HUMAN RIGHTS PROVISIONS OF THE U.N. CHARTER: THE HISTORY IN U.S. COURTS

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I. INTRODUCTION

American law schools use appellate court decisions to teach the implementation and progression of the law. Typically, the first case in a series will stand for the proposition that a plaintiff is entitled to a certain right. A later case demonstrates that a subsequent plaintiff is also entitled to the right. After a number of cases are presented, the student is expected to understand the law, policy, doctrine or test that applies to situations revolving around the right. When a court veers in a new direction, this method results in the appearance that the court inexplicably did a doctrinal about-face. For example, *NLRB v. Jones & Laughlin*[1] and *U.S. v. Darby*,[2]

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1. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

2. U.S. v. Darby, 312 U.S. 100 (1941).

cases marking the end of the *Lochner*[3] era, appear illogically decided when measured only by the precepts of *stare decisis*.

Judges, however, do not operate in a case book world. They operate in a world with politicians, citizens and their interest groups, the media, economic upheavals, wars, and myriad other extra-judicial factors. Studying a legal doctrine or trend in its historical context may provide a less myopic view of the law's progression, demystifying seemingly irrational decisions. When one understands President Franklin Roosevelt's "Court packing plan," the Supreme Court's decisions in *NLRB* and *Darby* are more comprehensible. A discussion of the Court packing plan is often included in constitutional law case books as an illustration of outside influences on the judicial process;[4] however, it is one of only a few historical explanations contained in most case books.

This paper analyzes the historical settings of several significant cases in which plaintiffs asked the courts to apply the U.N. Charter, casting these cases in a new light. It has frequently been argued that U.S. courts have been at best ambivalent about utilizing international treaties in U.S. courts.[5] Judges often have invoked the political question doctrine, which allows them to remove themselves from involvement in an international issue.[6] Another method of avoiding treaty application in U.S. courts is the doctrine of non-self-execution, which requires enabling

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3. Lochner v. New York, 198 U.S. 45 (1905). During the Lochner era, the Supreme Court frequently applied substantive due process to invalidate regulations that were aimed at redressing societal inequalities. For example, Lochner struck down a New York law aimed at limiting the number of hours that bakery employees could work. The Lochner Court held that the "right to make a contract . . . [was] part of the liberty of the individual protected by the 14th Amendment." *Id. at* 53. By the 1930's, this reasoning was used to find several of Franklin Roosevelt's New Deal provisions unconstitutional. Roosevelt responded with a plan to reform the Supreme Court that would have allowed him to appoint six new Justices to the Court. Although the plan was never enacted, the Court responded by upholding several New Deal regulations, beginning with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

4. *See, e.g.*, PAUL A. FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS, 260-62 (4th ed. 1977); GERALD GUNTHER, CONSTITUTIONAL LAW Ch. 8 (11th ed. 1985); WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW CASES, COMMENTS, QUESTIONS 98-100 (7th ed. 1991). For other examples of historical analysis of Supreme Court decisions, *see* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 91 STAN. L. REV. 61 (1988).

5. *See, e.g.*, Richard B. Bilder, *Integrating International Human Rights Law into Domestic Law-U.S. Experience*, 4 HOUS. J. INT'L L. 37 (1981).

6. The political question doctrine holds that when an issue is textually dedicated by the Constitution to a political branch of the government, lacks standards by which the judiciary can resolve it, requires an initial policy determination, or if decided by a court could cause embarrassment to the U.S. government in its foreign relations, it should be found to be nonjusticiable. *See* Baker v. Carr, 369 U.S. 186 (1962).

legislation for a treaty to apply domestically.[7] These doctrines have produced a line of cases that overwhelmingly-but not exclusively-reject the application of treaties (especially human rights treaties) in U.S. courts.[8] Yet placing these cases in a historical setting and viewing them with an eye on events surrounding the decisions shows that U.S. courts are becoming more willing to consider and apply human rights treaties.

A. Background

Even before the emergence of the modern Nation-State system in the 17th century, States have concluded treaties with one another.[9] For most of that time, treaties dealt with matters arising between States in their sovereign capacity; rarely has a treaty dealt with issues that applied to individuals within a State.[10] Only recently have States begun to make international agreements that relate to the treatment of nationals within their own borders.[11]

In the past, treaties were generally enforced by the use of sanctions. If one State violated its treaty with another State, the latter State would apply sanctions-diplomatic, economic or military reprisals. For the most part, the threat of reprisals kept States from violating their treaty obligations. With the formation of the League of Nations after World War I, the world community began exploring human rights as a new subject matter for treaties and created new enforcement mechanisms with the League itself and the Permanent Court of International Justice. Although the League eventually dissolved, it provided a foundation for the formation of the United Nations. The Permanent Court of International Justice evolved into the current International Court of Justice (ICJ). States

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7. When a treaty is non-self-executing, it cannot be applied to individuals in U.S. courts without further enabling legislation. In other words, a non-self-executing treaty will bind the U.S. in its relations with other nations, but not in its relations with its own citizens. *See* JOHN H. JACKSON, UNITED STATES, IN THE EFFECT OF TREATIES IN DOMESTIC LAW 141, 148-56 (Frances G. Jacobs & Shelley Roberts eds., 1987).

8. *See infra* note 20.

9. J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 7-8 (9th ed. 1984).

10. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 2 (1988).

11. *See* STARKE, *supra* note 9, at 14. *See also* Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 953 (D.C. Cir. 1988) (noting that government officials may be held responsible for certain egregious violations of their own citizens' rights but nonetheless holding that this "expanded law of nations" does not (1) include, as a principle of jus cogens, protection of citizens from harms resulting from their own government's contravention of an International Court of Justice decision; and (2) alter the domestic law principle that congressional enactments cannot violate, but only supersede, prior inconsistent treaties or customary norms of international law).

continue to make treaties on sovereign issues, but the human rights of their citizens have increasingly become a subject for international agreements.

A treaty provides the most authoritative method of ascertaining and defining a precept of international law. As a matter of international law, a treaty is any written agreement between two States, regardless of what title it is given.[12] Under U.S. law, however, an international agreement becomes a treaty only after it has been signed by the President and ratified by the Senate.[13] Article VI of the Constitution makes treaties "the supreme law of the land"; Article III(2) places jurisdiction for cases "arising under" treaties with the federal courts.[14] Since the Statute of the ICJ gave that body jurisdiction only over matters arising between States-and since a State submits to the ICJ's jurisdiction only voluntarily[15]-domestic courts are left to enforce treaties that deal with individual rights.

