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JUDICIAL ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS*

by

EDWARD D. RE**

I. INTRODUCTION

It is a great pleasure to be here at the University of Akron School of Law to deliver the 1994 Weick Lecture. The Lecture Series, co-sponsored by the Akron Bar Foundation and the University of Akron School of Law, honors Judge Paul Charles Weick, a distinguished jurist, public servant and lawyer. An outstanding lawyer honored for his contribution to the legal profession, the organized bar and the greater community, Judge Weick's talents were recognized by President Eisenhower who appointed him to the U.S. District Court, and later to the U.S. Court of Appeals. His dedicated service as judge and chief judge of the Court of Appeals for the Sixth Circuit has earned for him an enduring place in the history of the federal judiciary of our country.

I welcome the family of Judge Weick to the lecture that bears his name, as well as his many friends and admirers whose presence adds to the importance of the occasion.

I shall speak of international law, international human rights, the jurisdiction of domestic courts, and have entitled my lecture "Judicial Enforcement of International Human Rights."

II. HUMAN RIGHTS AS IDEALS AND AS LEGAL NORMS

The subject of human rights in the world must be one of humanity's greatest concerns on earth. No one may question the yearning of humanity to achieve a society where human decency prevails, and all persons are treated with the respect and dignity due the human person. The striving has always been to attain a universal norm of fair, decent and acceptable treatment for all individuals throughout the world.

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The yearning and the effort to achieve human rights date back to ancient times, and have been the subject of much of the thought and writings of the great philosophers.¹ Lawyers proceed a step beyond the ideal of philosophers and strive to fashion legal remedies for a violation of human rights.² The law, we have been told by Holmes, is a calling of thinkers. It is worthy of note at the outset that the law is a calling, a vocation, a ministry. Lawyers, however, are not merely *thinkers*, they must also be *doers*. They are not only concerned with ideals and lofty goals. Lawyers, strive to learn how, and to what extent, it is possible and feasible to give legal effect to ideals and moral norms.³

Lawyers are thinkers who must determine what are the fundamental human rights that must be legally enforced by a society worthy of being called civilized. Lawyers, therefore, devote their energies not only to human rights, but also to legal remedies designed to give effect to fundamental rights. Hence, for lawyers, the legal question presented deals with converting the ideals into legally enforceable norms. To phrase the inquiry in simple terms: what needs to be done to give legal effect to those moral norms which embody human rights and fundamental freedoms? What are the institutions of government that are charged with the responsibility of enforcing these moral norms? In general terms, therefore, the subject pursued by lawyers deals with giving legal effect to moral norms. In the area of human rights, the crucial question pertains to the enforcement of those human rights that are fundamental and are the birthright of all human beings.

Our subject, therefore, does not deal merely with abstract ideals, but with the enforcement of those ideals. It does not deal merely with human rights, but with legally enforceable norms. It is interesting to note that the great Roman jurist Ulpian, noting the distinction between rights as ideals and rights to be realized, asserted that the law is the "true philosophy." In his view, since law was based on reason and served the ideal of justice for all, it is the lawyer who pursues the calling of the true "philosopher." In his view, therefore, the study of law was the highest form of "philosophy" because it is the law that gives to notions of right and wrong a concrete and practical form.⁴

¹ See brief treatment in A. D'AMATO, INTERNATIONAL LAW ANTHOLOGY 21-24 (1994). CHARLES FRANKEL, *THE PHILOSOPHY OF THE ENLIGHTENMENT*, IN V. FIRM, A HISTORY OF POLITICAL SYSTEMS 266, 268 (1950) ("The doctrine of natural rights held that, over and above the particular customs of any given society there were certain universal principles whose protection is the purpose and touchstone of every society. Every individual has certain inviolable claims — to life, liberty, security from arbitrary government actions. . .").

² See Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1259-60, 1284-85 (1993).

³ See Roscoe Pound, *The Limits of Effective Legal Action, Address Before the Pennsylvania Bar Association (June 27, 1916)*, in 3 A.B.A. J. 55, 64 (1917), reprinted in THE LAWYER'S TREASURY 223, 232 (Eugene C. Gerhart ed., 1956); Edward D. Re, *Human Rights and Effective Legal Action*, 67 ST. JOHN'S L. REV. 465, 467 (1993).

⁴ See, TONY HONORE, ULPIAN 30-31 (1982).

The subject of international human rights has been of great interest to me for many years. Forty years ago I explored some of the efforts of the international community to guarantee essential human rights to all human beings throughout the world. The study, entitled *Freedom in the International Society*,⁵ traces some of the major efforts to codify basic human rights.⁶ It culminates with expressions of optimism and hope for the progress that can follow the milestone of the Universal Declaration of Human Rights.⁷ In eloquent terms, that great document, destined to become the Magna Carta of the modern world,⁸ gives expression to fundamental universal norms that are essential in a free society.⁹

III. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

Commencing with the Universal Declaration, it can no longer be doubted that the ideals so beautifully enshrined in that document of human freedom express universally accepted moral norms.¹⁰ The norms enumerated in that Declaration, approved by the unanimous vote of the General Assembly of the United Nations on that historic date of

⁵ Edward D. Re, *Freedom In the International Society*, in CONCEPT OF FREEDOM 217 (Carl W. Grindel ed., 1955). On the words "human rights" see Jacob W.F. Sundberg, *What is "Human Rights": The Universal Declaration*, 20 AKRON L. REV. 591, 593 (1987).

⁶ Re, *supra* note 5, at 235-89.

⁷ *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 3 U.N. GAOR Supp. No. 16, U.N. Doc A/810 (1948).

⁸ Commenting upon the significance of the Declaration, Mrs. Roosevelt asserted: "We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. . . . This Declaration may well become the international Magna Carta of all men everywhere." Mrs. Franklin D. Roosevelt, *General Assembly Adopts Declaration of Human Rights*, 19 DEP'T ST. BULL. 751 (1948). The Declaration has also been described as "the most important written instrument and landmark in the history of mankind . . . the charter of liberty of the oppressed and the downtrodden." Sean MacBride, *The Enforcement of the International Law of Human Rights*, 1981 U. ILL. L. REV. 385, 387 (1981).

