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Conference Report: Human Rights in American Courts

Deborah R. Gerstel

Adam G. Segall

CONFERERNCE REPORT: HUMAN RIGHTS IN AMERICAN COURTS

Deborah R. Gerstel and Adam G. Segall*

INTRODUCTION

On October 21, 1985, the International Human Rights Law Group and the International Legal Studies Program of the American University, Washington College of Law co-sponsored a working conference on the implementation of international human rights law in United States courts.[1] Some thirty-five scholars and practitioners of international law attended the conference. These experts engaged in a candid and realistic assessment of domestic human rights litigation to date, evaluating successes and failures of various litigation strategies previously employed, and expressing thoughts on future action. The following is a synopsis of the conference discussions.

The organizers divided the subject matter into three specific subfields of international human rights litigation. During their first session, participants discussed human rights in American foreign policy. The general themes emerging from this session included the effectiveness of human rights statutes in shaping American foreign policy, adjudicatory relief through access to domestic courts (of particular interest were the issues of standing and the political question doctrine), and the availability of alternative methods of promoting and enforcing human rights in the domestic arena.

In the second session the conferees analyzed questions of international human rights law in immigration cases. They focused on such themes as the impact of international law in shaping issues of domestic immigration law, the receptivity of administrative agencies to reliable evidence regarding human rights abuses in foreign countries, and possible strategies to ensure United States compliance with international ob-

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* Deborah R. Gerstel and Adam G. Segall were the rapporteurs for the conference. Ms. Gerstel received her J.D. (August 1986), Washington College of Law, American University; B.A. (1982), University of Pennsylvania. Mr. Segall received his J.D. (May 1986), Washington College of Law, American University; B.A. (1983), University of Rochester.

1. The Conference Chairman was Steven M. Schneebaum, a partner in the law firm of Patton, Boggs & Blow. Mr. Schneebaum chairs the Domestic Litigation Committee of the International Human Rights Law Group, and has been involved in the preparation of *amicus curiae* briefs in a number of the major cases discussed during the course of the day-long conference.

ligations regarding refugee law.

In the third session, participants discussed attempts to use customary international law in domestic courts. Debate centered on the success of particular types of cases, the sufficiency of United States legal protections to assure redress of human rights violations, and the available methods for challenging sovereign immunity and the Act of State defense as applied by domestic courts.

I. HUMAN RIGHTS IN UNITED STATES FOREIGN POLICY

The United States Congress has passed a number of statutory measures over the past several years in its attempt to inject human rights considerations into American foreign policy. During the first session, conference participants evaluated problems encountered by attorneys in attempting to enforce this legislation in the courts.[2]

Obtaining effective relief from an adjudicatory body requires, foremost, the ability to have grievances heard. Consequently, a majority of the debate and discussion centered on the barriers that litigants have encountered in the pursuit of claims in United States federal courts. While discussion focused primarily on the political question doctrine,[3] participants considered several other barriers, including dismissal by equitable discretion based on the difficulty of the fact finding inherent in alleged violations outside the country, the limitations on the type of relief that can be granted, and the unavailability of a statutory private right of action in many circumstances. Each of these barriers has prevented adjudication of the merits of cases involving international human rights issues by denying entry, at a threshold level, into the do-

2. David Weissbrodt was the discussion leader for the first session. Mr. Weissbrodt is Professor of Law at the University of Minnesota Law School.

3. The most authoritative and commonly cited formulation of the political question doctrine is that of Justice Brennan in the seminal case of Baker v. Carr, 369 U.S. 186 (1962):

> Prominent on the surface of any case held to involve a political question is found (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. If one of these conditions is inextricable from the case at bar, the adjudication of the case may be said to require the resolution of a political question that is nonjusticiable and hence not reviewable by the court.

mestic courts.

The principal case the conferees reviewed was *Sanchez-Espinoza v. Reagan*,[4] in which a group of congressmen, aliens, and private domestic plaintiffs delineated a number of constitutional and statutory claims in challenge to United States policy in Nicaragua.[5] Applying the test laid down in *Baker v. Carr*,[6] the district court in *Sanchez* exercised its equitable discretion and dismissed each of the federal claims as nonjusticiable under the political question doctrine.[7] Although the plaintiffs in

4. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

5. *Id.* at 596. The complaint listed twenty-six plaintiffs: twelve non-resident aliens, citizens of Nicaragua; twelve members of Congress; and two residents of Florida who sued on behalf of that state. The district court grouped the causes of action together into three broad categories of claims for relief. *Id.* at 598.

Only the congressional plaintiffs' actions were discussed in this segment of the conference. The congressional plaintiffs alleged that the United States has been sponsoring, and continues to sponsor, raids against towns and villages in Nicaragua. They alleged that paramilitary activities are financed and carried out by the United States government, its agents and employees, against the people of Nicaragua in an attempt to overthrow their national government. *Id.* The congressional plaintiffs alleged that these activities constitute acts of war which have not been authorized by Congress pursuant to Article I, § 8, cl. 11 of the Constitution and violate the so-called neutrality laws set forth in 18 U.S.C. §§ 956-60 (1982). *Id.* Section 960 states:

> Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace, shall be fined . . . or imprisoned.

Id.

The twelve legislators also alleged a violation of the War Powers Resolution, 50 U.S.C. § 1541 (1982), which states:

> It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Id.

Further, the congressional plaintiffs also brought suit under the Boland Amendment to the 1983 Department of Defense Appropriations Act, Pub. L. No. 97-377 § 793, 96 Stat. 1865 (codified at 37 U.S.C. § 308 (1982) (prohibiting the Central Intelligence Agency and the Department of Defense from using any of the funds provided in the Act for military activities aimed at overthrowing the government of Nicaragua).

The Congressmen sought declaratory and injunctive relief to stop an alleged undeclared war waged by the federal defendants against the people and government of Nicaragua. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202, 202 (D.C. Cir. 1985).

6. Baker v. Carr, 396 U.S. 186, 217 (1962).

7. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 601-02 (D.D.C. 1983). The district court in *Sanchez* found that it lacked judicially discoverable and manageable standards for resolving the dispute and that it could not find the claims justiciable without

Sanchez had argued that violations of several United States laws were continuing to occur, the court never considered the merits of these arguments. Conference participants generally agreed that such grounds for dismissal as were employed in *Sanchez* are arbitrary, and too often merely provide a convenient way for the courts to avoid certain difficult or sensitive cases.

It was suggested that the plaintiffs in *Sanchez* may have decreased their chance of success by arguing too many different statutory bases for their claims. The district court was able to sidestep completely the argument that *Sanchez* presented qualified alien plaintiffs with presumed rights of action in a tort suit under the Alien Tort Statute[8] by reference to the nonjusticiability of the claims under the War Powers Resolution,[9] Neutrality laws,[10] and the Boland Amendment.[11] Several participants criticized the attempt to obtain standing through the use of these other statutes as a strategic failure. Instead of forcing the court to evaluate the alleged tortious acts, this approach focused judicial attention on the alternate bases for standing and jurisdiction asserted. In addition, it was noted that within the framework of the Alien Tort Statute the alien plaintiffs could have made better use of international human rights law to obtain relief.

Conference participants assessed the impact of *Sanchez* relative to

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expressing a lack of respect due coordinate branches of government. *Id.* at 600. The court determined that it must take special care when confronted with a challenge to the validity of United States foreign policy initiatives, to pay appropriate deference to decisions of the political branches. In sum, the court decided to exercise its equitable discretion to dismiss the legislators' claims, noting that the proper forum for such policy determinations was not in the courtroom, but in the Congress. *Id.*

The Nicaraguan plaintiffs sought monetary and equitable relief for injuries caused by the alleged U.S.-sponsored terrorist raids. *Id.* at 598. They maintained that these raids violate fundamental human rights established under international law and the United States Constitution. The plaintiffs also sought injunctive relief prohibiting further U.S. military involvement in Nicaragua. *Id.* The court decided that the allegations of these nonresident aliens presented a nonjusticiable political question based on another Baker v. Carr standard: the potential of embarrassment from multifarious pronouncements by various departments. *Id.* at 600. On appeal, the circuit court affirmed the lower court decision on other grounds. Sanchez-Espinoza, 770 F.2d 202, 206 (D.C. Cir. 1985). The Circuit Court used the political question doctrine to deny relief only on the issue of the congressional appellants' claim that assisting the Contras is tantamount to waging war. *Id.* at 210. They argued that the defendants' actions deprived Congress of its right under art. I, § 8, cl. 11 of the Constitution to participate in the decision to declare war. *Id.* The court, citing Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), held that this activity presented a nonjusticiable political question.

