11

Interpenetration of International and National Systems: Internal Protection of Human Rights by States

Human rights violations occur *within* a state principally in relations between a government and its own citizens, rather than on the high seas or in outer space outside the jurisdiction of any one state. Ultimately, effective protection must come from within the state. The international human rights system does not place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of human rights—although the recent intervention in Somalia made a modest and confused step in that direction in a chaotic situation where a central organized government had all but ceased to exist. Rather the international system seeks to persuade or pressure states to fulfill their obligations through one or another method—either observing national law (constitutional or statutory) similar to the international norms, or making the international norms themselves part of the national legal and political order.

Such is the focus of Chapter 11, which falls into three sections. *Section A* describes the adoption by many states during the last half century of constitutions informed by liberal political (and often economic) premises and frequently declaring human rights. It notes the many relationships between such state constitutions and the human rights movement. *Section B* inquires how states 'internalize' *treaty* norms—that is, how they incorporate the provisions of human rights treaty within the state's legal and political order so that they can be implemented and enforced by state authorities. *Section C* then turns to the internalization of *customary* international law. It examines distinctive legislation with the United States, the Alien Tort Statute, to explore how courts have used customary human rights norms in order, in a sense, to 'enforce' them against foreign violators. That third section thus provides a bridge to the themes of Chapter 12.

A. THE SPREAD OF STATE CONSTITUTIONS IN THE LIBERAL MODEL

This section examines briefly one of the important phenomena in the fifty years of the human rights movement: the spread among many states of constitutions expressing the principles of political (and sometimes economic) liberalism, and often declaring human rights. The tradition and history of many states adopting such constitutions have often involved neither liberal principles nor espousal of human rights.

One can approach this phenomenon from two perspectives. First, the adoption of liberal-style constitutions (or at least constitutions with a significant liberal component) can be seen as a *horizontal* trend among states, a consequence of the influence and pressures exerted by powerful countries within the liberal constitutional tradition like the United States. For the states achieving independence upon decolonization and adopting constitutions in the liberal model, the primary influence may have been the internal constitutional and political orders of the former colonial powers.

A second perspective stresses the links between the spread of such types of constitutions and the achievements of the human rights movement in constructing an international system of norms, institutions and processes. One could describe these links and the related influence and pressure as *vertical* rather than horizontal in character, since they come from international law and institutions 'above' the state rather than from other states.

Both horizontal and vertical influences and pressures were simultaneously at work in this process of state drafting of constitutions. They were indeed complexly intertwined, for the very states exerting a 'horizontal' influence were simultaneously creators and members of the international system exerting pressure from above. International human rights figured ever more pervasively in the discourse of international relations and made demands on states that in many respects could best be met through constitutions assuring citizens of the state conduct required by the treaties. Those constitutions both 'borrowed' from other states and revealed, through their governmental structure and declarations of rights, the influence on them of the UDHR and the two basic Covenants.

COMMENT ON CONSTITUTIONS AND CONSTITUTIONALISM

The range of constitutions

Most states of the world (the United Kingdom being the most striking exception) have a formal, written constitution. By itself, that statement says very little. A 'constitution' refers simply to a basic state document that organizes a

political system by, for example, setting forth the basic institutions of government. It need not follow any particular structure, impose or reflect any particular political or economic system or ideology, or prescribe any particular form of government. It may be democratic or authoritarian, oriented to private property and markets or to collective ownership and central direction, multi-party or one-party, attentive or not to individual rights, and so on.

Constitutions vary radically in their practical significance and symbolism as well as content. At one extreme, entire instruments or particular provisions may be meant to be hortatory and aspirational rather than to form part of the state's legal system. Those aspirations may represent genuine goals to be worked toward, or amount to sham and pretense, a shallow disguise of radically different and less admirable state purposes and methods. At the other extreme, constitutional provisions may be judicially enforceable against the government in actions brought by private parties, even to the extent of judicial review—that is, testing legislation against constitutional norms, and invalidating legislation found to violate them.

From a different perspective, a constitution may be broadly understood by the people to be insignificant, a document freely manipulated by government. Or it may be understood as an authoritative charter or even solemn covenant between the government and people. If the latter, it will tend to be more stable and resistant to change; the amendment process will be correspondingly complex, demanding and time-consuming.

Constitutionalism

Scholars frequently use the term 'constitutionalism' to describe a particular genus of constitutional system. This fluid term is put to many different uses; there is no consensus over exact content, although most of the scholarly discourse would agree on the core meaning. Constitutionalism in this Comment refers to a constitutional system that falls within the liberal tradition (see the Comment on liberalism at p. 187, *supra*) and possesses many characteristics of the democratic state. (See the Comment on democratic government at p. 658, *supra*). Often constitutionalism is implied when one speaks of the spread of constitutions among states as a part of the human rights movement.

Constitutionalism refers broadly to the following characteristics of a constitution, found among states to a greater or lesser degree, in different combinations and with different emphases. Often based on a conception of popular sovereignty, the constitution assures accountability to the people through a range of techniques and institutions, the most important being the requirement of periodic and genuine elections in a multi-party system. Consistent with the liberal tradition, the constitution would control and limit the powers of government in several different ways, including a scheme of checks and balances through a separation of powers that must include an independent judiciary. That judiciary becomes the essential guardian of the rule of law, in the sense that the executive (or 'government') must act within established legal

frameworks and according to established processes. The legality and legitimacy of that action must be subject to judicial review.

Constitutionalism implies that the constitution is a 'real' rather than merely hortatory instrument, truly the fundamental law or charter—in the words of the United States Constitution, 'supreme law.' It thus possesses a distinctive solemnity and force. It may come to symbolize the nation itself.

Constitutionalism generally involves a declaration of the individual rights associated with the liberal tradition, in the manner of the Bill of Rights of (the first ten amendments to) the U.S. Constitution. These rights are indispensable to setting limits to governmental action, particularly when they are coupled with judicial review of the constitutionality of legislation. Judicial review itself could be seen as a desired but not essential element of the constitutional scheme.

The list of rights declared will vary among states. For example, in the constitutional history of the United States, the property right protected by the Fifth and Fourteenth Amendments to the Constitution has played a large and influential role. That has been much less the case in many states whose constitutions now fall within the liberal tradition.

Two polar illustrations: the P.R.C. and South Africa

Since the People's Republic of China was founded in 1949, it has had five constitutions, the last three effective in 1975, 1978 and 1982.

> Each of these constitutions has signaled a change in power or a change in the economic or political objectives of the Chinese leadership. . . . The judiciary had virtually no significant role in this constitutional evolution. . . . [E]ach constitution has been premised on the belief that rights are granted to citizens by the state. Rights are not derived from human personhood, nor are they enshrined or fixed within the constitution itself. This premise or belief allows the state to change both the quality and quantity of a citizen's rights whenever it is believed necessary because the existence of such rights does not limit the power of the state. Consequently, each constitution has either implicitly or explicitly permitted the state to define the nature of a citizen's rights by legislation. . . . [T]he U.S. constitutional principle of checks and balances between the traditional branches of government (executive, judicial, and legislative) is absent.[1]

The Preamble to the 1982 Constitution states four principles to which the state is committed, including the people's democratic dictatorship, Mao Zedong Thought and the leadership of the Communist Party. In several respects that Constitution implemented the changes in economic policy that have subsequently led to a limited market sector with individual ownership of

[1] Ralph Folsom, J. Minan and L.A. Otto, Law and Politics in the People's Republic of China 56 (1992).

property complementing collective property and central direction. Like its predecessors, it rejected or changed the content of some prior constitutional rights. For example, it eliminated the provision in the 1975 Constitution for 'speaking out freely . . . and writing big character posters [as] new forms of carrying on socialist revolution created by the masses of the people.'[2]

The second illustration is a polar one, of a state in transition from a racist regime to constitutionalism. Perhaps no change in regime and principles has been as sudden and dramatic as that in South Africa. After the collapse of apartheid came the Constitution of the Republic of South Africa, an interim document adopted in 1993 and effective the next year, a transitional constitution valid for two years from April 1994 and serving the purpose of facilitating the transition to democracy.

Under Section 4, the Constitution is 'the supreme law of the Republic and any law or act inconsistent with its provisions shall [unless otherwise provided in the Constitution] be of no force and effect.' Some illustrative provisions, each representing a dramatic break with tradition, follow:

1. Chapter 3, entitled 'Fundamental Rights,' declares many of the traditional human rights. Section 8 provides that 'every person' has the right to 'equal protection of the laws.' The forbidden grounds of discrimination include 'race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or langauge.' There is probably no more inclusive provision in any state's constitution—surely not in any international human rights instrument. Section 8 goes on to state that it 'shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.'

2. Under Section 35, courts shall interpret the provisions of Chapter 3 to 'promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter. . . .'

3. The Constitution creates an independent and impartial judiciary (Sec. 96). A Constitutional Court has jurisdiction over all matters relating to the interpretation and enforcement of provisions of the Constitution, including 'any alleged violation or threatened violation of any fundamental right,' and 'any inquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution.'

[2] Ibid. at 65.

NOTE

The variation in declared rights among state constitutions exists as well between any one constitution and the international instruments such as the UDHR and the two Covenants. Consider the following comments about the United States.

LOUIS HENKIN, CONSTITUTIONALISM AND HUMAN RIGHTS

in Henkin and Rosenthal (eds.), Constitutionalism and Rights 383 (1990), at 390.

There are other differences between U.S. constitutional rights and international human rights. Rights under the United States Constitution have to be understood in the larger conception of the United States as a 'liberal state.' Individualism was historically the hallmark of the American society, related perhaps to our vast spaces and the distant frontier. In the liberal state, rights of autonomy, liberty, and property are axiomatic as are freedom of enterprise, minimal government, and essential laissez-faire in economic as in other matters. As a liberal state the United States stood in contradiction to a welfare state, or to any other utilitarian conception that one may restrict the rights of the few to enhance the rights and welfare of the vast majority.

On the other hand, the international human rights instruments were designed for acceptance by states generally. Most states do not have an individualist tradition and do not value individualism. They are committed not to the liberal state but to the welfare state, not to minimal government but to activist, efficient, maximal government. The liberties and immunities recognized as human rights, then, are exceptional limitations on government. Inevitably, then, even when the international instruments and the U.S. Constitution recognize the same rights, even in the same terms, the content, scope, and significance of a constitutional right in the United States may be very different from what it is in another state operating under the international norm.

A related difference in the U.S. and international conceptions and scope of rights derives from the original philosophical conception of U.S. rights. American political society was conceived as a social compact—presumably an agreement among the people to form a polity as well as an agreement as to the kind of government to be created and the conditions that should govern it. Only the last part of that compact is in the Constitution and in our constitutional jurisprudence. Except for the amendment abolishing slavery, the Constitution protects individual rights only against invasion by government, against state action; it does not address rights between individuals. The concept of state action, too, has to be seen in the context of the United States as a liberal state. Restrictions on the state are congenial to that concept.

Restrictions on private persons are not, since every right of an individual against his/her neighbor is a restriction of some right of the neighbor.

Apart from what particular states might be moved to do, it was necessary to find other foundations—principally the power of Congress to regulate interstate commerce—to support power for Congress to forbid private violations of rights, for example, private discrimination on account of race or religion. Neither Congress nor any state is constitutionally required to adopt such legislation. On the other hand, the International Covenant on Civil and Political Rights requires states not only to respect rights but to ensure them, and a state party would seem to be obliged to protect life, liberty, or property, reputation or honor from violation by one's neighbor.

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The biggest difference between the international bill of rights and ours involves what in the international lexicon are called economic and social rights. The Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights imply that only a welfare state is a human rights state. . . .

. . . [E]conomic and social rights are not constitutional rights in the United States. The Constitution still reflects a commitment to limited government, to the view that 'that government governs best which governs least.' The Constitution tells government what not to do; it imposes few positive obligations. While the international human rights idea requires a state to organize itself and its resources to ensure basic human needs to those of its inhabitants who cannot meet them otherwise, there is no constitutional right in the United States to food, housing, health care, education, or other basic human needs, and no constitutional obligation to provide them. . . .

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NOTE

As rights migrate, they often take on the cultural characteristics of their new homes. Hence an abstract right, such as that to free speech, may assume a markedly different form in the constitutions of states of a particular religious or political character. Those differences can be expressed through the types of limitations to the right that may depart radically both from limitations in other states and in the international instruments. Note the following illustrations.

> *Pakistan Constitution (1973), Art. 19*: 'Every citizen shall have the right to freedom of speech and expression, and there shall be freedom of the press, subject to any reasonable restrictions imposed by law in the interest of the glory of Islam or the integrity, security or defence of Pakistan

or any part thereof, friendly relations with foreign States, public order, decency or morality. . . .'

Constitution of the Former U.S.S.R., Art. 50: Citizens have the rights of free speech, press and assembly '[i]n accordance with the interests of the working people and with a view to strengthening the socialist system. . . .'

QUESTION

Assume that a state's constitutional declaration of a right like free speech meets on its face the relevant international criteria set forth in the UDHR and ICCPR. What further inquiries about the state's legal and political system would you wish to make in order to assess the degree to which the state is observing and protecting this right?

NOTE

The three following readings depict some of the dilemmas of constitutionalism in those parts of the world where its spread in the last half century has been most marked: the new states of Africa and Asia following decolonization, and the states of Central–Eastern Europe after the collapse of the Soviet Union and communist rule. Those dilemmas recall the issues of universalism and cultural relativism debated in Chapter 4. The term constitutionalism as used in these readings sometimes appears synonymous with political democracy. Several themes emerge:

the difficulties of 'transplanting' constitutions in the liberal model from countries in which they grew over time organically (even if the process started by violent revolution) to states of a radically different ethnic, cultural, religious, economic and political character

the pull on the new constitutions by indigenous forces and traditions, including nationalism, ethnic divisions and religion

the question of how much cultural and economic baggage accompanies a constitution drawn from other states and from international instruments—for example, the degree to which market organization and a strong private property regime inhere in the organization of government power and declarations of rights in the new constitutions

the problems stemming from the adoption of a constitution that may for its effective functioning require a different foundation (an active civil society, for example) from that which the society can now provide

the lesser value placed by parts of the population on governmental and constitutional structures than on the achievements or programs of a government in (depending on which part of the population is consulted) bringing about economic development or continuing to provide social welfare.

YASH GHAI, THE THEORY OF THE STATE IN THE THIRD WORLD AND THE PROBLEMATICS OF CONSTITUTIONALISM

in Douglas Greenberg, Katz, Oliviero and Wheatley (eds.), Constitutionalism and Democracy 186 (1993), at 187.

[The author states his purpose as trying to 'provide some explanation of why it has proven so hard to establish constitutionalism in many developing countries, but particularly in Africa.' He uses a dichotomy of Weber to illustrate his argument: legal–rational as opposed to patrimonial. Ghai relates the first term to the notion of the rule of law; the authority of the state is 'founded in law,' which provides the framework for state operations. No one is above the law. The impartiality of the state bureaucracy is ensured by fidelity to law, which requires independence of the judiciary.]

Patrimonialism is a different mode of domination. It is a form of personal rule, which does not tolerate opposition. Administration is based on the total power and discretion of the ruler. The bureaucracy is an extension of his household; and to which he delegates its powers. Officials owe their appointments to his trust and goodwill. There is no clear separation between the private and public spheres of the ruler. He is above the law, as are his officials, and dispenses justice; petitions to him for clemency and generosity substitute for legal writs. The ideological superstructure of such domination is the goodness, generosity, and concern of the ruler for his people. He is the 'father of his people,' 'the father of his nation.'

I argue that in many Third World countries the trend has been toward the patrimonial form of rule and away from the rational–legal. . . . The trend has fundamental implications for constitutionalism. . . .

It is unnecessary to argue that on the whole the record of most Third World governments on human rights is dismal. . . . The denial of human rights is part of the wider spectrum of undemocratic and authoritarian rule.

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For a variety of reasons, countries emerging from colonial rule did so with constitutions closely modeled on those of the west. Whether they provided for parliamentary or presidential systems, they separated powers and personnel, diffused power through federal or regional devices, limited the scope of

legislative and executive power by human rights, and separated religion under the state. A variety of devices protected minorities, and judicial review safeguarded the supremacy of the constitution. During the early years of decolonization, there was great faith in the ability of constitutions to settle the problems of new nations; later, considerable cynicism set in, and few, even those who participated in its preparation, believed that constitutional settlements made at independence would endure. Only a handful of countries still have the constitution they adopted on independence; yet, despite political vicissitudes in which military or other authoritarian regimes replaced democracy, aspirations for the return to the constitutional values of the independence period for the resolution of their problems animates the peoples of these countries.

Although it appears unfair to condemn them as utopian, one must question the feasibility of western models for most developing countries. Western constitutions (and constitutionalism) assume settled political and economic conditions and a broad consensus on social values. . . . The constitutions themselves created neither the conditions nor the consensus, although they consolidated and reinforced them. Constitutionalism represented the victory of particular groups and classes; but the victory itself was often the result of violence, exploitation, and repression.

In the developing countries the constitutions were expected to carry a much heavier burden. They had to foster a new nationalism, create a national unity out of diverse ethnic and religious communities, prevent oppression and promote equitable development, inculcate habits of tolerance and democracy, and ensure capacity for administration. These tasks are sometimes contradictory. Nationalism can easily be fostered on the basis of myths and symbols, but in a multiethnic society they are often divisive. Traditional sources of legitimacy may be inconsistent with modern values of equality. Economic development, closely checked and regulated during colonialism, also threatens order and ethnic harmony, as it results in the mobility of people and the intermingling of communities in contexts where there is severe competition for jobs and scarce resources. Democracy itself can sometimes evoke hostilities as unscrupulous leaders prey on parochialism, religion, and other similar distinctions.

The burden of constitutional tasks was, moreover, compounded *au fond* by the nature of Third World polities, different in crucial respects from the west. Although often attended by violence, the growth of the state in the west was more organic than it was in the Third World where it was an imposition. The state dominated the economy and was instrumental in shaping it; in the west the state reflected the economy. The political factor was consequently more important. Political power is harder to control because civil society is weak and fragmented, itself the result of colonial practices (which have proved congenial to new governments). The state in the west enjoyed relative autonomy from international forces, which facilitated indigenous control over society and enabled a degree of diffusion and institutionalization of power. The Third

World state owes not only its genesis to imperialism, but even contemporary international economics and politics condition its very nature and existence. Hardly in control of its destiny, such a society finds it hard to institutionalize power on the basis of general rule, any more than it can resist encroachments on rights and democracy engineered by the more powerful states and corporations. At the time many Third World states moved into independence, the tools of coercion were easily available, which made them careless of cultivating the consent of the ruled.

The ideology of constitutionalism has only the slenderest appeals to the rulers or the ruled in the Third World. Legitimacy comes from other sources, and some of these sources are antithetical to the rule of law. Closely associated with independence was the ideology of modernization and development, in whose name state structures were strengthened and their writ expanded. People appear to regard the promotion of development as the primary task of the government; and the governments, for their part, justify the aggregation and concentration of power (and dismiss debates on human rights) on the imperatives of development. Closely connected ideologies proclaim the supremacy of the party, reaching in some countries levels of deification, or, more frequently, the sanctification of the leader. . . .

Another important source of legitimacy, more significant in Asia than in Africa, is religion, of which the most influential has been Islam, the world view of many of its adherents being dominated by religion. Their religious belief underpins their self-identification and locates them within a community. The Islamic revolution in Iran inspired Muslims in many other parts of the world to establish a state based on Koranic principles. Islam makes no distinction between the temporal and the spiritual, and provides a complete system of philosophy and life. In many ways the resurgence of Islam is a reaction to unequal development as well as to the dominance of western influence in many Third World countries. As with other religious movements, it is in a significant measure a response to the tensions and uncertainties of modernization, the concentration and secularization of public power. But these lead to the theocratization of power, with less rather than more democracy.

If the rule of law as an ideology is unimportant, it will come as no surprise that it is also unimportant in its substantive aspect. In most developing countries, whether the economic system is a species of capitalism or socialism, general norms play a secondary role. Both kinds of economy are essentially administered economies, where the license is the king and discretion is the norm. . . . Capitalists seek the embrace of the governments, and concentration of state and capital is extensive and complex. Markets themselves are the creation of governments. . . . Multinationals accept that bargains have to be struck with the government and concessions negotiated. . . . [I]t is the character of the state and the nature of the process of accumulation in most Third World countries that undermine constitutionalism.

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RADHIKA COOMARASWAMY, USES AND USURPATION OF CONSTITUTIONAL IDEOLOGY

in Douglas Greenberg, Katz, Oliviero and Wheatley (eds.), Constitutionalism and Democracy 159 (1993).

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. . . [T]he term 'constitutionalism' will be used broadly, in both its ideological sense and imply a process and style of decision making specific to the genre of constitutions drafted in the Anglo-American tradition of jurisprudence. Although they vary in substance and although many of the provisions in South Asian Constitutions have been taken from socialist constitutions, . . . these constitutions have a similarity of tradition, style, and interpretation that reveals their origins in a liberal, social democratic political order. . . . In the South Asian context, constitutionalism has been enhanced by these traditions, which, precisely because of their source, share a similar crisis of confidence; they are not considered legitimate, and are not widely accepted as the only means of conducting political life. . . .

In today's world, with the exception of the United Kingdom, the source of legitimacy for liberal democratic values is a written constitution. In India and Sri Lanka, the source itself has been subject to repeal, reenactment, and an extraordinary number of amendments. This fact leads one commentator to state that the use of constitutions in these societies is 'instrumental' for those who actually capture state power. Therefore, constitutions and constitutionalism in South Asia cannot be seen as fundamental law but as a process in which the values of the constitution are mediated by realities of power and social antagonism.

The transfer of power in South Asian societies after the era of British imperialism saw the transfer on paper of the institutions of parliamentary democracy. Within a decade, Pakistani society experienced the strengthening of the executive presidency and the growth of military dictatorships. In Sri Lanka, three decades witnessed three constitutions, each drafted by a different government. Successive Indian governments in three decades of existence amended the constitution 50 times. Clearly the sense of a constitution as 'fundamental law' has yet to emerge as a settled consensus, accepted by all shades of political opinion. The process has begun but it may still take some time for the constitutions to become accepted social contracts.