B. Scope

The U.N. Charter is a duly signed and ratified treaty of the United States.[16] Because the United States has ratified only one other international human rights treaty[17] and because innumerable cases containing the phrase "human rights" or similar phrases are outside the scope of international

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12. Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

13. U.S. CONST., art. II, § 2, cl. 2.

14. U.S. CONST., art. III, § 2, cl. 1, art. VI, cl. 2.

15. Statute of the International Court of Justice, June 26, 1945, arts. 34, 35, 36, 59 Stat. 1055, T.S. No. 993.

16. The Vienna Convention obligates a State to "refrain from acts which would defeat the object and purpose of a treaty" which a State has signed, but not yet ratified. Vienna Convention, *supra* note 12, art. 18. Therefore, under the Convention, a signed, unratified treaty still has a somewhat binding effect on a State. However, the U.S. Constitution recognizes a "treaty" only after it is ratified by the Senate and signed by the President. The U.N. CHARTER is a treaty under U.S. law. *See* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER (Burns Weston et al. eds., 2d ed. 1990).

17. The United States has signed several international human rights treaties, but ratified only one. Among the treaties signed, but not ratified, by the U.S. are: the Convention on the Elimination of All Forms of Racial Discrimination, the Covenant on Economic, Social, and Cultural Rights, The Covenant on Civil and Political Rights, the American Convention on Human Rights, Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The U.S. ratified (with reservations) the Convention on the Prevention and Punishment of the Crime of Genocide in 1988, 37 years after its entry into force. *See* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER (Burns Weston et al. eds., 2d ed. 1990).

law,[18] this paper focuses on the application of the human rights provisions of the U.N. Charter in U.S. courts.

The doctrine of non-self-execution has had a significant impact on attempts to employ the U.N. Charter in U.S. courts. The doctrine of non-self-execution, a domestic law concept, determines whether a ratified treaty is directly incorporated into U.S. law or whether it requires further legislation to make it applicable within the United States.[19] The human rights provisions of the U.N. Charter have been found non-self-executing and therefore do not apply within the United States in the absence of further legislative implementation.[20] The political question doctrine, as developed in *Baker v. Carr*,[21] also limits application of the Charter and other treaties in U.S. courts.

In spite of these restrictions on the use of treaty law, over 250 cases make reference to the U.N. Charter; seven cases in particular provide parallel and contrasting applications of the human rights precepts of the Charter in U.S. courts. *Oyama v. California*[22] and *Sei Fujii v. State*[23] were challenges to the California Alien Land Law.[24] These two cases, decided in 1948 and 1952, represent the minority's initial commitment to the application of the human rights provisions of the U.N. Charter, this commitment was severely curtailed by the doctrine of self-execution. In the 1980s, *Filártiga v. Peña-Irala*[25] and *Tel-Oren v. Libyan Arab Republic*[26] resulted in a "one step forward, two steps back" application of the Charter. The *Tel-Oren* retreat was halted by *Forti v. Suarez-Mason*.[27] In 1991 and 1992, *United States v. Verdugo-Urquidez*[28] and *United States v.*

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18. For a thorough study of court opinions containing human rights terms, see Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L & COMP. L. 543 (1989).

19. JACKSON, *supra* note 7, at 148-56.

20. *See, e.g.*, Frolova v. U.S.S.R., 761 F.2d 370 (7th Cir. 1985) (per curiam); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985); Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980); Hitai v. Immigration and Naturalization Serv., 343 F.2d 466 (2nd Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Sei Fujii v. State, 242 P.2d 617 (Cal. 1952).

21. *Baker*, 369 U.S. at 186.

22. Oyama v. California, 332 U.S. 633 (1948).

23. 242 P.2d 617 (Cal. 1952).

24. CAL. CODE § 261 (Deering 1943).

25. Filártiga v. Peña Irala, 630 F.2d 876 (2d Cir. 1980).

26. *Tel Oren*, 726 F.2d at 774.

27. Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).

28. United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991), *vacated*, 112 S. Ct. 2986 (1992) (mem.).

Alvarez-Machain[29] arose from incidents involving alleged violations of an extradition treaty between the United States and Mexico, resulting in divergent holdings which heartened, then disappointed, proponents of international human rights. These cases, viewed in isolation, represent at best a vacillating commitment by the courts to the Charter. However, the historical context of the formation of the United Nations and domestic political concerns reveals *Oyama* to be the first step toward greater acceptance by the courts of the principles of the U.N. Charter.

Courts often refer to the Universal Declaration of Human Rights[30] when discussing the U.N. Charter. The human rights provisions of the Charter and the Universal Declaration may be used interchangeably.[31] Although the Universal Declaration is a non-binding expression of the U.N. General Assembly, it is regarded as authoritative in interpreting the human rights provisions of the Charter.

C. The Creation of the United Nations

The U.N. Charter was signed in San Francisco on June 26, 1945.[32] The rise of Nazism, the deaths of millions of ethnic minorities in World War II, and the Nuremberg and Tokyo trials after the war all contributed to the formation of the United Nations.[33] While the Charter supported human rights ideals, it retained the principle of a State's sovereignty over its own citizens and a balance of power that favored the Allies-China, France, the USSR, Great Britain, and the United States.[34] Nonetheless, for those who lived through the horrors of World War II, the Charter provided hope that a State would never again have free rein over the treatment of its own citizens. The United States was at the forefront in arguing to include protection of individual rights in the U.N. Charter.[35]

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29. United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

30. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

31. *See, e.g.*, Richard B. Lillich, *The Declaration of the Rights of Man and of the Citizen,* The Universal Declaration of Human Rights and Contemporary Human Rights Law, *in* LES DROIT DE L'HOMME: UNIVERSALITE ET RENOUVEAU 1789-1989, at 107, 111 (Guy Braibant & Gerard Marcou eds., 1990) (stating that "the Universal Declaration of Human Rights . . . may be said to have become an authentic interpretation of the U.N. Charter").

32. THOMAS HOVET, JR. & ERICA HOVET, THE UNITED NATIONS: 1941-1979, at 1 (1979).

33. *See* THE EVOLUTION OF THE UNITED NATIONS 1 (G.R. Bunting & M.J. Lee eds., 1964).

34. U.N. CHARTER, arts. 1, 2, 26, 55.

35. *See* EVAN LUARD, A HISTORY OF THE UNITED NATIONS 31-32 (1982); T.R. FEHRENBACH, THIS KIND OF PEACE 77 (1966).

In 1948, without a dissenting vote, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights,[36] largely authored by Eleanor Roosevelt. Upon its passage, she said, "[t]his must be taken as testimony of our common aspiration first voiced in the Charter of the United Nations to lift men [sic] everywhere to a higher standard of life and to a greater enjoyment of freedom'"[37] Although the United States was actively involved in the promulgation of international human rights standards, the question addressed here is whether the United States has championed these rights in its own courts.

