The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law

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I. INTRODUCTION

Professor Lea Brilmayer proposes that American courts apply international law in disputes concerning the rights of individuals to be treated fairly by governments even if such an application would require the frustration of domestic policy. The “vertical” model that she postulates to facilitate such judicial intervention, if followed by the courts, could buttress the vindication of the human rights of aliens and refugees in the United States.

As Professor Brilmayer notes, American courts are wary of looking to international law to uphold the rights of individuals against violation by governments, although they do often turn to constitutional (and other domestic law) principles for guidance. In the area of immigration, however, it is sometimes unclear how much legal protection the Constitution affords aliens and refugees in the United States. Over a century ago, in Chae Chan Ping v. United States (The Chinese Exclusion Case), the Supreme Court declared that the power to exclude aliens, which was not enumerated in the Constitution, is an inherent attribute of sovereignty that is largely immune from constitutional restraint. Shortly thereafter, in Fong Yue Ting v. United States, the Court said that the power to expel aliens was “one to be determined by the political departments of the government” and that “the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.” This early expression of judicial deference to the legislature partakes of Professor Brilmayer’s “horizontal” model of the traditional application of international law in which the proper parties are considered to be states and not individuals.

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2. Id. at 2278-79.
3. 130 U.S. 581 (1889); see also Nishimura Ekiu v. United States, 142 U.S. 651 (1892).
4. 149 U.S. 698, 731 (1893).
5. Brilmayer, supra note 1, at 2292-95 & passim.

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The relatively recent development of the law of international human rights since World War II has set the stage for a new form of judicial intervention in the United States on behalf of individual rights. While sometimes idealistic, the existence of international customary legal norms relating to the rights of individuals, as well as treaties according such rights, have increasingly given rise to the prospect of judicially enforceable international human rights law. As Professor Brilmayer points out, the courts are traditionally considered guarantors of individual rights, particularly the rights of individuals with unpopular claims that are unlikely to find redress through the political process.⁶

This Comment discusses several efforts during the last decade by aliens and refugees to bring human rights claims in U.S. courts. It examines challenges to the detention of Cuban and other asylum seekers, the program of interdicting Haitians on the high seas, and the procedures and criteria for determining refugee status. It focuses in particular on Professor Brilmayer's arguments in favor of appropriate judicial intervention.

The detention cases offer opportunities to assess the willingness of courts to address claims—based on customary international law as well as conventional treaty provisions—of executive branch abuse in immigration enforcement within the United States. The Haitian interdiction case provides a basis to evaluate judicial efficacy in enforcing international refugee law in refugee-screening procedures on the high seas. Finally, cases of refugee status determination in the United States provide an example of the judiciary's use of international law to interpret domestic statutes.

II. THE ARBITRARY AND PROLONGED DETENTION OF ALIENS: APPLICATION OF CUSTOMARY INTERNATIONAL LAW

In 1980, over 125,000 Cubans suddenly and unexpectedly arrived in small boats in the United States.⁷ Among these arrivals were individuals who indicated during initial interviews with immigration officials that they had been convicted of crimes or suffered from mental illness.⁸ Virtually all of these Cubans were technically inadmissible under United States immigration law because they lacked a valid passport or visa.⁹

Initially, the arriving Cubans were either released immediately into the United States or detained in immigration facilities—most for a relatively short period of time. Ultimately, over 124,000 Cubans were released and given special "entrant" parole status in the United States.¹⁰ Legislation, including

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⁶. Id. at 2296.
¹⁰. See Helton, supra note 7, at 357.
a 1986 enactment, offered most of these entrants the opportunity of permanent resident status.11

Several hundred Cubans, however, were never released. Others, who ran afoul of the authorities, had their immigration parole revoked and were re-incarcerated in immigration jails or federal prisons. Some of these were later re-paroled. Cuba agreed to receive only 2746 of those nationals incarcerated in 1984, and later suspended the agreement.12 As of October 1989, United States immigration authorities still held in custody 2232 Cubans, many of whom Cuba has not agreed to receive back.13

