Human Rights, International Law and Domestic Courts

Judge Edward D. Re

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HUMAN RIGHTS, INTERNATIONAL LAW
AND DOMESTIC COURTS

JUDGE EDWARD D. RE*  

GREETINGS  

Father Harrington, Reverend Members of the Clergy, Eminent Jurists, Distinguished Public Officials, Dean Hasl, Members of the Faculty, Alumni and Friends of St. John's.  

Permit me at the outset to extend a special welcome to all of our foreign guests to the United States, the great City of New York and St. John's University. It is with great pleasure and pride that I welcome our renowned participants in this Roundtable. Of course, I refer to the distinguished jurists who honor us with their presence: Hon. Antonio Brancaccio, Chief Justice, Supreme Court of Cassation of Italy; Hon. Pierre Drai, Chief Justice, Supreme Court of Cassation of France; Hon. Giovanni E. Longo, President of Division, Supreme Court of Cassation of Italy; and Hon. Brian Walsh, Justice, European Court of Human Rights, former Justice, Supreme Court of Ireland.  

A special word of gratitude is due to my dear friend and colleague, His Excellency Justice Giovanni Longo, for his invaluable contribution in the selection of the distinguished panelists. May I add that Justice Longo also serves as Secretary General of the Union Internationale des Magistrats (International Association of Judges).

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Chief Judge Emeritus of the United States Court of International Trade and Distinguished Professor of Law, St. John's University School of Law. Judge Re was Chairman of the Foreign Claims Settlement Commission of the United States and Assistant Secretary of State for Education and Cultural Affairs. He served as Chair for the American Bar Association's Section of International and Comparative Law, as President of the American Society of Comparative Law and is a Member Emeritus of the Board of Higher Education of the City of New York. Effective December 15, 1993, the International Association of Judges appointed Judge Re as its Principal Representative to the United Nations. On January 13, 1994, Chief Justice Rehnquist appointed Judge Re a member of the U.S. Judicial Conference Committee on International Judicial Relations.
I also wish to thank all of the judges, members of the faculty and alumni who are in the audience, and who will take part in this panel discussion. All of you will help make this portion of our rededication ceremonies both intellectually stimulating and memorable.

I. INTRODUCTION

The theme of our Conference holds great meaning for freedom-loving people everywhere. The subject of our deliberations deals with the role of law and the role of the courts in effectuating human rights. Although we will discuss international law, our primary concern is the role of domestic courts in giving effect to human rights and fundamental freedoms as enforceable legal norms.

Although human rights as ideals continue to be the concern of philosophers, jurists must consider and ascertain which of the ideals that may be described as fundamental human rights are legally enforceable. Are the ideals merely moral norms, or are they legal rights to be legally enforced? It is to be noted at the beginning of our deliberations that, when we acknowledge the existence of human rights, we have also admitted that there are limitations upon the power of government. Hence, individuals enjoy certain human rights that governments have a duty to respect.

On the international level, the existence of human rights implies a limitation upon the unfettered sovereignty of states,¹ as

¹ See, e.g., The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812). The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. Id. at 136; Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (holding that deliberate torture under color of authority violates accepted international standards); see also Jeffrey A. Blair & Karen E.M. Parker, Comment, The Foreign Sovereign Immunities Act and International Human Rights Agreements: How They Co-Exist, 17 U.S.F. L. REV. 71 (1982). The Comment suggests that under the Foreign Sovereign Immunities Act of 1976 (see infra note 39) foreign governments may be precluded from asserting immunity from U.S. jurisdiction in circumstances where they are being sued for human rights violations. Id. at 72. Countries which are signatories to international agreements may not claim immunity if the act for which they have
well as a duty upon nations to respect these rights. 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 as moral or ethical norms, but with human rights as legally enforceable norms. It is interesting to note that the great Roman jurist Ulpian, commenting upon 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.”

As I have noted, 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 philoso-
phy undoubtedly influenced the Universal Declaration of Human Rights.\textsuperscript{8} Regardless of the underlying basis, no nation today may claim the sovereign right to violate universal rights deemed to be fundamental or unalienable.\textsuperscript{9} 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 exist to give these rights vitality and make them a reality.

II. INTERNATIONAL LAW AND HUMAN RIGHTS

Many of these fundamental human rights are at the heart of modern international law.\textsuperscript{10} For Americans, it is important to remember that international law is part of the law of the land.\textsuperscript{11}

\textsuperscript{8} G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 16, at 71-77, U.N. Doc. A/810 (1948), reprinted in Jack Donnelly, International Human Rights 165 (1993) [hereinafter "Universal Declaration"]. Article 3 of the Universal Declaration states that "[e]veryone has the right to life, liberty and the security of person." \textit{Id.} at 166. Also compare Article 12 of the Universal Declaration ("[N]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence ...") \textit{with} the Bill of Rights in U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... "). \textit{See also} Louis Henkin, Rights: American and Human, 79 Colum. L. Rev. 405, 415 (April 1979) ([M]ost of the Universal Declaration of Human Rights, and later the International Covenant on Civil and Political Rights, are in their essence American constitutional rights projected around the world."). In the past, the United States has been a leader and major sponsor in promoting human rights efforts in the international arena. Diab, \textit{supra} note 1, at 324.

