The Enforceability of International Human Rights Norms in United States Courts: Recent Case Law Developments

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While there has doubtless been enormous progress since 1945 in enunciating and refining the normative content of international human rights, the enforceability of human rights law remains problematic. This brief essay will survey the recent enforcement status of international human rights norms in United States domestic courts, under two headings: actions between non-government parties, and actions alleging violations of human rights by the United States.

I. HUMAN RIGHTS OBLIGATIONS OF NON-GOVERNMENT PARTIES: FILARTIGA V. PENA-IRALA

In March 1976, Joelito Filartiga, the 17-year-old son of a leading opponent of the Stroessner regime in Paraguay, disappeared from his home in Asuncion. When his body was found, it showed evidence of severe torture. The boy's sister was led to the body by Americo Pena, Inspector General of the Asuncion police, who shouted at her, "here you have what you have been looking for for so long and what you deserve."

Even in Paraguay, the brutal murder of a teenager at the hands of the police caused sufficient uproar to cause Pena to leave the country. He came to the United States, and "went underground," an undocumented alien, in New York City.

The Filartiga family located Pena in New York, and he was apprehended by the Immigration and Naturalization Service. While Pena was in detention pending deportation, Joelito's father and sister had him served with process in a civil lawsuit for the wrongful death of Joelito Filartiga. The action was brought in the U.S. District Court for the Eastern District of New York, asserting as the basis of federal jurisdiction §9 of the Judiciary Act of 1789, 28 U.S.C. §1350: "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."

Though the origins and meanings of this venerable provision are murky,[1] the *Filartiga* case clearly satisfied two of its three jurisdictional prerequisites: the plaintiffs were aliens, and their action was "for a tort only." The question presented to the court was whether the allegation of torture was sufficient to suggest a "violation of the law of nations." Judge Eugene H. Nickerson of the U.S. District Court answered that it was not, holding that to implicate international law, an act must have perpetrator and victim of different nationalities.[2] The United States Court of Appeals for the Second Circuit reversed.[3]

In an opinion by Chief Judge Irving Kaufman, the Court found that customary international law, as reflected in a host of solemn multilateral conventions,[4] has come to enshrine a legal prohibition against state-sanctioned torture. Judge Kaufman therefore concluded that the three criteria of §1350 were satisfied. In order, however, to deflect a constitutional challenge to the exercise of such jurisdiction on the grounds that such a case did not arise "under the laws of the United States,"[5] the Court went on to discuss and to defend the proposition that customary international law, including the law of human rights, is part and parcel of our legal system. "The constitutional basis for [§ 1350]," wrote Judge Kaufman, "is the law of nations, which has always been part of the federal common law."[6]

It should be noted that the defendant in *Filartiga* was an individual—albeit one acting under at least apparent official authority—and not a government. Nor did Paraguay espouse the cause of Pena or endorse his actions as its own. Thus *Filartiga* presented no questions of sovereign immunity or of act of state, although Judge Kaufman noted that the latter defense, if raised, would not have been likely to prevail.[7]

The holding of the Court of Appeals in *Filartiga* was momentous, since it was the first express acknowledgment by an American court of the incorporation of customary international law of human rights within the law of the United States.

The holding went, however, to jurisdiction only. The appeal was from an order granting a motion to dismiss. The Second Circuit reversed and remanded, and the case was set by the district court for further proceedings.

At that point, the defendant ceased further participation in the case.[8] A default was granted, and Judge Nickerson referred the quantification of damages to a U.S. Magistrate. Magistrate Caden held a hearing at which witnesses were called, and then awarded the two plaintiffs a total of $375,000 in compensatory damages. The prayer for punitive damages and for the decedent's pain and suffering was rejected, on the grounds that the substantive law of Paraguay governed the award, and that these items could not be recovered in a Paraguayan court. The plaintiffs appealed these determinations to Judge Nickerson.

