UNIVERSITY OF
PITTSBURGH
LAW
REVIEW

Symposium

Strangers to the Constitution: Immigrants in American Law

VOLUME 44 WINTER 1983 NUMBER 2

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HUMAN RIGHTS IN THE FEDERAL COURTS: A REVIEW OF RECENT CASES*

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Over the last several years, interest in the domestic invocation of international human rights norms has increased sharply. This interest has been expressed in judicial opinions and in academic commentaries. It is of enormous potential significance to those—such as refugees, undocumented immigrants, and prisoners—the contours of whose legal rights have been difficult to ascertain.

Now that most of the "Freedom Flotilla" Cubans and nearly all of the Haitian "boat people" are free, perhaps it is time to take stock of the role of human rights in the law of the United States. This article is a survey of cases since *Filartiga v. Pena-Irala*,[1] the landmark decision of the Court of Appeals for the Second Circuit recognizing at once the evolution of human rights principles into binding rules of law and the incorporation of customary international norms into this nation's domestic legal system. These cases show a growing acceptance by advocates and judges alike of the famous dictum of Mr. Justice Gray: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[2]

I. *FILARTIGA V. PENA-IRALA*[3]

The facts and decision in *Filartiga* have already been widely discussed in the literature.[4] Plaintiffs were the survivors of a Paraguayan teenager allegedly tortured to death by the defendant,

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1. 630 F.2d 876 (2d Cir. 1980).

2. The Paquete Habana, 175 U.S. 677, 700 (1900).

3. 630 F.2d 876 (2d Cir. 1980).

4. *See, e.g.*, Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims*, 22 HARV. INT'L L.J. 53 (1981). The author, counsel for three *amici curiae* in the *Filartiga* appeal, has commented extensively on the case; *see* Schneebaum, *The Legal Rights of Refugees*, TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 383 (3 MICHIGAN Y.B. OF INT'L LEGAL STUD.).

then inspector general of the Asuncion police. Pena was found in the United States, where he was living illegally, and was served with process while he was in detention at the Brooklyn Navy Yard. The complaint stated a cause of action for wrongful death, alleged to have been brought about by various brutal and tortious acts.

Federal jurisdiction was alleged in *Filartiga* pursuant to 28 U.S.C. § 1350,[5] which provides as follows: "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." In sustaining federal jurisdiction under this statute the Second Circuit made history.[6]

In finding jurisdiction under § 1350, the sole question at issue was whether torture is a "violation of the law of nations," where actor and victim are of the same nationality. Canvassing the traditional sources of international law,[7] Judge Kaufman found this condition to be met. Yet in order to protect the assertion of federal jurisdiction from constitutional objection, he went on to establish a proposition not strictly required under § 1350. To survive a challenge to the exercise of jurisdiction, it was necessary to demonstrate that *Filartiga* was to be decided under the Constitution or under the laws and treaties of the United States.[8]

Since international law is and always has been part of the federal common law, "brought to America in the colonial years as part of the legal heritage from England,"[9] Judge Kaufman found that the district court could constitutionally entertain the *Filartiga* case. This proposition is not novel,[10] but it was invoked to unique effect in

5. Judiciary Act of 1789, § 9, 1 Stat. 73. There have been only minor revisions in terminology since the provision was first enacted. For a comprehensive review of the "Alien Tort Claims Act" in its historical perspective, see Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952) and Dickinson, *The Law of Nations as Part of the National Law of the United States*, II, 101 U. PA. L. REV. 792 (1953).

6. The provision has been the clear basis of jurisdiction in only one reported case: Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). Some commentators maintain that it was invoked in Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607), a case concerning title to a boatload of slaves.

7. These are enunciated in Article 38 of the Statute of the International Court of Justice 59 Stat. 1055, 1060 (1945). *See Filartiga*, 630 F.2d at 881-85.

8. This is the constitutional limit of the powers of the federal judiciary. *See* U.S. CONST. art. III, § 2.

9. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27 (1952); *Filartiga*, 630 F.2d at 886.

10. Indeed, Judge Kaufman was careful to cite extensive and venerable authority, including eighteenth and nineteenth century decisions from both sides of the Atlantic.

Filartiga. For here, in contrast to other decisions over the years,[11] international law, as incorporated into United States law, was the source of the right that the plaintiffs sought to vindicate. Moreover, the relevant international law was customary rather than conventional.[12]

II. *RODRIGUEZ-FERNANDEZ V. WILKINSON*[13]

In *Rodriguez*, the plaintiff sought to enforce rights derived from customary international law against the government of the United States. He was a "Freedom Flotilla" Cuban refugee, who arrived in Florida with 130,000 of his fellow countrymen in the spring of 1980. Unlike the vast majority of the refugees, Rodriguez admitted to Immigration and Naturalization Service officials that he had been convicted of crimes in Cuba.[14] Because of the convictions, he was scheduled for an exclusion hearing, and in July 1980 an administrative law judge ordered him excluded. He took no appeal.

