

# University of Minnesota Law School Scholarship Repository

---

Constitutional Commentary

---

2000

## Aim Globally

Martin S. Flaherty

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

### Recommended Citation

Flaherty, Martin S., "Aim Globally" (2000). *Constitutional Commentary*. 698.  
<https://scholarship.law.umn.edu/concomm/698>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# AIM GLOBALLY

*Martin S. Flaherty\**

## INTRODUCTION

Recently, the Hong Kong judiciary dealt with a case that could not be more foreign nor more familiar. In *HKSAR v. Ng Kung Siu*, two dissidents were convicted of, among other things, desecrating the national flag in violation of local and Chinese law.<sup>1</sup> The two challenged their convictions, arguing that the ban violated the Hong Kong Basic Law, which effectively serves as the city's constitution within the People's Republic of China. The intermediate Court of Appeal invalidated the flag desecration ban on two grounds. It held first that the Basic Law incorporated the International Covenant on Civil and Political Rights, including "the right to freedom of expression."<sup>2</sup> It then concluded that this general concept protected even the defacing of sacred national symbols. For this proposition the court cited no English precedents from Hong Kong's colonial past and still less any Chinese principles from its uncertain present. Instead it staked its claim squarely and almost exclusively on *Texas v. Johnson*<sup>3</sup> and *United States v. Eichman*.<sup>4</sup> Hong Kong's highest tribunal, the Court of Final Appeal, reversed.<sup>5</sup> Yet here too, the

---

\* Professor, Fordham Law School; Co-Director, Joseph R. Crowley Program in International Human Rights; Visiting Professor, China University of Political Science and Law, Beijing, Spring 1999. My thanks to my fellow members of the Georgetown Biennial Discussion Group on Constitutional Law for useful comments. Special thanks to Mark Tushnet for his efforts organizing the discussion group over the years, for arranging publication of this year's session and for his patience and understanding with regard to this piece. My thanks as well to Curtis Bradley for reviewing an earlier draft with a critical eye.

1. See *HKSAR v. Ng Kung Siu*, [1999] 2 HKC 10, 18-20 (opinion of the Court of Appeal of Hong Kong), available at LEXIS-NEXIS, Hong Kong Cases Database, 1999-2 HKC 10.

2. International Covenant on Civil and Political Rights, adopted by the General Assembly on Dec. 19, 1966, 999 U.N.T.S. 171, art. 19(2) ("ICCPR").

3. 491 U.S. 397 (1989).

4. 496 U.S. 310 (1990).

5. See *HKSAR v. Ng Kung Sui*, [2000] 1 HKC 117 (Opinion of the Court of Final

American cases made an appearance. In a careful concurrence, Justice Bokhary noted how both Supreme Court decisions had been decided by a single vote, in part to justify the Court of Final Appeal coming out the other way, but also to declare that the local flag desecration laws “lie just within the outer limits of constitutionality.”<sup>6</sup>

*Ng Kung Siu* demonstrates the ongoing power of the U.S. legal canon abroad. This may not be a new story, but the narrative is picking up speed. National and transnational courts—especially constitutional tribunals—have long invoked U.S. decisions even as our judiciary seems bent on repudiating them. Just months before deciding the flag case, Hong Kong’s first venture into judicial review self-consciously tracked *Marbury*.<sup>7</sup> Outside courtrooms popular movements, too, have drawn upon U.S. staples, as witness South Africa and Eastern Europe. One need not be a critic to figure out that this sort of thing will only increase as law follows power in a world facing globalization under the aegis of a lone superpower. Not for nothing does China’s new national contract law discard much of the German civil law tradition to borrow instead upon the Uniform Commercial Code.

