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INDIVIDUAL ENFORCEMENT OF OBLIGATIONS ARISING UNDER THE UNITED NATIONS CHARTER

INTRODUCTION

The proper role of domestic courts in the international legal order has been a bewildering and complex area. Conflicting theoretical approaches have emerged from a comparatively small number of cases. Yet because of the slow development of an international order based on the rule of law, the importance of domestic litigation in the enforcement of international legal standards cannot be overlooked.

In the United States, the failure of the Supreme Court to supply a coherent legal framework has left to lower courts the task of sorting through the various substantive and procedural doctrines in an attempt to reach consistent conclusions. Prominent among the procedural doctrines invoked by the courts has been the broad concept of justiciability. Often, because of the nature of the plaintiffs' injuries or because of the nature of the legal basis for the suit, relief has been denied on the grounds of standing to sue. Additionally, the doctrine of self-execution may be a bar to a suit; that is, absent additional legislative action, an international agreement does not create enforceable rights for individual citizens.

Recent cases among the federal appellate courts suggest a willingness to address questions of international law once thought to be within the exclusive domain of the executive branch. Additionally, in the area of standing, the courts are attempting to apply extensions of the concept developed in recent Supreme Court decisions in a way that seriously undermines their traditional reliance on the doctrine of self-execution of treaties. This comment presents a discussion of those developments in the context of cases arising both under the United Nations Charter and resolutions of the Security Council. It is the author's opinion that movement toward enforcement of obligations created by the United Nations Charter or Security Council Resolutions by domestic courts is a positive step—particularly in the area of human rights.

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THE DOCTRINE OF SELF-EXECUTION

The doctrine of self-execution springs from the Supremacy Clause of the Constitution which creates the primacy of treaties over state law. The Supremacy Clause is also interpreted to mean that treaties become the law of the land automatically, without an implementing act of Congress. While there may have been some doubt as to whether the Supremacy Clause was meant to have that effect, the question was settled by Chief Justice John Marshall's opinion in *Foster v. Neilson.*

A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially, so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision . . . .

But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court.

Thus the law has stood for nearly 150 years.

A recent Ninth Circuit case has contributed what appears to be the most widely accepted restatement of the doctrine. The case, *People of Saipan v. United States Dep't of Interior,* arose under the United Nations Charter and concerned the Trust Territory of the Pacific Islands. On January 1, 1972, the

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3. 27 U.S. (2 Pet.) 253 (1829).
4. *Id.* at 314.
5. *See* The Head Money Cases, 112 U.S. 580, 598 (1884). "[A] treaty may also contain provisions which . . . partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *See also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS § 154 (1965).
6. 502 F.2d 90 (9th Cir. 1974).
7. The islands of the Trust Territory are located in the Western Pacific Ocean north of the Equator. There are approximately 96 island units, variously small islands or atolls, which are scattered over an oceanic area larger than the continent of Australia or continental United States. The islands total land area, however, is only 687 square miles, and only 64 are regularly inhabited.

High Commissioner of the Trust Territory of the Pacific Islands approved and later executed a lease agreement allowing Continental Airlines to construct and operate a hotel on public land adjacent to Micro Beach, Saipan. The plaintiffs, residents of Saipan who regularly used the beach for swimming, fishing, and picnicking, and regarded it as one of their favorite beach areas in Saipan, alleged that the action violated the provisions of the National Environmental Policy Act (NEPA) because no environmental impact statement was prepared or considered prior to the approval of the lease. The plaintiffs sought an injunction prohibiting the implementation of the lease agreement until the environmental impact of the hotel had been studied and evaluated.

The district court came to the "reluctant conclusion" that the Trust Territory government was not a federal agency subject to judicial review under the Administrative Procedure Act and that the Trusteeship Agreement did not vest plaintiffs with individual legal rights which they might assert in court. The court of appeals affirmed on the grounds relating to the Administrative Procedure Act, but found the Trusteeship Agreement self-executing.

While the court assumed without deciding that the trusteeship provisions of the United Nations Charter were not self-executing, it held that the Trusteeship Agreement operated to give the plaintiffs standing, concluding that it was "a source of rights enforceable by an individual litigant in a domestic court of law." In considering the question of the self-execution of the Trusteeship Agreement, the court relied on an examination of several "contextual factors," including:

[T]he purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and

8. Id. at 648.
11. Id. at 648.
12. 5 U.S.C. §§ 701-706 (1970). The Administrative Procedure Act, which provides for judicial review of "agency action," defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency . . . ." Id. § 701(b)(1). However, it is further provided that this definition does not include, inter alia, "the governments of the territories or possessions of the United States." Id. § 701(b)(1)(C).
13. 502 F.2d at 97.
the immediate and long-range social consequences of self- or non-self-execution." Using these criteria, the Saipan court decided that the first recourse of the plaintiffs should be to the High Court of the Trust Territory. Significantly, however, the court did not question plaintiffs' standing and regarded the earlier decision in Diggs v. Schultz, discussed below, as firmly establishing the right of the islanders to enforce their treaty rights in federal court. Indeed, the court directed the High Court to reconsider its previous opinion with regard to the non-enforceability of the Trusteeship Agreement in light of Diggs. Finally, the federal district court was instructed to assume jurisdiction of the case if the High Court refused to review the acts of the High Commissioner.

