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Book Review of Federal Courts and the International Human Rights Paradigm and World Justice? U.S. Courts and International Human Rights

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BOOK REVIEWS

Federal Courts and the International Human Rights Paradigm

By Kenneth C. Randall. Durham, North Carolina: Duke University Press, 1991, pp. ix, 295, $45.00.

World Justice? U.S. Courts and International Human Rights

Edited by Mark Gibney. Boulder, Colorado: Westview Press, 1991, pp. xiv, 178, $39.95.

Filartiga v. Pena-Irala[1] and *Tel-Oren v. Libyan Arab Republic*[2] are the yin and yang of human rights litigation in the United States. Legal niceties aside, they represent nothing less than the question of the role of the federal judiciary in human rights enforcement and, more generally, in matters of international concern. *Federal Courts and the International Human Rights Paradigm* and *World Justice? U.S. Courts and International Human Rights* (with the notable exception of one essay) are premised on the assumption that an active federal judiciary is not only appropriate, but necessary. The first of these books argues for more expansive federal court jurisdiction over human rights litigation and the second explores the extent to which the courts are implementing and enforcing human rights.

Professor Randall sets out to demonstrate that federal court jurisdiction is appropriate not only in the context of state and federal relations and within the constitutional framework of the executive, legislative, and judicial branches, but also in the hierarchy of the international legal system. With respect to the latter, the author builds upon Richard Falk's seminal work, *The Role of Domestic*

1. 630 F.2d 876 (2d Cir. 1980).
2. 726 F.2d 774 (D.C. Cir. 1984) (per curiam), *cert. denied*, 470 U.S. 1003 (1985).

Courts in the International Legal Order.[3] Given the ambitious scope of this inquiry, Randall surprisingly limits his examination to enforcement of the most peremptory human rights violations (such as the prohibitions on torture, genocide, slavery, and piracy) and select criminal offenses (hijacking, taking of hostages, and offenses against internationally protected persons), which he characterizes as "terrorist" offenses. It is an unfortunate choice of terminology that obscures the common thread in the international law offenses he addresses—that each is relatively well defined and well accepted.

That criticism aside, the book is a comprehensive, straightforward, and very useful examination of human rights litigation in the domestic and international legal order. Randall's clarity and uncluttered style is at its best in alleviating the needless obfuscation of federal court jurisdiction over human rights litigation on grounds of diversity, alienage, the Alien Tort Statute, and the existence of a federal question. The author effectively builds this discussion upon an historical examination of federal judicial authority from the Articles of Confederation to the drafting of the Constitution. Critical to Randall's hypothesis is that the Constitution's framers intended for federal courts to have clear primacy over state courts in adjudicating claims with international overtones and a forceful role vis-à-vis the executive and legislative branches in cases with international components. The analysis at this juncture would have benefitted from a less cursory exploration of state court jurisdiction under the transitory tort doctrine. Nevertheless, the centerpiece of his analysis is a thorough dissection of the Alien Tort Statute, which quite effectively refutes the opinions of Judges Bork and Robb in *Tel-Oren.* Having drawn a "road-map" for litigants pursuing nonstated offenders in federal court, the author then turns to suits against state offenders under the Foreign Sovereign Immunities Act, and discusses the hurdles of the political question doctrine, act-of-state doctrine, and forum non conveniens.

The culmination of the domestic law analysis is Randall's proposed legislation for jurisdiction of human rights and terrorism offenses (both as limited by the author) over nonstate and state defendants. One certainly can debate whether such legislation is merely an academic exercise (because Congress is so unlikely to adopt such legislation) or quite the converse—the most likely avenue for expansionism given the reticence of an increasingly conservative judiciary. In any event, Randall's proposals are intriguing and, oddly at times, more conservative in defining the scope of jurisdiction than the previous discussion merits. For example, Randall makes a forceful argument for restrained application of the act-of-state doctrine, yet the proposed statute precludes jurisdiction whenever the executive branch determines "United States foreign policy interests require application of the act-of-state doctrine, and a suggestion to that effect is filed with the court." (p. 131)

3. RICHARD A. FALK, THE ROLE OF THE DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (Richard B. Lillich ed. 1964).

The second part of the book, domestic jurisdiction in the world legal order, is most interesting for its thesis that the Westphalian paradigm of an international legal system with its emphasis on nation-state actors has been replaced by a new world order matrix in which fundamental human rights norms will take priority over state sovereignty. The fast pace of recent events has outdistanced the author's arguments, while at the same time making his theory of an emerging human rights paradigm even more viable.

