Enforcing International Human Rights Law in the United States Human Rights: An Agenda for the Next Century: Part II - Implementing and Enforcing Human Rights: Chapter 17

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A. Introduction

Since the human rights promises in the United Nations Charter were made nearly fifty years ago, civil rights and civil liberties lawyers in the United States have tried to use international human rights law in their cases for human rights victims in this country.\(^1\) The results of these efforts, with some limited exceptions, have been quite modest.

Nor has United States domestic legislation, with few exceptions, been influenced much by the force of international human rights law. Even in the area of refugee rights, where the apparent influence of international law has been greatest, domestic pressures have frequently overcome U.S. commitment to international law. The Clinton administration’s adherence to the Bush administration’s Haitian interdiction program is the most recent illustration of this reality.\(^2\)

There is a continuing disparity between the U.S. government’s commitment to the application of international human rights norms in the rest of the world and its willingness to accept these obligations fully within its own borders. This feature of U.S. political and legal culture was demonstrated with unmistakable clarity by the handling of the three human rights treaties that emerged from the Senate during the Reagan/Bush years.
The Genocide Convention, the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights (ICCPR) all won Senate approval only after they had been saddled with reservations, declarations, and understandings designed to ensure that these treaties would have virtually no domestic legal effect in enhancing human rights.

Even the relatively minor respects in which these treaties would have protected human rights beyond current domestic U.S. law and practice were not tolerated in the ratification process. The Bush administration even refused to accede to the ICCPR provision outlawing the execution of pregnant women, which would have merely brought U.S. law in line with existing U.S. practice on this noncontroversial issue.

This limited acceptance of obligations under major international human rights treaties not only sends an unfortunate message to the rest of the world about the actual importance of their own human rights obligations; it also reinforces the notion that international human rights law should not play an important role in domestic human rights issues. Until U.S. political leaders send a different message, it is likely that international human rights law will continue to play a marginal role in domestic civil rights and civil liberties cases or debates. U.S. failure to accept these obligations fully may also undermine U.S. foreign policy efforts to persuade other governments to adhere to international human rights law.

The Clinton administration has proclaimed its support for the ratification of all major human rights treaties now pending before the Senate — namely, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights — and also of the Convention on the Rights of the Child. This is a positive development but it remains to be seen whether the administration will be committed to
ensuring that international human rights standards become a significant element of U.S. law and policy.

The second section of this chapter will assess the role that international human rights standards play in U.S. domestic law and practice. There has been a great deal of progress in the development of international human rights law in the past fifty years. There has been some progress in using this growing body of law in U.S. forums, but this progress has been excruciatingly slow.

The third section proposes a series of recommended steps that the Clinton administration should take to make international human rights standards a more integral part of U.S. domestic legal and political life. Some of these recommendations are quite modest. Others are more far-reaching. None has been made based on its political feasibility. All are premised on the propositions that strong presidential leadership is required for international human rights standards to play a serious role in U.S. domestic human rights law and policy and that it is important for this transformation to take place in the near future.

B. The History of International Human Rights Law in U.S. Human Rights Law and Practice

As is true for domestic human rights law, international human rights law consists of both positive law (in this case, treaties and other international agreements) and unwritten law (in this case, it is called "customary international law"). The U.S. record respecting both types of international human rights law has been disappointing.

The United States has ratified few international human rights treaties, has encumbered those few ratifications with numerous "reservations," "understandings," and "declarations" that severely limit the impact of ratification within the United States, and has treated most such treaties as not being enforceable in domestic courts under the "non-self-executing treaty" doctrine.

Likewise, with few exceptions, U.S. courts have not treated customary international human rights law as binding in
domestic litigation. Customary international law norms have been confined largely to an interpretive role, in which courts have relied on them for guidance in interpreting ambiguous aspects of domestic constitutional or statutory provisions. Even that interpretive reliance has not occurred with sufficient clarity or regularity to make it a significant, systematically used element of domestic legal analysis.

Beyond the reality that international human rights law has had little impact in U.S. domestic litigation, it has also had a modest impact on the formulation and implementation of domestic policy generally. Perhaps because of the limited ability to enforce international human rights norms in U.S. courts, officials at all levels of government have rarely considered international human rights standards in the formulation or execution of government policies.

1. International Human Rights Treaties

Of the more than forty international human rights treaties to which the United States could be a party, it has ratified only a handful altogether, and only one of the major international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR). The United States has been especially reluctant to ratify human rights treaties that have a potential domestic impact.

The United States has not ratified one of the two major United Nations Covenants that, together with the Universal Declaration of Human Rights and ICCPR, constitute the "International Bill of Rights": the International Covenant on Economic, Social, and Cultural Rights (ICESCR). Nor has the United States ratified the major applicable regional human rights treaty, the American Convention on Human Rights. The other unratified human rights treaties that could be especially fertile sources for expanding protection of rights in the United States include the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Optional Protocol to the ICCPR.
Although the United States recently ratified the ICCPR, that ratification was qualified by so many reservations, declarations, and understandings that concerns have been raised that it may have little or no domestic effect in the United States. Indeed, the United States apparently issued a reservation, declaration, or understanding whenever the ICCPR's provisions seemed to prescribe more protective human rights guarantees than those currently recognized under U.S. law. Therefore, even assuming that the United States has satisfied the international standards for ratification of the ICCPR, that ratification may not be very meaningful in terms of extending the human rights of people in the United States.