Yet *Ng Kung Siu* by comparison also shows the U.S. legal culture at its worst, and not just because *Johnson* and *Eichman* might well not come out the same way today. It has long been an international truism that the United States is exceptionally parochial, especially for a great power. This too is an old story, one with unfortunately little narrative development. In failing his (admittedly unfair) pop quiz on world leaders, George W. Bush may at the time have gained more votes than he lost. Next to American jurists, however, “W.” seemed a cosmopolite worthy of the Hong Kong bench. Those rare counsel who do cite non-U.S. law typically do not get very far. Here think of the Su-

---

Appeal of Hong Kong), available at LEXIS-NEXIS, Hong Kong Cases Database, 2000-1 HKC 117.

6. *Id.* at 70 (Bokhary, J., concurring). In addition, Justice Bokhary also noted Justice Kennedy’s discomfort with voting to invalidate the Texas statute. See *id.* at 63-64 (Bokhary, J., concurring). He also reviewed the judicial response to flag desecration bans in Italy, Germany, Norway, Japan, and Portugal. See *id.* at 64-67.

7. See *Ng Ka Ling (an infant) v. Director of Immigration*, [1999] 1 HKC 291, available at LEXIS-NEXIS, Hong Kong Cases Database, 1999-2 HKC 291; *Chan Kam Nga (an infant) v. Director of Immigration*, [1999] 1 HKC 347, available at LEXIS-NEXIS, Hong Kong Cases Database, 1999-1 HKC 347. For an account of the controversy surrounding these decisions, see generally Report of the Joseph R. Crowley Program in International Human Rights, *One Country, Two Legal Systems?*, 23 *Fordham Int’l L.J.* 1 (1999).

preme Court's almost sneering dismissal of Justice Breyer's suggestion that the European Union's actual practice belied what the majority had said was all but a logical impossibility in a multi-sovereign federal system.<sup>8</sup> With incentives like this, it is small wonder that the vast majority of U.S. law students graduate without having the least idea about the status of U.S. treaties in domestic law, the basics of a civil law system, or the applicability of international custom.

Nowhere is this problem worse than the canon, especially its constitutional division. U.S. casebooks and law reviews grace the shelves of underfunded law schools in Beijing and are requested from less fortunate institutions in Bosnia, Haiti, and (in exile) Burma. More and more these materials cover not just case law, but history, economics, philosophy and the contributions of the previously voiceless. But, to a one, they have next to nothing to say about how the world's last superpower engages with the law beyond its borders. The balance of this Essay will first consider the scope of the problem in two essential areas: the constitutional law of foreign affairs and international law applicable to the United States.<sup>9</sup> It will then suggest at least certain essentials without which no casebook, course, or hornbook in U.S. constitutional law can be considered complete. On the theory that we must crawl before we can run, these basics will be mainly but not entirely confined to old time case law. For foreign affairs law, the short list includes *Foster v. Neilson*,<sup>10</sup> *Reid v. Covert*,<sup>11</sup> *The Paquete Habana*,<sup>12</sup> and *Missouri v. Holland*.<sup>13</sup> For applicable international law the candidates include UN Charter, the ICCPR, *Soering v. United Kingdom*,<sup>14</sup> and *Filartiga v. Pena-Irala*.<sup>15</sup>

---

8. See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 *Colo. L. Rev.* 1277, 1288 (1999).

9. A third vital area that should be integrated into the constitutional law canon is comparative approaches from other jurisdictions. See Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law* (Foundation Press, 1999).

10. 27 U.S. (2 Pet.) 253 (1829).

11. 354 U.S. 1 (1957).

12. 175 U.S. 677 (1900).

13. 252 U.S. 416 (1920).

14. 11 *Eur. Hum. Rts. Rev.* 439 (1989).

15. 630 F.2d 876 (2d Cir. 1980).

## I. TERRA INCOGNITA

Wherever else they get it, law students do not encounter the world outside our borders through American constitutional law casebooks. This at any rate is how things look from a quick, unscientific, yet almost certainly representative survey of the free volumes that publishers annually add to a typical professor's shelf. As Louis Henkin points out, "This was not always so. In earlier days, the constitutional law of foreign affairs was one, important, integral part of constitutional debate and study."<sup>16</sup> It is not so now. Specialization, national hubris, and fixation with the Supreme Court all have something to do with this. Regardless of the cause, casebooks indicate that international concerns are almost entirely outside the canon. With regard to constitutional foreign affairs law, the coverage ranges from the pretextual to the non-existent. With regard to international standards that bind the United States, the coverage is less than that.