II. APPLICATION OF THE CHARTER IN U.S. COURTS

A. 1948 - 1980

1. The Doctrine of Non-Self-Execution

The earliest mention of the U.N. Charter by the U.S. Supreme Court occurred in *Oyama v. California*.[38] *Oyama* arose under the California Alien Land Law, which made it illegal for aliens who were ineligible for naturalization to own, occupy, lease or transfer agricultural land in California. It also required any land acquired in contravention of the law to escheat to the state. Under U.S. naturalization laws in force at the time, the Alien Land Law applied only to East Asian aliens.[39] Kajiro Oyama, ineligible for citizenship because of his Japanese birth, purchased agricultural land in California and had the deeds executed to his minor son, Fred, who was a U.S. citizen by virtue of his birth in California. In 1942, the Oyamas, along with all persons of Japanese descent, were forcibly removed from California and sent to an interment camp. In 1944, when Fred was sixteen years old and still interred outside of California, the state filed a petition to declare an escheat on Fred's land as deeded to him with the intention of violating the Alien Land Law. The trial court ordered the land to revert to the state and the California Supreme Court

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36. Universal Declaration of Human Rights, *supra* note 30.

37. Eleanor Roosevelt, Address Before the United Nations General Assembly, in 19 DEP'T ST. BULL., 1948, at 751, *quoted in* AN AGENDA FOR ACTION IN 1988 (1988).

38. 332 U.S. at 633.

39. *Id.* at 647 (Black, J., concurring). Federal immigration law permitted only "whites and Negroes" to become naturalized citizens. *See* ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 22 (1972). The California Alien Land Law forbade ineligible aliens from owning land in California. Therefore, the law worked only to exclude aliens of Oriental ancestry from owning land.

upheld the ruling.[40] The U.S. Supreme Court reversed the California Supreme Court in 1947.[41] The opinion of the Court, written by Chief Justice Vinson, found that Fred had been discriminated against solely on the basis of his Japanese ancestry. The Court found a conflict between a state's right to determine land use policy and the right of a U.S. citizen to own land anywhere in the country, holding that under the Supremacy Clause, the state right gave way to the federal interest. The Court took issue with the California court's presumption that the transfer of the land to Fred was suspect. If the Oyamas had not been Japanese, the transfer would have been presumed a gift. Because the Court did not reach the issue of whether the Alien Land Law violated the Equal Protection Clause, the statute itself remained in force.

Justice Black, joined by Justice Douglas, concurred in the decision, although he would have struck down the Alien Land Law on equal protection grounds.[42] In addition, he noted the international implications of such a law. "[W]e have recently pledged ourselves to cooperate with the United Nations to 'promote ... human rights ... for all without distinction as to race....' How can this nation be faithful to this international pledge if state laws which bar land ownership ... on account of race are permitted to be enforced?"[43] Justice Murphy, joined by Justice Rutledge, also concurred in the Court's decision, noting that the Alien Land Law's "inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned."[44]

The U.N. Charter, then, had an auspicious beginning in the Supreme Court. Four justices would have applied the Charter to invalidate California's Alien Land Law. Justices Murphy and Rutledge advocated striking down the Land Law because it violated human rights provisions of the Charter, as well as equal protection. Justices Black and Douglas also noted the United States' commitment to the U.N. Charter as a reason (in addition to equal protection and conflict with federal laws) to invalidate the Alien Land Law. Neither concurring opinion mentioned the doctrine of non-self-execution.

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40. People v. Oyama, 173 P.2d 794 (Cal. 1946).

41. *Oyama*, 332 U.S. at 633.

42. *Id.* at 649.

43. *Id.* at 649-50 (Black, J., concurring) (footnote omitted).

44. *Id.* at 673 (Murphy, J., concurring). For an in-depth discussion of the *Oyama* and *Sei Fujii* decisions see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation:* 1946 -1955, 69 IOWA L. REV. 901, 917-31 (1984).

The seminal case applying the doctrine of non-self-execution to the U.N. Charter was heard in 1952. *Sei Fujii v. State*[45] arose under the California Alien Land Law that was at issue in *Oyama*. As in *Oyama*, California had reclaimed land purchased by a Japanese national. Sei Fujii challenged the Alien Land Law under the U.N. Charter and the Fourteenth Amendment. The California Supreme Court found that the Alien Land Law was unconstitutional under the Fourteenth Amendment as arbitrary discrimination against a non-citizen. However, the court also found that the human rights provisions of the U.N. Charter were not self-executing and therefore did not override local laws. The court held that the human rights provisions of the U.N. Charter "[s]tate general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons." The court's reading of the Charter led it to conclude that "it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country . . . ."[46] Although *Sei Fujii v. State* was never appealed to the U.S. Supreme Court, this reasoning has been adopted consistently by U.S. courts-including the U.S. Supreme Court-since *Sei Fuji* was decided.[47] Yet four years earlier in *Oyama*, four justices of the Supreme Court would have applied the Charter's human rights provisions to overturn the law that was eventually overturned in *Sei Fujii*, without calling for further legislation to implement the Charter. What happened in those four years to change judicial attitudes toward the Charter?

2. Anti-Communism and States' Rights

Judges, although in theory insulated from the political process, are nonetheless influenced by public opinion. Judicial decisions are based not only on logic, but "the felt necessities of the time, the prevalent moral and political theories, [and] institutions of public policy."[48] In the 1950s, politicians, educators and other commentators decried the United Nations as a communist tool to implement world domination. After the decision in *Oyama*, one journalist noted that "what four justices of the Supreme Court

45. 242 P.2d at 617.

46. *Id.* at 620-21.

47. *See, e.g.*, Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955).

48. Oliver Wendell Holmes, Jr. (1881) *quoted in* J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 43 (1961).

say in one case, five may say in another . . . . [leading to] revolutionary consequences in our internal affairs. For example, it would be impossible to remove Communists from government offices . . . ."[49] One allegation of communist infiltration of the United Nations involved Alger Hiss, who organized the San Francisco meeting that produced the U.N. Charter and was later accused of being a Communist spy.[50] This concern led the Senate Judiciary Committee to hold hearings on U.S. citizens who were employees of the United Nations and suspected of being Communists.[51] Supposed Communist dominance of the United Nations was summed up by William Fleming, who contended that "[t]he United States delegation [to the U.N.] has, unfortunately, not realized that the struggle against communism is a global one....it is waged...everywhere, including the Council chambers of the United Nations ...."[52]

Not only was the United Nations viewed as an agent of world communism, but its creation fueled the concern of states' rights supporters about using international agreements to dismantle discriminatory laws in Southern states.[53] Indeed, the two issues were often joined: charges of Communist ties were leveled at civil rights organizations working for desegregation in the South.[54] The concern that international agreements would adversely impact states' rights predated the formation of the United

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49. CHELSY MANLY, THE U.N. RECORD: TEN FATEFUL YEARS FOR AMERICA 185 (1955). The Universal Declaration of Human Rights states, "[e]veryone has the right of equal access to public service in his [sic] country." Universal Declaration of Human Rights, *supra* note 30, art. 21(2).

