

THE “BLANK STARE PHENOMENON”: PROVING CUSTOMARY INTERNATIONAL LAW IN U.S. COURTS

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I speak from the perspective of a civil rights and human rights practitioner, giving you the view from the trenches. I have litigated approximately twenty cases involving customary international law, and from that experience I have learned lessons, some painful, about the reality of this type of litigation. Some of my observations may appear pessimistic, but I remain committed to the cause and, in the long term, I believe that the prospects for the use of customary law in U.S. courts are good. Despite the cautionary tales I recount here, I have not given up and do not intend to shift my focus to an alternate line of work, such as products liability litigation.

The attraction of international human rights law to me is simple: international human rights law promises more for my clients than U.S. domestic legal standards in many instances. From the standpoint of a civil rights lawyer, the enterprise of proving customary human rights norms is not worth a candle unless the clients will benefit. We may not achieve these benefits in the short term, but in the long run customary human rights norms will help the kinds of clients that the American Civil Liberties Union, the NAACP Legal Defense and Education Fund, or other similar groups represent, in a wide variety of contexts.

My assigned topic for this symposium was “proving international customary law.” I wondered whether I was expected to approach this topic from a technical evidentiary standpoint, because the threshold problem is proving the basic legitimacy of the concept to skeptical judges. I call this problem the “blank stare phenomenon.”

The first time I encountered the “blank stare phenomenon” was in attempting to argue customary law to District Judge Earl Carroll in the Arizona Sanctuary case¹ in 1985. Joan Fitzpatrick and Deborah Perluss prepared an extensive memorandum proving the relevant customary norms

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¹ United States v. Socorro de Aguilar, No. 85-008-PHX-ECH (D. Ariz.), *aff'd*, 871 F.2d 1436 (9th Cir. 1989).

of temporary refuge and humanitarian initiative, precisely as customary law should theoretically be proved.² We provided enormous quantities of supporting documentation, and we arranged to have Professor Richard Lillich available as an expert witness. We also had witnesses prepared to lay the factual predicate for the application of the norms by testifying about conditions in El Salvador and Guatemala.

The Sanctuary case had a high national profile, and at the hearing on the relevance of the international law claims the courtroom was filled. I offered to present our witnesses, but Judge Carroll replied that he was uninterested in hearing any testimony. However, he was gracious enough to allow me to talk for about an hour, during which he asked me some questions. Yet, when we spoke about customary law, there was that stare. That blank stare. It was as if the concepts we had so meticulously briefed bore no resemblance to law in the eyes of Judge Carroll. This same phenomenon has occurred in other courtrooms. This judicial skepticism is one of the largest obstacles for a lawyer trying to use customary law in domestic litigation.

With respect to the technical aspects of proving customary law, it is simply unrealistic to expect practitioners to prove state practice in the manner international legal scholars typically suggest. Rarely will it be feasible for practitioners to produce the kind of evidence that we presented in the Sanctuary case. In only a handful of cases will the litigants have the kind of resources that will enable them to undertake the full-scale proof of consistent state practice and *opinio juris* that classic international legal doctrine prescribes.³ Certainly, in ordinary human rights or civil rights cases practitioners are unlikely to undertake such a demanding project.

Thus, for practical reasons it will generally be necessary to resort to similar and more accessible sources of proof, such as expert affidavits, treaties that codify customary norms, resolutions of international bodies, and the other types of proof relied on in cases such as *Filartiga*.⁴ Moreover, from a philosophical standpoint as a human rights lawyer, I believe governments should be held to their promises, as reflected in such instruments.

² Memorandum of Points and Authorities in Opposition to the Government's Motion in Limine and In Support of Defendants' Motion to Dismiss, *United States v. Socorro de Aguilar*, No. 85-008-PHX-ECH (D. Ariz., filed March 28, 1985).

³ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 (1987) (giving the basic framework concerning evidence of international law).

⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

The politics of recognizing customary norms are quite intriguing. Alston and Simma⁵ accurately predict that § 702 of the Restatement will dominate the recognition of customary norms in the United States. In actual litigation, judges will defer to the Restatement's list of norms, which will come to define the universe of customary norms. Resort to the Restatement eliminates the need for direct proof of extensive state practice, sparing judges the task of reading and analyzing extensive documentary evidence. Of course, citation to the Restatement also offers advantages to the litigants, at least where § 702 includes norms of relevance to their claim.