STANDING

Before a litigant can argue the merits of his case, he must first establish that he has standing to sue. The requirement arises from the "cases and controversies" language in the Constitution. Federal judicial authority is limited to present or possible adverse parties, and the determination focuses on "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

The United States Supreme Court has evolved several interrelated standing requirements. The first is that of injury in fact. This has been broadly construed to include aesthetic, environmental, recreational as well as economic injury. Nor need it be substantial. The second requirement is that the plaintiff be within the "zone of interests" sought to be protected by the law in question. To this has been added the necessity that the plaintiff allege direct injury. Finally, the plaintiff must show a logical nexus between the status asserted and the claim sought to be adjudicated, but, as the court in the Diggs case noted, "It is far from clear that this (last) formulation adds

14. Id. Discussed at text accompanying footnotes 73-79 infra.
19. 392 U.S. at 102.
anything of substance to the two requirements just discussed.\(^20\)

It is these twin doctrines of self-execution and standing that have been used to determine the viability of individual actions brought under the United Nations Charter.

**INDIVIDUAL ACTIONS UNDER THE UNITED NATIONS CHARTER**

The status of the United Nations Charter as part of the law of the land has been and remains a controversial question. While it is cited with some regularity, it has rarely been used as the rule of decision in a case, often due to the courts' use of the doctrines of standing and self-execution. The greatest attention has been focused on the Charter's human rights clauses which, although they legally bind the United Nations member States, have never been deemed enforceable by individuals. Thus, any attempt to litigate under these provisions remains problematical. As a result, few civil rights attorneys have apprised themselves of the possibility of invoking them as positive law.

Nevertheless, recent developments suggest that courts' attitude toward the Charter may be changing. To understand the significance of the recent decisions, it is necessary to give some background on the history of the Charter in the courts.

**History of the Charter in the Courts**

The first references to the Charter gave promise that the drafters had created an instrument that would have binding legal effect domestically as well as in the international arena. In *Hurd v. Hodge*,\(^21\) a case involving racially restrictive covenants, Judge Edgerton wrote an intelligent and moving dissent to the court's decision to enforce the covenants. The dissent cited the human rights provisions of the Charter, interpreting them as compelling statements of public policy rather than binding law:

The Charter of the United Nations provides that "The United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race . . . and that all Members pledge themselves to take joint and separate action for that purpose . . . America's adherence to this

\(^{20}\) 470 F.2d at 462 n.2.

\(^{21}\) 162 F.2d 233 (D.C. Cir. 1947) (Edgerton, J., dissenting).
Charter, the adherence of other countries to it, and our American desire for international good will and cooperation cannot be neglected . . . .

When *Hurd* reached the Supreme Court along with its companion cases of *Shelley v. Kraemer* and *McGhee v. Sipes*, it was reversed on fourteenth amendment grounds. In an apparent reference to Judge Edgerton's Charter argument, the Court noted that:

The power of federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.

The same year, the Supreme Court in *Oyama v. State of California,* reversed a decision of the California Supreme Court upholding the California Alien Land Act. The law prohibited aliens ineligible for American citizenship from acquiring, owning, occupying, leasing or transferring agricultural land. Any property acquired in violation of the statute was to escheat as of the date of acquisition. Justices Murphy and Rutledge, joining in the decision of the Court, concurred on several distinct grounds, closing their opinion with this significant passage:

Moreover, this nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion. The Alien Land Law stands as a barrier to the fulfillment of that national pledge. Its inconsistency with the Charter, which has been duly ratified and adopted by the United States, is but one more reason why the statute must be condemned.

And so in origin, purpose, administration and effect, the Alien Land Law does violence to the high ideals of the

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22. *Id.* at 245 (footnotes omitted).
28. *Id.* §§ 1, 2. At the time the law was adopted, only free white persons and persons of African nativity and descent were eligible for citizenship. 332 U.S. 633, 635 n.3 (1948).
Constitution of the United States and the Charter of the United Nations.\textsuperscript{30}

In even stronger language the Oregon Supreme Court in Kenji Namba v. McCourt,\textsuperscript{31} followed Oyama in overturning Oregon's Alien Land Law. The court cited the Charter in finding the statute unconstitutional. "When our nation signed the Charter of the United Nations we thereby became bound to [those] principles. . . ."\textsuperscript{32} Unfortunately, this pronouncement has been largely ignored by both Oregon courts and others. Indeed all of the cases discussed above have received very little recognition, at least for their references to the Charter. The first attempts to use the Charter directly as positive law met with correspondingly meager success.