On January 10, 1984, Judge Nickerson entered a Memorandum and Order awarding damages of $10.4 million. Punitive damages, said the Judge, are an appropriate means of reflecting the fact "that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe."[9] That internationally-guaranteed rights can sustain such remedies is clear, Judge Nickerson wrote, since, "plainly, international 'law' does not consist of mere benevolent yearnings never to be given effect."[10]

HANOCH TEL-OREN v. LIBYAN ARAB REPUBLIC

Judge Nickerson's conviction that international human rights may be enforced in the Federal courts seems not, however, to be the law in the District of Columbia Circuit. In *Hanoch Tel-Oren v. Libyan Arab Republic*,[11] the plaintiffs were representatives of persons murdered in a terrorist attack upon a bus in Israel. The defendants were the Government of Libya, the Palestine Liberation Organization, and certain Arab-American groups, which were alleged to have conspired to support and/or to carry out the bombing. Jurisdiction was asserted under §1350, on the basis of the claim that terrorism is a violation of international law.

Numerous grounds existed for the dismissal of the complaint. Two of the defendants (Libya and the PLO) were not effectively served. The relevant statute of limitations[12] was exceeded. Libya could probably claim sovereign immunity. As to the remaining defendants, the claims that they participated in the tort were scanty and conclusory. Nor is it clear—for better or worse—that acts of terrorism are in fact "committed in violation of the law of nations."

Despite all of these potential bases for a judgment, Judge Joyce Hens Green went on to opine about the jurisdictional prerequisites of §1350. In an opinion facially inconsistent with *Filartiga*, the Judge declared that for a violation of international law to sustain jurisdiction under the Alien Tort Claims Act, international law itself must include a provision conferring "a private right of action."[13] Certainly, there is no consensus among states as to the availability of judicial remedies for terrorism (or, indeed, for torture). Therefore, reasoned Judge Green, one asserting the right to be free from terrorism, or to be compensated for injuries resulting therefrom, is not availed by §1350.

The decision was appealed as to all defendants but one, although Libya and the PLO again declined to appear. On February 3, 1984, the U.S. Court of Appeals for the D.C. Circuit entered a two page *per curiam* affirmance of the dismissal. Judges Edwards, Bork, and Robb attached to that opinion 111 pages of separate concurrences.

Judges Edwards and Bork differed sharply as to the scope and meaning of §1350, and the correctness of the holding in *Filartiga*. Judge Edwards believed the *Filartiga* reasoning to be supportable on either of two bases. On one theory, which he seemed to prefer, *Filartiga* not only vests the Federal courts with jurisdiction over a certain class of cases, but also points to international law as providing the "standards of liability applicable in concrete situations."[14] That is, a §1350 plaintiff must allege not only "a tort committed in violation of the law of nations," but, so to speak, an "international tort." International law defines the offense and sets the rules as to who has standing to sue, and who has sufficient international personality to be responsible.

In the alternative formulation, Judge Edwards indicated that municipal law might define the offense (the tort) and generate the "substantive right."[15] Alleged international violations on this theory would simply characterize or inform the complaint of a municipal tort. In this formulation, in other words, §1350 would support jurisdiction over a purely municipal tort, the commission of which involved a violation of international law.[16]

Judge Edwards concluded, however, that under neither theory "must plaintiffs identify and plead a right to sue granted by the law of nations."[17] Though the Judge therefore disagreed with Judge Green's troublesome *dicta*, he went on to conclude that the Palestine Liberation Organization,[18] as a non-government entity, is not bound by international prohibitions of *official* torture, and that there is no clear consensus through which the Court could infer an international norm prohibiting terrorism. On these bases, Judge Edwards voted to affirm the dismissal.

Judge Bork sustained virtually all of Judge Green's opinion, including the *dicta* concerning the need to demonstrate a private right of action. He also held that cases brought under §1350, since they implicate the foreign relations of the United States, ought to be scrutinized most carefully before they are adjudicated.

Where Judge Edwards thought that the PLO is not enough like a state in international law to make its acts "official," Judge Bork went further. He opined that only in truly exceptional cases do international obligations apply to individuals (or non-public entities) at all. In short, Judge Bork left little doubt that had he been on the *Filartiga* panel, he would not have reached the same result as the Second Circuit. For all of Judge Bork's reasoning in *Tel-Oren* applied in the earlier case: the defendant was an individual (hence not a "subject" of international law); the case potentially affected for-

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eign relations; the applicable international norm contained no consensus on remedies; and there was no express grant of a private right of action by statute. The upshot of this reasoning, of course, is that there is, in Judge Bork's view, no right to be free from torture or from other acts the illegality of which is established, or is reinforced by, international law. Human rights law, in this analysis, is not normative but merely hortatory.