8. 28 U.S.C. § 1350 (1982).
9. 50 U.S.C. §§ 1541-48 (1982 & Supp. II 1984).
10. 18 U.S.C. § 956 (1982).
11. 37 U.S.C. § 308 (1982).

the judicial decision in *Crockett v. Reagan*,[12] in which twenty-nine congressional plaintiffs focused on alleged violations of the Foreign Assistance Act[13] and the War Powers Resolution[14] in attempting to challenge United States economic and military assistance to El Salvador. The government defendants in *Crockett* argued that legislation supporting previous executive actions had estopped challenges to the adequacy of executive certifications regarding the circumstances in El Sal-

12. Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d. 1355 (D.C. Cir. 1983). In *Crockett*, twenty-nine members of Congress brought suit against President Reagan and other United States officials challenging the legality of the United States military presence in, and military assistance to, El Salvador. The plaintiffs claimed that United States military officials had been introduced into situations in El Salvador where imminent involvement in hostilities was clearly indicated by the circumstances and, consequently, the President's failure to report to Congress violated the War Powers Resolution. The plaintiffs also claimed that unilateral executive policy violated the Congressional War Powers set forth in art. I, § 8 of the Constitution. Additionally, the plaintiffs alleged that violations of human rights by the government of El Salvador were pervasive and that in the absence of a certification of "exceptional circumstances" by the President, United States military assistance to El Salvador violated the Foreign Assistance Act of 1961.

13. The plaintiffs cited two provisions of the Foreign Assistance Act of 1961. The first, the Harkin Amendment, § 116, 22 U.S.C. § 2151 (1982) states in part:

> No assistance may be provided . . . to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

Id.

The second provision of the Foreign Assistance Act of 1961 relied upon is § 502B, 22 U.S.C. § 2304 (1982), which states in part: "[n]o security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided . . . unless the President certifies in writing . . . that extraordinary circumstances exist warranting provision of such assistance." *Id.*

14. War Powers Resolution, 50 U.S.C. §§ 1541-48 (1982). Particularly, § 1543(a) provides:

> In the absence of a declaration of war, in any case in which United States Armed Forces are introduced: (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and the President pro tempore of the Senate a report, in writing, setting forth: (A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement.

Id.

vador.[15] As in *Sanchez*, the court in *Crockett* applied principles of equitable discretion, holding that "whatever infirmities the President's certification may or may not suffer, it is clear that under these circumstances plaintiffs' dispute is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issue, and who have accepted the President's certifications."[16]

The consensus among conference participants was that there is little possibility of successfully basing a suit on either the War Powers Resolution or Section 502 of the Foreign Assistance Act. The barriers presented, as illustrated in both *Crockett* and *Sanchez*, are considerable. Another barrier to litigation besides the political question doctrine is that of the standing of litigants in the first place to bring suit testing the legality of United States foreign policy. The question of standing turns first on whether there has been injury-in-fact to the party seeking relief—the complainant must be within the zone of interests sought to be protected by the law in question. Second, there must be a logical nexus between the status asserted and the claim sought to be adjudicated, in order to insure that the litigant is the proper party to represent the interests involved. This can be a major stumbling block in human rights cases where often the courts find that United States plaintiffs suffer at most only indirect injuries or that the causal relationship between the plaintiffs' claims and the challenged action is too weak to support an adequate nexus.[17] As a tactic to move beyond the problem posed by standing, some participants urged greater reliance on lawsuits in which human rights litigants would be the defendants. Such "defensive lawsuits," it was agreed, could overcome the barrier of standing and allow human rights litigants to contest matters of foreign policy.

Turning from the barriers to litigation, participants launched into a debate on the propriety and effectiveness of bringing actions where the probability of a positive legal determination is doubtful. A wide range

15. Crockett v. Reagan, 558 F. Supp. 893, 896 (D.D.C. 1982). Defendants argued that Congress had given tacit approval to the Presidential actions and cited the International Security and Development Cooperation Act of 1981, 22 U.S.C. § 2370 (1982), which specifically authorizes economic and military assistance to El Salvador, including the assignment of members of the Armed Forces to El Salvador to carry out various duties under the Foreign Assistance Act of 1961 and the Arms Export Control Act. *Id.* at 896.

16. Crockett v. Reagan, 558 F. Supp. 893, 902 (D.D.C. 1982).

17. Diggs v. Shultz, 470 F.2d 461, 463-65 (1972). The appellate court, unlike the district court, found that the complainants had standing. The appellate court, however, went on to dismiss the complaint as non-justiciable. *Id.*

of views existed on this issue. One perspective was that a strategy of prolific litigation raises public awareness, forces recognition of international law, and serves to educate the judiciary. The competing viewpoint advocates a more selective strategy. Under this latter formulation, careful selection among cases would help weed out frivolous suits and concentrate limited legal resources.

There were several comments on the question of whether doubtful suits should be used to achieve effective publicity. One participant argued that the goal of introducing and establishing human rights norms in United States courts must be paramount. "Where the President is aiding in the torture of others, we want the judiciary to be able to come in against the President. The purpose of continuing lawsuits which may be frivolous, therefore, is to attempt to bring the action into a legal context. It is necessary to create a means for dialogue even if you know you are going to lose." As an example, this participant cited the *Greenham Women* case,[18] in which "it was understood that the case [seeking an injunction against the deployment of cruise missiles in a town in England] was unwinnable." Although held by the district court to present a non-justiciable political question, *Greenham Women* proved effective in focusing media attention in Europe and the United States on NATO's cruise missile deployment policy.

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18. Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984). *Greenham Women* was an action brought by an association of British women, a United States citizen living in England, and two United States Congressmen. *Id.* at 1332. The association alleged that the deployment of cruise missiles contravened customary norms of international law, subjecting the plaintiffs to tortious injury actionable under the Alien Tort Statute, 28 U.S.C. § 1350 (1982). 591 F. Supp. 1332, 1334. The United States citizen alleged that the deployment violated her right to life and liberty under the fifth and ninth amendments of the United States Constitution. *Id.* The congressional plaintiffs alleged that deployment violated their constitutional right and responsibility as members of Congress to declare war and provide for the general defense and welfare. *Id.* The court cited the standards of *Baker v. Carr* in applying the political question doctrine to declare the controversy non-justiciable. *Id.* at 1335-39. The opinion stated:

> If the merits were reached, the court would have to determine whether the United States, by deploying cruise missiles, is acting aggressively rather than defensively, increasing significantly the risk of incalcuable death and destruction rather than decreasing such risk and making war rather than promoting peace and stability. . . . Questions like how to insure peace, how to promote prosperity, what is a fair utilization and distribution of economic resources, are examples of questions that must be decided by the fair, sound, reasoned, and mature judgements of men and women responsive to the common good. The power to make these determinations is therefore appropriately allocated to the political branches.

Id. at 1337-38.

The court concluded that the fact finding that would be necessary for a substantive decision was unmanageable and beyond the competence and expertise of the judiciary. *Id.* at 1338.

There were many responses to this line of reasoning. One participant stressed the need to adhere to Rule 11 of the Federal Rules of Civil Procedure, which bars attorneys from initiating proceedings with knowledge that the case is frivolous.[19] A distinction was raised, however, between cases which lack a sufficient legal basis and those which merely appear "unwinnable" even though warranted by law. Another participant contended that there is often little or no time to decide whether to initiate an action. Therefore, consistent with ethical obligations, a practicing attorney has a duty to bring the suit if she holds the conviction that the case is not frivolous in the first instance.

Several individuals feared that the law ultimately produced by the initiation of doubtful cases could produce bad precedent. Confronted with borderline cases, judges may create new barriers resulting in "bad law" under which every human rights lawyer will then be obliged to work. Despite the positive benefits of increased legal awareness, many participants suggested that such "bad law" has a ripple effect extending to cases of all kinds brought before all adjudicatory bodies. Query, how successful is a highly publicized case if the legal result presents a new hurdle for future litigants? Under the *Sanchez* analysis, for example, a broad range of questions formerly open for adjudication might now be considered non-justiciable under the broad "political question" doctrine. If the primary goal of those who brought the suit was simply to direct public and media attention to the situation in Nicaragua, one participant argued that Congressional trips to Nicaragua could have produced a positive dramatic effect without creating bad legal precedent.