\textit{Sei Fujii}

One of the most thorough of the early opinions dealing with the Charter again concerned the California Alien Land Law, challenged before the California Supreme Court in Sei Fujii v. State.\textsuperscript{33} The law was overruled in a rather far-reaching opinion based on a fourteenth amendment equal protection argument. The court's analysis of the effect of the Charter's human rights clauses on the law is relevant to this discussion.

Plaintiffs contended that under the Charter, Articles 1, 55 and 56,\textsuperscript{34} the statute constituted unlawful discrimination on the

\begin{itemize}
\item Article 1 provides in part: "The purposes of the United Nations are . . . to achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." U.N. Charter art. 1, para. 3.
\item Article 55 provides that:
\begin{itemize}
\item a. higher standards of living, full employment, and conditions of economic and social progress and development;
\item b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
\item c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
\end{itemize}
\end{itemize}

U.N. Charter art. 55.

Article 56: "All Members pledge themselves to take joint and separate action in
basis of race. While the court accepted the contention that the Charter is a treaty and as such is superior to state law, it ruled that the articles in question were not self-executing and therefore conferred no individual rights on the plaintiffs. The careful discussion of the Charter may have been prompted by the unprecedented court of appeals decision which undoubtedly led to the grant of certiorari by the high court. The court of appeal eschewed any reference to specific constitutional provisions, resting its decision squarely on the Charter as both a statement of policy and a source of binding law. It went so far as to quote the Universal Declaration of Human Rights as an internationally accepted statement of the content of the term “human rights.” The appellate court therefore held that the Alien Land Law, being in conflict with the Charter, must fall. Its provisions that restricted rights on the basis of race and color were found to be “untenable and unenforceable.” Unfortunately, the court rested its application of the Charter on the traditional role of the United States as a champion of human rights, rather than on a convincing discussion of the self-execution of the particular provisions involved. Nevertheless, the lower court’s emphasis on the public policy aspects of the case and the social desirability of courts enforcing the non-discrimination clauses of the Charter presaged a similar attitude in People of Saipan v. United States Dep’t of Interior. The California Supreme Court’s majority opinion in Sei Fujii concerning the self-execution of the human rights articles remains, however, the generally accepted point of view in American courts.

Pauling v. McElroy

Pauling v. McElroy, a district court decision, highlighted most of the major problems litigants face in attempting to sue under the Charter. The action was brought by American citizens, Linus Pauling among them, and non-resident aliens, in cooperation with the Organization for the achievement of the purpose set forth in Article 55.” U.N. CHARTER art. 56.

35. This portion of the opinion will be discussed more fully, infra.
38. 217 P.2d at 488.
39. 502 F.2d 90 (9th Cir. 1974). See notes 73-79 and accompanying text infra.
Including several Marshall Islanders and Japanese citizens. They sued for declaratory relief and preliminary injunctions against the Commissioner of the Atomic Energy Commission and the Secretary of Defense to stop nuclear testing on the atolls of Entiewok and Bikini in the Pacific Islands Trust Territory. In addition to claims that the tests as authorized by the Atomic Energy Act were unconstitutional, the Islander plaintiffs asserted that atomic testing threatened them with the destruction and contamination of their food supply. A similar complaint had been rejected earlier by the United Nations Trusteeship Council on March 29, 1956.

The court denied relief on all counts. Concerning standing, the court held that those plaintiffs who were American citizens did not show sufficient imminency of harm; those near enough to the site of the tests to satisfy that requirement were nonresident aliens who did not fall under the protection of the Constitution. The court dismissed the arguments based on the United Nations Charter and the international law of the sea, finding them non-self-executing and thus not capable of conferring individually enforceable rights:

The provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court.

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41. These islands were originally German colonies administered after World War I by Japan under a League of Nations mandate. After World War II, the Security Council transferred them to the administration of the United States under the provisions of the United Nations Charter providing for an international trusteeship system. TRUSTEESHIP AGREEMENT FOR THE FORMER JAPANESE MANDATED ISLANDS APPROVED AT THE ONE HUNDRED AND TWENTY-FOURTH MEETING OF THE SECURITY COUNCIL, APR. 2-JULY 18, 1947, 61 Stat. 3301 (1947), T.I.A.S. No. 1665 (approved by the Security Council April 2, 1947; approved by the President pursuant to a joint resolution of Congress, July 18, 1947).


43. 164 F. Supp. at 392.