⁹ Re, *supra* note 5, at 255-61:

The thirty articles of the Declaration proclaim the right to life, liberty and security of person, freedom from slavery, torture, cruel, inhuman or degrading treatment or punishment, freedom from arbitrary arrest, detention or exile, right to a fair and public hearing by an independent and impartial tribunal, presumption of innocence, protection against ex post facto laws, freedom from arbitrary interference with one's privacy, family, home or correspondence, freedom to leave any country, freedom of movement and residence, right of asylum from persecution, equal rights as to marriage, right to own property, freedom of religion, expression, assembly, association, right of people to have their will serve as the basis of the authority of Government, right to work, right to join trade unions, right to rest and leisure, right to social security, right to education, right to participate in the cultural life of the community, right to equality before the law, and freedom from discrimination.

Id. at 257.

¹⁰ See Arthur J. Goldberg, *The Need for a World Court on Human Rights*, 11 HOW. L. J. 621, 621 (1965). "[T]here is no sovereign right of any state large or small to deny the fundamental Rights of Man — rights which belong to him because as a child of God he is endowed with human dignity." *Id.*

December 10, 1948, represented the consensus of the civilized world.¹¹ What is also noteworthy is that the rights and freedoms enshrined in the Universal Declaration were recognized and accepted by the world community of nations notwithstanding religious, philosophical or political differences. Indeed, it has been noted by Jacques Maritain, a distinguished philosopher, in his *THE RIGHTS OF MAN AND NATURAL LAW*, that the Universal Declaration represents a universal standard of human rights "precisely because the world community was able to proclaim it notwithstanding the wide array of political philosophies, political theologies and political systems."¹² It is also well to remember that the Universal Declaration does not represent the maximum, but the minimum degree of liberty or freedom to which all human beings are entitled.¹³ It can hardly be questioned that, what was at that time already a universal consensus on universal human rights, has been strengthened by the passing of time.¹⁴ Regardless of the violations of human rights that continue to occur throughout the world, no responsible world leader or nation would dare assert that the rights therein proclaimed, and the conduct therein proscribed, are not *universal* norms that bind all of the nations of the world.¹⁵ International law scholars will have no difficulty in demonstrating that these universal norms have become customary international law that bind the nations of the world.¹⁶

To say that facility of travel, modern communications and technology have made the world smaller is to state the obvious. This coming together of nations and people has promoted the universal acknowledgement and acceptance of human rights for all individuals. Subsequent to the achievement of the Universal Declaration, significant efforts

¹¹ For votes on each article of the Declaration, see 1948 *Yearbook on Human Rights* 465 (1950). The vote on the whole Declaration was *in favor*: 48 votes; *against*: nil; *abstaining*: 8 votes (communist bloc nations, Saudi Arabia and South Africa). *Id.*

¹² Noel A. Kinsella, Panel Discussion: Human Rights as Comparative Constitutional Law, 20 AKRON L. REV. 591, 678 (1987).

¹³ The Universal Declaration and the many United Nations human rights covenants, declarations and resolutions are not merely evidence of a body of international human rights law but constitute customary international law. See R.B. Lillich & F.C. Newman, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY, 65-66 (1979). See also *Filatiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

¹⁴ "It is indisputable that by almost any measure immense progress has been achieved since [the adoption of the Declaration]." Philip Alston, *Appraising the United Nations Human Rights Regime*, in THE UNITED NATIONS AND HUMAN RIGHTS 14 (Philip Alston ed., 1992).

¹⁵ "The Universal Declaration, as a projection of the Charter of the United Nations, and particularly as international customary law, binds all states." Reynaldo Galindo Pohl, UN Doc. E/CN.4/1987/23, at 4-5 (1987), quoted in THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 84 n.9 (1989). See also Department of State Report: Country Reports on Human Rights Practices For 1993, 103d Congress, 2d Sess., February 1994.

¹⁶ The Restatement of Foreign Relations notes, "[P]ractice accepted as building customary human rights law includes: . . . virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 701 note 2 (1987). See also MERON, *supra* note 15, at 83-93 nn.9 & 32.

have been designed to codify the rights proclaimed in the Universal Declaration into the form of binding treaties or Covenants on Human Rights. Examples, and some of the results of these efforts are, the "International Covenant on Civil and Political Rights"¹⁷ and the "International Covenant on Economic, Social and Cultural Rights."¹⁸ In addition to these efforts by the United States may be mentioned the European experience with the Convention on Human Rights¹⁹ that has succeeded in giving the principles of the Universal Declaration the dignity of a treaty binding upon the member European states. These regional and international human rights protection systems are in part the fruits of the inspiration of the Universal Declaration.²⁰

Today, lawyers may rightly assume that no nation will assert a sovereign right to violate the fundamental human rights and freedoms proclaimed in the Universal Declaration of Human Rights. The very notion of the existence of human rights of individuals implies a *restriction* upon the power of states and governments. The American Declaration of Independence, after proclaiming as self-evident certain unalienable rights, declares that governments are instituted to "secure these rights." For the United States, therefore, to guarantee fundamental human rights is to be faithful to its founding document and the Bill of Rights. Much of this American political philosophy undoubtedly influenced the Universal Declaration. Regardless of the underlying basis, no nation today can claim the sovereign right to violate those universal rights deemed to be fundamental or unalienable.²¹ Hence, because of the acceptance of international legal norms in the area of human rights, the effort today is not merely to *assert* fundamental rights and freedoms to which human beings are entitled, but rather to strengthen the *enforcement* mechanisms that must exist to give these rights vitality and to make them a reality.²²

The subject is vast and, beyond the Universal Declaration, would require a treatment of the various United Nations human rights covenants that have been drafted to give legal status to the moral norms set forth in the Universal Declaration. Many of the human

¹⁷ G.A. Res. 2200(XXI), 21 U.N. GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). The International Covenant on Civil and Political Rights affirms the right to an effective remedy and expressly sets forth the obligation of the parties "[t]o ensure that any person whose rights or freedoms as herein recognized are violated *shall* have an effective remedy notwithstanding that the violation has been committed by persons acting in an official capacity." Paust, *supra* note 2, at 1259.

