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INTERNATIONAL LAW IN THE FEDERAL COURTS

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In 1960 George Kennan, the American diplomat and historian, warned Americans that:

> [I]nternational life normally has in it strong competitive elements. It did not take the challenge of Communism to produce the situation. Just as there is no uncomplicated personal relationship between individuals, so, I think, there is no international relationship between sovereign states which is without its elements of antagonism, [or] its competitive aspects. Many of the present relationships of international life are only the eroded remnants of ones which, at one time, were relationships of most uncompromising hostility. Every government is in some respects a problem for every other government, and it will always be this way so long as the sovereign state, with its supremely self-centered rationale, remains the basis of international life. The variety of historical experience and geographic situation would assure the prevalence of this situation even if such things as human error and ambitions did not.[1]

Today's international scene and America's role in it seems, temporarily at least, to be in a more cooperative mode than Kennan

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1. G. KENNAN, RUSSIA & THE WEST UNDER LENIN AND STALIN 393 (1960-61).

predicted. Throughout Eastern Europe, the Communist party is sharing political power and tolerating private property. Baltic States are testing various forms of independence. Formerly closed economic systems are applying for Western financial credits. Closed borders are now open. To the west, Europe prepares for the dissolution of its economic boundaries in 1992. Third World nations have tied their futures to American banks, and some of these banks are suffering well-deserved anxiety. Throughout the world, the most influential economic entities are no longer exclusively nation-states, but also multinational corporations.

All of this reflects a rapidly changing and yet unformed international world order. And in this volatile international climate, the words of James William Fullbright, former Chairman of the Senate Foreign Relations Committee are instructive: we cannot be handicapped by policies based on old myths. Instead we must recognize current realities.[2]

Governments, including our own, have recognized that nations, no matter how powerful, cannot alone solve such world problems as terrorism, poverty, or environmental destruction. Nation-states search for consensus, and as a result, international treaties and customary laws have emerged in all facets of the law: sales,[3] evidence,[4] environmental,[5] and human rights,[6] for example.

This changing international climate has produced a call for federal courts to acquire an awareness and understanding of international concerns. Federal courts are asked to interpret and apply law that was neither enacted by Congress nor pronounced by a Supreme Court decision. The result is an emerging body of federal international common law.

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2. James William Fullbright, Senate Speech, Mar. 27, 1964 ("We are handicapped by [foreign] policies based on old myths rather than current realities.").

3. *See, e.g.*, 1980 United Nations Convention for the International Sale of Goods, A/Conf.97/18, Annex I (Apr. 10, 1980), *reprinted in U.N. Conference for the International Sale of Goods*, OFFICIAL RECORDS 178-79 (1981) (U.N. Sales No. E.85.US). *See generally* J. HONNOLD, UNIFORM LAW OF INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS SALES CONVENTION (1982).

4. *See, e.g.*, Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 U.S.T. 2555, T.I.A.S. No. 7444. The United States and sixteen other nations are party to this convention.

5. Harm to the environment often crosses national borders forcing states to view the environment as a global issue. As a consequence international environmental laws have developed to protect the environment and allocate responsibility and liability when damage occurs. *See generally* D. KAY & H. JACOBSEN, ENVIRONMENTAL PROTECTION—THE INTERNATIONAL DIMENSION, Magrow, *Transboundary Harm: The International Law Commission Study of "International Liability"*, 80 AM J. INT'L L. 305 (1986).

6. *See infra* note 30.

Federal courts are also reaching beyond domestic borders to decide disputes that traditionally laid beyond their jurisdictional reach.[7] Because the courts engage in these functions, it is of utmost importance that the legal profession understand the effects of international law on domestic jurisprudence and the courts' role in the international picture.[8]

As early as 1900, Justice Gray recognized that "international law is part of our law."[9] This article discusses these much quoted words. Section I provides some background on the sources of international law and its role in our judicial system. Sections II and III focus upon two important, yet different, areas. These areas are the introduction of international law in federal courts and the efforts of federal courts to impose U.S. domestic policy internationally. Human rights and terrorism provide examples for each phenomenon.

I. SOURCES OF INTERNATIONAL LAW

As a general proposition, treaties and customary international norms are the two principal sources of international law utilized by U.S. courts.[10] Treaties are recognized by the U.S. Constitution.[11] The courts independently have recognized customary international law as playing a prominent part in our jurisprudence. While treaties and customary international law both assume leading roles, their historic roots are divergent.

The United States Constitution provides in Article VI that "all treaties . . . shall be the supreme law of the land; and the Judges in every state shall be bound thereby. . . ."[12] "Self-executing trea-

7. *See infra* section III.

8. Some scholars argue that recent negative attitudes of the United States Government toward the International Court of Justice's authority to decide international disputes, places domestic courts in the position to decide important international legal controversies. *See* Frankowska, *The Vienna Convention on the Law of Treaties*, 28 VA. J. INT'L L. 281 (1988), citing R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 170 (1964).