Liberal scholarship in these societies has taken the constitution as granted and then spelled out the enormous evidence of situations and contexts that violate the basic tenets of any liberal constitution. If one adopts this line of reasoning, the picture is very clear; constitutions in South Asia are formal pieces of paper, whose basic provisions, such as fundamental rights, are rarely observed. However, what is also interesting but rarely analyzed are the ways and means in which liberal democratic values are transformed by the contexts

of cultural nationalism and economic and social underdevelopment. This process has openly perverted liberal values. In certain creative instances, and in specific areas, experiments have resulted in what may be termed a 'genuine legitimacy' for liberal values.

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Some major changes occurred in the 1970s and the 1980s. Liberal democratic values, no longer merely a 'passive inheritance' from the British, have become an active tool of political and social accountability. Examples of this change are the growth of social action litigation in India, the shift in the language and the discourse of political opposition against military dictatorship in Pakistan and in Sri Lanka, and a slowly growing judicial scrutiny in such areas as freedom of speech and criminal procedure. These changes cannot all be called revolutionary, but liberal values are not only longer valid as 'scraps of paper'; they have become active, albeit in association with other values, interests and struggles peculiar to the South Asian context.

The ideology of constitutionalism has also furthered political reform, both in government and as a mobilizing force, in the last four decades. In India, constitutionalism in the form of social action litigation has been most successful in economic and social areas where the state has not lived up to the standards that it has set for itself. This is especially true in India regarding legislation with respect to caste, class, and women. As we have seen, the ideology of constitutionalism has also been important as a language of protest against military regimes and authoritarian governments. . . . It is important to note, however, that constitutionalism as substantive ideology (as opposed to commitment to process and procedural style) does not have a monopoly on dissent. Marxism, nationalism, ethnic chauvinism, and religious fundamentalism are some of the alternative discourses competing for ideological legitimacy in many South Asian societies.

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How then can constitutionalism acquire 'genuine legitimacy' in South Asia? One must recognize the inherent strength of a constitutional process—its potential for evolution and growth. None of the other ideologies prevalent in South Asia today is as committed to so specific and detailed a process of nonviolent decision making. . . . The strength of the constitutionalism as an ideology is that it spells out the ways and means of resolving conflict, of electing representatives, of making and implementing public decisions, and of reconciling interests and rights in a systematic and open manner. No indigenous ideology in South Asia that has gained currency as a dominant political force has such a comprehensive project for consultation, compromise and conflict resolution. The political processes represented by the architects of indigenous ideology were either dynastic, religious, or tribal and not one of them was designed to cater to the needs of the modern nation-state.

To survive and grow as an important aspect of political life, constitutionalism must develop internal processes relevant to the actual struggles taking place in South Asian societies. The involvement of constitutional processes in elite concerns and in elite rights, such as property, lessens their legitimacy in the society at large. If, in the coming years, the processes of constitutionalism were to be attached to issues of poverty, political repression, social justice, regional backwardness, etc., it would be more likely that constitutionalism would enhance and enrich the democratic process in South Asian societies. Success will depend on a younger generation of lawyers, born in the post-colonial period, who have in some way managed to integrate values drawn from Asian civil society with the modern political demands for democracy and constitutionalism. The use of constitutionalism in the future cannot be restricted to that of a watchdog for an errant executive. Its uses must be extended to become active and dynamic, to protect values by the use of language, discourse, and doctrine that have some resonance in South Asian reality.

ANDRÁS SAJÓ AND VERA LOSONCI, RULE BY LAW IN EAST CENTRAL EUROPE: IS THE EMPEROR'S NEW SUIT A STRAITJACKET?

in Douglas Greenberg, Katz, Oliviero and Wheatley (eds.), Constitutionalism and Democracy 321 (1993), at 326.

Reformative and revolutionary forces considered the legal system one to be sued and conquered for their purposes. In Hungary, and to a certain extent in Poland, and in a different way in the Soviet Union, Communists were partly responsible for the beginning of reform or, at least, some of the Communists tried to control reform processes. In these countries, the transformation of the legal system was considered a proof of the good intentions of the reformists. It was an often-stated belief that a modernized legal system, which observed constitutionalism and promised a calculable legal environment for business, including a gradual transition to market economy, would grant legitimacy and credibility to the reform process both inside and outside the country. Furthermore, it was hoped that a system with more open rules would increase the efficiency of that system. The ruling elites hoped that once their system became constitutional, it would also be acceptable and, therefore, would continue to survive.

Given the nature of the system, the interests of the participants and the transition process, this proved to be a somewhat naive illusion. The results were contradictory, and certainly far from the expected with respect to the quality of the legal system. In the Soviet Union, Mikhail Gorbachev's rule partly destroyed the old inefficient but working network of illegal relations without replacing it with a system based on the rule of law. In Poland and Hungary,

the spectacular changes in the public law contributed to democracy, but failed to instill respect for constitutionalism or to create the rule of law.

Both in the reform process and after the more or less revolutionary victories by the masses, the creation of a constitutional legal system with western types of liberal/formal solutions was a high priority. For the public this ideology was not self-legitimating. Religion, anticommunism, nationalism, and consumer values seem more important now to the masses. . . . There has only been a minimal common acceptance of the liberal tradition. Agreement exists on the importance of human rights, on the separation of powers (interpreted as denial of one-party rule), and on independent judiciary; but there is still no position of principle on welfare rights or on public interest priorities, in particular *vis-à-vis* private property. This level of acceptance obviously reflects the present political struggle for the control of the state, and more generally the slow emancipation of society from centralism.

Democratic legislation was thought to be a remedy for the malaise of the previous system. In this respect the east European transformation process follows the general pattern of revolutionary legal change: it is a denial of the previous solutions. The replacement of these solutions is, however, a matter of choice; there are many ways to part with the past. One group of possible choices is offered by the available western models (which are often little and selectively known or misunderstood, and are too sophisticated to be adapted). Another major choice consists of the pre-Communist legal solutions, which present linguistic barriers, and which are attractive because they can be legitimized as genuinely national solutions. The problem is that these solutions are often outdated; they did not meet criteria of democracy 50 or 60 years ago. Nor were these central European societies particularly modernized before World War II. One should keep in mind, however, that nationalism and religion were important sources of resistance, and important conservative voices among the emerging leaders in the society supported this solution.

If the new ruling classes and elites manage to convince the population that they are offering them rights through the new legal system, their legitimacy will increase. This is not an easy task, as economic hardship and political instability make it imperative to pass unpopular measures through law. . . .

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One of the first steps of the social and political transformation taken in all former socialist societies was the amendment of the Communist constitutions. These amendments abolished the privileges of the Communist Party. Moreover, in the case of Hungary, they institutionalized the protection of human rights and separation of powers. Nevertheless, in every case the amendments were the result of an elite agreement with the former Communist leadership. They were not intended to be expressions of the 'will,' values, or demands of the masses who to varying degrees participated in the process resulting in the collapse of Communist rule. The amendments, openly intended to be revised, reflected the provisional arrangements: revisions

became routine procedures as new conflicts emerged. Such confrontations surfaced over presidential powers in Poland, Bulgaria, and Hungary, over federalism in Czechoslovakia, and over the constitutional powers of the executive (government) in all the countries of the region.

From the point of view of a rule of law system or any system that takes law (i.e., the meaning of words) seriously, utilizing the constitution to rewrite political agreements is counterproductive to the goal of creating respect and belief in constitutionalism. If a constitution is easy to amend it loses its majestic special role. The Hungarian Constitution of 1989 was amended six times in the first year of its existence; the changes amount to one-third of the text. Issues of constitutional amendment aimed at settling conflicts absorb a considerable amount of time in parliamentary debates in Czechoslovakia and in Bulgaria. In that process law, including the text of the Constitution, easily becomes a matter of technicality. For instance, after the Hungarian Constitutional Court ruled unconstitutional an article of the Election law, the Parliament the next day amended the Constitution so as to make the article in question conform to the Election Law!

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. . . [T]he emerging sentiments of nationalism and religion are not particularly tolerant of some of the formal 'impartial' criteria of law and constitutionalism. Other elements relate directly to the interests of the freely elected governments in maintaining the role of the state sector in the economy and perhaps in the welfare sector as well. Social groups for whom the reduction of the state sector means unemployment and poverty support these tendencies. The same social groups have less interest in and comprehension of individual rights and their protection through courts as their education in a paternalistic tradition, has alienated them from law. Paternalism, in this context, means that they accept their role as clients and as more or less obedient servants of an uncontrolled state welfare system.

Political power factors also make the emergence of constitutionalism difficult. In all these societies at least part of the present ruling elite was involved in one way or another in the Communist system. Revision of the past through retroactive laws (political justice, revision of privatization decisions, reprivatizations, and indemnification of the economic and political victims of Communism) became crucial in one respect or another in all the countries of the region in 1990. Obviously, this is not the best education in constitutionalism. . . .

Forms of intolerance, in addition to anti-Communism, present problems for constitutionalism. In general, there is little tolerance for minorities, and protection of them is not high on the priority lists of political organizations capable of shaping constitutions. Political forces do not incline to undertake the commitments necessary to write a constitution for the future that would require a firm stance on constitutional values that are unpopular or still debatable. Constitution making is taking the form of a major power struggle in

Czechoslovakia in relation to the federalism issue and in Bulgaria. In Poland, in light of an increasing personal presidential power and an antiliberalism reflected in the pending antiabortion legislation, religious school education by ministerial decree, and nonprivatization, a new constitution may well not be a major contribution to constitutionalism.

The emerging elites and the lack of constitutional legal culture are not the only factors responsible for these conceptual insufficiencies. Communist rule and the lack of a capitalist society and a civic culture contributed to the passive acceptance and mistrust of law. On the other hand, as the emergence of civil society and a nonstate ownership system that would make personal independence a possibility is very slow, there is little actual interest or urge to have a rule of law system. Of course, the failure to develop a constitutional framework and an impartial legal system will make the formation of a constitutionalism-hungry society extremely painful if not impossible in the coming years. . . .

B. HUMAN RIGHTS TREATIES WITHIN STATES' LEGAL AND POLITICAL ORDERS

Constitutionalism as described in Section A represents states' efforts to create an internal order that is consistent to an important degree with fundamental aspects of liberal and democratic political theory and with the international human rights movement. Deeply influenced by the Western models and by the basic international human rights instruments, these new constitutions in many parts of the world are nonetheless emphatically *national* instruments, freshly created by each state.

Section B shifts attention to international instruments, specifically to human rights treaties. It examines the interpenetration of the international and national systems, the significance of treaties within as well as without states. The broad questions explored are: How do these treaties influence the national legal and political systems of states parties? Are they actually incorporated into a state legal system, or reproduced in state legislation, and, if so, with what effects on the different branches of government such as the judiciary? Or do they remain distinct from the state system, 'above' it as part of international law? The readings draw on the techniques and experiences of a number of European countries and of the United States to develop answers to these questions.

The materials then use the experience of the United States in its ratification of the International Covenant on Civil and Political Rights as a case study of problems in this field.

1. BASIC NOTIONS: ILLUSTRATIONS FROM DIFFERENT STATES

VIRGINIA LEARY, INTERNATIONAL LABOUR CONVENTIONS AND NATIONAL LAW (1982), at 1.

The relationship between international law and national law, in the past, was largely an interesting theoretical problem, engaging legal scholars in a doctrinal debate; it has now become an important practical problem, primarily as a result of the increasing adoption of treaties whose scope is not inter-state relations but the relations of states with their own citizens. These treaties are concerned with 'the common interests of humanity' and have a quasi-legislative character. Their efficacy depends essentially on the incorporation of their provisions in national law. . . .

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International law determines the validity of treaties in the international legal system, i.e., when and how a treaty becomes binding upon a state as regards other State Parties. It also determines the remedies available on the international plane for its breach. But it is the national legal system which determines the status or force of law which will be given to a treaty within that legal system, i.e., whether national judges and administrators will apply the norms of a treaty in a specific case. . . . When the treaty norms become domestic law, national judges and administrators apply them, and individuals in the ratifying states may receive rights as a result of the treaty provisions. Thus, developed municipal legal systems supplement the more limited enforcement system of international law.

While the international legal system does not reach *directly* into the national systems to enforce its norms it attempts to do so *indirectly*. States are required under international law to bring their domestic laws into conformity with their validly contracted international commitments. Failure to do so, however, results in an international delinquency but does not change the situation within the national legal systems where judges and administrators may continue to apply national law rather than international law in such cases. The work of the supervisory bodies of the International Labour Organization in influencing states to bring their law into conformity with ILO conventions is an example, however, of the increasing efficacy of the international legal system in this regard.

The status of treaties in national law is determined by two different constitutional techniques referred to in this study as 'legislative incorporation' and 'automatic incorporation'. In some states the provisions of ratified treaties do not become national law unless they have been enacted as legislation by the

normal method. The legislative act creating the norms as domestic law is an act entirely distinct from the act of ratification of the treaty. The legislative bodies may refuse to enact legislation implementing the treaty. In this case the provisions of the treaty do not become national law. This method, referred to as 'legislative incorporation', is used, inter alia, in the United Kingdom, Commonwealth countries and Scandinavian countries. In other states, which have a different system, ratified treaties become domestic law by virtue of ratification. This method is referred to as 'automatic incorporation' and is the method adopted, inter alia, by France, Switzerland, the Netherlands, the United States and many Latin American countries and some African and Asian countries. It is important to note that in many of these states, proclamation or publication of the treaty may also be necessary for its force as national law. Even in such states, however, some treaty provisions require implementing legislation before they will be applied by the courts. Such provisions are categorized as 'non-self-executing.'

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International law does not dictate that one or the other of the methods of legislative or automatic incorporation must be used. Either is satisfactory assuming that the norms of treaties effectively become part of national law. Conversely, neither method is ipso facto satisfactory under international law, if, in practice, the norms of ratified treaties are not applied by national judges and administrators. The method by which treaties become national law is a matter in principle to be determined by the constitutional law of the ratifying state and not a matter ordained by international law. The international community, lacking more effective means of enforcement, is often dependent on the constitutional system of particular states for the effective application of treaties intended for internal application.

Some national constitutions provide for automatic incorporation of treaty provisions. In other states, judicial decisions have determined that treaties are to be automatically incorporated. A correlation appears to exist between legislative consent to ratification and automatic incorporation. In states with the system of automatic incorporation, legislative consent by at least one house of the legislature is generally required before the executive may ratify treaties. In states with the system of legislative incorporation, ratification of treaties is frequently a purely executive act not requiring prior approbation of the legislature. In the United Kingdom, and other common law countries which have followed U.K. precedent in this regard, parliamentary consent to ratification is normally not required and express legislative enactment of treaty provisions is necessary before they become domestic law.

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An individual may invoke the provisions of a treaty before national courts in automatic incorporation states in the absence of implementing legislation only when its provisions are considered to be self-executing and when he has

standing to do so. . . . It suffices at this point to state that, in general, treaty provisions are considered by national courts and administrators as self-executing when they lend themselves to judicial or administrative application without further legislative implementation. . . .

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RUDOLPH BERNHARDT, THE CONVENTION AND DOMESTIC LAW

in R. St. J. Macdonald, F. Matscher and H. Petzold. (eds.), The European System for the Protection of Human Rights 25 (1993), at 26.

. . .

One could imagine an express or implicit rule in national law that the Convention (or treaties in general) is superior to any provision in the domestic law, including the constitution of the State concerned. No such rule seems at present to exist, so we turn to the solutions which are adopted in the different Member States of the Convention.

A. The Convention as part of a Member State's constitution

The Convention can be expressly incorporated into a Member State's constitutional law. This solution has until now been adopted only in Austria, where the Convention formally has the rank of constitutional provisions. This has the consequence that no statute or secondary legislation is valid if it violates conventional norms. . . . It is obvious that even this solution cannot avoid difficult constitutional problems, if contradictions become visible between the Convention (as interpreted by the Convention organs) and other constitutional norms and principles. . . .

B. The Convention as superior to statutory law

In the great majority of Member States of the Council of Europe, treaties in general and the Convention in particular are part of the domestic legal order. To this extent, the Convention may have a higher rank than normal legislation, but below the constitution. Such an intermediate position of the Convention may follow from Article 55 of the French Constitution or from similar provisions in other constitutions. Article 55 provides: '[T]reaties or agreements duly ratified or approved shall, upon their publications, have an authority superior to that of laws. . . .'

If, under such rules, the Convention clearly prevails in conflicts between its requirements and provisions in national legislation, a satisfactory solution has undoubtedly been found, especially if the individual can invoke the Convention before domestic courts and institutions against formal legislative enactments. . . .

C. The Convention as having the rank of statutory law

In several States the Convention (like other treaties) is part of domestic law with the same rank as normal legislation. In these States, the Convention is approved by the legislature and introduced into the internal legal order similarly to normal statutes. . . .

In theory, the Convention has the same rank as other legislation in these States, and the *lex posterior rule* in principle applies, in the sense and with the consequence that the Convention supersedes older statutes, and later statutes prevail over Convention provisions. This theoretical position does not have greater practical importance, since other principles also come into play: the principle *lex specialis derogat leges generales* (under which the treaty rule is considered to be the more specific law), and the widely recognized principle that a State's statutes should be interpreted in harmony with the international obligations it has incurred. Thus, the formal equal rank of general statutes and the Convention leads to the elimination of conventional norms only in the rare cases where the later statute stands in clear and intended contradiction to the Convention. In actual practice, this possibility appears without real significance. The German Federal Constitutional Court has expressly held that priority must be given to the Convention even over statutes that have been enacted later, because it cannot be assumed that the legislature, without clearly stating so, wanted to deviate from Germany's obligations under public international law.

D. The Convention as lacking internal legal validity

Finally, a minority of the Member States of the Council of Europe still follow the principle that domestic law and treaty law are totally distinct legal areas, and treaties are not introduced into the internal legal order except in cases where an enabling law expressly declares a treaty to be part of the law of the country. This principle is still valid for the United Kingdom of Great Britain and Northern Ireland, for the Irish Republic and also for the majority of the Scandinavian States. . . .

For those States in which the Convention remains an inter-State treaty without incorporation into the internal legal order, some legal problems remain important. An initial question is whether States are not obliged to incorporate the Convention into domestic law, and whether States are not in breach of the Convention if they do not declare the Convention to be part of the law of the country. Some writers have in fact taken the position that States are obliged to make the Convention part of domestic law, but this is still a minority view among the scholars of international law. The European Court of Human Rights has repeatedly declared that there is no legal obligation to make the Convention part of domestic law, even if the incorporation of the Convention conforms better to the *telos* of this Convention than the separation of the two legal orders. . . .

There seems to be another encouraging tendency at least in some of the

States which have not incorporated the Convention in their domestic law. National courts in several of these States refer to the Convention and its interpretation by the Convention organs in their decisions, and they try to avoid conflicts between the Convention and national law. . . .

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JORG POLAKIEWICZ AND VALÉRIE JACOB-FOLTZER, THE EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW

12 Hum. Rts. L. J. 65 and 125 (1991), at 65.

. . . [T]he Convention for the Protection of Human Rights and Fundamental Freedoms . . . has gradually acquired the status of a 'constitutional instrument of European public order in the field of human rights'. . . .

It therefore seems appropriate to give a survey of the Convention's impact on the development of domestic law in the member States. Special emphasis has been given to the case-law of the European Court of Human Rights. . . .

. . . [This] study is limited to those 17 countries that formally incorporated the substantive provisions of the Convention in their internal law (i.e. Austria, Belgium, Cyprus, Finland, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Portugal, San Marino, Spain, Switzerland and Turkey). It is obvious that here the influence of Strasbourg case-law is far more important than in those countries where the Convention has only the status of international law (i.e. Denmark, Iceland, Ireland, Norway, Sweden and the United Kingdom). The study will focus on the status of the Convention in domestic law, its rank in the hierarchy of norms, legislative reforms directly or indirectly prompted by judgments of the European Court and reference to Strasbourg case-law by municipal courts. . . .

. . . It is not surprising that in the Netherlands, a monistic country with a constitution giving precedence to self-executing treaty provisions over domestic law, the influence of the Convention in the field of human rights is paramount. . . .

THE NETHERLANDS

1. Status of the Convention in domestic law

The ECHR and First Additional Protocol were signed by the Netherlands on 4 November 1950 and 20 March 1952. After having been approved by the Law of 28 July 1954, both were ratified on 31 August 1954. At the same time the Government recognised the compulsory jurisdiction of the European Court of Human Rights. A declaration recognising the right of individual petition in accordance with Article 25 ECHR was deposited with the Secretary General of the Council of Europe on 5 July 1960. . . . The Netherlands also ratified the 2nd, 3rd, 4th, 5th, 6th and 8th Protocols.

The relationship between international law and domestic law is regulated in a monistic way by the Dutch Constitution of 1983. Art. 93 of the Constitution provides that provisions of treaties and decisions of international organisations, the contents of which may be binding on everyone, shall have this binding effect as from the time of publication. The words 'the contents of which may be binding on everyone' are generally understood to refer to the self-executing character which is required for their application by Dutch Courts. The rights contained in the ECHR are considered self-executing by the courts and are therefore directly applicable.

According to Art. 94 of the Dutch Constitution

> regulations which are in force in the Kingdom of the Netherlands shall not be applied if this application is not in conformity with provisions of treaties or decisions of international organisations which are binding upon everyone.

The Dutch Courts have therefore to give precedence to self-executing treaty provisions over domestic law that is not in conformity therewith, be it antecedent or posterior, statutory or constitutional law. In a recent judgment the Supreme Court even affirmed the priority of the self-executing provisions of the Convention and the Sixth Protocol over conflicting [provisions of other treaties], when it refused to allow an American serviceman to be handed over to the U.S. authorities on the grounds that he would face capital punishment. But the courts have no competence to nullify, repeal or amend the legislation in question. The provision remains in force, but will not be applied.

There is no Dutch case-law on the reopening of a case after a judgment of the European Court finding that the ECHR had been violated during the proceedings leading to the judgment. According to Dutch procedural law, only criminal and administrative cases may be reopened on the grounds that new evidence has come to light since the judgment was given and which could have led to a different finding if it had been known earlier. Given the high rank accorded to international law by the Dutch Constitution, it is not improbable that Dutch Courts may regard an adverse judgment of the European Court as constituting new evidence.

2. Legislation

There are several instances of legislative reform provoked or, at least, influenced by judgments of the European Court of Human Rights.