Some international human rights experts argued that these extensive qualifications undermined the very validity of the U.S. ratification under international law and concluded that no ratification was a lesser evil than a ratification so riddled with limitations. Others believe that the ratification of the ICCPR even with these limitations offers many new tools for domestic civil rights and civil liberties advocates.

It is too early to tell what impact ratification of the ICCPR will have. The way in which the Clinton administration responds to the obligations imposed by the ICCPR may be the most significant factor in answering this question.

Another key limitation the United States placed on its ratification of the ICCPR was the declaration that the ICCPR provisions are not "self-executing," which means that they are not judicially enforceable against federal or state governments in United States courts. As it did with the ICCPR, the United States has expressly qualified its ratification of other international human rights treaties, including the Convention Against Torture, with the proviso that such treaties are not "self-executing."

Initiated by Chief Justice John Marshall, the doctrine that a treaty may be "non-self-executing" means that even without an express declaration to this effect, the provisions of U.S.-ratified human rights treaties might not be held to be enforceable in domestic courts in any event. In fact, the his-
tory of judicial responses to international human rights provisions in treaties leaves no ground for optimism.

The leading case is *Sei Fujii v. California*, in which the California Supreme Court held that the human rights provisions of the UN Charter were not self-executing. Of the various international instruments to which the United States is a party, the UN Charter was potentially the most fruitful source of rights protection in domestic courts, especially in an era in which the de jure discrimination practiced in so much of the United States was squarely at odds with the central nondiscrimination norms of the Charter and the Universal Declaration of Human Rights. Therefore, *Sei Fujii* was particularly damaging to the prospective domestic incorporation of international human rights law.

This much criticized decision was not appealed to the U.S. Supreme Court, nor has the Supreme Court ever expressly addressed the UN Charter's domestic enforceability in any other case. Nevertheless, most subsequent decisions throughout the United States have uncritically followed *Sei Fujii* in holding that the UN Charter's human rights provisions are not self-executing, and therefore are not directly incorporated into U.S. law. Although extradition treaties and treaties limiting the scope of extraterritorial jurisdiction over criminal offenses have been found to be self-executing, courts have consistently held the Universal Declaration of Human Rights and other international human rights instruments to be non-self-executing.

Equally important, Congress has never acted to implement the human rights provisions of the UN Charter or the Universal Declaration of Human Rights directly. As a result, the human rights provisions of the Charter and Universal Declaration have played a marginal role in United States domestic civil liberties and civil rights policies.

In summary, the United States has ratified only a few of the international human rights treaties that could potentially expand protection of human rights domestically, and even those few treaties are prevented from actually serving that function for several reasons: because the instruments of rati-
fication expressly declare that these treaties are non-self-executing or a court determines them to be non-self-executing; because Congress has not passed implementing legislation; and because their ratification is subject to limiting reservations, declarations, and understandings.

2. Customary International Human Rights Law

The United States record in terms of incorporating the other major category of international human rights law — customary international human rights principles — is as disappointing as its record with treaty law.

Customary international human rights law, as the international analogue to unwritten common law in the domestic sphere, consists of those principles that are so widely accepted by the community of nations that they are binding even on states that have not ratified treaties embodying them. Only states that have consistently objected to the principle during its process of emergence are not bound by it.

While treaty provisions are not themselves sources of customary international principles, they constitute evidence that such principles exist. The three classic types of such evidence, as enumerated by the Supreme Court, are "the works of jurists[,] . . . the general usage and practice of nations; [and] . . . judicial decisions." Other types of evidence include resolutions of international bodies, national legislation, public declarations by international and national officials, and diplomatic correspondence and instructions.

It is usually difficult to document that a principle has achieved the general recognition necessary to establish it as customary international law. Nevertheless, international jurists have made credible arguments that many international human rights principles have achieved that degree of general acceptance.

Some judges and scholars have made the stronger argument that most international human rights principles of customary law are included in the subset of customary norms that are so fundamental as to be "peremptory," or jus cogens, and thus not subject to being changed by
It has been argued that the international human rights standards embodied in the International Bill of Rights are at least "rapidly establishing" themselves as peremptory principles, if they have not already attained that status. Similarly, the International Court of Justice has declared that rules concerning the basic human rights are "obligations erga omnes (owing by each state to all persons)."

Not all commentators agree that all international human rights principles currently constitute nonderogable norms under the derogation provisions of human rights treaties. In contrast, there appears to be more agreement among international law scholars that many of these principles are included in customary international law. During the Carter administration, the U.S. government took the position that both the ICCPR and the ICESCR embody customary international law principles.

Despite the solid legal foundation for incorporating customary international human rights norms into domestic law, United States courts actually do so only rarely. In their recent comprehensive survey of the relevant judicial rulings, Professors Anne Bayefsky and Joan Fitzpatrick concluded:

United States courts generally manifest a deep reluctance to embrace international human rights law and to use it as an effective tool to redress abuses. This reluctance is born partly of unfamiliarity and perhaps a degree of intellectual laziness, but it also appears to stem from concerns about institutional competence and deference to the political branches.

Professors Bayefsky and Fitzpatrick grouped the cases concerning the integration of customary international human rights law into domestic law in three categories: 1) cases involving the specific incorporation of international law into United States law through the Alien Tort Claims Act (ATCA); 2) cases in which a right of action or a defense to criminal prosecution was directly based on international law; and 3) cases in which international law was used as an aid in interpreting United States law. In all three categories, they show, customary international human rights norms have had scant impact on United States law. They explained:
American courts generally avoid the application of international human rights norms or rely on the norms for reinforcement of results actually premised on some alternative source of values. Only in a few rare cases, primarily under the ATCA, does international human rights law appear to be the driving force supplying the rule of decision.

a. Alien Tort Claims Act cases.