¹⁸ G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. eliminate parenthetical (No. 16), at 49, U.N. Doc. A/6316 (1966).

¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 Nov. 4, 1950, U.N.T.S. 222.

²⁰ The Declaration has "inspired a whole cluster of international conventions, including the very important European Convention for the Protection of Human Rights and Fundamental Freedoms." JOHN HUMPHREY, *NO DISTANT MILLENNIUM: THE INTERNATIONAL LAW OF HUMAN RIGHTS* 155 (1989).

²¹ See, e.g., Goldberg, *supra* note 10, at 621.

²² On the "fundamental right to a remedy," see Jordan J. Paust, *On Human Rights: The Use of Human Rights Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 611-18 (1989).

rights provisions of these treaties may be given legal effect by their inclusion or embodiment in specific domestic statutes.²³

Of course, one need hardly be reminded that international law is expressly recognized in the Constitution of the United States, and that, in addition to the power of Congress to define and punish "[o]ffences against the [l]aw of [n]ations,"²⁴ Article VI declares treaties made under the authority of the United States, to be the supreme law of the land.²⁵ In countries like the United States where, by American constitutional law, not all treaty provisions are self-executing,²⁶ implementing legislation may be required to give the treaty provisions legal effect as domestic law. Additionally, international legal norms may be incorporated by reference into domestic statutes.²⁷

IV. THE ROLE OF THE JUDICIARY

There are several ways in which internationally accepted moral norms may become legal norms enforceable by the various organs of government. Of the various methods, I have chosen to discuss the role of the courts, and have, therefore, entitled my remarks *Judicial Enforcement of International Human Rights*. Since the discussion will not treat the role of the International Court of Justice, or other international tribunals, the discussion will deal with the role of our domestic courts. Hence, our inquiry is limited to the role of the domestic courts in the enforcement of international human rights.

With particular reference to the role of the judiciary, it is important to note that international legal norms may play a crucial role in the interpretation and application of constitutional or statutory provisions of law. For example, in a case where there is no contrary legislative expression, and where the interpretation of the statute is in doubt, courts have the opportunity to interpret and apply the statute in the light of the applicable international legal norm.²⁸ In the application of statutory provisions to particular cases, the courts must, of necessity, interpret the statute to ascertain meaning. Where the statute

²³ See, e.g., Sen. Hubert Humphrey, *The Senate Foreign Relations Committee and the Issue of International Human Rights* (discussing four legislative initiatives in the area of human rights), in *INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE* 191-92 (James C. Tuttle ed., 1978).

²⁴ U.S. CONST. art. I, § 8, cl. 10.

²⁵ U.S. CONST. art. VI.

²⁶ See, e.g., *Doe v. Plyler*, 628 F.2d 448, 453 (5th Cir. 1980); *United States v. Postal*, 589 F.2d 862, (5th Cir. 1979); cf. *People of Saipan ex rel. Guerrero v. Dep't. of Interior*, 502 F.2d 90, 100 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975).

²⁷ See, e.g., 28 U.S.C. § 1350 (1988). See also Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 6-18 (1992).

²⁸ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 114 (1987). "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." *Id.*

does not cover the specific situation presented, and when the statute is unclear, the judicial power of interpretation is of enormous importance. In these cases, in the absence of an expressed contrary legislative intent, the courts should, and indeed have the duty to interpret the statute in conformity and harmony with the pertinent international legal norm.²⁹ International legal scholars will state that the international legal norm may *inform* the court of the specific meaning to be given to the applicable statutory provision in question.

This suggested process or methodology of interpretation is not novel, and is in keeping with the clearly established doctrine expressed by Chief Justice Marshall in the famous *Paquette Habana*³⁰ case that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”³¹ Hence, in the interpretation and application of constitutional and statutory provisions, international legal norms are relevant, and may influence the outcome in cases before the domestic courts.

In the process of interpreting and applying constitutional and statutory provisions in the light of international legal norms the courts cannot be said to be usurping a legislative function. The application of law to the facts of the case is clearly a judicial function.³² In the words of Chief Justice Marshall:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.³³

Furthermore, it is unrealistic to assume that legislators are unaware of applicable international legal norms. Indeed, it may be assumed or shown that often the international legal norms inspired or brought about the enactment of the statutory provisions.³⁴ Under these circumstances, it is entirely within the judicial province for the courts to interpret and apply the statutory provision in the particular case in the light of the teaching of the international legal norm.³⁵ Moreover, it is submitted that courts cannot be oblivious to

²⁹ “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .” *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). See also Bayefsky & Fitzpatrick, *supra* note 27, at 23-27.

³⁰ *The Paquette Habana*, 175 U.S. 677 (1900).

³¹ *Id.* at 700.

³² See Edward D. Re, *The Courts' Enforcement of the Rule of Law*, 62 ST. JOHN'S L. REV. 601, 605 (1988).

³³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁴ See, e.g., *Humphrey*, *supra* note 23, at 191-92.

³⁵ See *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

the consequences of judicial decisions that ignore international human rights, and, by inaction or restrictive statutory interpretation, tolerate or permit their violation. In the application of constitutional guarantees and in the interpretation of laws that affect human rights, the Supreme Court in particular can neither restrict nor abandon its special constitutional role as the protector of fundamental human rights. In the words of Justice Thurgood Marshall, in his last dissenting opinion before retiring from the Court, the Supreme Court ought not “squander the authority and the legitimacy of this Court as a protector of the powerless.”³⁶

If agreement is to be sought as to the role of the Supreme Court, it ought to center upon the special responsibility of the Court to interpret and give effect to the rights and freedoms set forth in the United States Constitution. This responsibility is most important when dealing with the human rights of the disadvantaged, the unpopular, the poor and the powerless. It is true, of course, that all officers of government, legislative, executive and judicial, “shall be bound by Oath or Affirmation, to support [the] Constitution.”³⁷ Elected and appointed officials, however, do not enjoy the absolute immunity of judges, and are not insulated as are the judges. Only the judges are granted a special independence which, as a practical matter, guarantees a life tenure subject only to removal by impeachment under extraordinary circumstances.³⁸ This express constitutional conferral of judicial independence is for the benefit of the people and not the judges. Its purpose is to remove the judicial power from the “vicissitudes of political controversy” and the clamor of the moment. Perhaps the best expression of this thought is found in a statement by Justice Jackson who declared:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.³⁹

³⁶ *Payne v. Tennessee*, 111 S. Ct. 2597, 2625 (1991) (Marshall, J., dissenting).