9. The Paquete Habana, 175 U.S. 677, 700, 20 S. Ct. 290, 299, 44 L. Ed. 320 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.") *See* P. JESSUP, THE USES OF INTERNATIONAL LAW (1959); *see also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 187-88, 221-24 (1972).

10. *See* RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT THIRD]. *See also* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, T.I.A.S. No. 993.

11. U.S. CONST. art. VI (Treaties "shall be the supreme Law of the Land").

12. *Id.*

ties"—treaties binding on the United States without any legislative action—and non-self-executing treaties implemented by Congress,[13] supersede all inconsistent state and local laws,[14] as well as prior inconsistent federal statutes.[15] Treaties, like domestic legislation, however, are not recognized by U.S. courts if they conflict with the U.S. Constitution.[16] It is, of course, the task of the courts to determine whether a treaty is in conflict with the Constitution, but no provision in any treaty has been held unconstitutional by the Supreme Court, and few have been seriously challenged.[17]

While the United States has ratified over 890 treaties and is a signatory to 5,117 agreements,[18] much international law is not codified by a treaty to which the United States is a party. In the absence of treaties, courts are often called upon to apply general principles of international law, or customary international law.[19]

Most commentators agree that customary international law can be applied like a treaty. If this were so, customary international norms could supercede federal, state and local laws.[20] Unlike trea-

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13. On the distinction between self-executing and non-self-executing treaties, see RESTATEMENT THIRD, *supra* note 10, § 131; People of Saipan ex rel. Guerrero v. U.S. Dept. of Interior, 502 F.2d 90 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S. Ct. 1445, 43 L. Ed. 2d 761 (1975); Foster and Elam v. Nielson, 27 U.S. (2 Pet.) 253, 314, L. Ed. 415 (1829) (". . .when the terms of [the treaty] . . . 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 of the Court").

14. State of Missouri v. Holland, 252 U.S. 416, 40 S. Ct. 382, 64 L. Ed. 641 (1920). *See also* S.J. RES. 1, 83d Cong. 1st Sess., 99 Cong. Rec. 6777 (1953) (Proposed Constitutional amendment by Senator Bricker to reverse the principle of Missouri v. Holland).

15. Chae Chin Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 9 S. Ct. 623 32 L. Ed. 1068 (1889). For a comprehensive discussion of the "last in time" rule and its four exceptions see Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988). Paust also discusses the interesting question of what happens when a federal statute conflicts with customary international law, which, because it is constantly evolving, is always "last in time". *Id.* at 418-44. *See also* Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

16. Reid v. Covert, 354 U.S. 1, 16, 77 S. Ct. 1222, 1230, 1 L. Ed. 2d 1148, 1163 (1957) (". . .no agreement with a foreign nation can confer power of the congress, or on any other branch of government, which is free from the restraints of the Constitution.") *See generally* Paust, *supra* note 15, at 393 n.1 (1988).

17. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, *supra* note 9, at 137-40.

18. Telephone interview with State Dept. Treaty Dept. (Oct. 24, 1989). *See also* I. KAVASS & A. SPRUDZS, A GUIDE TO THE UNITED STATES TREATIES IN FORCE (1988 ed.).

19. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d. Cir. 1980) (applying customary human rights law).

20. RESTATEMENT THIRD, *supra* note 10, § 131; Henkin, *International Law as United States Law*, 82 MICH. L REV. 1557-59 (1984). *Contra* Goldklang, *Back on Board The Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, *supra* note 15.

ties, however, the question of what exactly is binding customary international law is often before the courts. The threshold question of whether the federal court should apply federal or state law becomes both interesting and complex. Is customary international law state substantive law, so that under *Erie Railroad v. Tompkins*[21] the federal courts must follow the lead of the state courts, or is it "federal common law?"

Early in our history, this perplexing question was irrelevant: International law was simply "common law" which during the era of *Swift v. Tyson*[22] was independently determined by federal and state courts. *Erie Railroad v. Tompkins*, however, ended the myth that there was a body of federal common law that the federal courts could interpret and apply independently of the states.

Following *Erie*, courts assumed that international law was part of state common law and that in diversity cases, federal courts were bound to apply international law as determined by the state courts.[23] As noted by Professor Louis Henkin, however, lawyers eventually recognized that such a state of affairs "made no sense."[24] Less than thirty years after *Erie* the Supreme Court made clear in *Banco Nacional de Cuba v. Sabbatino*[25]—the seminal case on the Act of State doctrine[26]—that federal common law survived *Erie* and that judge-made domestic "foreign relations law" is federal common law binding on the states. Contemporary scholars now recognize that international law is federal and not state law. Accordingly, cases arising under international law are "cases arising under . . . the laws of the United States"[27] and are within the Article III judicial power of the federal courts.

In the common law model, federal courts play a prominent role in shaping international law. They also insure that the United States abides by treaties as well as generally recognized principles

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21. 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

22. 41 U.S. (16 Pet.) 1 (1842).

23. *See, e.g.*, Bergman v. De Sieyes, 170 F.2d 360, 361 (2d Cir. 1984) (Judge Hand states that: "[S]ince the defendant was served while the cause was in the state court, the law of New York determines [the service's] validity, and, although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling on us, and we are to follow them so far as they have declared themselves.").