The ATCA provides federal district court jurisdiction over suits by aliens involving torts committed in violation of treaties or "the law of nations." Although it had rarely been used before then, new life was breathed into the ATCA by a 1980 decision of the U.S. Court of Appeals for the Second Circuit in Filartiga v. Pena-Irala. The Second Circuit held that the ATCA created an implied cause of action for violation of customary international human rights standards. The Filartiga court recognized that international law, or "the law of nations," is a dynamic concept that should be construed in accordance with the current customs and usages of civilized nations, as articulated by jurists and commentators. It specifically held that U.S. law directly incorporated customary international law principles prohibiting deliberate government torture.

The Filartiga decision created hope in the international human rights community that it presaged a trend toward increasing incorporation of customary international human rights norms into domestic law. However, that development has not occurred. Some subsequent opinions by federal and state court judges also have treated customary international human rights norms as directly enforceable. Other subsequent decisions, though, have criticized Filartiga's holding that the Alien Tort Claims Act automatically provides a cause of action for violation of established customary international law norms. Of more general concern, even some courts agreeing with this holding have emphasized that few norms have been established widely enough to be recognized as part of customary international law. Finally, in many cases brought under the ATCA, various jurisdictional doctrines bar relief. These include sovereign
immunity,\textsuperscript{50} head of state immunity, diplomatic immunity,\textsuperscript{51} and the act of state doctrine.\textsuperscript{52}

A recent development of great potential significance was the passage of the Torture Victim Protection Act (TVPA) in 1992.\textsuperscript{53} Although the TVPA strengthens and expands the coverage of the ATCA, its primary significance is that it is a modern expression of support from the political branches of government that U.S. courts should be open to victims of international human rights violations for redress. Significantly, though, the TVPA is focused on torture and summary execution committed by foreign officials abroad. The Congress has not shown a similar interest in providing remedies for international human rights violations committed by U.S. officials.\textsuperscript{54}

\textit{b. Cases in which claims or defenses are directly based on customary international human rights norms.}

A prime example of this use of international norms is the opinion of the federal district court in Kansas in \textit{Rodriguez-Fernandez v. Wilkinson}, decided in 1980.\textsuperscript{55} The court granted a writ of \textit{habeas corpus} to a “Marielito,” a Cuban who fled to the United States in the 1980 Mariel boat lift, holding that his indefinite detention in a penitentiary violated a customary international standard. As an “excludable” alien, he was not protected by the U.S. Constitution, nor did statutes or other sources of domestic law clearly protect him from indefinite detention. Nevertheless, the district court ordered him released strictly on the basis of customary international law. The court explained:

\begin{quote}
\textit{[E]ven though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law. Petitioner’s continued, indeterminate detention on restrictive status in a maximum security prison, without having been convicted of a crime in this country or a determination having been made that he is a risk to security or likely to abscond, is unlawful. . . .}\textsuperscript{56}
\end{quote}

The district court opinion in \textit{Rodriguez-Fernandez} represents a high-water mark to date in U.S. courts’ direct incor-
poration of customary international human rights norms into domestic law, as the actual, stand-alone basis for a claim or defense. Because the Tenth Circuit Court of Appeals grounded its affirmance of the lower court’s grant of the habeas corpus petition on another rationale,\(^7\) the district court’s specific holding has no precedential effect. Moreover, in ruling on other Marielito challenges to their indefinite detention, other circuit courts have expressly rejected the argument that these detainees had an actionable claim under international human rights law.\(^8\)

In addition to the U.S. courts’ general reluctance to incorporate international human rights law in all cases, they have specifically declined to recognize such law as the basis for a defense to a criminal prosecution for a particular reason: because the foreign policy implications are deemed to give rise to nonjusticiable “political questions.” Such defenses have been raised, and dismissed as nonjusticiable, in prosecutions for demonstrating against nuclear weapons,\(^9\) for giving sanctuary to Central Americans fleeing civil war,\(^0\) for draft resistance,\(^1\) and for nonpayment of taxes.\(^2\) In fact, prosecutors are increasingly making successful threshold motions to exclude all mention of international law in criminal cases.\(^3\)

c. Cases regarding interpretive use of customary international human rights norms.

In contrast to U.S. courts’ current reluctance to view themselves as bound directly by international human rights principles, they are much more willing to invoke such principles — whether embodied in treaties or in other manifestations of customary international law — to guide the interpretation of domestic legal norms. There is also a scholarly consensus supporting this interpretive use of international human rights norms in domestic litigation.\(^4\) Even positivists, who generally resist incorporating customary international law norms into U.S. domestic law, recognize that judges should be free to resolve ambiguities, or to fill gaps, in positive law by reference to universally accepted legal principles.\(^5\)
The interpretive reliance on customary international human rights law is consistent with the well-established canon of construction that domestic law should be construed to avoid a violation of international law. Chief Justice John Marshall expressed this precept in an 1804 decision: "[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains...."66

