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Federal Courts and World Civil Society

Gordon A. Christenson
University of Cincinnati College of Law

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Federal Courts and World Civil Society

Cover Page Footnote

University Professor of Law, University of Cincinnati College of Law.

Articles

FEDERAL COURTS AND WORLD CIVIL SOCIETY

GORDON A. CHRISTENSON*

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* University Professor of Law, University of Cincinnati College of Law.

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I. INTRODUCTION

This article proposes that in all international civil litigation federal judges should use international and foreign law pragmatically as an aid to decisions which further the substantive values of "world civil society."¹ These values are similar to those of civil society in a federal republic with an elaborate bill of rights—to preserve voluntary associations of human dignity and enterprise whose spirit transcends the public order of sovereign states. As Justice Sandra Day O'Connor recently observed:

As our domestic courts are increasingly asked to resolve disputes that involve questions of foreign and international law about which we have no special competence, I think there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals—just as we have offered these courts some helpful approaches from our own legal traditions.²

1. The term is offered by Ralf Dahrendorf. RALF DAHRENDORF, *THE MODERN SOCIAL CONFLICT* 181 (1988). Various other expressions are in use, such as "global civil society," "transnational civil society," and "international civil society."

2. Sandra Day O'Connor, *Federalism of Free Nations*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 13, 18 (Thomas M. Franck & Gregory H. Fox eds., 1996).

These traditions are mirrored most vividly in a contemporary world by two intense human purposes: first, people pursue economic well-being through voluntary work and exchange, with opportunities for the creation and distribution of new wealth increasingly driven by global market economies; second, all people seek human dignity and respect through human rights and personal security. These two intensities, protected by law through the courts, reflect the most important ends of an emerging "world civil society" as we approach the twenty-first century.

A. *The Idea of "Civil Society"*

"Civil society," said the late Ernest Gellner in the Tanner Lectures delivered just before Soviet Marxism fell, "is first of all that part of society which is not the state. It is residue."³ This residue is large, powerful, and organized. In the North Atlantic civilization, the idea "contains the assumption that civil society . . . is in a position to ensure that the state does its job *but no more*, and that it does it *properly*."⁴ Later, Gellner wrote: "'Civil Society' is markedly superior to a notion such as 'democracy,' which, though it may highlight the fact that we prefer consent over coercion, tells us precious little concerning the social precognitions of the effectiveness of general consent and participation."⁵ In customary and traditional societies, "civil society" also keeps a check on the arbitrariness of rulers, as Ummas do for Islamic civil societies.

The idea of "civil society" most often has accompanied social contract thought in liberal political theory from Locke, Rousseau, Ferguson, Kant, and other Europeans.⁶ French and German modern equivalents use "civil society" to denote the social totality which includes the state. Anglo-American usage separates voluntary, religious, and private spheres over the state within capitalist society.

3. Ernest Gellner, *The Civil and the Sacred*, in XII THE TANNER LECTURES ON HUMAN VALUES 301, 303 (1990).

4. *Id.*

5. ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 211 (1994). Democracy "lumps together participatory tribal segments, ancient or medieval city states and modern growth-oriented national or supra-national states." *Id.* Civil society is linked to historical destiny in that it is not possible to return to traditional agrarian society, nor some traditional communitarianism, nor centralized authoritarian regimes, industrialism and technological innovation being "our manifest destiny." *Id.* at 211-13.

6. See JEAN L. COHEN & ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* (1992). For the influence of pluralism on democratic theories of civil society, see *DEMOCRACY AND MODERNITY* (S.N. Eisenstadt ed., 1992); J. KEANE, *DEMOCRACY AND CIVIL SOCIETY* (1988); and ADAM B. SELIGMAN, *THE IDEA OF CIVIL SOCIETY* (1992) (questioning the universalist-citizenship model as against religious and traditional pre-political conceptions).