But, the most interesting aspect concerning the role of § 702 and the politics of recognizing customary law relates to cruel, inhuman, and degrading treatment or punishment. Section 702 includes the ban on cruel, inhuman, or degrading treatment or punishment on its rather short list of presently binding customary human rights norms. One might think, given general tendencies, that it should be relatively easy to convince a judge that this norm exists. But we have had enormous difficulty in doing so. This difficulty does not arise because the prohibition on cruel, inhuman, and degrading treatment or punishment does not really exist in international law. Rather, the difficulty is a political one. A telling example is provided by the reaction of Judge Real in the *Marcos* litigation.⁶

As we were going to the jury in the *Marcos* case in September of 1992 and we were arguing over jury instructions, Judge Real neglected to put in jury instructions about prolonged arbitrary detention and cruel, inhuman, and degrading treatment or punishment, which were important issues for the clients that I represented. After argument, Judge Real was convinced that prolonged arbitrary detention should be added to the jury instructions. However, he refused to add an instruction concerning cruel, inhuman, and degrading treatment or punishment. To my mind, the main reason Judge Real would not recognize the norm was his fear that it might then be applied to U.S. government officials. Judge Real could recognize a customary prohibition on torture, as applied to a Philippine dictator, because he could be confident it would not pertain to the conduct of local law enforcement officials. Acceptance of the enforceability of the customary international norm concerning cruel, inhuman, and degrading treatment or punishment

⁵ Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y. B. INT'L L. 82 (1992).

⁶ *In re Ferdinand E. Marcos Human Rights Litig.*, MDL No. 840 (D. Haw. Sept. 24, 1992).

would lead to demands by prisoners in U.S. jails and prisons that their conditions be improved beyond the shrinking rights now guaranteed to prisoners under the U.S. Constitution.⁷ This prospect was not one he apparently finds inviting. And in that respect, Judge Real may be typical of the present-day judiciary.

In the *Forti*⁸ decision, Judge Jensen likewise refused to recognize a customary norm against cruel, inhuman, and degrading treatment or punishment. Judge Jensen stressed the unmanageability of the standards and the lack of a precise definition of cruel, inhuman, and degrading treatment or punishment. But I am skeptical that those factors were the primary reason for his decision, since Judge Jensen also knew that if he accepted the norm it would have implications for the United States. Judges have largely the same reaction to international law as the Executive Branch when it proposes extensive packages of reservations, declarations, or understandings to the ratification of human rights treaties. The *Forti* decision was a judicial reservation, declaration, or understanding with respect to customary law. Perhaps we can change this reality, but as for now it is a major obstacle in human rights litigation.

Another sad lesson I have learned about customary law is that it really does not restrain U.S. executive action. Notwithstanding theory, when you litigate against the U.S. government on an issue to which the government is firmly committed, you lose. This is not a phenomenon unique to human rights litigation, but it has been an important factor in some of the major cases.

The Sanctuary case illustrates the problem. From a theoretical standpoint we had excellent arguments that should have led to the dismissal of some of the counts in the indictment. Some of the defendants were charged with harboring aliens because an undocumented person stayed in their house for an hour, or with illegally transporting undocumented persons because they drove those persons from one place to another place where those persons planned to present themselves to immigration authorities. We should have won those cases, given the arguments we presented. But the judge knew that this was a big political case. It was the U.S. government against the

⁷ See HUMAN RIGHTS WATCH/AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 98-114 (Dec. 1993).

⁸ *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), *modified*, 694 F. Supp. 707 (N.D. Cal. 1988).

Sanctuary movement, and in interpreting U.S. law the judge was not going to try to harmonize it with customary law. His position was that the defendants could not confront the U.S. government and get away with it. The judge never really tried to come to grips with the international law arguments because of the political dimension of the case. (We received a more respectful rejection of these arguments in *American Baptist Churches v. Meese*.⁹ Although we did not prevail on the international law issues, the issues were taken more seriously.)

Nevertheless, the international law arguments did have a great value in the Sanctuary case. The international aspect of that case was important in terms of the overall struggle of the Sanctuary movement to expose the hypocrisy of U.S. policy and disregard for international legal obligations, whether or not U.S. courts were prepared to recognize this. These arguments were influential in the court of public opinion. And, ultimately, vindication for the claim that administration of the asylum system was badly flawed and biased came in the settlement of the *ABC* case,¹⁰ through which many of the people assisted by the Sanctuary movement received relief after a five or six year struggle, but we lost the particular case, an important lesson.

The topic of "winning by losing" takes me to my prime example, *United States v. Alvarez-Machain*.¹¹ *Alvarez* is a perfect example of winning by losing because of the great embarrassment suffered by the government as a result of the kidnapping itself and widespread outrage and skepticism concerning the Supreme Court's tortured interpretation of the United States-Mexico extradition treaty. This embarrassment apparently will yield the drafting of a new, more precise extradition treaty.

The reasons we declined to rely on customary law initially in the *Alvarez* case are complex and relate in large part to the problems of proof and apparent legitimacy that are the subject of this essay. But after the Supreme Court reversed the lower courts' holding that Dr. Alvarez's abduction violated the extradition treaty, we returned to the Ninth Circuit to raise our customary law claims. We did precisely what we advised the Supreme Court we intended to do.¹² Customary law had not been raised by the original

⁹ 712 F. Supp. 756 (N.D. Cal. 1989).

