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International Human Rights Law in United States Courts: Professor Riesenfeld's Contributions

By NAOMI ROHT-ARRIAZA*

I. Introduction

Not so long ago, the use of international human rights law to uphold the rights of individuals in U.S. courts was practically unthinkable. International law concerned interrelations among sovereign states; individuals were irrelevant, or at least largely subsumed by the interests of their state. Moreover, with few exceptions, what happened to non-U.S. citizens abroad did not concern U.S. courts.

Although the application of international human rights law in U.S. courts remains far from commonplace, the exclusion of individual rights from the sphere of applicability of international law is definitively a relic of the past. Customary international law and, more recently, human rights treaty law, are becoming increasingly relevant to a broad range of civil rights, discrimination, and criminal defense cases. The challenge now is to educate both domestic advocates and judges as to the usefulness and applicability of an increasing body of law, so that judges routinely consider international law-based arguments with the same ease they consider constitutional or statutory ones.

In breaking down the barriers for human rights advocates attempting to bring suit in U.S. courts, Professor Stefan A. Riesenfeld has played an important role. This Essay focuses on some of those contributions. I consider two aspects of human rights law—the applicability and proof of customary international law, and the use of reservations in connection with human rights treaties. I end with a few musings on current problems and future directions for cases raising international human rights law in U.S. courts.

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II. Customary Law

Courts, advocates and scholars have identified three principal ways of using international law in individual rights cases: through the applicability of a treaty ratified by the United States, through the application of customary international law as federal common law or as the "law of nations," and as an aid to interpretation of domestic constitutional or statutory law.¹ The use of customary international law received a big boost in 1980, through the seminal case of *Filartiga v. Pena-Irala*.² That case, brought by a Paraguayan against an ex-chief of the Paraguayan police for the torture of a family member in Paraguay, required a U.S. court to decide whether official torture was a violation of the "law of nations."³ The district court dismissed the suit in part based on the idea that torture of a citizen by officials of his own state could not implicate the law of nations, which concerned inter-state relations.⁴

The Court of Appeals reversed. It reviewed evidence including unratified treaties, U.N. General Assembly resolutions, constitutional provisions of other countries, affidavits of international legal scholars and judicial decisions to find that official torture is now prohibited by the law of nations, and thus awarded damages to plaintiffs. In so doing the court applied a number of doctrines, including that of individual liability for certain heinous acts, the idea that international law, especially customary law, is constantly changing, and that customary international law is part of federal common law.⁵

The court based its argument in part on a brief *amici curiae* submitted jointly by the U.S. Departments of State and Justice. Professor Riesenfeld, at the time an attorney-advisor to the State Department, was a key supporter of the *amici* brief. His hand is particularly apparent in the citations to a German case finding individual rights under

1. See Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471, 474 (1994); see generally Symposium, *Problems of Proving International Human Rights Law in the U.S. Courts*, 25 GA. J. INT'L & COMP. L. 225 (1995).

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

3. The case was brought under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), which gives federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations." While the statute had existed since 1789, prior to *Filartiga* less than a handful of cases had attempted to use it.

4. *Filartiga v. Pena-Irala*, No. 79-C-917, Memorandum Order at 4 (E.D.N.Y., May 15, 1979).

5. Jeffrey Blum & Ralph Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L. L.J. 53 (1981).

international law⁶ and in the use of cases from other national courts employing customary law. For that reason, he is surely one of the "parents" of the string of successful suits brought under the Alien Tort Claims Act that came in the wake of *Filartiga*. These include: suits brought on behalf of victims of torture, summary execution, and disappearance in Argentina,⁷ Ethiopia,⁸ Guatemala,⁹ the Philippines,¹⁰ and Haiti;¹¹ and victims of genocide and war crimes in Bosnia-Herzegovina.¹² The *Filartiga* holding has been partially codified in the 1991 Torture Victims Protection Act.¹³ Others have chronicled the benefits and drawbacks of suits brought under these provisions,¹⁴ but they are undoubtedly one of the principal arenas in which U.S. judges confront issues of international human rights law.