\textsuperscript{9} \textit{See} Goldberg, \textit{supra} note 2.

\textsuperscript{10} \textit{See} Edward D. Re, Freedom in the International Society, in CONCEPT OF FREEDOM 217, 257 (Carl W. Grindel ed., 1955), referring to the numerous liberties preserved by the Universal Declaration:

\begin{quote}
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 ... freedom to leave any country, freedom of movement and residence, right of asylum from persecution, equal rights as to marriage ... freedom of religion, expression, assembly, association ... right to work ... right to rest and leisure ... right to equality before the law, and freedom from discrimination.
\end{quote}

\textit{Id.}

\textsuperscript{11} The Paquete Habana, 175 U.S. 677 (1900). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction ... ". \textit{Id.} at 700; \textit{see} U.S. CONST. art. VI, \textit{§} 2 ("[A]ll Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land ... ."); Restatement (Third) of Foreign Relations Law \textit{§} 111 (1986) ("International
Justice Harry Blackmun, at a recent speech before the American Society of International Law, spoke about “the Supreme Court, the law of nations, and the place in American jurisprudence for what the drafters of the Declaration of Independence termed 'a decent respect to the opinions of mankind.'”

Justice Blackmun noted:

The early architects of our nation were experienced diplomats who appreciated that the law of nations was binding on the United States. John Jay, the first Chief Justice of the United States, observed, in a case called *Chisolm v. Georgia*, that the United States “had, by taking a place among the nations of the earth, become amenable to the laws of nations.” Although the Constitution, by Art. I, § 8, cl.10, gives Congress the power to “define and punish ... Offenses against the Law of Nations,” and by Art. VI, cl.2, identifies treaties as part of “the supreme Law of the Land,” the task of further defining the role of international law in the nation's legal fabric has fallen to the courts.

After indicating that “[s]everal first principles have been established,” Justice Blackmun stated:

As early as 1804, the Supreme Court recognized that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.” In a trilogy of cases in the 1880s, the Court established that treaties are on equal footing with federal statutes and that, where a treaty and statute cannot be reconciled, the later in time is controlling.

Of particular importance to us is Justice Blackmun's discussion of the now classic case, *The Paquete Habana*, where he noted:

[The Supreme Court addressed the power of courts to enforce customary international law. In invalidating the wartime seizure of fishing vessels as contrary to the law of nations, the Court observed: “International law is part of our law, and must be ascertained and administered by the courts.” Where no

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13 Id. at 1 (emphasis added) (citation omitted).
14 Id.
15 Id. at 1, 6 (emphasis added) (citations omitted).
16 175 U.S. 677 (1900).
Thus, Justice Blackmun concluded by asserting that "[t]hese early principles established during the Supreme Court's first century continue to define the relationship between the law of nations and domestic American law." After introducing his subject as indicated above, Justice Blackmun announced the subject of his talk by stating that he wished to consider "the Supreme Court's application of these principles in four of the Court's recent cases." A word about each of these cases may be useful.

In United States v. Alvarez-Machain, the Court held that the forced abduction of a Mexican national by United States agents did not violate a United States-Mexico extradition treaty. Dr. Alvarez-Machain was kidnapped in Mexico and brought to the U.S. to stand trial for murder. Justice Blackmun, who was one of the three dissenting Justices, argued that "transborder kidnaping" contravened the very "spirit and purpose" of the treaty, which was to "preserve the territorial integrity of nations, protect individuals from arbitrary detention and arrest, and prevent international conflict." Again, in Sale v. Haitian Centers Council, Inc., Justice Blackmun dissented from the Court's decision to uphold the U.S. policy of "intercepting Haitian refugees on the high seas and summarily returning

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17 Blackmun, supra note 12, at 6 (emphasis added).
18 Id.
19 Id.
22 Id. at 670. Dr. Alvarez-Machain was charged with the kidnapping, torture and murder of a United States Drug Enforcement Administration [DEA] Agent. Id. at 657. Subsequently, DEA agents forcibly abducted Dr. Alvarez-Machain from his medical office in Mexico, and flew him by private plane to Texas where he was arrested. Id. After a motion to dismiss the indictment, the federal district court held that it did not have jurisdiction to try the doctor because his abduction violated the U.S.-Mexico Extradition Treaty. Id. at 657-58. The Supreme Court, however, reversed, concluding that the treaty had not been violated, and declined to imply a term to the treaty prohibiting international abductions. Alvarez-Machain, 504 U.S. at 669.
23 Id. at 657.
24 Blackmun, supra note 12, at 6.
them to Haiti." According to Justice Blackmun, such a ruling failed to respect the United Nations Convention Relating to the Status of Refugees by allowing "vulnerable refugees" to be returned to a place of persecution.