³⁷ U.S. CONST. art. VI, cl. 3.

³⁸ See Edward D. Re, *Judicial Independence and Accountability: The Judicial Council's Reform and Judicial Conduct and Disability Act of 1980*, 8 N. KY. L. REV. 221, 226 (1981).

³⁹ *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

V. HUMAN RIGHTS, DOMESTIC COURTS, AND THE POWER TO DECIDE

In a symposium on *Human Rights Before Domestic Courts*⁴⁰ I had occasion to state that the “courts cannot isolate themselves from the great moral issues of the day,”⁴¹ and that: “In the application of law, courts, as other organs of government, must also think of the consequences of their decisions and of their effect on human rights. In the application of law, courts cannot risk the fate of becoming irrelevant in their crucial role of applying the law as an instrument of justice.”⁴²

In the doing of justice in the field of international human rights, it should be obvious that:

[u]nless a contrary intention is clearly expressed, [statutes] may be construed in accordance with international legal norms. In an ABA Committee Report on Judicial Education on International Law, it is noted that the applicability of international legal norms in particular cases may be limited by considerations of jurisdiction, equity, and due process that apply in all proceedings before the U.S. courts. It is hoped, however, that those ‘considerations not be invoked merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system.’⁴³

In that symposium on *Human Rights Before the Domestic Courts*, reference was made to an address by Dean Roscoe Pound entitled *The Limits of Effective Legal Action*.⁴⁴ In that address, delivered the first year that he commenced his illustrious career as Dean of the Harvard Law School, Dean Pound spoke of the several periods of development of law. He started with *primitive* law, and indicated that gradually, but finally, a period is reached which tests the limits of effective legal action. This period of legal development approaches the maturity of law when the moral worth of the individual claims full legal recognition. In the words of Pound, this is when the law seeks “ambitiously to cover the whole field of social control. . . .”⁴⁵

Dean Pound, of course, reminded us that laws are not self-enforcing, and that “[h]uman beings must execute them, and there must be some motive setting the individual in motion to do this above and beyond the abstract content of the rule and its

⁴⁰ Symposium, *Human Rights Before Domestic Courts*, 67 ST. JOHN’S L. REV. 465 (1993).

⁴¹ Edward D. Re, *Human Rights, Domestic Courts, and Effective Remedies*, 67 ST. JOHN’S L. REV. 581, 591 (1993).

⁴² *Id.* at 591-92.

⁴³ *Id.* at 592 (quoting *Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report*, 24 INT’L LAW. 903, 915 (1990)).

⁴⁴ Pound, *supra* note 3.

⁴⁵ 3 A.B.A. J. at 65.

conformity to an ideal justice or an ideal of social interest."⁴⁶ At this juncture in his presentation, Pound referred to a social reformer who declared that "the real function of law is to register the protest of society against wrong."⁴⁷

Dean Pound's response is worthy of quotation:

Well, protests of society against wrong are no mean thing. But one may feel that a prophet rather than a law-maker is the proper mouthpiece for the purpose. It is said that Hunt, the agitator, appeared on one occasion before Lord Ellenborough at circuit, *a propos* of nothing upon the calendar, to make one of his harangues. After the Chief Justice had explained to him that he was not in a tribunal of general jurisdiction to inquire into every species of wrong throughout the kingdom, but only in a court of assize . . . Hunt exclaimed, "But, my Lord, I desire to protest." "Oh, certainly," said Lord Ellenborough. "By all means, Usher! Take Mr. Hunt into the corridor and allow him to protest as much as he pleases." Our statute books are full of protests of society against wrong which are as efficacious for practical purposes as the declamations of Mr. Hunt in the corridor of Lord Ellenborough's court."⁴⁸

For us, Dean Pound's reference to the remarks of Lord Ellenborough, that Mr. Hunt could protest in the corridor, reminds us that the courts can neither decide cases nor right wrongs unless they have *jurisdiction* to hear a case properly presented for adjudication. Jurisdiction is the key word for courts. It implies the legal right and authority by which judges and courts exercise their authority. Jurisdiction is required to give authority and power to adjudicate. Without it a court is powerless to hear a case and to give a remedy. Our topic, therefore, as noted at the outset, proceeds beyond a discussion of ideals and ethical norms.⁴⁹ It deals with a practical aspect of human rights and fundamental freedoms. Hence, the discussion pertains to the role of the courts, and the extent to which the courts may give legal effect to those moral norms embraced by the words, "human rights and fundamental freedoms."

VII. SAUDI-ARABIA V. NELSON⁵⁰

With these general observations, and the role of courts in the interpretation of statutes that implicate the enforcement of international human rights, I should like to discuss a modern case that raised some of these important issues, *Saudi Arabia v. Nelson*.⁵¹

⁴⁶ *Id.* at 69.

⁴⁷ *Id.*

⁴⁸ *Id.* at 69-70.

⁴⁹ See *supra* text accompanying notes 2-4.

⁵⁰ *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993).