In the aftermath of the *Marckx* case, the Dutch legislature amended various provisions of the Civil Code in order to eliminate the distinction between legitimate and illegitimate parentage in the law of succession. It is noteworthy that the Law of 27 October 1982 was given retroactive effect from 13 June 1979, the date when the European Court rendered its judgment in the *Marckx* case.

The *Benthem* case, directly concerning the Netherlands, provoked an important reform of Dutch administrative procedure. To meet the Court's requirements with regard to Article 6 § 1 ECHR, the Provisional Act on disputes before the Crown, which provisionally regulates proceedings in matters of litigation where the Crown has thus far been competent, was adopted on 18 June 1987. . . .

3. Case-law

Until about 1980, the attitude of Dutch courts towards human rights treaties in general and towards the ECHR in particular did not reflect the favourable attitude of the Dutch legislature towards international law embodied in the Constitution. In spite of its direct applicability, the ECHR was only treated as a subsidiary source of law. When specific provisions of the Convention were invoked before Dutch courts, these almost always came to the conclusion that no violation had occurred. As Van Dijk has indicated, the courts reached this result by:

> – applying a comparable provision of Dutch law and, if necessary, giving it a very broad scope, while ignoring the provision of the Convention, or
> – denying the self-executing character of a provision of the Convention, or
> – giving to the provision of the Convention a very restrictive scope, which made it not applicable to the case before the court, or
> – giving a broad scope to the restriction allowed for in the Convention to solve the non-conformity, or
> – interpreting the provision of the Convention and the applicable domestic law in such an 'embracing' way that a conflict between them is avoided.

. . .

This reticent attitude of Dutch courts towards the ECHR has changed quite dramatically during the 1980's. The statistical survey recently given by Van Dijk shows a considerable increase of references to the ECHR. The percentage of cases, however, in which the Supreme Court has found a violation of the Convention remains small (an average of 9%). When confronted with a conflict between a provision of the ECHR and a provision of Dutch law, the Supreme Court tends to circumvent it by giving to the latter an interpretation or scope different from its original meaning and from the anterior legal practice, or by inserting a new principle into Dutch law derived from the treaty provision. . . .

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A last example is the judgment of 1 July 1983. The Insanity Act empowers the public prosecutor in certain cases to prevent a detainee from applying to a court for release from detention. Following the European Court's judgment

in the *Winterwerp* case, the Supreme Court declared that the relevant provision was incompatible with Article 5 § 4 ECHR.

There are several examples where the Supreme Court has interpreted provisions of national legislation in the light of the provisions of the ECHR in order to avoid a possible conflict. In a judgment of 18 January 1980, the Supreme Court declared that Article 959 of the Civil Procedure Act concerning appeal against decisions of the local courts in matters of custody over infants, although originally intended to cover only cases of legitimate children, now had to be interpreted as applying equally to illegitimate children. The Court based its conclusions on the interpretation of Article 8 in connection with Article 14 ECHR given by the European Court of Human Rights in the *Marckx* case. The Court quashed the decision of the District Court rendered before the *Marckx* judgment was even delivered. It did not wait for the amendment of the national law in question, which was being prepared by the legislature. . . .

Many judgments concern the right of the accused to be tried within a reasonable time (Article 6 § 1 ECHR). Between 1980 and 1986, the Supreme Court dealt with 120 cases concerning this problem, in which 20 were found to contain a violation of the Convention. . . .

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The other example concerned the conviction of three persons on the basis of evidence given by anonymous witnesses. Only one of the accused filed an application to the European Commission that found a violation of the Convention. The two others asked for their release pending the examination of the case before the European Court. In its judgment, the District Court ordered the release of the two, considering that it was almost certain that the European Court would not accept a conviction on the sole basis of anonymous witnesses. The European Court in fact concluded that there had been a violation of Article 6 § 3 (d) taken together with Article 6 § 1 ECHR.

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CONCLUDING REMARKS

The foregoing survey offers a disparate but on the whole encouraging picture. The interpretation of the Convention given by the European Court of Human Rights has proved to be highly persuasive with regard to national jurisdictions and legislatures. With the exception of some rulings by the Austrian Constitutional Court, the Belgian Court of Cassation and the French *Conseil d'Etat* on the applicability of Article 6 § 1 ECHR to certain proceedings, it has never been openly defied by national courts. This persuasive authority may be attributed not only to the weight of the Court's arguments, but also to the possibility now existing in all member States that domestic court rulings could eventually be successfully challenged in Strasbourg.

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Several factors can be distinguished which determine the impact of Strasbourg case-law in domestic law. Most important among them is certainly the status of the Convention in the hierarchy of internal norms. . . .

A restraining factor is the existence of parallel constitutional safeguards against human rights abuses supplanting those of the Convention. Especially if the existence of such guarantees is coupled with a strong tradition of judicial protection of political and civil rights, as in Italy and the Federal Republic of Germany, influences from Strasbourg are of minor importance. Nevertheless, the German example shows that even under these conditions the practice of the European Court of Human Rights can become more relevant if the national constitutional court is willing to modify its purely domestic view. . . .

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. . . The role of municipal courts in assuring effective protection of the rights and freedoms contained in the Convention can hardly be overestimated. It is primarily before these courts that its guarantees are invoked. The possibility to file an application to the European Commission of Human Rights and to have the case eventually decided by the Court remains a time-consuming exercise which can only be envisaged as a last resort. It is therefore encouraging to see that, even in the absence of a formal procedure that regulates the relationship between the European Court and national jurisdictions, like the one in Article 177 of the EEC Treaty, we are witnessing the beginning of a dialogue between these different jurisdictions. In this respect, the practice of the European Court of Human Rights contributes substantially to the development of a truly European constitutional jurisprudence.

ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE

(1993), at 4.

[Although this book discusses the relevance of several treaties to the United Kingdom's internal legal order, the excerpts below refer only to the European Convention on Human Rights.]

Introduction

. . . [T]he Convention has a unique status in the United Kingdom. Of the twenty-four States which are bound by the Convention, eighteen have the Convention as part of their domestic law. This arises either constitutionally or by legislative enactment. Of the six States which do not have the Convention as part of domestic law, only the United Kingdom has no written constitution.

. . . [I]n the twenty-three States which have the Convention as part of

domestic law or have a written constitution, the rights and values found in the Convention are often reproduced in their constitutions. This means that when questions of civil or human rights arise at the national level, they are decided not on the basis and case-law of the Convention, but usually by reference to the States' own constitutional and legal values. . . .

. . . [T]he role of the European Convention on Human Rights in the United Kingdom is in a state of flux. Different judges have different ideas as to its usefulness. . . .

. . . [T]he legal culture in the United Kingdom is very different from that of the vast majority of its European neighbours. Not only do the judges have a very different career structure and training, but also in the United Kingdom there is no tradition of written constitutional values or fundamental human rights with which the legislator may not interfere.

The Relevance of the Convention in the United Kingdom Courts

[The author stresses that the Convention, although not incorporated into domestic law, 'is surprisingly relevant in the domestic courts of the United Kingdom.' He notes several contexts in which the Convention may be relevant, including as an aid to statutory interpretation; as part of the British common law; as a factor to be considered by administrative bodies when exercising their discretion; and as a consequence of the case-law of the European Court of Human Rights. The excerpts below deal with these contexts.]

In 1974 the House of Lords first used the Convention as an aid to statutory interpretation. In *R.* v. *Miah* Lord Reid, who delivered the only opinion, relied on Article 11(2) of the Universal Declaration of Human Rights and Article 7 of the European Convention on Human Rights to demonstrate that it was 'hardly credible that any government department would promote, or that Parliament would pass, retrospective criminal legislation'.

This conclusion stemmed from the general principle that, so far as the language permits, Parliament is presumed to legislate in accordance with international law. Where the rule of international law is straightforward, as it was in this case—States may not create criminal offences retroactively—then the solution is relatively easy. But other human rights are more problematic; their ambit depends largely on how much recognition is given to the individual right by any one court or judge.

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. . . [I]t is suggested that the concept of giving effect to the intentions of Parliament is an unhelpful one. A better justification for using the Convention as an aid to statutory interpretation is that all statutes ought to be interpreted 'so as to be in conformity with international law'. This is not, however, the attitude which was taken by the House of Lords Select Committee on a Bill of Rights in 1978; yet there is some evidence that judges are prepared to take this broad brush approach.

Lord Scarman, after stating that neither the European Convention nor the decision of the European Court of Human Rights in The *Sunday Times* case was part of the law of the United Kingdom, went on to justify his reference to the Convention:

> I do not doubt that, in considering how far we should extend the application of Contempt of Court, we must bear mind the impact of whatever decision we may be minded to make on the international obligations assumed by the United Kingdom under the European Convention. If the issue should ultimately be, as I think in this case it is, a question of legal policy, we must have regard to the Country's international obligation to observe the European Convention as interpreted by the European Court of Human Rights.

This seems to be a more 'honest' approach to the use of the Convention, as no reference is made to the implied intention of the framers of the secondary legislation under consideration. It could, however, be challenged on the grounds that it denies the 'transformation' tradition of English law. This states that treaties ratified by the executive are not part of the law until transformed by Parliament through legislation into domestic laws. It is suggested that this challenge fails. It fails due to the special nature of the European Convention on Human Rights and other relevant human rights instruments. The Convention declares principles; these principles can be legitimately used to interpret statutes where there is evidence of an intention by the legislature to give effect to those principles, either in the statute under consideration or in another statute. . . .

. . .

Before leaving the area of statutory interpretation mention should be made of the situation where there is a perceived clash between a statute and the Convention. Of course it is not clear at what point it is no longer possible to interpret a statute so as to be in conformity with the Convention, so that a judge is obliged to find the two in irreconcilable opposition. In the United Kingdom, when a statute is in opposition to a treaty, the statute must prevail. However, in the context of the European Convention on Human Rights Lord Denning felt able to depart from this orthodoxy. In *Birdie* v. *Secretary of State for Home Affairs* Lord Denning, MR. stated that 'if an Act of Parliament did not conform to the Convention I might be inclined to hold it invalid'; this surprising statement was repudiated in a later case in the same year, when Lord Denning returned to the orthodox view: that treaties do not become part of the law until made so by Parliament, and that 'if an Act of Parliament contained any provisions contrary to the Convention, the Act of Parliament must prevail'. He continued, 'But I hope that no Act ever will be contrary to the Convention. So the problem should not arise.'

The point did arise for Lord Denning in *Taylor* v. *Co-Op. Retail Services.*

After examining the *Case of Young, James and Webster*, decided by the European Court of Human Rights in Strasbourg, he concluded:

> Mr Taylor was subjected to a degree of compulsion which was contrary to the freedom guaranteed by the European Convention on Human Rights. He was dismissed by his employers because he refused to join a 'closed shop'. He cannot recover any compensation from his employers under English law because under the Acts of 1974 and 1976, his dismissal is to be regarded as fair. But those Acts themselves are inconsistent with the freedom guaranteed by the European Convention. The United Kingdom Government is responsible for passing those Acts and should pay him compensation. He can recover it by applying to the European Commission, and thence to the European Court of Human Rights.

. . .

[The following paragraphs consider the Convention as a part of the Common Law.]

. . . [T]he last word in this section has to be from the most recent case of *Derbyshire County Council* v. *Times Newspapers Ltd. and Others*. In this case the Court of Appeal had to define the extent of the Common Law tort of libel. The *Sunday Times* had published two articles questioning the propriety of certain investments made by the Council. The articles had headings such as 'Bizarre Deals of a Council Leader and Media Tycoon' and 'Revealed: Socialist Tycoon's Deals with a Labour Chief'. The judgment concedes that full use should be made of [Convention] Article 10 to resolve an uncertainty in municipal law. The court found that to allow a local authority to sue for libel was not necessary in a democratic society. It was an unjustifiable restriction on freedom of expression. The case really turns on proportionality, as the court considered that the other options open to the local authority—actions for criminal libel or malicious falsehood—might be legitimate restrictions on freedom of expression where the reputation of the local authority might be damaged so as to impair its function for the public good. It was the existence of alternative less intrusive measures which made the possibility of a civil libel action disproportionate and unnecessary.

The case is important because instead of the court using the Convention to bolster conclusions arrived at by other means the Convention was the starting-point for the judicial reasoning. . . .

Moreover the Court made extensive use of the Strasbourg case-law to accommodate the stress which the European Court and Commission of Human Rights have placed on freedom of the press and the legitimate discussion of persons with public functions in the public domain. This case probably represents the high point in the judicial consideration of the Convention as a tool for resolving uncertainty in the Common Law. . . .

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The Relevance of the Strasbourg Proceedings for the United Kingdom Courts

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Even if some of these cases suggest that the courts have been unwilling really to examine the case-law of the Commission and Court of Human Rights this looks set to change. At least in the recent *Derbyshire County Council* case considered [above] the logic and dynamic of the Convention's case-law was fully considered and cited at length by the Court of Appeal. The court weighed whether allowing the Council the right to bring libel proceedings would respond to a 'pressing social need' and was 'necessary in a democratic society' to the extent that was 'proportionate' to the goal: the protection of the 'reputation' of the Council.

Another case concerns the Isle of Man Court of Appeal. In *Teary (Sergeant of Police)* v. *O'Callaghan* this court recognized the significance of the *Tyrer* case, which found that birching as a judicial punishment was degrading punishment contrary to Article 3 of the Convention. O'Callaghan (16 years old) had been sentenced by magistrates to be whipped with the birch (four strokes). Despite the willingness of O'Callaghan to be birched, the Court of Appeal annulled the sentence, but pointed out that the court would take no consideration of the political consequences which might follow from allowing the sentence to stand, such as the United Kingdom being expelled from the Council of Europe, and that the sentence was nevertheless lawful. The decision to annul the sentence was based on the grounds that the courts should have regard to international obligations.

This case shows that the courts, even when faced with a popular legitimate law, such as the law of the Isle of Man on birching, may prefer to follow the Strasbourg lead. A parallel can be drawn between this case and the situation concerning homosexuality in Northern Ireland, where the Court of Human Rights, faced with another popular law (which prohibited sexual relations between men), found a breach of human rights: *Dudgeon* v. *United Kingdom*. It is in these types of situation involving unpopular minority interests that human rights theory is really tested. Both laws were relatively popular in the Isle of Man and Northern Ireland respectively and it was the European Court of Human Rights in Strasbourg that held the laws to violate human rights. It may well be that such a court can bring a detachment to bear on domestic laws that national courts may find hard. It is for this reason that even if the United Kingdom were to adopt the European Convention in the form of a Bill of Rights, the right of individual petition to Strasbourg should still be kept open, so that the European Court of Human Rights has the chance to examine cases arising in the United Kingdom context and give authoritative judgments on the scope of the rights guaranteed by the Convention.

. . .

COMMENT ON AUSTRALIAN RESPONSES TO THE TOONEN CASE

Recall the Toonen case, a communication to the ICCPR Committee that led to the Committee's 'views' reported at p. 545, *supra*. The case involved a law of Tasmania (a component state within the Australian federalism) making certain homosexual acts criminal; the Committee concluded that the statute violated provisions of the ICCPR on privacy. In this comment, we trace the consequences of its opinion for the Australian legal and political order.

The complaint in the Toonen case was sent to the ICCPR Committee on the same day that the First Optional Protocol entered into force for Australia, December 25, 1991. It thus immediately raised issues concerning the relationship between the ICCPR and Australian legal and political processes that had previously received little consideration from the public or media.

In Australia, as in the United Kingdom, ratification of a treaty has no formal effect on the internal legal order, although of course the state is bound internationally. For the Covenant (or part thereof) to become effective as internal law that could be invoked before Australian courts, Parliament would have to enact the Covenant (or the relevant part) as normal legislation.

At the time of ratifying the Covenant in 1980, the Australian Government had asserted that no new legislation was required since existing law was in full conformity with the requirements of the Covenant. As a result, individuals believing that the Covenant was violated by laws or acts of the Federal Government or an Australian state and wishing to litigate the relevant issue were obliged to do so on the basis of independent Australian laws which, in at least some instances, did not directly address the Covenant's provisions. Since Australia has no Bill of Rights and existing privacy legislation did not deal with the issues raised by the *Toonen* case, the ICCPR Committee correctly concluded in its views that there were no available domestic legal remedies.

Another important element of this case concerned the Australian system of federalism. Like its United States counterpart, that system allocates specific powers to the Commonwealth (the Federal level) and reserves the remaining powers to the states. Criminal law, at issue in this case, is a state matter unless it relates to a head of Federal power such as the Constitution's provisions on corporations or commerce. Under the 'external affairs power,' however, the Federal Government, which has exclusive power to enter into treaties, can undertake obligations which then bind the country as a whole, including the states.

It is generally accepted that the subject matter of a treaty need not relate to any enumerated head of Federal power. Australia's ratification of the ICCPR therefore provided the Commonwealth with the possibility of legislating in relation to any matter dealt with in the Covenant, including matters previously considered to be part of the exclusive domain of the states. Cf. *Missouri v. Holland*, p. 745, *infra*. Article 50 of the ICCPR reinforces this result by

providing that the Covenant's provisions 'shall extend to all parts of federal States without any limitations or exceptions.'

Another complication related to federalism arose when the Australian Government's written submission to the Committee supported the position of the complainant. Although the submission also provided information about the position of the Tasmanian Government, the latter had no opportunity to present its own case.

The Committee's final views in the case drew a mixed and often heated response within Australia. Although the Federal Government welcomed the outcome, the Tasmanian Government and many of its political allies at the Federal level expressed grave concern. The following sampling of media reaction was tabled in the Federal Parliament:[3]

> Geoffrey Barker, The Age, *A Wrong Move for the Right Reasons*, 21 April 1994
>
> A sceptic might conclude that the Government is prepared to acquiesce in a significant surrender of Australia's sovereign independence to a remote international committee whose membership and methods fall short of what, in other contexts, would be called world's best practice.
>
> Crispin Hull, Canberra Times, *We need a Proper Bill of Rights*, 2 August 1994
>
> On the human-rights matters, it is folly for Australia to permit its citizens to appeal to UN committees half-full of nominees from countries where the rule of tyranny is paramount over the rule of law. They are totally unaccountable to the Australian people.
>
> . . .
>
> John Hyde, The Australian, *Let Public Discretion Decide Our Rights*, 6 May 1994
>
> Governments have no moral right to get their way against Australian public opinion by selectively referring domestic issues to foreign tribunals.
>
> Malcolm Fraser, The Australian *UN Poses biggest threat to our sovereignty*, 17 August 1994
>
> Human rights are as well safeguarded in Australia as in any country I could name. Such rights are obviously much better protected here than in most countries. Yet we give UN committees concerned with human rights the capacity to review and to take action that can lead to the overturning of Australian law.
> The Government is doing all this, of course, without telling the Australian people, without having asked their permission. It is not the Government's sovereignty that is being given away, it is the sovereignty that belongs to all Australians acting together.

[3] Commonwealth of Australia, Senate, Daily Hansard, 8 Dec. 1994, pp. 4298–9.

A Senator also tabled a list of the membership of the Human Rights Committee and of the other two UN treaty bodies to which Australians can complain. The Federal Government responded cautiously. It sought the views of the independent Federal Human Rights and Equal Opportunity Commission and the matter was referred to the Senate Legal and Constitutional Legislation Committee for a full report. The resulting *Human Rights (Sexual Conduct) Act 1994* provided only that:

> (1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law . . . , to any arbitrary interference with privacy within the meaning of Article 17 of the [ICCPR].
>
> (2) For the purposes of this section, an adult is a person who is 18 years old or more.

The legislation was criticized in some quarters on several grounds. (a) It did not repeal the offending Tasmanian legislation but rather provided a basis on which any prosecution could be defended. (b) Invalidation of any law regulating sexual conduct depends upon a determination by the courts that it constitutes 'arbitrary interference'. (c) The legislation mischaracterizes the right to privacy by protecting that right only when exercised 'in private'.[4] Gay and lesbian groups continued to challenge the law and policy domestically and vowed to take the matter back to the Human Rights Committee. Many commentators concluded that the adoption of a domestic Bill of Rights or the incorporation of the ICCPR into domestic legislation would be necessary in order to stem a rising tide of complaints submitted to the ICCPR that the Australian courts could not entertain.

QUESTION

'The upshot of the differences between, say, the treaty systems in the U.K. and in The Netherlands is that Dutch citizens have a far easier path toward vindicating their rights under the European Convention on Human Rights—at least until Parliament legislates the Convention as internal law. This seems wrong. The Convention should have equal effects in all states parties, including ease of remedies for victims of violations, and particularly human rights treaties should so provide.' Comment.

[4] Wayne Morgan, Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations, 19 Melb. U. L. Rev. 740 (1994); and *idem.*, Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994, 1 Aust. J. Hum. Rts 409 (1994).

COMMENT ON TREATIES IN THE UNITED STATES

Read the references to 'treaties' in the following provisions of the Constitution: Art. I, Sec. 10; Art. II, Sec. 2; Art. III, Sec. 2; and Art. VI. The term 'treaty' has a special constitutional significance in the United States. The following materials speak of *treaties* in this constitutional sense, as opposed to another form of international agreement (so-called executive agreements) into which the United States enters. The information below about the United States law of treaties complements the Comment on Treaties at p. 30, *supra*, which describes treaties from an international-law rather than national perspective. Like the other materials in Chapter 11, this Comment ignores the distinctive issues about treaties' relations to domestic legal orders that are posed by the federal (component States) characteristic of the United States.

The conclusion of a treaty binding on the United States normally involves three stages. (1) Negotiation of the treaty is usually conducted by an agent of the Executive, although members of the Senate have occasionally been brought into the process at an early stage as observers and advisers. (2) The President submits the treaty to the Senate for the advice and consent required by Art. II, Sec. 2. If the treaty fails to receive the required two-thirds vote of those present, no further action may be taken on it. If it receives that vote, the President may ratify it. (3) Ratification takes place by an exchange of instruments or, in the case of multilateral agreements, by deposit with a designated depositary. The President then proclaims the treaty, making it a matter of public notice and often effective as of that time.

Of course the United States has had to resolve the same issues as other countries about the internal status and effect of treaties. Constitutional decisions have brought reasonably clear answers to some basic questions. For example, treaties that have become part of the internal legal order have the same domestic effect as federal statutes. A treaty thus supersedes earlier inconsistent legislation. Just as a statute can be superseded by a later inconsistent statute, so can a treaty be superseded, although maxims of interpretation encourage a judicial effort to construe the later-in-time statute so as not to violate the treaty. If that effort fails, the legislative rule prevails internally, although as a matter of international law the United States would have broken its obligations to the other treaty party.