The remaining two cases, Thompson v. Oklahoma and Stanford v. Kentucky, raised challenges to the execution of juvenile offenders. In Thompson, a plurality opinion ruled that "civilized standards of decency embodied in the Eighth Amendment prohibited" use of the death penalty against the juvenile defendant. By following the standard of many countries which had outlawed juvenile capital punishment, the majority arrived at a decision "consistent with international practice." In Stanford, however, the majority held that regardless of the United States' ratification of an international treaty explicitly prohibiting juvenile death penalties, the execution of the juvenile defendant was constitutionally valid. Justice Scalia distinguished the case by "emphasiz[ing] that it is American conceptions of decency that are dispositive, [and] rejecting the contention ... that the sentencing practices of other countries are relevant."

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28 Blackmun, supra note 12, at 7; see Sale, 113 S. Ct. at 2567-68 (Blackmun, J., dissenting) (arguing that both treaty and statute precluded Government from forcibly returning refugees to peril). The United States Coast Guard had been ordered by the President to intercept vessels unlawfully carrying passengers from Haiti to the United States and repatriate those passengers to Haiti without first ascertaining whether they were refugees. Id. at 2552. The Supreme Court concluded that no existing treaty or statute placed "any limit on the President's authority to repatriate aliens interdicted beyond the territorial seas of the United States." Id. at 2567.


30 Blackmun, supra note 12, at 7; see Sale, 113 S. Ct. at 2568 (Blackmun, J., dissenting) (arguing that terms of Convention unambiguously state that "[v]ulnerable refugees shall not be returned").

31 Blackmun, supra note 12, at 8 (quoting Thompson, 487 U.S. at 830).

32 Id.

33 Stanford, 492 U.S. at 368.

34 Id. at 369 n.1. "While [t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident... they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people." Id. (emphasis added) (quoting Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))
tice Brennan’s dissent in Stanford noted that “[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.”35 After referring to the four cases previously discussed, Justice Blackmun proffered that “unfortunately, the Supreme Court has shown something less than ‘a decent respect to the opinions of mankind.’”36

III. SAUDIA ARABIA V. NELSON37

Although I will not discuss further the four cases cited by Justice Blackmun, I would like to discuss a fifth case which also raises human rights concerns and deals with the role of international law in the adjudication of cases by domestic tribunals in general, and the Supreme Court of the United States in particular. This case is Saudia Arabia v. Nelson,38 decided by the Supreme Court on March 23, 1993. In broad terms, the Nelson case dealt with the interpretation of the United States Foreign Sovereign Immunities Act39 in a situation in which an American plaintiff claimed to have been mistreated and tortured by a foreign sovereign.40 Even beyond the interpretation of a domestic statute that deals with the immunity to be accorded a foreign sovereign before domestic courts, the case reveals the extent to which the courts are willing to give effect to universal legal norms and fundamental principles of international law.

The facts of Nelson are clear and straightforward. One may speak of “the facts,” since the defendants moved to dismiss for lack of jurisdiction, and, therefore, the facts as alleged by Nelson are deemed to be true for purposes of the motion.41

(Cardozo, J.)).

35 Stanford, 492 U.S. at 390 (Brennan, J., dissenting); see also Blackmun, supra note 12, at 8. “[T]he United States ‘stands almost alone in the world in executing offenders who were under 18 at the time of the crime.” Id. (referring to report of Amnesty International).


38 Id.


41 Id. at 351.
The plaintiff, Scott Nelson, while in the United States, saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital (the Hospital) in Riyadh, Saudi Arabia. The Hospital Corporation of America (HCA), an independent organization organized under the laws of the Cayman Islands, under contract with the Kingdom of Saudi Arabia, conducted recruitment in the United States of American employees for the Hospital. Nelson was recruited in the United States and subsequently interviewed by Hospital officials in Saudi Arabia. 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. The contract of employment was executed in Miami, Florida, in 1983.

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.” Nelson’s difficulties began when, in the performance of his duties, he discovered certain safety hazards at the Hospital. After he reported these safety hazards to an investigative commission of the Saudi government, Nelson was summoned to the Hospital’s security office. He alleged that he was subsequently taken to a jail cell where agents of the Saudi Government “shackled, tortured, and beat” him.

After his release and return to the United States, asserting that the court had subject matter jurisdiction under the FSIA, Nelson sued Saudi Arabia, the Hospital and the Hospital’s purchasing agent, in the United States District Court for the Southern District of Florida. The FSIA provides that a “foreign state

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42 Id. at 352.
43 Id. at 351-52.
44 Id. at 352.
45 Nelson, 507 U.S. at 352.
46 Id. Note that the facts of Nelson’s recruitment, particularly the activities in the United States, were important to his claim because the Foreign Services Immunities Act, under which Nelson sought jurisdiction over Saudi Arabia, only confers jurisdiction where an action is “based upon a commercial activity carried on in the United States by the foreign state.” 28 U.S.C. § 1605(a)(2) (1988).
47 Nelson, 507 U.S. at 352 (citation omitted).
48 Id.
49 Id.
50 Id. at 353 (citation omitted).
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." 52

The district court granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction, concluding that the "link between the recruitment activities and the defendants is not sufficient to establish 'substantial contact' with the United States" within the meaning of the commercial activity exception of the FSIA. 53 Moreover, the district court noted that, "even if the court had determined 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. 54