Another participant recounted a discussion he had with attorneys for the plaintiffs in a suit which had yielded a significant setback for human rights case law. Most human rights activists regarded the particular case, *Tel-Oren v. Libyan Arab Republic*,[20] as a disaster from the outset. When asked why they intended to file for *certiorari* with the Supreme Court in light of the damaging opinion they had received below, the attorneys stated that their sole duty was to their clients. Had the petition been granted, negative review by the Supreme Court could

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19. FED. R. CIV. P. 11 provides in part:
The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

20. *See infra* note 64 and accompanying text (citing and discussing *Tel-Oren*).

have increased substantially the damage done. Upon reflection, this participant asserted that the ethical obligations of attorneys extend beyond their clients; they also owe a duty to the proper development of the law. If the possibility arises that a case may create a negative result in the body of law, participants suggested that attorneys should at least inform their clients of that consideration.

Discussion shifted next to a consideration of appropriate legal, political, administrative, and educational strategies to be employed in the future. Participants deemed publicity of human rights issues to be essential, but not at any cost. There was a general consensus that attorneys must consider the most efficient use of limited resources in deciding whether to litigate. (Conferees returned to this theme throughout the day.) Participants noted that in the 1940's and 1950's the National Association for the Advancement of Colored People was the "only show in town" deeply involved in civil rights litigation. As a consequence, the NAACP could carefully select cases to be litigated, with a coordinated, long-term strategy in mind. By contrast, many groups and individual practitioners involved in human rights cases today simply do not agree on strategy. They respond to different constituencies and different concepts of legal ethics and moral obligations. It is essential, participants stressed, that these groups and individuals meet on a more regular basis to coordinate their legal efforts and to consider how their respective suits may affect one another.

An exchange between two conference participants, who were each involved at the time of the conference in immigration litigation in different parts of the country, brought this need for coordination into particularly sharp focus. Although one of the two cases could produce negative precedent for the other, the participant whose organization had taken the first case explained that a number of political and strategic reasons obliged his group to go forward with the suit.

To facilitate the proper selection and coordination of cases, many conference participants agreed on the need to establish operative criteria to distinguish between "hard" cases—those having a strong statutory jurisdictional basis, a meritorious claim, and solid popular support—and "soft" cases—those which are not necessarily frivolous but which have little chance of success and a high probability of an adverse ruling. In selecting such hard cases, one must look to the degree to which human rights practitioners can mobilize public opinion.

Participants discussed political options to expand access to the courts in human rights cases throughout the session. They generally agreed that an effective political strategy should take advantage of every public outcry against terrorism. One proposal called for legislation to facil-

itate action on behalf of the family of Leon Klinghoffer, victim of the *Achille Lauro* tragedy.[21] The suggested legislation would create district court jurisdiction and provide tort remedies for victims of foreign terrorist acts to sue their perpetrators, but would likely be broad enough to encompass a wide range of human rights violations.

In lieu of dramatic legislative reform, another participant called for the increasing efforts aimed at recognition of existing international law. For example, one strategy would be to declare terrorists *hostes humani generis* and, therefore, subject them to universal criminal jurisdiction. This could be accomplished by ratifying conventions which provide for such jurisdiction and by more stringently enforcing extradition provisions in existing treaties.[22] The same legislation implementing these conventions could provide the basis for legal action against violators, without the need for drastic new statutory developments.

Some participants believed that the Senate would not approve new jurisdictional legislation due to perceived judicial infringement on executive discretion in the conduct of United States foreign policy. There was concern, moreover, that a floor debate in Congress on these issues would produce adverse statements on international human rights law and thereby provide new grounds for judges to justify dismissal of fu-

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21. The *Achille Lauro* incident involved the taking of an Italian ship, allegedly by Palestinian Liberation Organization affiliates, off the coast of Egypt on October 7, 1985. Passengers and crew were held hostage for hours, during the course of which time an American passenger, Leon Klinghoffer, was murdered. Wash. Post, June 19, 1986, at A27, col. 4.

22. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *opened for signature* Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, *opened for signature* Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7570; Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *opened for signature* Sept. 14, 1963, 10 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Instutitions and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3; Protocol Amending the Slavery Convention Signed at Geneva on Sept. 25, 1926, *opened for signature* Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51; Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, G.A. Res. 260, U.N. Doc. A/181, at 174 (1948), 78 U.N.T.S. 277, 151 Brit. Foreign State Papers 682; Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 2 Bevans 607, 60 L.N.T.S. 253; Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, T.S. No. 469, 1 Bevans 424, 1 L.N.T.S. 83.

ture cases.[23]

As an alternative to court actions, various participants urged greater concentration on administrative hearings as an effective means to influence foreign policy. They noted that customs and trade statutes have provided a particularly significant basis for successful administrative proceedings. In the *South African Coal Case*,[24] for example, petitioners attacked a South African law that effectively obliged black miners to work under contracts enforceable by penal sanctions. Petitioners argued that the importation of coal mined under these circumstances violated a statute that prohibits importing goods produced by indentured labor into the United States.[25]

Although the Commissioner of Customs Services dismissed this complaint on the grounds that the plaintiffs did not satisfy a statutory proviso fixing a domestic consumptive demand,[26] the South African government subsequently repealed all of its penal servitude laws.[27] While the Commissioner of Customs Services found that the plaintiffs had not satisfied statutory provisions and therefore dismissed the complaint, the hearing did create favorable press, helped to define such terms as indentured labor, and may actually have induced South Africa to change its policy vis-à-vis the rights of workers.

The conference produced similar comments with respect to a case pending before the United States Court of International Trade, in which the plaintiffs were seeking to exclude various Soviet products

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23. *See infra* notes 82-85 and accompanying text (commenting on the need for judicial education in areas of international law).

24. Importation of Coal From the Republic of South Africa Case, Treasury Dep't, U.S. Cust. Serv., Res. 3-R:E:R 703971 T (1975). This was a 1975 proceeding brought by the United Mine Workers and the State of Alabama under § 307 of the Tariff Act of 1930, 19 U.S.C. § 1307 (1982), before the Commissioner of Customs to prevent the release of South African coal being imported by Gulf Power, a utility company. Butcher, *Southern African Issues in United States Courts*, 26 How. L.J. 601, 616 n.50 (1983).

25. The relevant test of the Tariff Act of 1930, 19 U.S.C. § 1307 reads:

> All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign county by convict labor and/or forced labor and/or indentured labor under penal sanctions shall not be entitled to enter at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

Id.

26. *Id.* Section 1307 provides that "in no case shall such provisions be applicable to goods wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States."

27. The repeal was set out in § 51 of the Second General Law Amendment Act of 1974 (Act No. 94 of 1974). Butcher, *Southern African Issues in United States Courts*, 26 How. L.J. 601, 623, n.73 (1983).

from the United States under the Tariff Act of 1930.[28] Both Customs and Treasury Department officials have argued before the International Trade Commission that it is impossible to tell whether the U.S.S.R. uses forced labor to manufacture specific products imported into the United States. For that reason, it was suggested, the proceeding before the United States Court of International Trade will highlight the need for more effective enforcement of Congressionally-mandated trade sanctions against countries that do not respect labor and workers' rights.

Beyond the customs and trade statutes, one participant suggested that attorneys in the human rights field should examine a broad array of administrative provisions and procedures. As an example, she noted one case in which an administrative action brought under the Marine Mammals Protection Act[29] reinforced United States policy towards Namibia. The conference participants concluded that increased concen-

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28. Tariff Act of 1930, 19 U.S.C. § 1307 (1982). *See* pending case derived from McKinney v. United States Department of the Treasury, No. 85-73 (Ct. Int'l Trade July 23, 1985). The plaintiffs in this proceeding were members of Congress, a shareholder, a labor union, and five organizations seeking to exclude from entry into the United States various products mined, produced, or manufactured in the Soviet Union allegedly by convict, forced, or indentured labor under the Trade Act of 1930, 19 U.S.C. § 1307 (1982).