24. Henkin, *International Law as United States Law*, *supra* note 20, at 1559.

25. 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 804 (1964).

26. The Act of State doctrine is the foreign relations equivalent of the political question doctrine. Republic of Philippines v. Marcos, 862 F.2d 1355, 1360 (9th Cir. 1988) (en banc), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1933, 104 L. Ed. 2d. 404 (1989). It is a prudential doctrine that prevents the judiciary from embroiling itself in affairs over which it has little or no power.

27. U.S. CONST. art. III.

of customary international law. The importance placed on these international norms and the extent to which the federal courts will act as an enforcer is aptly illustrated in the field of human rights law. It is here that the impact, or more accurately, the potential impact of international law on domestic jurisprudence can be seen most readily.

II. INTERNATIONAL HUMAN RIGHTS AND THE FEDERAL COURTS

Since 1945 the Supreme Court has used the term "human rights"[28] in over 140 decisions[29] and the Ninth Circuit has mentioned the term of art in over 80 cases. The frequent use of the term, however, does not necessarily indicate that international human rights norms have had a major impact upon recent decisions of the courts. In fact, while the courts almost daily confront issues arguably involving human rights—freedom of expression, the death penalty, prisoner's rights, and personal autonomy rights such as travel—courts have been slow to incorporate international human rights laws into domestic jurisprudence. This suggests that an uncertain resolution of the tension between national sovereignty and international human rights still persists in the United States. While our government is quick to condemn China or South Africa for practices that offend our human rights pronouncements, the United States is not a party to any of the major human rights treaties.[30]

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28. The American Law Institute defines "human rights" as "freedoms, immunities, and benefits which, according to widely accepted contemporary values, every human being should enjoy in the society in which he or she lives." RESTATEMENT THIRD, *supra* note 10, § 701, comment (a).

29. The Court's use of the term does not necessarily mean that the Court was referring to international human rights. *See* Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145, 210 (1983) (finding that "human rights" has been used in 62 decisions in the last fifty years, with half of those cases appearing in the last fifteen years).

30. In addition to the United Nations Charter, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1969), *effective* Oct. 24, 1945 and the Charter of the Organization of American States, 1948, 2 U.S.T. 2416, T.I.A.S. No. 2361, 119 U.N.T.S. 3, *as amended* 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, which both contain human rights provisions and to which the United States is a subscriber, the major international human rights conventions are: The United Nations' International Bill of Human Rights consisting of the Universal Declaration of Human Rights, signed Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948), the International Covenant on Civil and Political Rights and the Optional Protocol, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200(XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), and the International Covenant on Economic, Social and Cultural Rights, Adopted Dec. 16, 1966, entered into force Jan. 3, 1976, G.A. Res. 2200(XXI), 21 U.N. GAOR Supp. (No. 16) 49 U.N. Doc. A/6316 (1966); The International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, entered into force Jan. 4, 1969, 660 U.N.T.S. 195; The Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature Dec. 9,

Nonratification is most often based upon U.S. reluctance to yield sovereignty.[31]

While we are a charter member of the United Nations, whose Charter contains human rights provisions,[32] most courts hold that the charter is not self-executing and therefore not binding on the United States. The first important case invoking this rubric arose in California in 1958. In *Sei Fujii v. State*,[33] the California Supreme Court held that the human rights provisions of the United Nations Charter were non-self-executing. Consequently, they lacked the necessary domestic legal force to invalidate the challenged California Alien Land Law Statute. Although the case was never appealed to the U.S. Supreme Court, *Sei Fujii* has been followed with little discussion or analysis by state and federal courts. Many commentators suggest that the case would be decided differently today, particularly in view of the greater specificity that international human rights have acquired since the adoption of the United Nations Charter. Yet, no case has explicitly departed from *Sei Fujii*.[34]

Because the United States is not party to the major human rights treaties and the Charter is not binding on the courts, customary international law and a growing body of federal human rights common law provide the primary sources to which courts turn. While unratified treaties are not binding on the United States of their own force, courts have found that they evidence generally recognized

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1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277; The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, entered into force July 18, 1976, G.A. Res. 3068(XXVIII), 28 U.N. GAOR, Supp. (No. 30) 166, U.N. Doc. A/9030 (1974). The United States is party to the Convention on the Political Rights of Women, opened for signature Mar. 31, 1953, entered into force in the U.S. July 7, 1976, 27 U.S.T. 8289, T.I.A.S. 8289. For a comprehensive list of these and other important international human rights treaties and non-treaty instruments see H. HANNUM & R. LILLICH, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 13-16 (1985); L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW CASES AND MATERIALS 991-93 (2d ed. 1987).

31. *See generally* Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary on the Constitutional Implications of the Proposed Genocide Convention, 99th Cong., 1st Sess. (1985).

32. United Nations Charter, *supra* note 30, arts. 55 & 56.

33. 38 Cal. 2d 718, 242 P.2d 617 (1952) (en banc).