The Court of Appeals for the Eleventh Circuit reversed, holding that "the recruitment and hiring of Nelson in the United States ... was a commercial activity of Saudi Arabia" having "substantial contact with the United States." 55 As previously mentioned, the recruitment of Nelson in the United States was conducted by the HCA, a wholly owned subsidiary of an American Corporation, which in 1973 contracted with the Kingdom of Saudi Arabia to recruit employees for the Hospital. 56 The Court of Appeals noted that the contract, which created an agency relationship between the HCA and Saudi Arabia, empowered the HCA 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." 57

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

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*1 (S.D. Fla. Aug. 11, 1989) (mem.).
53 Nelson, 1989 WL 435302, at *2; see 28 U.S.C. § 1603(e) (1988) (providing definition of commercial activity carried on in U.S. by foreign state as "having substantial contact with the United States").
56 Id. at 1533.
57 Id.
acts for which damages [we]re sought, and the foreign sovereign's commercial activity." The Court of Appeals also concluded that the "detention and torture of Nelson [we]re so intertwined with his employment at the Hospital that they [we]re 'based upon' his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia." Hence, the Court of Appeals reversed the district court because it found Nelson's detention and torture directly attributable to the performance of his duties under the employment contract.

Subsequent to the decision of the Eleventh Circuit, the Department of State joined the defendants in urging a reconsideration en banc. The Court of Appeals denied the request, and the Executive Branch joined the defendants in their petition for certiorari before the Supreme Court. Even before the granting of the petition, the case had generated considerable media interest, and the titles or headlines of the news items suggest their content. The Supreme Court granted the petition for certiorari on June 8, 1992, and on March 23, 1993, reversed the Court of Appeals and dismissed the plaintiff's case in its entirety.

Justice Souter's opinion, which 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 conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States.

...

We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be

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58 Id. at 1534.
59 Id. at 1535.
60 Nelson, 923 F.2d at 1536.
64 Nelson, 507 U.S. at 363.
65 Id. at 366.
commercial activity by a foreign state, and we do not address
the case where a claim consists of both commercial and sover-
eign elements. We do conclude, however, that where a claim
rests entirely upon activities sovereign in character ... jurisdic-
tion will not exist under that clause regardless of any con-
nection the sovereign acts may have with commercial activity.66

Justice White’s concurring opinion convincingly demonstrated
that Saudi Arabia was engaged in a commercial activity or
“commercial enterprise.”67 In his words, “the state-owned
hospital was engaged in ordinary commercial business ... .”68 In
“get[ting] even with a whistle blower,” it did not matter to
Justice White whether the sovereign resorted to “thugs or
government officers to carry on its business.”69 Yet, 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 Nelsens’ suit, lacks a sufficient
nexus to the United States.”70

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.71 Justice Kennedy, with whom
Justices Blackmun and Stevens joined, stated that the counts of
failure to warn of foreseeable dangers “are based upon commer-
cial activity having substantial contact with the United States,”
since “they complain of a negligent omission made during the re-
cruiting of a hospital employee in the United States.”72

Justice Stevens, in his dissent, set forth the reasons why he
voted for an affirmance of the Court of Appeals.73 In his view,
Justice White “demonstrated ... [that the] operation of the hospi-
tal and its employment practices and disciplinary procedures are

66 Id. at 358 n.4.
67 Id. at 365 (White, J., concurring).
68 Id. at 369 (White, J., concurring).
69 Nelson, 507 U.S. at 368 (White, J., concurring) (stating that case should “turn
on whether sovereign is acting in a commercial capacity, not on whether it resorts to
thugs or government officers to carry on its business”).
70 Id. at 370 (White, J., concurring).
71 Nelson, 507 U.S. at 370-76 (Kennedy, J., concurring in part and dissenting in
part).
72 Id. at 371 (Kennedy, J., concurring in part and dissenting in part).
73 Id. at 377-79 (Stevens, J., dissenting).
‘commercial activities’ within the meaning of the statute.” Unlike Justice White, however, Justice Stevens stated:

[Saudia 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 [his] 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 ...."75

In a brief review of the Nelson case, it was noted that “[s]ome regular observers of the [FSIA] will no doubt be disappointed that the Court in this case did not provide doctrinal clarification of several of the obvious unresolved issues arising under the [FSIA] ... failed to use this case as a vehicle for providing a remedy in U.S. courts for intentional torts committed by foreign states in their own territory.”76 The reviewer, however, concluded “that Justice Souter struck the right balance between the competing considerations.”77 Yet, in light of the Eleventh Circuit decision, a move to amend the statute was initiated so as to grant relief for intentional torts committed overseas.78 Surely, “those interested in the expansion of human rights law,” as well as those who initiated the move to amend the statute, will not agree that the majority struck the right balance.79

Following the Eleventh Circuit’s ruling in Nelson, the Judiciary Committee of the United States House of Representatives proposed certain amendments to the FSIA,80 one of which would

74 Id. at 378 (Stevens, J., dissenting).
75 Id. at 378-79 (Stevens, J., dissenting).
77 Id.
78 Id.
80 See FOREIGN SOVEREIGN IMMUNITIES AMENDMENTS, H.R. REP. No. 900, 102d Cong., 2d Sess. 1 (1992) (reporting amendments to bill relating to jurisdictional immunities of foreign states in certain tort cases and recommending that bill be passed in amended form); FOREIGN SOVEREIGN IMMUNITIES AMENDMENTS, H.R. REP. No. 702, 103d Cong., 2d Sess. 1 (1994) (reporting added amendments to bill relating to
grant U.S. courts jurisdiction over any case in which:

money damages are sought against a foreign state for personal injury or death of a United States citizen occurring in such foreign state and caused by the torture or extrajudicial killing of that citizen by such foreign state or by any official or employee of such foreign state while acting within the scope of his or her office or employment.  