44. Presumably, the Marshall Islanders. See id. at 393.

45. See 339 U.S. 793 (1950). But see the District of Columbia Circuit's subsequent "clarification" of its holding in Pauling in Constructor Civiles de Centroamerica, S.A. v. Hannah, 459 F.2d 1183, 1190 n.13 (D.C. Cir. 1972). It stated: "Citing Johnson v. Eisentrager, [330 U.S. 793 (1950)], we have denied standing to nonresident aliens who have not alleged specific threatened injury in challenging the detonation of a nuclear device (citation omitted)." There have been many instances where non-resident aliens have been allowed standing to sue in United States courts to protect their personal or property rights. See, e.g., Disconto Gessellschaft v. Umbreit, 208 U.S. 570 (1908).
The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.46

With a final reference to the "so-called" human rights provisions of the United Nations Charter,47 the court dismissed the suit, saying that any conflict between the United Nations Charter and the Atomic Energy Commission would have to be resolved in the latter's favor.48

On appeal, the District of Columbia Circuit in a brief opinion affirmed the district court's decision solely on the ground of standing.49 The appellants, the court stated, had not alleged a sufficiently specific injury and had instead "set themselves up as protesters on behalf of all mankind, against the risks of nuclear contamination in common with people generally."50 The court found that there was no justiciable controversy presented, apparently because the issues raised were within the powers of the executive and legislative branches. They concluded that these were matters relating to foreign policy "within the historic areas of political power in which the acts of the Executive and Legislative Branches are supreme and beyond judicial review."51

Three months after the lower court's decision, the United States ceased nuclear testing and stated it would not be resumed. The request for relief could have been denied on the ground of mootness. In addition, the fact that the Trusteeship Council had rejected the complaint previously, although having no binding effect, lent authority to the court's decision. These two factors probably weighed heavily in the court's decision.

46. 164 F. Supp. at 393.
47. Id.
48. Insofar as Congress has the power to abrogate obligations under the Charter, the Court is undoubtedly correct. The legality of such derogation as a matter of international law is questionable. See L. Henkin, Foreign Affairs and the Constitution 151, 190-92 (1972). See generally Missouri v. Holland, 252 U.S. 416 (1920); Reid v. Covert, 354 U.S. 1 (1957).
50. Id. at 254.
51. Id. But see L. Henkin, supra note 29, at 214. "There is, then, no Supreme Court precedent for extraordinary abstention from judicial review in foreign affairs cases." Id. Such sweeping and unsupported statements as that of the court's were undoubtedly what led Mr. Justice Brennan to lament that the political question doctrine has "attributes which, in various settings, diverge, combine, appear, and disappear in seeming disorderliness." Baker v. Carr, 369 U.S. 186, 210 (1961).
THE HUMAN RIGHTS CLAUSES OF THE CHARTER

By briefly tracing the history of the Charter in the domestic courts of the United States, it can be readily seen that litigants have had little luck in persuading courts that its provisions are self-executing. The object of the greatest hope and the most notable failure has centered around the human rights provisions of the Charter, primarily Articles 1, 55 and 56. No court has followed up the early hints in Oyama, Namba and Hurd that the human rights provisions could provide a basis for the invalidation of discriminatory laws. Grave doubts were cast on whether they would ever be accorded such status. The lone exception, of course, was the California Court of Appeal decision overruled in Sei Fujii.52 Recent developments suggest that perhaps this court of appeal decision was rightly decided after all, and that if the Fujii case was decided today, it would be decided differently.53 The time is approaching for a reconsideration of the doctrine of self-execution in the context of the human rights clause.

Self-Execution and the Human Rights Clauses: The Arguments

The question of whether the human rights provisions of the Charter impose binding obligations on states was an early subject of controversy, although the weight of modern authority indicates that this is no longer a matter of dispute.54 Hans Kelsen led those who maintained that Articles 55 and 56 were non-obligatory. He found them “meaningless and redundant” and concluded that Article 56 created an “empty tautology” that urged the members to “cooperate with the Organization to bring about cooperation among themselves.”55 The arguments concerning the obligatory or non-obligatory nature of the articles focused on three main points:

55. H. Kelsen, supra note 54, at 99-100.
1) The meaning of the "pledge to cooperate" in Article 56;\textsuperscript{56}
2) The non-intervention principle of Article 2(7) and the failure to provide for compulsory powers of the United Nations in human rights, both bearing on the interpretation of Articles 55 and 56;\textsuperscript{57} and
3) The failure of Article 55(c) to specify particular human rights and fundamental freedoms.\textsuperscript{58}

The "Pledge to Cooperate." The Fujii court in 1955 regarded the "pledge" language as non-binding, noting that when the drafters wanted to impose a mandatory obligation, for instance in Articles 104 and 105, "they employed language which is clear and definite and manifests that intention."\textsuperscript{59} Although American courts have generally followed the Fujii court's interpretation,\textsuperscript{60} since the decision was not appealed to the Supreme Court, the question remains unsettled for the country as a whole.\textsuperscript{61}

