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International Law from the Trial Judge's Vantage Point

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When I was appointed to the bench twenty-eight years ago, the vast area of international law was primarily a matter of intellectual curiosity for federal district judges. We looked at comparative legal systems with an eye toward making our own work a little less burdensome and confusing. The trial judge is essentially a pragmatist controlled by the discipline of rules and dominated by the ideologies of others in the form of binding authority. Until recently, we were not called upon to examine the judgments and decisions of other nations.

International law today, however, is rapidly emerging in ways that affect a court's daily tasks. This emergence is coincident to globalization and a judge's intellectual curiosity has shifted to pragmatic necessity. The importance of globalization is obvious: twenty-five percent of the U.S. gross domestic product is internationally derived.[1] For example, there is no longer such a thing as an American car; its parts, design and various manufactures come from throughout the world.[2] Another example: guess, for a moment, the number of countries in which the clothes you are now wearing have their origins and assemblies.

We operate today under a growing number of international conventions, treaties and protocols. Moreover, globalization comprehends increased awareness of and access to cultures and places far different from our own. The reach of multi-national corporations, the speed of world-wide communications and the growth of English as a universal language have given international law an importance in the federal trial courts that could not even be imagined a quarter of a century ago.

Until 1992, the district court of Colorado had cumbersome procedures for admitting lawyers from other parts of the United States to appear as counsel.

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1. Flerida Ruth P.Romero, *Lecture: Legal Challenges of Globalization, Delivered as Part of the Indiana Supreme Court Lecture Series at Indiana University School of Law – Indianapolis*, 15 IND. INT'L & COMP. L. REV. 501, 503 (2005).

2. *See, e.g.*, Kenneth F. Dunham, *International Arbitration Is Not Your Father's Oldsmobile*, 2005 J. DISP. RESOL. 323, 324 (2005).

Admission was couched in the antiquated phrase *pro hac vice* and required the persistent presence of a Colorado lawyer as local counsel.[3] Today, the price of admission is $160 plus a statement listing the various courts to which the applicant has been admitted.[4] At least half of the lawyers appearing before me come from other parts of the United States. More to the point, I have given the temporary right of audience to lawyers from England, India, Hong Kong and Canada. With increasing regularity I receive written submissions from lawyers in Europe, Asia, Australia and South America. Depositions in cases tried in my court take place with local authorization in Japan, South Africa, Indonesia and elsewhere. It would require an entirely separate speech to address the international aspects of patent and other intellectual property cases that form a major part of my docket today. (For the first ten years I was on the bench, I never had a patent case assigned to me.)

The fact is that international law and foreign law are being raised in our federal courts more often and in more areas than our courts have the knowledge and experience to handle. As Justice Sandra Day O'Connor observed, "There is a great need for expanded knowledge in [this] field, and the need is now."[5]

With the foregoing in mind, I will describe the approach that I take in developing this needed knowledge and skill as a trial judge. I will not be able to resist also opining on some of the problems we face as judges because of the xenophobia and obduration of some appellate judges and politicians. Undoubtedly I will talk about what most of you already know, but my viewpoint as a trial judge may assist you in understanding the need to educate judges in the area of international law, as Justice O'Connor suggested.

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International law in U.S. courts is considered a branch of our law in much the same way that torts, contracts or securities law are part of our system. We use it when the facts of the case demand it. The question of whether an individual invoking international law has rights or obligations on the international plane is essentially irrelevant. What is relevant is whether this or that international law, as a matter of American law, is appropriate to the resolution of the controversy before the court. The source of the rights and obligations at bar may be international law, but the determinations will be made in the same way and to the same extent that the source would be domestic legal rights and obligations.

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3. *See* D.C. COLO. L. CIV. R. 301 (repealed 1992).

4. *See* D.C. COLO. L. CIV. R. 83.3 and D.C. COLO. L. CT. R. 57.5; *see also* Application for Admission to the Bar of the Court in the United States District Court for the District of Colorado (2005), http://www.co.uscourts.gov/forms/bar_app_new.pdf (requiring applicants to list all jurisdictions in which they are admitted to practice and submit a check to the Clerk of the Court in the amount of $160.00).