The Court of International Trade held that all plaintiffs lacked standing except those plaintiffs who, in their personal capacities as workers or producers in industries competing with Soviet forced labor goods, suffered injury. Further, the court stated that the Secretary of the Treasury's 1985 decision rendered this action moot. The Secretary had determined that:

> The available evidence, including the International Trade Commission Report and further information from the Central Intelligence Agency provides no reasonable basis to establish a nexus between Soviet forced labor practices and specific imports from the Soviet Union; there presently is no basis upon which to prohibit importation into the United States of any goods produced within the Soviet Union.

Id.

The constitutional limitation of the federal judicial power to cases in controversy requires dismissal of an action as moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969).

29. In re Fouke Co. to Waive the Moratorium on the Importation of Cape Fur Seal Skins, Doc. MMPAH No. 1, National Marine Fisheries Serv., Dept. of Commerce (1975). In this administrative hearing, the Chairman of a House Foreign Affairs subcommittee, members of the Congressional Black Caucus, and others intervened directly to challenge an application to waive a moratorium on the importation of cape fur seal skins harvested in Namibia. The State Department's view that the importation of Namibian seal skins would be inconsistent with treaty obligations and contrary to U.S. foreign policy interests led to a decision by the Director of the National Marine Fisheries Service to enforce the moratorium.

Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976). *See also* Butcher, *Southern African Issues in United States Courts*, 26 How. L.J. 601, 623-28 (1983) (discussing *Diggs* and related cases).

tration on administrative hearings is a significant means by which to influence national policy. This approach, they generally agreed, may also lay the foundation for later successful litigation.

Finally, participants reached a consensus on the fundamental role of legal scholarship in enhancing the opportunities for successful domestic litigation of international human rights questions. Such scholarship is essential in raising the consciousness of the judiciary, and may in fact be a more effective way to educate judges than expending legal resources and talent on numerous lawsuits. Participants suggested that legal scholarship can also help practitioners anticipate the kinds of cases likely to arise in the future, and appropriate responses to those cases.

II. APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN IMMIGRATION CASES

During the second session, conference participants addressed a number of questions concerning the use of international standards in United States immigration cases.[30] Participants discussed issues of substantive law as well as strategy with particular emphasis placed on cases involving refugees fleeing from armed conflicts in Latin America.

A. THE GENEVA CONVENTIONS

A substantial number of recent immigration cases litigated in the United States have involved refugees from countries torn by civil wars and internal strife such as El Salvador, Haiti, and Nicaragua. Certain practitioners have attempted to base defenses to deportation on the Geneva Conventions,[31] as well as on the customary international law re-

30. Arthur C. Helton of the Lawyers' Committee for Human Rights was the discussion leader for the second session.

31. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as First Geneva Convention of 1949]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as Second Geneva Convention of 1949]; Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as Third Geneva Convention of 1949]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as Fourth Geneva Convention of 1949][all four hereinafter collectively cited as Geneva Conventions of 1949]. *See generally* Conference, *The American Red Cross - Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts*, 33 AM. U.L. REV. 83 (1983) (discussing the implementation and enforcement of humanitarian law and

lated to armed conflicts.[32] Although the recent decision of Immigration Judge Horn in *In re del Carmen Medina*[33] may have created a "toehold" for the use of the Geneva Conventions in U.S. immigration proceedings, conference participants raised a series of doubts as to whether the terms of the Conventions actually apply in those cases.

Participants noted that the Geneva Conventions apply in their entirety only to international armed conflicts.[34] The various implementing and enforcement provisions of the Conventions do not, therefore, necessarily apply to non-international armed conflicts taking place within the territory of a single High Contracting Party. For example, the duty not to transfer persons to a country wherein they may have reason to fear persecution for their political opinions or religious beliefs explicitly extends only to "protected persons."[35] As specifically defined by the Geneva Conventions,[36] this category of "protected persons" does not include a State Party's own nationals. Accordingly, these provisions of the Geneva Conventions appear inapplicable to U.S. immigration cases involving refugees from non-international armed conflicts.[37] A potentially useful provision of the Geneva Conventions in these proceedings is common article 3.[38] Among all the provisions of the Conventions, only common article 3 explicitly guarantees the respect of fundamental human rights in non-international armed conflicts. Due to its special nature, common article 3 is also regarded as self-executing and creates enforceable rights under its own terms, wholly apart from the other terms of the Geneva Conventions.[39]

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human rights law in non-international armed conflicts).

32. Parker, *Geneva Convention Protection for Salvadoran Refugees*, 13 Immigration Newsletter 1, 6-7 (May-June 1984).

33. *In re* del Carmen Medina, No. A26 949 415 (U.S. Dept. of Justice, Exec. Office for Immigration Rev., Harlingen, Tex. July 25, 1985) (order for deportation).

34. Geneva Conventions of 1949, *supra* note 31, at art. 2. As article 2 is identical in all four of the Geneva Conventions of 1949, it is generally referred to as "common article 2."

35. Fourth Geneva Convention of 1949, *supra* note 31, at art. 45(4).

36. *Id.* at art. 4(1).

37. *Id.* at art. 45.

38. Geneva Conventions of 1949, *supra* note 31, at art. 3. As article 3 is identical in all four of the Geneva Conventions of 1949, it is generally referred to as "common article 3."

39. 1 INT'L COMM. OF THE RED CROSS, GENEVA CONVENTIONS OF 12 AUGUST 1949, COMMENTARY, I GENEVA CONVENTION 48 (J. Pictet ed., A. Delteney trans. 1960); Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U.L. REV. 9, 12 (1983).

The terms of common article 3 urge the parties to "endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention," but this is not mandatory in non-international conflict. Geneva Conventions of

As one participant noted, however, in order to invoke common article 3 as a contractual obligation in United States immigration proceedings, one must argue that common article 3 imposes legal obligations on states playing no acknowledged role in the conflict in question. In addition, in the view of this participant, despite any objective determination that domestic hostilities have risen to the level of an "armed conflict" for the purposes of common article 3, the enforcement of the rights guaranteed by that article rests solely with the country in which the conflict occurs. Another participant observed that in the case of El Salvador, the United Nations has indicated that it regards common article 3 as applying to the conflict in that country and since 1981, United Nations organs have also classified the Salvadoran conflict as meeting the higher threshold of Protocol II of the Geneva Conventions,[40] which primarily relates to full-scale civil wars.[41] Nonetheless, there is no contractual obligation for State Parties involved in non-international armed conflict to give effect to the articles of the Geneva Conventions other than the substantive human rights provisions of common article 3, except by special agreement.[42] Thus, the only remedy for the enforcement of common article 3 must be found in the parallel provisions of human rights treaties.

Concluding that the Geneva Conventions, as presently interpreted, apply to U.S. immigration cases only on a limited basis, the conference participants briefly considered the utility of the Convention Relating to the Status of Refugees and the Protocol to that instrument.[43] They fo-

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1949, *supra* note 31, at common art. 3.

40. Protocol Additional to the Geneva Convention of 12 August 1949 (Protocol II), *opened for signature* Dec. 12, 1977, *reprinted in* 16 I.L.M. 1442-49 (1977) [hereinafter cited as Protocol II]. The application of Protocol II is limited to armed conflicts between a High Contracting Party and other armed forces that are "under responsible command [and] exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* at art. 1(1).

41. The scope of Protocol II is further defined in article 1(2) which provides: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts." Protocol II, *supra* note 40, at art. 1(2).

42. *See supra* notes 38-39 and accompanying text (describing common article 3 of the Geneva Conventions of 1949).

43. United Nations Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 [hereinafter cited as the Refugee Convention]; Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 [hereinafter cited as the Refugee Protocol]. The Refugee Convention, never signed by the United States, covers only those persons who became refugees because of events prior to 1 January 1951. The Refugee Protocol, acceded to by the United States on 1 November 1968, binds states to apply articles 2 through 34 of the Refugee Convention

cused primarily on the 1985 holding in *Haitian Refugee Center v. Gracey*.[44] In that case, the court held that while the excluded alien plaintiffs had standing to sue in federal court, the complaint based upon the Refugee Protocol failed to state a claim for which relief could be granted. Therefore, the nonbinding protocol did not afford any rights to Haitians so as to preclude their interdiction by the United States officials on the high seas. While several of those at the conference regarded the *Gracey* decision as a major setback in the effort to expand reliance on the Refugee Convention, one participant pointed out that there was little novel about the *Gracey* ruling; courts have repeatedly issued unfavorable opinions regarding the Refugee Convention and the Protocol.[45]

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to refugees regardless of the date of the events leading to their becoming refugees. Refugee Protocol, *supra* at art. I.