Judge Robb found the entire case to "defy judicial application,"[19] and noted that he too would have dismissed *Filartiga*. Thus, the votes of two of the three members of the *Tel-Oren* panel would—albeit for differing reasons—deny access to the Federal courts to those who sue, "for a tort only, committed in violation of the law of nations,"[20] despite the unchanged express grant of the first Congress nearly 200 years ago.

II. HUMAN RIGHTS OBLIGATIONS OF THE UNITED STATES:

In the spring of 1980, some 130,000 Cubans landed in south Florida as part of the "Freedom Flotilla." Virtually all of them were undocumented, and many had been inmates of mental or penal institutions. Thus, with a very few exceptions, they were "excludable"—that is, the Immigration and Naturalization Service could have turned them away at the border. President Carter directed their admission, however, and only those who admitted having committed crimes of "moral turpitude,"[21] and those believed not capable of functioning in society, were detained for exclusion proceedings.

After exclusion, these Cubans could not be deported, as required by law, to "the country whence [they] came,"[22] since Cuba would not accept them back. They were instead sent to Federal penitentiaries, such as the one at Leavenworth, while the authorities slowly began to consider what to do next. They had been convicted of no crime in the United States, nor were they serving determinate sentences. They were simply to remain incarcerated while the wheels of diplomacy slowly ground (or did not grind) in determination of their fate.

RODRIGUEZ v. WILKINSON

Pedro Rodriguez-Fernandez sought to challenge his continued imprisonment, and sued for a writ of habeas corpus. The District Judge held[23] that Rodriguez, as an excluded alien nationally outside U.S. borders, was wholly without any constitutional protection.[24] Nevertheless, the Judge found that international law guarantees certain fundamental human rights, including the right to be free from arbitrary, open-ended detention. Therefore, he ordered Rodriguez freed.

On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed,[25] although reaching its result for different reasons. The Court distinguished earlier cases that seemed to deprive Rodriguez of constitutional protection for at least his basic human rights. To locate those, the Court looked, *inter alia,* to international norms, and found that "[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."[26] Thus, the Court determined that international law was not the basis of the right to be free from open-ended incarceration without indictment (much less conviction) for crime, but it informed or inspired the measure of constitutional protection to be accorded to all human beings in the United States, regardless of their immigration status.

PALMA v. VERDEYEN

In *Palma v. Verdeyen,*[27] the Fourth Circuit refused to release a Freedom Flotilla refugee whose case differed from Rodriguez's in one critical respect. While Rodriguez had been found by prison authorities to be well-behaved and generally deserving of release, Palma had commited a number of antisocial acts while in detention. The *Palma* Court, while accepting *Rodriguez,* held that in such circumstances detention was not "arbitrary."

Palma held also, however, that the statute empowering the Attorney General to "parole" aliens into the United States[28]—that is, to allow them physical entry without affecting their legal status—implicitly authorizes him to detain excluded aliens for however long is necessary to arrange and to effect their deportation. That question was not addressed by the *Rodriguez* Court. Thus, *Palma* would appear to be authority for the proposition that indefinite detention is not a violation of international law when it is authorized by statute, even if the "authorization" is entirely *sub silentio.*

"It would appear after* Jean *that international norms exercise distressingly little control over the actions of officers of the United States."

JEAN v. NELSON

This potentially dangerous line of reasoning culminated in the recent *en banc* decision of the Eleventh Circuit in *Jean v. Nelson.*[29] *Jean* concerned not Cubans but Haitians, detained at a center in Miami. The petitioners for writs of habeas corpus granting them freedom relied in part on the *Rodriguez* argument that international law does not permit arbitrary detention, and that such a norm of international human rights law is part of the core of constitutional rights to which even undocumented aliens are entitled.