5. Sandra Day O'Connor, Justice, United States Supreme Court, Keynote Address at the American Society of International Law Proceedings of the Ninety-Sixth Annual Meeting 351 (Mar. 16, 2002), *available at* http://www.humanrightsfirst.org/us_law/inthecourts/ASIL_Keynote_Add_2002_Just_O'Connor.pdf.

In a very real sense, it is not the international legal system that operates in U.S. courts but rather principles of international law that a judge determines are appropriate in the particular case. This role of international law in U.S. courts was addressed by the Supreme Court in 1900 in the landmark case of *The Paquete Habana*.[6] While one can never feel secure in the stability of precedent as cases are decided, and this particular case seems to be awaiting the judicial hangman, *The Paquete Habana* remains controlling authority. In the opinion, the Court noted that President William McKinley had ordered a naval blockade of the Cuban coast during the Spanish-American War "in pursuance of the laws of the United States, and the law of nations applicable in such cases."[7] The blockade commander captured two fishing vessels that were sold as prize of war.[8] The original owners sued to recover the proceeds of the sales.[9] The Supreme Court, sitting in admiralty as the prize court, held that international law prohibited seizing coastal fishing vessels during time of war.[10]

The Court wrote:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.... [11]

The meaning of this broad language has been the subject of academic controversy, but for a trial judge the message is clear. I am instructed that a treaty, executive act, legislation or authoritative judicial decision trumps customary international law. If there is no trump, then the customary international law card is played. The commentators, however, are more subtle. One view is that the first sentence, which quoted that "International law is part of our law" etc., means that international law is automatically and directly applicable in U.S. courts whenever relevant issues are up for decision. According to this analysis, customary international law is one of the laws of the United States comprising "the supreme law of the land" under Article VI of the Constitution that must be faithfully executed by the President under Article II, Sec. 3.[12] Under this view, courts have no independent role in their interpretation or application. Other commentators emphasize the second sentence regarding the trump cards and point out that President McKinley limited the application of customary international law in his executive order. Acts in violation of the executive order were therefore *ultra vires* and perforce void. Under this view, international customary law is treated as any other law under the common law method. Thus, the conclusions of U.S. courts are

6. The Paquete Habana, 175 U.S. 677 (1900).
7. *Id.* at 712.
8. *Id.* at 679.
9. *Id.*
10. *Id.* at 708.
11. *Id.* at 700.
12. U.S. CONST. art. VI, cl. 2; U.S. CONST. art. II, § 3.

influenced by prior international decisions or practice of the community of nations, but not compelled by them.

Perhaps more to the point of this address, the Restatement (Third) on the Foreign Relations Law of the United States rejects the view that newly developed customary international law could supersede a prior federal statute.[13] Unless, however, it is clear that Congress intended a different result, U.S. courts will attempt to interpret federal statutes to conform to customary international law, obligations and conventions. The courts will give special consideration and deference to views of the executive branch when called upon to interpret customary international law, and those rules or principles whose existence is disputed by the executive branch will normally not be given effect.

I also think it safe to say that in this area of developing jurisprudence for the federal courts, as in most other instances, considerable weight is given to the Restatement. When confronted with a question of international law, a federal trial judge is most likely to ask counsel, "What does the Restatement say?"

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Having described the basic outline of the trial judge's approach, I want to turn to what is for me, and I hope for you, a more interesting aspect: the revolution in the subject of international law in the U.S. courts. It is the recognition of individuals as capable of both exercising international rights and being compelled to respect international obligations. What was once the exclusive province of nation-states, national interests and sovereignty has been transformed into a dynamic and volatile subject of modern litigation. Individuals are no longer passive objects of international legal actions.

In this new development, a very old and unused law has been revived: I speak of the Alien Tort Statute that was passed by Congress in 1789 and hardly used at all until recently. This statute incorporates into U.S. law the law of nations for a specific purpose. The Alien Tort Statute gives federal courts original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[14] This statute was intended to assist the newly formed United States government in taking its place among the civilized nations of the world, primarily to obtain something more than mere sufferance from the nations of Europe.

