Denver Journal of International Law & Policy

Volume 10
Number 2 *Winter*

Article 12

May 2020

Fernandez v. Wilkinson: Making the United States Accountable under Customary International Law

Katharine J. Kunz

Fernandez v. Wilkinson: Making the United States Accountable Under Customary International Law

"We speculate that this opinion has the potential to affect, in addition to the petitioner, only a small subset of aliens consisting of the other approximately 230 Cuban nationals detained at Leavenworth as well as the nearly 1800 Cubans held in federal prisons across the country."[1] United States District Judge Richard D. Rogers humbly shouldered this limitation on the decision in *Fernandez v. Wilkinson*,[2] but under the proper circumstances it may provide a basis for the application of customary international law in the United States courts to litigation in many areas, especially human rights and habeas corpus.

Pedro Rodriguez Fernandez (Rodriguez) arrived in the United States in early June 1980, one of approximately 130,000 Cuban refugees to land during that year's mass immigration, seeking admission into this country. In the course of his entry proceedings he revealed that he had had criminal convictions in Cuba,[3] and that he had in fact been released to come to the United States directly from prison. Under immigration rules, this record made him "excludable" at the border, but Cuba did not respond to diplomatic efforts to return him. As a result, he was detained at the United States Penitentiary at Leavenworth, Kansas, indefinitely to await an apparently not forthcoming deportation. The *Fernandez v. Wilkinson* decision was rendered in habeas corpus proceedings brought against the Leavenworth Penitentiary warden.

The court was particularly impressed by the fact that Rodriguez was detained in a more restrictive area and given fewer privileges than the general inmate population at Leavenworth; but the element of arbitrary detention was the factor critical to the outcome. A specific finding was made that "extended, indefinite confinement in a federal prison [was] deleterious to the personal integrity of petitioner and [could] only be viewed as arbitrary detention."[4] The detention thus was unauthorized by law and an abuse of the discretion of the Attorney General and his delegates.[5]

---

1. Fernandez v. Wilkinson, 505 F. Supp. 787, 800 (D. Kan. 1980), *appeal docketed*, No. 81-1238 (10th Cir. Feb. 27, 1981).

2. 505 F. Supp. 787.

3. The crimes were two thefts of suitcases, in 1959 and 1964, and an attempted burglary. Rodriguez had been sentenced to fourteen years imprisonment for these, plus a penalty of three years for an escape. These offenses fit into the class of crimes of "moral turpitude" rendering an alien visa applicant excludable. 8 U.S.C. § 1182(9) (1976). 505 F. Supp. at 789. It appeared to the district court that he might already be eligible for release had he remained in Cuba. *Id.* at 791-92. No charge was ever made against Rodriguez within the United States.

4. *Id.* at 791.

5. *Id.* at 792.

In cases where aliens are excludable at the border, the relevant applicable rules[6] are similar to those used in deportation proceedings concerning persons earlier admitted into the country:[7] provision is made for minimal hearings and challenge to the Attorney General on the ground of abuse of discretion.[8] It is possible under each category to parole, or "conditionally release," the alien after he is found to be deportable.[9] The regular deportation proceedings contain two safeguards, absent from exclusion proceedings, to which the *Fernandez* court attached great significance. First, the regular deportation statute permits the Attorney General to contact alternative countries if that country from which the alien arrived in the United States refuses to take him back. The exclusion statute contains no such option, because usually an alien is screened for admissibility before he leaves his home for the United States, with the result that "alien convicts are normally disallowed entry to this country when they go through pre-processing prior to departing their home land."[10] Thus the Cuban refugees' situation was "unique in United States history,"[11] for they could not be returned to Cuba without that nation's acceptance, and no other recipient could be discovered.[12]

Second, the deportation statute contains a time limit beyond which the alien's detention is "automatically terminated."[13] That limit is six months, when the alien is to be released "if deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected,"[14] although such release is made subject to the supervision of the Attorney General. The only reference made by the exclusion statute to timing is the provision that the excludable alien's deportation be concluded "immediately."[15] Rodriguez' imprisonment had lasted beyond six months at the time of this decision.