50. Hiss was a career diplomat who was an advisor to President Roosevelt at the Yalta Conference and then was given responsibility for organizing the U.N. Conference on International Organization in San Francisco in 1945. Representatives of fifty nations attended the conference which resulted in the signing of the U.N. Charter. *See* Hovet, *supra* note 32. In 1950, after being named by Whittaker Chambers as a communist agent, Hiss was imprisoned for four years on charges of perjury. In 1992, General Dmitri Volkogonov announced that the files of the former Soviet Union contained no evidence that Hiss had ever been recruited. *See, e.g.*, Jeffrey A. Frank, *Stalin Biographer Offers Latest Twist in Hiss Case, No Evidence Diplomat Collaborated with Soviets*, WASH. POST, Oct. 31, 1992, at A3.

51. *Activities of United States Citizens Employed by the United Nations, Hearings Before the Subcomm. to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Comm. on the Judiciary*, 82d Cong., 2d Sess. through 83d Cong. 1st Sess. (1952-1954).

52. William Fleming, *Danger to America: The Draft Covenant on Human Rights*, 37 A.B.A.J. 816, 860 (Nov. 1951).

53. *See, e.g.*, L.K. HYDE, JR., THE UNITED STATES AND THE UNITED NATIONS 173 (1960).

54. *See* ANNE BRADEN, HOUSE UN-AMERICAN ACTIVITIES COMMITTEE: BULWARK OF SEGREGATION (n.d.); *see also* Dudziak, *supra* note 4, at 75.

Nations,[55] arising when Justice Holmes delivered the opinion of the Supreme Court in *Missouri v. Holland*.[56] Dictum in this opinion indicated that the federal government could legally ratify a treaty that could take away rights reserved to the states by the Tenth Amendment. Although *Missouri v. Holland* arose under a treaty dealing with migratory birds, it was seen to have a sweeping impact on the powers reserved to the states. One commentator argued that "[t]his language [in *Missouri v. Holland*] can really mean nothing more nor less than that an act of Congress, concededly in contravention of...[a] constitutional prohibition, may be rendered valid by enactment pursuant to a treaty on the subject ...."[57]

Formation of the United Nations heightened the concern that federal action over traditionally local issues would expand. If held to the standards of international human rights agreements, a U.S. state might be "compelled to forego its right to deal with its own social problems in accordance with its own judgment."[58] To safeguard states' rights, Senator John Bricker of Ohio proposed amending the Constitution so that no treaty could be applied domestically without specific implementing legislation.[59] In other words, the Bricker Amendment would have foreclosed the possibility of self-executing treaties. When the Senate voted on the amendment in 1954, it fell one vote short of the two-thirds necessary to amend the Constitution.[60]

During this period, the Supreme Court decided *Brown v. Board of Education*.[61] This case, although it did not analyze the application of international agreements to segregation issues, reinforced the fears of Southern states' rights advocates of federal government interference in essentially state decisions. While civil rights battles were being fought in

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55. *See, e.g.*, Christopher Steskal, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187, 193 (1992); *see generally* JOHN M. SPIVACKJ, RACE, CIVIL RIGHTS AND THE UNITED STATES COURT OF APPEALS FOR THE FIFTH JUDICIAL CIRCUIT (1990).

56. Missouri v. Holland, 252 U.S. 416 (1920) (documenting Justice Holmes' observation that: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States").

57. Eberhard P. Deutsch, *The Treaty Making Clause: Decision for the People of America*, 37 A.B.A. J. 659, 662 (1951).

58. Fleming, *supra* note 52, at 817.

59. ALFRED H. KELLY & WINFERD A. HARBISON, THE AMERICAN CONSTITUION: ITS ORIGINS AND DEVELOPMENT 558 (7th ed. 1990).

60. THOMAS FRANCK & MICHAEL GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 256 (1987).

61. Brown v. Board of Education of Topeka, 349 U.S. 294 (1954).

the courts, culminating in the *Brown* decision, African-Americans also petitioned the United Nations for relief for segregation and related issues.[62] Although the United Nations did not support the civil rights movement, the U.N. Charter, with its human rights clauses, was perceived as a vehicle for abrogating states' rights in racial issues,[63] just as the treaty in *Holland* invalidated Missouri's laws regarding migratory birds.[64]

3. Validating the Doctrine of Non-Self-Execution

Between 1947 and 1956, the make-up of the Supreme Court changed. Justice Murphy, whose concurrence in *Oyama* cited the U.N. Charter, and Justice Rutledge, who joined that concurrence, were both off the Court by 1949. They were replaced by Justices Tom Clark and Sherman Minton. In 1953, Earl Warren, who was perceived at the time as a "mildly liberal Republican," was named Chief Justice.[65] The appointment of Warren, along with Clark, Minton, and John Harlan in 1955, represented an attempt to move the Court in a direction more amenable to "legislative discretion, state police power, and society's concern for stability, security, and continuity."[66] All of these factors diminished the Supreme Court's enthusiasm for the U.N. Charter.[67] Indeed, the self-execution of the Charter had never been the majority view, although it was supported by a strong minority.

In 1955, the Court, demonstrating this lack of enthusiasm for the Charter, denied certiorari for *Rice v. Sioux City Memorial Park Cemetery*,[68] letting stand the Iowa Supreme Court's finding that the U.N. Charter was irrelevant to state law. In 1965, the Court of Appeals for the

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62. *See* Dudziak, *supra* note 4, at 93-98.

63. KELLY & HARBISON, *supra* note 59, at 582.

64. 252 U.S. at 435.

65. KELLY & HARBISON, *supra* note 59, at 569.

66. *Id.* at 568.

67. *See Oyama,* 332 U.S. 633; Lockwood, *supra* note 44; *Sei Fujii* 242 P.2d 617.