The Report noted that "[i]n recent years, several U.S. citizens have been tortured abroad and have faced difficulties in obtaining a remedy." Conscious that State Department intervention, or use of the Torture Victim Protection Act, might not provide an effective remedy, the Committee sought to expand the circumstances under which an American who has been subjected to torture by a foreign state may bring suit in United States courts. Considering the limited remedies jurisdictional immunities of foreign states in certain cases involving torture and extrajudicial killing and recommending that bill be passed as amended).

FOREIGN SOVEREIGN IMMUNITIES AMENDMENTS, H.R. REP. No. 900, 102d Cong., 2d Sess. 1 (1992). The proposed amendments contained in this Report were intended to supplement and supersede a bill which was introduced in the House of Representatives more than two years prior to the Nelson ruling to amend section 1605(a) of the FSIA. See H.R. 2357, 102d Cong., 1st Sess. (1991). H.R. 2357 proposed a new section which would, as an exception to foreign sovereign immunity, grant U.S. courts jurisdiction over conflicts in which:

money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, of a United States citizen employed by such foreign state, occurring in such foreign state and caused by the tortious act or omission of such foreign state or of any official or employee of such foreign state while acting within the scope of his or her office or employment.

H.R. 2357 at 2. The essential difference between the original bill and the Committee Report is that the Committee Report specifically deals with “torture or extrajudicial killing.” H.R. 900; see also H.R. REP. No. 702, supra note 80 (adding “act of genocide” to extrajudicial killing and torture as additional exception to foreign sovereign immunity).

H.R. REP. No. 900 at 3.

Pub. L. No. 102-256, 106 Stat. 73 (1992). “An individual who, under actual or apparent authority, or color of law, of any foreign nation ... subjects an individual to torture shall, in a civil action, be liable for damages to that individual ....” Id.

See H.R. REP. No. 900 at 3-4 (“State Department’s familiar role of ... maintaining foreign relations may conflict with its role of defending the rights of U.S. citizens;” because “[t]VPA will not be available to all U.S. citizens who are tortured abroad because in many cases the plaintiff may not be able to obtain personal jurisdiction over the individual torturers, or may not even know their identity”).

See text accompanying note 81. The Committee expressed the view that the U.S. had abdicated its “moral responsibility to provide leadership in the area of human rights by undertaking efforts to extend the scope of international laws protecting those rights.” H.R. REP. No. 900 at 4. “[A]n action constituting a violation of set-
available to victims of torture abroad, and the potential deprivation of their "day in court," it would indeed be appropriate for Congress seriously to consider amending the FSIA so as to reflect the restrictive theory of sovereign immunity.86

IV. INTERNATIONAL LEGAL NORMS AND DOMESTIC COURTS

In the allegations of torture in the Nelson case, two points should be noted. First, as a matter of international law, torture should be included among a state’s erga omnes87 duties. Torture is expressly condemned by Article 5 of the Universal Declaration88 and by the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.89 These obligations or duties which bind all nations are well-recognized peremptory norms under the doctrines of erga omnes and jus cogens.90

86 The proposed amendments were not enacted. The House Report on the bill to which the amendments were to apply is H.R. 2357. (The complete bill tracking report of H.R. 2357, the precursor to H.R. REP. No. 900, is available in LEXIS, Legis Library, BLT102 File)

87 Erga omnes means the concern of all, and it has been used to describe a right so important that all states have a legal interest in its protection. See Philip S. Wellman, Human Rights, International Law, and the Federal Courts, 7 CONN. J. INT’L L. 181 (1991) (reviewing KENNETH C. RANDALL, FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM (1991)). Wellman characterizes the author’s premise as one which envisions “an international legal system working beyond the traditional Westphalian boundaries and protecting all individual victims of terrorist acts and human rights violations.” Id. at 217.

88 See Universal Declaration, supra note 8, at 166 (stating that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).


90 “Jus cogens is defined as law so compelling that it invalidates rules consented to by states by treaty or custom and represents a core group of fundamental norms
In addition to this first point of international law, a second point that should be noted is that these international legal principles are also relevant in interpreting domestic statutes.\(^9\) Hence, quite apart from the views of scholars who strongly assert that governments do not enjoy sovereign immunity when they commit gross human rights violations,\(^9\) others would have hoped that the FSIA would have been interpreted more in keep-

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\(^9\) See Judicial Education on International Law Committee of the Section of International Law of the American Bar Association: Final Report, 24 INT'L LAW. 903, 907-08 (Fall 1990) [hereinafter “Final Report”]. “[I]nternational legal norms may find their way into United States law ... when incorporated by reference in statutes or by private parties in their dealings inter se, or when used by courts to inform the content of otherwise ambiguous Constitutional or statutory provisions.” Id. at 914 (footnote omitted).