The United States District Court for the District of Kansas heard Rodriguez's petition for a writ of *habeas corpus*.[15] Petitioner argued that his detention violated various provisions of the United States Constitution as well as binding norms of customary international law. The court rejected the constitutional arguments, finding itself constrained by precedent to hold that, for Rodriguez, an excluded alien notionally outside the borders of the United States, "the machinery of domestic law utterly fails to operate to assure protection."[16]

Judge Rogers went on, however, to locate in customary international law the respect for human rights that he could not find in the Constitution. He concluded that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remedial

11. The Paquete Habana, 175 U.S. 677 (1900); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); The Nereide, 13 U.S. (9 Cranch) 388 (1815).

12. The United States has not ratified most of the principal human rights treaties, yet the Second Circuit accepted these as evidence of customary law in the absence of congressional acts to the contrary. *See Filartiga*, 630 F.2d at 881-84.

13. 654 F.2d 1382 (10th Cir. 1981), *aff'g* Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980).

14. Rodriguez evidently had been convicted of theft, attempted burglary, and escape from prison, all crimes of "moral turpitude" and therefore grounds for exclusion pursuant to U.S. immigration laws. 8 U.S.C. § 1182(a)(9) (1976); 8 U.S.C. § 1225(b) (1976).

15. Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980).

16. *Id.* at 795.

ferred that the *Rodriguez* precedent has been weakened; for the apparently small difference in the facts of the two cases was the express basis of the decision in *Palma*.

Like Rodriguez, Palma was a Mariel boatlift Cuban who was ordered excluded according to statutory procedures. Like Rodriguez, he was detained in a federal penitentiary when his deportation "to the country whence he came" (i.e. Cuba)[27] was shown to be diplomatically if not literally impossible. Like Rodriguez, Palma was being held without term, despite having committed no crime for which he was sentenced to prison in the United States. Unlike Rodriguez, however, Palma behaved extremely poorly in detention. He was not recommended for parole by the Commissioner, on the grounds that he had been involved, while in prison, in assaults, arson, theft, and various other antisocial acts.[28] Whereas Rodriguez was by all accounts a model prisoner eligible for parole,[29] Palma was considered potentially violent and a threat to society.

The Fourth Circuit found that this difference justified continued detention in *Palma*: imprisonment of a *dangerous* person is not arbitrary, and therefore not a violation of international law or of notions of constitutional fairness. The court specifically rejected the Government's invitation to condemn *Rodriguez* as wrongly decided.[30] It specifically endorsed the part of the holding in *Rodriguez* in which arbitrary detention was condemned as a violation of customary international law.[31]

Although the *Palma* analysis may seem somewhat facile, its result is plainly correct. The arbitrariness of detention ought to be measured not by officials' opinions of what detainees *might* do, but by judicial determinations of what they *have* done. It is hard to imagine a federal court allowing the release of an excluded alien who appears determined to commit a crime. If such a result follows from a finding that the Attorney General lacks discretionary authority in these cases, it is unlikely that such a finding will ever be made. The courts will not deliberately endanger society in this way; and if they were forced to decide, they would more probably expand the

27. 8 U.S.C. § 1227 (1976). The Tenth Circuit in *Rodriguez* stated that "[w]e would not read" that section "to preclude his being sent to a country other than Cuba, if Cuba will not take him." 654 F.2d at 1390.

28. *See Palma*, 676 F.2d at 102-05.

29. *Rodriguez*, 654 F.2d at 1385.

30. *Palma*, 676 F.2d at 105.

31. *Id.* at 106 n.5.

discretion of executive branch officials to detain people without charge or trial, and without the possibility of judicial review.

V. *ORANTES V. SMITH*[32]

Orantes is a class action brought on behalf of Salvadoran nationals in the United States. The plaintiffs seek redress for numerous alleged actions of the Immigration and Naturalization Service. The challenged actions include: the use of coercive tactics to encourage "voluntary" departure; failure to apprise the plaintiffs of certain rights, including the right to apply for political asylum; denial of access to counsel; unjustified use of solitary confinement; and acceleration of deportation proceedings against applicants for asylum. As of this writing, the case is still *sub judice*, and any conclusions expressed about it are necessarily tentative. Judge Kenyon, in his order provisionally certifying the class and preliminarily enjoining certain of the abuses described in the complaint, has, however, reached some interesting results concerning international law and its relevance to litigants in the United States.