III. Reservations to Treaties

For many years customary international law was the main avenue for raising international human rights claims in U.S. courts. This was the case largely because the United States, while active internationally in the elaboration and promotion of human rights treaties, had ratified practically none.¹⁵ The Genocide Convention, signed in 1948, was fi-

6. Matter of the Republic of the Philippines, 46 BVerfGE 342, 362 (2 BvM 1/76, Dec. 13, 1977).

7. Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); modified Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal. 1988).

8. Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996).

9. Xuncax v. Gramajo, 886 F. Supp. 162, 178 (D. Mass. 1995).

10. In Re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S. Ct. 2960, 125 L. Ed. 2d 661 (1993).

11. Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993).

12. Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1996).

13. See H.R. REP. No. 367, 102d Cong., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86. The TVPA extended the *Filartiga* cause of action to U.S. citizens, and covers cases of torture and summary execution.

14. See Ellen Lutz, *The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 B.C. THIRD WORLD L.J. 43 (1994); Paul Hoffman, *The "Blank Stare Phenomenon": Proving Customary International Law in U.S. Courts*, 25 GA. J. INT'L. & COMP. L. 181 (1995); Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In re Marcos Litigation*, 67 ST. JOHN'S L. REV. 491 (1993).

15. The U.N. Charter and the 1949 Geneva Conventions were exceptions, but early on courts rejected the applicability of the human rights provisions of the Charter. See, e.g., *Sei-Fujii v. State of California*, 38 Cal. 2d 718, 242 P.2d 617, 722 (1952); *Handel v. Arturovich*, 601 F. Supp. 1421 (C.D. Cal. 1985), but see *U.S. v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992) (POW provisions of Geneva Convention III are self-executing). Because they apply to situations of armed conflict, the Geneva Conventions were inapplicable to most claims of human rights abuse. In addition, the United States has ratified several antislavery treaties, see, e.g., Supplementary Convention on the Abolition of Slavery, the Slave

nally ratified forty years later by the U.S. Senate.¹⁶ A short series of treaties followed: the Convention Against Torture,¹⁷ the International Covenant on Civil and Political Rights,¹⁸ the Convention Against Racial Discrimination.¹⁹ A longer list awaits hearings on ratification.²⁰

Treaties, according to the U.S. Constitution, are the law of the land.²¹ A treaty prevails over inconsistent state law and over federal statutes passed before the treaty's ratification.²² After a treaty is negotiated and signed by the Executive, it must be ratified by two-thirds of the Senate to become U.S. law.²³ Once ratified, the question of whether the treaty is directly applicable as law in U.S. courts turns on whether or not it is considered "self-executing." Professor Riesefeld's work on the definition and implications of self-execution, both in a comparative context and in U.S. constitutional law, has made it easier to argue that provisions of human rights treaties may be applied directly by U.S. courts.

Trade, and the Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957), and the Convention on the Political Rights of Women, Mar. 31, 27 U.S.T. 1909, 193 U.N.T.S. 135 (entered into force for the United States on July 7, 1976).

16. Convention on the Prevention and Punishment of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); senate advice and consent, 132 CONG. REC. S. 1377 (1986) (entered into force for the United States Feb. 23, 1989); Genocide Convention Implementation Act of 1987, Pub. L. 100-106, 102 Stat. 3045, (1988) (codified at 18 U.S.C. § 1091-92 (1994)).

17. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987); senate advice and consent, 136 CONG. REC. S. 17491-2 (1990) (entered into force for the United States Nov. 20, 1994).

18. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); senate advice and consent, 138 CONG. REC. S. 4783 (1992) (entered into force for the United States Sept. 8, 1992).

19. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Senate advice and consent, 140 CONG. REC. S. 7634 (1994) (entered into force for the United States Nov. 20, 1994).