The statute was designed to avoid international conflict by providing an objective forum in which aliens could seek redress for injuries inflicted by American citizens, either in the United States or abroad, when those injuries were such as to implicate the honor or protective duty of the injured alien's country. The statute is solely a grant of jurisdiction and does not require a particular result in any case.

13. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (1987).

14. 28 U.S.C. § 1350 (2007).

In *Filartiga v. Pena-Irala*, a 1980 decision of the Second Circuit, the court found jurisdiction under the Alien Tort Statute over a claim by an alien against an official of his own government for the torture-slaying of the plaintiff's son.[15] The court found that torture conducted under color of law was a violation of the law of nations and that the international law of human rights did not distinguish between violations directed at one's own subjects and violations directed at others.[16] Faced with a possible flood of cases brought by aliens against their own governments asserting violations of international human rights law, the federal courts have moved to limit *Filartiga's* principles both on political question and lack of available remedy grounds.[17]

However, jurisdiction under the Alien Tort Statute does not lie against a foreign state. Jurisdiction in such cases is found only if the cause of action falls within one of the exceptions to immunity enumerated in the Foreign Sovereign Immunities Act. In general terms the exception to sovereign immunity does not apply to discretionary acts; the Supreme Court has held that the exception is limited by its terms to damages occurring in the United States.[18]U.S. embassies are not within this exception.[19]

As one commentator has stated about the Alien Tort Statute:

> [O]ver the last quarter-century, starting with *Filartiga v. Pena-Irala*, the venerable statute has been deployed as the basis for a thriving body of human rights jurisprudence, permitting U.S. judges to give effect within their courtrooms to some of the most fundamental commitments made by nations to one another in the years following World War II.[20]

This brings us to a discussion of some U.S. Supreme Court cases that, among other things, have prompted legislation which at first blush is amusingly stupid, but on reflection is dangerous both to the concept of international law and to the place of the United States in the community of nations.

The first case is the 1992 decision in *United States v. Alvarez-Machain* that has been condemned even by nations friendly to the United States and described by Justice Stevens as "monstrous."[21] The Court held that the conduct of an agency of the United States, the Drug Enforcement Administration [DEA], in kidnapping a foreign national while in his own country and transporting him to the United States against his will despite the existence of a fully functioning extradition treaty, did not affect the jurisdiction of the U.S. District Court over his person.[22] The Court

15. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

16. *Id.*

17. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1117-20 (9th Cir. 2006).

18. Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004) (listing the exceptions of violation of safe conduct, infringement of the rights of ambassadors, and piracy).

19. *See id.*

20. Steven M. Schneebaum, *The Paquete Habana Sails On: International Law in U.S. Courts After* Sosa, 19 EMORY INT'L L. REV. 81, 82 (2005).

21. U.S. v. Alvarez-Machain, 504 U.S. 655, 687 (Stevens, J. dissenting).

22. *See id.* at 668-70.

held in effect that treaties do not confer rights on individuals unless they are expressly so described in the advice and consent to their ratification.[23] Alvarez was tried for his alleged role in the brutal murder of DEA Agent Enrique Camarena.[24] The judge directed a verdict of acquittal at the conclusion of the prosecution's case.[25] It was a good result for the plaintiff, but a sorry one for the law of nations.