In 1989, Professor Jordan Paust of the University of Houston Law Center published a comprehensive survey of the interpretive use of customary international human rights norms by U.S. courts throughout history.67 He concluded: "[M]ost of the Supreme Court Justices throughout United States constitutional history have recognized that human rights can provide useful content for the identification, clarification and supplementation of constitutional or statutory norms."68 Moreover, he showed that the Supreme Court's interpretive reliance on customary international human rights norms has been steadily increasing.69 He also demonstrated that the many Supreme Court Justices who have invoked customary international human rights concepts have spanned disparate jurisprudential approaches.70

Despite the fact that U.S. courts have relied upon customary international norms to assist in interpreting domestic law with relative frequency — certainly far more frequently than such norms have been deemed directly incorporated into U.S. law — this reliance has not been done in a sufficiently clear, consistent, and principled fashion. As Professors Bayefsky and Fitzpatrick explained:

Those courts which do make use of international law sources as an aid to interpretation usually (a) do not tend to justify its introduction by references to the principle of consistency with international obligations, nor (b) concern themselves with establishing the binding quality of the source by proving that it is truly customary international law. This tendency impedes the development of clear and consistent principles concerning the interpretive relevance and importance of customary human rights norms in U.S. law.71

The Rehnquist Court's most recent discussion of this issue offers little ground for optimism about the use of customary
international human rights norms in U.S. courts. Until recently, the Supreme Court had consistently invoked international human rights norms in determining whether an application of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment. For example, in Thompson v. Oklahoma, in 1988, the Court held that a death sentence imposed on an offender who was fifteen years old at the time of his offense violated the Eighth Amendment. Writing for the plurality, Justice John Paul Stevens cited international legal standards in reasoning that the sentence "offended civilized standards of decency." He noted that the leading Western European countries, as well as the Soviet Union, prohibited executions of individuals who were juveniles at the time of their crimes. He also cited two treaties that the United States had not ratified that explicitly prohibit juvenile death penalties: the ICCPR and the American Convention on Human Rights. In his dissent, Justice Antonin Scalia implied that international standards should not be taken into account in interpreting the U.S. Constitution.

One year later, in Stanford v. Kentucky, the Supreme Court concluded that the Eighth Amendment does not bar the imposition of the death penalty on someone who was sixteen or seventeen years old at the time of committing the crime in question. The majority opinion was written by Justice Scalia, who took this opportunity to reiterate his views about the irrelevance of international law and practices in construing the United States Constitution. Justice Scalia's majority opinion, as well as Justice Brennan's dissent, well state the two widely divergent possible views about interpreting domestic law in light of international customary law.

Justice Scalia's majority opinion recognized that the key question in Eighth Amendment analysis is whether the challenged punishment is contrary to "evolving standards of decency." In determining what those standards are, Justice Scalia explained, "we have looked not to our own [that is, the Justices' own personal] conceptions of decency, but to those of modern American society as a whole." Then, in a
footnote to this sentence, Justice Scalia emphasized his rejection of the theory that international law plays even an interpretive role in United States jurisprudence. He wrote:

We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various amici that the sentencing practices of other countries are relevant. While "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 concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.8

In contrast, Justice Brennan's dissent stated: "Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis . . . . In addition. . . three leading human rights treaties ratified or signed by the United States explicitly prohibit juvenile death penalties."81

As disappointing as the Supreme Court's recently constricted view about the interpretive value of customary international norms is, the impact of that view is less significant than that of typical Supreme Court rulings. In contrast with domestic law, there is no judicial hierarchy in the interpretive use of customary international law.82 Accordingly, both lower federal courts and state courts may make interpretive use of international norms, independent of the U.S. Supreme Court's rulings in this area. In fact, lower federal court judges have relied on international human rights standards in construing both constitutional and statutory provisions, and state court judges have done the same.83 Additionally, legislative and executive branch officials, at all levels of government, are free to take account of customary international law norms in their official acts.

Historically, though, customary norms have not been taken into account by government officials. Likewise, what have been termed "quasi-legal standards" and international
guidelines have not been taken into account consistently, or even frequently, by government officials in formulating or implementing government policy.\textsuperscript{84}

While there are isolated examples of domestic United States enforcement of international human rights standards, be they customary norms or "quasi-legal standards," the federal government's failure to take action to enforce, or at least encourage compliance with, international human rights standards has severely limited their domestic impact.

3. The Relevance of International Human Rights Standards for the Protection of Civil Liberties in the United States

One of the reasons why the United States is lagging in its support for international human rights treaties is the widespread — and generally accurate — attitude that U.S. civil rights and civil liberties law is more protective of individual rights than the laws of any other country, so Americans do not need these international protections.

This objection raises an important point — that international human rights norms would be incorporated into domestic law only to the extent that the international standards are more right-protective than the domestic standards.\textsuperscript{85} To the extent that international human rights standards are less protective than the corresponding U.S. norms, the former would not supersede the latter. To clarify this, the United States should qualify its ratification of any international human rights treaty by making a reservation to provisions that are less rights-protective than domestic law. The ICCPR includes one such provision that was appropriately the subject of an express U.S. reservation; article 20 excludes hate speech and war propaganda from free speech protection, in contrast with U.S. law.\textsuperscript{86}

The observation that Americans enjoy a relatively high standard of human rights protection as a general matter does not diminish the importance of looking to international human rights law as a vehicle for securing and expanding domestic rights. Especially in light of the Rehnquist Court's narrow interpretation of judicially protectable rights under
the U.S. Constitution, in certain significant respects U.S. rights standards are less protective than are the comparable international norms.