\(^9\) See, e.g., Jordan J. Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine, 23 VA. J. INT'L L. 191 (1983). Those acts which deprive foreign states and individuals of immunity include human rights violations, genocide and international terrorism. Id. at 223-25. Paust contends that even violations of international law which occur entirely within a state's territorial boundaries “are not immune to responsive action by or on behalf of the international community.” Id. at 222 (emphasis added). Paust has also contended that the very notion of “sovereignty” is contingent upon obedience to, and respect for, international law. Jordan J. Paust, Draft Brief Concerning Claims to Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violators of International Law Under the FSIA, 8 HOUS. J. INT'L L. 49, 59 (1985) [hereinafter “Paust, Draft Brief”]. Accordingly, “judicial deference to foreign state acts is rightly conditioned upon foreign state respect for international law .... [A]n illegal act is incapable of protection by the judiciary.” Id. Furthermore, states will not enjoy immunity for illegal acts committed by their agents or officials under the premise that such acts were “discretionary” in nature. Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980). Thus, the Republic of Chile was denied sovereign immunity under FSIA section 1605(a)(5)(A) in an action for the assassination of a former Chilean ambassador and foreign minister. Id. But see Diab, supra note 1, at 335 (offering argument that human rights concerns should “be left exclusively to the domestic legislation of a sovereign state”). Human rights “are not to be controlled through international agreement or monitored by international tribunals.” Id.
HUMAN RIGHTS

ing with the Congressional intent of depoliticizing these determinations in specific cases. As stated by a Canadian scholar: "Indeed, the whole rationale for legislating the restrictive theory [of sovereign immunity] in the first place was to give the Executive distance from the whole process to ensure less political, more legal decisions." 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 prevent bias and inconsistency, thus increasing fairness both to plaintiffs and to sovereign defendants.

It cannot be questioned that the two broad purposes of the FSIA were to codify the restrictive theory of sovereign immunity and to transfer the responsibility of determining the applicability of sovereign immunity in specific cases from the executive to the judicial branch. The legislative history of the bill, the Foreign Sovereign Immunities Act of 1976, sets forth the constitutional authority for the enactment of the legislation. In the discussion of section 1602, entitled "Findings and Declaration of Purpose," it is expressly stated:

[Decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity; that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally

93 See, e.g., Hatfield-Lyon, supra note 36, at 336 (suggesting that since premise of creating exceptions to sovereign immunity was to allow non-political, legal resolutions of claims, FSIA should be construed as such).
97 See id.
In signing the legislation, President Ford stated:

This statute will also make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law. And it makes this development in the law available to all American citizens.99

The "modern and enlightened trend" to which the President referred is the restrictive theory of sovereign immunity.100 The basic premise of this theory is that, in commercial matters, termed by the President "ordinary legal disputes," a foreign sovereign no longer enjoys the defense of sovereign immunity.101 It was foreseen by the legislature that the issue to be resolved by the courts was the meaning of the words "commercial activity."102 The statute was intended to define "commercial activity" as:

including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial

100 Id. at 33. The United States first contemplated a restrictive policy of granting immunity for "foreign government-owned and government-operated vessels" in 1948. Edward D. Re, Nationalization and the Investment of Capital Abroad, 42 GEO. L.J. 44, 60 (1953-54) (footnote omitted). This restrictive theory of immunity was formally adopted by the Department of State in 1952. Id. at 60-61. See Jack B. Tate, Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, letter to Acting Attorney General Philip B. Perlman by the Department's Acting Legal Advisor Jack B. Tate, 26 DEP'T ST. BULL. 984 (1952) [hereinafter "Tate Letter"]. Under this new restrictive theory of immunity, foreign states and their instrumentalities were to remain free from the jurisdiction of U.S. courts "with regard to [their] sovereign or public acts (jure imperii) ... but not with respect to private acts (jure gestionis)." Id. When the Tate Letter was issued, at which time the executive branch was still making determinations about whether a foreign government would be entitled to immunity from suit, the State Department announced a policy of advising the Attorney General of its position in each case, so that the government could be better represented before the courts. See id. at 985.
101 Von Mehren, supra note 99, at 33.
102 H.R. REP. No. 1487 at 16, 1976 U.S.C.C.A.N. at 6615 (stating that "[t]he courts would have a great deal of latitude in determining what is a 'commercial activity' for the purposes of [FSIA]"); see Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. of Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 56, 53 (1976) (recognizing inability to delineate between commercial and governmental activities therefore leaving demarcation to be solved by courts with "very modest guidance").
conduct. A “regular course of commercial conduct” includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a “particular transaction or act.”

House Report 94-1487 clearly envisaged that the courts would have considerable “latitude” in determining what constitutes a commercial activity, and thought it “unwise to attempt an excessively precise definition of this term, even if that were practicable.” The House Report, nonetheless, does furnish examples:

Activities such as a foreign government’s sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

Having established that the FSIA embodies certain international legal norms, our discussion will now consider the role of domestic courts in effectuating these norms.