Turn first to foreign affairs law. As noted, the term as used here simply refers to the often complex ways in which the Constitution mediates between international law and the domestic legal order. How are treaties made? More importantly, what is a self-executing vs. a non-self-executing treaty? What are reservations, understandings, and declarations? Can a treaty extend federal power not otherwise delegated in the Constitution? Can a treaty abridge individual rights? "States'" rights? Not long ago, assembling material on these matters would have been no easy task. Yet readily available scholarship has filled this gap for at least a generation. Henkin's *Foreign Affairs and the Constitution*, first published in 1972, recently went into its second edition. Likewise, the *Restatement (Third) of the Foreign Relations Law of the United States* appeared in 1987. At nearly the same time any number of casebooks in public international law, international human rights, even international business transactions also came out addressing some or all of these matters. Debate on almost all these questions, moreover, has freshly arisen as a "new foreign affairs law" school seeks to challenge the "orthodoxy" on these matters that has stood for most of the century.<sup>17</sup>

---

16. Louis Henkin, *Foreign Affairs and the Constitution* vii (2d ed. 1996).

17. See generally Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. Colo. L. Rev. 1089 (1999) (introductory essay on American foreign affairs law at the end of the twentieth century, describing law as "more tolerant of state involvement in foreign affairs, more willing to impose limits on the national government's extension of power, and less reliant on the judiciary to maintain foreign affairs uniformity"). For efforts at

That said, it would be difficult to discover any of this in an introductory constitutional law course. Many casebooks begin promisingly enough, offering sections or subsections devoted in some way to "foreign affairs." Yet nearly all of these turn out to serve mainly as adjuncts to domestic concerns, typically separation of powers or federalism. Many "foreign affairs" sections accordingly spotlight material such as the *United States v. Curtiss-Wright*, the War Powers Resolution, or even *Youngstown Sheet and Tube v. Sawyer*.<sup>18</sup> While these materials deal with the domestic allocation of authority to affect foreign affairs, none of them primarily go to the question of how foreign affairs may affect domestic authority. The main exception here is the frequent inclusion of *Missouri v. Holland*, which deals with the newly relevant question of whether treaties can augment Congressional authority otherwise unavailable under domestic grants of power such as the Commerce Clause. As such, the case is an essential chesnut in any foreign affairs course.<sup>19</sup> But even here, *Missouri* does not primarily appear to illustrate the potentially vast source of power that the current treaty obligations may afford the federal government. Rather, it mainly comes in either to illustrate the doctrines of limited or separated powers<sup>20</sup> or, more creatively, to generate questions about changing interpretive con-

---

both describing and forging the "new foreign affairs law," see generally Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1396 (1999); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). For responses, see generally David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Beth Stephens, *The Law of our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L. Rev. 393 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L. Rev. 371 (1997).

18. The casebook I have often used is one example: Geoffrey R. Stone, et al., *Constitutional Law* 473-93 (Aspen, 3d ed. 1996). See also Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* 223-36 (West, 5th ed. 1997).

19. It can also be the basis of applying foreign affairs law to domestic controversies. See generally Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Comm. 33 (1997) (arguing that human rights treaties to which the United States is a member provide an independent justification for the Religious Freedom Restoration Act).

20. See, e.g., Douglas W. Kmiec and Stephen B. Presser, *The American Constitutional Order: History, Cases, and Philosophy* 497 (Anderson, 1998 ed.); William B. Lockhart, et al., *The American Constitution: Cases-Comments-Questions* 113-14 (West, 8th ed. 1996).

texts.<sup>21</sup> For these reasons, it often does not appear in a separate “foreign affairs” section at all.