The Eleventh Circuit went far beyond the caveats in *Palma. Jean* holds that excludable aliens are entitled to no constitutional rights, not only in contesting the terms and conditions of their exclusion, but at all.[30] Under *Jean,* an undocumented alien could be subjected to virtually any form of official lawlessness, and his remedy would be only what Congress expressly allowed him and not one whit more.[31] Presumably, physical abuse or medical experimentation could be practiced on such unfortunates: they can, after all, always accept repatriation.[32]

In *Jean,* the Court went on also to hold that undocumented, excludable aliens have no right to be informed that they may be eligible for political asylum.[33] In so doing, it declined to follow at least two district courts and one court of appeals.[34]

Thus, it would appear after *Jean* that international norms exercise distressingly little control over the actions of officers of the United States. Other recent decisions, too, illustrate a trend toward abstention from scrutiny, according to international law, of acts asserted to be in the national interest.[35]

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CONCLUSION

After a promising beginning in *Filartiga,* the enforceability of international human rights norms has suffered serious setbacks in the courts. It may well be that, as Judge Edwards noted in *Tel-Oren,* this is "an area of the law that cries out for clarification by the Supreme Court."[36] Yet, the recently decided cases seem to suffer from the same lack of focus, the same lack of emphasis on individual rights. If, as Judge Nickerson so eloquently wrote, international human rights norms do not "consist of mere benevolent yearnings never to be given effect,"[37] then the rights guaranteed by international law must find their enforcement in the traditional means that are the genius of our common law and our Constitution. For it is enshrined in our legal system that "[i]nternational 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."[38]

FOOTNOTES

[1] Before the *Filartiga* case, § 1350 had been successfully cited as the basis of jurisdiction only once, or at most twice. *See Adra v. Clift,* 195 F. Supp. 857 (D. Md. 1961); *see also Bolchos v. Darrell,* 3 Fed. Cas. 810 (D.S.C. 1795). The statute was aptly termed "a legal Lohengrin" by Friendly, J., who noted that "although it has been with us since . . . 1789, no one seems to know whence it came." *IIT v. Vencap Ltd.,* 519 F.2d 1001, 1015 (2d Cir. 1975).

For further discussion of *Filartiga* and a more extensive treatment of the general subject, *see* R. Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law* in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (H. Hannum, ed.) (Univ. of Pennsylvania Press, 1984), at 223–247.

[2] The Judge felt constrained by *IIT, supra,* and *Dreyfus v. von Finck,* 534 F.2d 24 (2d Cir.), *cert. den.,* 429 U.S. 835 (1976). These cases approved a *dictum* to the cited effect in *Lopes v. Reederei Richard Schroder,* 225 F. Supp. 292 (E.D. Pa. 1963).

[3] *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980). This case has been the subject of extensive analysis. *See, e.g.,* Blum & Steinhardt, 22 *Harv. Int'l L. J.* 53 (1981), and the author's article in 3 *Mich. Y.B. of Int'l L.* 373 (1982).

[4] These instruments are for the most part not treaties of the United States within Article VI of the Constitution; therefore, no question arises of their direct enforceability. *See* 630 F.2d at 882–4.

[5] This limitation on the powers of the Federal courts is laid down in the Constitution, Art. III, § 2(1).

[6] 630 F.2d at 885.

[7] 630 F.2d at 889–90. Likewise, the defense of *forum non conveniens* was not asserted.

[8] Pena had been deported to Paraguay in 1979, immediately after Judge Nickerson first dismissed the complaint.

[9] *Filartiga v. Pena,* Memorandum and Order of January 10, 1984 (E.D.N.Y.), slip op. at 7–8.

[10] *Id.,* slip op. at 6.

[11] 517 F. Supp. 542 (D.D.C. 1981), *aff'd,* ___ F.2d ___ (D.C. Cir. February 3, 1984).

[12] D.C. Code § 12-301(4) establishes a one-year limitations period for intentional torts.

[13] 517 F. Supp. at 549. This reasoning seems based on an analogy to rights vouchsafed by treaty. The author criticizes this rationale in 4 *Houston J. Int'l L.* 65 (1981), arguing that customary and treaty law must be analyzed by the same standard to determine whether they are "self-executing." He concludes that if there is in international law a clear right not to be tortured, then the inclusion of international law in the law of the United States means that domestic judicial remedies are available (assuming that normal jurisdictional prerequisites are satisfied). *See also* the author's short piece in *Bklyn. J. Int'l L.* 289 (1982).