68. Rice v. Sioux City Memorial Park Cemetery, 348 U.S. 880, *aff'd per curiam, cert. dismissed,* 349 U.S. 70, 80 (1955). The case arose when a cemetery in Sioux City, Iowa, refused to bury Plaintiff's husband, a Winnebago Indian. *Id.* The contract for the sale of the cemetery plot stated, "burial privileges accrue only to members of the Caucasian race." The trial court found the clause was not void, but was unenforceable as a violation of both the Iowa and U.S. Constitutions. *Id.* However, the cemetery, could rely on the clause as a defense and such reliance would not constitute state action. *Id.* The trial court further found the U.N. Charter was irrelevant to the issue. The Iowa Supreme Court affirmed and the U.S. Supreme Court granted certiorari and the decision was affirmed by an evenly divided Court. *Id.* A re-hearing was granted but the decision was vacated and certiorari was dismissed as improvidently granted. *Id.*

Second Circuit was presented with a petition to review a determination of the Immigration and Naturalization Service (INS) in *Hitai v. Immigration and Naturalization Service*.[69] Thirteen years after the human rights provisions of the U.N. Charter were found to be non-self-executing in *Sei Fujii* by the California Supreme Court, the Court of Appeals dismissed the petitioner's claim that the INS's refusal to adjust his immigration status violated Article 55 of the U.N. Charter. The court noted in two sentences that, according to *Sei Fujii*, the U.N. Charter could not serve to overturn a domestic law. After *Hitai*, the Charter was infrequently invoked by petitioners. When it was presented as a basis for determination, the courts maintained the *Sei Fujii* rule.[70]

B. The 1980s

1. Customary International Law

Under the doctrine of *stare decisis* the courts continued to treat the U.N. Charter as non-self-executing, but starting in 1980 the Charter began to take on a role in the courts which had origins in a line of cases from the beginning of the twentieth century. In 1900, the Supreme Court decided the case of *The Paquete Habana*.[71] When war broke out with Spain in 1898, U.S. ships captured two fishing vessels sailing out of Havana under the Spanish flag. The case arose over the issue of the condemnation of the vessels and their cargoes as prizes of war. Because the Constitution commits "all cases of admiralty and maritime jurisdiction" to the federal courts[72] and because U.S. admiralty law derives from international law, the Court was accustomed to applying international law in admiralty cases.[73] The importance of *The Paquete Habana* to U.S. law is the Court's statement that "[i]nternational law is part of our law."[74] The Court also recognized the sources of international law, including the "customs and

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69. Hitai v. Immigration and Naturalization Serv., 343 F.2d 466 (2d Cir. 1965).

70. *Sei Fujii*, 242 P.2d at 617. *See Hiati*, 343 F.2d at 466. *See also* Richard B. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, 74 AM. SOC'Y OF INT'L LAW PROC. 20, 21 (1980).

71. The Paquete Habana, 175 U.S. 677 (1900).

72. U.S. CONST. art. III, § 2, cl. 1.

73. 175 U.S. at 700.

74. *Id.*

usages of civilized nations; and as evidence of these, ... the works of jurists and commentators."[75]

The Supreme Court recognized that customary international law-law not codified in a treaty, but existing because of its recognition by nations, jurists or commentators-is part of U.S. law. In recent years, courts sympathetic to the human rights goals of the United Nations have used the Charter as evidence of individual human rights generally. Other sources, such as the Universal Declaration of Human Rights or laws of individual nations, provide the specific content of individual human rights.

Customary international law is by its nature more difficult to ascertain than law codified in a treaty. However, its advantage in U.S. courts over treaty law is that the doctrine of non-self-execution does not apply.[76] This advantage crystallized in cases brought by plaintiffs invoking the U.N. Charter as evidence of the existence of individual human rights. These cases show a change in the Charter's role from a treaty specifically applicable in isolated situations to an expression of the existence of general human rights for individuals.

2. The Charter and Individual Rights

Almost thirty years after *Sei Fujii*, *Filártiga v. Peña-Irala*[77] offered a court an opportunity to utilize the U.N. Charter's human rights provisions more meaningfully than they had been in U.S. courts since Oyama. The Second Circuit Court of Appeals found in *Filártiga* that the plaintiffs had suffered a violation of their human rights as guaranteed by international law. The violation occurred in Paraguay in 1976 when Joelito Filártiga was kidnapped, tortured, and killed by Americo Peña-Irala, the Inspector General of Police in Asuncion. Joelito's death was in retaliation for his father's vocal and long-standing opposition to President Alfredo Stroessner, who had been in power in Paraguay since 1954. After Joelito was tortured and killed in Peña-Irala's home, his sister, Dolly, was taken to the home and shown the body of her dead brother. Joelito's father, Dr. Joel Filártiga, began a criminal action in the Paraguayan courts against Peña-Irala and the Asuncion police. Filártiga's attorney, who was

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75. *Id.* As further support for these sources of international law, the Statute of the International Court of Justice lists "general principles of law recognized by civilized nations" and "judicial decisions and the teachings of the most highly qualified publicists" among its sources of international law. The Statute of the International Court of Justice, *supra* note 15, art. 38.

76. Jordan J. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 HOUS. J. INT'L L. 81, 139 (1981).

77. *Filártiga*, 630 F.2d at 879-80.

later unjustly disbarred, was taken to police headquarters, chained to a wall and threatened with death.[78] During the criminal proceeding, which was still pending in 1980, the police produced a witness, Hugo Duarte, who claimed to have killed Joelito after finding him with Duarte's wife. This crime of passion was not punishable under Paraguayan law.[79] In any event, independent autopsies did not bear out this version of Joelito's death.[80]

In 1978, Dr. Filártiga, his daughter Dolly, and Americo Peña-Irala were all in the United States. When Dolly learned of Peña-Irala's presence in the United States, she reported him to the INS and he was arrested for remaining beyond the term of his visitor's visa. The Filártigas then filed a civil suit against Peña-Irala in federal district court, alleging causes of action that arose under wrongful death statutes, the U.N. Charter, the Universal Declaration of Human Rights, the U.N. Declaration Against Torture, and the American Declaration of the Rights and Duties of Man. The district court dismissed the complaint on jurisdictional grounds.[81] On appeal to the Second Circuit, however, Judge Irving Kaufman found that torture violated customary international human rights law and that U.S. courts had jurisdiction over the case under the Alien Tort Act.[82] Unfortunately, because of the original dismissal, the Filártigas were unable to delay the deportation of Peña-Irala and he was allowed to leave the country.[83]

In applying the U.N. Charter to this case, Judge Kaufman noted:

> While [the human rights provisions of the Charter have] been held not to be wholly self executing, this observation alone does not end our inquiry. For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture. This prohibition has become part of

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78. Richard P. Claude, *The Case of Joelito Filártiga and the Clinic of Hope*, 5 HUM. RTS. Q. 275, 285 (1983).

79. *Id.* at 284.

80. *Id.* at 285.

81. *Filártiga*, 630 F.2d at 879-80.

82. Alien's Action for Tort, 28 U.S.C. § 1350 (1948). "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." *Id.*

83. 630 F.2d at 880.