Strands of Scottish Enlightenment, influential in eighteenth-century America, embrace a moral philosophy which questions the rationality of the old natural law basis for civil society by showing the independent influence of customs, practices, and institutions (as social fact) which resist formal law.⁷

In the West, "civil society" grew from two entirely different points of view to fill a communal void as medieval society and the feudal system were replaced by the modern national state with a central monopoly of coercive power under some semblance of law. This central public monopoly restrains violence from blood feuds, and private wars as well as ethnic and religious violence and ordinary crime, delicts and private disputes. The first viewpoint, in the tradition of Hobbes held that hostile human nature organized within nations in a state of nature requires the state with a monopoly of coercive power to restrain the natural hostilities and selfishness of its citizens in order to have a civil society where individuals might freely associate, have commerce, exchange goods and opinions, and tolerate diverse beliefs.⁸ The second tradition of civil society was Lockean. Well articulated by the founders of the Scottish Enlightenment, such as Hutcheson, Smith, and Hume, it reflected an ancient tradition from Cicero where equal citizenship under law was the bond of civil society.⁹ This tradition held that all persons were "born fit" for civil society, which is necessary to keep government accountable to the people for serving the general or common good and to prevent corruption of power by faction, passion, or interest.¹⁰

Various analogues of these two variants of civil society in the Western tradition may be found in governments of most countries today and especially in competing legal philosophies in pluralistic cultures. Such pluralism reigns in the United States, where suspicion

7. See ADAM FERGUSON, *AN ESSAY ON THE HISTORY OF CIVIL SOCIETY* (Duncan Forbes ed., 1996) (1767) (first treatment in English of civil society based on ethical sensibilities of individuals); see also MARVIN B. BECKER, *THE EMERGENCE OF CIVIL SOCIETY IN THE EIGHTEENTH CENTURY: A PRIVILEGED MOMENT IN THE HISTORY OF ENGLAND, SCOTLAND, AND FRANCE* (1994); Marvin B. Becker, *An Essay on the Vicissitudes of Civil Society with Special Reference to Scotland in the Eighteenth Century*, 72 *IND. L.J.* 463 (1997).

8. THOMAS HOBBS, *MAN AND CITIZEN (De Homine and De Cive)* 113, 118 (Bernard Gert ed., 1991) ("[O]riginal of all great and lasting societies consisted not in the mutual good will men had towards each other, but in the mutual fear they had of each other.").

9. See JOHN LOCKE, *AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND THE END OF CIVIL GOVERNMENT* 41, reprinted in *LOCKE'S SECOND TREATISE OF CIVIL GOVERNMENT* (Lester DeKoster ed., 1978) (1690). Scottish enlightenment relied not on transcendence, but on an inner sensibility or a common "sense." See FERGUSON, *supra* note 7; SELIGMAN, *supra* note 6, at 25-26 (arguing that ethical synthesis constructed by Ferguson, Hutcheson, Hume and Smith—of reason and passion, individual and society, public and private—is no longer tenable).

10. See *THE FEDERALIST NO. 10* (James Madison).

of officials who seek the rents of office turns into a theory of collective choice and competing theories of the public good become republican virtue. Civil cultures which hold ruling classes to account in their own behavior may be observed in traditions as distinct as Persian, Chinese, Hindu, and Arab.¹¹

B. *The Marxist Interlude*

During the nineteenth-century industrial revolution, Marx saw that the so-called voluntary associations of civil society set against the coercive order of the sovereign state in liberal theory were in fact involuntary instruments at the mercy of the price of labor in a capitalist society which dominated the European state. This critical observation cast serious doubt on liberal claims for civil society. "Free" labor has its nonmonetary price. As commodity, labor in a so-called voluntary association, in effect, is compulsory, subordinating all members to an impersonal rule of value.¹² "[B]ecause incorporation into this association through the labour contract takes the form of a relation of exchange between legal equals, the process of surplus extraction is reconstituted as a private activity of civil society."¹³