Perhaps the most vital question about a treaty effective as domestic law is its status *vis-à-vis* the Constitution. Will a treaty provision—perhaps one requiring a government to ban certain types of 'hate' speech—be given effect internally even if legislation to the same effect that was independent of any treaty commitment would be judged to be unconstitutional? The U.S. Supreme Court considered this question in the following decision.

REID v. COVERT

Supreme Court of the United States, 1957.
354 U.S. 1, 77 S. Ct. 1222.

[Mrs. Covert and Mrs. Smith killed their husbands, who were then performing military service in England and Japan, respectively. They were each tried by courts-martial convened under Article 2(11) of the Uniform Code of Military Justice, which provided:

> The following persons are subject to this code:
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States. . . .

After conviction, each woman sought release on a writ of habeas corpus, which was granted in the case of Mrs. Covert and denied in the case of Mrs. Smith. On direct appeal the Court affirmed Mrs. Covert's case and reversed Mrs. Smith's. There were four opinions. Six members of the Court agreed that civilian dependents of members of the armed forces overseas could not constitutionally be tried by a court-martial in time of peace for capital offenses, even if committed abroad. Justice Black (in an opinion joined by the Chief Justice, Justice Douglas and Justice Brennan) concluded that military trial of civilians was inconsistent with the Constitution—particularly with those provisions of Article III, Section 2 and of the Fifth and Sixth Amendments which assure indictment by grand jury and trial by jury. Justice Frankfurter and Justice Harlan, in concurring opinions, limited their holdings to capital cases. There was a dissenting opinion.

The excerpts below from the opinion of Justice Black refer to 'executive agreements.' For present purposes, they can be considered to be the equivalent of treaties.]

At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.[5] For its

[5] Executive Agreement of July 27, 1942, 57 Stat. 1193. The arrangement now in effect in Great Britain and the other North Atlantic Treaty Organization nations, as well as in Japan, is the NATO Status of Forces Agreement, 4 U.S. Treaties and Other International Agreements 1792, T.I.A.S. 2846, which by its terms gives the foreign nation primary jurisdiction to try dependents accompanying American servicemen for offenses which are violations of the law of both the foreign nation and the United States. Art. VII, §§ 1(b), 3(a). The foreign nation has exclusive criminal jurisdiction over dependents for offenses which only violate its laws, Art. VII, § 2(b). However, the Agreement contains provisions which require that the foreign nations provide procedural safeguards for our nationals tried under the terms of the Agreement in their courts. Art. VII, § 9. Generally, see Note, 70 Harv. L. Rev. 1043.

Apart from those persons subject to the Status of Forces and comparable agreements and certain other restricted classes of Americans, a foreign nation has plenary criminal jurisdiction, of course, over all Americans—tourists, residents, businessmen, government employees and so forth—who commit offenses against its laws within its territory.

part. the United States agreed that these military courts would be willing and able to try and to punish all offenses against the laws of Great Britain by such persons. In all material respects, the same situation existed in Japan when Mrs. Smith killed her husband. Even though a court-martial does not give an accused trial by jury and other Bill of Rights protections, the Government contends that article 2(11) of UCMJ, insofar as it provides for the military trial of dependents accompanying the armed forces in Great Britain and Japan, can be sustained as legislation which is necessary and proper to carry out the United States' obligations under the international agreements made with those countries. The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.

. . .

. . . There is nothing in [the language of Article VI of the Constitution] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result. These debates as well as the history that surrounds the adoption of the treaty provision in Article VI make it clear that the reason treaties were not limited to those made in 'pursuance' of the Constitution was so that agreements made by the United States under the Articles of Confederation, including the important peace treaties which concluded the Revolutionary War, would remain in effect. It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. For example, in Geofroy v. Riggs, 133 U.S. 258, 267, 10 S.Ct. 295, 297, 33 L.Ed. 642, it declared:

> 'The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of

the States, or a session of any portion of the territory of the latter, without its consent.

This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

There is nothing in State of Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641, which is contrary to the position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

In summary, we conclude that the Constitution in its entirety applied to the trials of Mrs. Smith and Mrs. Covert. Since their court-martial did not meet the requirements of Art. III, § 2, or the Fifth and Sixth Amendments we are compelled to determine if there is anything *within* the Constitution which authorizes the military trial of dependents accompanying the armed forces overseas. . . .

[The opinion concluded that the Constitution did not authorize such trials.]

NOTE

Although *Reid* v. *Covert* involved a capital case, later decisions such as *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 80 S.Ct. 297 (1960), extended it to non-capital cases as well.

COMMENT ON SELF-EXECUTING TREATIES

A question that frequently arises in the United States, as in the European states earlier examined, is whether a treaty is 'self-executing,' in the sense that it creates rights and obligations for individuals that are enforceable in the courts without legislative implementation of the treaty. The concept of 'self-executing' is close to the concept of 'automatic incorporation' in the excerpts from Virginia Leary, p. 726, *supra*.

Each country here faces distinctive problems. In the United States, the answer to the question posed is bound up in constitutional text and in the

allocation of powers over treaties among the Executive Branch, the Senate and the Congress as a whole. For example, note the status of 'supreme law' that is accorded the treaty under Art. VI of the Constitution (the Supremacy Clause), and the relationship of that clause to the self-executing character of treaties.

Consider the following excerpts from Section 111 of the *Restatement (Third), Foreign Relations Law of the United States* (1987):

> (3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.
>
> (4) An international agreement of the United States is 'non-self-executing' (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.

Comment (h) to Section 111 provides:

> In the absence of special agreement, it is ordinarily for the United States to provide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or by appropriate executive or administrative action. If the international agreement is silent as to its self-executing character and the intention of the United States is unclear, account must be taken of . . . any expression by the Senate or by Congress in dealing with the agreement. . . . Whether an agreement is to be given effect without further legislation is an issue that a court must decide when a party seeks to invoke the agreement as law. . . . Some provisions of an international agreement may be self-executing and others non-self-executing. If an international agreement or one of its provisions is non-self-executing, the United States is under an international obligation to adjust its laws and institutions as may be necessary to give effect to the agreement.

Certain types of treaties have traditionally been understood to be self-executing and have been applied by courts without any implementing legislation. Consider bilateral treaties giving (reciprocally) rights to nationals of each party to establish residence for certain purposes in the territory of the other party, establish corporations, conduct business there, and so on, frequently on national-treatment terms. Courts have long entertained actions by nationals of a treaty party seeking to enforce one or another of the rights provided for in the treaty.

Under U.S. law (as developed through constitutional decisions of the courts), certain types of treaties cannot be self-executing but require imple-

menting legislation to have domestic effects. Note Section 111(4)(c) above of the Restatement. For example, a treaty obligating the United States to make certain conduct criminal and closely defining that conduct and its penalty would nonetheless require such legislation. A treaty obligating the United States to pay funds to another state may require an appropriation of funds by the Congress.

Generally it is not relevant from an international-law perspective whether a treaty is self-executing, since a state is obligated under international law to do whatever may be required under its internal law (such as legislative enactment) to fulfill its treaty commitments.

SEI FUJII v. STATE

Supreme Court of California, 1952.
38 Cal.2d 718, 242 P.2d 617.

[In this litigation, Fujii, a Japanese who was ineligible for citizenship under the United States naturalization laws then in effect, brought an action to determine whether an escheat of certain land that he had purchased had occurred under provisions of the California Alien Land Law. That Law (1 Deering's Gen.Laws, Act 261, as amended in 1945) provided in part:

> §1. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, use, cultivate, occupy, transfer, transmit and inherit real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the same manner and to the same extent as citizens of the United States except as otherwise provided by the laws of this state.
>
> §2. All aliens other than those mentioned in section one of this act may acquire, possess, enjoy, use, cultivate, occupy and transfer real property, or any interest therein, in this state, and have in whole or in part the beneficial use thereof, in the manner and to the extent, and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise.
>
> §7. Any real property hereafter acquired in fee in violation of the provisions of this act by any alien mentioned in section 2 of this act, . . . shall escheat as of the date of such acquiring. to, and become and remain the property of the state of California.

. . .

The Superior Court of Los Angeles County concluded that the property purchased by Fujii had escheated to the State. This decision was reversed by the District Court of Appeals, Second District. That court held that the Alien Land Law was unenforceable because contrary to the letter and spirit of the Charter of the United Nations, which as treaty was superior to state law. That

decision was reviewed by the California Supreme Court. Excerpts from its opinion by Chief Justice Gibson appear below.]

It is first contended that the land law has been invalidated and superseded by the provisions of the United Nations Charter pledging the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race. Plaintiff relies on statements in the preamble and in Articles 1, 55 and 56 of the Charter, 59 Stat. 1035.

It is not disputed that the charter is a treaty, and our federal Constitution provides that treaties made under the authority of the United States are part of the supreme law of the land and that the judges in every state are bound thereby. U.S. Const., art. VI. A treaty, however, does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing. In the words of Chief Justice Marshall: A treaty is 'to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the court.' Foster v. Neilson, 1829, 2 Pet. 253, 314, 7 L.Ed. 415.

In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. . . . In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. . . .

It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state 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. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. . . . Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, 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 upon the ratification of the charter.

The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals. For example, the treaty involved in Clark v. Allen, 331 U.S. 503, 507–508, 67 S.Ct. 1431, 1434, 91 L.Ed. 1633, relating to the rights of a national of one country to inherit real property located in

another country, specifically provided that 'such national shall be allowed a term of three years in which to sell the [property] . . . and withdraw the proceeds . . .' free from any discriminatory taxation. See, also, Hauenstein v. Lynham, 100 U.S. 483, 488–490, 25 L.Ed. 628. In Nielsen v. Johnson, 279 U.S. 47, 50, 49 S.Ct. 223, 73 L.Ed. 607, the provision treated as being self-executing was equally definite. There each of the signatory parties agreed that 'no higher or other duties, charges, or taxes of any kind, shall be levied' by one country on removal of property therefrom by citizens of the other country 'that are or shall be payable in each state, upon the same, when removed by a citizen or subject of such state respectively.' In other instances treaty provisions were enforced without implementing legislation where they prescribed in detail the rules governing rights and obligations of individuals or specifically provided that citizens of one nation shall have the same rights while in the other country as are enjoyed by that country's own citizens. . . .

It is significant to note that when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention.[6] In Curran v. City of New York, 191 Misc. 229, 77 N.Y.S.2d 206, 212, these articles were treated as being self-executory.

. . .

The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations. Secretary of State Stettinius, Chairman of the United States delegation at the San Francisco Conference where the charter was drafted, stated in his report to President Truman that Article 56 'pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization without infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.' The same view was repeatedly expressed by delegates of other nations in the debates attending the drafting of article 56.

The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter

[6] The opinion here refers to Charter Article 104 (giving the UN 'such legal capacity as may be necessary for the exercise of its functions' in member states) and Article 105 (giving the UN 'such privileges and immunities as are necessary').

provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law. . . .

[The Court then upheld plaintiff's alternative allegation that the Alien Land Law was invalid since violative of the Equal Protection Clause of the Fourteenth Amendment.]

QUESTIONS

1. What advantages do you see in the U.K. system (legislation) and in the U.S. system (self-executing treaties) for giving treaty provisions internal effect? If you were drafting the U.S. Constitution freshly, which of the constitutional arrangements in the prior readings for giving treaties internal effect would you select?

2. What relation do you see between the conception of self-executing treaties in the U.S. and the provision of Article VI of the Constitution that treaties consistent with the Constitution form part of the 'supreme law' of the land?

3. 'The path of self-executing treaty can frustrate fundamental democratic principles. It would be satisfactory if the House of Representatives, the more popular and representative House in Congress, participated in giving consent to ratification, but only the Senate does. If two-thirds of that body will go along with treaty provisions that might bring about deep internal change in U.S. law, the treaty has the force of 'supreme law.' But there has been no full legislative process and debate, and that's not how laws should be made in the U.S.' Comment. Can you give realistic illustrations for the argument made? Are they apt to be common in treaty making?

2. RATIFICATION BY THE UNITED STATES OF THE ICCPR

In comparison with other democratic states, and even with many one-party and authoritarian states that are persistent and cruel violators of basic human rights, the United States has a modest record of ratification of human rights treaties. That comparison cuts both ways. One might say that the U.S. has a lesser commitment to and concern with developing international human rights than do many (say, European and Commonwealth) states of a roughly similar political and economic character. As the world's leading power, its lesser commitment necessarily weakens the human rights movement. *Or*, one might say that the United States does not engage in the hypocrisy of many states in

ratifying and then ignoring treaties. If it ratifies, it means to comply, and hence will take a careful look to be certain that full compliance is possible.

One can be certain that neither of these 'pure' explanations captures the complexity of the arguments within the Executive Branch and the Senate about ratification of these treaties. This section examines in detail the debates over ratification of the ICCPR to illustrate that complexity.

As background to the materials on the ICCPR, the introductory readings below describe earlier attitudes within the United States about involvement in the international human rights system, and indicate the reasons why the United States effectively withdrew from participation in human rights treaties in the early 1950s. Recall the description at p. 119, *supra*, of the significant role played by the United States just a few years earlier in helping to launch the International Bill of Rights through the drafting of the Universal Declaration.

LOUIS SOHN AND THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973) at 961.

1. In 1945, during the Senate Foreign Relations Committee's hearings on the U.N. Charter, a principal Department of State expert on the Charter, Dr. Leo Pasvolsky, was questioned extensively on the relationship between Article 2(7) and the human rights provisions of the Charter. The following is an excerpt from his testimony:

> Senator Millikin. I notice several reiterations of the thought of the Charter that the Organization shall not interfere with domestic affairs of any country. How can you get into these social questions and economic questions without conducting investigations and making inquiries in the various countries?
>
> Mr. Pasvolsky. Senator, the Charter provides that the Assembly shall have the right to initiate or make studies in all of these economic or social fields. . . .
>
> Senator Millikin. Might the activities of the Organization concern themselves with, for example, wage rates and working conditions in different countries?
>
> Mr. Pasvolsky. The question of what matters the Organization would be concerned with would depend upon whether or not they had international repercussions. This Organization is concerned with international problems. International problems may arise out of all sorts of circumstances. . . .
>
> Senator Millikin. Could such an Organization concern itself with various forms of discrimination which countries maintain for themselves, bloc currency, subsidies to merchant marine, and things of that kind?
>
> Mr Pasvolsky. I should think that the Organization would wish to discuss and consider them. It might even make recommendations on any

matters which affect international economic or social relations. The League of Nations did. The International Labor Office has done that. This new Organization being created will be doing a great deal of that. . . .

Senator Millikin. Would the investigation of racial discriminations be within the jurisdiction of this body?

Mr. Pasvolsky. Insofar, I imagine, as the Organization takes over the function of making studies and recommendations on human rights, it may wish to make studies in those fields and make pronouncements.

Senator Vandenberg. At that point I wish you would reemphasize what you read from the Commission Report specifically applying the exemption of domestic matters to the Social and Economic Council.

Mr. Pasvolsky. I will read that paragraph again.

Senator Vandenberg. Yes, please.

Mr. Pasvolsky. (reading):

'The members of Committee 3 of Commission II are in full agreement that nothing contained in chapter IX can be construed as giving authority to the Organization to intervene in the domestic affairs of Member states'. . . .

Senator Millikin. Is there any other international aspect to a labor problem or a racial problem or a religious problem that does not originate domestically? . . .

Mr. Pasvolsky. Well, Senator, I suppose we can say that there is no such thing as an international problem that is not related to national problems, because the word 'international' itself means that there are nations involved. What domestic jurisdiction relates to here, I should say, as it does in all of these matters, is that there are certain matters which are handled internally by nations which do not affect other nations or may not affect other nations. On the other hand, there are certainly many matters handled internally which do affect other nations and which by international law are considered to be of concern to other nations.

Senator Millikin. For example, let me ask you if this would be true: It is conceivable that there are racial questions on the southern shores of the Mediterranean that might have very explosive effects under some circumstances; but they originate locally, do they not, Doctor?

Mr. Pasvolsky. Yes.

Senator Millikin. And because they might have explosive effects, this Organization might concern itself with them; is that correct?

Mr. Pasvolsky. It might, if somebody brings them to the attention of the Organization.

Senator Millikin. And by the same token, am I correct in this, that in any racial matter, any of these matters we are talking about, that originates in one country domestically and that has the possibility of making international trouble, might be subject to the investigation and recommendations of the Organization?

Mr. Pasvolsky. I should think so, because the Organization is created for that.

2. A number of different versions of the proposal to amend the treatymaking power under the U.S. Constitution were considered by the Congress in the

course of the so-called 'Bricker Amendment' debate, which lasted roughly from 1952 to 1957.[7]

. . .

4. It is generally acknowledged that the defeat of the proposed constitutional amendment was due in large measure to the vigorous lobbying by the Eisenhower Administration and its concomitant undertaking, articulated in the above-quoted testimony by Secretary of State John Foster Dulles, not to adhere to human rights treaties. This undertaking was also embodied in a policy statement issued by Mr. Dulles in the form of a letter addressed to Mrs. Oswald B. Lord, the United States Representative on the United Nations Commission on Human Rights. 28 DSB 579-80 (1953); 13 M. M. Whiteman, Digest of International Law 667-68 (Washington, D.C., 1970). This letter read in part as follows:

> In the light of our national, and recently, international experience in the matter of human rights, the opening of a new session of the Commission on Human Rights appears an appropriate occasion for a fresh appraisal of the methods through which we may realize the human rights goals of the United Nations. These goals have a high place in the Charter as drafted at San Francisco and were articulated in greater detail in the Universal Declaration of Human Rights. . . .
>
> Since the establishment of these goals, much time and effort has been expended on the drafting of treaties, that is, Covenants on Human Rights, in which it was sought to frame, in mutually acceptable legal form, the obligations to be assumed by national states in regard to human rights. We have found that such drafts of Covenants as had a reasonable chance of acceptance in some respects established standards lower than those now observed in a number of countries.
>
> While the adoption of the Covenants would not compromise higher standards already in force, it seems wiser to press ahead in the United Nations for the achievement of the standards set forth in the Universal Declaration of Human Rights through ways other than the proposed Covenants on Human Rights. This is particularly important in view of the likelihood that the Covenants will not be as widely accepted by United Nations members as initially anticipated. Nor can we overlook the fact that the areas where human rights are being persistently and flagrantly violated are those where the Covenants would most likely be ignored.
>
> In these circumstances, there is a grave question whether the completion, signing and ratification of the Covenants at this time is the most desirable method of contributing to human betterment particularly in areas of greatest need. Furthermore, experience to date strongly suggests

[7] (Eds.) The Bricker Amendment, a series a proposals for constitutional amendments, would have significantly limited executive power over treaties and correspondingly increased the power of the Senate or the Congress as a whole. Different versions of the amendments would have curtailed the use of self-executing treaties by requiring treaties followed by legislation, and redrawn the boundary line between treaties and executive agreements so as to require larger Senate participation.

that even if it be assumed that this is a proper area for treaty action, a wider general acceptance of human rights goals must be attained before it seems useful to codify standards of human rights as binding international legal obligations in the Covenants.

With all these considerations in mind, the United States Government asks you to present to the Commission on Human Rights at its forthcoming session a statement of American goals and policies in this field; to point out the need for reexamining the approach of the Human Rights Covenants as the method for furthering at this time the objectives of the Universal Declaration of Human Rights; and to put forward other suggestions of method, based on American experience, for developing throughout the world a human rights conscience which will bring nearer the goals stated in the Charter. . . .

. . . By reason of the considerations referred to above, the United States Government has reached the conclusion that we should not at this time become a party to any multilateral treaty such as those contemplated in the draft Covenants on Human Rights, and that we should now work toward the objectives of the Declaration by other means. While the Commission continues, under the General Assembly's instructions, with the drafting of the Covenants, you are, of course, expected to participate. This would be incumbent on the United States as a loyal Member of the United Nations.

NOTE

In the years following the decision to withdraw from participation in the two major Covenants, the United States did ratify a few human rights treaties, including the Slavery Convention, the Protocol Relating to the Status of Refugees, the Convention on the Political Rights of Women, and the four Geneva Conventions on the laws of war. But it was not until the Carter administration in the late 1970s that a President sought the Senate's consent for ratification of a number of major treaties (including the two Covenants).

In recent years, the record of the United States has substantially improved, for it has become a party not only to the ICCPR but also to the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; and the International Convention on the Elimination of All Forms of Racial Discrimination. But there has never been sustained debate in the Senate or broader political debate in the country about participation in three major and widely ratified treaties: the Convention on the Elimination of All Forms of Discrimination against Women, the American Convention on Human Rights, or indeed the International Covenant on Economic, Social and Cultural Rights.

The following materials deal with aspects of the ratification process of the International Covenant on Civil and Political Rights. Given the similarities between the provisions of that Covenant and the U.S. tradition of liberal con-

stitutionalism and a Bill of Rights, no opponents of ratification then expressed doubt about the broad consistency between the principles of the Covenant and the United States Constitution. There were statements from civil liberties groups stressing significant if more limited ways in which the U.S., were it to become a party without making numerous legislative and policy changes, would be in violation of several ICCPR provisions.[8]

Debate in the Senate hearings over the ICCPR concentrated on relatively few provisions in and omissions from the Covenant that raised questions for some or many participants in this process, as well as on the question of whether the Covenant was to be self-executing. Throughout the ratification process much attention was given to the use of reservations, declarations and understandings to 'cure' the few problems that emerged. The materials below have the same focus.

COMMENT ON THE INTERNAL EFFECT OF THE ICCPR

One of the recurrent issues before the Executive Branch and the Senate in deciding whether the U.S. should become a party to the International Covenant on Civil and Political Rights was whether the Covenant, or salient parts of it, should be understood to be self-executing. Note that the ICCPR itself makes no reference to its self-executing or non-self-executing character but provides in Article 2(2):

> Where not already provided for by existing legislation or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 2(3) bears out this obligation by stating the further undertaking to 'ensure that any persons whose rights . . . are violated shall have an effective remedy,' and to 'ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities . . . and to develop the possibilities of judicial remedy.' How the states fulfill these obligations lies within their discretion; they are not obligated to incorporate the treaty *as such* within their domestic legal order, whether through automatic incorporation (self-executing treaty) or legislative incorporation. Consider the following comments on the ICCPR:

> In practice, differences in the domestic status of the Covenant are substantial. [The author describes the differences among several European

[8] See, e.g., Human Rights Watch and American Civil Liberties Union, Human Rights Violations in the United States: A report on U.S. compliance with the International Covenant on Civil and Political Rights (1993).