34. *See, e.g.*, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985); Spiess v. C. Itoh & Co. (America), Inc., 643 F.2d 353 (5th Cir. 1981), *vacated*, 475 U.S 1128, 102 S. Ct. 2951, 73 L. Ed. 2d. 1344 (1982); Hitai v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir.), *cert. denied*, 382 U.S. 816, 86 S. Ct. 36, 15 L. Ed. 2d 63 (1965); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959); Rice v. Sioux City Memorial Park Cemetery, Inc., 245 Iowa 147, 60 N.W.2d 110 (Iowa 1953), *aff'd*, 348 U.S. 880, 75 S. Ct. 122, 99 L. Ed. 1161 (1954), *vacated by* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955). For a more comprehensive list of cases, see L. SOHN, & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 944-45 (1973).

principles of international law and thus have the force of customary international law.[35]

One of the most interesting cases, and to date the most commonly cited, is the Second Circuit's decision in *Filartiga v. Pena-Irala*.[36] In this case the court held that the Alien Tort Claims Act[37] provides the court jurisdiction to decide a tort claim brought by two Paraguayans against a former Paraguayan chief of police who allegedly tortured a family member to death. The court further concluded that the right to be free from torture "has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights."[38] To support its conclusion, the court traced the evolution of this rule from the United Nations Charter, the Universal Declaration and other major international human rights instruments.[39]

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35. Under the title "Customary International Law of Human Rights" section 702 of the Restatement Third of Foreign Relations Law of the United States states that:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones:

(a) genocide,

(b) slavery or slave trade,

(c) the murder or causing the disappearance of individuals,

(d) torture or other cruel, inhumane, or degrading treatment or punishment,

(e) prolonged arbitrary detention,

(f) systematic racial discrimination, or

(g) a consistent pattern or gross violations of internationally recognized human rights.

RESTATEMENT THIRD, *supra* note 10, § 702.

According to the comments "The customary law of human rights is part of the law of the United States to be applied as such by the State as well as the federal courts." *Id.* § 702 comment (c).

36. 630 F.2d 876 (2d Cir. 1980).

37. 28 U.S.C. 1350 (1982). "The Alien Tort Statute . . . is an ancient yet uncelebrated law. Enacted as part of the Judiciary Act of 1789, the Statute confers original jurisdiction on federal courts when an injured alien plaintiff bring suit against a defendant for committing a tort in violation of the Law of Nations." Harvey, *The Alien Tort Statute: International Human Rights Watchdog or Simply Historical Trivia?*, 21 J. MARSHALL L. REV. 341 (1988).

38. Filartiga, 630 F.2d at 882. *See also contra* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003, 105 S. Ct. 1354, 84 L. Ed. 377 (1985). In Tel-Oran, the court dismissed the case brought under the Alien Tort Statute for alleged acts of terrorism in Israel. Each member of the three-judge panel filed a concurrence. Judge Edwards believed that the statute allowed the suit, but there was insufficient evidence that terrorism or non-official torture violated the law of nations. Judge Bork reasoned that separation of powers concerns required that a plaintiff establish a private cause of action before invoking the statute. Judge Robb based his conclusions on the political question doctrine. For a detailed discussion of this case and the different opinions, see Comment, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127 (1986).

39. *See* T. BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 245-46 (1988); Blum & 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). *See also* Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection*

In 1980, the U.S. District Court in Kansas also applied customary international law to order the release of a detained Cuban national who arrived in the United States as an undocumented alien.[40] The court held that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, [such detention] is judicially remedial as a violation of international law."[41]

In recent death penalty decisions, moreover, customary international human rights norms are increasingly cited. Choosing not to follow these norms, however, the Supreme Court recently decided in *Stanford v. Kentucky; Wilkins v Missouri*[42] that the imposition of capital punishment on an individual for a crime committed before the age of sixteen or seventeen did not violate evolving standards of decency and thus did not amount to cruel and unusual punishment in violation of the eighth amendment.[43] Despite this holding, which is seemingly inconsistent on its face with international human rights law, a majority of the Court may still believe that the customary international human rights law has a place in eighth amendment analysis. The four dissenting Justices cited human rights treaties[44] and also stated that "contemporary standards of decency in the form of legislation in other countries is of relevance to eighth amendment analysis."[45] Justice O'Connor concurred in the majority position but not in its reasoning. While she did not cite foreign or international laws, her concurrence followed her argument in *Thompson v. Oklahoma*.[46] In *Thompson*, the ma-

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Analyses, 52 U. CIN. L. REV. 3 (1983).

40. Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub nom.*, 654 F.2d 1382 (10th Cir. 1981). For an in depth discussion of this case *see* Goldklang, *Back on Board the Paquete Habana: Resolving the Conflict Between Statutes and Customary International Law*, *supra* note 15.

41. 505 F. Supp. at 798. The Tenth Circuit affirmed on appeal. It based its holding on U.S. statutory provisions, however, rather than on international law. The court did note that the district court's consideration of international law was appropriate and its interpretation of the law was correct. 654 F.2d at 1388, 1390. *But see* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (eleventh circuit declines to follow tenth circuit), *aff'd* 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985).