V. THE ROLE OF THE COURTS

Reverting to the role of the courts, and that of the United States Supreme Court in particular, I should like to quote from an ABA Committee Report on Judicial Education on International Law, which observed that:

the applicability of international legal norms in specific cases may be, and frequently is, limited by the considerations of jurisdiction, equity and due process that bear upon all proceedings before U.S. courts. A decent respect for the opinions of mankind, however, as well as for our own judicial traditions, demands that such considerations not be invoked merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system.

105 Id.
The last sentence from the ABA Committee report, i.e., “an unwillingness to accord international legal norms their rightful place in our legal system,” is the great concern of lawyers and scholars who assert that international law is indeed part of the law of the land. These concerns ought also to be the concerns of judges.

In the *Nelson* case, a question deserving consideration was whether the commercial activity exception provision of the FSIA could properly be interpreted in a manner that would be faithful to the expressed legislative intent, and, at the same time, would give effect to the international legal standard that condemns torture. Counsel for the Saudi government asserted, in a law review article, that the *Nelson* case neither involved a question of international law, nor was a human rights case. Such an assertion is surely strained, if not fanciful, in a case brought against a foreign sovereign where the plaintiff sues for injuries sustained as a result of torture inflicted by the foreign sovereign. Regardless of labels, the question was whether, in the interpretation and application of the FSIA, it would have been reasonable and proper to interpret the FSIA in keeping with the restrictive theory of sovereign immunity, and in accordance with principles of international law. Hence, it would be pertinent to determine whether acts of torture and detention are “peculiarly sovereign in nature” (and thus entitled to immunity), and

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107 *Id.* at 915.
108 *Id.*
110 Everett C. Johnson Jr., *Saudi Arabia v. Nelson: The Foreign Sovereign Immunities Act in Perspective*, 16 HOUS. J. INT'L L. 291 (1993) (stating *Nelson* is simply case of construing statutory construction of FSIA). Johnson regards the Supreme Court’s decision as a “testament to judicial restraint” in that it declined to read the FSIA more broadly to cover alleged human rights violations. *Id.* at 304. He states that although a broader range of remedies might be made available to plaintiffs through expanded U.S. jurisdiction over human rights cases, the FSIA was specifically designed to *eliminate* remedies under certain conditions. *Id.* at 292-93 (emphasis added).
111 *Nelson*, 507 U.S. at 361.
112 *Id.* The Supreme Court’s rationale hinged on its conviction that “a foreign state’s exercise of the power of its police has long been understood” as being unique
whether the U.S. courts have jurisdiction under FSIA over cases which involve violations of international legal norms.\textsuperscript{113} In hypothetical terms, if, in conducting a “commercial activity,” a defendant foreign sovereign violates an established international norm, would not the defendant be liable? Of course, one would hope that the court would not seek the escape of determining that there was no “commercial activity,” and thereby conclude that it had no jurisdiction. Surely, it would be sad indeed to conclude that it had no jurisdiction; that a determination was made “merely to disguise an unwillingness to accord international legal norms their rightful place in our legal system.”\textsuperscript{114}

In discussing the power and duty of the courts to interpret constitutional provisions and statutes, in the United States one must remember the special role of the courts under Article III of the Constitution. It is this third Article and the doctrine and practice of judicial review that give a very special role to all judges appointed under Article III, and to the Supreme Court in particular.\textsuperscript{115} Given the fact that U.S. courts have historically interpreted and applied international law in the adjudication of disputes,\textsuperscript{116} judges might arguably have an even greater responsibility to exercise their constitutionally granted authority over matters in which international human rights have been vio-

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\textsuperscript{113} See Hatfield-Lyon, supra note 36, at 337. “The purpose of governmental activity in a free and democratic society cannot be interpreted to include the violation of human rights; it must, rather, be interpreted so as to protect and preserve them.” Id. (footnote omitted); see also generally Paust, Draft Brief, supra note 92, at 57-61 (discussing nonimmunity for governments which violate international human rights).

\textsuperscript{114} See supra notes 11 and 91 and accompanying text.

\textsuperscript{115} Final Report, supra note 91, at 915.

\textsuperscript{116} See U.S. CONST. art. III, § 2 (enumerating the types of cases over which U.S. courts exercise jurisdiction). Article III courts may hear “all Cases, in Law and Equity, arising under ... the Laws of the United States, and Treaties made ... under their Authority ... [as well as cases] between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” Id. The Supreme Court has original jurisdiction over “Cases affecting Ambassadors, other public Ministers and Consuls,” and appellate jurisdiction over cases mentioned in section two, clause one. Id.
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.”118 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.119 This express constitutional conferral of judicial independence is for the benefit of the people, that is, the litigants. Its purpose is to remove the judicial power from the “vicissitudes of political controversy” and the clamor of the moment.120 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.121