Dr. Alvarez-Machain then sued DEA Agent Sosa and the other individual kidnappers.[26] The burden on Dr. Alvarez-Machain as plaintiff was not to prove that the Alien Tort Statute created a private cause of action, but that the facts alleged in the complaint described a violation of international law. For reasons that do not bear scrutiny, the Court found that Dr. Alvarez-Machain failed to establish that there was a firm international consensus on an enforceable right to be free from temporary restraint by law enforcement officers acting extraterritorially.[27]

It is not, however, the result that has spurred opposition, but rather the Court's announced premise that international human rights are the legally enforceable rights of individuals and that the conduct of individuals may be found to be actionable violations of those rights. The Bush Administration had called upon the Court to reject those propositions that carry with them the tradition dating back to Chief Justice Marshall that international law is part of our law, with its interpretation consigned to the judicial branch.[28]

In this sense, there is a *Marbury v. Madison* flavor to Justice Souter's opinion. Marbury did not get his appointment as a justice of the peace, but the doctrine of judicial review of the political branches' actions in determining the law was firmly established. In *Sosa*, Dr. Alvarez-Machain did not recover for the wrongs done to him, but the principle of international law being part of U.S. law was emphatically stated.

The third case is the Supreme Court's 2005 decision in *Roper v. Simmons*, holding that executing an offender for crimes committed before he was eighteen years old would be cruel and unusual punishment.[29] Justice Kennedy's majority opinion cites international instruments and other nations' practices to demonstrate evolving standards and attitudes against capital punishment of youthful offenders.[30] Justice Scalia's dissent attacks the majority's reliance upon international treaties and foreign practices.[31] Justice O'Connor filed a separate

23. *Id.* at 667-69.

24. *Id.* at 655; U.S Drug Enforcement Administration, Biography of Agent Enrique Camarena, http://www.dea.gov/agency/10bios.htm (last visited Feb. 19, 2007).

25. Alvarez-Machain, 504 U.S. at 655-56.

26. Alvarez-Machain v. U.S., 107 F.3d 696, 698 (9th Cir. 1996).

27. Sosa, 542 U.S. at 713.

28. David R. Mapel, *Fairness, Political Obligation, and Benefits Across Borders*, 37 POLITY 426, 437 n.25 (2005).

29. Roper v. Simmons, 543 U.S. 551, 551 (2005).

30. *Id.* at 575-76.

31. *Id.* at 622-28 (Scalia, J., dissenting).

dissent finding insufficient evidence of a national consensus on the issue, but endorsing the relevance of international practice to Eighth Amendment analysis.[32]

Justice O'Connor's comments merit emphasis. She said:

> Obviously, American law is distinctive in many respects.... [b]ut this Nation's evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement — expressed in international law or in the domestic laws of individual countries— that a particular form of punishment is inconsistent with fundamental human rights.[33]

Interestingly enough, in the 2004 decision *Olympic Airways v. Husain*, Justice Scalia, joined by Justice O'Connor, dissented from the majority opinion for its failure to address how the courts of U.S. treaty partners addressed the issue of what constitutes a factual event under the Warsaw Convention.[34] Justice Scalia's dissents must be studied carefully to discern when and under what circumstances he thinks international law is relevant to American judicial enquiry. That, however, is not my assigned topic. Suffice for the moment to say that Justice Scalia asserts that foreign law should have no bearing on the proper interpretation of the U.S. Constitution and judges interpreting our Constitution should pay no heed whatsoever to how other countries interpret their own constitutions.[35]

Two other decisions merit reference in this regard. The 2002 case of *Atkins v. Virginia* held that the cruel and unusual punishments prohibition of the Eighth Amendment forbids the execution of mentally retarded defendants.[36] The Court determined that "the evolving standards of decency" that mark the progress of a maturing society placed the execution of the mentally retarded beyond the pale.[37] In so ruling, the Court took account of practice in American states, but also referred favorably to a brief filed by the European Union that catalogued the overwhelming repudiation of the practice by the rest of the world.[38]

In 2003, the Supreme Court decided *Lawrence v. Texas* and invalidated a state law criminalizing homosexual sodomy.[39] The Court's opinion focused on U.S. sources, but Justice Kennedy's majority opinion also cited a 1967 Act of the English Parliament and a 1981 ruling of the European Court of Human Rights invalidating similar criminal prohibitions.[40] Justice Kennedy alluded to these

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32. *See id. at* 604 (O'Connor, J., dissenting).

33. *Id.* at 605.

34. Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting).