Those who find the articles mandatory assert that the word pledge in its ordinary meaning denotes a solemn promise or undertaking establishing a legal obligation,\textsuperscript{62} and in lieu of the recent International Court of Justice advisory opinion, discussed below, this view appears to have been confirmed.\textsuperscript{63} Chief among those who found the articles obligatory was Hersch Lauterpacht. He felt that the view of Kelsen and others that the articles were merely a declaration of principles was "no more than a facile generalization." He stated:

There is a distinct element of legal duty in the undertaking expressed in Article 56 in which "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." The cumulative legal result of all these pronouncements cannot be ignored. . . . Any construction of the Charter according to which Members of the United Nations are, in law, entitled to disregard—and

\textsuperscript{56} Id.  
\textsuperscript{58} H. Kelsen, supra note 54, at 100.  
\textsuperscript{59} Sei Fujii v. State, 38 Cal. 2d at 723, 242 P.2d at 621.  
\textsuperscript{60} See notes 33-39 and accompanying text supra.  
\textsuperscript{62} The French text reads: "Les membres s'engagent . . . a agir."  
to violate—human rights and fundamental freedoms is destructive of both the legal and the moral authority of the Charter as a whole.\textsuperscript{44}

This view was given significant support by the International Court of Justice in its \textit{Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)} (hereinafter \textit{Namibia Opinion}).\textsuperscript{45} The court gave a lengthy consideration to the voluminous materials introduced by the member nations. Among these was a written statement submitted by the United States. It was directly supportive of the court’s final opinion. In a discussion of South Africa’s presence in Namibia and its consequences, the statement provided that, “[i]n accordance with Chapter IX of the Charter (Articles 55 and 56), States have an obligation to cooperate with the United Nations towards the realization of human rights and fundamental freedoms, without discrimination, for the people of Namibia,”\textsuperscript{46} apparently referring to a present obligation, not a contract to take action in the future.

In paragraph 131 of the Court’s decision, this view was affirmed and expanded:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, color, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.\textsuperscript{47}

\begin{thebibliography}{99}
\bibitem{64} H. \textsc{Lauterpacht}, \textit{International Law and Human Rights} 148-49 (1950).
\bibitem{65} [1971] I.C.J. 16.
\bibitem{67} [1971] I.C.J. 16, 45. \textit{See also} Commission on the Status of Women, International Instruments and National Standards Relating to the Status of Women, Report of the Secretary-General, U.N. Doc. E/CN.6/552 (1972) [hereinafter cited as Report of the Secretary-General]. “However, the proposition that one aspect of the human rights question is sufficiently defined in the Charter, namely, the prohibition of dis-
\end{thebibliography}
Thus, the International Court of Justice presently regards the Charter human rights provisions as creating present, binding obligations—a position supported by the United States Government.

The Application of Article 2(7). Article 2(7) of the Charter provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

The by now well-worn argument that this article of the Charter prevents any consideration of a state’s policies concerning the human rights of its citizens has been sufficiently discredited so as to need little discussion. State practice as well as the practice of the organs of the United Nations particularly support the view that human rights is a matter of international concern. In any case, Article 2(7) forbids only United Nations intervention and speaks not at all to the question of obligations assumed as individual states, pledging to take separate action. It can hardly be claimed that requiring a member to live up to a voluntarily assumed obligation, such as demanding compliance with Articles 55 and 56, constitutes unlawful intervention.

The Specific Obligation Assumed Under Article 55(c). The final claim of those opposing the application of the human rights articles as obligatory is that their provisions are too vague for enforcement. This, indeed, was the argument of the Fujii court in denying that the provisions are capable of being considered self-executing. Yet the plain meaning of the terms seems abundantly clear, at least for purposes of judicial enforcement. To maintain that the words “achievement of respect for, and observance of, human rights and fundamental freedoms made in the enjoyment of human rights and fundamental freedoms on the grounds of race, sex, language or religion, has never been contested.” Id. at 8.


freedoms" are vague and unenforceable is to deny the fact that legal phrases gain their force and substance from the entire web of experience which produced them. Although at one time "human rights" may have been an ambiguous phrase, the present international consensus on its substantive content cannot be ignored or denied. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights evidence an unprecedented international consensus on the meaning of the concept of human rights. At the very least, the fact that the articles prohibit distinctions made in the enjoyment of human rights and fundamental freedoms on the grounds of race, sex, language or religion has never been questioned. In view of the foregoing, it seems that the Fujii determination of the non-self-executing status of Articles 55 and 56 is ripe for overruling.