So much for the foreign affairs matters that do filter in. More generally, many, if not most, casebooks effectively offer nothing on many, if not most, foreign affairs issues under any rubric. To take one example, neither current doctrine nor related scholarly discussion on whether, for example, treaties can trump rights shows up—or at most receives a terse note—in: *The American Constitution*, by Lockhart, et al.; *American Constitutional Interpretation* by Murphy, Fleming and Barber, *Constitutional Law*, by Cohen and Varat; *Constitutional Law* by Lively, Haddon, Roberts, and Weaver; *Constitutional Law* by Stone, Seidman, Sunstein and Tushnet; *Constitutional Law: Themes for the Constitution’s Third Century*, by Farber, Eskridge and Frickey; *Processes of Constitutional Decisionmaking*, by Brest and Levinson; or the *American Constitutional Order* by Kmiec and Presser. As several familiar titles may indicate, this and related omissions hardly occur because the editors have narrow or parochial interests.

As for international standards themselves, the story is even more stark. However much they apply as the “supreme Law of the Land,” they simply have no place in the canon. The absence is especially striking with regard to treaties that are broadly similar to the Constitution itself. Just a partial list along these lines includes the U.N. Charter, the International Covenant on Civil and Political Rights (ICCPR),<sup>22</sup> and the American Declaration of the Rights and Duties of Man,<sup>23</sup> to name a very few.

A similar pattern is if anything more true of customary international law. This law, too, “is part of our law,”<sup>24</sup> though exactly this proposition has come under attack by the “new foreign affairs” school. International custom also has strong parallels with domestic constitutional doctrines, most notably Justice Harlan’s approach to substantive Due Process. Customary international law, moreover, has furnished the rule of decision in a

---

21. See, e.g., Walter F. Murphy, et al., *American Constitutional Interpretation* 206-08 (Foundation Press, 2d ed. 1995); Paul Brest and Sanford Levinson, *Processes of Constitutional Decisionmaking* 500 (Little, Brown & Co., 3d ed. 1992). An exception is Rotunda’s *Modern Constitutional Law*, which deals with *Missouri* as a treaty case at 236-38 (cited in note 18).

22. 999 U.N.T.S. 171 (1976), ratified by the U.S. June 8, 1992.

23. O.A.S. Res. XXX, International Conference of American States, 9th Conf., O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965).

24. *The Paquete Habana*, 175 U.S. at 700.

number of significant Federal decisions either directly<sup>25</sup> or indirectly thanks to Congressional incorporation of the "law of nations" in the Alien Tort Claims Act.<sup>26</sup> Perhaps even more important is the principle famously articulated by Chief Justice Marshall that just "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>27</sup> Not only does none of this appear, but here the omission counts double since it goes to method as well as substance. Casebooks give students no inkling of how to identify international custom. Not surprisingly, they also fail to identify those customary obligations that would make almost any short list,<sup>28</sup> not to mention promising candidates—such as prohibition against the execution of minors—that would have major consequences given U.S. practice.<sup>29</sup>

## II. FOREIGN FUNDAMENTALS AND INTERNATIONAL ESSENTIALS

Small wonder, then, that most American law students, lawyers, and judges have little idea of how international law operates domestically or how the Constitution mediates the two. Just this term, I told my class on international human rights that, as a study for a conference at Georgetown, I would ask them at the outset a number of questions, including whether a treaty could trump statutes or curtail rights. When almost no one could answer, I thanked them for making just the point I sought. Unfortunately, this typical response also meant that the course would have to take a detour to cover fundamentals in foreign affairs law and the essentials in international standards. But it is exactly these materials that suggest what all American law students should encounter in the first place. The upper-level detour, in

---

25. See, e.g., *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980).

26. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 876 (2d Cir. 1980); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

27. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). For a reconstruction of this principle, see Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Georgetown L.J. 479 (1997). Exactly this rule of interpretation is likely to play a significant part this term, when the Supreme Court considers the prolonged detention of aliens in *Zadvydas v. Underdown*, 69 U.S.L.W. 3257 (Oct 10, 2000) (granting petition of certiorari and consolidating with *Reno v. Ma*, 208 F.3d 815 (9th Cir. 2000)).