42. ___ U.S. ___, 109 S. Ct. 2969, 106 L. Ed. 2d 306 (1989).

43. For a detailed discussion of the Supreme Court's treatment of cases involving juveniles sentenced to the death penalty, *see* Hoffman, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229 (1989) (surveying the Supreme Court's unsettled jurisprudence on this issue following Thompson v. Oklahoma,, 487 U.S. ___, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988), *see infra* text accompanying note 46. *See also* Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983).

44. ___ U.S. at ___, 109 S. Ct. at 2985-86 n.10, 106 L. Ed. 2d at 331.

45. ___ U.S. at ___, 109 S. Ct. at 2985, 106 L. Ed. 2d at 331.

46. 487 U.S. ___, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988).

jority held that the execution of an individual for a crime committed while under the age of fifteen was unconstitutional. In her *Thompson* concurrence, Justice O'Connor cited to the Geneva Convention Relative to the Protection of Civilian Persons in Time of War,[47] an international treaty that the United States has ratified.

It is premature to suggest that the Supreme Court is approaching consensus on the relevance of international human rights norms to domestic death penalty decisions. But it is safe to say that while most of the major treaties have not been made formally part of U.S. law by Senate ratification, they have become customary international law and the federal courts have the power to enforce them. For the federal courts to implement United States compliance with international human rights norms and to ensure that the courts recognize their important role in cases in which human rights are asserted, lawyers must continue to utilize this growing body of federal common law.

III. TERRORISM—JUDICIAL OUTREACH

Federal courts also apply domestic laws to foreign parties and transactions. This outreach function allows for the exportation of U.S. criminal and commercial law beyond our borders.[48]

Among the most interesting examples is the exportation of U.S. criminal laws, notably the Racketeering Influenced and Corrupt Organizations Act (RICO).[49] Defining various "prohibited activities" and imposing criminal and civil liability upon those who engaged in them, Congress sought to punish criminal conspiracies involving white collar or business crimes, the instruments or effects of which cross interstate or international borders. While the statute is

47. 6 U.S.T. 3516, T.I.A.S. No. 3365 (1955).

48. Five principles of international jurisdiction over foreign nations or foreign transactions are internationally recognized. These include: (1) the territorial principle—jurisdiction based on the incident occurring on a state's soil; (2) the nationality principle—jurisdiction based on the nationality of the accused; (3) the passive personality principle—jurisdiction based on the nationality of the victim; (4) the protective principle—jurisdiction based on the state's interest in protecting itself; and (5) the universality principle—jurisdiction over universal crimes. *See* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *supra* note 30, at 823; *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 A. J. INT'L L. 435, 445 (Supp. 1935). While historically there was some debate over the legitimacy of the passive personality principle, *see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW IN THE UNITED STATES § 30(2) (1962), all five principles are now recognized in the United States. *See* RESTATEMENT THIRD, *supra* note 10, at §§ 402-404, § 402 comment (f) (discussing the passive personality principle).

49. Pub. L. No. 91-452, 84 Stat. 923, *codified at* 18 U.S.C. §§ 1961-1968 (1982 ed. & Supp. V).

relatively new and will be tested often in court as various applications are attempted, its use in reaching across international borders is already raising interesting questions. For example, federal courts are involved in complex civil RICO litigation as the government of the Philippines seeks to trace and recover public property diverted into private assets by former President Ferdinand Marcos and his associates.[50]

Of equal interest to international business executives and their lawyers is the exportation of American antitrust[51] and securities laws.[52] Nationals of any country who perform acts that are legal at home, but which are denounced as crimes in the United States by either of these bodies of laws, may find themselves facing arrest and prosecution in the United States if the actors later are found in the United States or if they can be waylaid and extradited to the United States.[53]

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50. *See, e.g.*, Republic of Philippines v. Marcos, 862 F.2d 1355 (9th Cir. 1988) (en banc), *cert. denied*, ___ U.S. ___, 109 S. Ct. 1933, 104 L. Ed. 2d 404 (1989); Republic of the Philippines v. Marcos, 806 F.2d 344 (2nd Cir. 1986), *cert. dismissed*, 480 U.S. 942, 107 S. Ct. 1597, 94 L. Ed. 2d 784 (1987), *cert. denied*, 481 U.S. 1048, 107 S. Ct. 2178, 95 L. Ed. 2d 835 (1987); Republic of the Philippines v. Westinghouse Electric Corp., 714 F. Supp. 1362 (D.N.J. 1989); New York Land Co. v. Republic of the Philippines, 634 F. Supp. 279 (S.D.N.Y. 1986). *See generally* Meagher, *Recent Developments: The Marcos Cases*, 29 HARV. INT'L L.J. 127 (1988) (discussing 1987 cases in the second, fourth, and ninth circuits).