In perhaps the most direct test to date of Professor Brilmayer’s “vertical” model of enforceable individual rights, some United States courts have affirmed the principle that prolonged arbitrary detention violates international law. In Fernandez v. Wilkinson,14 for example, the district court found: “Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law.”15 In Fernandez, an excludable alien who came to the United States in 1980 on the “freedom flotilla” from Cuba sought habeas corpus relief after being detained for more than six months. The district court held, inter alia, that the alien’s indeterminate incarceration constituted prolonged arbitrary detention in violation of international law and ordered his release. The court of appeals affirmed, holding that under international as well as constitutional law the statute16 under which the individual was being held did not authorize indeterminate detention. The court of appeals observed that “[n]o principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”17

Similarly, in Soroa-Gonzales v. Civiletti,18 where a writ of habeas corpus was issued to an excludable alien indefinitely detained, the court observed:

Were the Court forced to decide, however, whether [the detention] amounted to “arbitrary detention” in violation of the Universal Declaration of Human Rights (Article 9), the International Covenant on Civil and Political Rights (Article 9, ¶1), and the American Convention on
Human Rights (Article 7, ¶3), the Court would conclude that petitioner’s further detention was arbitrary.19

In the immigration context, international law recognizes only two legitimate purposes of detention: (1) to facilitate removal and (2) to protect society from those who pose a danger to it pending removal.20

American courts addressing customary international law in this area have required that the factfinding process used to make detention determinations comport with fundamental procedural fairness. The court in Fernandez-Roque v. Smith observed that “if the Court were applying customary international law here, the Court would hold that customary international law requires . . . periodic, individualized hearings” to establish that the continued detention of an alien “is reasonably necessary for early deportation or for the protection of society from one proven to be dangerous.”21 Another court has similarly held that detention is permitted under the Immigration and Nationality Act only when the government can show that the detention is temporary. “The government can meet this burden by showing that it is actively negotiating for the alien’s return to his country of origin, or to some other country; alternatively, the government can show that it has a procedure for periodic review of the alien’s suitability for parole.”22

A complication arises when there is a conflict between international and domestic law. Customary international law may be ousted from the body of domestic law by, in the words of The Paquete Habana Court, a “controlling executive or legislative act or judicial decision.”23 This issue was addressed in Garcia-Mir v. Meese,24 a class action by Mariel Cubans in which the Court of Appeals for the Eleventh Circuit was asked to determine, inter alia, whether the trial court correctly held that the international law prohibition against prolonged arbitrary detention was inapplicable to the case. The court of appeals found that the trial court was correct in finding that the acts of the Attorney


23. 175 U.S. 677, 700 (1900).
24. 788 F.2d 1446, 1453-55 (11th Cir. 1986).
General in authorizing detention constituted a "controlling executive act." While accepting that such detention violated international law, the court concluded that "the power of the President to disregard international law in service of domestic needs is reaffirmed."\textsuperscript{25}

The court of appeals, however, identified no constitutional authority vested in the executive to detain the Mariel Cubans. This overly deferential judicial evaluation of the acts of a relatively low-level federal official as constituting an effective repeal of international law is reminiscent of the "horizontal" approach to enforcement.

III. DETENTION AND ARTICLE 31 OF THE REFUGEE PROTOCOL

While the courts have applied customary international law in examining the prolonged detention of non-nationals, paradoxically, they have been less willing to enforce more conventional treaty-based entitlements. Deference to the executive on matters of immigration control and enforcement explains this approach.

In 1981, the immigration authorities began systematically detaining Haitians who had reached the United States without determining whether the aliens were likely to abscond or pose a threat to public safety or national security.\textsuperscript{26} In 1982, after a federal court ordered the release of 1800 Haitians on the grounds that the detention policy had been formulated without following the rulemaking process required by the Administrative Procedure Act,\textsuperscript{27} the Immigration and Naturalization Service (INS) published an interim rule formalizing the detention policy.\textsuperscript{28} The rule was made permanent in October 1982.