While the trend of the Rehnquist Court's rulings is toward lesser protection of rights, the trend in international human rights law appears to be in the opposite direction. One important area where international law is more rights-protective than domestic law is privacy, especially in the sense of personal autonomy and decisions about sexuality. Other areas where international human rights law is more protective than domestic law include the death penalty, prisoners' rights, the rights of other institutionalized individuals such as mental patients, and certain aspects of criminal procedure.

The fact that international human rights law contains certain added rights protections, beyond those afforded by current U.S. law, is illustrated by the additional rights guarantees contained in the ICCPR. If the United States had ratified the ICCPR without limitations on its rights-enhancing provisions, it would have expanded the rights of Americans in the following significant respects: prohibiting the execution of juvenile offenders and of pregnant women; incorporating international standards of cruel, inhuman, or degrading treatment and punishment into U.S. law; requiring the retroactive imposition of lighter criminal penalties; affording compensation for unlawful arrests and for convictions resulting from the miscarriage of justice; and requiring jails and prisons to separate juvenile from adult offenders and defendants awaiting trial from those who had already been convicted.

None of these more protective human rights standards would have had a huge impact on United States law and practice; however, these are significant protections accepted by United States treaty partners and the international community. There is no compelling reason why the United States should not give full effect to these international obligations.

The foregoing history of the impact of international human rights law in United States law and practice demonstrates a
general resistance to the applicability of international human rights standards in resolving domestic civil rights or civil liberties controversies. The United States has supported the development of international human rights law and institutions without a concomitant commitment to the integration of these developments into the U.S. domestic legal system.

The following recommendations address that reality and suggest ways in which the United States' stated commitment to international human rights can also become an actual commitment to the people within U.S. borders.

C. Recommendations for the Clinton Administration

1. The administration should support the early ratification of the human rights treaties now pending in the Congress and of other human rights treaties not yet submitted to the Senate.

The ratification of human rights treaties is an essential step in any strategy to make international human rights law meaningful in the U.S. domestic context. Early ratification of the international human rights treaties now under Senate consideration should be a significant priority for the administration.

The United States completed the ratification process of the International Covenant on Civil and Political Rights (ICCPR) in 1992. By September 1993, the United States was required to submit its first report to the Human Rights Committee detailing the steps it has taken to ensure compliance with the obligations it has assumed under the Covenant. The administration should take the reporting process under the ICCPR seriously and use its initial reports to outline an agenda for reform of U.S. laws and practices that do not conform to the obligations the United States has assumed in the ICCPR. (See recommendation two below.) By the beginning of 1994 the United States had not made its first report to the Human Rights Committee. This delay raises concerns about the seriousness of the administration’s commitment to the obligations the U.S. has assumed in ratifying the ICCPR.
The Senate gave its consent to the ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT) in October 1990; however, the ratification process for this Convention will not be complete until Congress passes implementing legislation. Such legislation was close to passage in the 102nd Congress and at the time of this writing pending in the House, although there has been little progress toward its passage. Enacting legislation to implement, and hence complete ratification of, CAT should be a high priority for the administration and the Congress.

Once the ratification process is completed the administration should act promptly to fulfill U.S. obligations under CAT, including the creation of training programs and materials and other measures designed to ensure that all federal, state, and local agencies implement the prohibitions against torture and other forms of cruel, inhuman, and degrading treatment or punishment found in CAT. The administration should also seek the enforcement authority it needs to take effective action against torture and other forms of cruel, inhuman, or degrading treatment or punishment by state and local authorities.100

For more than a decade, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights have been awaiting Senate approval. President Carter forwarded them to the Senate with recommendations for ratification. The Senate did not act on Carter’s recommendations, and Presidents Reagan and Bush did not endorse them.

The Clinton administration has recently endorsed ratification of these treaties. The administration should push for early Senate approval of them and there should be implementing legislation, if necessary, to ensure domestic enforcement of their guarantees. The administration has also expressed its support for ratification of the Convention on
the Rights of the Child. The administration should now sign the Convention and present it to the Senate for its advice and consent.

There are several other human rights treaties that have not yet been submitted to the Senate for its advice and consent. Most important is the Optional Protocol to the ICCPR, providing for the right of individual petition to the Human Rights Committee to enforce the ICCPR's guarantees. The Clinton administration should endorse the Optional Protocol and submit it to the Senate for prompt consideration and approval. People in this country should be able to file individual petitions if they believe their rights under the ICCPR are not being respected. This procedure would also be a valuable means of making all government officials aware, at all levels, of their obligations under the ICCPR.

Human rights treaties, with the notable exception of the Convention Against Torture, have floundered in the Senate for long periods without serious action. This administration should change the political dynamics of the process by pressing for expeditious Senate action on all these human rights treaties. Ratification of these treaties is an essential first step in the genuine incorporation of international human rights law in the U.S. domestic legal and political system.

2. The administration should ensure the domestic implementation of the rights guaranteed in the human rights treaties ratified by the United States.

Ratification of human rights treaties should be viewed as a beginning of the process of incorporating international human rights standards and not as the end of the process. As noted above, the United States has conditioned its ratification of the human rights treaties it has ratified with a long list of reservations, declarations, and understandings designed to ensure that the treaties would have no, or very limited, domestic effect within the United States. This policy defeats the purposes of ratification and reinforces the view that international human rights standards are to be applied
only to the human rights practices of other countries and not within the United States.