51. Antitrust laws apply to both domestic and foreign transactions. *See* Sherman Act § 1, 15 U.S.C . § 1 (1982) ("every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared illegal. . . ."); Clayton Act § 1, 15 U.S.C. § 12 (1982) (" 'Commerce,' as used herein means trade or commerce among the several States and with foreign nations,. . ."). Moreover, courts have extended U.S. antitrust laws to reach foreign acts by foreign parties when the conduct is intended to and does affect U.S. commerce. United States v. Aluminum Co. of America, Inc., 148 F.2d 416, 444 (2d Cir. 1945). *See generally* Gervurtz, *Using Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L L. 211 (1987). *But see* Timberline Lumber Co. v. Bank of America, N.T. and S.A. 549 F.2d 597, 613-15 (9th Cir. 1976) (court refrains from exercising antitrust jurisdiction where principles of comity caution against the application of U.S. laws); In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253-56 (7th Cir. 1980) (same).

52. *See, e.g.*, 15 U.S.C. §§ 77v, 78aa. (granting U.S. courts jurisdiction over offenses and violations of domestic securities laws).

53. Extradition occurs when an individual accused or convicted in one state is found in the territory of another state who surrenders the individual to the state under whose laws he or she is wanted. M.C. BASSIOUNI, INTERNATIONAL EXTRADITION, ch. I, §§ 1-6 to 1-7. There is no duty under international law to extradite a wanted individual, however; extradition is only required by treaty or other equivalent legal obligations. *Id.* ch. I, § 2-2. Extradition in the United States is governed by 18 U.S.C. §§ 3181-3195 (1984). The United States is party to over 100 extradition treaties. *See* 18 U.S.C § 3181 (listing treaties). Most extradition treaties are based on the theory *aut dedere aut judicare*, which imposes upon any state that refuses to extradite an international criminal the obligation to prosecute the criminal itself. *See generally* Costello, *International Terrorism and the Development of the Principles Aut Dedere Aut Judicare*, 10 J. INT'L L. & ECON. 483 (1975).

Furthermore, Congress recently expanded the jurisdiction of U.S. courts to reach individuals who engage in terrorist[54] acts against U.S. citizens, even when those acts take place on foreign soil or in international airspace or waters. Primarily based upon the principle of passive personality jurisdiction,[55] Congress criminalized the taking of American hostages irrespective of the locus of the seizure.[56] In some instances, the willful destruction of an aircraft, assaulting of passengers or crew on board an aircraft, damaging an aircraft, or placing destructive devices on board, are also illegal and actionable.[57] The Act to Combat International Terrorism further authorizes the Attorney General to reward individuals who furnish information regarding certain terrorist acts.[58] And in 1986 Congress supplemented its anti-terrorist legislation with the Omnibus Diplomatic Security and Antiterrorism Act.[59] The act criminalizes various terrorist acts committed against Americans abroad.[60]

Prior to the enactment of this legislation, U.S. courts were frequently unable to obtain jurisdiction over international terrorists who victimized U.S. citizens. While in some instances international treaties provided a jurisdictional basis for domestic courts to prosecute international terrorists, these treaties do not apply to all terrorist activities. For example, if an individual seizes a foreign vessel in international waters or a foreign aircraft over international waters, the vessel or aircraft could be a "pirate vessel" thus providing all states jurisdiction to capture and prosecute the "pirate."[61] The definition of piracy is very specific, however, and there are limits to

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54. " 'Terrorism' is a vacuous and amorphous concept entirely devoid of an accepted international legal meaning, let alone an objective political referent." Boyle, *Preserving the Role of Law in the War Against International Terrorism*, 8 WHITTIER L. REV. 735, 735 (1986). In this article, the term "terrorism" is used in its broadest sense to include all non-military international acts of violence. *See* Kane, *Prosecuting International Terrorists in the United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294, 295-96 n.13 (1987) (providing many definitions of "terrorism"). *See also* The Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801(a) (1982) (defining "terrorism" for the purpose of authorizing domestic intelligence activities).

55. *See supra* note 48.

56. The Hostage Taking Act of 1984, 18 U.S.C. 1203 (1984).

57. The Destruction of Aircraft Act, 18 U.S.C. 32 (1984).

58. 18 U.S.C. § 3071 (1984).

59. Pub. L. 99-399, ch. 113A, 100 Stat. 853, 896-907 (1986). *See generally* Recent Developments, *U.S. Legislation to Prosecute Terrorists: Antiterrorism or Legalized Kidnapping*, 18 VAND. J. TRANSNAT'L L. 915, 957-58 (1985).

60. *See* 18 U.S.C. § 2331 (Supp. IV 1986).

61. *See* Third United Nations Convention on the Law of the Seas *signed* at Montego Bay, December 10, 1982, U.N. Doc. A/Conf./62/122/ Cor. 3, *reprinted in* 21 I.L.M. 1261 (1982). *See generally* L. HENKIN, CHANGING LAW FOR THE CHANGING SEAS 72 (1968); Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM J. TRANSNAT'L L. 35, 81 n.218 (1986).

a state's ability to utilize piracy law to prosecute international terrorists.[62]

International conventions on civil aviation also permit states to intercept foreign, state-owned aircraft to gain jurisdiction over offenses committed on board an aircraft.[63] If the aircraft is not state-owned, however, these conventions are inapplicable.