> states that were described in the materials, pp. 728–38, *supra*, examining the internal effect in those states of the European Human Rights Convention.] In its examination of individual communications and State reports, the [ICCPR Human Rights Committee] has confirmed that the States Parties may implement the Covenant domestically as they see fit. There is, however, a certain tendency to promote the *direct applicability* of the Covenant.[9]

In his book on the ICCPR Committee,[16] McGoldrick describes the consistent attention that the Committee has given in its examination of states' reports to the internal effect of the Covenant.

> States are requested to explain how their respective legal regimes would resolve the problems of conflict between the provisions of the Covenant and those of its Constitution and internal laws including the role of customary laws, traditional institutions, and tribal traditions. Details are sought of the account taken of the Covenant for the purpose of interpreting provisions of domestic legislation and as a standard for the administrative authorities in the exercise of discretionary powers.

COMMENT ON TREATY RESERVATIONS

At the urging of the Executive Branch, the ratification by the United States of the ICCPR was made subject by the Senate to a number of reservations, understandings and declarations. This Comment provides background on relevant aspects of the international law of treaties.

Article 2(1)(d) of the Vienna Convention on the Law of Treaties defines a reservation to mean 'a unilateral statement' made by a State when ratifying a treaty 'whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.' Article 19 provides that a State ratifying a treaty may make a reservation unless it is 'prohibited by the treaty' or 'is incompatible with the object and purpose of the treaty.' Section 313 of the *Restatement (Third), Foreign Relations Law of the United States* (1987), is to the same effect. Comment (g) to Section 313 refers to the terms *declaration* and *understanding*, both of which appear in the following materials:

> When signing or adhering to an international agreement, a state may make a unilateral declaration that does not purport to be a reservation. Whatever it is called, it constitutes a reservation in fact if it purports to exclude, limit, or modify the state's legal obligation. Sometimes, however, a declaration purports to be an 'understanding,' an interpretation of the agreement in a particular respect. Such an interpretive declaration is not

[9] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary 54 (1993).
[10] Dominic McGoldrick, The Human Rights Committee 270–71 (1991).

a reservation if it reflects the accepted view of the agreement. But another contracting party may challenge the expressed understanding, treating it as a reservation which it is not prepared to accept.

The issue of the effect of reservations to a multilateral human rights treaty was earlier addressed by the International Court of Justice in its 1951 advisory opinion on *Reservations to the Genocide Convention*,[11] which influenced the Vienna Convention's provisions above. The principal questions put to the I.C.J. by the UN General Assembly was whether a reserving state could be regarded as a party to the Genocide Convention if its reservation was objected to by one or more existing parties but not by others, and, if so, what effect the reservation then had between the reserving state and the accepting or rejecting parties.

In responding to that question[12], the Court addressed the 'traditional concept . . . that no reservation was valid unless it was accepted by all the contracting parties without exception. . . .' In the context of the Genocide Convention, the Court found it 'proper' to take into account circumstances leading to 'a more flexible application of this principle.' It emphasized the universal character and aspiration of multilateral human rights treaties. Widespread ratifications had 'already given rise to greater flexibility in the international practice' concerning them.

After concluding that the Genocide Convention (whose provisions were silent on the issue of reservations) permitted a state to enter a reservation, the Court considered 'what kind of reservations may be made and what kind of objections may be taken to them.' It underscored the special character of the Convention, which was 'manifestly adopted for a purely humanitarian and civilizing purpose.' In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest in the 'accomplishment of those high purposes which are the *raison d'être* of the convention.' In such circumstances, one cannot 'speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.' Permitting any one state party that objected to another state's reservation of any type to block adherence to the convention by that other state would frustrate the convention's goal of universal membership.

On the other hand, the Court could not accept the argument that 'any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty.' It followed that 'it is the compatibility of a reservation with the object and purpose of the

[11] International Court of Justice, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15.

[12] The Court concluded (1) that a state whose reservation has been objected to by one or more parties but not by others can be regarded as a party to the Convention 'if the reservation is compatible with the object and purpose of the Convention;' and (2) that a state party objecting to a reservation that it views as incompatible with the Convention can consider the reserving state not to be a party.

Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.'

Subsequent to the ratification of the ICCPR by the United States that was made subject to certain reservations, the ICCPR Human Rights Committee adopted its General Comment No. 24 relating to reservations made upon accession to that convenant. The General Comment, which appears at p. 774, *infra*, develops some of the ideas in this Comment.

SENATE HEARINGS ON INTERNATIONAL HUMAN RIGHTS TREATIES

S. Comm. For. Rel., 96th Cong., 1st Sess. (1979).

[In 1977, President Carter signed four human rights treaties on behalf of the United States and soon thereafter submitted them to the Senate for its consent to ratification. The Carter Administration proposed that the Senate adopt a number of reservations, understandings and declarations as part of its consent. The following excerpts from the 1979 Senate hearings on the treaties concern only one of them, the International Covenant on Civil and Political Rights. Some references to the proposals for reservations, understandings and declarations appear in these excerpts. The treaties were never brought to vote in the Senate, and the matter effectively died until the Bush Administration revived in 1991 the question of U.S. participation in the International Covenant on Civil and Political Rights. It submitted the Covenant afresh to the Senate, together with modestly amended proposals for reservations, understandings and declarations that are set forth at p. 767, infra.]

Statement of Charles Yost, Former Ambassador to United Nations

. . .

There are, in my judgment, few failures or omissions on our part which have done more to undermine American credibility internationally than this one. Whenever an American delegate at an international conference, or an American Ambassador making representations on behalf of our Government, raises a question of human rights, as we have in these times many occasions to do, the response public or private, is very likely to be this: If you attach so much importance to human rights, why have you not even ratified the United Nations' conventions and covenants on this subject? Why have you not taken the steps necessary to enable you to sit upon and participate in the work of the United Nations Human Rights [Committee]?

Our refusal to join in the international implementation of the principles we so loudly and frequently proclaim cannot help but give the impression that we

do not practice what we preach, that we have something to hide, that we are afraid to allow outsiders even to inquire whether we practice racial discrimination or violate other basic human rights. Yet we constantly take it upon ourselves to denounce the Soviet Union, Cuba, Vietnam, Argentina, Chile, and many other states for violating these rights. We are in most instances quite right to do so, but we seriously undermine our own case when we resist joining in the international endeavor to enforce these rights, which we ourselves had so much to do with launching.

Many are therefore inclined to believe that our whole human rights policy is merely a cold war exercise or a display of self-righteousness directed against governments we dislike. . . .

. . .

Moreover, the powers of the two international bodies applying the Convention on Racial Discrimination and the Covenant on Civil and Political Rights are so strictly limited that it is impossible for them to intrude in the domestic affairs of a party to these instruments without the consent of that party.

. . .

Prepared Statement of Senator Jesse Helms

. . .

. . . Article 17 [of the Universal Declaration of Human Rights] reads: 'Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.'

President Truman insisted that the Universal Declaration contain article 17 guaranteeing the individual's right to property, before the United States would support the declaration. It has been the consistent position of the United States since that time—of Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon and Ford—that before the United States would become a party to any implementing treaty of the declaration, the treaty must recognize each person's right to property as a basic human right protected under international law.

On October 5, 1977, President Carter reversed this American position of nearly three decades by signing, on behalf of the United States, the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

On February 23 of last year, the President transmitted these covenants to the Senate for ratification. Because of the history of these covenants regarding article 17 of the declaration and personal property rights, their ratification by the Senate would for the first time legitimize the unlawful expropriation without compensation or arbitrary seizure of Americans' property overseas.

Furthermore, ratification by the Senate would again for the first time have the United States formally acquiesce to Socialist and Marxist governments' denial of basic individual economic rights. As presently written, these U.N. covenants require the United States to ignore basic constitutional rights of Americans as a matter of international law.

. . .

How is it that we are suddenly asked to abandon a right so central to the Constitution and Bill of Rights? Would we not hesitate to abandon its companion rights central to the existence of a free society? Rights such as freedom of speech, of the press, and of religion?

. . .

Prepared Statement of Robert Owen, Legal Adviser, Department of State

. . .

. . . But because these treaties do concern themselves with the relations between governments and individuals rather than solely with those between States, objections have been raised to them. It is feared by some that these treaties could be used to distort the constitutional legislative standards that shape our federal and our state governments' treatment of individuals within the United States. These criticisms deserve response.

Such objections tend to fall into three categories. First, it is said that the human rights treaties could serve to change our laws as they are, allowing individuals in courts of law to invoke the treaty terms where inconsistent with domestic law or even with the Constitution. The second type of objection is that the treaties could be used to alter the jurisdictional balance between our federal and state institutions. Since these first two objections will be addressed during these hearings by the Department of Justice, I will go into them only briefly. The third type of objection is that the relationship between a government and its citizens is not a proper subject for the treaty-making powers at all, but ought to be left entirely to domestic legislative processes. This last point I shall address in somewhat more detail.

As others have noted, the treaties do diverge from our domestic law in a relatively few instances. Critics fear that this divergence will cause changes in that domestic law outside the normal legislative process, or at least will subject the relations between the government and the individual to conflicting legal standards.

This fear is not well-founded, in our judgment, for two reasons. First, the President has recommended that to each of the four treaties there is appended a declaration that the treaties' substantive provisions are not self-executing.

. . .

. . . This does not mean that vast new implementing legislation is required, as the great majority of the treaty provisions are already implemented in our domestic law. It does mean that further changes in our laws will be brought about only through the normal legislative process. This understanding as to the non-self-executing nature of the substantive provisions of the treaties would not derogate from or diminish in any way our international obligations under the treaties; it touches only upon the role the treaty provisions will play in our domestic law.

A second reason why we need not fear a confusion of standards due to possible conflicts between the treaty provisions and domestic law rests in this Administration's recommended reservations and understandings. In the few instances where it was felt that a provision of the treaties could reasonably be interpreted to diverge from the requirements of our constitution or from federal or state law presently in force, the Administration has suggested that a reservation or understanding be made to that provision. In our view, these reservations do not detract from the object and the purpose of the treaties—that is, to see to it that minimum standards of human rights are observed throughout the world—and they permit us to accept the treaties in a form consonant with our domestic legal requirements.

. . .

The third objection that has been raised is that the subject matter of these treaties lies beyond the scope of the treaty-making power. The text of the Constitution, of course, gives no guidance as to what may or may not be the subject of a treaty. The Supreme Court has said a number of times that '[t]he treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our government and other nations.' Although the Court has not elaborated upon what a 'proper subject of negotiation' might or might not be, it has come to be commonly accepted that the treaty power extends to any 'matter of international concern.' See *Restatement of Foreign Relations Law*. (§40, comment b at 117 (1965))

Although there have in the past been differences of opinion as to what is and is not a matter of 'international concern,' it seems clear today that no matter how widely or narrowly the boundaries of 'international concern' be drawn, a treaty concerning human rights falls squarely within them.

. . .

. . . The primary objective is the fostering of international commitments to erect and observe a minimum standard of rights for the individual as set forth by the treaties. This standard is met by our domestic system in practice, although not always in precisely the same way that the treaties envision. By ratification, we would commit ourselves to maintain the level of respect we already pay to the human rights of our people; we would commit ourselves

not to backslide, and we would be subjecting this commitment and our human rights performance as a whole to international scrutiny.

Our main goal in suggesting the reservations that I have described is thus not to evade the minimum standards imposed by the treaties whenever they touch our system. The rationale behind the reservations is, rather, that we take our international legal obligations seriously, and therefore will commit ourselves to do by treaty only that which is constitutionally and legally permissible within our domestic law. In this respect, it should be noted, we are in good company. . . .

Another reason why the Administration has proposed a number of reservations, understandings and declarations is pragmatic. We believe these treaties to be important and necessary, and we are anxious to secure the advice and consent of the Senate to their ratification. It is our judgment that the prospects for securing that ratification would be significantly and perhaps decisively advanced if it were to be clear that, by adopting these treaties, the United States would not automatically be bringing about changes in its internal law without the legislative concurrence of the federal or state governments.

. . .

Statement of Jack Goldklang, Office of Legal Counsel, Department of Justice

. . .

. . . Because we already have on the books a very complicated legal system of local, State, and Federal law, we felt it would be better not to have an additional body of self-executing law. If we did, the courts then would be left with the job of trying to see whether differences in language which exist between the treaties and our own laws made a legal difference, and whether the rights that we have here in the United States have been changed.

If one reads through these treaties, one finds that in substance we have, by and large, the rights that are required, but one also sees that the language in the treaties is not necessarily the language that we are familiar with and comfortable with. Therefore, I think it is entirely appropriate that we recommend a declaration [that the treaty not be self-executing] and that the Senate adopt a declaration on this matter.

. . .

* * * * *

Senator PELL. Do you think by affixing reservations we may be making an error in that we would be permitting other nations also to affix reservations and reinterpret the covenants according to their own ideologies?

Mr. OWEN. The reservations that we have recommended in some cases are absolutely essential in order to avoid conflicts with our own Constitution.

As to the other reservations, if the Senate should decide that they are not necessary, I think the administration would be willing to dispense with them. Then we would be, in effect, bringing about a more rigorous civil rights regime and there would be no possible criticism that we were not fulfilling the treaties as a whole.

. . .

Response by the Department of State to a Memorandum of the Lawyers Committee for International Human Rights

. . .

The provisions of the Covenants do not differ greatly from protections offered under U.S. law. If the United States ratifies these Covenants without reservations in the few instances where they do diverge from U.S. law, the nation assumes an international obligation to adopt legislation to rectify the differences. The Departments of State and Justice recommended reservations in these few instances so as to leave to the federal and state legislatures decisions as to whether such legislative changes should be undertaken. At a time of concern that the Executive Branch excessively encroaches upon legislative prerogatives, it was felt that these issues of domestic policy were best left in the hands of both Houses of Congress and the state legislatures.

. . .

Opposition to Ratification

Senator PELL. Where do you think the opposition has been to the passage of these treaties? Why is it we have had to delay for 20 years or more?

. . .

Mr. FARER. . . . I think that race relations have been one factor, if we will be perfectly frank. A lot of opposition came from representatives of States where law or practice were crudely discriminatory.

But I also think that like most other countries, particularly large countries, we tend to react instinctively with some belligerence to the idea that other countries and peoples can assess for themselves what we are doing, and the idea that they may fault the level of achievement that we have managed to reach.

. . .

Senator PELL. What would you think, Professor Sohn?

Mr. SOHN. I agree with the two other speakers that the fears have been exaggerated and that it is simply part of the general feeling that the United States knows better about various things and therefore should not be subject to other peoples' judgments. It reminds me of what happened in the United Kingdom when they finally ratified the European Convention on Human Rights. The Foreign Minister made a statement in the House of Commons saying of course we are willing to ratify it because nobody can find anything wrong with the British laws on human rights. Well, of course, 2 weeks later all of the cases relating to immigration from Kenya to the United Kingdom by people nominally British citizens and the restrictions on them by immigration authorities immediately were taken to the European Commission. The United Kingdom had to admit that its administrative procedures were not in accordance with the standards of the Convention.

I think on the one hand we always say to everybody else that our standards are higher than those of anyone else; but we will discover, if we are subject to international supervision, that there are some skeletons in our closet and they will be paraded in public, and we do not like that idea.

. . .

Statement of Phyllis Schlafly

. . .

I oppose Senate ratification of these international human rights treaties for the following reasons.

First, the treaties do not give Americans any rights whatsoever. They do not add a minuscule of benefit to the marvelous human rights proclaimed by the Declaration of Independence, guaranteed by the U.S. Constitution, and extended by our Federal and State laws.

Second, the treaties imperil or restrict existing rights of Americans by using treaty law to restrict or reduce U.S. constitutional rights, to change U.S. domestic Federal or State laws, and to upset the balance of power within our unique system of federalism.

Third, the treaties provide no tangible benefit to peoples in other lands and, even if they did, that would not justify sacrificing American rights.

. . .

This covenant sets up a Human Rights [Committee] of 18 members on which the United States would have at most one or perhaps no representative at all. It would have the competence to hear complaints against us, and who knows what they would do.

. . .

Statement of Oscar Garibaldi, Professor, Virginia Law School

. . .

The implementation systems of the Covenants are considerably weaker than the European or inter-American systems. They basically consist in the submission of reports, to be considered by the Human Rights Committee or the ECOSOC, with the addition of a voluntary fact-finding and conciliation procedure in the Covenant on Civil and Political Rights. I am very skeptical about the effectiveness of these procedures, if by this we mean their ability to influence the States Parties' conduct. . . .

In any event, these procedures will engender practices, which will significantly contribute to the interpretation of the treaties. In this sense, we should remember that the composition of the Human Rights Committee follows the ubiquitous principle of equitable distribution, which ensures the presence of members from totalitarian and authoritarian countries. As a result, the practice of the Committee already shows attempts to redefine the language of the Covenant on Civil and Political Rights, dilute its standards, and enforce it selectively.

. . .

Let me now summarize the reasons why I conditionally support . . . the Covenant on Civil and Political Rights only if the U.N. makes a number of reservations—not necessarily those proposed by the Administration—designed to make these treaties compatible with some basic principles of American law and foreign policy. . . . The reasons for my support of [the Covenant and one other of the four submitted treaties] are the following. First, although they are far from perfect, these treaties are largely the philosophical offering of classical liberalism; for the most part, they set limits to governmental power over individuals' lives. they prescribe not what governments should do, but what governments may not do. Second, the language of these treaties—indeed the language of human rights as a whole—is particularly susceptible to semantic infiltration, that is, the redefinition of a term to serve the purposes of totalitarian doublespeak. Because of the high emotional appeal of human rights language and its operational function in international law, we cannot afford to abandon these concepts to the enemies of freedom. But this long-term semantic struggle will be waged in the implementation organs set up by these treaties, which argues for a responsible American voice in these fora. . . .

. . .

QUESTIONS

1. In these excerpts from the Hearings, the Legal Adviser to the State Department noted the common acceptance of the view that the treaty power extended to any 'matter of international concern' (quoting from a Restatement). He argued that, whatever the boundaries of that conception, human rights treaties clearly fall within it. Suppose he were challenged on that assertion. With what arguments could he best support it?

2. Based on the prior readings, how would you identify the principal concerns that a President who believed it important to ratify a given human rights treaty should be aware of when seeking the Senate's consent? Can you think of ways in which the President might seek to alleviate or dispose of those concerns before submitting the treaty to the Senate?

LETTER FROM PRESIDENT BUSH TO SENATE FOREIGN RELATIONS COMMITTEE

Rep. of S. Comm. For. Rel. to Accompany Exec. E, 95–2 (1992), at 25.

August 8, 1991.

DEAR MR. CHAIRMAN: I am writing to urge the Senate to renew its consideration of the International Covenant on Civil and Political Rights with a view to providing advice and consent to ratification.

The end of the Cold War offers great opportunities for the forces of democracy and the rule of law throughout the world. I believe the United States has a special responsibility to assist those in other countries who are now working to make the transition to pluralist democracies. . . .

United States ratification of the Covenant on Civil and Political Rights at this moment in history would underscore our natural commitment to fostering democratic values through international law. The Covenant codifies the essential freedoms people must enjoy in a democratic society, such as the right to vote, freedom of peaceful assembly, equal protection of the law, the right to liberty and security, and freedom of opinion and expression. Subject to a few essential reservations and understandings, it is entirely consonant with the fundamental principles incorporated in our own Bill of Rights, U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community and provide an additional and effective tool in our efforts to improve respect for fundamental freedoms in many problem countries around the world.

. . .

PROPOSALS BY BUSH ADMINISTRATION OF RESERVATIONS TO INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Rep. of S. Comm. For. Rel. to Accompany Exec. E, 95-2 (1992) at 10.

[In 1978, the Carter Administration had proposed a list of reservations, understandings and declarations when it put four human rights treaties, including the ICCPR, to the Senate for its consent to ratification. In 1991, when the Bush Administration revived the ICCPR alone among the four treaties, it submitted a revised list to the Senate Foreign Relations Committee. The following excerpts from this 1991 submission include the Bush Administration's explanation of the reasons for proposing several of the reservations, understandings and declarations.]

GENERAL COMMENTS

. . .

In a few instances, however, it is necessary to subject U.S. ratification to reservations, understandings or declarations in order to ensure that the United States can fulfill its obligations under the Covenant in a manner consistent with the United States Constitution, including instances where the Constitution affords greater rights and liberties to individuals than does the Covenant. Additionally, a few provisions of the Covenant articulate legal rules which differ from U.S. law and which, upon careful consideration, the Administration declines to accept in preference to existing law. Specific proposals dealing with both situations are included below.

FORMAL RESERVATIONS

1. Free Speech (Article 20)

Although Article 19 of the Covenant specifically protects freedom of expression and opinion, Article 20 directly conflicts with the First Amendment by requiring the prohibition of certain forms of speech and expression which are protected under the First Amendment to the U.S. Constitution (i.e., propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence). The United States cannot accept such an obligation.

Accordingly, the following reservation is recommended:

> Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States.

. . .

2. Article 6 (capital punishment)

Article 6, paragraph 5 of the Covenant prohibits imposition of the death sentence for crimes committed by persons below 18 years of age and on pregnant women. In 1978, a broad reservation to this article was proposed in order to retain the right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishment. The Administration is now prepared to accept the prohibition against execution of pregnant women. However, in light of the recent reaffirmation of U.S. policy towards capital punishment generally, and in particular the Supreme Court's decisions upholding state laws permitting the death penalty for crimes committed by juveniles aged 16 and 17, the prohibition against imposition of capital punishment for crimes committed by minors is not acceptable. Given the sharply differing view taken by many of our future treaty partners on the issue of the death penalty (including what constitutes 'serious crimes' under Article 6(2)), it is advisable to state our position clearly.

Accordingly, we recommend the following reservation to Article 6:

> The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.

. . .