28. See *Restatement (Third) of the Foreign Relations Law of the United States* § 702 and § 702 cmt. (1987).

29. See *id.*

other words, should furnish the basis for augmenting the first-year canon.

This canon-within-the-canon logically begins with treaties, the primary source of international rules.<sup>30</sup> Some nations, such as Turkey, place treaties above their own constitutions while others, such as the U.K., require legislative incorporation before they can operate domestically. The United States, of course, falls somewhere in between, as was first made clear in *Foster v. Neilson*, which held that U.S. treaties are ordinarily self-executing, but may be non-self-executing depending upon the intent of the treaty-makers. Aside from its historical importance, *Foster* meets all the classic requirements of a canonical case: it remains the leading precedent in the area; it generates (or is about to generate) controversy;<sup>31</sup> and last but not least, it was written by John Marshall. As a bonus, *Foster* all but compels some consideration of the treaty-making process, including the Senate's current practice of limiting our treaty obligations through reservations, understandings, and declarations (RUDs) as well as the recently hot topic of executive agreements.<sup>32</sup>

Other treaty basics remain, together with cases that go along with them. The question whether treaties provide Congress with an independent source of power may have seemed moot after the New Deal, but is newly relevant in light of *United States v. Lopez*<sup>33</sup> and *City of Boerne v. Flores*.<sup>34</sup> For this reason, *Missouri v. Holland* merits its unusual popularity. But for this reason, casebooks should treat the decision for the foreign affairs case that it is, which means highlighting the world of multi-lateral treaty commitments that could give Congress potentially

---

30. See Statute of the International Court of Justice, art. 38(a).

31. See generally John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955 (1999); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154 (1999).

32. See generally Bruce Ackerman and David Golove, *Is NAFTA Constitutional?*, 108 Harv. L. Rev. 799 (1995) (challenging customary interpretation of the Treaty Clause); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221 (1995) (Treaty Clause exclusivity as a case study for text and structural constitution/interpretation). For opposite takes on the use of RUDs, see Curtis A. Bradley and Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. (forthcoming 2000) and Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341 (1995).

33. 514 U.S. 549 (1995).

34. 521 U.S. 507 (1997). For the relevance of international obligations to the case, see Neuman, *Global Dimension of RFRA* at 41-54 (cited in note 19).

vast new sources of power, rather than as a quirky angle on domestic doctrine. Enhanced treatment of *Missouri* necessarily leads to enhanced treatment of *Reid v. Covert*. As any capable student would discern, *Missouri* not only left open whether treaties could trump the Constitution, its expansive view of treaty power appeared to point in that direction. *Reid* settled the matter in just the opposite way, holding that a treaty could not diminish individual rights however much it could effectively reduce the power of the states.

Despite recent challenges, international custom also still counts as "supreme Law." In terms of human rights, this doctrine may well prove more important than the status of treaties. Even though the the U.S. has finally gotten around to ratifying most of the major human rights instruments, the Senate has almost always tacked on RUDs that downgrade the nation's obligations to the level of the Constitution. Yet the sheer number of human rights treaties can also serve as evidence of customary international standards that would bind the U.S. anyway, most provocatively, in areas such as the death penalty and affirmative action. For all these reasons, American lawyers in an age of globalization will be ill-served without at some point coming across *The Paquete Habana*, the case that most famously sets out the principle or *Banco Nacional de Cuba v. Sabbatino*,<sup>35</sup> the modern case generally read to confirm it. The American legal community should also have some passing knowledge of why federal courts have increasingly become a preferred global forum for suits against human rights abusers from around the world. Here *Filartiga v. Pena-Irala* and *Kadic v. Karadžić* are the best illustrations of how the Alien Tort Claims Act, first enacted in 1789, is now read to permit aliens to bring suit against their former oppressors for violations of modern international custom.

