

Announcements

United States has signed the Convention on the Rights of the Child!!

American Convention now has 25 ratifications, including Brazil!!

*Marcus update*

## Helsinki Human Rights Process

What is it?

How many nations? Originally 35 nations from USSR & Turkey on East to Canada and US on the West. Now 53 countries, 100 Supp.

How did it start?

What was the incentive?

Soviet bloc wanted to reach agreement on post-WW2 boundaries

West resisted, but finally participated as a way of reducing tensions and promoting human rights goals.

What is the governing document?

Helsinki Final Act (1975). 419

What is its legal status?

Not a binding treaty. Why not?

Was the USSR successful in establishing agreement on the post WW2 borders? Yes. Principle I (420). Although there is language that says that borders can be modified according to international law and by agreement. 420T What does that mean?

Principle I (420) also recognizes that each country has the right "freely to choose" its own "political, social, economic and cultural systems."

Note how the ICJ uses that agreement against the United States in the Nicaragua opinion. 428. What does that use say about the legal status of the Helsinki Accord?

What are the principle human rights elements in this agreement? Principle VII (420-21)

Recognition of the UN Declaration of Human Rights as the repository of the listing of human rights norms. And each state commits to acting "in conformity" with the Universal Declaration!!

Protection of minorities [but no special status for them]. 421T [And note Principle VIII, which recognizes the right to self-determination, but also reaffirms the "territorial integrity of States."]

Freedom of religion and of belief. 420B. Principle VII

Basket III (425)

Freedom of movement

Reunification of families.

What does Principle VI (420) prohibiting intervention in domestic affairs mean?

Note also that it also prohibits "political, economic or other coercion...to secure advantages of any kind." Is that realistic??

See also final statement on 422 5/6!!

Compare to Art. 2(7) of the UN Charter.

How is it enforced? Monitored?

Regular diplomatic meetings. NGOs. Helsinki Watch groups. 432 para.2.

But note the difficulties the Watch Groups had in the Soviet bloc nations in the early years, 430, 431.

Did it lead to the end of the Cold War?

In Czechoslovakia, the Charter 77 Human Rights Movement, 431B, played a key role in moving the country toward democracy.

Mention significance of notification of all military manouvers in 1986 agreement. 418 2/3

Does the United States have human rights problems that may violate the Helsinki Accords?

Soviet Union charged US with holding political prisoners.

Do we?

What do you think of Ambassador Wise's response on 440-42?  
See also 105 Supp B.

555-56: Two runaway young boys leave Arkansas and are apprehended in Ohio. They are put in a juvenile detention center. Facility built for 50 now houses 100. Persons who have been convicted are commingled with persons who have just been arrested.

Two boys put into cell built for one. Water on floor. Filthy. 556 1/3

Later one boy put in with a 17-year-old who had been convicted by juvenile court of sexual assault, who raped him and broke his arm.

Parent brings an action under 42 U.S.C. sec. 1983, 564.

To what extent is US law violated by this sequence of events? Ohio memo on 559-60 indicates that Ohio law does not prohibit this type of commingling.

D.B. v. Tewksbury (D.Or. 1982) 561 holds that this commingling does violate the Due Process Clause, because it constitutes pretrial punishment. 562 1/2

Is the list on 562 2/3 realistic? Must all prisons provide all those amenities?

Cruel & Unusual Punishment Clause? Eighth Amendment? 561

Can international law be helpful in this situation?

UN Standard Minimum Rules for the Treatment of Prisoners, 566--what is the status of this document? Rules appear to be clear that untried prisoners should be kept separate from convicted prisoners and juveniles should be separated from adults. 567T

ICCPR, art. 10(2)(a), 568--clearly prohibits commingling "save in exceptional circumstances"--how can this be used?

1. Federalism reservation?
2. Not self-executing?

Is the 1989 Convention on the Rights of the Child helpful? See Art. 37 on 569.

Customary international law?

How does it fit into US law, 595, can it be overridden by statute? by executive statement. Garcia-Mir 595. Does later in time rule govern?

What are the three ways international law can be used? 569B

1. Explicit, binding self-executing treaty obligations.
2. Customary law obligation.
3. Persuasive in interpreting open-ended provisions of national law.

Linde at 570+ argues in favor of the latter approach whenever possible. Americans want to believe we are complying with international human rights standards.

But also and at the same time, 572 2/3, we are reluctant to allow the executive branch to impose requirements on us without legislative input.

So we need to argue that the legislator intended that the international standard be applicable.

Matter of Medina (Bd. Immigration Appeals 1988) 584

US sought to deport Ms. Medina, 26 year old single female, native and citizen of El Salvador, who entered US illegally in 1980 through Texas.