The detention referred to in this discussion is only that which is "for the sole purpose of effecting deportation."[16] If deportation is not realiza-

---

6. Immigration and Nationality Act of 1952, 8 U.S.C. § 1226 (1976).

7. *Id.* § 1252.

8. *Id.* §§ 1105(a), 1226(b).

9. For deportable immigrants, 8 U.S.C. §§ 1252(a)(3), (d); for excludable aliens, 8 U.S.C. § 1182(d)(5). The tragedy that could result where an alien was held indefinitely before parole was possible is exemplified in Shaughnessy v. Mezei, 345 U.S. 206 (1953).

10. 505 F. Supp. at 792.

11. Testimony of Immigration and Naturalization Service [INS] District Director, George W. Geil, in hearing on another (unspecified) Cuban detainee's habeas corpus case. *Id.*

12. In effect the INS was stuck with Pedro Rodriguez and the others. It was granted by the court that the situation was likely occasioned by an innocent failure of the authorities to adjust timely immigration procedures to meet the challenge of the mass immigration. *Id.* at 792, 794, 799.

13. *Id.* at 793. 8 U.S.C. § 1252(c).

14. *Id.*

15. 8 U.S.C. § 1227(a).

16. 505 F. Supp. at 793, *citing* Wong Wing v. United States, 163 U.S. 228, 235 (1896);

ble within the time limit, the "continued detention of the alien [is] without cause."[17] In cases where the alien is determined to be a security risk, or when he has been charged or convicted in accordance with United States law and procedure, it is possible that he might legally be detained past the statutory limit. The *Fernandez* court declared, however, that "indeterminate detention in a maximum security prison of excluded aliens who have not been convicted of a crime in this country or found to be a security risk is arbitrary and every bit as objectionable as indefinite detention of deportable aliens."[18]

The most peculiar difference to be found between the treatment of excluded aliens and those who have been admitted into the United States, later to become deportable, is the "time-honored legal fiction" according to which certain excludable and excluded aliens "are not recognized under the law as having entered our borders. Consequently, these nonentrants customarily have not enjoyed the panoply of rights guaranteed to citizens and alien entrants by our Constitution."[19] In the absence of argument against this precedent in the *Fernandez* proceedings, the court reaffirmed its legitimacy,[20] at the same time setting the basis for an unprecedented constitutional ruling.

On the authority of the legal fiction of nonentry, the court rejected the petitioner's claim that his detention violated the Eighth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution.[21] It summarized these holdings and the breadth of the resulting problem in this fashion:

> We have declared that indeterminate detention of petitioner in a maximum security prison pending unforeseeable deportation constitutes arbitrary detention. Due to the unique legal status of excluded aliens in this country, it is an evil from which our Constitution and statutory laws afford no protection. Our domestic laws are designed to deter private individuals from harming one another and to protect individuals from abuse by the State. But in the case of unadmitted aliens detained on our soil, but legally deemed to be outside our borders, the machinery of domestic law utterly fails to operate to assure protection.[22]

Unable to find relief under domestic law, the court then sought to deter-

---

Kusman v. District Director of Immigration, 117 F. Supp. 541 (S.D.N.Y. 1953).

17. 505 F. Supp. at 793. *See also* Ross v. Wallis, 279 F. 401 (2d Cir. 1922); *Kusman*, 117 F. Supp. 541.

18. 505 F. Supp. at 794.

19. *Id.* at 790. As authority for the constitutionality of this denial of rights, the court cites, *inter alia*, Fiallo v. Beal, 430 U.S. 787 (1977); Matthews v. Diaz, 426 U.S. 67 (1976); Kleindienst v. Mandel, 408 U.S. 753 (1972); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953), *citing* Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring); Knauff v. Shaughnessy, 338 U.S. 537 (1950).