The rule, which is still in effect, requires detention of aliens who arrive without proper entry documents. Parole is permitted only when it is "strictly in the public interest."\textsuperscript{29} This public interest exception applies to various categories of aliens, provided that the individuals in question present neither a threat to security nor a risk of absconding: pregnant women; some juveniles; aliens for whom a United States relative has filed an immigrant visa petition; aliens who will be witnesses in judicial, administrative, or legislative proceedings; and aliens whose continued detention is not in the public interest as deter-
mined by a local immigration official. Most arriving aliens seeking political asylum do not fit within the narrow boundaries of this exception, which is generally applied in a restrictive fashion.

A policy of detaining refugees violates basic obligations under the United Nations Protocol relating to the Status of Refugees, a multilateral treaty to which the United States is a party. The signers of the Protocol agree not to impose "penalties" on refugees illegally present in their country who come directly and who present themselves promptly to the proper authorities and show good cause for their illegal entry or presence. The Protocol also prohibits the unnecessary restriction of such refugees' freedom of movement. U.S. detention policy violates these provisions to the extent that refugees to whom they are applicable are automatically incarcerated without the possibility of release. Yet, the only American court that has addressed this issue—even after assuming the applicability and enforceability of the Protocol provisions—found that the individuals in question, Afghans who had traveled through Pakistan, had not "come directly" to the United States. Although under the

31. See Helton, supra note 7, at 360-62.

expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order. . . .

34. The Protocol adopts Article 31(1) of the Convention, which reads:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

35. The Protocol incorporates Article 31(2) of the Convention, which reads:

The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Id. at 6275, 189 U.N.T.S. at 174.
36. Singh v. Nelson, 623 F. Supp. 545, 560 (S.D.N.Y. 1985). A related question is whether Article 31 of the Convention as incorporated by the Protocol is self-executing, i.e., enforceable in U.S. courts. Some courts have recognized that provisions of the Protocol are enforceable. See Kashani v. INS, 547 F.2d 376 (7th Cir. 1977) (Protocol binding on U.S. and requires U.S. to adopt Protocol's "well-founded fear of persecution" standard in deportation proceedings); Coriolan v. INS, 559 F.2d 993, 996 (5th Cir. 1977)
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Protocol, which incorporated Article 31 of the 1951 Convention relating to the Status of Refugees, the judiciary has a conventional source of authority to review refugee detention claims, it has rarely invoked the provision.

IV. THE U.S.-HAITIAN INTERDICTION PROGRAM: NONREFOULEMENT

The extraterritorial application of refugee protection provides perhaps the most challenging opportunity for judicial enforcement of international human rights law. In 1981, President Reagan determined that illegal immigration had become a "serious national problem detrimental to the interests of the United States."37 Unauthorized Haitian migration was of particular concern to the government.38

President Reagan thus announced the creation of an interdiction program designed to deter the illegal immigration of Haitian boat people.39 The Haitian Migrant Interdiction Program was established by proclamation and executive order issued on September 29, 1981.40 Under this program, United States Coast Guard vessels are to stop and board suspicious Haitian or unflagged vessels on the high seas, determine if their passengers are undocumented aliens bound for the United States, and if so, return them to Haiti.41 The executive order also provides that "no person who is a refugee [is to] be returned without his consent."42 The first interdiction took place on October 12, 1981. According to the INS, as of 1990, 361 boats carrying 21,461 Haitians had been intercepted. Of these, the Coast Guard permitted only six of these interdicted Haitians to seek asylum in the United States.43

Under the Protocol relating to the Status of Refugees,44 a "refugee" is defined as any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable


39. Id.
41. REFUGEE REFOULEMENT, supra note 38, at 10-13.
42. Exec. Order 12,324, supra note 40, at 993 n.8.
43. REFUGEE REFOULEMENT, supra note 38, at 15.
44. Protocol relating to the Status of Refugees, supra note 32.
or, owing to such fear, is unwilling to avail himself of the protection of that country."

A most fundamental right protected by the Protocol is the right not to be returned to a place where a refugee would face persecution. Article 33(1) sets forth this principle of nonrefoulement: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Even before the receiving country grants formal refugee status, then, a person claiming to flee persecution is protected by the principle of nonrefoulement. Once an individual meets the criteria contained in the refugee definition, he or she is clearly entitled to the protections afforded by the Protocol.