Once these foreign affairs basics gain admittance, the relevant international standards themselves must follow. Double back, therefore, to the subject of treaties that the Supremacy Clause makes federal law, that *Foster* does or does not make self-executing, and that Senate RUDs usually water down. Time was when, at least in a rights context, the U.S. had signed so few instruments that there would have been little to add. This has changed dramatically in just the last five years. Currently, the

---

35. 376 U.S. 398 (1964).

U.S. has ratified no less than ten major multilateral human rights treaties, and has signed several more.<sup>36</sup>

Load a canon with too much and it may explode, but at least a few of these instruments should be part of the inheritance of any world, and therefore any American, citizen. The short list begins with the U.N. Charter, or at least the provisions most directly related to U.S. constitutional practice. To depart from human rights, this would mean Chapter VII, which grants the Security Council the authority to order coercive measures against nations that threaten world peace.<sup>37</sup> These provisions enhanced Presidential assertions during the Gulf War and undermined them at the time of Kosovo. To return to human rights, likewise essential are Articles 55<sup>38</sup> and 56,<sup>39</sup> which obligate the U.S. to observe fundamental international freedoms and may yet mandate the enforcement of those standards in federal and state courts.

These obligations, in turn, suggest at least the mention of subsequent treaties that define the human rights to which the Charter refers. Now that we have ratified it, the ICCPR should head the list. Other candidates include: Convention on the Pre-

36. Ratifications include: the ICCPR (cited in note 2); the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly Dec. 10, 1984, 1465 U.N.T.S. 85; and the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. Signed but yet to be ratified instruments include: the International Covenant on Economic, Social, and Cultural Rights, adopted by the General Assembly Dec. 16, 1966, 993 U.N.T.S. 3; Convention on the Elimination of All forms of Discrimination Against Women adopted by the General Assembly Dec. 18, 1979; 1249 U.N.T.S. 13; and the American Convention on Human Rights, signed Nov. 22, 1969, 1144 U.N.T.S. 123. See Louis Henkin and John Lawrence Hargrove, eds., *Human Rights: An Agenda for the Next Century* 334 (Amer. Society of Int'l Law, 1999).

37. In particular, see U.N. Charter, arts. 39-41.

38. Article 55 of the U.N. Charter states:

With a view to the creation of conditions of stability and well-being what are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

39. Article 56 of the U.N. Charter states: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."

vention and Punishment of the Crime of Genocide,<sup>40</sup> the Convention on the Elimination of All Forms of Racial Discrimination,<sup>41</sup> and Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>42</sup> One personal favorite, however, is the American Declaration of the Rights and Duties of Man. Unlike the Inter-American Convention or other instruments we have yet to ratify, the U.S. is now legally bound to various provisions of this originally aspirational document. In consequence applicants can and have brought complaints against the U.S. before the Inter-American Commission of Human Rights for violations of the Declaration, though the U.S. has never agreed to take part in the Inter-American process.<sup>43</sup>

That leaves custom. As noted, customary international law will probably play at least as great a domestic role as treaties since Senate RUDs have gutted human rights while international custom continues to develop. Not unlike substantive Due Process, figuring out acceptable ways of identifying customary international law rules is almost as important as getting to the rules themselves. But while an array of permissible methods mark the domestic process, its international counterpart has long had but a single, fixed, formula. As any international law primer teaches, a principle becomes customary only if: a) it reflects a general practice or commitment among the world's nations and b) has been undertaken out of a sense of legal obligation (*opinio juris sive necessitatis*).<sup>44</sup> Single and fixed, however, does not mean simple. A nation that engages in torture but is publically committed to opposing the practice, for example, more likely than not counts toward the general international practice against torture. The basic test is still sufficiently simple that no law student heading off into the next century should escape some encounter with it, however thorny its actual application can be.

This point goes double given conflicts that appear on the horizon. Even a more or less fixed formula for unenumerated norms will generate great debate about specific content. Still, anyone entering an increasingly globalized legal world should at least be aware of the debate's terms. At one end, the *Restatement (Third)* erred on the side of a short, readily defensible list.