⁵¹ *Id.*

The facts of *Nelson* are quite straightforward as are the issues presented. The plaintiff, Scott Nelson, while in the United States, saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital in Riyadh, Saudi Arabia.⁵² The Hospital Corporation of America, under contract with the Kingdom of Saudi Arabia, conducted in the United States the recruitment of American employees for the hospital.⁵³

Nelson was interviewed in Saudi Arabia for a position by hospital officials.⁵⁴ After returning to Florida, Nelson was hired in the United States and entered into a contract of employment with the hospital as a monitoring systems engineer.⁵⁵ The contract of employment was executed in Miami, Florida, in November 1983.⁵⁶

In accordance with the Hospital's job description for a monitoring systems engineer, Nelson was responsible for "monitoring all 'facilities, equipment, utilities and maintenance systems to insure the safety of patients, hospital staff, and others.'"⁵⁷

Nelson was summoned to the hospital's security office after he observed, in the course of his duties, certain hazards which he reported to an investigative commission of the Saudi government.⁵⁸ He alleged that he was subsequently taken to a jail cell where he was "shackled, tortured, and bea[ten]" by Saudi government agents.⁵⁹

After his release and return to the United States, Nelson sued Saudi Arabia, the hospital, and the hospital's purchasing agent in the United States District Court for the Southern District of Florida, asserting that the court had subject matter jurisdiction under the Foreign Sovereign Immunities Act.⁶⁰ The FSIA provides that:

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; . . .⁶¹

⁵² *Id.* at 1474.

⁵³ *Id.*

⁵⁴ *Id.* at 1475.

⁵⁵ *Id.* at 1474-75.

⁵⁶ *Id.* at 1484 (citing Respondents Brief at 43-45). "[T]he House Report that accompanied the Immunities Act states that the making of a "single contract" in the United States can support jurisdiction." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991) (citing H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615). The House Report further stated that "a commercial activity carried on in the United States by a foreign state would *include not only* a commercial transaction performed and *executed* in its entirety in the United States. . . ." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (emphasis added).

⁵⁷ *Nelson*, 113 S. Ct. at 1475 (quoting Petitioners Brief at 4).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 1476.

⁶¹ 28 U.S.C.A. § 1605(a)(2) (West 1994).

The district court granted Saudi Arabia's motion for dismissal for lack of subject matter jurisdiction, concluding that the "link between the recruitment activities and the [d]efendants is not sufficient to establish 'substantial contact' with the United States"⁶² within the meaning of the commercial exception of the [FSIA].⁶³ Moreover, the district court "noted that, 'even if the court had found that . . . Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities,'" there still would not be a sufficient nexus between the activities and the complaint to maintain the cause of action.⁶⁴

The Court of Appeals reversed holding that "the recruitment and hiring of Nelson, in the United States, was part of a process having "substantial contact with the United States."⁶⁵ The recruitment was conducted by the Hospital corporation of America (HCA) which in 1973 contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employers for the Hospital.⁶⁶ "HCA, a corporation organized under the laws of the Grand Cayman Islands, is the wholly owned subsidiary of an American corporation."⁶⁷ The contract created an agency relationship between the HCA and Saudi Arabia.⁶⁸ Under the contract HCA was empowered to "recruit and employ administrative . . . and all other personnel with full authority to initially set and subsequently adjust their salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel."⁶⁹ The Court of Appeals agreed with Nelson that the recruitment and hiring in the United States constituted a "commercial activity," and that there was a "jurisdictional nexus" between "the acts for which damages are sought, and the foreign sovereign's commercial activity."⁷⁰ The Court of Appeals also concluded that the "detention and torture of Nelson are so intertwined with his employment at the Hospital that they are 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia."⁷¹ Hence, the Court of Appeals reversed since Nelson's detention and torture were directly attributable to the performance of his duties under the contract of employment.⁷²

⁶² *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1530 (11th Cir. 1991), *rev'd*, 113 S. Ct. 1471 (1993) (citing *Nelson v. Saudi Arabia*, no. 88-1791, slip op. at 5 (S.D. Fla. Aug. 11, 1989)).

⁶³ See 28 U.S.C.A. § 1605(a)(2) (West 1994).

⁶⁴ *Nelson*, 923 F.2d at 1530 (citing *Nelson v. Saudi Arabia*, no. 88-1791 at 8).

⁶⁵ *Id.* at 1533.

⁶⁶ *Id.* at 1530.

⁶⁷ *Id.* at 1533.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1534.

⁷¹ *Id.* at 1535.

⁷² *Id.* at 1536.

In discussing the *Nelson* case before law professors and law students, one cannot resist sounding a theme that highlights the role of the lawyer in the judicial process. For many years I have stressed the partnership of bench and bar,⁷³ and the crucial role of the lawyer in the trial and appellate process.⁷⁴ Indeed, it may be said that the lawyer, by the competent representation of cases before the courts is also truly a lawmaker.⁷⁵

In the *Nelson* case, particularly for those concerned with the human rights violations throughout the world, and interested in the realization and vindication of human rights, the hero is Professor Anthony D'Amato.⁷⁶ Professor D'Amato was counsel for the Nelsons who argued before the three-judge panel of the Court of Appeals for the Eleventh Circuit. Speaking of his experience in arguing the *Nelson* appeal before the Court of Appeals, at a panel discussion on "International Human Rights in American Courts: The Case of *Nelson v. Saudi Arabia*,"⁷⁷ Professor D'Amato stated: "The judge in the District Court threw the case out on sovereign immunity grounds. It was my honor to argue the case in the 11th Circuit at Atlanta."⁷⁸ Professor D'Amato's observations and thoughts the moment he entered the Court of Appeals are of particular interest to practicing lawyers. They also indicate the difficulty in attempting to label or characterize judges. Professor D'Amato, who succeeded in the Court of Appeals in obtaining a reversal of the District Court, continued:

When I walked into the court room I saw Judge Re . . . sitting on the bench as a designated judge [from] the United States Court of International Trade, where he was Chief Judge. And I thought: Now what do I do? Judge Re, a conservative judge, and I have a case where an American citizen is complaining that a foreign sovereign, Saudi Arabia, must be brought to account in court for a tort committed in that foreign territory. How do you make a case like that sound conservative? My only recourse was that, like many conservative judges, Judge Re is a firm believer in the rule of law. So it was my job to make our case so grounded in the exact rule of law that the other side would look like the radicals.