20. These include the: *Convention on the Elimination of All Forms of Discrimination against Women*, 7th mtg., U.N. Doc CEDAW/SP/1994/2 (1993); *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/736 (1989), reprinted in 28 I.L.M. 1448; *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49-52, U.N. Doc. A/6316 (1966); and the *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (1970). The current makeup of the Senate Foreign Relations committee makes it unlikely that the ratification process will advance in the near future.

21. See U.S. CONST. art. VI, cl. 2.

22. *Id.*; *Cook v. United States*, 288 U.S. 102, 118 (1933).

23. U.S. CONST. art. II, § 2, cl. 2.

The doctrine of self-executing treaties emerged in U.S. law in 1829.²⁴ Throughout his many writings, Professor Riesenfeld has been a champion of the idea that U.S. courts are the proper authorities to decide the domestic effect of treaty provisions. He has also meticulously and insistently used the court decisions of other countries to illuminate treaty practice, sometimes a rare method for U.S.-based academics. Based in part on these comparative studies, Professor Riesenfeld took issue with the often-used test of the "intent of the parties" when applied to multilateral (as opposed to bilateral) treaties. He found that the variety of domestic approaches to treaty implementation among states made such a test "dubious."²⁵ Rather, he posited that in the United States a treaty should be deemed self-executing if it (a) involves the rights and duties of individuals; (b) does not cover a subject for which legislative action is required by the Constitution; and (c) does not leave discretion to the parties in the application of the particular provision.²⁶ This test has been widely used since Professor Riesenfeld first posited it.²⁷

For purposes of human rights law, if the intent of the parties is not determinative in deciding whether a treaty provision is self-executing, then it follows that the U.S. executive's views on the subject, while "an element" in interpreting a given provision, cannot bind the courts. Thus, if a provision meets the objective test for self-execution,

24. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). Marshall wrote:

[A treaty] 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.

Id. at 314. See also *Asakura v. Seattle*, 265 U.S. 332 (1924).

25. Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971) [hereinafter Riesenfeld, *A Notable German Judgment*]. Elsewhere, he explains that there are at least three systems: in some states (e.g., Canada and the United Kingdom), separate parliamentary action is needed to create rights and duties of individuals based on a treaty; in others (like the United States) the Executive and the Senate share the treaty-making power, and under some circumstances a treaty may create rights without further legislation, and in others, the entire legislature must assent to the treaty, which then becomes applicable as domestic law. See also Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 899 (1980) [hereinafter Riesenfeld, *Win at Any Price?*].

26. Riesenfeld, *A Notable German Judgment*, *supra* note 25, at 550.

27. See, e.g., *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988); *U.S. v. Green*, 671 F.2d 46, 50 (1st Cir. 1982); *U.S. v. Noriega*, 808 F. Supp. 791, 798 (S.D. Fla. 1992).

the courts should be able to apply it in individual cases, notwithstanding even a formal declaration by the Executive to the contrary.²⁸

Both the Executive Branch and the Senate have attempted to limit the direct applicability of ratified treaties. In ratifying the human rights treaties, the Senate attached to each treaty a long list of reservations, declarations, understandings, and provisos, intended to remove any potential for the treaties to affect domestic law.²⁹ Reservations in international law are intended to allow states to assume the bulk of the legal obligations contained in a treaty while modifying or excluding the legal effects of certain provisions of the treaty in their application to that state.³⁰ Unless the treaty otherwise specifies, reservations to treaties are generally allowed unless they are "incompatible with the object and purpose of the treaty."³¹ Understandings, declarations and provisos, on the other hand, are not intended to vary legal obligations, but to express a party's interpretation of a provision or state a government's position on the relation of the provision to other law.³²

Some of the reservations attached by the U.S. Senate arguably violate the "object and purpose" of the treaty in their specifics, while others do so through blanket statements intended to limit the benefits of the treaty to those already provided in U.S. law. An example of the former involves, for instance, application of the death penalty to a minor who was under the age of eighteen at the time of the crime. While Article 6(5) of the International Covenant on Civil and Political Rights provides that "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age," the United States entered a reservation to this provision.³³ The United

28. Riesenfeld, *Win at Any Price?*, *supra* note 25, at 900-01.

29. See generally Symposium, *Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate*, 42 *DEPAUL L. REV.* 1169 (1993) [hereinafter Symposium]. See also William Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the U.S. Still a Party?*, 21 *BROOK. J. INT'L L.* 277 (1995).

30. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

31. *Id.* art. 19, 1155 U.N.T.S. at 336-37, 8 I.L.M. at 686-87.

32. Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, in Symposium on Parliamentary Participation in the Making and Operation of Treaties, 67 *CHI.-KENT L. REV.* 571, 602 (1991).

33. The U.S. reservation reads: "[T]he United States reserves the right, subject to Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below the eighteen years of age." Senate Advise and Consent to International Covenant on Civil and Political Rights, S. 4783-84, 102d Cong., Apr. 2, 1992, 31 I.L.M. 653.

Nations Human Rights Committee, the body charged with overseeing implementation of the Covenant, as well as a large number of states, have objected to the reservation as contrary to the "object and purpose" of the treaty.³⁴ Moreover, both the Human Rights Committee and the European Court of Human Rights have concluded that a reservation that is invalid because it violates the object and purpose of the treaty is severable, so that the treaty will bind the reserving party without benefit of the reservation.³⁵

An example of the second type of problematic reservation is the U.S. declaration that the substantive provisions of human rights treaties are "non-self-executing." Although not framed as such, the statement in essence amounts to a reservation, because the self-executing nature of treaty obligations is not a unilateral question³⁶ and is part of the "essential elements of the Covenant guarantees."³⁷ Nonetheless, the question remains whether U.S. courts are bound by the conditions imposed by the Senate, or rather must make their own determination of the validity of a reservation.

In a 1991 article co-authored with Professor Frederick Abbott, Professor Riesenfeld argued that U.S. courts must independently evaluate the existence and legality of reservations to treaties.³⁸ This contradicted the traditional view that because the Senate may decide whether to ratify a treaty, it can conditionally ratify it, and that such conditions, while perhaps both unwise and invalid as a matter of international law, have valid domestic effect.³⁹ Instead, Riesenfeld and

34. Belgium, Denmark, Finland, France, Germany, Italy, Norway, Portugal, Sweden, Spain, and the Netherlands have all objected to the U.S. reservation. Multilateral Treaties Deposited with the Secretary-General, Status as of Dec. 31, 1994, U.N. Doc. ST/Leg/SERE/13 at 127-29. The Human Rights Committee expressed its views in its Comment responding to the U.S.'s first report under the Covenant. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 24, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT, U.N. Doc. CCPR/C/79/Add. 50 (1995).

35. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 24 TO RESERVATIONS MADE UPON RATIFICATION OR ACCESSION TO THE COVENANT OR THE OPTIONAL PROTOCOL THERETO, OR IN RELATION TO DECLARATIONS UNDER ARTICLE 41 OF THE COVENANT, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6, para. 20 (1994) [hereinafter General Comment No. 24]; *Belilos v. Switzerland*, Eur. Ct. H.R. (Ser. A) 466 (1988). See also Schabas, *supra* note 29, at 291.

36. Riesenfeld & Abbott, *supra* note 32, at 608.

37. This was the position of the Human Rights Committee, which noted that without applicability in domestic courts "[n]o real international rights or obligations have thus been accepted." General Comment No. 24, *supra* note 35.

38. Riesenfeld & Abbott, *supra* note 32, at 571.

39. See, e.g., Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Power Reservation*, 56 COLUM. L. REV. 1151 (1956); Lori F. Damrosch, *The Role of the*

Abbott argued that "it is a constitutional requirement that Senate reservations be a valid part of a treaty instrument under international law in order for them to have domestic legal effect."⁴⁰ This is so because a reservation invalid under international law is severed from the treaty, so that it no longer falls within the Senate's power to ratify. Under U.S. law, the Senate does not have the power to make law on its own, and the Senate and President combined do not have the power to make law other than a treaty. Thus, unless both houses of Congress pass, and the President signs, a reservation invalid under international law, the reservation has no domestic effect.