Self-Execution and the Human Rights Clauses: Reapplying the Saipan Criteria. As noted above, the Saipan test for self-execution is the definitive modern statement of the doctrine. Keeping in mind that this test was an elaboration of secondary criteria, to be considered in the event of ambiguity, it is necessary to look at the primary criteria of the purpose of the clauses and the objectives of its creators. To determine these, it is not necessary to go beyond Article 1 of the Charter's statement of the purposes and objectives of the United Nations, which provides, inter alia, that its aim is to achieve international cooperation, to promote and encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. Especially significant also is the statement in the Preamble regarding the determination of the drafters to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." The latter statement appears to be an invitation for the members to begin promoting the enforcement of international legal

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70. U.N. Charter, art. 55, para. (c).
71. Universal Declaration, supra note 37.
75. See Schulter, supra note 53, at 62 n.291.
76. U.N. Charter art. 1, para. 3.
77. U.N. Charter, preamble.
norms in their domestic courts. A logical place to begin would be with the Charter itself.

The second step is to determine the existence of domestic institutions appropriate for direct implementation of requirements of the clause in question. The Saipan court further elaborated this criterion in deciding that finding the Trusteeship Agreement self-executing would require "little legal or administrative innovation in the domestic flora." 78

As a counterpoise to this test, the court suggested its third factor, the determination of the existence of an alternative forum, finding in that case that "the alternative forum, the Security Council, would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable." 79 The court seemed to be proposing a balancing test. How significant it intended the lack of an alternative forum to be, however, is unclear.

It is not clear, for example, whether a court is obligated to hear a case if the plaintiff can show that he will be left without a forum. Succeeding courts have not read Saipan in that way. In Diggs v. Richardson, 80 the District of Columbia Circuit Court of Appeals purportedly applied the Saipan criteria in a case involving the attempted enforcement of a United Nations Security Council Resolution, calling upon

\[ \text{All states . . . to abstain from sending diplomatic or special missions to South Africa that includes the Territory of Namibia in their jurisdiction . . . [and] to abstain from entering into economic and other forms of relationship or dealings with South Africa on behalf of or concerning Namibia which may entrench its authority over the Territory.} \] 81

The court found that the Resolution was "not addressed to the judicial branch of our government" and did not "confer rights on individual citizens." 82 Yet the court recognized that the plaintiffs had judicially cognizable injuries by affirming the

78. 502 F.2d at 97.
79. Id.
80. 555 F.2d 848 (D.C. Cir. 1976).
82. 555 F.2d at 851.
district court’s finding that they had standing to sue. This presented the anomaly of an injury which the courts would recognize but not redress, even while realizing that the only alternative forum would be the Security Council.

The ability of the domestic judicial system to implement the human rights articles presents little difficulty. Essentially, the clauses would require that the human rights granted by the state be administered without discrimination. The substantive contents of those rights could be determined by looking to those rights already granted through the Constitution and federal statutes. Indeed, the latter could be regarded as executing the clauses if need be. In that way, the courts could be performing their dual function as agents of both the domestic and the international legal orders and of ensuring respect for our international obligations.

The fourth standard in the Saipan test, that of determining the immediate and long-range social consequences of self-execution is extremely ambiguous as an analytical tool. Indeed, the Saipan court itself made no attempt to utilize it. Arguably, the fact that those in government empowered with making international agreements under the Constitution have done so and approved such an agreement makes the question of its desirability and its social consequences moot. The inclusion of such a broad and ill-defined test will undoubtedly prove troublesome to those in search of guidance on the question of self-execution, and it appears to add little to the other three criteria.

The immediate and long-range social consequences of the self-execution of the human rights clauses have been indicated.83 Their application would work no radical change on the rights of citizens as now enforced nor would they have a deleterious effect on rights. The positive effects of enforcing obligations under the Charter could only increase respect for the United States abroad. In summary, there appear ample reasons for, and little against, a domestic court’s finding the human rights clauses of the Charter self-executing. Although the courts have not accepted that argument directly, recent cases suggest a slightly changing attitude.

**Recent Developments Concerning the Relation of Standing and Self-Execution**

A discussion of *Diggs v. Schultz*84 and *Diggs v.*
Richardson\textsuperscript{85} is included to illustrate the recent blurring of the former distinctions between the doctrines of standing and self-execution. Schultz and Richardson, rather than being brought under the Charter directly, were brought under Security Council Resolutions. In Article 25, member nations agree “to accept and carry out the decisions of the Security Council.”\textsuperscript{86} This requirement is generally read as applying only to those resolutions based on Chapter VII of the Charter, i.e. made in response to a threat to the peace or an actual breach of it.\textsuperscript{87} Such resolutions thus constitute valid international agreements, and litigants face the same difficulties in maintaining their suits—asserting sufficient standing and demonstrating the self-execution of the resolution in question.