Next, I thought: Judge Re is an expert on contracts, but my case concerns torts. How do I deal with this part of the problem? The only light that I saw on that issue was that Scott Nelson was tortured. Why? Because

⁷³ See Edward D. Re, *The Partnership of Bench and Bar*, 16 CATH. LAW. 194, 204-08 (1970).

⁷⁴ See Edward D. Re, *The Role of the Lawyer in Modern Society*, 30 S.D. L. REV. 501, 503-08 (1985).

⁷⁵ See EDWARD D. RE & JOSEPH R. RE, BRIEF WRITING AND ORAL ARGUMENT 93-95 (7th ed., 1993).

⁷⁶ Leighton Professor of Law, Northwestern University School of Law.

⁷⁷ Panel Discussion *International Human Rights in American Courts: The Case of Nelson v. Saudi Arabia*, in, 85 AM. SOC'Y INT'L L. PROC. 324, 324 (1992).

⁷⁸ *Id.*

he was trying to follow his contract, under which he was hired as a monitoring systems engineer, accountable for the safety of the people in the hospital, and he was trying to do his job when he reported the violation. So I argued before the court that he was tortured for doing his job.⁷⁹

Judge Re, who served as chair of the panel discussion, in response, stated:

Professor D'Amato used the word 'conservative.' I am conservative only in the sense that I believe in (1) preserving those values that have made this the great nation that it is, and (2) giving reality to all the values set forth in our founding documents; some of them have not yet been attained. In addition, my love is not really contracts. My love is equity. . . .⁸⁰

Professor D'Amato argued before the Court of Appeals that Nelson "was tortured for doing his job," — a theme or point that carried the day in the Court of Appeals.⁸¹ Surely, it violates no confidence to say that the appellate court would not have reversed the District Court's dismissal of the case if Nelson's troubles did not stem directly and exclusively from his performance of his duties under the contract of employment as a "monitoring systems engineer" for the hospital.⁸² He was not a mere tourist who had violated the law of the host country;⁸³ nor was he a defendant who had been arraigned and charged with the commission of a crime, and found himself in the clutches of the police of the host country while awaiting trial.⁸⁴

I will not comment on the accuracy of Professor D'Amato's reference to Judge Re as a "conservative judge." It might be interesting to see the applicability of the label, for those who use labels, to the several Supreme Court opinions in case of *Saudi Arabia v. Nelson*.⁸⁵ Justice Souter's opinion, that reversed the Court of Appeals on the ground that Nelson's suit was not based on a commercial activity, was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia and Thomas. The opinion stated:

Because we concluded that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact

⁷⁹ *Id.* at 324-25.

⁸⁰ *Id.* at 325.

⁸¹ *Nelson v. Saudi Arabia*, 923 F.2d 1528 (11th Cir. 1991), *rev'd*, 113 S.Ct. 1471 (1993).

⁸² *Id.* at 1535-36.

⁸³ *Saudi Arabia v. Nelson*, 113 S.Ct. 1471, 1482 (1993) (White, J., concurring).

⁸⁴ *Id.* Although never charged with an offense, Saudi Arabia asserted that the actions taken against Nelson were the result of Nelson's submission of a false diploma from the Massachusetts Institute of Technology in his application for employment. *Nelson*, 923 F.2d at 1536.

⁸⁵ 113 S.Ct. 1471 (1993).

with the United States. . . . We do not mean to suggest that the first clause of Section 1605 (a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements. We do conclude, however, that where a claim rests entirely upon activities sovereign in character, as here, see *infra*, at 1479-1480, jurisdiction will not exist under that clause regardless of any connection the sovereign acts may have with commercial activity.⁸⁶

Justice White was most convincing that Saudi Arabia was engaged in a commercial activity or "commercial enterprise." In his words, it was "self-evident" that "the state-owned hospital was engaged in ordinary commercial business."⁸⁷ In "getting even" with a whistle-blower,⁸⁸ it did not matter to Justice White whether the sovereign resorted to "thugs or government officers to carry on its business."⁸⁹ Justice White concurred in the judgment of reversal because, in his view, the commercial activity in the United States did not constitute the commercial activity upon which Nelson's action was based, and the commercial activity in Saudi Arabia "though constituting the basis of the Nelsons' suit, lacks a sufficient nexus to the United States."⁹⁰

Justices Blackmun and Kennedy dissented in part, and voted for a remand of the case on the "failure to warn" claims set forth in the Nelson complaint.⁹¹ Justice Kennedy, with whom Justice Blackmun and Stevens joined, stated that the failure to warn counts "of foreseeable dangers are based upon commercial activity having substantial contact with the United States,"⁹² since "they complain of a negligent omission made during the recruitment of a hospital employee in the United States."⁹³

Justice Stevens, in his dissent sets forth the reasons why he voted for an affirmance of the Court of Appeals.⁹⁴ In his view Justice White "demonstrated [that the] operation of the hospital and its employment practices and disciplinary procedures are 'commercial activities' within the meaning of the statute. . . ."⁹⁵ Unlike Justice White, however, Justice Stevens:

⁸⁶ *Id.* at 1477, 1478 n.4.

⁸⁷ *Id.* at 1481, 1484.

⁸⁸ *Id.* at 1481-83.

⁸⁹ *Id.* at 1483.

⁹⁰ *Id.* at 1484.

⁹¹ *Id.*

⁹² *Id.* at 1485.

⁹³ *Id.*

⁹⁴ *Id.* at 1487-89.

⁹⁵ *Id.* at 1488.