It remains to be seen whether U.S. courts will be receptive to this argument. If they are, it would remove the primary obstacle to the use of human rights treaties *qua* treaties in U.S. courts. While this would not preclude continuing use of these treaties as evidence of custom (as in *Filartiga*) or as guides for interpretation of U.S. legal provisions,⁴¹ it would restore treaties to their usual preeminence as an independent source of international norms. The range of cases in which recently-ratified human rights treaties might be applicable, and might provide rights beyond those extant in current U.S. law, is quite broad. In addition to the death penalty for minors example discussed earlier,⁴² provisions of California's Proposition 187 (restricting access to education and medical services for the undocumented)⁴³ and the 1996 federal welfare reform bill might raise treaty-based challenges.⁴⁴ Other possible examples include the recently-passed Antiterrorism and Effective Death Penalty Act's⁴⁵ provisions limiting judicial re-

United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties, 67 CHI-KENT L. REV. 515 (1991); Michael Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257 (1983).

40. Riesenfeld & Abbott, *supra* note 32, at 592.

41. For examples of cases using international standards to interpret U.S. laws, see *Lipscomb v. Simmons*, 884 F.2d 1242 (9th Cir. 1989); *Lareau v. Manson*, 507 F. Supp. 1177 (D. Conn. 1980); *Sterling v. Cupp*, 625 P.2d 123 (Or. 1981).

42. See *supra* note 34 and accompanying text. The issue is raised in a case now before the Nevada Supreme Court, *Dominguez v. State*, No. 26562 (on file with author), in which a death sentence was imposed on a defendant who was 16 years old at the time he committed the crimes.

43. Anne Wagley, *Newly-Ratified International Human Rights Treaties and the Fight Against Proposition 187*, 17 CHICANO-LATINO L. REV. 88 (1995).

44. See de la Vega, *supra* note 1, at 474.

45. Pub. L. 104-132, 110 Stat. 1214 (1996). I am indebted to Dima Said for information on the Antiterrorism and Effective Death Penalty Act.

view⁴⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act's provisions for summary removal of certain legal aliens.⁴⁷

As many other authors have pointed out, these broad reservations, and especially the non-self-executing provisions, have stunted the use of international human rights treaties, and kept U.S. courts from playing their rightful role in the development of international law itself.⁴⁸ The inability to raise treaty-based arguments directly has had another worrisome side effect: advocates have learned to rely too heavily on customary law. Many arguments start from customary law, but then use treaties as the most weighty evidence of the state practice and *opinio juris* required to establish a customary law norm. This "second-best" form of argument, driven by the inability to use treaty law directly, distorts the proper relationship between treaties and custom.⁴⁹ It also makes U.S. judges more reluctant to rely on international human rights-based arguments. While judges can analogize treaties to both contracts and statutes and thus have little problem with their interpretation, ascertaining customary law is a less familiar technique and one which may give many judges enough pause for them to sidestep the issue. Thus, if Professor Riesenfeld and Professor Abbott's theory is successful, it will go far to restoring a balance and promoting the use of international law in cases involving individual rights.

IV. Conclusion

These are admittedly only two of the many possible examples of Professor Riesenfeld's contributions to an astounding array of areas of law. But they are two, I believe, where his work will directly impact the human rights, and thus the lives, of people for years to come.

46. *Id.*

47. Illegal Immigration Reform and Immigrant responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

48. See generally Symposium, *supra* note 29; Damrosch, *supra* note 39.

49. It also opens up a series of problems peculiar to the application of customary law, including the requirement that there be no "controlling legislative or executive act." See Michael Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. REV. 321 (1985).