20. 505 F. Supp. at 790.

21. *Id.*

22. *Id.* at 975.

mine whether relief was available under international law.

An *amicus curiae* brief filed by Kansas Legal Services was credited with raising the argument adopted by the court that "international law secures to petitioner the right to be free of arbitrary detention and that his right is being violated."[23] The *amicus* brief cited two multilateral instruments: the Universal Declaration of Human Rights[24] and the American Convention on Human Rights,[25] the latter signed by President Carter in 1977. The court responded favorably, reciting the provisions on arbitrary detention, and brought into the discussion two more documents, the European Convention for the Protection of Human Rights and Fundamental Freedoms[26] and the International Covenant on Civil and Political Rights,[27] quoting from the latter at length in the text of the opinion.[28] The court noted that since the United States is not a ratifying party to the American Convention, the European Convention, or the Covenant on Civil and Political Rights, the present petitioner had alleged no direct violation of a binding treaty obligation.[29] But there remains the important effect given by internal United States law to international law, both by constitutional mandate and by governmental policy.

Illustrating the Carter Administration's attitude toward arbitrary detention within the context of the United States' international obligations, the court quoted Patricia M. Derian, President Carter's Assistant Secretary of State for Human Rights and Humanitarian Affairs: "Our human rights concerns embrace those internationally recognized rights found in the United Nations Declaration of Human Rights. The specific focus of our policy is to seek greater observance by all governments of the rights of the person including . . . freedom from arbitrary detention."[30] And for

---

23. *Id.*

24. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

25. American Convention on Human Rights, *done at* San Jose, Nov. 22, 1969, *entered into force* July 18, 1978, O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21, rev. 6, (1979); *reprinted in* 9 INT'L LEGAL MAT. 673 (1970).

26. Convention for Protection of Human Rights and Fundamental Freedoms, *done at* Rome, Nov. 4, 1950, *entered into force* Sept. 3, 1953, [1950] Europ. T.S. No. 5 (1968), 213 U.N.T.S. 221.

27. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 INT'L LEGAL MAT. 168 (1967).

28. 505 F. Supp. at 797.

29. *Id.* at 795. The court recognized the binding obligation of the United States under the United Nations Charter. *Id.* at 796. *See generally* Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE L. REV. 263 (1980). On the changing nature of the acceptance under international law of the human rights of individuals, *see generally* Ferguson, *International Human Rights*, 1980 L. FORUM 681 (1980); Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L.S. L. REV. 11 (1978); Nanda, *From Gandhi to Gandhi—International Legal Responses to the Destruction of Human Rights and Fundamental Freedoms in India*, 6 DEN. J. INT'L L. & POL'Y 19 (1976); Note, *Detention Without Trial in Kenya*, 8 GA. J. INT'L & COMP. L. 441 (1978).

30. 505 F. Supp. at 798, *quoting* Derian, *Human Rights and U.S. Foreign Policy—The*

expression of Congress' recognition of the same commitment, it quoted Congressman Donald M. Frasier, former Chairman of the Subcommittee on International Organizations and the Commission on International Relations, House of Representatives:

> Generally [Congress has] said the military aid should be reduced or terminated to a country guilty of a consistent pattern of gross violations of internationally recognized human rights. We define gross violations as those involving the integrity of the person: torture, prolonged detention without charges or trial, and other cruel and inhuman treatment.[31]

The court continued, borrowing from the recent decision in *Filartiga v. Pena-Irala*,[32] two citations from which set forth the traditional interpretation of constitutional references to international law as part of the law of the United States. The *Filartiga* court cited Justice Marshall's 1815 statement that absent congressional enactment,

> United States courts are 'bound by the law of nations, which is a part of the law of the land.' These words were echoed in *The Paquete Habana* [1900]: '[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.'[33]