¹⁰ *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991).

¹¹ 112 S. Ct. 2188 (1992).

¹² In response to a question by Justice O'Connor at oral argument, I informed the Supreme Court that if we did not prevail on the treaty claim we would return to the Ninth Circuit for rulings on our objections to the abduction and impending trial based on other

trial lawyer, but we had taken steps to preserve those claims as the case proceeded on the extradition treaty issue. Yet, when we returned to the Ninth Circuit and filed a brief notifying the court of our intention to brief and argue customary law, the Ninth Circuit ruled that the Supreme Court decision foreclosed the claim.¹³ We went back to them and said, "But why? Could you please tell us, because there's this case called *The Paquete Habana*¹⁴ and cases following it that hold that customary law is the law of the land. The least you could do is tell us why the Supreme Court decision wipes out an argument that has never been briefed or decided by anybody." But the Ninth Circuit declined to do that. They peremptorily sent the mandate down so as to prevent a petition for rehearing *en banc*. Their attitude seemed to be, "Get on with it, and don't bother us with any more international law issues."

So, we went back to the trial court and said to Judge Rafeedie, who we thought would be more sympathetic, "The Supreme Court hasn't decided this. That's clear. The Ninth Circuit hasn't told us anything other than that they read the opinion and possibly for procedural reasons they think you should deal with this issue initially. We will prove the customary norms to you."

Judge Rafeedie gazed at me during the oral argument and indicated that he liked the argument, but he asked pointedly, "Are you telling me that the Supreme Court is going to let me do this? I mean, aren't they going to reverse me?"

The message the Ninth Circuit heard from the Supreme Court was that international law does not matter. They may have read the Supreme Court's message in *Alvarez* accurately. This was the most troubling experience I have encountered in attempting to rely on international law in domestic litigation, because of the dismissive attitudes of both the Supreme Court and the Ninth Circuit to arguments of great seriousness and moment. As soon as the Supreme Court's decision came down, the lower court judges simply folded their tents. Even in the *Verdugo* case¹⁵ where oral argument had been scheduled on the customary law claims, the Ninth Circuit simply took

international norms, including customary law. *United States v. Alvarez-Machain*, No. 91-712 (Supreme Court, Official Transcript of Oral Argument, April 1, 1992) at 34-35.

¹³ *United States v. Alvarez-Machain*, 971 F.2d 310 (9th Cir. 1992), *amended*, 1992 U.S. App. LEXIS 28367 (9th Cir., decided Nov. 3, 1992).

¹⁴ 175 U.S. 677 (1900).

¹⁵ *United States v. Verdugo-Urquidez*, 1994 U.S. App. LEXIS 16083 (9th Cir. 1994).

the motion off its calendar, saying, in effect, "We want to hear your regular arguments, your usual arguments."

Where one can anticipate that courts are likely to respond to international law arguments with disdain or superficiality, a plan for embarrassing judges may be called for. In *Alvarez* we had a press strategy in anticipation of the decision and we aggressively tried to embarrass the U.S. government around the world. We prepared video tapes as well as written press materials. Our strategy was very successful. I recently performed a computer-assisted search of press reports and discovered that there were approximately two thousand articles in the world press on the case during the month following the decision. Our press clippings indicate that the vast majority of the coverage was highly critical of the decision and the government's position in the case. Ultimately, the government was quite embarrassed by the decision. Whether Justices of the Supreme Court are ever embarrassed by their erroneous decisions, I am uncertain.

The government's embarrassment was compounded by the acquittal of Dr. Alvarez pursuant to a motion filed under Rule 29 of the Federal Rules of Criminal Procedure at the end of the government's presentation of the evidence at the trial. Rule 29 requires a showing that no reasonable juror would vote for a conviction, a difficult standard to meet. The government's case was shockingly weak, but even so Rule 29 motions are rarely granted even in cases where they should be, because most judges prefer to send the case to the jury rather than risk criticism for acquitting the defendant. Perhaps the Supreme Court's legal error with respect to the treaty argument in *Alvarez* influenced Judge Rafeedie to be more responsive to arguments emphasizing the extraordinary factual weakness of the government's case, but it is impossible to determine this.