4. Article 15(1) (post-offense reductions in penalty)

Article 15, paragraph 1, precludes the imposition of a heavier penalty for a criminal offense than was applicable at the time the offense was committed, and requires States Party to comply with any post-offense reductions in penalties: '[i]f, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.' Current federal law, as well as the law of most states, does not require such relief and in fact contains a contrary presumption that the penalty in force at the time the offense is committed will be imposed, although post-sentence reductions are permitted (see 18 U.S.C. §3582 (c)(2) and the Federal Sentencing Guidelines) and are often granted in practice when there have been subsequent statutory changes. Upon consideration, there is no disposition to require a change in U.S. law to conform to the Covenant.

Accordingly, we recommend a reservation similar to the one proposed in 1978:

> Because U.S. law generally applies to an offender the penalty in force at the time the offense was committed, the United States does not adhere to the third clause of paragraph 1 of Article 15.

. . .

UNDERSTANDINGS

1. Article 2(1), 4(1) and 26 (non-discrimination)

The very broad anti-discrimination provisions contained in the above articles do not precisely comport with long-standing Supreme Court doctrine in the equal protection field. In particular, Articles 2(1) and 26 prohibit discrimination not only on the bases of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth' but also on any 'other status.' Current U.S. civil rights law is not so open-ended: discrimination is only prohibited for specific statuses, and there are exceptions which allow for discrimination. For example, under the Age Discrimination Act of 1975, age may be taken into account in certain circumstances. In addition, U.S. law permits additional distinctions, for example between citizens and non-citizens and between different categories of non-citizens, especially in the context of the immigration laws.

In interpreting the relevant Covenant provisions, the Human Rights Committee has observed that not all differentiation of treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In its General Comment on non-discrimination, for example, the Committee noted that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.

Notwithstanding the very extensive protections already provided under U.S. law and the Committee's interpretive approach to the issue, we recommend [an understanding that expresses the preceding concerns. Its text is here omitted.]

4. Article 14 (right to counsel, compelled witness, and double jeopardy)

In a few particular aspects, this Article could be read as going beyond existing U.S. domestic law. In particular, current Federal law does not entitle a defendant to counsel of his own choice when he is either indigent or financially able to retain counsel in some form; nor does federal law recognize a right to counsel with respect to offenses for which imprisonment is not imposed. With respect to the compelled attendance and examination of witnesses, a criminal defendant must show that the requested witness is necessary to his defense. Under the Constitution, double jeopardy attaches only to multiple prosecutions by the same sovereign and does not prohibit trial of the same defendant for the same crime in, for example, state and federal courts or in the courts of two states. See *Burton v. Maryland*, 395 U.S. 784 (1969).

To clarify our reading of the Covenant with respect to these issues, we recommend the following understanding, similar to the one proposed in 1978:

> The United States understands that subparagraphs 3(b) and (d) of Article 14 do not require the provision of a criminal defendant's counsel of choice when the defendant is provided with court-appointed counsel on grounds

of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed. The United States further understands that paragraph 3(e) does not prohibit a requirement that the defendant make a showing that any witness whose attendance he seeks to compel is necessary for his defense. The United States understands the prohibition upon double jeopardy in paragraph 7 to apply only when the judgment of acquittal has been rendered by a court of the same governmental unit, whether the Federal Government or a constituent unit, as is seeking a new trial for the same cause.

DECLARATIONS

1. Non-self-executing Treaty

For reasons of prudence, we recommend including a declaration that the substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, implementing legislation is not contemplated.

We recommend the following declaration, virtually identical to the one proposed in 1978 as well as the one adopted by the Senate with respect to the Torture Convention:

> The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

. . .

3. Article 41 (state-to-state complaints)

Under Article 41, States Party to the Covenant may accept the competence of the Human Rights Committee to consider state-to-state complaints by means of a formal declaration to that effect. . . .

Accordingly, we recommend informing the Senate of our intent, subject to its approval, to make an appropriate declaration under Article 41 at the time of ratification, as follows:

> The United States declares that it accepts the competence of the Human Rights Committee to receive and consider communications under Article 41 in which a State Party claims another State Party is not fulfilling its obligations under the Covenant.

. . .

NOTE

The Senate consented to ratification subject to the described (and other) reservations, understandings and declarations. In the Senate debate preceding the approving vote, Senator Moynihan noted that '[o]thers have raised the legitimate concern that the number of reservations in the administration's package might imply to some that the United States does not take the obligations of the covenant seriously.' He stressed how few and selective the reservations were, in the context of the entire covenant, and argued that 'a wholly different interpretation' could be placed on them—namely, as an indication of the seriousness with which the United States approached its new obligations, unlike 'nations of the totalitarian block [that] ratified obligations without reservation—obligations that they had no intention of carrying out.' He observed that 'a Senator might well conclude that it is in the interests of the United States to ratify the covenant with this package of reservations even if that Senator disagrees strongly with a particular domestic practice which has prompted a reservation.' Efforts to change that domestic practice through legislation could continue. 138 Cong. Rec. S4781, April 2, 1992. On ratification, the United States became a party to the Covenant.

* * * * *

With respect to the reservation covering Article 20, note the ambiguous wording of para. 2 of that article, providing that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' The ICCPR Committee has not issued a General Comment on Article 20. Manfred Nowak, in his *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993), observes (p. 365) that the 'legal formulation of this provision is not entirely clear.' The wording of para. (2)

> literally means that incitement to discrimination without violence must also be prohibited. . . . Particularly inexplicable is the insertion of the word 'discrimination'. . . . It is most difficult to conceive of an advocacy of national, racial or religious hatred that does not simultaneously incite discrimination. . . . Art. 20(2) as well may be sensibly interpreted only in light of its object and purpose, i.e., taking into consideration its *responsive character* with regard to the Nazi racial hatred campaigns. . . . Thus, despite its unclear formulation, States Parties are not obligated by Art. 20(2) to prohibit advocacy of hatred in private circles that instigates non-violent actions of racial or religious discrimination. What the delegates . . . had in mind was to . . . prevent the public incitement of racial hatred and violence within a State or against other States and peoples.

QUESTIONS

1. Recall that a number of NGOs participating in the Senate hearings on ratification of the ICCPR opposed the proposed (and later adopted) declaration to the effect that the substantive provisions of the Covenant would not be self-executing. Note the following comments in a report by the largest domestic civil-liberties organization and the largest U.S.-based international human rights organization in the United States: Human Rights Watch and American Civil Liberties Union, *Human Rights Violations in the United States: A report on U.S. compliance with the International Covenant on Civil and Political Rights* 2 (1993):

> . . . Americans would have been able to enforce the treaty in U.S. courts either if it had been declared to be self-executing or if implementing legislation had been enacted to create causes of action under the treaty. The Bush administration rejected both routes. The result was that ratification became an empty act for Americans: the endorsement of the most important treaty for the protection of civil rights yielded not a single additional enforceable right to citizens and residents of the United States.
>
> We issue this report to demonstrate the inaccuracy of the view that Americans do not need the protection of the ICCPR. As we show, the Bush administration was wrong in its assessment that the United States is already complying with all the treaty's obligations, even after the administration nullified some of the rights through its reservations, declarations and understandings. In the areas of racial and gender discrimination, prison conditions, immigrants rights, language discrimination, the death penalty, police brutality, freedom of expression and religious freedom, we show that the United States is now violating the treaty in important respects. As a result, the Clinton administration is under an immediate legal obligation to remedy these human rights violations at home, through specific steps that we outline.
>
> Moreover, to ensure that these remedies are sufficient, we believe the U.S. government is obligated to grant Americans the right to invoke the protections of the treaty in U.S. courts, at least through specific legislation enabling them to do so, but preferably through a formal declaration that the treaty is self-executing, and thus invocable in U.S. courts without further legislation. . . .

Do you agree with these observations about the need for a self-executing Covenant? What arguments would you make against this position?

2. What remedial path has a U.S. citizen who plausibly claims that the government has violated his rights under the ICCPR, but who lacks any plausible claim under U.S. law? What steps could she realistically take to pressure the U.S. government to accept her position?

3. Ratification by the U.S. of the ICCPR Optional Protocol does not seem to have been discussed. No such proposal was put to the Senate. (a) Why do you suppose this to have been the case? (b) As a member of the State Department, would you have argued for or against joining the Optional Protocol? (c) 'Ratification of the Optional Protocol would have been the correct solution, preferable to making the ICCPR self-executing.' Comment.

NOTE

A number of states parties to the ICCPR objected to one or more of the reservations of the United States. [13] Some illustrations follow.

The governments of several states—including Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Portugal, Spain and Sweden—objected to the reservation regarding Article 6, para. 5, prohibiting the imposition of the death sentence for crimes committed by persons below 18 years of age, and found that reservation incompatible with the ICCPR's provisions and with its object and purpose. Most of these states also objected to other reservations (or to understandings), particularly the one relating to Article 7. These states, however, stressed that (to take one illustration) the state's position on the relevant reservations (p. 56) 'does not constitute an obstacle to the entry into force of the Covenant between the Kingdom of Spain and the United States of America.'

In objecting to three reservations and three understandings, Sweden observed (p. 57) that under international treaty law, the name 'assigned to a statement' that excluded or modified the effect of certain treaty provisions

> does not determine its status as a reservation to the treaty. Thus, the Government considers that some of the understandings made by the United States in substance constitute reservations to the Covenant.
>
> A reservation by which a State modifies or excludes the application of the most fundamental provisions of the Covenant, or limits its responsibilities under that treaty by invoking general principles of national law, may cast doubts upon the commitment of the reserving State to the object and purpose of the Covenant. The reservations made by the United States of America include both reservations to essential and non-derogable provisions, and general references to national legislation. Reservations of this nature contribute to undermining the basis of international treaty law. All States parties share a common interest in the respect for the object and purpose of the treaty to which they have chosen to become parties.

[13] The objections are set forth in alphabetical order of the states involved, starting at p. 47 in CCPR/C/2/Rev 4, 24 August 1994, entitled 'Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto.'

GENERAL COMMENT NO. 24 OF HUMAN RIGHTS COMMITTEE

CCPR/C/21/Rev.1/Add.6, 2 Nov. 1994.

[At its 52nd session in 1994, the ICCPR Committee adopted General Comment No. 24 entitled: 'General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant.' (Earlier General Comments (GCs) of the Committee appear at p. 522, *supra*). This GC was adopted after the ratification of the ICCPR by the United States described above, and preceded the Committee's consideration of the first periodic report submitted by the U.S. in 1995. It refers to the judicial decision and to the provisions of the Vienna Convention on the Law of Treaties described in the Comment on Treaty Reservations, p. 756, supra.

The GC notes that as of its date, 46 of the 127 states parties to the ICCPR had entered a total of 150 reservations, ranging from exclusion of the duty to provide particular rights, to insistence on the 'paramountcy of certain domestic legal provisions' and to limitation of the competence of the Committee. Those reservations 'tend to weaken respect' for obligations and 'may undermine the effective implementation of the Covenant.' The Committee felt compelled to act, partly under the necessity of clarifying for states parties just what obligations had been undertaken, a clarification that would require the Committee to determine 'the acceptability and effects' of a reservation or unilateral declaration.

The GC notes that the ICCPR itself makes no reference to reservations (as is true also for the First Optional Protocol; the Second Optional Protocol limits reservations), and that the matter of reservations is governed by international law. It finds in Article 19(3) of the Vienna Convention on the Law of Treaties 'relevant guidance.' Therefore, that article's 'object and purpose test . . . governs the matter of interpretation and acceptability of reservations.' The GC continues:]

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of

national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be.

9. Applying more generally the object and purpose test to the Covenant, the Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (Article 2(1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (Article 2(2)).

10. The Committee has further examined whether categories of reservations may offend the 'object and purpose' test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. This underlines the great importance of non-derogable rights. But not all rights of profound importance, such as articles 9 and 27 of the Covenant, have in fact been made non-derogable. One reason for certain rights being made non-derogable is because their suspension is irrelevant to the legitimate control of the state of national emergency (for example, no imprisonment for debt, in article 11). Another reason is that derogation may indeed be impossible (as, for example, freedom of conscience). At the same time, some provisions are non-derogable exactly because without them there would be no rule of law. . . .

11. The Covenant consists not just of the specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3. of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. . . .

The Committee's role under the Covenant, whether under article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence. Accordingly, a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. . . . Domestic laws may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed

to allow the Covenant rights to be enforceable at the local level. Reservations often reveal a tendency of States not to want to change a particular law. And sometimes that tendency is elevated to a general policy. Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed.

. . .

17. . . . [Human rights] treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. . . . Because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant. . . .

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. . . . Because of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively, by reference to legal principles, and the Committee is particularly well placed to perform this task. The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

19. Reservations must be specific . . . . States should not enter so many reservations that they are in effect accepting a limited number of human rights obligations, and not the Covenant as such. So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to the presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law.

20. . . . It is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved; and to explain the time period it requires to render its own laws and practices compatible with the Covenant, or why it is unable to render its own laws and practices compatible with the Covenant. . . .

QUESTIONS

1. 'The sequence from the *Reservations to the Genocide Convention* decision of the I.C.J. (p. 757, *supra*) to General Comment No. 24 is less surprising than it is inevitable. The judicial decision relaxes the relevant international law rules. All are welcome to the human rights treaties, so make entrance as easy as possible. What followed was foreseeable, including the reaction of the ICCPR Committee.' Comment.

2. Could General Comment No. 24 stand as an interpretation and elaboration of the Vienna Convention, covering all types of multilateral treaties, or do you believe that it has a special relevance to (a) the ICCPR, or (b) all human rights treaties in general?

3. What is the status of the U.S. ratification of the ICCPR from the perspective of General Comment No. 24? If the General Comment had preceded that ratification, should the U.S. now be considered a state party? What other factors might be relevant to that determination?

4. Why was there near unanimity among the states parties to the ICCPR that objected to the reservations by the United States about the reservation concerning Article 6, para. 5 (death sentence)? Did that reservation raise a special problem under the Covenant?

5. In the light of General Comment No. 24, if you were a Senator committed to U.S. ratification of the major human rights instruments, would you have voted for *any* reservation? Did any one of the reservations have a special justification?

COMMENT ON U.S. RATIFICATION OF THE CONVENTION ON ELIMINATION OF RACIAL DISCRIMINATION

In 1994, the United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) subject to three reservations, one understanding, and one declaration (stating that the Convention is not self-executing).

One reservation was addressed to Article 4 of CERD, which is the equivalent of Article 20 of the ICCPR. States Parties 'condemn all propaganda . . . based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin.' They undertake to declare a punishable offence 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence' against such a race or group. Article 1 defines 'racial discrimination' to mean any distinction based

on 'race, colour, descent, or national or ethnic origin' that has the purpose or effect of impairing equal enjoyment of rights 'in the political, economic, social, cultural or any other field of public life.'

Another reservation concerned the extent to which CERD reaches beyond state discrimination to prohibit certain private or non-governmental conduct. Recall Article 1's definition of 'racial discrimination' and consider the following provisions:

> *Article 2. Para. 1:* 'States Parties condemn racial discrimination and undertake to pursue by all appropriate means . . . a policy of eliminating racial discrimination in all its forms . . . and, to this end: . . . (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation . . . , racial discrimination by any persons, group or organization; . . .'
>
> *Article 5:* States Parties undertake to guarantee the right of everyone to the enjoyment of stated rights, including '(e) Economic and social rights, in particular: . . . (iii) the right to housing; (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.'

The reservation noted that the U.S. Constitution and laws reached 'significant areas of non-governmental activity' in protecting against discrimination. It continued:

> Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under [designated provisions, including paragraph (1) and subparagraph 1(d) of Article 2, and Article 5] with respect to private conduct except as mandated by the Constitution and laws of the United States.[14]

QUESTIONS

1. What is your view of what the United States in its reservation sees as a possible contradiction: (a) the definition of discrimination in Article 1 which appears to refer only to fields of 'public life,' and (b) the provisions of Articles 2 and 5? What are the different meanings that you might attribute to the term 'public'?

[14] 140 Cong. Rec. S 7643, 103rd Cong. 2nd Sess., June 7, 1994.

2. In what respects could Articles 2 and 5 be read to go beyond existing U.S. regulation of discrimination by private (i.e. non-governmental) actors? Can you give concrete illustrations?

3. Why would you have supported or opposed this particular reservation?

C JUDICIAL ENFORCEMENT OF CUSTOMARY NORMS: THE ALIEN TORT STATUTE

The following decisions applying the Alien Tort Statute bridge in some sense Chapters 11 and 12. They fit within this chapter's scheme because the judiciary in the United States absorbs international human rights norms—unlike the prior sections, customary rather than treaty norms—into the domestic legal system. On the other hand, the decisions anticipate Chapter 12 because they involve civil claims based on alleged human rights violations that occurred outside the United States. In some sense, the United States, through its judiciary, here seeks to enforce human rights in foreign countries by affording remedies to foreign victims of violations committed by officials in those countries.

The decisions return to themes about customary international law that were first explored in Chapter 2. Recall *The Paquete Habana*, p. 60, *supra*, and its illustration of earlier, traditional approaches to identifying international customary norms. Compare the approach in the *Filartiga* decision that follows, in terms of (i) the court's method and (ii) the kinds of legal and other materials drawn on by the court as it decides whether a given norm has been established at customary international law and thus forms part of the law of the United States.

FILARTIGA v. PENA-IRALA

United States Court of Appeals, Second Circuit, 1980.
630 F.2d 876.

Irving R. Kaufman, Circuit Judge

. . .

Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the

law of nations.' Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 77 (1789), *codified at* 28 U.S.C. §1350. Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.

I

The appellants, plaintiffs below, are citizens of the Republic of Paraguay. Dr. Joel Filartiga, a physician, describes himself as a longstanding opponent of the government of President Alfredo Stroessner, which has held power in Paraguay since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa, and has since applied for permanent political asylum. The Filartigas brought this action in the Eastern District of New York against Americao Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. Because the district court dismissed the action for want of subject matter jurisdiction, we must accept as true the allegations contained in the Filartigas' complaint and affidavits for purposes of this appeal.

The appellants contend that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. . . . The Filartigas claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Shortly thereafter, Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.

. . .

In July of 1978, Pena sold his house in Paraguay and entered the United States under a visitor's visa. He was accompanied by Juana Bautista Fernandez Villalba, who had lived with him in Paraguay. The couple remained in the United States beyond the term of their visas, and were living in Brooklyn, New York, when Dolly Filartiga, who was then living in Washington, D.C., learned of their presence. Acting on information provided by Dolly the Immigration and Naturalization Service arrested Pena and his companion, both of whom were subsequently ordered deported on April 5, 1979 following a hearing. They had then resided in the United States for more than nine months.

Almost immediately, Dolly caused Pena to be served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation. The complaint alleged that Pena had wrongfully caused Joelito's

death by torture and sought compensatory and punitive damages of $10,000,000. The Filartigas also sought to enjoin Pena's deportation to ensure his availability for testimony at trial. The cause of action is stated as arising under 'wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations,' as well as 28 U.S.C. §1350, Article II, sec. 2 and the Supremacy Clause of the U.S. Constitution. Jurisdiction is claimed under the general federal question provision, 28 U.S.C. §331 and, principally on this appeal, under the Alien Tort Statute, 28 U.S.C. §1350.

Judge Nickerson stayed the order of deportation, and Pena immediately moved to dismiss the complaint on the grounds that subject matter jurisdiction was absent and for *forum non conveniens*. On the jurisdictional issue, there has been no suggestion that Pena claims diplomatic immunity from suit. . . . Pena, in support of his motion to dismiss on the ground of *forum non conveniens*, submitted the affidavit of his Paraguayan counsel, Jose Emilio Gorostiaga, who averred that Paraguayan law provides a full and adequate civil remedy for the wrong alleged. Dr. Filartiga has not commenced such an action, however, believing that further resort to the courts of his own country would be futile.

Judge Nickerson heard argument on the motion to dismiss on May 14, 1979, and on May 15 dismissed the complaint on jurisdictional grounds.[5]

. . .

The district court continued the stay of deportation for forty-eight hours while appellants applied for further stays. These applications were denied by a panel of this Court on May 22, 1979, and by the Supreme Court two days later. Shortly thereafter, Pena and his companion returned to Paraguay.

II

Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. §1350, which provides: '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.' Since appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates

[5] The court below accordingly did not consider the motion to dismiss on *forum non conveniens* grounds, which is not before us on this appeal.

established norms of the international law of human rights, and hence the law of nations.

The Supreme Court has enumerated the appropriate sources of international law. The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' United States v. Smith, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820); Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 295 (E.D.Pa.1963). In *Smith*, a statute proscribing 'the crime of piracy [on the high seas] as defined by the law of nations,' 3 Stat. 510(a) (1819), was held sufficiently determinate in meaning to afford the basis for a death sentence. The *Smith* Court discovered among the works of Lord Bacon, Grotius, Bochard and other commentators a genuine consensus that rendered the crime 'sufficiently and constitutionally defined.' *Smith*, supra, 18 U.S. (5 Wheat.) at 162, 5 L.Ed. 57.

[The Court then discussed *The Paquete Habana*, p. 60 *supra*, stressing its lesson that 'courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.']

The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. Thus, in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Court declined to pass on the validity of the Cuban government's expropriation of a foreign-owned corporation's assets, noting the sharply conflicting views on the issue propounded by the capital-exporting, capital-importing, socialist and capitalist nations. Id. at 428-30, 84 S.Ct. at 940–41.

The case at bar presents us with a situation diametrically opposed to the conflicted state of law that confronted the *Sabbatino* Court. Indeed, to paraphrase that Court's statement, id. at 428, 84 S.Ct. at 940, there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.

The United Nations Charter (a treaty of the United States, see 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

Id. Art. 55. And further:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Id. Art. 56.

While this broad mandate has been held not to be wholly self-executing, Hitai v. Immigration and Naturalization Service, 343 F.2d 466, 468 (2d Cir.1965), 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 guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, 'no one shall be subjected to torture.' The General Assembly has declared that the Charter precepts embodied in this Universal Declaration 'constitute basic principles of international law.' G.A.Res. 2625 (XXV) (Oct. 24, 1970).

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975). . . . The Declaration goes on to provide that '[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law.' This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly. . . .

. . . [A] U.N. Declaration is, according to one authoritative definition, 'a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.' 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights 'no longer fits into the dichotomy of "binding treaty" against "nonbinding pronouncement," but is rather an authoritative statement of the international community.' *E. Schwelb, Human Rights and the International Community* 70 (1964). Thus, a Declaration creates an expectation of adherence, and 'insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States.' 34 U.N. ESCOR, supra. Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law. . . .