She argued that she should be granted asylum, because El Salvador was not complying with its obligations under Article 3 of Geneva Convention, 585, and thus that US would be in noncompliance if it deported her.

What does Article 3 require?

Is US bound by it? US has ratified.

But, US is not a party to the El Salvador civil war, and hence not bound in that context?? 585 5/6. Weird.

Is it self-executing?

Board rules that Article 1, 585B, does not evince an intent to create judicially enforceable rights in private persons!!! 586T  
Convincing?

What arguments were in the ACLU brief on this matter?

Presumption of self-execution, unless clear indications to the contrary!!

Treaty establishes rights and duties re individuals.

Quoting from the test from People of Saipan 588T. Discuss.

Is customary law self-executing?

Forti v. Suarez-Mason (ND Cal 1987, 1988) 601, 609

Alien Tort Statute, 28 USC 1350--review text on 598 1/2, 604 1/2.

What are the torts committed in violation of the law of nations??

Originally--piracy, assaults on diplomats.

Then--slave trade.

Now--torture, Filartiga, Suarez-Mason 605-06

Jensen's criteria--universal, definable, obligatory--605 2/3 [is "universal" the right word? See Newman ideas on 613--"international consensus," "internationally recognized," "widely accepted"--what was required in the Nicaragua case--something less than universal.]

Prolonged arbitrary detention--606

Summary execution--606

Causing disappearance--607 NO!--why not; 609 YES--what was different--consensus definition supplied with statements from Law Professors. Discuss definition--abduction & and refusal to acknowledge.

Cruel, Inhuman and Degrading Treatment--608 NO!; 611 STILL NO--why not--definition too relativistic--discuss Prof. Lillich's statement--612T

What about the Greek Case, 612--gross humiliation--why isn't that satisfactory?

Would the N.Ireland case have helped?

Committee of US Citizens Living in Nicaragua v. Reagan (DC Cir 1988) 621

[Who is Mikva?]

What was wrong with this lawsuit?

What was the theory of the suit?

Plaintiffs sought to stop the US from assisting the contras in light of the ICJ Nicaragua decision.

Is this a political question?

Definition? See 622 1/4, quoting from Japan Whaling Ass'n case.

Holding? Court doesn't really resolve the matter. 622 3/4

Is there a cause of action?

What is needed?

Injury. Note close link to standing.

Claim cognizable in judicial terms.

What is the strongest claim of the plaintiffs?

Their personal liberty and property rights are infringed by the contras who are going around killing people and destroying stuff. 622B Fifth Amendment taking claim? Plaintiffs claim they are intended targets of the contras. 623T.

These claims are justiciable!! 623 1/5

But the claims are nonetheless dismissed, because plaintiffs have not linked their claimed injury to US action. Doesn't this go to the merits of the claim? 623 1/3

What if Nicaragua had been the plaintiff? Would they have standing? Cause of action? 627-28, Q.3

Is the US acting in violation of international law?

Treaty law? UN Charter, art. 94.

Customary law?

Jus cogens? 623 2/3

If Pres. & Cong. both agree to violate international law, can the judiciary prevent such an occurrence? 623B

No, 624T, although if it is in violation of a jus cogens principle, the question is less clear??!!

626-27--if US adopted a foreign policy that resulted in the enslavement of some individuals, "that policy might well be subject to challenge in domestic court under international law..." 627T

Discuss/explain.

Is this hypo too easy, because the 13th Amendment would also be violated? Can we think of a peremptory norm that would not also violate the US Constitution? Q.6, p. 628.

Committee of US Citizens Living in Nicaragua v. Reagan (DC Cir 1988) 621

Discuss hypo in Q.6, p.628--construction of road and oil well into Amazon, which will lead to genocide of natives in the region. Is this a violation of a peremptory norm? Of the US Constitution?

Isn't disregard of an ICJ judgment pretty bad?

Has the US violated art. 94 of the Charter?

Court sees a conflict between the treaty (prior) and the subsequent statute providing funding for the Contras. 624B.

Which prevails?

Should the UN Charter be viewed as just any old treaty?

Should the court have tried to reconcile funding of Contras with Art. 94? Would it have been possible? Q.1, p. 627.

Discuss Diggs v. Shultz (DC Cir 1972) 624 2/5

Byrd Amendment v. Security Council Resolution (and art. 25)

Note discussion of monist v. dualist, 625, 1/5--which is US-- "partly dualist"!! meaning what?

Standing? 625 1/3

Is Article 94 self-executing?

What's the test?

Is this provision designed to create private rights? 625 3/5

Conflict between statute and customary law? 625 3/4

Yes, if monist. No, if dualist?

Court says clearly that subsequently enacted statutes preempt customary international law. 626 1/2.

Does it work in reverse too?