> customary international law, as evidenced and defined by the Universal Declaration of Human Rights ....[84]

Judge Kaufman's approach to the U.N. Charter was unique in several respects. First, he noted that the Charter was not "*wholly* self-executing" (emphasis added). In past cases, courts had dismissed the human rights provisions of the Charter as entirely non-self-executing. Second, he found that the lack of self-execution in itself did not foreclose the possibility of reliance on the Charter. Rather, Judge Kaufman utilized the Charter to lay the foundation that human rights guarantees exist in international law, then consulted other sources such as the Universal Declaration of Human Rights to determine the extent of these rights. Judge Kaufman's approach, therefore, layered international obligations one on top of the other to arrive at the international norm of freedom from torture.

Judge Kaufman noted a lack of agreement on the "precise extent" of the human rights norms that are guaranteed by the Charter. The Charter was consulted not to show the content of a specific human right, but rather that the inclusion of "human rights and fundamental freedoms" in the Charter demonstrated the presence of human rights under international law. Judge Kaufman went on to examine other U.N. declarations characterized as "specify[ing] with great precision the obligations of member nations under the Charter," noting that a "[d]eclaration creates an expectation of adherence."[85] Judge Kaufman also examined the domestic law of various nations as a means determining international norms, observing that the United States and Paraguay, as well as at least fifty-three other nations, explicitly outlawed torture in their constitutions.[86] The significance of the *Filártiga* court's analysis to U.S. domestic law was that the U.N. Charter was judicially held to be a guarantee of human rights that may be applied to an individual in the U.S. courts. Judge Kaufman thus restored the Charter, whose human rights provisions had been deemed too vague to be self-executing. Clearly, further action was needed to list and define the *specific* rights that are guaranteed under international law, but Judge Kaufman's analysis allowed measures other than domestic legislation to demonstrate the execution of a treaty. *The Paquete Habana* clearly stated that international law is part of U.S. law. Judge Kaufman used international customary law discerned from U.N. documents, treaties, domestic laws, and the writings of scholars

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84. *Id.* at 881-82.

85. *Id.* at 883.

86. *Id.* at 884.

to define the extent of the rights in the Charter and provide the necessary "legislation" to execute those provisions.

The court's decision in *Filártiga* was seen as a milestone by international human rights lawyers who had previously been frustrated in their attempts to apply international human rights law in U.S. courts.[87] But hopes that were raised by *Filártiga* were dashed four years later by *Tel-Oren v. Libyan Arab Republic*.[88] The story behind *Tel-Oren* was as horrendous as the factual backdrop of *Filártiga*. In 1978, thirteen members of the Palestine Liberation Organization (PLO) landed by boat in Israel[89] and seized two civilian buses, a taxi, and a private car, taking the passengers hostage. The passengers were tortured and eventually twenty-two adults and twelve children were killed. Eighty-seven people were seriously injured. The suit was brought by survivors and next-of-kin of those murdered, mostly Israeli citizens. The defendants included the PLO and the Libyan Arab Republic. It was alleged that Libya trained the terrorists and financed the operation.

The District court dismissed the suit as lacking subject matter jurisdiction. The D.C. Circuit upheld the dismissal with three concurring opinions. Many saw this dismissal as a retreat from the principles set forth in *Filártiga*. However, only Judge Bork explicitly denounced the *Filártiga* court's reasoning. His disagreement was based largely on the question of whether the Alien Tort Act[90] created a cause of action or simply provided for jurisdiction. Judge Bork found the Alien Tort Act was a jurisdictional statute only and went on to opine that no individual cause of action arose under the U.N. Charter (or the other treaties cited) because of the doctrine of non-self-execution. He further noted that the Alien Tort Act, drafted in 1789, must be read in light of the international law recognized at that time. Judge Robb did not explicitly disagree with the *Filártiga* court, but found that *terrorism* as a crime is not clearly defined in international law. Asserting that the executive branch should more appropriately declare the U.S. position on the crime of terrorism, he found the case nonjusticiable under the political question doctrine.[91] Judge Edwards, however, agreed with "the legal principles established in *Filártiga*,"[92] although he found a lack of consensus in the international community that terrorism committed

87. *See, e.g.*, Claude, *supra* note 78.

88. 726 F.2d at 775-827.

89. The *Tel-Oren* court did not address the evidence, if any, that proved the participation of the PLO in this attack. *Id.* at 775.

90. 28 U.S.C. § 1350 (1948).

91. For a definition of the political question doctrine, see *supra* note 6 .

92. *Tel-Oren*, 726 F.2d at 776.

by a non-State actor (the PLO) was a violation of international law. (Libya was only accused of financing and training the terrorists, not of participating in the event.)

In spite of the decisions in *Tel-Oren*, the U.N. Charter is still seen as a source of international human rights law in U.S. courts. Although the Charter is not universally accepted by jurists, the reasoning of the Charter's most vociferous opponent in *Tel-Oren* is not widely accepted. Judge Bork found the U.N. Charter non-self-executing and further claimed that the Alien Tort Act, enacted in 1789, gave jurisdiction only if the claimed violation would also have been an international law violation recognized in 1789. Judge Bork consulted Blackstone and found three possible offenses against the law of nations: violations of safe conduct, infringement of the rights of ambassadors, and piracy.[93] As Judge Edwards pointed out, this construction ignored the precedent established in *The Paquete Habana*, for applying international law as it exists "at the present day."[94] On its surface, *Tel-Oren* appeared to cut against the *Filártiga* principles. However, the factual differences in the cases as well as the dissimilarity of the torts claimed (torture and terrorism) make the two cases easily distinguishable. Certainly *Filártiga*, which has been questioned by subsequent courts, does not necessarily establish precedent. Nonetheless, one recent case in particular indicates that the *Filártiga* doctrine is still good law.

The U.S. District Court for the Northern District of California decided *Forti v. Suarez-Mason*[95] on October 6, 1987, three years after the *Tel-Oren* court cast doubt on the *Filártiga* principles. Once again, the facts of the case tell a disturbing tale. In the late 1970s, in Argentina, both left-wing and right-wing extremists waged a war of terrorism against suspected subversives. In response to this "dirty war," President Peron declared a state of siege in 1975 and gave the military the responsibility for suppressing terrorism. Suarez-Mason was Commander of the First Army Corps. In 1976, the Army ousted Peron and took control of the country. The state of siege continued, and between 1976 and 1979 an estimated 12,000 people disappeared at the hands of the military. In 1984, Raul Alfonsin was elected President of Argentina and the government began investigating human rights abuses, bringing criminal charges against offenders. Suarez-Mason was one of those charged, but he fled the

93. *Id.* at 813.

94. *The Paquete Habana*, 175 U.S. at 717.