44. Haitian Refugee Center v. Gracey, 600 F. Supp. 1396 (D.D.C. 1985) (challenging the interdiction by U.S. officials of visaless aliens on the high seas). Executive Order No. 12324, dated September 29, 1981, ordered the Secretary of State to enter into cooperative arrangements with foreign governments to prevent illegal immigration into the U.S. Interdiction of Illegal Aliens, 46 Fed. Reg. 48,109 (1981). The Secretary of Transportation was also ordered to issue instructions to the Coast Guard in order to enforce the suspension of undocumented aliens and interdiction of any vessel carrying such aliens. *Id.* Vessels covered in this order are vessels of foreign nations with which the U.S. has arrangements. *Id.*

The Executive Order directed the Coast Guard to return the vessels and their passengers to the country from which they came, when there was reason to believe that an offense has been committed against the U.S. immigration laws, or laws of a foreign country with which the U.S. had an arrangement. *Id.* at 48,109-10. No person deemed a refugee was returned without his consent. *Id.*

The U.S. and Haiti entered into a cooperative arrangement to prevent the illegal immigration of undocumented Haitians into the U.S. by sea. The arrangements permitted U.S. authorities to board Haitian vessels to inquire about the condition and destination of the vessels, and the status of those on board. If a violation of U.S. or Haitian law was discovered, the vessel could be returned to Haiti. Any Haitian who qualified for refugee status would not be returned to Haiti. The Government of Haiti agreed that any returned Haitians would not be prosecuted. Haitian Refugee Center, Inc. v. Gracey, 600 F. Supp. 1369, 1405 (D.D.C. 1985).

45. *See, e.g.*, Bertrand v. Sava, 684 F.2d 204, 218-19 (2d Cir. 1982) (holding that the U.N. Convention and Protocol Relating to the Status of Refugees did not afford unadmitted Haitian aliens any rights in seeking parole beyond those granted under the Immigration laws of the U.S.); Pierre v. United States, 547 F.2d 1281, 1288-90 (5th Cir. 1977) (rejecting the contention that the Protocol invests Haitian aliens with a liberty right protectable by due process or other constitutional protections; the Court noted that "the intent of Congress in acceding to the Protocol was to leave existing immigration precedures intact"); Ming v. Marks, 367 F. Supp. 673, 677 (S.D.N.Y. 1973), *aff'd*, 505 F.2d 1170 (2d Cir. 1974) (*per curiam*), *cert. denied*, 421 U.S. 911 (1975) (holding that "the history of the adoption of the Protocol by this country makes clear that all the individuals and institutions involved in that process had a continuing belief that the Convention would not alter or enlarge the effect of existing immigration laws, chiefly because it was felt that our immigration laws already embodied the principles of the Convention").

See Note, *The Endless Debate: Refugee Law and Policy and the 1980 Refugee Act*,

Among the various rights accorded refugees by the Protocol is the important one of *nonrefoulement*.[46] While article 33 is generally understood to preclude deportation of refugees based on a "well-founded fear" of persecution in the state they fled, the Immigration and Naturalization Service has interpreted this treaty obligation more restrictively and withheld deportation only where a refugee can show a "clear probability" of such persecution.[47] In *Immigration and Naturalization Service v. Stevic*,[48] the Supreme Court upheld the INS interpretation and found no merit in the "argument that this construction is inconsistent with the Protocol."[49]

Conference participants discussed efforts to establish a higher standard of *nonrefoulement* than the "clear probability" standard approved in *Stevic*. Reference to customary principles of international law, it was suggested, holds out greater promise in domestic immigration cases than does invocation of treaty obligations.[50] Wide agreement existed that the deportation of Salvadorans, for example, constituted a violation of customary principles of human rights and humanitarian law. Rather than confronting the various hurdles discussed above regarding the invocation of the Geneva Conventions and other treaties as specifically binding in particular cases, more than one participant recommended reference to these treaties simply as examples and evidence of customary international norms.[51] It was noted that judges, scholars, and practitioners in a variety of countries had assessed a proposed theory under which the mere existence of an armed conflict created a *prima facie* right to universal asylum for persons fleeing the conflict,

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32 CLEV. ST. L. REV. 117 (1983-84) (proposing that the provisions of the Refugee Protocol are self-executing and enforceable).

46. Article 33(1) provides that "[n]o Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Refugee Convention, *supra* note 43, at art. 33(1).

47. *See* Immigration and Naturalization Service v. Stevic, 467 U.S. 401, 429-30 (1984) (holding that an alien seeking relief from deportation because he would be persecuted upon his return must "establish a clear probability of persecution to avoid deportation"); *See* Note, *The Alien's Burden of Proof Under Section 243(h): How Clear is Clear Probability?*, 17 IND. L. REV. 581, 585-88 (1984) (discussing generally the INS criteria).

48. Immigration and Naturalization Service v. Stevic 467 U.S. 401 (1984).

49. *Id.* at 428 n.22.

50. *See generally* Perluss & Hartmen, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551 (1986) (discussing the existence of a norm of temporary refuge as a customary humanitarian norm rather than an extension of refugee law).

51. *See infra* notes 79-81 and accompanying text (discussing the use of treaties as proof of customary international law).

and had rejected it as an overbroad construction of the law.

Several comments addressed the remedy of extended voluntary departure through which a deportable alien may be permitted to extend his stay in the United States.[52] Inasmuch as the relevant code provisions authorize extended voluntary departure not only on the basis of individual circumstances but also on broad nationality grounds, this remedy would seem to comprise an important source of relief for refugees threatened with deportation. It was noted, however, that the United States has granted extended voluntary departure on nationality grounds only on a limited basis.[53]

One conference participant offered a two-part explanation for the United States refusal to apply the same nationality criteria to the cases of aliens from El Salvador as applied to aliens from other countries. First, the government fears that offering a blanket remedy of extended voluntary departure in the case of Salvadorans would invite a deluge of applications not conceivable, for simple reasons of geography, from a country such as Poland. Furthermore, from a political standpoint, the Administration wants Salvadorans to remain in their country to help fight the war against the rebels.

It was acknowledged that the opinions of immigration attorneys play no role in State Department decisions regarding the granting of this particular remedy. The provisions for extended voluntary departure theoretically provide an important means of relief for refugees. As a practical matter, conference participants concluded that as long as the application of this remedy remains solely at the discretion of the Attorney General[54]and the State Department,[55] the option of extended voluntary departure will not exist in many cases.

B. LITIGATION STRATEGIES

Conference participants attempted to look behind the restrictive judi-

52. Federal regulations provide that the immigration judge may authorize the suspension of an alien's deportation; if the alien also establishes that he is willing and able to leave the U.S. the alien may file for an extension of time which to deport voluntarily. This decision is within the sole jurisdiction of the district director. 8 C.F.R. § 244 (1986).

53. Under established procedures, the Department of State recommends to the Justice Department which countries should receive this special status. As of February 1986, the only countries to have this status were Afghanistan, Ethiopia, Poland, and Uganda.

54. 8 U.S.C. § 1103(a) (1982): "[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." *Id.*

55. *See supra* note 53 and accompanying text (discussing State Department procedure regarding extended voluntary departure).

cial attitude vis-à-vis international law often encountered in immigration cases. In so doing, certain participants laid the blame for this situation not with the judiciary, but with the faulty strategy of practitioners who come before it. Attorneys involved in immigration cases, it was remarked, often refrain from citing international law in their arguments. Attorneys are often concerned that judges will not be familiar with international standards and will therefore be confused by and uncomfortable with their invocation. For that reason, attorneys frequently raise international norms almost as an afterthought, thereby contributing to a denigrating judicial attitude toward this body of law. Particularly when cases raise questions as to the self-executing nature of treaties, many attorneys automatically assume that arguments based on international law will fail. In essence, they engage in a self-censoring process before the arguments are even raised. One participant argued that by not forcefully asserting claims based on international law where applicable, these immigration lawyers may in fact be guilty of malpractice in the representation of their clients.

It was also noted, however, that some attorneys in immigration cases "throw in international law" on too casual a basis. These practitioners use references to international law simply as boilerplate language to supplement their other arguments without careful consideration of the substance of the asserted international claims and their relative merits in each individual case. These practitioners may be equally culpable in providing the basis for a skeptical judicial approach to international law claims in immigration and asylum cases.