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117 See Hatfield-Lyon, supra note 36, at 337. “A court that does not meaningfully consider the international human rights of its government is giving a judicial override to these obligations, thereby violating international laws and denying justice.” Id. (footnote omitted). Professor Hatfield-Lyon urges that American courts follow the Canadian approach to international human rights cases and adopt a human rights exception to immunity under the FSIA. Id. at 333-36.
118 U.S. CONST. art. VI, cl. 3.
119 See U.S. CONST. art III, § 1; see also 28 U.S.C. § 372 (1993). Any person may submit a written complaint to the clerk of the appellate court regarding conduct of a federal judge which is “prejudicial to the effective and expeditious administration of the business of the courts,” or a judge’s alleged inability “to discharge all the duties of office by reason of mental or physical disability ... .” Id. § 372(c)(1). Ultimately, the Judicial Conference of the United States may recommend to the House of Representatives that the judge be impeached, upon which the House of Representatives may take “whatever action [it] considers to be necessary.” Id. § 372(c)(3)(B). See section 372(c) in its entirety for the procedure used in conducting investigations; see also Edward D. Re, Judicial Independence and Accountability: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 8 No. KY. L. REV. 221, 242-54, appendix (1981) (discussing procedure for investigation of judicial misconduct in detail).
121 Id.
The doctrine and practice of judicial review has given the American Constitution and its Bill of Rights special status as living documents in securing the rights of the people against governmental abuse. Notwithstanding occasional lapses, it cannot be denied that the Supreme Court has not only given meaning and vitality to the ideals set forth in the Constitution and the Bill of Rights, but it has also expanded upon the notions of life and liberty enshrined in those documents. Over the course of our history, the exceptions and lapses are indeed few when compared to the expansion that has resulted by including within those concepts prohibitions against a variety of forms of discrimination, freedom of association, rights of privacy and a host of other rights deemed to be fundamental.

VI. CONCLUSION

One cannot conclude any treatment of a subject which deals with human rights and international law in domestic courts without invoking the preamble to the Constitution, which proclaims that its purpose is to “form a more perfect Union” and “establish Justice.” To these inspiring words it is added that the Constitution was also ordained and established to “secure the Blessings of Liberty to ourselves and our Posterity.” It cannot be doubted that a motivating purpose was the enjoyment and expansion of the concept of liberty. Clearly, it was the hope that “justice” would be construed to attain and not to restrict the

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122 See, e.g., Ng Fung Ho. v. White, 259 U.S. 276, 281-85 (1922) (entitling Chinese nationals admitted into United States, upon habeas corpus petition, to judicial hearing to adjudicate claim of citizenship). The Fifth Amendment affords “protection in its guarantee of due process of law” to those faced with “loss of both property and life ... or of all that makes life worth living.” Id. at 284-85; Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (allowing claimant’s private cause of action under Fourth Amendment against federal agents for unlawful search and seizure). “[T]here is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name.” Id. at 394-95 (quoting United States v. Lee, 106 U.S. 196, 219 (1882)) (emphasis added). The Supreme Court has ensured that “[a]t a minimum, a deprivation of life, liberty, or property must be accompanied by ‘notice and opportunity for hearing appropriate to the nature of the case.’” Edward D. Re, Due Process, Judicial Review, and the Rights of the Individual, 39 CLEV. STATE L. REV. 1, 9 (1991) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

123 U.S. CONST. preamble.

124 Id.
full enjoyment of the blessings of liberty. To give meaning to those words, an independent judiciary must effectuate, and, indeed, when possible, enlarge and expand upon those human rights that have become universally accepted as indispensable to the dignity of all people.

Justice Blackmun, in his thoughtful address, borrowed the words “a decent respect to the opinions of mankind” from the first paragraph of the Declaration of Independence.125 These powerful words, invoked by Thomas Jefferson, ought to continue to guide the actions of all public officials, and judges in particular. Hence, evaluated against this standard of “a decent respect to the opinions of mankind,” Justice Blackmun concluded his thoughtful speech by quoting Professor Henkin, who remarked that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”126 Justice Blackmun added: “Unfortunately, as the cases I have cited illustrate, the Supreme Court’s own recent record in the area is somewhat more qualified. I would say that, at best, the present Supreme Court enforces some principles of international law and some of its obligations some of the time.”127

Indeed, there is much food for thought in Justice Blackmun’s concluding words. He stated:

I have been serving on the federal bench for 34 years. During that time, the United States has become economically and politically intertwined with the rest of the world as never before. International human rights conventions—still a relatively new idea when I came to the bench in 1959—have created for nations mutual obligations that are accepted throughout the world. As we approach the 100th anniversary of The Paquete Habana ... it perhaps is appropriate to remind ourselves that now, more than ever, “international law is part of our law” and is entitled to the respect of our domestic courts. Although the recent decisions of the Supreme Court do not offer much hope for the immediate future, I look forward to the day when the Supreme Court, too, will inform its opinions almost all the time with a decent respect to the opinions of mankind.128

I share Justice Blackmun’s hope for the future and conclude by

125 THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
126 Blackmun, supra note 12, at 8 (quoting LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979)).
127 Blackmun, supra note 12, at 8.
128 Id. at 8-9.
expressing the thought that courts cannot be oblivious to 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 can neither abandon nor restrict its special role as guardian of the Constitution and protector of fundamental human rights.