An important, insightful rule stated in *Filartiga* as a basis for determination of customary international law was applied without modification to bring together all of the various authorities cited by the *Fernandez* court:[34]

> Principles of customary international law may be discerned from an overview of express international conventions, the teachings of legal scholars, the general custom and practice of nations and relevant judicial decisions. [Citation omitted.] When, from this overview a wrong is found to be of mutual, and not merely several, concern

---

Executive Perspective, [1978] INT'L HUMAN RIGHTS L. & PRAC. 183. For an insightful appraisal of the United States' human rights policy under the Carter administration, see GLOBAL HUMAN RIGHTS 3-91 (V. Nanda, J. Scarritt, & G. Shepherd eds. 1981).

31. 505 F. Supp. at 797-98, *quoting from* Frasier, *Human Rights and U.S. Foreign Policy—The Congressional Perspective*, [1978] INT'L HUMAN RIGHTS L. & PRAC. 171, 178.

32. 630 F.2d 876 (2d Cir. 1980). *See* Development, *Filartiga v. Pena-Irala: Providing Federal Jurisdiction for Human Rights Violations through the Alien Tort Statute*, 10 DEN. J. INT'L L. & POL'Y 355 (1981).

33. 630 F.2d at 887. The Court relied on The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815), and The Paquete Habana, 175 U.S. 677 (1900), for these principles.

34. In addition to those mentioned *supra* in notes 22-25, 28-34, the court relied on: Arbitration Matter of France *ex rel* Madame Julien Chevreau, M.S. Dep't of State, file no. 500, AIA/1197, *quoted in* 1 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 440-63 (1937); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Order of 29 January 1971, [1971] I.C.J. 12, 76 (separate opinion of Vice President Ammoun); Bilder, *The Status of International Human Rights Law: An Overview*, [1978] INT'L L. & PRAC. 1, 8; Stotzky, *Book Review*, 11 MIAMI J. INT'L L. 229 (1979).

among nations, it may be termed an international law violation.[35]

Determining that the presence of rules against arbitrary detention in the cited international instruments indicates this mutual concern, and distilling from these and other sources a consensus of international law on arbitrary detention according to the rule in *Filartiga*, the court declared that there was an international law violation in the treatment of Rodriguez. Applying this rule to the situation presented, the court concluded that "even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially [remediable] as a violation of international law."[36]

The final ruling was an order that the respondent terminate the arbitrary detention of the petitioner within ninety days, by deportation, release on parole, determination of security threat or likelihood of absconding, or transfer to a refugee camp; if termination according to one of these or another reasonable alternative was not effected within the prescribed time, the court would grant the writ of habeas corpus and release Rodriguez on parole.[37]

The effect of *Filartiga v. Pena-Irala* was to grant foreign nationals a United States forum for the vindication of violations of international law, specifically in contravention of the law against torture.[38] The unanswered question is how that decision will affect violations of other, similarly well-established rules of international law. The decision in *Fernandez v. Wilkinson* has made a logical application of the rule: the United States, too, is bound by customary international law and will be held to the accordant standard of conduct by its own courts.

The limitation inherent in the facts of this case cannot be disregarded, for had Rodriguez been a United States resident there would have been no question of his eligibility for habeas corpus relief under the Constitution. By the strength of the authority and reasoning mustered by the court in support of its conclusion, however, this decision could surpass that limitation. In essence, the court said that where there exists a shortfall in constitutional protection to the disadvantage of any individual within United States territory, if there is adequate protection under customary international law the court will apply the customary rule. The question arises, then, what will be the reaction of courts if domestic law—constitutional or general, statutory or common—is challenged as falling short of a principle of international law. It is submitted that a strong case may be made under *Fernandez* for the supremacy of customary international law.

Katharine J. Kunz

---

35. 505 F. Supp. at 798, *citing Filartiga*, 630 F.2d 876 (1980).
36. 505 F. Supp. at 798.
37. *Id.* at 800.
38. Note 32 *supra*.