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Lori Fisler Damrosch
Columbia Law School, damrosch@law.columbia.edu

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ration of Human Rights[39]—all of which recognize a right to privacy—have generated a rule of customary international law cognizable by an English court. Surely a municipal court faced with lacunae in its own common law in the field of fundamental rights is entitled to enlist the aid of treaties reflecting generally recognized rights, either on the ground that these rights have become part of customary international law or because they provide evidence of widely accepted principles of law, worthy of incorporation into a fertile common law system. Sir Robert Megarry's judgment in *Malone* is in many ways reminiscent of the majority judgment of the International Court of Justice in the 1966 *Southwest Africa Cases*[40] in which the court rejected any suggestion that it might engage in the creative exercise of "filling in the gaps" in the international legal order.[41] This judicial philosophy has been widely condemned at the international level, and one hopes that it will not be resurrected at the domestic level.[42]

Conclusion

Current developments in human rights law in the United States and Britain demonstrate that the lacunae of municipal law are susceptible to international norms and that an innovative judiciary may contribute substantially to the unity of international law and municipal law in the promotion of human rights. International lawyers have an important role to play in this process as domestic lawyers, not versed in international law, will often fail to recognize the opportunity for the application of international human rights law when it arises. The message that emerges from this discussion is clear: international lawyers are as much needed on the domestic legal scene as they are in the international legal arena.

Application of Customary International Law by U.S. Domestic Tribunals

*by Lori Fisler Damrosch**

In recent years there has been a significant expansion of the number and kinds of cases in U.S. courts raising issues of customary international law. U.S. courts are increasingly asked to enforce international norms of behavior against foreign governments, state and local governments, and indeed the U.S. Government itself. To a greater and greater extent the courts themselves have become actors on the international scene: in the view of one party to a lawsuit, judicial or quasi-judicial acts may threaten to violate international law, while in the view of another party those same sorts of acts can contribute affirmatively to the development and enforcement of international law norms.

Generally speaking, the legislative and executive branches of government have welcomed the growing involvement of the courts in customary interna-

*Of the Connecticut, District of Columbia and New York Bars.

[39]Article 12.

[40]1966 I.C.J. 6.

[41]*Id.* at 48.

[42]*See* J. Dugard, The Southwest Africa/Namibia Dispute 357 (1973).

tional law issues,[1] out of a conviction that the courts will be reaching the "right" results on the merits of the issues and will thereby be contributing in a positive fashion to the progressive development and application of international law. Does recent experience bear out this judgment? One way to approach the question is to see whether judicially enunciated rules of international law match up with the pronouncements of the Department of State on the same issues. As a tentative hypothesis, there should be a high degree of congruence between, for example, a U.S. Government amicus brief and the opinion of a court of appeals on a customary international law point.

It is difficult to sustain a comparable hypothesis with respect to treaty law, in light of a recent pattern of judicial skepticism about Executive Branch submissions on the meaning of treaties. A typical passage from a court opinion interpreting a treaty will begin with the acknowledgement that "the views of the State Department are ordinarily entitled to great weight," but then will go on to say in words or substance that "we find them wholly unpersuasive in the present case." In several recent extradition cases, for example, the courts have had before them affidavits from State Department negotiators and other expressions of the State Department's position, but have reached precisely the opposite conclusion from the Department on both the meaning of the treaty and its application to the pending case.[2] Another example is the series of cases on the relationship between U.S. equal employment laws and the treaty of friendship, commerce and navigation with Japan.[3] The judicial adjectives used to describe the State Department's various communications on the meaning and application of the treaty ranged from "entirely conclusory"[4] to "largely insignificant"[5] to "an aberration."[6]

What explains the courts' less-than-deferential attitude toward the Department's views on treaty interpretation? Apparently, the courts perceive the task of treaty interpretation as essentially no different from statutory or contractual interpretation, which is their own area of expertise. As with a statute or contract, they begin with the text and attempt to discern its "plain meaning," if any. If the meaning is ambiguous, they look to supplementary sources and methods analogous to the interpretive aids for statutes and contracts. A treaty, like a contract, has a negotiating history, which is frequently reflected in a documen-

[1]The Foreign Sovereign Immunities Act of 1976 gives a mandate to the courts to decide certain customary international law issues that had previously been left to the executive branch. *See* 28 U.S.C. §§1602, 1605 (a) (3), 1610 (a) (3) (1976).

For other recent indications of support from the legislative and executive branches for judicial involvement in customary international law issues, *see, e.g.*,Statement of Senator Mathias introducing S. 1434 (the "International Rule of Law Act"), 127 Cong. Rec. S. 7120-21 (97th Cong., 1st Sess., June 25, 1981); Memorandum for the United States as Amicus Curiae in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir.), *reprinted at* 19 ILM 585 (1980); *cf.* Letter of Monroe Leigh, Legal Adviser, reprinted as Appendix 1 to Opinion of the Court in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706-11 (1976).