[w]as also convinced that [Saudi Arabia's] commercial activities . . . have sufficient contact with the United States to justify the exercise of federal jurisdiction. . . . The position for which [Nelson] was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and taking [those] allegations as true, it was precisely [Nelson's] performance of those responsibilities that led to the hospital's retaliatory actions against him. . . . If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry. . . .⁹⁶

In a brief review of the *Nelson* case in the American Journal of International Law, the reviewer noted that:

[S]ome regular observers of the Foreign Sovereign Immunities Act will no doubt be disappointed that the court in this [*Nelson*] case did not provide doctrinal clarification of several of the obvious unresolved issues arising under the Act.⁹⁷

The reviewer also notes that

Other observers, especially those interested in the expansion of human rights law, will be even more disappointed that the Court failed to use this case as a vehicle for providing a remedy in the U.S. courts for intentional torts committed by foreign states in their own territory.⁹⁸

The reviewer concludes:

To this reviewer, it appears that Justice Souter struck the right balance between the competing considerations. However, it should be noted that there is a move afoot to amend the statute so as to provide relief for the overseas international tort.⁹⁹

As may be noted from the various opinions in *Nelson*, not every one will agree as to where to strike "the right balance." Whether the right balance has been struck usually depends upon the views of the observer. "Those interested in the expansion of human rights law," and those who caused the move that is afoot to amend the statute will not agree that the majority struck the right balance. Moreover, what is involved is not merely

⁹⁶ *Id.* at 1488-89.

⁹⁷ Keith Highet & George Kahale III, *Foreign Sovereign Immunities Act—Commercial Activity Exception—Nature and Purpose Tests—Police Power as Sovereign Power: Saudi Arabia v. Nelson*, 87 AM. J. INT'L L. 442, 444 (1993).

⁹⁸ *Id.*

⁹⁹ *Id.*

“to provide relief for over-seas intentional torts,”¹⁰⁰ but to have the interpretation and application of the FSIA reflect the restrictive theory or principle of foreign sovereign immunity that it was thought was being codified by the Foreign Sovereign Immunities Act.¹⁰¹

Speaking prior to the Supreme Court reversal in *Nelson*, Professor Paust¹⁰² stated that “the purpose of the act, which should guide interpretation of any of its provisions,”¹⁰³ was to codify the restrictive principle, and that “[h]ere it is worth emphasizing that if the activity can be engaged in by a private actor (for example, the sale of military boots or weapons, kidnapping, beatings, torture or some other international crime), the acts are properly classifiable as private, unprotected acts.”¹⁰⁴ Professor Paust continued: “Such an approach is reflected in the FSIA, section 1603(d) (*i.e.*, the nature of the activity test versus the government’s motive, goals or purpose). Additionally, as noted in the 1976 House Report on the FSIA and by Judge Re in his 1991 opinion, a major purpose of the Act, which should guide interpretation of any of its provisions, was to codify” the so-called ‘restrictive principle.’”¹⁰⁵

Professor Paust expresses the view that petitioners [the defendants] in *Nelson* were fundamentally mistaken and begged the question when they asserted that “arbitrary arrest and torture are claims arising from ‘purely sovereign’ or ‘core sovereign’ conduct.”¹⁰⁶ Professor Paust was referring to the Executive’s Statement of Interest in the

¹⁰⁰ *Id.*

¹⁰¹ See 28 U.S.C.A. § 1602 (West 1994)(declaration of purpose); see also H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-8 (1976) and S. Rep. No. 1310, 94th Cong., 2d Sess. 8-9 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605-06. It is not questioned that “. . . the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial . . . acts.” *Nelson v. Saudi Arabia*, 923 F.2d 1528, 1532 (11th Cir. 1991) (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976)).

¹⁰² Professor of Law, University of Houston.

¹⁰³ See *supra* note 77, at 326 (remarks by Jordan J. Paust).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 327. Article 5 of the Universal Declaration of Human Rights provides: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Adopted by the U.N. General Assembly, Dec. 10, 1948. U.N.G.A. Res. 217 A(III), U.N. Doc. A/810, at 71 (1948). See also Karen Parker & Lyn Beth Neylon, *Jus Cogens, Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 438-39 (1989)

Torture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes* . . . which every State has a legal interest [to implement]. The International Law Commission . . . has labelled serious violations of these basic human rights as ‘international crimes,’ giving rise to the specific responsibility of the States concerned. In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture. (footnotes omitted).

Id.

request for a rehearing en banc, which was submitted to the Court of Appeals for the Eleventh Circuit after its decision of the case.¹⁰⁷ Professor Paust states that the Executive made the same mistake when it argued that “torture is and ‘remains’ merely a ‘police’ or ‘law enforcement activity [that] is *sovereign* in nature’”¹⁰⁸

Other scholars are also of the opinion that “[s]uch violations of international law distinguish the *Nelson* case from others involving the legitimate exercise of the state’s police power.”¹⁰⁹ “Far from being . . . sovereign activities,” Professor Paust asserts that “acts of torture are so tainted with illegality”¹¹⁰ that “they are expressly sanctionable, despite the official status or purpose of the perpetrator,”¹¹¹ and quotes from Professor D’Amato’s brief in opposition to the petition for certiorari before the Supreme Court: “Respondents are not aware of any case . . . in which a government has ever attempted to justify or excuse torture as an ‘exercise of police power.’”¹¹²

Quite apart from the views of scholars who strongly assert that governments should not enjoy sovereign immunity when they commit gross human rights violations, others would have hoped that the FSIA would have been interpreted more in keeping with the Congressional intent of depoliticizing such determinations in specific cases.¹¹³ As stated by a Canadian scholar: “Indeed the whole rationale for legislating the restrictive theory in the first place was to give the Executive distance from the whole process to ensure less political, more legal decisions.”¹¹⁴ In the words of another scholar:

The primary impetus for the passage of the FSIA was to transfer adjudication of sovereign immunity issues from the Executive to the Judiciary, to

¹⁰⁷ See Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing en Banc, No. 89-5981 (April 1, 1991).

¹⁰⁸ See *supra* note 77, at 327 (remarks by Jordan J. Paust, quoting Statement of Interest of the United States in Support of Rehearing and Suggestion for Rehearing en Banc, No. 89-5981 at 3, (April 1, 1991)).

¹⁰⁹ *Id.* at 327.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (quoting Respondents’ Brief in Opposition to Petition for Writ of Certiorari, *Nelson v. Saudi Arabia*, 112 S. Ct. 2937 (1992). (No. 91-522, at 3)). Professor D’Amato did not write the brief or argue before the Supreme Court.

¹¹³ See *supra* note 101.