95. *Forti*, 672 F. Supp. at 1531.

country. In 1987, he was arrested in California and while awaiting extradition was served with the complaint in this case.[96]

The petition was filed by Alfredo Forti and Debora Benchoam. The complaint was based on activities that took place in the area of Argentina commanded by Suarez-Mason. On February 18, 1977, military officials seized Alfredo along with his mother and four brothers. Although no charges were ever filed against them, the five brothers were held in detention for six days, before being released-blindfolded-on a street in Buenos Aires. Their mother was not released and in 1987 her whereabouts were still unknown. An Argentine court held the First Army Corps, commanded by Suarez-Mason, responsible for the seizure of the Forti brothers and the disappearance of their mother.[97]

The second petitioner, Debora Benchoam, was sixteen when she and her seventeen year old brother were taken from their home by the military in 1977. Debora was held by the authorities for more than four years. While imprisoned, she was blindfolded, handcuffed, and deprived of food and clothing; one of her guards attempted to rape her. As a result of international and domestic pressure, she was finally granted the "right of option" which allowed her to leave Argentina. The body of Debora's brother was returned to his family the day after his abduction. He had been severely beaten and died of bullet wounds. Both plaintiffs accused Suarez-Mason of torture, prolonged arbitrary detention, summary execution, causing disappearance, and cruel, inhuman, and degrading treatment.[98]

The *Forti* court found that the Alien Tort Act provided jurisdiction in the case, following the reasoning of the *Filártiga* court and Judge Edwards in *Tel-Oren*. The court noted this analysis is the "better reasoned and more consistent with principles of international law. There appears to be a growing consensus that § 1350 provides a cause of action for certain 'international common law torts.'"[99] The court found that the "proscription [against official torture] is universal, obligatory and definable." The court also found causes of action for prolonged arbitrary detention and summary execution, but could find no international consensus on prohibitions against causing disappearance or cruel, inhuman and degrading treatment.[100] Conspicuously absent from the court's analysis

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96. *Id.* at 1536.

97. *Id.* at 1537.

98. *Id.*

99. *Id.* at 1539.

100. *Forti*, 672 F. Supp. at 1541-43.

is any mention of the U.N. Charter. Perhaps the court's silence meant that the Charter was so clearly understood to guarantee individual human rights that it need not even be argued.[101]

C. The 1990s

The trend of relying on the U.N. Charter to provide statements of the basic, underlying principles of international law as they relate to individuals has continued. In *U.S. v. Verdugo-Urquidez*,[102] the court was required to interpret an extradition treaty between the United States and Mexico.[103] Since a legal document was available, the court did not need to perform an exhaustive search for customary principles of international law. Verdugo-Urquidez had been abducted in Mexico by Mexican citizens working on behalf of the U.S. government. He was brought to the United States and tried and convicted in the murder of a U.S. Drug Enforcement Agent in Mexico. He appealed his conviction on the ground that the United States had violated their treaty obligations with Mexico and therefore could not exercise jurisdiction over him. The Court of Appeals overturned his conviction.[104] The U.S. government argued that since the extradition treaty did not specifically forbid abductions, their actions did not violate the treaty. In rejecting this argument, the court turned to the U.N. Charter as proof that the "territorial integrity of a sovereign nation may not be breached by force."[105] While territorial integrity is not usually thought of as an individual right, in this instance it provided the rationale for proving that the extradition treaty and hence Verdugo-Urquidez's individual rights had been violated.

In 1992, the Supreme Court was called upon to decide this issue in *U.S. v. Alvarez-Machain*.[106] Under the same extradition treaty and in response to the same murder in Mexico, the U.S sponsored the abduction of another Mexican national. The Supreme Court found, contrary to the *Verdugo-Urquidez* court, that the United States had not violated the

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101. In a recent case dealing with the international laws of the sea, the Court of Appeals for the Second Circuit noted, "the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas." Amerada Hess v. Argentina, 830 F.2d 421, 424 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989), *reprinted in* 26 I.L.M. 1374, 1378 (1987).

102. 939 F.2d at 1341.

103. Extradition Treaty Between the United States of America and the United Mexican States, May 4, 1978, 31 U.S.T. 5059.

104. *Verdugo-Urquidez*, 939 F.2d at 1341.

105. *Id.* at 1352.

106. *Alvarez-Machain*, 112 S. Ct. at 2188.

extradition treaty because the treaty did not specifically prohibit the abductions.[107] The Court noted that the defendant raised the issue that the U.N. Charter should inform the interpretation of the extradition treaty. However, the Court did not reach the issue of sovereign territorial integrity, a State claim, noting instead that Alvarez-Machain did not claim that the U.N. Charter provided him any *individual* rights in this context.[108] The Court examined closely the language and purposes of the extradition treaty itself, and concluded that the determination of a treaty violation was better left to the diplomatic offices of the two governments.

Although the majority in *Alvarez-Machain* glossed over the issue of territorial integrity presented by the U.N. Charter, the three dissenting Justices were not so dismissive. Justice Stevens, joined by Justices Blackmun and O'Connor, mentioned the U.N. Charter only once in his dissent, in a footnote. However, that footnote was one of at least five references in the dissent to the doctrine of sovereign territorial integrity.[109] Just as the *Forti* court's failure to mention the Charter may be construed as a sign of its acceptance, the relegation of the Charter to a footnote in this dissent may also indicate acceptance of the Charter's authority. Justice Stevens found no need even to argue whether the Charter provided an authoritative statement of the principle of territorial sovereignty.

III. CONCLUSION

The context of *Alvarez-Machain* is similar to *Sei Fujii* and *Tel-Oren*. All of these cases followed precedents (*Oyama*, *Filártiga*, and *Verdugo-Urquidez*) that were milestones in incorporating international law via the U.N. Charter into U.S. domestic law. On the surface, all three of the subsequent cases appear to restrict the application of the U.N. Charter outlined by the precedents. *Sei Fujii*, with its long-unquestioned doctrine of non-self-execution, especially operated to restrict the application of the Charter principles to individual rights in the United States However, the historical context proves these cases to be less damaging to applying the Charter than they first appeared. It is premature to assess the impairment to applying Charter principles caused by *Alvarez-Machain*, as it was decided just two years ago. The earlier decisions, however, as evidenced by *Forti*, convey that the U.N. Charter is not merely a "moral commitment

107. *Id.* at 2193.

108. *Id.* at 2196.