[2]In Galanis v. Pallanck, 568 F.2d 234, 239 (2d Cir. 1977), the court characterized the Department's statement as both "inconclusive" and "conclusory," and cited an earlier extradition case, Greci v. Birkners, 527 F.2d 956, 960 (1st Cir. 1976), in which the views of the Department had been described as "contrary to both the plain language of the treaty and the available history."

[3]*See, e.g.*, Avagliano v. Sumitomo Shoji American, Inc., 638 F.2d (552) (2d Cir.), *cert. granted*, 102 S.Ct. 501 (1981). The case was reversed June 15, 1982, *id.* at 2374, after Ms. Damrosch delivered her remarks.

[4]Spiess v. C. Itoh & Co. (America) Inc., 643 F.2d 353, 372 (5th Cir. 1981) (Reavley, J., dissenting).

[5]*Id.*

[6]*Id.* at 358 n.3 (majority opinion), 372 (dissent).

tary record. Like a statute, it has a legislative history of committee reports, hearings and statements by draftsmen and sponsors. Since courts consider themselves to be indisputable experts in analyzing these sorts of materials, they tend to view the State Department's role in elucidating the meaning of a treaty text as no more authoritative than that of the agency that drafted a statute or an attorney who negotiated a contract. Perhaps the Department can be of some assistance in providing otherwise inaccessible primary source materials; but once this material is made available, the courts process it in much the same way as material put into the record by other litigants. Moreover, the courts seem to have little sympathy or patience with the forces that might motivate the Department to change its mind about the meaning of a treaty text in the light of international experience,[7] to generate a new record of diplomatic correspondence while a case is sub judice[8] or to withhold on asserted national security grounds the classified documents that might be relevant to proving or disproving its position.[9]

By contrast, when an issue of customary international law is involved, the courts tend to show a greater willingness to follow the views of the State Department—at least when those views are clearly and persuasively presented. The *Filartiga* case is a recent example.[10] Possible explanations for the higher degree of deference in customary international law matters are the relative (or perceived) inaccessibility of source materials and judges' relative unfamiliarity with the methods for divining the existence of customary international law rules. Furthermore, the courts probably recognize that by following the Department's lead with respect to the content of customary international law rules, they can help develop international law in directions favorable to overall U.S. interests.[11]

If there is a dichotomy between customary international law and treaty law in the extent to which courts are willing to give weight to the State Department's views, it could have curious ramifications. In the postwar period, the subject-matter fields that were once the province of customary international law have one by one given way to treaty law, largely through the development of multilateral conventions enunciating the black-letter rules where once upon a time there was only unwritten custom.[12] Bilateral treaties cover an equally wide range of traditional customary international law subjects, particularly in the area of

[7] *See* Spiess v. C. Itoh & Co., *supra* note 4; Avigliano v. Sumitomo, *supra* note 3.

[8] Avigliano v. Sumitomo, *supra* note 3.

[9] The problem of classified source material came up in the Iranian claims and assets litigation between November 1979 and January 1981, when the Department was hampered in taking any positions on the merits because of the continuing detention of American hostages in Iran and the pendency during part of that period of highly sensitive negotiations for their release. Some judges were willing to accept submissions in camera or under seal, *see, e.g.,* New England Merchants Nat'l Bank v. Iran Power Gen. & Transmission Co., 502 F.Supp. 120, 133-34 (S.D.N.Y. 1980), *remanded,* 646 F.2d 779 (2d Cir. 1981), but others either were reluctant or refused outright. *See* IRANIAN ASSETS LITIGATION REPORTER, 1617-18 (Oct. 17, 1980).

[10] Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980). The government's amicus brief, on which the court drew heavily, is reprinted at 19 ILM 585 (1980).

[11] *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432-33 (1964).

[12] *See, e.g.,* Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; Vienna Convention on the Law of Treaties, *reprinted at* 63 AJIL 875 (1969), 8 ILM 679 (1969).

state responsibility to aliens.[13] Many of these purport to codify or clarify customary international law by reducing to written rules the norms derived from custom.

Interestingly, the displacement of unwritten custom with black-letter texts may have the unintended effect of increasing the frequency with which domestic courts are called upon to apply the standards we think of as "customary." Treaty texts are easily accessible to potential litigants—much more so than the sources of customary international law—and can be readily invoked in pleadings and proceedings before domestic tribunals. Our constitutional provision giving treaties the status of the supreme "law of the land" will not be overlooked.[14] And correctly or not, both litigants and courts will have a tendency to think that verbal formulations in treaties can be parsed like the terms of a statute or contract, even though the customary norm involved may be ambiguous or evolving.