\textit{Diggs v. Schultz}

\textit{Diggs v. Schultz} was a suit instituted by Representative Diggs of Michigan, and a number of others,\textsuperscript{88} seeking declaratory and injunctive relief against presidential authorization of the importation of metallurgical chromite from Southern Rhodesia pursuant to the Byrd Amendment\textsuperscript{89} to the Strategic and

\begin{itemize}
\item \textsuperscript{85} 555 F.2d 848 (D.C. Cir. 1976). Recently, in actions relying on Art. 2(7), litigants have attempted to invoke the Charter to overturn the Ker-Frisbie rule that the forcible abduction of a defendant from another country or state does not prevent a court from asserting jurisdiction. See United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); United States ex. rel. Lujan v. Gengler, 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975); United States v. Lira, 515 F.2d 68 (2d Cir.), cert. denied, 423 U.S. 847 (1975). For a discussion of these cases, see Sarsody, \textit{Jurisdiction Following Illegal Extraterritorial Seizure: International Human Rights Obligations as an Alternative to Constitutional Stalemate}, 54 \textit{Tex. L. Rev.} 1439 (1976).
\item \textsuperscript{86} U.N. CHARTER art. 25.
\item \textsuperscript{87} L. SOHN & T. BUENGENTHAL, \textit{INTERNATIONAL PROTECTION OF HUMAN RIGHTS} 475 (1973).
\item \textsuperscript{88} The plaintiffs determined to have standing were M'Gabe and Zimbabwe, who were unable to return to their homeland; Diggs, Conyers, Rangel, Stokes and Franck, who had been denied entry into Southern Rhodesia; the American Committee on Africa, whose chairman had been denied entry; the Council for Christian Social Action of the United Church of Christ, whose missionaries had been arrested and deported from Southern Rhodesia; and Gore Vidal, an author, who had the sale of one of his books banned in Southern Rhodesia.
\item \textsuperscript{89} 50 U.S.C. § 98h-1 (Supp. V 1975) (amending 50 U.S.C. §§ 98-98h (1946)) provides:
\begin{quote}
Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (section 1202 of Title 19), for so long as the importation into the
\end{quote}
\end{itemize}
Critical Materials Stock Piling Act in violation of the United Nations embargo of that country. The district court granted defendant's motion to dismiss based on plaintiffs' lack of standing and non-justiciability of the issues raised. On appeal, the court affirmed the decision on the latter ground, although, in a significant advance, it determined that the plaintiffs did have standing to raise the issue.

The court had no problem in finding the injury in fact for most of the named plaintiffs. In all but one instance the injuries were non-economic, i.e., the limitation on the right to travel in Rhodesia. While this would seem to be part of the exercise of that country's legitimate sovereign rights, the court felt that the exclusions were invidious and discriminatory. Without a discussion of the Resolution's self-execution, the court stated that the plaintiffs' legitimate quarrel was with the United States government. It was the American government's violation of the embargo imposed by Security Council Resolution which led to the plaintiffs' injuries. The Resolution had been promulgated in an attempt to terminate the policies of the Southern Rhodesian government which had given rise to the plaintiffs' wrong. The illegal action of the United States in flouting the embargo tended to deprive the plaintiffs of potential benefits.

Although the district court found this nexus tenuous, the appellate court, using a test similar to the alternative means of enforcement test later promulgated in *Saipan*, responded vigorously, stating that such a view:

strikes us as tantamount to saying that because the performance of the United Nations is not always equal to its promise, the commitments of a member may be disregarded without having to respond in court to a charge of treaty violation. It may be that the particular economic sanctions invoked against Southern Rhodesia in this instance will fall short of their goal, and that appellants will ultimately reap no benefit from them. But, to persons situated as are appellants, United Nations action constitutes

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92. 470 F.2d at 464-65.
93. See note 77 supra.
94. See notes 41-42 and accompanying text *supra.*
the only hope; and they are personally aggrieved and injured by the dereliction of any member state which weakens the capacity of the world organization to make its policies meaningful.\textsuperscript{95}

While far-reaching, this finding is not without support in the decisions of the Supreme Court. For instance, in Association of Data Processing Serv. Organizations, Inc. v. Camp,\textsuperscript{86} the plaintiffs challenged a ruling of the Comptroller of the Currency that would have allowed banks to sell data processing services. They alleged that such a ruling was contrary to the banking statutes,\textsuperscript{96} and contended they would be injured by the increased competition. The Court found this injury sufficient, and held that the statute protected their interests. Yet it is clear that it was not the agency's activities that would inflict the direct injury on the plaintiffs, but the activity of the banks, that is, of third parties. Thus the injury need not spring directly from the actions of the agency being sued.

In assuming the validity of the Security Council Resolution as a basis of a legal right, the Diggs court seemed to find it the equivalent of a treaty. Yet it is unlikely that such an unprecedented step would be taken without an explicit and careful analysis. Indeed, the court's failure to grapple with the issue was entirely consistent with the Data approach which requires only that the resolution be arguably equivalent to a statute. The question of the legal rights, if any, created by the Resolution was an issue to be raised in a trial on the merits.