109. *Id.* at 2198, 2199, 2201, 2202, 2206 (Stevens, J., dissenting).

of foremost importance,"[110] but a document that "guarantee[s] [human rights and fundamental freedoms] to all ...."[111]

In 1952, the Supreme Court of California was influenced by political concerns to back away from the commitment to the United Nations expressed by four Justices of the Supreme Court in *Oyama*. But over the last four decades, the Court has slowly regained its commitment to the United Nations and to the U.N. Charter as an authoritative document. What is the context of this renewal? The changing government and public opinion toward the United Nations may be traced back to the late 1960s. As the Commission to Study the Organization of Peace noted, in 1968, "[i]t cannot be doubted that the provisions of the Charter and the continuous worldwide debate about their implementation have brought a change in the moral and political climate ...."[112] In 1977, speaking before the U.N. General Assembly, President Jimmy Carter said that "no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world."[113] President Carter renewed the drive for the United States to ratify the major human rights treaties, although this was not accomplished during his presidency.[114]

In 1979, the U.S. Court of Appeals for the Second District requested an *amicus curiae* brief from the U.S. Department of Justice in the *Filártiga* case. The Department of Justice, with the input of the Department of State, delineated the U.S. position in regard to the U.N. Charter. The brief noted that the Charter "imposed on U.N. members a general obligation to promote `universal respect for, and observance of, human rights and fundamental freedoms ....'" [115] The brief went on to state that "in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts."[116]

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110. *Sei Fujii*, 242 P.2d at 517, 622.

111. *Filártiga*, 630 F.2d at 881.

112. COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 4 (1968).

113. Cyrus Vance, Law Day Speech on Human Rights and Foreign Policy, *reprinted in* THE HUMAN RIGHTS READER 300 (Walter Laqueur & Barry Rubin eds., 2d ed. 1989).

114. *See supra* note 17.

115. Memorandum for the United States as Amicus Curiae, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 591 (1979) (footnote omitted).

116. *Id.* at 603.

The Reagan and Bush administrations have also participated in the legitimation of the United Nations and the Charter. Under the Reagan Administration in 1988, the Senate ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the first human rights treaty ratified by the United States since the U.N. Charter.[117] In a very different context which may have called into question U.S. allegiance to human rights *per se* but reaffirmed U.S. commitment to the United Nations, President Bush chose to work within the framework of the U.N. Security Council in pursuing military intervention against Iraq.[118]

The expansion of the U.S. commitment to the United Nations and the Charter may be too recent to forecast a change in international law. The presidential campaign and election of Bill Clinton in 1992 reveal growing discontent in the United States with concern over foreign affairs.[119] However, since the founding of the United Nations in 1945, U.S. acceptance of the U.N. Charter has increased, although that growth has not been without its waning periods. While the U.S. public is weary with government preoccupation with foreign matters, the safeguarding of human rights for all individuals, as expressed by the U.N. Charter, appears to be firmly entrenched in the U.S. court system. The next few years may not see a burgeoning of the human rights recognized by the courts, but it appears unlikely that the courts will retreat from the Charter and its dictates.

While fears of communism and diminution of states' rights hobbled the U.N. Charter in U.S. courts in the past, another concern is raised today. With increasing respect for the diversity among cultures, the question of the appropriateness of a U.S. court ruling on matters pertaining to foreign nationals and foreign governments arises. Fears of paternalism by the United States are not unfounded. However, the application of the U.N. Charter in U.S. courts also presents opportunities that were not available in the past. Although the cases discussed herein dealt only with foreign nationals, the growing acceptance of customary international human rights law as evidenced by the U.N. Charter may provide relief for

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117. *See supra* note 17. *See also Reagan Oks Genocide Treaty*, ST. LOUIS POST DISPATCH, Nov. 5, 1988, at 1B.

118. *See, e.g.*, Mark Potts, *Crisis in the Gulf: Iraq's Invasion of Kuwait*, WASH. POST, Aug. 7, 1990, at A1; Elaine Scioline, *Peace Keeping in a New Era: The Super Powers Act in Harmony*, N.Y. TIMES, Aug. 28, 1990, at A13.

119. *See, e.g.*, Michael Kranish, *Little Political Gain Seen for Bush at G-7 Summit*, BOSTON GLOBE, July 5, 1992, at A9; Leslie H. Gelb, *They Agree to Disagree, Bush Creates a Fake Fight to Avoid a Real One*, DETROIT FREE PRESS, July 31, 1992, at 11A.

U.S. citizens in the future. As noted above,[120] African-Americans attempted to solicit the help of the United Nations in the struggle for desegregation. Similarly, Native American tribes have filed formal complaints with the U.N. Human Rights Commission relating to issues of self-determination and property rights. Although the United Nations has taken no action on these petitions,[121] the U.S. courts may soon determine such claims by U.S. citizens based on international law. The closest a U.S. court has come to taking this type of action was in *Rodriguez-Fernandez v. Wilkinson*.[122] Rodriguez-Fernandez was not a U.S. citizen, but a Cuban seeking refugee status. While in Cuba, he had been convicted of burglary and theft. Based on these convictions, the I.N.S. ordered him deported, but Cuba would not accept him. He was held in a federal penitentiary, pending his acceptance by Cuba. He filed a writ of habeas corpus, on the grounds that his indefinite detention violated the Constitution and international human rights law. The district court found that Rodriguez-Fernandez, as an excludable alien, could not claim Constitutional protection, but that his detention violated customary international human rights norms. On appeal, he was ordered released as a matter of domestic law.[123] The court of appeals did not as obviously acknowledge the claim as based on international law, but nonetheless noted that their decision was consistent with international law.[124]

As a matter of international law, domestic courts have long been seen as an appropriate enforcement mechanism. Indeed, "[g]iven the dearth of truly effective human rights fora, national courts are the primary guarantors of the rights of man [sic]."[125] Certain violations of international law are universal offenses, to be tried by a State even when they occur outside its territory. Piracy and genocide are such offenses;[126] the *Filártiga* opinion adds torture to this list. The lack of international fora make this use of national courts necessary. "The cause of international law and justice demands application of international law by national courts."[127] The reliance on the U.N. Charter and customary norms of international law by U.S. courts in recent decades expresses the evolution of international law

120. *See* Dudzian, *supra* note 4, at 93-98.

121. ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW 1286-87 (3d ed. 1991).

122. Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980).

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

124. *Id.* at 1390.

125. Lillich, *supra* note 31, at 116.

126. Amerada Hess, 830 F.2d at 421.

127. Josef Rohlik, Filártiga v. Peña-Irala: *International Justice in a Modern American Court?*, 11 GA. J. INT'L & COMP. L. 325, 332 (1981).

and the importance of U.S. compliance with such law. The potential for chauvinistic application of human rights norms certainly exists, but the understanding that international law applies within the borders of the United State is a decidedly non-paternalistic stance. While application can be problematic and approaches are not universal, the United States is a member of the world community and as such is subject to international law. This historical analysis of the U.N. Charter and the U.S. courts denotes an increasing awareness of the obligations and duties of the United States as a member of the world community.