In other cases, the International Convention Against the Taking of Hostages,[64] to which the United States is party, may provide the necessary jurisdictional basis. This Convention defines hostage-taking as an international offense,[65] and thus allows for prosecution under the universal principle of jurisdiction.[66]

The antiterrorism legislation ensures that the United States can assert jurisdiction over all cases where U.S. citizens are victimized, even when an international treaty does not provide domestic jurisdiction. In 1989, the first trial under these laws[67] ended in Washington, D.C. with the United States obtaining a criminal conviction

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62. *See generally* Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1, 18-20 (1988).

63. *See* The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, *done* Sep. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969). *See also* The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, *done* Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 106 (entered into force Mar. 8, 1971); The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *done* Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

64. *Done at* New York, Dec. 17, 1979, U.N. Doc. A/RES/34/146 (1979), *reprinted in* 18 I.L.M. 1456 (1979).

65. *Id.* art. 1.

66. The United States may also be able to prosecute an individual if he or she is deemed a "combatant" under the laws of war and his or her act constitutes a "grave breach" under the Fourth Geneva Convention, Convention (IV) Relative to the Protection of Civilian Persons in Times of War, *signed at* Geneva, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287. The 1977 Protocols Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflict, *opened for signature*, Dec. 12, 1977, U.N. Doc. A/32/44 (1977) (*entered into force* Dec. 7, 1978), *reprinted in* 16 I.L.M. 1391 (1977) makes the laws of war applicable to "armed conflict in which people are fighting against colonial domination and alien occupation and against racist regimes" *Id.* art. 1, para. 4. Protocol I is generally considered to be binding customary international law. *See* Cassesse, *The Geneva Protocol of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law*, 3 UCLA PAC. BASIN L.J. 55, 70-71 (1984).

For a more in-depth discussion of the various international laws under which a state can prosecute an international terrorist, see Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, *supra* note 62.

67. This was not the first suit brought in U.S. courts following acts of terrorism abroad. Civil suits have been brought for breach of duty by victims of terrorist attacks against airline carriers. *See, e.g,* In re Hijacking of Pan Am World Airways, Inc., Aircraft at Karachi International Airport, Pakistan on September 5, 1986, 713 F. Supp. 1483 (S.D.N.Y 1989); Stanford v. Kuwait Airlines Corp., 705 F. Supp. 142 (S.D.N.Y 2989); Sweis v. Trans World Airlines, Inc., 681 F. Supp. 501 (N.D. Ill. 1988).

of Fawaz Yunis, a Lebanese national who participated in the hijacking of a Jordanian airplane in Beirut.[68] Yunis was sentenced to thirty years in prison. U.S. jurisdiction was premised on the fact that the flight carried two American passengers, allowing jurisdiction based on the international principles of universal and passive personality jurisdiction and the 1984 antiterrorism legislation.[69] These Americans were held captive for over thirty hours. Neither was killed, and they were released before the hijackers blew up the aircraft.

American forces took custody of Yunis for prosecution only after he was lured aboard a yacht in international waters by plain clothes female FBI officers posing as drug dealers.[70] He was flown to the United States in a Navy jet, which was refueled over the Atlantic to avoid "international complications."[71] When the flight landed at a military airbase he was admitted without travel documents as a prisoner in FBI custody.

In addition to finding that the court had jurisdiction under principles of international law and domestic antiterrorism legislation,[72] the district court also found that while the U.S. constitutional protection of due process under the law applies to aliens arrested by federal officials overseas,[73] Yunis' rights were not violated by the abduction.[74] The court based its finding that Yunis' due process rights were not violated on the *Ker-Frisbie* doctrine. This doctrine allows U.S. courts to retain in personam jurisdiction over a defendant irrespective of the method by which he was arrested or brought to the United States.[75] The court also found that Yunis' capture did

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68. *See* Engleberg, *U.S. Convicts Arab in Jet's Hijacking*, N.Y. Times, Mar. 15, 1989, at A3, col. 1; Wright *Younis [sic] Is Found Guilty of Air Piracy, Hostage-Taking*, L.A. Times Mar. 18, 1989, at A1, col. 5.

69. It is undisputed that the only nexus to U.S. courts was the presence of U.S. citizens on board the aircraft. "The airplane was registered in Jordan, flew the Jordanian flag and never landed on American soil or flew over American airspace." United States v. Yunis, 681 F. Supp. 896, 899 (D.D.C. 1988).

70. Wash. Post, Sept. 19, 1987, at A18, col. 1; Wash. Post, Sept. 18, 1987, at A1, col. 4.

71. *Id.*

72. United States v. Yunis, 681 F. Supp. at 899-909.

73. This holding may be called into doubt by the Supreme Court's recent decision in United States v. Verdugo-Urquidez, ___ U.S. ___, 110 S. Ct. 1056 (1990), which holds that the Constitution does not grant foreigners in foreign countries protection from warrantless searches conducted by U.S. law enforcement agents.