The Diggs decision has potentially two areas of innovative effect. The first is in its expansion in the concept of standing in the federal courts. The second is in increasing the likelihood that international organizations may promulgate resolutions which may be relied on in domestic courts to challenge the actions of administrative agencies.

\textit{Diggs v. Richardson}

In \textit{Diggs v. Richardson},\textsuperscript{88} decided four years after \textit{Diggs v. Schultz}, again by the District of Columbia Circuit, many of the same issues were raised, and the approach developed in the

\textsuperscript{95} 470 F.2d at 465.
\textsuperscript{96} 397 U.S. 150 (1970).
\textsuperscript{97} "No bank service corporation may engage in any activity other than the performance of bank services for banks." Bank Services Corporation Act, 12 U.S.C. § 1864 (1970).
\textsuperscript{98} 555 F.2d 848 (D.C. Cir. 1976).
earlier case was applied. The violation of Security Council Resolution 301 occurred in the context of an inspection visit by Department of Commerce officials authorized under the Marine Mammal Protection Act of 1972 for the purpose of determining if its requirements for the harvesting of fur seals for importation into this country were met. To prevent further visits, plaintiffs sought injunctive and declaratory relief.

The standing of the plaintiffs to bring the suit was placed in question and, in view of the narrowing of the concept which took place between the Schultz case and this one, the court’s decision to uphold it was important. The asserted injuries were indeed so similar to Schultz that the court spent little time in discussing it and moved instead to the question of the legal right the plaintiffs sought to assert, that is, the self-execution of the Resolution.

The court affirmed the district court’s opinion that the Resolution in question did not confer rights upon the citizens of the United States that are enforceable in court in the absence of implementing legislation. After an obligatory nod to the Foster v. Neilson test and the Head Money Cases, the court relied on the Saipan criteria to come to its decision.


101. The plaintiffs were: 1) Charles Diggs, Jr., Chairman of the House Subcommittee on Africa; 2) George Houser, Executive Director of the American Committee on Africa; 3) Southwest Africa People’s Organization (SWAPO), an association of inhabitants of Namibia and persons who have come from Namibia; and 4) Theo-Ben Gurirab, a member of SWAPO and its unrecognized “representative plenipotentiary to the United Nations and to the Americas,” a refugee from Namibia who does not return there since he would be subject to arrest by the government of South Africa. Plaintiffs Diggs and Houser have been denied entry into the territory of Namibia. SWAPO brought suit on behalf of itself and its members, many of whom are prevented from returning to Namibia.

102. See Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976); United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974); Warth v. Seldin, 422 U.S. 490 (1975). Over the last few years, the Supreme Court has grown increasingly strict in applying its requirement that cases present actual controversies. The new formulation of that principle states that indirectness of injury is not necessarily fatal to standing, “[I]t may make it substantially more difficult to meet the minimum requirements . . . to establish that, in fact, the asserted injury was the consequence of the defendant’s actions, or that the prospective relief will remove the harm.” Warth v. Seldin, 422 U.S. 490, 505 (1973). Plaintiffs are required to show a sufficient personal stake in the outcome of the controversy, and to show a non-speculative relation of their injury to the challenged actions of the defendants in order to be granted standing.


104. 112 U.S. 589 (1884).

105. See notes 42-43 and accompanying text supra.
Unfortunately, the court gave only slight indications of how those criteria applied to the Resolution and relied mainly on an unarticulated admixture of the doctrines of self-execution and political question. Thus, while it affirmed the right of standing recognized in *Schultz* and *Saipan*, the court's pronouncements on self-execution and political question, especially in view of repeated government acknowledgments of the obligatory nature of the Resolution,\(^{106}\) served to further confuse the already murky issue of justiciability.

**Conclusion**

It has been the purpose of this comment to trace the history of the Charter in United States courts insofar as it has operated to grant plaintiffs standing to sue under it and to analyze its application under the related but analytically distinct concept of self-execution. The foothold gained in the two *Diggs* cases and the *Saipan* case appears to be firmly established and presages well for the future of our courts as forums increasingly more aware of their obligation to realize that violations of international law are not merely political matters to be settled through diplomatic channels by the states involved, but are also worthy of redress by injured individuals in the domestic courts.

Scott Lord

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106. Plaintiffs cited a letter from Deputy Secretary of State Robert S. Ingersoll to Secretary of Commerce Frederick B. Dent, in which Ingersoll stated: "We do not believe that an official visit to Namibia by Commerce Department employees or contract personnel, and a possible determination by you regarding South Africa's management of Namibian marine mammal resources can be brought into conformity with... the obligations [set forth in Security Council Resolution 301]." Letter from Deputy Secretary of State Robert S. Ingersoll to Secretary of Commerce Frederick B. Dent (Aug. 2, 1974).