The first step to remedy the damage done by the existing package of reservations, declarations, and understandings to the ICCPR would be to pass a "Human Rights Conformity Act" that would implement many of the ICCPR provisions that are now subject to the existing reservations, declarations, and understandings. For example, such legislation would prohibit the execution of offenders who were under eighteen at the time they committed their crimes. The adoption of such legislation should also lead to the formal withdrawal of many of the reservations, declarations, and understandings now encumbering U.S. acceptance of the ICCPR.

While it would be desirable for the United States to permit all human rights treaties to be directly enforced by U.S. courts without the need for such legislation, at a minimum the ratification of the ICCPR should trigger a full scale debate in the Congress about all of the provisions in the ICCPR that would enhance rights protection beyond U.S. law. Without such a serious debate U.S. ratification is purely symbolic and has no significant domestic effect.

The same process should be initiated in connection with the ratification of the other treaties awaiting Senate approval. If it is impossible politically to change U.S. domestic human rights law or practices through the ratification process itself, ratification should at least require a good faith legislative debate and decision about the extent to which the United States will guarantee the rights in these treaties in practice.

Many Americans appear to view the usual legislative process as the only appropriate method for changing U.S. domestic law and policy. Accordingly, they will not accept the notion that treaties can become "the law of the land," directly enforceable in U.S. courts, but rather insist on implementing legislation. Instead of viewing this two-step process as a perversion of the Constitution, human rights advocates should take advantage of it to develop broader political
acceptance of these international human rights standards within the political process. The administration should foster this process by pushing for implementing legislation to secure all the rights embodied in the human rights treaties the United States ratifies that are not currently protected by U.S. law.

In some cases, there may be a legitimate debate even among human rights advocates about whether certain provisions in existing international human rights treaties would truly advance the cause of civil liberties and civil rights in the United States. For example, civil rights and civil liberties groups have differed over whether the federal prosecution of the four Los Angeles Police Department officers charged with the beating of Rodney King, after their acquittal in state court, is appropriate from a civil liberties perspective. Article 14(7) of the ICCPR, which would bar such a re-prosecution, would resolve this debate in a manner that many civil rights groups would oppose. On the other hand, the “dual sovereignty” doctrine that eliminates a double jeopardy defense to such subsequent federal prosecutions has been widely criticized by commentators over the years. Ratification of the ICCPR should, at a minimum, lead to a serious debate about the continuing legitimacy of the “dual sovereignty” doctrine.\textsuperscript{102}

So far debates about the pros and cons of changing U.S. law to reflect particular international human rights standards have been avoided in the ratification process. The administration should ensure that such debate occurs and should endorse the maximum acceptance of the international human rights norms in the human rights treaties the United States ratifies.

3. The administration should issue an executive order requiring all federal agencies to consider U.S. international human rights obligations and other international human rights standards in connection with the promulgation of federal regulations and in connection with their other actions.
In theory, the federal government is bound by U.S. international obligations, customary or treaty-based, but in practice, it is unlikely that federal agencies truly are guided by international human rights or other international obligations when they act. The recommended executive order would elevate the importance of international human rights obligations in the context of administrative action, at least at the federal level. This action would be especially timely now that the United States has ratified the ICCPR and is on the verge, we hope, of ratifying a number of other international human rights treaties. Even though the ICCPR has been declared to be non-self-executing this should not prevent the administration from insisting on full compliance with the ICCPR in the conduct of the federal government.

In addition to requiring consideration of customary and treaty-based human rights obligations, the executive order should also require consideration of other international standards the United States has supported in the international arena (that may or may not rise to the level of legal obligation) but has often forgotten in the domestic context. For example, the Federal Bureau of Prisons should consider the Standard Minimum Rules of Detention and other international standards and principles applicable to the rights of prisoners whenever it acts. There are many other examples of internationally approved rules, guidelines, or principles concerning a wide range of human rights issues that require the political weight of the Presidency behind them if they are to be taken seriously in the U.S. domestic legal system.

Such executive and administrative action can lead the way to a wider acceptance and understanding of international human rights law in the U.S. domestic legal system and make it more likely that the rights recognized in the major international human rights treaties will be fully enforced in the U.S. domestic legal system.

4. The administration should support legislation providing for legal and equitable remedies for violations of United States international human rights obligations in U.S. courts.
The enforcement of international human rights will not truly become a reality in the United States until there are effective judicial remedies for the violation of these rights. This has been the U.S. experience in the context of enforcing civil rights and civil liberties.

There should be a statute, fashioned after 42 U.S.C. section 1983, providing for liability “in an action at law, suit in equity, or other proper proceedings for redress” for violations of internationally protected human rights committed under the color of state or federal law. The Federal Tort Claims Act should be amended to permit suits against the United States for the violation of internationally protected human rights by federal officials.

Such a statute could be open-ended, applying to all obligations in treaties ratified by the United States and to customary norms, or it could be more narrowly drawn to apply to specific rights identified in advance by Congress. A more general authorization to the courts to enforce international human rights obligations would bring these obligations to life more fully; however, even a more limited statute would represent a major advance in the incorporation of international human rights law into the U.S. domestic legal system.

The administration should also support amendments to the Foreign Sovereign Immunities Act that would make it possible for victims to sue foreign sovereigns in United States courts at least for acts of torture, disappearance, or summary execution. Under existing law, foreign sovereigns are generally immune from suit for even the most egregious human rights violations if these violations are committed outside of the United States. The availability of such damage remedies in United States courts would be a major contribution to the worldwide struggle to end these violations.