. . . The international consensus surrounding torture has found expression in numerous international treaties and accords. . . . The substance of these international agreements is reflected in modern municipal—i.e. national—law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay. . . . We have been directed to

no assertion by any contemporary state of a right to torture its own or another nation's citizens. Indeed, United States diplomatic contacts confirm the universal abhorrence with which torture is viewed:

> In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.[16]

Memorandum of the United States as *Amicus Curiae* at 16 n. 34.

Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists—we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. Accordingly, we must conclude that the dictum in Dreyfus v. von Finck, [534 F.2d 24 (2d Cir.1976), at 31] to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy of our own government,[17] all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. We therefore turn to the question whether the other requirements for jurisdiction are met.

III

. . .

It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the

[16] The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, 'The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law.' J. Brierly, The Outlook for International Law 4–5 (1944).

[17] E.g., 22 U.S.C. § 2304(a)(2) ('Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.'); 22 U.S.C. § 2151(a) ('The Congress finds that fundamental political, economic, and technological changes have resulted in the interdependence of nations. The Congress declares that the individual liberties, economic prosperity, and security of the people of the United States are best sustained and enhanced in a community of nations which respect individual civil and economic rights and freedoms').

orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state when the wrong occurred. . . .

. . . Here, where *in personam* jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate Paraguayan law, and the policies of the forum are consistent with the foreign law,[18] state court jurisdiction would be proper. Indeed, appellees conceded as much at oral argument.

. . . [W]e proceed to consider whether the First Congress acted constitutionally in vesting jurisdiction over 'foreign suits,' . . . alleging torts committed in violation of the law of nations. A case properly 'aris[es] under the . . . laws of the United States' for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. . . . The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law *of the United States* upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.

During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 Blackstone, Commentaries 263–64 (1st Ed. 1765–69); 4 id. at 67. . . .

. . .

As ratified, the judiciary article contained no express reference to cases arising under the law of nations. Indeed, the only express reference to that body of law is contained in Article I, sec. 8, cl. 10, which grants to the Congress the power to 'define and punish . . . offenses against the law of nations.' Appellees seize upon this circumstance and advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress. E.g., Ware v. Hylton, 3 U.S. (3 Dall.) 198, 1 L.Ed. 568 (1796); *The Paquete Habana*, supra, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320; *Sabbatino*, supra, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). . . .

The Filartigas urge that 28 U.S.C. §1350 be treated as an exercise of Congress's power to define offenses against the law of nations. While such a reading is possible . . . we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law. The statute nonetheless does inform our analysis of Article III, for we

[18] Conduct of the type alleged here would be actionable under 42 U.S.C. § 1983 or, undoubtedly, the Constitution, if performed by a government official.

recognize that questions of jurisdiction 'must be considered part of an organic growth part of an evolutionary process,' and that the history of the judiciary article gives meaning to its pithy phrases. Romero v. International Terminal Operating Co., 358 U.S. 354, 360, 79 S.Ct. 468, 473, 3 L.Ed.2d 368 (1959). The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today.

. . . The paucity of suits successfully maintained under the section is readily attributable to the statute's requirement of alleging a '*violation* of the law of nations' (emphasis supplied) at the jurisdictional threshold. Courts have, accordingly, engaged in a more searching preliminary review of the merits than is required, for example, under the more flexible 'arising under' formulation. . . . Thus, the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue.

[Discussion omitted of prior decisions under the Alien Tort Statute involving different fact situations and distinct claims such as suits for fraud or for wilful negligence leading to an accident.]

Since federal jurisdiction may properly be exercised over the Filartigas' claim, the action must be remanded for further proceedings. Appellee Pena, however, advances several additional points that lie beyond the scope of our holding on jurisdiction. Both to emphasize the boundaries of our holding, and to clarify some of the issues reserved for the district court on remand, we will address these contentions briefly.

IV

Pena argues that the customary law of nations, as reflected in treaties and declarations that are not self-executing, should not be applied as rules of decision in this case. In doing so, he confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied, which will be addressed at a later stage in the proceedings. The two issues are distinct. Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness, see Home Insurance Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926 (1930); consequently, it looks to wholly different considerations. See Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1954). Should the district court decide that the *Lauritzen* analysis requires it to apply Paraguayan law, our courts will not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under

the law of the forum and the law of nations but not the law of the jurisdiction in which the tort occurred.[19]

Pena also argues that '[i]f the conduct complained of is alleged to be the act of the Paraguayan government, the suit is barred by the Act of State doctrine.' This argument was not advanced below, and is therefore not before us on this appeal. We note in passing, however, that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. See Banco Nacionale de Cuba v. Sabbatino, supra, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804; Underhill v. Hernandez, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456 (1897). Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority. . . .

. . .

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

[19] In taking that broad range of factors into account, the district court may well decide that fairness requires it to apply Paraguayan law to the instant case. See Slater v. Mexican National Railway Co., 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed. 900 (1904). Such a decision would not retroactively oust the federal court of subject matter jurisdiction, even though plaintiff's cause of action would no longer properly be 'created' by a law of the United States. See American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260, 36 S.Ct. 585, 586, 60 L.Ed. 987 (1916) (Holmes, J.). Once federal jurisdiction is established by a colorable claim under federal law at a preliminary stage of the proceeding, subsequent dismissal of that claim (here, the claim under the general international proscription of torture) does not deprive the court of jurisdiction previously established. . .

NOTE

Following remand, the defendant took no part in the action and a default judgment was entered. The district court, 577 F. Supp. 860 (E.D.N.Y. 1984), awarded punitive damages of $5,000,000 to each plaintiff, so that the total judgment amounted to $10,385,364. The judgment was never collected.

Like many cases under the Alien Tort Statute (ATS), *Filartiga* was not defended throughout, and the case ended in a default judgment. The appellate courts in these cases have frequently been required to rule on motions by defendants to dismiss for want of subject matter jurisdiction or for failure to state a cause of action. For purposes of their decisions on these matters, they have taken plaintiffs' allegations as true. That is, such trial and appellate court decisions do not involve fact finding.

Filartiga and the following decisions under the ATS take different positions about the statute's purpose and effect and the bases for jurisdiction. Bear in mind several possible positions: (1) The only question before a court (as in the *Filartiga* decision) is subject matter jurisdiction. This is all that the ATS purports to do. It does not create a cause of action, point toward resolution of the merits, and so on. (2) The ATS creates a federal cause of action. The court fills in the remedial provisions. (3) The court can assert general federal question jurisdiction under 28 U.S.C.§1331, for the civil action is one 'arising under the . . . laws . . . of the United States.'

QUESTIONS

1. Describe the court's argument in concluding that torture is a violation of customary international law, a part of the 'law of nations' under §1350. Compare and contrast the approach of the Supreme Court in *The Paquete Habana*, p. 60, *supra*. Specifically, (a) what use is made in *Filartiga* of UN resolutions and declarations and of human rights treaties? What relevance to this case have those treaties? (b) Does the court's conception of custom stress consensus over norms or over practice? What is the relation between the two? (c) How would you criticize the court's discussion of state practice that it uses to support its finding of an international custom? (d) What relevance to this decision has the classical notion of *opinio juris*?

2. Note the difficulty in drawing on the 'law of nations' to support civil cases like those under the ATS rather than criminal cases. (a) What relevance to this decision has, for example, the Nuremberg precedent, p. 102. *supra*? (b) In what instances does international law provide for civil remedies against perpetrators for violations of human rights (recall the provisions of universal and regional human rights treaties)? Are those examples helpful to plaintiffs in ATS cases? (c) What relevance to this issue has Article 8 of the UDHR or Article 2(3) of the ICCPR?

COMMENT ON THE TEL-OREN CASE, THE ACT-OF-STATE DOCTRINE, AND SOVEREIGN IMMUNITY

Tel-Oren v. Libyan Arab Republic

In 1978, in a few violent hours, members of the Palestine Liberation Organization (PLO) entered Israel for a terrorist raid, killing 24 people and wounding 77 more. With few exceptions, the victims were Israeli civilians. Plaintiffs in *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774 (D.C. Cir. 1984), included most of the wounded and relatives of most of the killed. Plaintiffs alleged that the PLO had trained the terrorists and planned the raid, and that Libya had participated. Jurisdiction was claimed under 28 U.S.C. §1331 and under the Alien Tort Statute, 28 U.S.C. §1350. The court of appeals affirmed *per curiam* a dismissal by the district court for want of subject matter jurisdiction. Each of the three judges wrote a separate opinion. The description below of two of the opinions deals only with the claim under the Alien Tort Statute and only with the PLO as defendant.

In his opinion, *Judge Edwards* drew on the *Filartiga* decision, *supra*, stressing its observation that the law of nations was not stagnant but should be construed 'as it exists today among the nations of the world,' and its conclusion that §1350 opened federal courts for 'adjudication of rights already recognized by international law.' Plaintiffs were not required to point to a specific right to sue under the law of nations in order to establish jurisdiction under §1350. That section requires only that the action rest upon a violation of the law of nations. This permits countries 'to meet their international obligations as they will'—or as a treaty (no such treaty being relevant to this case) might specifically provide.

One could infer from *Filartiga*, said Judge Edwards, that persons could be subject to civil liability under §1350 either by (i) committing a crime that traditionally warranted universal jurisdiction (such as the criminal prosecution of a pirate or slave trader) or (ii) committing an offense comparably violating contemporary international law. Commentators had begun to identify 'a handful of heinous actions—each of which violates definable, universal and obligatory norms—and in the process are defining the limits of section 1350's reach.' Judge Edwards referred to a then current draft of the *Restatement of the Law of Foreign Relations* that included as violations of customary international law murder and torture, both of which were within plaintiffs' allegations.

Nonetheless, Judge Edwards affirmed the dismissal on grounds that the PLO was not a recognized state, and that (unlike *Filartiga*) the case did not therefore involve 'official torture' or persons acting under color of state law. He was unwilling to extend the notion of the law of nations (and hence §1350) to include conduct of non-state actors. Nor, alternatively, was he willing to view terrorism (by analogy to piracy) as a violation itself of the law of nations

that, without any state's involvement, led to individual responsibility of those committing terrorist acts.

Judge Bork took a very different position. He argued that §1350 was no more than a grant of jurisdiction to federal courts, and criticized the opinion in *Filartiga* for its failure to inquire whether international law created a cause of action enforceable by private parties in municipal (national) courts. Recalling that there was no concept of international human rights in 1789, Judge Bork stressed that neither was there any recognition of a right of private parties to recover under customary international law. 'That problem is not avoided by observing that the law of nations evolves.' Contemporary customary international law should not be construed to create such a civil action, for international law is fundamentally a law among states in which individuals have no direct enforcement or other role.

In these types of cases, Judge Bork continued, the understanding of international law argued for by §1350 plaintiffs would require that 'our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.' To recognize such an action would amount to 'judicial interference with nonjudicial functions, such as the conduct of foreign relations.' Adjudication 'would present grave separation of powers problems.' A different conclusion might be reached if §1350 'had been adopted by a modern Congress that made clear its desire that federal courts police the behavior of foreign individuals and governments.'

Drawing on Blackstone, Judge Bork concluded that the 1789 Congress enacting the Alien Tort Statute might have been thinking of the then principal offenses by individuals against the law of nations: violation of safe-conducts, infringement of rights of ambassadors, and piracy. This modest list of civil actions based on the law of nations continues in effect today. Nor should the contemporary human rights treaties be construed to create private causes of action, except where (as with respect to the European Human Rights Convention) they specifically do so.

The Act-of-State Doctrine

In his observations about potential judicial interference with the conduct of foreign relations, Judge Bork drew on a strand of Supreme Court decisions dealing with the so-called act-of-state doctrine. That doctrine has figured prominently in recent decisions under the Alien Tort Statute (together with other doctrines and principles such as sovereign immunity and the political question defense).

Bypassing the complexities in the act-of-state doctrine and its exceptions, this Comment sketches some of its characteristics that are relevant to litigation under §1350. An early statement of the doctrine appears in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). An American citizen in Venezuela was operating under contract a local water system. Over a period of several months, a

Venezuelan general effectively exercising governmental power denied him the necessary documents to permit him to leave, thus coercing him to continue his operations. That citizen later brought an action against the general in a U.S. federal court to recover damages for unlawful detention. The Supreme Court affirmed a judgment for the defendant, stating in part:

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

It agreed with the conclusion of the lower court that 'the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.'

The principal decision launching the act-of-state doctrine on its modern career is *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), a case involving a Cuban expropriation of sugar properties owned by U.S. residents. The question arose in the context of deciding whether a U.S. court would apply the act-of-state doctrine and therefore presume the expropriation to be legal, *or* would examine the legality of the Cuban expropriation and, if it were found illegal, would deny it effect.

It was the contention of the U.S. commercial interests involved in the litigation that the doctrine did not apply to acts of state violating international law. Such a violation was claimed to have occurred in this case, since the compensation offered by Cuba did not meet an alleged customary international law standard of prompt, adequate and effective compensation for takings by a state of alien-owned property. The Supreme Court, however, pointed out that this standard was disputed among states. 'There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.'

In finding the act-of-state-doctrine applicable (thus leading to the presumed legitimacy of the Cuban expropriation), Justice Harlan wrote for the Court:

> [The doctrine's] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interests or with international justice. It is also evident that some aspects of international law touch more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. . . . Therefore, rather than laying down or

> reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

The *Sabbatino* decision, together with later decisions in this field, stress the relevance to the doctrine's application of several other factors, including whether the Executive Branch (generally the Department of State) informs a court that it opposes judicial examination of the legality of the foreign government's act on the ground of the act-of-state doctrine.

Sovereign Immunity

Recall Judge Edward's opinion in the *Tel-Oren* case dismissing the §1350 action because the PLO was not a recognized state and thus could not commit 'official torture' or action under color of state law. However, had the PLO been a recognized state, a judicial action would have been barred under the doctrine of sovereign immunity, as indeed was the case with the government of Libya, the second defendant in *Tel-Oren*. This question of sovereign immunity has frequently arisen in cases under the Alien Tort Statute, sometimes in a close relation to the act-of-state doctrine.

The Foreign Sovereign Immunities Act of 1976 (FSIA), codified principally at 22 U.S.C.A. §§1602–11, provides a comprehensive legislative framework for deciding on claims of foreign defendants for immunity. Foreign states, including 'an agency or instrumentality' thereof, are immune from judicial jurisdiction, subject to enumerated exceptions. Those exceptions include court actions growing out of a state's commercial activities occurring in the United States, and actions involving property expropriated by the foreign government in violation of international law.

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), involved a §1350 action growing out of the Falklands (Malvinas) war between the U.K. and Argentina. It was based on the damage to plaintiff's ship by an attack of Argentine aircraft. Plaintiff claimed that the attack was in violation of international law. The Supreme Court refused to draw an exception to the rule of immunity for suits under the Alien Tort Statute because of Argentina's alleged violation of international law. It drew from the FSIA 'the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions.'

Saudi Arabia v. *Nelson*, 113 S. Ct. 1471 (1993), involved tort claims based on alleged human rights violations. The Supreme Court held that alleged acts of unlawful detention and torture by the defendant state do not fall within any of the FSIA's exceptions. It concluded that '[t]he conduct [complained of by plaintiff] boils down to abuse of the power of its police by the Saudi

Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature.' Sovereign immunity was granted Saudi Arabia.

In *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), the court of appeals agreed with the plaintiff's argument that official acts of torture attributed to Argentina constituted a violation of a *jus cogens* norm of the 'highest status within international law.' Nonetheless, taking its lesson from the *Amareda Hess* decision in which the Supreme Court was so specific, the court concluded that it was Congress that would have to make any further exceptions to sovereign immunity. 'The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.'

In view of the FSIA and the decisional law described above, plaintiffs in §1350 actions have sought to avoid the issue of sovereign immunity by suing not the state itself but individual perpetrators—as indeed occurred in *Filartiga*. Courts required to sort out the relevance of sovereign immunity when individual defendants are before it have taken different approaches. For example, in *Chuidian* v. *Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), the court held that the individual defendant, who had been acting in his official capacity, had immunity as 'an agency or instrumentality of a foreign state.' It observed that 'a suit against an individual in his official capacity is the practical equivalent of a suit against the sovereign directly.' The court, however, conceded that sovereign immunity would not be granted to individuals acting beyond the scope of their official duties, or in their individual capacities.

That very situation was present in *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994). The court held that the FSIA did not bar jurisdiction under §1350 over the estate of former President Ferdinand Marcos for alleged acts of torture and wrongful death, since those were not official acts perpetrated within the scope of his official authority in the Philippines but rather acts outside the scope of his authority as President. Quoting from a prior related case, the court said that '[o]ur courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law.' At the same time, the requirement of state action under the definition of official torture (recall Judge Edward's discussion of this issue in *Tel-Oren*) could still be met by an official acting under color of authority, though not within an official mandate. That official could violate international law for purposes of the Alien Tort Statute.

All these issues are raised by the *Suarez-Mason* decision that follows.

FORTI v. SUAREZ-MASON

United States District Court, Northern District California, 1987.
672 F. Supp. 1531.

MEMORANDUM DECISION AND ORDER
JENSEN, DISTRICT JUDGE.

. . .

Having now considered all of the parties' submissions in support of and opposition to defendant's motions, the Court hereby denies defendant's motion to dismiss and grants a temporary stay. An explanation of the Court's ruling follows.

I

FACTS

This is a civil action brought against a former Argentine general by two Argentine citizens currently residing in the United States. Plaintiffs Forti and Benchoam sue on their own behalf and on behalf of family members, seeking damages from defendant Suarez-Mason for actions which include, *inter alia*, torture, murder, and prolonged arbitrary detention, allegedly committed by military and police personnel under defendant's authority and control. . . .

. . .

Plaintiffs' action arises out of events alleged to have occurred in the mid-to late 1970s during Argentina's so-called 'dirty war' against suspected subversives. In 1975 the activities of terrorists representing the extremes of both ends of the political spectrum induced the constitutional government of President Peron to declare a 'state of siege' under Article 23 of the Argentine Constitution. President Peron also decreed that the Argentine Armed Forces should assume responsibility for suppressing terrorism. The country was accordingly divided into defense zones, each assigned to an army corps. In each zone the military was authorized to detain suspects and hold them in prison or in military installations pursuant to the terms of the 'state of siege.' Zone One—which included most of the Province of Buenos Aires and encompassed the national capital—was assigned to the First Army Corps. From January 1976 until January 1979 defendant Suarez-Mason was Commander of the First Army Corps.

On March 24, 1976 the commanding officers of the Armed Forces seized the government from President Peron. The ruling military junta continued the 'state of siege' and caused the enactment of legislation providing that civilians accused of crimes of subversion would be judged by military law. In the period from 1976 to 1979, tens of thousands of persons were detained without charges by the military, and it is estimated that more than 12,000 were 'dis-

appeared,' never to be seen again. *See generally Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (1986).

In January 1984 the constitutionally elected government of President Raul Alfonsin assumed power. The Alfonsin government commenced investigations of alleged human rights abuses by the military, and the criminal prosecution of certain former military authorities followed. The government vested the Supreme Council of the Armed Forces with jurisdiction over the prosecution of military commanders. Summoned by the Supreme Council in March 1984, defendant failed to appear and in fact fled the country. In January of 1987 Suarez-Mason was arrested in Foster City, California pursuant to a provisional arrest warrant at the request of the Republic of Argentina. While defendant was in custody awaiting an extradition hearing he was served with the Complaint herein.

[The court described the allegations in the Complaint about acts committed in the zone under the defendant's command. Those acts included (a) the torture, killing and continued disappearance of several family members of the plaintiffs, (b) harsh imprisonment without judicial process of one plaintiff for four years, (c) abduction and seizure of family members without charge, and (d) the seizure of personal property.]

Although the individual acts are alleged to have been committed by military and police officials, plaintiffs allege that these actors were all agents, employees, or representatives of defendant acting pursuant to a 'policy, pattern and practice' of the First Army Corps under defendant's command. Plaintiffs assert that defendant 'held the highest position of authority' in Buenos Aires Province; that defendant was responsible for maintaining the prisons and detention centers there, as well as the conduct of Army officers and agents; and that he 'authorized, approved, directed and ratified' the acts complained of.

. . . Although both plaintiffs retain their Argentine citizenship, both reside currently in Virginia. Plaintiffs predicate federal jurisdiction principally on the 'Alien Tort Statute,' 28 U.S.C. §1350, and alternatively on federal question jurisdiction, 28 U.S.C. §1331. Additionally, they assert jurisdiction for their common-law tort claims under principles of pendent and ancillary jurisdiction.

Based on these above allegations, plaintiffs seek compensatory and punitive damages for violations of customary international law and laws of the United States, Argentina, and California. They press eleven causes of action. Both allege claims for torture; prolonged arbitrary detention without trial; cruel, inhuman and degrading treatment; false imprisonment; assault and battery; intentional infliction of emotional distress; and conversion. Additionally Forti claims damages for 'causing the disappearance of individuals,' and Benchoam asserts claims for 'murder and summary execution,' wrongful death, and a survival action.

. . .

II

SUBJECT MATTER JURISDICTION

As a threshold matter, defendant argues that the Court lacks subject matter jurisdiction under 28 U.S.C. §1350, the 'Alien Tort Statute.' Defendant urges the Court to follow the interpretation of §1350 as a purely jurisdictional statute which requires that plaintiffs invoking it establish the existence of an independent, private right of action in international law. Defendant argues that the law of nations provides no tort cause of action for the acts of 'politically motivated terrorism' challenged by plaintiffs' Complaint. Alternatively, defendant argues that even if §1350 provides a cause of action for violations of the law of nations, not all of the torts alleged by plaintiffs qualify as violations of the law of nations. For the reasons set out below, the Court rejects defendant's construction of §1350 and finds that plaintiffs allege sufficient facts to establish subject matter jurisdiction under both the Alien Tort Statute and 28 U.S.C. §1331. . . .

A. The Alien Tort Statute

[The court agreed with the views of Judge Edwards in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d (D.C. Cir. 1984), *supra*. Plaintiffs are not required to 'establish the existence of an independent express right of action' under the law of nations, for that law doesn't create or define civil actions. Hence such a requirement 'would effectively nullify' a vital portion of §1350. That section provides both for jurisdiction and for a federal cause of action arising by recognition of certain 'international common law torts.' As indicated in Judge Edward's opinion, such an international tort must be 'definable, obligatory (rather than hortatory) and universally condemned. . . . The requirement of international consensus is of paramount importance . . . .']