---

40. See *supra*, note 36.

41. *Id.*

42. *Id.*

43. See Henkin and Hargrove, *Human Rights* at 549-51 (cited in note 36).

44. See *Restatement (Third)* § 102(2) (cited in note 28).

By its count the following acts violate the customary law of human rights: "genocide"; "slavery or the slave trade"; "the murder or causing the disappearance of individuals"; "torture or other cruel, inhuman, or degrading treatment or punishment"; "prolonged arbitrary detention"; "systematic racial discrimination"; and "a consistent pattern of gross violations of internationally recognized human rights."<sup>45</sup> Even under this short list, certain current U.S. practices may or have been called into question. Prolonged detention of Cuban refugees has led at least one federal court to grant a writ of *habeas corpus* based upon U.S. violation of international custom.<sup>46</sup>

Some critics, however, have claimed that the short list is too short.<sup>47</sup> On this view, customary international human rights should entail both expansive conceptions of the *Restatement* enumeration as well as others not set forth. One example of a more expansive conception relates to cruel or inhuman treatment. Currently the *Restatement* declares that this principle does not prohibit pain and suffering arising from lawful imprisonment to the extent consistent with the U.N. Standard Minimum Rules for the Treatment of Prisoners. While U.S. practice may run into trouble enough here, a colorable argument can be made that the customary rule has evolved to prohibit extended imprisonment on death row, especially in light of the European Court of Human Rights ruling in *Soering v. United Kingdom*.<sup>48</sup> Meanwhile, examples of additional customary rights plausibly include a right to equal treatment with regard to religion and gender as well as the accepted category of race. These additions may not seem problematic in themselves. Then again, international equality standards, among other things, tend to reduce state action barriers and increase the scope for affirmative action remedies. In this light, customary equality rights, both old and new, would at the very least present the U.S. with interesting challenges.<sup>49</sup>

---

45. *Id.* at § 702.

46. *Fernandez v. Wilkinson*, 505 F. Supp. 787, 787 (D. Kan. 1980) affirmed on other grounds, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

47. See Robert B. Lillich, "Remarks," 1985 Am. Socy. Intl. L. Proc. 84, 84-86.

48. In *Soering v. United Kingdom*, the European Court of Human Rights held that the United Kingdom would violate the European Convention on Human Rights if it extradited an applicant suspected of murder back to Virginia on the grounds that he could face "death row" syndrome—i.e., a prolonged, uncertain, and thus inhuman wait for his execution—if his trial took place in the United States. 11 Eur. Hum. Rts. Rev. 439, 439 (1989).

49. As any foreign affairs law specialist would recognize, the mini-canon proposed

## CONCLUSION

None of this is to say that a law student, professor, practitioner, or judge cannot, without too much difficulty, get a grounding in any, all, or more of these topics. To the contrary, the state of international legal education in America has probably never been better than since Hamilton's day. "Global" programs, courses, journals, conferences, exchanges, and internships flourish. This form of flourishing, however, has taken place almost entirely within its own nook. With certain exceptions, it remains the case that the best way not to write for a law review is to do a piece that appears relevant to an international law review. Put another way, increased interest in international law has yet to have much effect on the canon or canons that exist in related areas, and constitutional law is no exception. What would have to go to make room, and on what basis, is another matter. Still, it does not seem to be asking for too much for the constitutional experts of the United States at least to approach being as cosmopolitan as the constitutional "novices" of Hong Kong.

---

here merely scratches the surface. With regard to case law, other leading candidates include: *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993) (holding that neither domestic nor international law prohibits the U.S. turning back refugees on the high seas); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (holding that U.S.-Mexico extradition treaty did not prohibit abduction of defendant); and *Zschernig v. Miller*, 389 U.S. 429 (1968) (invalidating state statute for intruding into foreign affairs matters entrusted exclusively to the federal government).