The principle of nonrefoulement has an extraterritorial aspect as well. The United Nations Declaration on Territorial Asylum provides that no one entitled to seek asylum "shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." Accordingly, prospective asylum seekers are entitled to the protection of nonrefoulement and, by implication, to a period of stay and procedures sufficient to assess entitlement to refugee protection.

Upon accession to the Protocol in 1968, the United States became bound to respect the principle of nonrefoulement. While the court in Haitian Refugee Center, Inc. v. Gracey questioned the binding nature of Article 33 of the Convention (incorporated in the Protocol) when it examined the Haitian interdiction program, other courts have ruled that Article 33 and other provisions
of the Protocol establish rights which are enforceable independent of other United States domestic laws. A court following Professor Brilmayer’s “vertical” model would presumably not hesitate to enforce the Protocol in this instance.

V. REFUGEE STATUS DETERMINATION: INTERNATIONAL STANDARDS

In the relatively conventional area of applying international refugee law criteria, the courts, fortified by statutes enacting international standards, have sometimes intervened to curb excesses by the executive. In congressional hearings, representatives of the State Department assured Congress that ratification of the 1967 Refugee Protocol would not require revision of United States law to implement the Protocol. However, the executive’s deeds fell short of its promises, thereby prompting congressional action.

Through such means as immigration parole, preference admissions, and defense to deportation, the executive continued a prior practice of allocating refugee admissions and asylum along essentially ideological lines: those asylum seekers fleeing communist or communist-dominated regimes were far more likely to receive protection than those fleeing regimes allied with United States interests, such as El Salvador, even though documented human rights abuses might have been endemic in such U.S.-aligned countries. The United States adopted restrictive approaches toward claims from nationals not favored as a matter of foreign policy, such as Haiti. Such differential treatment led to the enactment of the Refugee Act of 1980.

By incorporating the Protocol’s standards into the Refugee Act, Congress provided additional grounds for courts to intervene and curb unduly restrictive refugee admissions practices by the executive. For example, the Supreme


54. Id. at 253.


56. On the other hand, even with the benefit of a statutory incorporation of international standards, the Supreme Court has recently reiterated the deference to be accorded to foreign relations considerations implicated in the immigration area. INS v. Abudu, 485 U.S. 94, 110 (1988) (“INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions . . . apply with even greater force in the INS context.”). Cf. McNary v. Haitian Refugee Ctr., 111 S. Ct. 888 (1991) (allowing judicial review of pattern of allegedly unconstitutional practices in INS’s implementation of amnesty program for alien farm workers).
Court in *INS v. Cardoza-Fonseca*\(^7\) thwarted an initial attempt by the Board of Immigration Appeals (BIA)\(^8\) to apply a restrictive standard of proof in asylum adjudications. The Court’s intervention did not, however, end the BIA’s efforts at restrictive interpretation. After *Cardoza-Fonseca*, the Board shifted its focus and has since required asylum applicants to demonstrate that the risk of harm to them derives narrowly from one of the grounds for persecution specified in the “refugee” definition.\(^9\) In particular, the BIA has, in several cases, improperly restricted the category of persecution based on political opinion or social group membership. Several federal courts have overturned restrictive BIA decisions which applied an unduly narrow view of persecution due to political opinion.\(^6\) Other courts, however, have permitted the BIA to apply its restrictive refugee definition.\(^6\)

The BIA particularly narrowed the refugee definition in several precedent decisions relating to Salvadorans who unwillingly became involved in the civil war in El Salvador.\(^6\) In these decisions, the BIA held, inter alia, that when an alien claims that his general moral convictions justify his refusal to serve in a military that violates international human rights standards, the alien must show not only that such violations occurred, but also that they represent the policy of the foreign government.\(^6\) In addition, the applicant must present “at a minimum” evidence of condemnation of military action by international governmental bodies, not merely by nongovernmental organizations.\(^6\)

In a number of decisions, the BIA has greatly circumscribed an alien’s ability to claim persecution. For instance, after being forcibly recruited by guerrillas and participating in a raid, an alien who later escaped could not claim that the guerrillas were persecuting him on the basis of political opinion because the

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\(^7\) 480 U.S. 421, 440 (1987). The Court held that the Protocol’s “well-founded fear of persecution” standard for asylum claims requires only a demonstration of a “reasonable possibility” of persecution that might, for example, be met if an applicant could demonstrate a 10% possibility that he or she would be subject to persecution abroad. Id. at 431, quoting I.A. GrahMadsen, *The Status of Refugees in International Law* 180 (1966)).