5. The administration should support legislation giving the federal government the authority to enforce U.S. international human rights obligations.

There are many areas where the federal government lacks the authority to enforce international human rights obligations in the face of systematic violations by state and local
government authorities. The most dramatic example of this enforcement gap is the absence of adequate federal enforcement authority to eliminate police misconduct amounting to torture or cruel, inhuman, or degrading treatment or punishment.

The only enforcement authority now possessed by the federal government in this area is to bring federal criminal civil rights prosecutions under 18 U.S.C. §§ 241 and 242. The Justice Department has no civil enforcement authority in this area. Despite efforts, Congress has failed to pass legislation that would authorize the Justice Department to bring lawsuits to enjoin a “pattern and practice” of violations by local officials. An important first step would be for the administration to support police accountability legislation of the kind that passed the House of Representatives in the 102nd Congress.105

The federal government did not monitor or respond seriously to human rights violations against prisoners in the Reagan and Bush years. The Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997, provides a basis for the Justice Department to intervene in egregious cases. The Clinton administration should vigorously enforce CRIPA as a means of guaranteeing internationally protected rights. In addition, the administration should support legislation to expand the Justice Department’s role regarding violations of the international human rights of prisoners. The administration should also ensure that the federal government consistently monitors conditions of prisoners and addresses human rights violations.

These are only two examples of areas in which the administration should seek and exercise more authority in ensuring that U.S. international human rights obligations are respected in practice.

6. The administration should take executive action and support legislation to prevent kidnapping of criminal suspects from other countries in violation of international law.

There are many instances in recent years of United States actions at odds with its customary international human
rights law obligations. The kidnapping of Dr. Humberto Alvarez Machain is a prominent example of such an action.

The April 1990 kidnapping of Dr. Alvarez from Mexican territory by Drug Enforcement Administration (DEA) agents without the consent of the Mexican government violated a variety of customary law and treaty-based restrictions on the exercise of law enforcement authority by the United States on the territory of Mexico. The United States Supreme Court decided that the U.S.-Mexico extradition treaty did not explicitly prohibit such abductions. The Court did not address other international law restrictions on such abductions; however, the Court’s opinion offered little hope that U.S. courts would restrain such abductions based on international law.

The violation of international law in the Alvarez case could have been cured by executive action after the abduction or by restraint in the first instance. It is important for the administration to demonstrate its allegiance to U.S. international law obligations in this high-profile context by issuing an executive order banning such abductions and by supporting legislation prohibiting such abductions and denying U.S. courts jurisdiction to try suspects kidnapped despite the existence of extradition treaties or in violation of multilateral treaties or customary law.

7. The administration should file amicus curiae briefs in appropriate cases involving international human rights issues.

The U.S. government’s brief in Filartiga v. Pena-Irala had a significant impact on the positive decision in that case. The brief brought a combination of the government’s prestige, resources and expertise to bear in the case. The government’s support for the human rights plaintiffs in Filartiga made it easier for the court to find that torture was a violation of international customary law and that the recognition of a claim for relief in U.S. courts against a foreign torturer would not interfere with U.S. foreign policy.

The Clinton administration could play an important role in furthering the use of international human rights standards in
U.S. courts by participating in key cases raising human rights issues. This role would be especially important in cases where the consideration of international human rights standards would affect the interpretation of federal statutes. Of greatest importance would be the statement that such participation would make about the importance of international human rights law in the U.S. domestic legal system.

D. Conclusion

All these recommendations are directed to the need for leadership from the administration in accelerating the process of the legal, political, and social acceptance of international human rights standards within the United States. It is hypocritical for the United States to champion human rights in international forums and in U.S. foreign policy if it does not accept these standards within its domestic legal system.

Even if it is not possible for the United States to embrace all international human rights standards immediately without reservation, it is essential that the United States accept and incorporate these standards in practice to the maximum degree possible and that the nation makes this process of incorporation a national priority. At this point, domestic incorporation of international human rights standards is barely on the national agenda. If the Clinton administration is able to put it on the national agenda, it will have accomplished a great deal.

NOTES


2 Sale v. Haitian Centers Council, Inc., 61 U.S.L.W. 4684 (1993). The Supreme Court reversed a Second Circuit decision that had given a broad view to the non-refoulement obligations in Article 33.1 of the United Nations Convention relating to the Status of Refugees and to the Congressional intent in incorporating these standards in the


Nomination of Warren M. Christopher to be Secretary of State, Hearing before Comm. on Foreign Relations, U.S. Senate, 103rd Cong., 1st Sess. (1993), at 56.


GA Res. 271A, UN Doc. A/810 (1948).


Opened for signature, March 1, 1980, 1249 UNTS 13 (signed by the United States in 1980).


Our Constitution declares a treaty to be the law of the land. It is, consequently, 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.


22 See Lockwood, supra note 1, at 912.


26 See, e.g., Cook v. United States, 288 U.S. 102 (1933); Ford v. United States, 273 U.S. 593 (1927).


28 See Restatement (Third) of Foreign Relations Law of the United States, Sec. 102(2).


1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   (b) international custom, as evidence of a general practice accepted as law;

   (c) the general principles of law recognized by civilized nations;

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(d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

31 See Chen, supra note 8, at 362.

32 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 (1964) (high standard of mutual assent between civilized nations is required before rule may be said to be part of customary international law).