As we litigate customary international law issues, we must remind ourselves that we operate in an era during which very few rights protective decisions are being made by the courts, under any body of law. Our difficulties in the area of customary law are not really surprising in light of this general trend. About eleven years ago I urged those interested in this field to channel international human rights claims to state courts.¹⁶ At that time, a liberal majority presided on the California Supreme Court, one of whose previous justices was Frank Newman, a prominent scholar in our field. Since 1986, however, three members of that court have been removed

¹⁶ Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61 (1984).

from the bench in an election dominated by concerns that they had recognized too many rights for persons on California's death row.¹⁷ Now the California Supreme Court is barren ground for human rights litigation, and it is often impossible to convince it even to interpret the California Constitution more broadly than the Rehnquist Court interprets the United States Constitution. Civil rights lawyers hesitate to make any creative arguments because hanging on to existing rights protective doctrine seems a difficult enough task. It will take some time before the personnel on the California Supreme Court changes sufficiently to provide a realistic chance for progressive rights protective arguments to succeed.

From the Supreme Court down, we have similar problems with the federal judiciary. If we had been able to argue *Alvarez* when the kidnapping occurred in April 1990, we would likely have won. Justices Brennan and Marshall were still on the Supreme Court at that time. Justice Brennan might even have authored the majority opinion, and it would have been a wonderful landmark decision. Instead of being remembered as the person who lost one of the biggest international human rights cases, I would be known as the lawyer who won *Alvarez*. This remarkable difference between what actually happened and what I think might have happened two years earlier has nothing to do with any hypothetical difference in the quality of our arguments or the precedents and principles on which we relied. The change in personnel in the Supreme Court was determinative.

The same problem affects the lower federal courts. The amazing thing is that we win at all. Judge Pamela Rymer, who decided *Handel v. Artukovic*,¹⁸ one of the chief cases rejecting an implied cause of action for damages from a customary norm, was the issues director for the Goldwater campaign in 1964.¹⁹ Judge Rymer is a very smart, but very conservative judge, who is generally receptive to pressures to narrow access to the courts in line with the policies of the Reagan and Bush Administrations. Such judges tend to resist expansion of civil rights or human rights law in particular. With a different judge in *Handel* ten years ago, we might have had a decent chance for acceptance of the argument that a claim for damages

¹⁷ O'Hara & Gregor, *Caught in a Backlash*, MACLEAN'S, Nov. 17, 1986, available in LEXIS, News Library, Arcnws File.

¹⁸ 601 F. Supp. 1421 (C.D. Cal. 1985).

¹⁹ *10 People Frequently Mentioned as Maybes*, USA TODAY, Oct. 14, 1991.

may be implied from international customary law, analogous to the *Bivens*²⁰ line of cases implying rights of action from the Constitution.

However, Judge Rymer recently sat on the panel that decided the appeal in *Trajano*,²¹ one of the cases consolidated in the *Marcos* human rights litigation. I feared that she might reject the theoretical framework of the *Filartiga* case,²² but to my relief, she did not. This demonstrates that we have succeeded in developing a line of precedent that is sturdy enough to survive scrutiny even by generally conservative jurists. For example, in the *Abebe-Jiri*²³ trial here in Georgia last year concerning an Ethiopian torturer, on which Beth Stephens and I collaborated, Judge Tidwell's first question at oral argument was, "Why are we here? This happened in Ethiopia? They are Ethiopians? Why Atlanta?" The strength of the *Filartiga* precedent convinced Judge Tidwell that it was appropriate for him to apply international human rights law in this case.

A key point in such case may be the fact that we are able to invoke a statute, the Alien Tort Claims Act.²⁴ When there is a statute instructing judges to look at the law of nations, our task of establishing the legitimacy and relevance of customary law is much easier. Once in the door, however, we often discover that the judges are not greatly intrigued by the theoretical aspects of customary law. What drives the cases are good, solid facts, as in *Abebe-Jiri* and the *Marcos* cases.

Just a week prior to this Colloquium (in 1994), the plaintiffs in the *Marcos* cases received a \$1.2 billion judgment, from a jury that responded to our request that they grant substantial damages in order to send a message about the seriousness of violations of customary law. These Hawaiian jurors sent a powerful message about the deserved consequences to a dictator who tortures, summarily executes, and arbitrarily detains people in his country. This provides grounds for optimism.

But the critical crossroads for the ATCA precedents will come when we try to rely upon them to sue U.S. government defendants. Will the judges

²⁰ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²¹ *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), *cert. denied sub nom.*, *Marcos-Manotoc v. Trajano*, 113 S. Ct. 2960 (1993).

²² 630 F.2d 876 (2d Cir. 1980).

²³ *Abebe-Jiri v. Negewo*, No. 1:90-cv-2010 GET (N.D. Ga., Aug. 20, 1993). The defendant's appeal was argued in January 1995 in the Eleventh Circuit, but we still await the decision as this Colloquium goes to press.

²⁴ 28 U.S.C. § 1350 (1994).

react to that effort in the same way that Judge Real reacted in our argument about cruel, inhuman, and degrading treatment or punishment at the *Marcos* trial? This concerns me greatly, but we would be faithless to our belief in the universality of customary law if we failed to invoke these norms against U.S. defendants guilty of their breach.