\(^8\) The BIA, part of the Department of Justice, has been delegated certain adjudicative responsibilities, including determining appeals of asylum claims in administrative immigration court proceedings. 8 C.F.R. § 3 (1990).


\(^6\) See, e.g., Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989); Desir v. Ichert, 840 F.2d 723 (9th Cir. 1988); Del Valle v. INS, 776 F.2d 1407 (9th Cir. 1985); Argueta v. INS, 759 F.2d 1395 (9th Cir. 1985).

\(^6\) Compare Perlera-Escobar v. Executive Office for Immigration Review, 894 F.2d 1292, (11th Cir. 1990) and Novos-Umania v. INS, 896 F.2d 1 (1st Cir. 1990) with Maldonado-Cruz v. INS, 883 F.2d 788 (9th Cir. 1989).


guerrillas had a right to discipline him as a deserter. Nor would the BIA allow the same alien to claim persecution based on his fear of retribution by the government for involuntarily taking part in a guerrilla raid since the government had the right to punish rebels. In another case, an alien who claimed a fear of persecution based on a position of neutrality in a civil war had to show that he had asserted an affirmative decision to remain neutral prior to the deportation hearing and had received some threat or could be targeted for persecution because of his neutral posture. Nor could an alien who had fought against guerrillas, both as a member of the national police and as a guard at the U.S. Embassy, claim that his fear of retribution by the guerrillas was a fear of persecution because the dangers faced by police officers are not related to their political beliefs. In each of these cases, the BIA has unduly narrowed the scope of protection under the Protocol. Professor Brilmayer's "vertical" model of enforceability would clearly warrant judicial intervention to compel adherence to such international standards.

VI. CONCLUSION

The mandate of U.S. courts to protect the human rights of aliens and refugees would seem to be clear. International law, both customary and treaty-based, provides aliens and refugees specific protection requiring serious judicial attention. Yet, courts have often failed to recognize their obligation to apply international law. For example, the judiciary has shown considerable reluctance to intervene in challenging the extraterritorial exercise of executive power in screening Haitians interdicted on the high seas. Even when the alleged abuses of executive prerogative have occurred within the territorial confines of the United States, as with the alien and refugee detention cases, the courts have eschewed intervention, usually referring to a special deference owed to the executive branch in the immigration area. In instances where they have reviewed and overruled government action, as in the refugee status cases, the courts generally have not based their rulings on international law, but have preferred instead to use international law to interpret domestic statutes. Judicial recognition of Professor Brilmayer's analysis clearly would give courts greater

69. The international origin of the statutory standards in the Refugee Act provides a rationale to utilize foreign jurisprudence to interpret common treaty terms such as the refugee definition. See Helton, INS v. Cardoza-Fonseca: The Decision and Its Implications, 16 N.Y.U. REV. L. & SOC. CHANGE 35, 45 (1987-88).
comfort in the direct application of international law in each of these situations.\footnote{70}

The resistance of the judiciary, however, is not so much due to the difficulty in articulating a facilitating doctrine. Rather, judicial reticence stems more from a general unfamiliarity with the law of international human rights and a parochial legal tradition suspicious of the international law making process—including its relation to the customary international law of human rights. In order to realize the mandate to protect the human rights of aliens and refugees, courts must become more knowledgeable about the substance of international legal doctrine. But just as importantly, courts must develop greater awareness of, and sensitivity to, the development and authority of international law. Such regard by the judiciary will assist the United States in attaining full compliance with the law of nations.

\footnote{70. The responsibility of applying international human rights law is not only the province of the judiciary. The issues discussed in this Comment stem from executive branch enforcement and adjudication. Both the executive and legislative branches of government should be more cognizant of the strictures of human rights law in policymaking. Greater attention to such sources of authority by the coordinate branches of government would clearly fortify the recognition of such principles by the judiciary.}