74. United States v. Yunis, 681 F. Supp. 909, 916-21 (D.D.C.), *reversed on other grounds*, 859 F.2d 953 (D.C. Cir. 1988).

75. Ker v. People of State of Illinois, 119 U.S. 436, 7 S. Ct. 225, 30 L. Ed. 421 (1886); Frisbie v. Collins, 342 U.S. 519, 72 S. Ct. 509, 96 L. Ed. 541 (1952), *reh'g denied*, 343 U.S. 937, 72 S. Ct. 768, 96 L. Ed. 1344.

not fall within the narrow exception to the *Ker-Frisbie* doctrine established by the Second Circuit in *United States v. Toscanino*,[76] for "conduct of a most shocking and outrageous character."[77] The court apparently believed that the federal officer's conduct was necessary to capture Yunis.

Yunis will surely appeal his case. His attorney has stated publicly[78] that an appeal may be based on, among other grounds, the argument that the antiterrorism laws violate the 1971 Montreal Convention on the Suppression of Unlawful Acts Against the Safety of Civil Aviation.[79] The Montreal Convention stipulates that the primary rights of prosecution should be in one of three countries: (1) where the hijacking initiated, (2) where the plane landed or (3) where the aircraft was based.[80] The Convention further states that if a suspected hijacker is arrested in a fourth country, and if his extradition is not sought by one of the primary countries, the fourth country is obligated to submit the case to its competent authorities for prosecution.[81]

It will be interesting to see how federal appellate courts deal with emerging questions about extraterritorial jurisdiction and conflicts between the relevant domestic and international laws. The U.S. government's position appears to be that any hijacking anywhere in the world is a federal offense if an American national is on board the hijacked plane or vessel.[82] It is also apparently the U.S. position that once our law enforcement officers have possession of a violator of our laws anywhere in the world, it does not matter how that possession came about.[83] This clearly invites lawyers to study potential conflicts between U.S. antiterrorism policy and international

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76. 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974), *on remand*, 398 F. Supp. 916 (E.D.N.Y. 1975).

77. United States ex rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001, 95 S. Ct. 2400, 44 L. Ed. 2d 668 (1975) (distinguishing and limiting Toscanino).

78. Wright, *U.S. Sentences Arab Hijacker to 30 Years*, L.A. Times, Oct. 5, 1989, at A6, col 1.

79. *See supra* note 63.

80. Montreal Convention, *supra* note 63, at art. 5.

81. *Id.* at art. 7.

82. *See supra* text accompanying notes 54-60.

83. *See* Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, *supra* note 62, at 4-5. Findlay quotes statements made by former President Reagan, former Secretary of State Schultz, former Attorney General Meese, former Deputy Secretary of State Whitehead, Ambassador-at-Large for Counter-Terrorism Oakley, and State Department Legal Advisor Sofaer all supporting the use of force to apprehend terrorists. Recent events in Panama demonstrate that the Bush administration also supports the use of force to abduct individuals indicted under the laws of the United States. *See A Transcript of Bush's Address on the Decision to Use Force in Panama*, N.Y. Times, Dec. 21, 1989, at A9, col. 1.

legal principles against the use of force,[84] notions of national sovereignty and international human rights norms.[85]

It is uncertain how federal appellate courts will resolve these issues. Political pressure to strike out at terrorism may be directed creatively at other evils in other times. Principled standards for extraterritorial enforcement of domestic policy are as sorely needed as principled standards for balancing sovereignty and the moral demands of international human rights laws.

CONCLUSION

The judicial branch participates, willingly or not, in the development of U.S. foreign and domestic policy. It was not a lawyer but a historian who said there is no such thing as foreign policy; there is domestic policy applied externally.[86] The federal courts apply international treaties and customary law; they determine whether a treaty is self-executing; they ascertain customary norms and they increasingly preside over the prosecution of foreigners when they violate domestic or international laws. Accordingly, the words of Albert Einstein, uttered in 1953, are instructive today: "[o]ur defense is not in armaments, nor in science, nor in going underground. Our defense is in law and order."[87]

As the world becomes more and more interdependent and nations achieve consensus on global problems, laws with international impact will continue to proliferate. Courts will be looking increasingly to international, as well as domestic law, to decide cases involving issues such as environmental preservations, human rights, contracts and crimes. It is timely to increase our preparation for these changes.

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84. *See, e.g.*, United Nations Charter, *supra* note 30, art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."). The Charter does not proscribe the use of necessary and proportionate force in self defense. *Id.* at art. 51; *see also The Caroline*, 2 MOORE DIGEST OF INTL. LAW 412 (1906) (". . .those exceptions should be confined to cases in which the 'necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.' ").

85. *See generally* Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, *supra* note 62, at 33-39 (discussing the possible international human rights protections afforded to international terrorists).

86. *See* E.R. MAY, THE MAKING OF THE MONROE DOCTRINE 254-60 (1975).

87. *Quoted by* Lapp, *The Einstein Letter that Started it All*, N.Y. Times, Aug. 2, 1964 (Magazine).