First, the court did not hesitate to evaluate evidence concerning the state of affairs in El Salvador, including its political climate, the constant presence of official violence, and the hopelessness of many of its citizens in the face of these overwhelming conditions.[33] Second, the court took as obvious that undocumented aliens possess basic constitutional rights. Finally, Judge Kenyon found that a specific right to apply for (though not to be granted) political asylum is guaranteed by statute when the law is read against its international background.

The Refugee Act of 1980[34] speaks in its Preamble of "the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands."[35] The statute implemented in the United States, the United Nations Protocol Re-

32. 541 F. Supp. 351 (N.D. Cal. 1982). The Order re Provisional Class Certification and Preliminary Injunction; Findings of Fact and Conclusions of Law discussed below was entered on June 3, 1982.

33. Contrast this with the reticence of the U.S. District Court for the District of Columbia to involve itself in weighing evidence of conditions in Central America. Crockett v. Reagan, No. 81-1034 (D.D.C. Oct. 4, 1982). Appeal docketed No. 82-2461 (D.C. Cir. ——).

34. Pub. L. No. 96-212, 94 Stat. 102 (1980). *See generally* Martin, *The Refugee Act of 1980: Its Past & Future*, TRANSNATIONAL LEGAL PROBLEMS OF REFUGEES 91 (1982 MICH. Y.B. INT'L LEGAL STUD.).

35. *See Orantes*, 541 F. Supp. at 374.

lating to the Status of Refugees,[36] which, in turn, updates and applies the Convention Relating to the Status of Refugees.[37] Judge Kenyon held that the Act "specifically confers the right to *apply* for political asylum."[38]

The Refugee Act expressly acknowledges the right to apply for asylum by directing the Attorney General to establish application procedures.[39] It prohibits deportation of those eligible for asylum.[40] Even without the Act, however, the right to apply would emerge from the United Nations Protocol. That is, the obligation to afford putative refugees the right to apply for asylum is an international obligation of the United States.

In *Orantes*, the court held that for such a right to be meaningful, those who may claim it must be informed of its existence. Indeed, Judge Kenyon appended to his opinion a form styled "Notice of Rights," which would inform Salvadorans, in Spanish and English, of their rights under United States law. The form read in part as follows:

> 3. RIGHT TO APPLY FOR POLITICAL ASYLUM
>
> You may be eligible for political asylum if you have reason to believe that you would be persecuted because of your race, religion, nationality, membership in a particular social group, or political opinions if you were returned to El Salvador. If you wish to apply for political asylum, you should so inform the INS agent who gave you this Notice.[41]

This is an extraordinary device for assuring that those whose rights are vouchsafed by international law are permitted to exercise those rights intelligently. Taken together with the other facets of Judge Kenyon's order, providing for notice of various procedural rights, assuring the right to counsel, and improving the living conditions of detainees, the opinion in *Orantes* promises to be a landmark in judicial defense of internationally protected persons.

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36. *Done* Jan. 21, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (entered *into force* Oct. 4, 1967, *entered into force for U.S.* November 1, 1968).

37. *Done* at Geneva, July 28, 1951. 189 U.N.T.S. 150, *reprinted in* 19 U.S.T. at 6259.

38. *Orantes*, 541 F. Supp. at 375 (emphasis in original). The reference is to 8 U.S.C. § 1253(h).

39. 8 U.S.C. § 1158(a) (Supp. V 1981).

40. 8 U.S.C. § 1253(h) (1976).

41. *Orantes*, 541 F. Supp. at 387.

VI. CONCLUSION

The emergence in the latter half of the twentieth century of a coherent body of international law respecting the rights of individual human beings, whatever their nationality and wherever they may be, is an exciting development. To recognize this is not to embrace the naive belief that the existence of law entails general respect for the law. All of us are aware that in many parts of the world this is further from the truth now than it was before these developments occurred.

In the United States, however, the role of the judiciary does permit real optimism, because the existence of legal rights brings with it the possibility of legal enforcement. Refugees, undocumented aliens, those expelled from their homeland are no longer international pariahs without hope of finding protection. Rather, they are entitled, as human beings, to some measure of respect and, consequently, to some measure of hope.

The integration of international human rights norms into the law of the United States is being achieved. This is happening not through any revolutionary alteration in the political attitudes of judges or of advocates. It is happening because international law itself is coming to be solidified, clear, and principled. Our legal system contains that evolving corpus of international law, and must change with it. The *Filartiga* case and its progeny illustrate the vitality of that system, even as they challenge us to be mindful that it be used to further, rather than to diminish, respect for human dignity.