35 Parker & Neylon, supra note 33, at 442.


38 See Louis B. Sohn, “The New International Law: Protection of the Rights of Individuals Rather than States,” 32 Am. U.L. Rev. 1, 12 (1982) (UN Charter, UDHR, ICCPR, ICESCR, as well as about fifty additional declarations, and conventions concerning especially important human rights issues, “have become a part of international customary law and . . . are binding on all states.”).


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

Id. at 889-90.

Id. at 884.

Id. at 884-85.


For citations, see "Strossen II," supra note 5, at 822 n. 81-82.


See States v. Covos, 872 F. 2d 805, 808 (8th Cir. 1989) (insufficient evidence to demonstrate that customary international law prohibits warrantless use of pen register to track all calls made from telephone); Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988) (finding the prohibition against cruel, inhuman, and degrading treatment or punishment not to be judicially enforceable); Jean v. Nelson, 727 F. 2d 957, 964 n. 4 (11th Cir. 1984) (there is apparently no customary international law norm against detention of uninvited aliens); Tel-Oren v. Libyan Arab Republic, 726 F. 2d 774, 795-96 (D.C. Cir. 1984) (Edwards, J., concurring) (politically motivated terrorism does not violate customary international law); In re Alien Children Educ. Litig., 501 F. Supp. 544, 596 (S.D. Tex. 1980) (right to education not recognized as customary international law principle).

See Bayefsky & Fitzpatrick, supra note 40, at 9-13 (discussing ATCA cases addressing sovereign immunity issues).


See Bayefsky & Fitzpatrick, supra note 40, at 13-18 (discussing ATCA cases addressing act of state doctrine).

Pub.L. No. 102-256, 106 Stat. 78 (1992). The TVPA was intended to strengthen and expand the ATCA, especially by giving U.S. citizens...

54 Of course, U.S. civil rights laws offer remedies for many international human rights law violations committed by U.S. officials. See, e.g., 42 U.S.C. section 1983. Recently, the ACLU filed a suit for damages under the ATCA and the Federal Tort Claims Act against the U.S. officials involved in the kidnapping and ill treatment of Dr. Humberto Alvarez Machain.


56 Id. at 798.

57 654 F. 2d 1382, 1388-90 (10th Cir. 1981) (ruling that the Immigration and Naturalization Act did not permit indefinite detention of an excludable alien).

58 See, e.g., Gisbert v. U.S. Attorney General, 988 F. 2d 1437 (5th Cir. 1993); Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (9th Cir. 1991); Garcia-Mir v. Meese, 788 F. 2d 1446 (11th Cir. 1986).


60 United States v. Aguilar, 871 F. 2d 1426 (9th Cir. 1989).


62 See, e.g., First v. Commissioner, 547 F. 2d 45 (7th Cir. 1976); Graves v. Commissioner, 698 F. 2d 1219 (6th Cir. 1982); Lull v. Commissioner, 602 F. 2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); United States v. Malinowski, 472 F. 2d 850 (3rd Cir. 1973); Autenrieth v. Cullen, 418 F. 2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036.

63 See Bayefsky & Fitzpatrick, supra note 40, at 23.


68 Id. at 596.

69 Id. at 588-89.

70 See id. at 590.

71 Bayefsky & Fitzpatrick, supra note 40, at 27.


74 Id. at 830 (plurality).

75 Id. at 831 n.34.

76 Id. at 863-65 (Scalia, J., dissenting).


78 492 U.S. at 369.

79 Id.

80 Id. at 369 n. 1.

81 Id. at 389-90 (Brennan, J., dissenting).

For citations, see "Strossen II," supra note 5, at 835-36 n. 140-42. See also Bayefsky & Fitzpatrick, supra note 40 at 23-27, 72-80; Faust, supra note 67, at 594 (1989 survey of federal courts' interpretive reliance on customary international human rights norms revealed that, since 1930, human rights precepts had been cited in more than one thousand lower federal court opinions, and that the frequency of such citation had increased over time).

See Jiri Toman, "Quasi-Legal Standards and Guidelines for Protecting Human Rights," in Guide to International Human Rights Practice, (2d ed.) (1992). For example, the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress for the Prevention of Crime and Treatment of Offenders is in this category. Six states have adopted the rules administratively and they have been cited by the courts on occasion, see, e.g., Estelle v. Gamble, 429 U.S. 97, 103-04 & n.8 (1976), Lareau v. Manson, 507 F. Supp. at 1188 n.9. However as a general matter, the Standard Minimum Rules have not had a significant impact on the treatment of prisoners in the United States. See also Bayefsky & Fitzpatrick, supra note 40, at 24-25.

See Reid v. Covert, 354 U.S. 1, 89 (1957).


See Statement of the ACLU, supra note 86, at 6.

Id. at 7.

Id.

Id. at 8.

See U.S. Ratification, supra note 6, at 51-127.

Article 6(5).

Id.

Article 7.

Article 15(1).

Article 9(5).

Article 10(2)(b).

101 For further examples of ICCPR provisions that would have increased human rights protections beyond current domestic law, but for the reservations, declarations, and understandings, see supra, p. 492.


103 The relevant portion of Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceedings for redress."


105 See Hoffman, supra, note 100.


107 Senator Daniel Patrick Moynihan (D-NY) has introduced legislation, Senate Bill 72, that would prohibit such unconsented-to abductions and deprive the courts of jurisdiction to try defendants abducted in violation of international law.

108 630 F.2d 876 (2d Cir. 1980). For a discussion of the case, see supra, p. 485.