35. *Id.*

36. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

37. *Id.*

38. *Id.* at 316 n.21; *see also* Brief for The European Union as Amicus Curiae Supporting Petitioner at 4-10, McCarver v. N.C., 533 U.S. 975 (2001) (No. 00-8727).

39. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

40. *Id.* at 572-73; *see also id.* at 604 (Scalia, J., dissenting) (citing Canadian case law with

foreign laws to rebut the claim of the supporters of the Texas law that criminal prohibition of homosexual sodomy was universally accepted within Western civilization.

All of these cases, and particularly the last two, prompted a U.S. congressman and a U.S. senator to introduce a bill called the "Constitution Restoration Act" that, among other things, would make it an impeachable offense for a federal judge to base a decision on foreign law. Section 201 of the Act states:

> In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.[41]

Aside from its grammatical incompetencies, the proposed Act does not define what it means by "constitutional law" and "English common law." A plain reading suggests that a judge could be impeached for relying on the Ten Commandments. Pretty clearly, John Locke, Montesquieu, Edmund Burke, and Rousseau would be suspect, and I could be impeached for citing Plato's Republic. Aside from all else, it would make determining the intent of the Framers a more onerous task.

As for the English common law, one would need to tread softly. Most American states include within their constitutions or statutes a provision that the common law of England that can be considered of full force stops as of March 24, 1607: the day the first ship sailed from England to what would become the lost colony of Jamestown, Virginia. I would dare not cite the Statute of Frauds which was enacted by the British Parliament in 1677. A host of other precedents, such as the McNaghten Case, would be swept away from the American lexicon. I think the point is made that this proposed statute is utterly stupid. In the unlikely event that Congress would enact the Constitution Restoration Act, it would not be enforceable and the first court to review it would likely strike it down without having to rely on any foreign law.

I said earlier, however, that further reflection suggests to me that beyond the xenophobic blindness of this proposed legislation, a more insidious danger lurks. We cannot afford to ignore outrageous demonstrations of ignorance such as the canard that the Holocaust never happened, nor the instant one which presumes that the fundamental law of the United States can be understood without reference to the history of western civilization.

On a more practical basis, the attack on the use of international law receives aid and comfort from significantly influential elements of the business community. It is not directly related to the Guantanamo cases, nor for that matter to the brutal murder of DEA agent Camarena described in the *Sosa* decision. The gravamen is

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disapproval as an example of "judicial imposition of homosexual marriage").

41. Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004); Constitution Restoration Act of 2005, S. 520, 109th Cong. § 201 (2005).

that human rights activists have begun to use the Alien Tort Statute in suits against businesses, including UNOCAL and others, for allegedly participating in systemic human rights abuses in cooperative ventures with Third World governments.[42]

The threat of subjecting overseas activities of American businesses to judicial review is ominous. As the United States government increases its use of American businesses and their subsidiaries to enforce and enlarge the new American imperium, the idea of being sued in American courts for reprehensible acts is not an unrealistic proposition. Why, one must speculate, would the U.S. Department of Justice argue for the most restricted judicial interpretation of the Alien Tort Statute? One has only to suggest the different consequences of class actions and individual tort claims to come up with a plausible explanation.

From a trial judge's perspective, the class action looms large. Indeed, only a few mega-verdicts would be enough to change much of the overseas conduct of American businesses.

It is obvious that our world is becoming increasingly interdependent. The age of nationalism is not over, but it will change or perish. There is much to learn from every system of law and government and if we fail to take advantage of these experiences and wisdom, we do so at our peril. It is neither desirable nor possible that this country we love so much can go it alone or sustain the status of a superpower without embracing the concept and the reality of mutual global concern. What a wonderful reality it would be for this country to be loved for what we do and revered for the justice we provide.

42. *See, e.g.*, Nat'l Coal. Gov't of the Union of Burma v. UNOCAL, Inc., 176 F.R.D. 329, 334 (C.D. Cal. 1997), *rev'd on other grounds*, 70 F. Supp. 2d 1073, 1082 (C.D. Cal. 1999); Doe I v. UNOCAL Corp., 395 F.3d 932, 936 (9th Cir. 2002).