Accepting Randall's position that an aggressive judiciary serves the interests of domestic and international law, how well are the federal courts actually implementing and enforcing human rights principles? After reading *World Justice? U.S. Courts and International Human Rights,* one would have to answer, "Not nearly well enough." In this collection of essays, only one author, Professor John Rogers, takes the position that federal courts should be reticent in adjudicating human rights claims. Yet every other essay, whatever its topic, reveals critical deficiencies in judicial receptivity to human rights advocacy. For example, Professor Ralph Steinhardt attacks the impedimenta of the act-of-state and political question doctrines as being premised on the faulty notion that the United States Government speaks with "one voice" on foreign relations when in fact the Constitution was drafted to allow separate and distinct voices in each of the three branches of government on international issues (p. 24). Professor Daniel Bodansky suggests that there is strong international precedent for the exercise of universal jurisdiction by domestic courts yet to be utilized effectively in federal court. Perhaps the most serious indictment of the federal courts is that there is still a need for a human rights advocate such as Professor John Quigley to argue what should be self-evident: that extradition by abduction is illegal and federal courts should refuse extradition in such cases.

An essay by Professor Bert Lockwood serves as an interesting companion piece to Randall's work. Lockwood contends that the frontier of human rights litigation in this country is the enforcement of economic, social, and cultural rights. He optimistically predicts that constitutional guarantees may be utilized to incorporate many of these rights into domestic law. A related note of optimism is sounded in the concluding piece by Professor Anthony D'Amato:

> Looking ahead, I hope that the new and exciting human rights cases that some American lawyers are initiating in United States courts will help educate our own government as to the proper translucency of our own country. . . . Courts throughout the world can be a forum in which people can assert the primacy of their human rights in all situations in which states are impeding the realization of those rights. (p. 171)

The editor of the book, Professor Mark Gibney, earlier suggests that the federal courts can and should play a vital role in national dialogue concerning foreign policy.

This optimism, however laudable, is tempered by the essay of Professor Howard Tolley, Jr., the only political scientist other than Gibney of the authors represented. Tolley's essay is a fascinating and disturbing report card for the federal judiciary in human rights litigation. Twenty-two cases were selected in

which district and appellate court judges made conflicting rulings on comparable issues in alien tort cases and refugee rights cases. Tolley concludes from the comparisons:

> Republican appointees came out three to one against the human rights claimants, while Democratic appointees favored refugee petitioners in two-thirds of the cases decided. President Reagan appointed ten judges voting in the cumulative total of 22 cases, and nine rejected the human rights petitioners. All three women and all three black judges in the sample voted for the refugee petitioners. Gender and race were not related to voting in alien tort claims litigation, as the seven [sic] women and black judges divided almost evenly between plaintiffs and defendants. (p. 138)

Faced with such statistics, Tolley suggests that the most likely avenue for successful litigation is utilization of international law to construe domestic law rather than a "premature, overambitious effort to realize monist ideals." (p. 142)

Advocacy necessitates optimism. For the human rights advocate, there is much in the so-called "new world order" to engender optimism, yet the ethnocentric fragmentation of the nation-state is also cause for concern. Both chains of development suggest an increasing need and better defined framework for judicial activism by United States courts in human rights enforcement. This task, however, does not appear to be one that the current federal judiciary will welcome, if any broad conclusions are to be drawn from Tolley's study. However correct Randall might be that there is an international human rights paradigm, it is his artful manipulation of domestic law to serve human rights objectives that holds the most promise for successful human rights litigation in the foreseeable future.

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