[14] *Hanoch Tel-Oren v. Libyan Arab Republic,* ___ F.2d ___ (D.C. Cir. 1984), slip op. at 14 (Edwards, J., concurring).

[15] *Id.* at 15.

[16] Judge Edwards found this rationale to be exemplified in *Adra, supra.* In that case, the defendant was alleged to have committed a purely municipal tort—absconding with a minor child over whom the plaintiff had lawful custody by the use of a false passport, in violation of binding international norms. Jurisdiction was held proper under § 1350, although relief was ultimately denied.

[17] *Tel-Oren, supra,* slip op. at 29 (Edwards, J., concurring).

[18] Judge Edwards held that the PLO was the only defendant as to whom the complaint set out sufficiently well-pleaded allegations. *Id.* at 1, n. 1. He did not address the question whether service on the PLO had been effective, or the applicability of the statute of limitations.

[19] *Tel-Oren, supra,* slip op. at 1 (Robb, J., concurring).

[20] 28 U.S.C. § 1350.

[21] 8 U.S.C. §§ 1182(a)(9), 1225(b).

[22] 8 U.S.C. § 1224.

[23] *Rodriguez v. Wilkinson,* 505 F. Supp. 787 (D. Kan. 1980).

[24] The Judge was urged to adopt this position by reference to the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953).

[25] *Rodriguez-Fernandez v. Wilkinson,* 654 F.2d 1382 (10th Cir. 1981).

[26] 654 F.2d at 1388.

[27] 676 F.2d 100 (4th Cir. 1982).

[28] 8 U.SC. § 1182(d)(5)(A).

[29] ___ F.2d ___ (11th Cir. February 28, 1984) *(en banc), reversing* 711 F.2d 1455 (11th Cir. 1983).

[30] The *Jean* Court held *Mezei, supra,* to be controlling and scolded the Tenth Circuit for distinguishing that case in *Rodriguez-Fernandez. Jean (en banc), supra,* slip op. at 30–32. The Eleventh Circuit did not, however, deal meaningfully with the actual basis for the treatment of that decision: that the statutory framework governing parole was altered after *Mezei,* or the fact that Mezei was excluded on national security grounds.

[31] Since the Eleventh Circuit was unwilling to overrule the Fifth Circuit in *United States v. Henry,* 604 F.2d 908 (5th Cir. 1979), it carved out a very narrow and curious exception: an excludable alien may be detained indefinitely without charge or trial, but he must be read his *Miranda* rights if he is to be subject to judicial proceedings. *See Jean (en banc), supra,* slip op. at 26, 28–29.

[32] The Court did not distinguish situations in which an alien is unwilling to return home, where he is financially unable to do so, or where his native land will not take him back and he knows of no one else who wants or will accept him.

[33] *Jean (en banc), supra,* slip op. at 46–52. As to this point, four Judges dissented.

[34] *Orantes-Hernandez v. Smith,* 541 F. Supp. 351 (C.D. Cal. 1982); *Nunez v. Boldin,* 537 F. Supp. 578 (S.D. Tex.), *app. dis'd,* 671 F.2d 426 (5th Cir. 1982).

[35] *Crockett v. Reagan,* 558 F. Supp. 893 (D.D.C. 1982), *aff'd,* 720 F.2d 1355 (D.C. Cir. 1983) (court has no judicially-manageable standards for determining constitutional challenges against U.S. policy in El Salvador); *Sanchez-Espinoza v. Reagan,* 568 F. Supp. 596 (D.D.C. 1983), *app. pending,* No. 82-3395 (D.C. Cir.) (tort claims of Nicaraguan plaintiffs allegedly injured by United States actions in their country present non-justiciable questions). This trend may also have been exemplified by *Dames & Moore v. Regan,* 453 U.S. 654 (1981) (President held authorized to compromise and settle claims of Americans against Iran).

[36] *Tel-Oren, supra,* slip op. at 1 (Edwards, J., concurring).

[37] Note 10, *supra.*

[38] *The Paquete Habana,* 175 U.S. 677, 700 (1900) (*per* Gray, J.).