¹¹⁴ Jennie Hatfield-Lyon, *Nelson v. Saudi Arabia: An Opportunity for Judicial Enforcement Of International Human Rights Standards*, 86 AM. SOC’Y OF INT’L L. PROC. 331, 336 (1992) (citing *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983)).

¹¹⁵ Joan Fitzpatrick, *Reducing the FSIA Barrier to Human Rights Litigation—Is Amendment Necessary and Possible?*, 86 AM. SOC’Y OF INT’L L. PROC. 338, 344 (1992) (citing 28 U.S.C. 1602; H.Rep. No. 1487, 94th Cong., 2d Sess. (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606).

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

Id.

prevent bias and inconsistency, thus increasing fairness both to plaintiff's and to sovereign defendants.¹¹⁵

As may be gathered from the various Executive Branch submissions and newspaper accounts subsequent to the Court of Appeals decision in *Nelson*, it can hardly be said that the process was less political than it would have been prior to the enactment of the FSIA.¹¹⁶

The continuing role of the Executive Branch in cases before the domestic courts which involve human rights violations is in itself an important subject that justifies study. It is well to remember that the reason that victims of human rights violations sue before our courts is because of their inability to find an effective international forum, and because of the unwillingness or inability of the courts of the offending state to grant a remedy. Referring to this frustration experienced by human rights victims, it has been noted that:

[T]he United States has traditionally enjoyed an independent judiciary with a commitment to providing remedies for violations of rights, even where the violators wield the authority of the state. While these traditions may be eroding, as our judiciary becomes increasingly subservient to Executive Branch politics in the adjudication of international law issues, the possibility of justice still beckons.¹¹⁷

The belief that the courts are not providing an effective remedy, when a reasonable interpretation of existing legislation would justify the granting of an effective remedy, helps explain the need to seek congressional intervention. The "move that is afoot" to

See also Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 28 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State) (Congress "put (its) faith in the U.S. courts to work out progressively, on a case-by-case basis the distinction between commercial and governmental" activity.); *Texas Trading & Milling Corp. v. Federal Republic of Argentina*, 647 F.2d 300, 309 (2d Cir. 1981); Letter from Attorney General Michael G. Kleindienst and Secretary of State William P. Rogers to the President of the Senate, January 22, 1973, reprinted in 12 I.L.M. 118, 120 (1973). *Id.*

¹¹⁶ *See, e.g.*, Neil A. Lewis, *U.S. Wants Saudi Torture Suit Settled*, N.Y. TIMES, April 23, 1991; Thomas Lippman, *Saudi Abuses Against Americans Alleged by Publicizing their Harrowing Complaints, Two Americans Have Put the Bush Administration in a Politically Awkward Position*, WASH. POST, May 25, 1992, at A3; *No Ally for Tortured Citizen U.S. Government Joins Saudis Against American Lawsuit*, SEATTLE TIMES, May 25, 1992, at A4; Rosalind Resnick, *Torture Case Comes Home*, NAT'L L. J., March 25, 1991, at 9; *U.S. Opposes American in Case vs. Saudis*, BALTIMORE EVENING SUN, April 9, 1991, at A6; *U.S. Seeks to Prevent Saudis from Being Sued*, N.Y. TIMES, April 9, 1991, at Int'l Sect.; *U.S. Sides Against American in Lawsuit Over Saudi Actions*, CHARLOTTE OBSERVER, May 25, 1992, at 3A; *Workers' Tales of Torture Strain U.S. - Saudi Ties Bush Administration Sides With Mideast Ally Against Citizen in Supreme Court Case*, WASH. POST, May 24, 1992, at A8; Pete Yost, *U.S. Opposes American Who Accused Saudis of Torture*, SACRAMENTO BEE, May 25, 1992, at A10.

¹¹⁷ Fitzpatrick, *supra* note 115, at 344.

amend the FSIA is indicative of the efforts of those who believe that the restrictive theory or principle of sovereign immunity does not and should not shield nations who commit international crimes and violate international norms that embody fundamental human rights. Others simply urge that, in interpreting and applying ambiguous statutory provisions, the courts should be guided by international legal norms. This is of special importance for the United States and the Supreme Court. Writing prior to the Supreme Court reversal in *Nelson*, Professor Hatfield-Lyons¹¹⁸ stated: "The Supreme Court in *Nelson* has an unusual opportunity to send a signal to the world community that United States courts take human rights seriously, and that no one is above the law."¹¹⁹ Speaking on the same occasion, Professor Fitzpatrick¹²⁰ observed: "The case of *Nelson v. Saudi Arabia* signals a welcome receptiveness to the justiciability of claims of torture and arbitrary detention by foreign sovereigns, when such acts have a 'jurisdictional nexus' with commercial activity carried on in the United States by the sovereign or its agents."¹²¹

VIII. CONCLUSION

It is appropriate to conclude by reverting to the initial distinction made between ideals and legally enforceable rights. It was stressed that the domain and special concern of lawyers is not merely human rights in the abstract, but international human rights that are to be given legal effect and enforced. Classical legal scholars can deliver an enlightening lecture commencing with the words *Ubi jus ibi remedium*, i.e., where there is a right, there is a remedy. The words are only the beginning of a most important practical inquiry. Is it true that when there is a right there is a remedy? Are all rights legally enforceable? I have stressed that the role of the lawyer is to strive to achieve effective legal remedies for human rights violations. Hence, the concern of lawyers is the effective enforcement of universally accepted legal norms that have been eloquently set forth in the Universal Declaration of Human Rights. The concern of lawyers ought no less to be the concern of judges within the proper scope of their authority and jurisdiction.

In the area of human rights and liberties the United States has traditionally been a beacon of hope. As for the special role of the Supreme Court, in giving meaning to the words of the Constitution and laws which guarantee basic rights, the Court cannot ignore, restrict or abandon its historic role as the protector of fundamental human rights.

¹¹⁸ Professor, Queen's University, Kingston, Ontario, Canada.

¹¹⁹ Hatfield Lyon, *supra* note 114, at 337.

¹²⁰ Professor and Associate Dean for Academic Affairs, University of Washington.

¹²¹ Fitzpatrick, *supra* note 115, at 338.