender benefit from a legislated reduction in penalty that occurs after his or her crime.<sup>265</sup> This is required neither by federal law<sup>266</sup> nor by all state law. Third, greater protection against ill treatment in detention is afforded under the Universal Declaration and the ICCPR.<sup>267</sup> Other protections offered by international law, which are not generally a part of domestic law, include compensation for persons who have suffered punishment from a miscarriage of justice,<sup>268</sup> segregation of accused from convicted detainees,<sup>269</sup> segregation of juveniles from adults in detention facilities,<sup>270</sup> and prohibition of the imposition of the death penalty on persons below eighteen years of age and on pregnant women.<sup>271</sup> These are only some examples of the possible areas in which international human rights standards may be used to interpret United States laws to ensure greater protection of human rights.

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263. American Convention, *supra* note 6, art. 8; ICCPR, *supra* note 4, art. 14(7).

264. *See, e.g.*, *Bartkus v. Ill.*, 359 U.S. 121 (1959); *Abbate v. United States*, 359 U.S. 187 (1959) (holding that successive state and federal prosecutions for the same offense are not barred by the United States Constitution). *But see* *Benton v. Md.*, 365 U.S. 784 (1969).

265. American Convention, *supra* note 6, art. 9; ICCPR, *supra* note 4, art. 15(1).

266. 1 U.S.C. § 109 (1947); *United States v. Kirby*, 176 F.2d 101, 104 (2d Cir. 1949).

267. ICCPR, *supra* note 4, art. 7; Universal Declaration, *supra* note 2, art. 5.

268. Article 14(6) of the ICCPR provides that

[w]hen a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

269. Article 10(2)(a) of the ICCPR provides that "[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons . . . ."

270. Article 10(2)(b) of the ICCPR provides that "[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication."

271. *Id.* art. 6(5). In *Eddings v. Okla.*, 102 S. Ct. 869 (1982), counsel cited this provision in oral argument as an example of international consensus that persons who commit crimes when they are under eighteen years of age should not be subjected to the death penalty.