As customary international law issues arise more frequently in domestic tribunals, it will become increasingly important to improve the quality of the dialogue between the State Department and the courts. It may be helpful for the Department to take a more activist approach toward participation in international law cases.[15] This does not necessarily mean that the Department should intervene in every lawsuit that raises an international law issue; but when the Department does decide to take a position in a brief or correspondence, it should avoid the conclusory format of some of its past statements and instead document its reasoning and conclusions with sufficient detail so that the courts will be persuaded rather than insulted.

On the other hand, the courts need to understand the factors that sometimes hamper the Department in addressing certain issues publicly or with full effectiveness. Among these are classified source material, the pendency of a crisis or an ongoing diplomatic dialogue. All of these were present in the Iran crisis, but for some reason the District Courts seemed to want to barge ahead on difficult legal issues of great sensitivity, either without the benefit of the Department's views or in apparent disregard of the views that had been expressed.[16] Perhaps it is significant that the international law issues in those cases were cast in terms of statutory or treaty interpretation rather than customary international law, even though concepts that evolved through custom were necessarily impli-

[13] *See, e.g.*, Treaty of Amity, Economic Relations, and Consular Rights with Iran, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93.

[14] U.S. Const. art. VI. RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) 131 (Tent. Draft No. 1, 1980), takes the position that customary international law enjoys the same status as treaty law for purposes of Articles III and VI of the Constitution.

[15] Significantly, courts have frequently noted the absence of a Department position in cases raising important international issues. *See, e.g.*, Fernandez v. Wilkinson, 505 F.Supp. 787, 795 n.1 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981). There can be many reasons for nonparticipation, such as shortage of personnel in the Office of the Legal Adviser to research and brief points of law arising in litigation between private parties, or the difficulty in obtaining interagency clearance on a statement of position. On occasion, courts have inferred (sometimes incorrectly) that Department silence indicates lack of concern over points at issue. *See Communications to Courts, reprinted at* 74 AJIL 665-67, 928-29 (1980).

[16] *See, e.g.*, American International Group, Inc. v. Islamic Republic of Iran, 493 F.Supp. 522 (D.D.C. 1980); New England Merchants Nat'l Bank v. Iran Power Gen. & Transmission Co., 502 F.Supp. 120 (S.D.N.Y. 1980), *remanded* 646 F.2d 779 (2d Cir. 1981).

cated:[17] the District Courts may have considered themselves perfectly capable of interpreting a statute or a treaty on their own timetables, with or without the Department's participation. This kind of obliviousness is damaging to both the diplomatic and the judicial process and underscores the need for an improved two-way dialogue between the branches, especially when the consequences of a ruling can have international ramifications far beyond the particular case.

In conclusion, U.S. tribunals have an increasingly important role to play in the development and application of customary international law. Their effectiveness in this role will depend, in part, on the extent to which they are persuaded by the logic of the State Department's positions. No longer can a State Department "suggestion" dictate the outcome of a case. The challenge for the Department will be to improve its advocacy, and for the courts to enhance their appreciation and understanding of international legal problems.

COMMENTS BY JOHN CLAYDON*

The other panelists have provided a good picture of how customary international law can be incorporated into domestic law. My focus will be relatively narrow and will be primarily on two potential growth areas. The first is indirect incorporation: the use of international norms as an aid to interpret domestic law—to fill in gaps and resolve ambiguities. My basic argument is that there exists a discernible trend in this direction and that an important element of this trend is a tendency on the part of judges not to be too particular about establishing the international legal status of the norm as custom or, for that matter, anything else. If this is the case, then a point of entry into domestic law is provided for the plethora of guidelines, recommendations, codes of conduct, declarations, etc. emanating from a wide variety of international organizations and possessing uncertain or doubtful legal status. Second, there is another potentially important function for both "hard" and "soft" law that is currently underutilized: its application, in some legal systems at least, to police otherwise enforceable domestic norms or the laws and judgments of other states, by denying them effect.

In many legal systems, custom, like treaties, can be used to supplement domestic law, whether constitutional, statutory or common law. As Professor Dugard has pointed out, a major obstacle, at least in traditional theory, to the use of custom for this purpose is that it can be difficult to prove custom. On the other hand, as he also notes, once past this hurdle the position of custom is stronger because, unlike an unincorporated treaty, it forms part of the law of the land. This is particularly true in the case of legal systems following the British rule that all treaties are non-self-executing and need implementing legislation to receive direct incorporation. Even though there is no theoretical problem in the British system if the ratified treaty is only being used as an aid to interpret domestic law, there is still uncertainty on the part of British judges who are

[17]In American International Group, *supra* note 16, the District Court treated the issue of nationalization without adequate compensation as an issue of both treaty law and customary international law. 493 F.Supp 524-25. In New England Merchants Nat'l Bank, *supra* note 16, the court decided novel questions under both the Foreign Sovereign Immunities Act and the Treaty of Amity with Iran, characterizing its own decision as "no more than that traditionally held."

*Faculty of Law, Queen's University, Ontario.