C. Administrative Hearings

Conference participants noted that questions of immigration law are commonly raised not before the courts, but before those administrative tribunals designated by Congress as having exclusive original jurisdiction over deportation and asylum cases.[56] This fact has yielded both positive and negative consequences. To the detriment of practitioners and their clients, one participant reiterated, domestic administrative law offers no relief to those refugees who fear returning to face an armed conflict, but only to those who will confront individualized persecution. In addition, several participants pointed out that administrative law judges in immigration cases are given only narrow authority and

56. *See* 8 U.S.C. § 1105(a) (1982) (noting the procedure prescribed by the immigration laws shall be the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore made against aliens within the U.S. pursuant to administrative proceedings).

are reluctant to look beyond the relevant statute and regulations to broader questions of international law. On the positive side, proceedings before an administrative tribunal generally offer the opportunity to raise issues from a defensive posture, easing the burden a petitioner would encounter in an affirmative suit.

III. THE USE OF CUSTOMARY INTERNATIONAL LAW IN DOMESTIC COURTS

During its third session of the day, the conferees focused on questions unique to the invocation of customary international law in United States courts.[57] Participants noted certain advantages to basing claims on customary international law in domestic litigation. Perhaps most significantly, reference to customary law avoids the often confusing self-executing/non-self-executing distinction presented when dealing with treaties.[58] In addition, the Supreme Court has expressly recognized the binding nature of customary international law on United States courts through the doctrine of incorporation.[59]

The discussion leader identified two principal types of cases in which plaintiffs have alleged violations of customary international norms as a basis for a cause of action. After analyzing the history and potential for legislative reform of the statutory bases for these cases, participants turned to a consideration of the general problems of proving customary

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57. Joan Hartman, Professor of Law at the University of Washington School of Law, was the discussion leader for the third session.

58. The self-executing/non-self-executing distinction was outlined by the Supreme Court in Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829):

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

Id. at 314.

59. The Paquete Habana, 175 U.S. 677 (1900). In *The Paquete Habana*, the U.S. Supreme Court made clear that customary international law is a part of U.S. federal law and "incorporated" therein to the extent that it is not in conflict with domestic statutory or common law. In ruling that principles of customary international law should be controlling in evaluating the legality of the seizure of a Cuban fishing vessel by a U.S. blockade squadron, the Court noted:

> International law is part of our law, and must be ascertained and administered by courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

Id. at 700.

international law.

A. The Alien Tort Statute

The first category of cases considered were those in which plaintiffs relied upon the Alien Tort Statute[60] as the jurisdictional basis for their claim. Section 1350 provides that the "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[61] The landmark decision in *Filartiga v. Peña-Irala*[62] represented a major step forward in the application of this statute. In *Filartiga*, the Second Circuit found that torture carried out under color of governmental authority constitutes a violation of customary norms of international law as recognized by all countries. The court ruled that this "violation of the law of nations" satisfied the jurisdictional threshold set by the Alien Tort Statute.[63]

The optimism created by the *Filartiga* ruling was tempered significantly by the decision handed down four years later in *Tel-Oren v. Libyan Arab Republic*.[64] The circuit court's ruling was comprised of three separate opinions, each indicating different reasons for dismissing a claim brought under the Alien Tort Statute. Principal attention, however, has focused on Judge Bork's opinion, which stated that the law of nations must explicitly confer a private right of action, independent of the 1789 jurisdictional statute, for a federal court to afford redress to an injured alien plaintiff. The *Tel-Oren* holding has raised considerable doubt concerning any expanded application of this statute in the fu-

60. 28 U.S.C. § 1350 (1982).

61. *Id.*

62. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). *Filartiga* involved a suit brought under § 1350 by two citizens of the Republic of Paraguay against a Paraguayan government official who was present in the United States on a visitor's visa. The Filartigas, self-described opponents of the Stroessner regime in Paraguay, alleged that Peña-Irala, the Inspector General of Police in Asuncion, Paraguay, had kidnapped and tortured to death Joelito Filartiga, their son and brother.

63. Filartiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

64. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1354 (1985). *Tel-Oren* involved a tort action for compensatory and punitive damages, brought by the survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel. The suit, brought in U.S. District Court for the District of Columbia, named as defendants the Libyan Arab Republic, the Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America. The complaint charged the defendants with committing multiple tortious acts in violation of the law of nations, treaties of the United States and criminal laws of the United States, as well as common law. The district court dismissed the action for lack of subject matter jurisdiction. Plaintiffs appealed.

ture.[65] An array of international law experts have roundly criticized Judge Bork's opinion.[66] Notwithstanding *Tel-Oren*, conference participants concurred that the rule of *Filartiga* remains intact, even if circumscribed. In all likelihood, a federal court will follow the *Filartiga* decision in the next case with a similar fact pattern brought under the Alien Tort Statute. It was generally assumed that suits which attempt to extend the Second Circuit reasoning far beyond that scenario will almost certainly encounter difficulties in the federal courts.[67]

Several individuals emphasized the significant impact of contemporary political considerations on the development of section 1350 case law. One participant contended that in the *Filartiga* case, for example, the Department of Justice was initially reluctant to file a brief in support of the plaintiff, due to fear of retaliation by other countries. The Justice Department overcame this reluctance only at the prompting of the Department of State.

Similarly, one conference participant suggested that sensitivity to the current political climate could again produce major improvements in the body of case law. In particular, a tort suit brought against the Palestine Liberation Organization by the family of Leon Klinghoffer and aliens held hostage on board the *Achille Lauro* would present a fact

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65. *See infra* note 74 (discussing order of court vacating its judgment that jurisdiction was proper under the Alien Tort Statute in Siderman v. Argentina, No. CV 82-1772 RMT (MCx), slip op. (C.D. Cal. Sept. 28, 1984)).

66. *See* D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 94-105 (1985) (arguing that Judge Bork blurred the concepts of "cause of action" and "jurisdiction" in his *Tel-Oren* opinion, thereby allowing him to achieve his desired result of a narrow and restrictive interpretation of international law); Gross, *After Tel-Oren: Should Federal Courts Infer a Cause of Action Under the Alien Tort Claims Act?*, 3 DICK. J. INT'L L. 281-313 (1985) (arguing that Judge Bork ignored the statements of the *Filartiga* court in coming to the erroneous conclusion that no private right of action exists under the Alien Tort Claims Act).

67. One conference participant suggested that aside from the naming of a government defendant, the United States, the case of Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985), was factually on point with *Filartiga*. While this individual offered the analogy as proof of the uncertain status of the *Filartiga* rule and the arbitrary application of the Alien Tort Statute, others could point to the *Sanchez* decision as a demonstration of the above thesis. Under this analysis, the *Sanchez* case did not produce an inconsistent application of section 1350; it simply tried to stretch the rule of *Filartiga* too far. Even in his opinion in *Sanchez*, Judge Scalia indicated that he did not necessarily disagree with the rule of *Filartiga*, but simply found it inapplicable to the case at hand:

> Assuming, however, that the Alien Tort Statute covers state acts as well, then it embraces this suit only insofar as the federal appellees are sued in their offical capacities—*i.e.*, to the extent that appellants are seeking to hold them to account for, or to prevent them from implementing in the future, *actions against the United States*.

Id. at 207 (citations omitted, emphasis in original).

pattern similar to that considered in *Tel-Oren*. National outrage at the brutal murder of an American in a wheelchair, however, might produce sufficient pressure to yield a markedly different result.

Filartiga remains an exception to the general unwillingness of the federal courts to hear cases brought under the Alien Tort Statute. The courts have declined to exercise jurisdiction in Alien Tort cases primarily because they have refused to recognize that the alleged tortious acts constituted violations of universally recognized norms of international law.[68] Consequently, some participants argued that Congressional amendments to the Alien Tort Statute would clarify the scope of actions redressable under the statute.