B. Analysis Under 28 U.S.C. §1350

In determining whether plaintiffs have stated cognizable claims under Section 1350, the Court has recourse to 'the works of jurists, writing professedly on public law; . . . the general usage and practice of nations; [and] judicial decisions recognizing and enforcing that law.' *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820). . . .

1. Official Torture

In Count One, plaintiffs both allege torture conducted by military and police personnel under defendant's command. The Court has no doubt that official torture constitutes a cognizable violation of the law of nations under §1350. . . . The claim would thus allege torture committed by *state officials* and so fall within the international tort first recognized in *Filartiga*.

2. Prolonged Arbitrary Detention

. . .

There is case law finding sufficient consensus to evince a customary international human rights norm against arbitrary detention. *Rodriguez-Fernandez v. Wilkinson*, 505 F.Supp. 787, 795–98 (D. Kan.1980) (citing international treaties, cases, and commentaries), *aff'd*, 654 F.2d 1382 (10th Cir.1981); . . .

The consensus in even clearer in the case of a state's *prolonged* arbitrary detention of its own citizens. *See, e.g., Restatement (Revised) of the Foreign Relations Law of the United States* §702 (Tent. Draft No. 6, 1985) (prolonged arbitrary detention by state constitutes international law violation). The norm is obligatory, and is readily definable in terms of the arbitrary character of the detention. The Court finds that plaintiffs have alleged international tort claims for prolonged arbitrary detention.

3. Summary Execution

. . .

The proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory. The Court emphasizes that plaintiff's allegations raise no issue as to whether or not the execution was within the lawful exercise of state power; rather, she alleges murder by state officials with neither authorization nor recourse to any process of law. Under these circumstances, the Court finds that plaintiff Benchoam has stated a cognizable claim under §1350 for the 1977 murder/summary execution of her brother by Argentine military personnel.

4. Causing Disappearance

. . .

Sadly, the practice of 'disappearing' individuals—i.e., abduction, secret detention, and torture, followed generally by either secret execution or release—during Argentina's 'dirty war' is now well documented in the official report of the Argentine National Commission on the Disappeared, *Nunca Mas*. Nor are such practices necessarily restricted to Argentina. With mounting publicity over the years, such conduct has begun to draw censure as a violation of the basic right to life. Plaintiff cites a 1978 United Nations resolution and a 1980 congressional resolution to this effect. U.N.G.A.Res. /173 (1978); H.R.Con.Res. 285, 96th Cong., 2d Sess. The Court notes, too, that the proposed Restatement of the Law of Foreign Relations lists 'the murder or causing the disappearance of individuals,' where practiced, encouraged, or condoned by the state, as a violation of international law. However, plaintiffs do not cite the Court to any case finding that causing the disappearance of an individual constitutes a violation of the law of nations.

Before this Court may adjudicate a tort claim under §1350, it must be

satisfied that the legal standard it is to apply is one with universal acceptance and definition; on no other basis may the Court exercise jurisdiction over a claimed violation of the law of nations. Unfortunately, the Court cannot say, on the basis of the evidence submitted, that there yet exists the requisite degree of international concensus which demonstrates a customary international norm. Even if there were greater evidence of universality, there remain definitional problems. It is not clear precisely what conduct falls within the proposed norm, or how this proscription would differ from that of summary execution. . . . Yet there is no apparent international consensus as to the additional elements needed to make out a claim for causing the disappearance of an individual. For instance, plaintiffs have not shown that customary international law creates a presumption of causing disappearance upon a showing of prolonged absence after initial custody.

For these reasons the Court must dismiss Count Four for failure to state a claim upon which relief may be grounded.

. . .

5. Cruel, Inhuman and Degrading Treatment

Finally, in Count Five plaintiffs both allege a claim for 'cruel, inhuman and degrading treatment' based on the general allegations of the Complaint and consisting specifically of the alleged torture, murder, forcible disappearance and prolonged arbitrary detention.

This claim suffers the same defects as Count Four. Plaintiffs do not cite, and the Court is not aware of, such evidence of universal consensus regarding the right to be free from 'cruel, inhuman and degrading treatment as exists, for example, with respect to official torture.' Further, any such right poses problems of definability. . . . Accordingly, the Court dismisses Count Five of the Complaint for failure to state a claim upon which relief may be granted.

. . .

[The court also found jurisdiction under 28 U.S.C. §1331, which covers claims based on federal common law. It cited cases including *The Paquete Habana*, 175 U.S. 677, *supra* p. 60, for the proposition that federal common law incorporated international law.

The court, after describing decisions such as *Underhill* and *Sabbatino*, *supra* p. 791, next concluded that the act of state doctrine, which if applicable would block adjudication of the legality of defendant's conduct, did not apply. It said in part:]

. . . Defendant maintains that all of the challenged acts were taken pursuant to the 'state of siege' declared by the constitutional government and reaffirmed by the military junta. Thus, defendant argues, he was a government official acting under policies promulgated by the junta, and this Court cannot adjudicate the question of his liability without also passing on the question of the legality of the acts of the Argentine government. This, he concludes, is pre-

cisely the sort of case which the act of state doctrine removes from the courts' scrutiny.

. . .

Here, by contrast, [with prior discussed decisions], plaintiffs allege acts by a subordinate government official in violation not of economic rights, but of fundamental human rights lying at the very heart of the individual's existence. These are not the public official acts of a head of government, nor is it clear at this stage of the proceedings to what extent defendant's acts were 'ratified' by the *de facto* military government. . . .

Equally unpersuasive is defendant's argument that allegations of 'official' conduct sufficient to establish jurisdiction under 28 U.S.C. §1350 automatically implicate the act of state doctrine. . . . [F]or purposes of §1350 a plaintiff must allege 'official' (as opposed to private) action—but this is not necessarily the governmental and public action contemplated by the act of state doctrine. That is, a police chief who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be 'official' simply by virtue of his position and the circumstances of the act; his conduct may be wholly unratified by his government and even proscribed by its constitution and criminal statutes. . . .

The procedural context of defendant's motion governs here. Inasmuch as this is a Rule 12(b) (6) motion, the Court must accept as true the allegations of the Complaint, and may not dismiss the Complaint unless plaintiffs can prove no set of facts to establish their claims. The Court cannot say at this stage of the proceedings that adjudication of plaintiffs' claims will necessarily entail considering the legality of the official acts of a foreign sovereign.

. . .

NOTE

Plaintiffs in the above case filed a motion for reconsideration of the court's order dismissing the claims for 'disappearance' and 'cruel, inhuman or degrading treatment.' In *Forti* v. *Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988), Judge Jensen denied reconsideration of the second claim. 'Plaintiffs' submissions fail to establish that there is anything even remotely approaching universal consensus as to what constitutes "cruel, inhuman or degrading treatment."' He granted, however, plaintiffs' motion with respect to disappearance and reinstated that claim, stating in part:

> The legal scholars whose declarations have been submitted in connection with this Motion are in agreement that there is universal consensus as to the two essential elements of a claim for 'disappearance.' In Professor Franck's words:

> The international community has also reached a consensus on the definition of a 'disappearance.' It has two essential elements: (a) abduction by a state official or by persons acting under state approval or authority; and (b) refusal by the state to acknowledge the abduction and detention.

Plaintiffs cite numerous international legal authorities which support the assertion that 'disappearance' is a universally recognized wrong under the law of nations. For example, United Nations General Assembly Resolution 33/173 recognizes 'disappearance' as violative of many of the rights recognized in the Universal Declaration of Human Rights, G.A. Res. 217 A (III), adopted by the United Nations General Assembly, Dec. 10, 1948, U.N. Doc. A/810 (1948) [*hereinafter* Universal Declaration of Human Rights]. These rights include: (1) the right to life; (2) the right to liberty and security of the person; (3) the right to freedom from torture; (4) the right to freedom from arbitrary arrest and detention; and (5) the right to a fair and public trial. Id., articles 3, 5, 9, 10, 11. *See also* International Covenant on Political and Civil Rights, articles 6, 7, 9, 10, 14, 15, 17.

Other documents support this characterization of 'disappearance' as violative of universally recognized human rights. The United States Congress has denounced 'prolonged detention without charges and trial' along with other 'flagrant denial[s] of the right to life, liberty, or the security of person.' 22 U.S.C. §2304 (d)(I). The recently published Restatement (Third) of the Foreign Relations Law of the United States §702 includes 'disappearance' as a violation of the international law of human rights. The Organization of American States has also denounced 'disappearance' as 'an affront to the conscience of the hemisphere and . . . a crime against humanity.' Organization of American States, Inter-American Commission on Human Rights, General Assembly Resolution 666 (November 18, 1983).

. . .

QUESTIONS

1. What differences do you see between the positions on the ATS of the opinions in *Filartiga* and *Suarez-Mason*?

2. Do you agree with the court's resolution of the defense of act of state? Does this case present a stronger argument than *Filartiga* for such a defense?

3. Suppose that the former dictatorial president of a state that continues to be governed by an authoritarian elite supported by the military is sued for wrongful death damages under the Alien Tort Statute when he is in the United States (where he owns valuable real property). The plaintiff produces convincing evidence of the torture and murder of his parents, political opponents of the defen-

dant, on the orders of the defendant. Torture and killing (or forcing flight from the state through threats) were and continue to be the government's strategy for dealing with potentially threatening political opponents. The presidential successor to the defendant protests to the State Department this civil suit in the United States, which he views as an insult to the state's sovereignty? How should the court rule on the defenses of act of state and sovereign immunity? How, for example, might the defendant distinguish the *Filartiga* decision?

4. The plaintiff, a citizen of State X now in the U.S., brings an ATS action against a visiting official from X for categorically denying the plaintiff in X a permit to hold a parade in X's capital city. The parade's purpose was to publicize the program of the opposition party in X (to which plaintiff belongs). X is a tightly controlled state in which opposition parties are permitted to operate within severe limits. Elections are sham, the press is censored, the jails hold some political prisoners. Assume that there is no issue of sovereign or diplomatic immunity. What problems do you see in such an action? How does the action differ from *Filartiga* and *Suarez-Mason*?

5. How do you assess the significance of ATS actions and decisions, given that the collection of damages in most (not all) cases is unlikely? From the perspective of the human rights movement or the development of that movement within the United States, are ATS actions helpful? Why? Can you see any disadvantages in them?

TORTURE VICTIM PROTECTION ACT

106 Stat. 73 (1992), 28 U.S.C.A. §1350 Notes.

. . .

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical, or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

SENATE REPORT ON THE TORTURE VICTIM PROTECTION ACT

S. Rep. 102–249, Committee on the Judiciary, 102nd Cong., 1st Sess., 1991.

. . . This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was ratified by the U.S. Senate on October 27, 1990. The convention obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts. This legislation will do precisely that—by making sure that torturers and death squads will no longer have a safe haven in the United States.

. . .

The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, derived from the Judiciary Act of 1789 (the Alien Tort Claims Act) which permits Federal district courts to hear claims by aliens for torts committed 'in violation of the law of nations.' (28 U.S.C. 1350). Section 1350 has other important uses and should not be replaced. . . .

. . .

The TVPA would . . . enhance the remedy already available under section 1350 in an important respect: while the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.

. . .

Congress clearly has authority to create a private right of action for torture and extrajudicial killings committed abroad. Under article III of the Constitution, the Federal judiciary has the power to adjudicate cases 'arising under' the 'law of the United States.' The Supreme Court has held that the law of the United States includes international law. In *Verlinden B.V.* v. *Central Bank of Nigeria* 461 U.S. 480, 481 (1983), the Supreme Court held that the 'arising under' clause allows Congress to confer jurisdiction on U.S. courts to recognize claims brought by a foreign plaintiff against a foreign defendant. Congress' ability to enact this legislation also drives from article I, section 8 of the Constitution, which authorizes Congress 'to define and punish . . . Offenses against the Laws of Nations.'

IV. ANALYSIS OF LEGISLATION

. . .

D. Who can be sued

First and foremost, only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal court to obtain personal jurisdiction over a defendant, the individual must have 'minimum contacts' with the forum state, for example through residency here or current travel. Thus, this legislation will not turn the U.S. courts into tribunals for torts having no connection to the United States whatsoever.

The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign governments immune from suits in U.S. courts, except in certain instances.

The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction by U.S. courts over foreign diplomats. . . .

. . .

Similarly, the committee does not intend the 'act of state' doctrine to provide a shield from lawsuit for former officials. In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Supreme Court held that the 'act of state' doctrine is meant to prevent U.S. courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

E. Scope of liability

. . .

The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture. It will not permit a lawsuit against a former leader of a country merely because an isolated act of torture occurred somewhere in that country. However, a higher official need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them. . . .

Finally, low-level officials cannot escape liability by claiming that they were acting under orders of superiors. Article 2(3) of the Torture Convention explicitly states that 'An order from a superior official or a public authority may not be invoked as a justification for torture.'

. . .

VII. MINORITY VIEWS OF MESSRS. SIMPSON AND GRASSLEY

. . .

The executive branch, through the Department of Justice, has expressed a most serious concern with S. 313, which we share. Senate bill 313 could create difficulties in the management of foreign policy. For example, under this bill, individual aliens could determine the timing and manner of the making of allegations in a U.S. court about a foreign country's alleged abuses of human rights.

There is no more complex and sensitive issue between countries than human rights. The risk that would be run if an alien could have a foreign country judged by a U.S. court is too great. Judges of U.S. courts would, in a sense, conduct some of our Nation's foreign policy. The executive branch is and should remain, we believe, left with substantial foreign policy control.

In addition the Justice Department properly notes that our passage of this bill could encourage hostile foreign countries to retaliate by trying to assert

jurisdiction for acts committed in the United States by the U.S. Government against U.S. citizens. For example, if this bill's principles were adopted abroad, Saddam Hussein could try a United States citizen police officer who happened to be present in Iraq, in an Iraqi court, for alleged human rights abuses against any United States citizen that the policeman happened to arrest while performing his duties in the United States.

. . .

QUESTIONS

Compare the TVPA with the prior §1350 decisions. What are the differences with respect to coverage and parties in civil actions under the two statutes? What are the differences with respect to the bearing on the civil actions of international law?

COMMENT ON CRIMINAL PROSECUTION UNDER CONVENTION AGAINST TORTURE

Although the preceding Senate Report states that the TVPA 'will carry out the intent' of the Torture Convention, it does so only with respect to *civil liability*. Article 14 of that Convention provides that each State Party 'shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation. . . .'

Compare the provisions for *criminal prosecution* under Article 1 of the Convention, which applies (with respect to torture, as there defined) to pain and suffering that is 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.' Article 2 provides that States Parties 'shall take effective . . . measures to prevent acts of torture' in their territory. But the Convention reaches beyond this traditional territorial base for a state's criminal jurisdiction. Under Article 4, each State Party 'shall ensure that all acts of torture are offences under its criminal law,' and 'shall make these offences punishable by appropriate penalties.' Under Article 5(1), each Party 'shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4'

(a) when offenses are committed in the state's territory;
(b) when 'the alleged offender is a national of that State;' and
(c) when 'the victim is a national of that State if that State considers it appropriate.'

In addition, jurisdiction is to be established under Section 5(2) where the alleged offender is present in the state's territory and the state does not

extradite him pursuant to the Convention to other indicated and involved states for criminal prosecution there.

In 1990, the Senate Committee on Foreign Relations reported favorably on the Convention and recommended that the Senate give its consent to ratification. With respect to Article 5, the Committee report states:[20]

> A major concern in drafting Article 5 . . . was whether the Convention should provide for possible prosecution by any State in which the alleged offender is found—so-called universal jurisdiction. The United States strongly supported the provision for universal jurisdiction, on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences. Provision for 'universal jurisdiction' was also deemed important in view of the fact that the government of the country where official torture actually occurs may seldom be relied on to take action. . . . [E]xisting federal and state law appears sufficient to establish jurisdiction when the offense has allegedly been committed in any territory under U.S. jurisdiction. . . . Implementing legislation is therefore needed only to establish Article 5(1)(b) jurisdiction over offenses committed by U.S. nationals outside the United States, and to establish Article 5(2) jurisdiction over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction. . . . Similar legislation has already been enacted to implement comparable provisions of the Conventions on Hijacking, Sabotage, Hostages, and Protection of Diplomats.

In 1990, the Senate consented to ratification of the Convention, provided that the criminal legislation required by the Convention first be enacted by Congress. The Torture Convention Implementing Legislation was enacted in 1994, 18 U.S.C.A. §§2340–2340B. Section 2340A gives courts jurisdiction for torture (as defined) committed 'outside the United States' where the alleged offender is a U.S. national or 'is present in the United States, irrespective of the nationality of the victim or alleged offender.' The United States then ratified the Convention.

The different jurisdictional bases referred to in this Comment, including the notion of universal jurisdiction, are further developed in Chapter 15 in connection with an analysis of the jurisdictional provisions of the International Criminal Tribunal established to deal with crimes in the former Yugoslavia and Rwanda. See pp. 1022–25, *infra*.

[20] Sen. Comm. For. Relations, Report on Convention against Torture, 100th Cong., 2d Sess. (1990).

COMMENT ON RELEVANCE OF INTERNATIONAL LAW TO CONSTITUTIONAL LITIGATION OVER THE DEATH PENALTY

Courts in the United States have drawn on international law in a number of contexts involving alleged violations of human rights other than the core examples of torture, disappearances and summary execution that figured in the cases discussed above. They have referred explicitly to customary international law, and more generally to state practice and consensus, and to treaties including some not ratified by the U.S. The other contexts include treatment of prisoners, detention of refugees and Eighth Amendment jurisprudence about 'cruel and unusual punishment.' The last illustration concerns particularly the constitutionality of the death penalty. This Comment suggests the difficulties confronted in advancing arguments about or related to international law in such constitutional litigation.

Several of the major human rights treaties contain provisions limiting the use of the death penalty, although none prohibit it outright. For example, Article 6, para. 2 of the ICCPR permits the death sentence 'only for the most serious crimes,' while para. 5 prohibits the death sentence for pregnant women or for crimes committed by persons below the age of eighteen. Article 4 of the American Convention on Human Rights states similar injunctions, and prohibits capital punishment for political offenses.

In recent years, there has been a significant movement to abolish the death penalty altogether. Optional Protocol No. 2 to the ICCPR (effective 1991, 28 ratifications as of September 1995) does precisely that, subject to a limited exception for war-time crimes. Protocol No. 6 to the European Convention on Human Rights (effective 1985, 23 ratifications) (the Convention itself being silent with respect to the death penalty) and a Protocol to the American Convention on Human Rights to Abolish the Death Penalty (effective 1991, 3 ratifications) are to the same effect.

State practice reflects this trend toward abolition. Amnesty International reports that as of December 1994

> 54 countries have abolished the death penalty for all offenses, while 15 have done so for all but exceptional crimes such as war crimes. Twenty-seven countries can be considered abolitionists *de facto*. They retain the death penalty in law but have not carried out any executions for the past 10 years or more.[21]

The trend in the United States had been in the other direction. In April 1995, the laws of 38 states of the U.S. federalism made provision for the death penalty, and the number of executions increased twenty-fold in the past

[21] Amnesty International, The Death Penalty List of Abolitionist and Retentionist Countries (December 1994), AI Index: ACT 50 01/95.

decade. The size of death row grew from about 500 inmates in 1976 to nearly 3,000 in 1994.[22]

The U.S. Supreme Court considered in several cases the argument that imposition of the death penalty violates customary international law that is binding on the United States. In *Coker v. Georgia* 433 U.S. 584 (1977), the Court referred to that law to bolster its decision that imposition of the death penalty for the rape of an adult woman was 'cruel and unusual' within the meaning of the Eighth Amendment. Justice White relied on UN data, noting that it was 'thus not irrelevant here than out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.'

In *Thompson v. Oklahoma*, 478 U.S. 815 (1988), the plurality in favor of finding unconstitutional capital punishment for those who committed a crime when under sixteen years of age relied on a comparative survey of those states that had either outlawed the death penalty or did not apply it to juveniles, and on human rights treaties proscribing such punishment. Justice Stevens wrote for the plurality, stating in part:

> The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community. Thus, the American Bar Association and the American Law Institute have formally expressed their opposition to the death penalty for juveniles. Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed. The death penalty has been abolished in West Germany, France, Portugal, The Netherlands, and all of the Scandinavian countries, and is available only for exceptional crimes such as treason in Canada, Italy, Spain, and Switzerland. Juvenile executions are also prohibited in the Soviet Union.

Justice Scalia, dissenting, wrote that reliance on Amnesty International's account of practices in foreign states was 'totally inappropriate as a means of establishing the fundamental beliefs of this Nation.' He continued:

> That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the

[22] Death Penalty Information Center, Facts about the Death Penalty (December 14, 1994).

> concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. See *Palkó* v. *Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (Cardozo, J.). But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own.

The minority view in *Thompson* became the majority in *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), upholding the constitutionality of the imposition of capital punishment on those who had committed crimes when sixteen or seventeen years old. In determining what 'standards of decency' relevant to capital punishment had evolved, the Court looked to 'those of modern American society as a whole. We emphasize that it is *American* conceptions of decency that are dispositive.' It rejected the dissent's view that sentencing practices of other countries were relevant. The dissenting opinion of Justice Brennan presented comparative data about sentencing and observed:

> In addition to national laws, three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties [citing the ICCPR and the American Convention on Human Rights, then signed but not ratified, and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War]. Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.

QUESTIONS

1. When an opinion sets forth data about the number of states that have, for example, abolished capital punishment when a crime is committed by a juvenile, is its author making an international law argument? What type of argument? For a rule of customary international law?

2. How do you assess the following claims addressed to a state that is not party to any treaty abolishing capital punishment: (a) international law now bars the death sentence apart from serious crimes during war; (b) international law now bars the imposition of the death sentence on those who committed the relevant crimes when under 18.

3. If you believe claim (b) above to be strong, what is the effect of the U.S. reservation to Article 6 of the ICCPR, p. 768, *supra* that was attached to the ratification of that Covenant?

ADDITIONAL READING

There is a large legal literature on the Alien Tort Statute. Two recent articles on the implications of the current Ferdinand Marcos litigation that is referred to in a Comment above are: Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Human Rights Litigation*, 67 St. John's L. Rev. 491 (1993) and Ralph Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims against the Estate of Ferdinand Marcos*, 20 Yale J. Int. L. 65 (1995).