A lengthy discussion ensued over current initiatives in Congress to bring about such reform.[69] Potential amendments discussed included the expansion of the Alien Tort Statute to incorporate American as well as alien plaintiffs; expansion of the definition of torts "committed in violation of the law of nations" specifically to include torture, extrajudicial killings, piracy and slave trading; extension of liability to any person acting under color of state law; and a possible prerequisite exhaustion of administrative remedies. These legislative efforts, it was

68. Filartiga v. Peña-Irala, 630 F.2d 876, 888 n.23. *See, e.g.*, Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (air disaster, even if caused by willful negligence, does not violate law of nations); Khedival Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49, 52 (2d Cir. 1960) (denial of free access to harbor not a violation of international law); Huynh Thi Anh v. Levi, 586 F.2d 625, 630 (6th Cir. 1978) (no discernible rule of international law governing child custody); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (eighth commandment "Thou shalt not steal" not part of the law of nations); Abiodun v. Martin Oil Serv., 475 F.2d 142, 145 (7th Cir. 1973), *cert. denied*, 414 U.S. 866 (1973) (breach of contract through fraud and deceit not a violation of international law); Cohen v. Hartman, 490 F. Supp. 517, 519 (S.D. Fla. 1980), *aff'd*, 634 F.2d 318, 320 (5th Cir. 1981) (neither conversion nor breach of fiduciary duty violates international law); Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 327-28 (E.D. Pa. 1966) (refusal to pay life insurance proceeds not violation of law of nations); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 293-97 (E.D. Pa. 1963) (neither unseaworthiness nor negligence constitutes tortious violation of international law). *But see* Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 864-65 (D. Md. 1961) (mother's concealment of daughter's name and Lebanese nationality, inclusion of daughter in her Iraqi passport, and having her admitted to the United States thereunder were tortious acts under the law of nations); *cf.* Nguyen Dayen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (dictum) (the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort in violation of the law of nations).

69. Some of the proposals under consideration were the direct result of efforts by private organizations, in particular the Lawyers' Committee for Human Rights. Participants also noted that staff people in one Senate office recently drafted a bill to revise the Alien Tort Statute wholly on their own initiative, without prompting from any public interest group, and characterized this as a hopeful sign of congressional support for the *Filartiga* approach and its codification.

urged, could open opportunities to expand the scope of the Alien Tort Statute. A careful redefinition of statutory terms also may assist judges to recognize that certain international human rights norms have achieved the status of law. On the other hand, certain conference participants voiced doubts as to the advisability of efforts to amend the Alien Tort Statute. Adequate legislative history does not exist to ascertain the original intent of the drafters in 1789,[70] rendering section 1350 a broadly interpretable statute. A reopening of the question—an inevitable consequence as the amendment process would produce new legislative history—could narrow rather than expand current judicial construction of the statute. Of greatest concern to this second group of participants was not the likelihood that legislative reform efforts would fail, but that the process would produce potentially harmful floor debate on the proper scope of judicial authority. In this pessimistic scenario, the *Congressional Record* would yield a plethora of negative statements regarding section 1350 and customary international law which would be cited in all future cases based on the statute or on any other international legal norm.

B. THE FOREIGN SOVEREIGN IMMUNITIES ACT

The second category of cases discussed were those brought under the Foreign Soverign Immunities Act[71](FSIA) to sue a foreign government or one of its agencies or instrumentalities. Two recent cases, it was observed, suggest that the Foreign Sovereign Immunities Act may effectively support causes of action based on gross violations of human rights that clearly violate international law.[72] In *Siderman v. Argentina*,[73] the court determined that notwithstanding the Foreign Sovereign Immunities Act and the Act of State Doctrine, a foreign government may be subject to a suit brought under the Alien Tort Statute

70. *Cf.* IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975), in which Judge Friendly characterized the Alien Tort Statute as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, . . . no one seems to know whence it came . . . ." *Id.* at 1015.

71. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1982).

72. In a pending case, Martin v. The Republic of South Africa, Transvaal Dep't of Hosp. Services, 84 Civ. 9094 (CES) (S.D.N.Y. Filed Dec. 17, 1984), plaintiffs sought federal jurisdiction under the Foreign Sovereign Immunities Act in support of a claim by a black American dancer denied emergency medical treatment by two state-funded hospitals in South Africa. Relying on customary international norms prohibiting racial discrimination, the plaintiff argued that the denial of emergency medical treatment on the basis of race constituted an egregious violation of international law, for which the South African government should not be permitted to shield itself from liability.

73. Siderman v. Argentina, No. CV 82-1772-RMT (MCx), (C.D. Cal. Sept. 28, 1984) (available June 26, 1986, on LEXIS, Genfed library, Courts file).

that alleged specific instances of torture authorized by the government. The Republic of Argentina and one of its provinces were ordered to pay $2.7 million in damages for the torture of an Argentinian plaintiff now residing in the United States.[74] The second case, *Von Dardel v. Union of Soviet Socialist Republics*,[75] held that to interpret the Foreign Sovereign Immunities Act as a bar to suits against foreign goverments brought under the Alien Tort Statute would act *pro tanto* to repeal that statute.[76] Accordingly, the court entered a default judgement against the U.S.S.R. for the unlawful seizure, imprisonment, and possible death of a Swedish diplomat, Raoul Wallenberg, at the end of World War II.[77]

Several participants addressed the need for congressional amendments to the Foreign Sovereign Immunities Act to create an explicit exception to immunity whenever a state commits gross violations of human rights. Such amendments could prove advantageous in cases in which the United States cannot acquire *in personam* jurisdiction over an individual defendant. In addition, it was suggested that these amendments might clear up a good deal of confusion surrounding both the Foreign Sovereign Immunities Act and the Alien Tort Statute.

There were differing opinions as to which violations of human rights should trigger an exclusion from the scope of sovereign immunity in the

74. The Court did hold, however, that the Act of State Doctrine applied to and barred the plaintiffs' claims regarding the expropriation of property. *Id.*

In an order filed on March 7, 1985, Judge Takasugi vacated the default judgment and dismissed the action based on a reconsideration of the issue of foreign sovereign immunity. Order Vacating Default Judgment and Dismissing Action, Siderman v. Argentina, No. CV 82-1772-RMT (MCx) (C.D. Cal. Mar. 7, 1985) (copy on file in the offices of The American University Journal of International Law and Policy). Judge Takasugi noted that although the Alien Tort Statute arguably provides an exception to foreign sovereign immunity, its silence on the subject should be interpreted according to perceptions of the state of the immunity law at the time the statute was originally enacted. *Id.* at 2. He noted that the case law of 1789 recognized foreign sovereign immunity as absolute, "especially as to acts of sovereigns within their own geographic territory." *Id.*, citing The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). Thus, Judge Takasugi reasoned that if Congress had intended the Alien Tort Statute to embody an exception to foreign sovereign immunity, the statute would have expressly provided for it. *Id.* at 3. With respect to the Foreign Sovereign Immunities Act, Judge Takasugi held that none of its enumerated exceptions applied to this case. *Id.* This interpretation of the Alien Tort Statute raises serious questions of the continued usefulness of this statute for aliens to enforce human rights claims against foreign governments in the United States federal courts. It also supports the notion advanced by the conference participants that a "gross violation of human rights" exception should be codified in the Foreign Sovereign Immunities Act.

75. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985).

76. *Id.* at 254.

77. *Id.* at 263.

event that an effort to amend the Foreign Sovereign Immunities Act proved successful. One participant suggested that the list of gross violations contained in the Draft Restatement of Foreign Relations Law of the United States would provide a good starting point.[78] Others felt that the Restatement list was too short, and that codification of it would severely limit practitioners in future cases.

C. PROBLEMS OF PROOF OF CUSTOMARY INTERNATIONAL LAW

There was a general consensus among conference participants that the most difficult problem involved in the invocation of customary international law in domestic litigation is proving, to the satisfaction of the court, that the particular principle in question has risen to the level of a binding and universally accepted international norm. The court may consider several factors to determine customary law.[79] Participants assessed the relative utility of each of these factors.

Courts will likely look to the practice of states in deciding whether a standard has reached the level of customary international law. It was observed that documentation of uniform practice of dozens of individual countries is a difficult process. Blatant exceptions to that uniformity can pose major problems in the weighing of evidence of state practice.[80]

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78. The Draft Restatement list reads as follows:

§ 702. Customary International Law of Human Rights. A state violates international law if, as a matter of state policy, it practices, encourages or condones

(a) genocide,
(b) slavery or slave trade,
(c) the murder or causing the disappearance of individuals,
(d) torture or other cruel, inhuman or degrading treatment or punishment,
(e) prolonged arbitrary detention,
(f) systematic racial discrimination, or
(g) consistent patterns of gross violations of internationally recognized human rights.

RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 702 (Tentative Draft No. 6, 1985).

79. In *Filartiga*, for example, the court examined the usage of nations, judicial opinions, and the works of jurists (as sources of customary international law), to arrive at its conclusion that official torture is a universal prohibition of the law of nations. Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980). In so doing, it found evidence of the consensus of nations in the numerous international treaties and accords decrying torture, and in the widespread adoption of domestic law opposing torture. *Id.* at 883-84.

80. The court in *Filartiga* eliminated many evidentiary problems by ignoring the impact of non-conforming state practice on the recognized customary norm outlawing torture. Although the court recognized that many states practice torture, it concluded that no state espouses a right to torture its citizens. Filartiga v. Peña-Irala, 630 F.2d 876, 884 (2d Cir. 1980). Not all experts, however, have so lightly dismissed the significance of non-conforming state practice, as this may indicate the absence among states of a sense of legal obligation. *See* Comment, *Custom and General Principles as*

Some participants argued that courts should not look to evidence of actual state practice, but rather to that which states claim to recognize as law: their respective statutes and constitutions. Other conference participants felt that courts cannot legitimately ignore evidence of actual state practice. Most participants agreed, however, that when proffering evidence of state practice, attorneys must also prove that such practice reflects *opinio juris sive necessitatis*, the requirement that states adhere to the norms out of a sense of legal obligation and not merely as a result of convenience or custom.[81] Proof of customary international law by treaty, it was suggested, presents fewer difficulties for the judge and practitioner than does proof by reference to state practice. One participant observed that citing treaties to which the United States is not a party creates no problem in domestic litigation if the treaties are offered as evidence of a level of consensus among states. While some conference participants proposed that the more effective route is to refer to the decisions of international human rights tribunals relating to particular treaty provisions than to cite the treaties directly, since these more clearly interpret standards, others noted that decisions of international tribunals are, unfortunately, poorly indexed and not easily accessible.

Conference participants observed that in proving some points of customary law, questions arise as to the evidentiary value of United Nations resolutions. The resolutions and decisions of other international and regional organizations may also be cited as proof of evolving norms of customary international law.

D. The Need For Judicial Education

Conference participants generally perceived domestic courts to be re-

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Sources of International Law in American Federal Courts, 82 Colum. L. Rev. 751, 756, 764 (1982) (noting a more restrictive view objecting to the court's "casual treatment of the problem of practice," and asserting that "it is clear that neither practice without belief nor belief without the corresponding practice can constitute a rule of customary international law."

81. The state actor must believe that its conduct is required by international law; actual practice alone is not enough to establish customary international law.

> Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove . . . [t]hat courts abstained from criminal prosecution of foreign seamen for tortious acts in collision cases, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom.

The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A.) No. 10, at 28 (Judgment of Sept. 7).

luctant to rule on customary international law questions because of their tendency toward judicial restraint reinforced by judicial concern over deciding issues relatively alien to the domestic jurisprudential experience. Consequently, participants focused on the need to educate judges as to the existence of and the vital role to be played by customary international law. It was agreed that practitioners must take the initiative to show judges where and how to define international customary norms. They must also support these arguments with substantial and convincing evidence. Despite general agreement on the scope and nature of the challenge, participants' views varied widely on the means to be employed to accomplish this task.

One participant suggested that decisions of various European courts should be invoked to define terms and demarcate specific customary norms.[82] Decisions of international courts may also help to demonstrate the contours of customary norms. It was noted, however, that attorneys must proceed cautiously with this approach, because certain European countries take a rather restrictive view with regard to issues affecting human rights.[83]

Other conference participants recommended increased use of briefs *amicus curiae* to educate the judiciary. This strategy makes efficient and effective use of legal resources while providing a broader base of support for the preferred outcome. One participant also suggested that *amicus* briefs present an opportunity to advocate broad developments in the law rather than limiting the focus to the specific grievances of one party. Alternatively, attorneys can use *amicus* briefs to concentrate judicial attention on certain narrowly targeted issues. A practical problem with the increased use of *amicus* briefs, it was observed, is the

82. The Lawless Case, 1960 Y.B. EUR. CONV. ON HUMAN RIGHTS, 474 (Eur. Comm'n on Human Rights), *reprinted in* 31 I.L.R. 290; R. v. Commissioner of Police, (1983) Q.B. Div'l Ct., *reported in* THE TIMES (London), May 28, 1983, CO/565/83 (available June 26, 1986, on LEXIS, Enggen library, Cases file).

83. As an example, one participant contended that much of the French criminal code may violate customary international law. *See, e.g.*, [C. PEN.] art. 12 (1810) (amended 1959): "Every person sentenced to death will be decapitated."; C. PEN., art. 35: "Whenever loss of civil rights has been imposed as the principle punishment, the judgement may also provide for jailing, but not to exceed five years. If the convict is a foreign national, or a French citizen who has lost his citizenship, jailing shall always be pronounced." C. PEN., art. 76: "Any French national shall be guilty of treason and sentenced to death, if he knowingly has participated in an action of demoralization of the army or nation aimed at prejudicing the national defense."; C. PEN, art. 132: "Any person who counterfeits or debases gold or silver money or lawful currency in France, or its importation into French territory, shall be punished by hard labor for life."; C. PEN., art. 274: "Every person apprehended begging at a place where a public institution for the prevention of begging exists shall be punished by jailing from three to six months and shall, thereafter, be lodged in such institution."

difficulty of locating appropriate litigation in progress in order to submit a brief in a timely fashion.

Conference participants concluded with a brief review of certain evolving customary norms, and focused particularly on the question of basing claims in domestic suits on developing international norms in the area of economic and social rights. *Price v. Cohen*,[84] which raised the question of whether a right to subsistence existed under the fourteenth Amendment, was cited as an example of a case in which evidence of such customary norms might have proven useful. In cases such as *Price*, it was urged, attorneys could use proof of international norms to persuade judges to employ higher standards of review, or to encourage an affirmative finding that the particular right is of a fundamental and absolute nature.[85]

Some participants cautioned, however, that economic and social rights are not as clearly recognized as civil and political rights. Very little customary international law on economic and social rights exists. Where customary norms do exist, they are often very narrowly construed.

In addition, when asking a judge to consider a customary social or economic norm, an attorney must prove both the existence of the norm and its relationship to the domestic right sought. By clearly defining the nexus between customary international norms and domestic legal rights, human rights practitioners will educate the judiciary and significantly increase the likelihood that such arguments will succeed in United States federal courts.

CONCLUSION

The Law Group organizers and the particpants in general felt that the American University conference was a great success. Its value was

84. Price v. Cohen, 715 F.2d 87 (3d Cir. 1983). In 1982, the Pennsylvania legislature passed a law in effect prohibiting persons between the ages of 18 and 45 from acquiring general year-round welfare relief unless they come within the specific category of being chronically needy. The plaintiffs were denied year-round relief on the grounds that they were declared to be transitionally needy. The plaintiffs alleged that the Pennsylvania law discriminates impermissibly on the basis of age. *Id.* at 91. The court, however, held that the Pennsylvania law did not violate the plaintiffs' fourteenth amendment rights because the legislature was furthering a legitimate state interest. *Id.* at 96.

85. The fundamental nature of social and economic rights is illustrated by the International Convention on Economic, Social, and Cultural Rights, *opened for signature* Dec. 19, 1966, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (requiring that parties to the Convention recognize the right of everyone to an adequate standard of living including food, clothing, and housing conditions).

seen to lie in the opportunity it gave participants to come together to discuss pending cases and long range strategies, and to compliment and to criticize each other's work.

Similar conferences have been held at roughly five-year intervals, with the most recent taking place at Washington and Lee University in late 1979. By combining practitioners and academics, they are a clearinghouse for ideas that should result in a more orderly development of human rights law in domestic courts, as well as improved recognition of human rights issues in the law schools and their journals.

While the years since the landmark court of appeals decision in *Filartiga* have seen some setbacks, most participants felt that such recent events have increased the importance of broad cooperation and coordination of human rights lawyers. As the conference chairman stated, "If we have served to focus and to improve the quality of argument in even a single lawsuit involving human rights norms, we have performed a valuable function. But even if the only result of the conference is to prevent some poorly conceived action from being brought and from damaging the gains the participants have achieved before, we will have succeded."