Serious discussion of why the political in civil society should be excluded from surplus extraction took ideological form culminating in the Bolshevik revolution, nationalization of private production, and a seventy-five-year purge of civil society in Russia. Revival of the idea of civil society followed the post-cold war decline of Marxist influence whose critical insights, some thought, would survive those of Lenin and Stalin. In a recent post-Marxist analysis, for example, Justin Rosenberg examines the structure of civil society from the perspective of the whole Westphalian system of sovereign nation-states.¹⁴ For Rosenberg, accumulation and capture of surplus by transnational corporations through the capitalist system of global market exchange, free from serious political control by any nation (save background state enforcement of rights created by private

11. See SURYA PRAKASH SINHA, *LEGAL POLYCENTRISM AND INTERNATIONAL LAW* 69-147 (1996) (discussing diversity of many different forms of civilizations and their effect on contemporary international law).

12. See F. Perlman, *Introduction* to ISAAC RUBIN, *ESSAYS ON MARX'S THEORY OF VALUE* (1973).

13. JUSTIN ROSENBERG, *THE EMPIRE OF CIVIL SOCIETY: A CRITIQUE OF THE REALIST THEORY OF INTERNATIONAL RELATIONS* 125 (1994).

14. *Id.* at 131; see also ELLEN WOOD, *THE PRISTINE CULTURE OF CAPITALISM* 34 (1991) ("It is not at all as paradoxical as it may seem that the concept of the state has been least well defined precisely where the formal separation of state and civil society characteristic of capitalism occurred first and most 'naturally' — in Britain and the United States.")

transactions through courts or administrative agencies), with their massive economic displacements means creation of a new structure of civil society. In the sovereign states-system sanctioned by world trade agreements, it is now possible "to command and exploit productive labour (and natural resources) located under the jurisdiction of another state."¹⁵ This new circumstance becomes an "Empire of Civil Society" made to order, in his view, for dominance by Anglo-American institutions.¹⁶ The exercise of this power has two linked aspects, "a public political aspect which concerns the management of the states-system, and a private political aspect which effects the extraction and relaying of surpluses."¹⁷

Totalitarianism denies the possibility of any civil society, for it destroys both public and private life.¹⁸ As totalitarianism recedes, however, once-dormant civil institutions revive, now in tension with governments of states in contemporary post-cold war societies, whose public functions are understood to provide security, protect environmental, health and safety concerns, and ensure the well-being of their populations. Jurgen Habermas, a European social philosopher, defines this renewal of civil society in a way reminiscent of Tocqueville, the European aristocrat who wrote about American civil society before Marx did. In his most recent book, *Between Facts and Norms*, Habermas, who devotes an entire chapter to *Civil Society and the Political Public Sphere*, proposes the following meaning:

Civil society is composed of those more or less spontaneously emergent associations, organizations, and movements that, attuned to how societal problems resonate in the private life spheres, distill and transmit such reactions in amplified form to the public sphere. The core of civil society comprises a network of associations that institutionalizes problem-solving discourses on questions of

15. ROSENBERG, *supra* note 13, at 129.

16. Surveying the systematic character of . . . failure [of the international system to recapture control over states and markets], one is driven to conclude that the US has found in the modern clerisy of this "American social science" a rather more serviceable ideologue than Charles V was able to command in the Dominican Order of his day.

Id. at 173.

17. *Id.* at 131.

18. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 473-78 (1973). Totalitarianism is a terror-ruled movement sustained in motion when government "presses masses of isolated men together and supports them in a world that has become a wilderness for them," destroying through their isolation any public capacities and the possibility of private life as well. *Id.*

general interest inside the framework of organized public spheres.¹⁹

Habermas overcomes the Marxist critique by excluding from reconstructed civil society any capitalist private enterprises, subordinating them entirely to the new civil society through the public sphere and the apparatus of liberal government. Only through civil society are problems brought into the public sphere, he thinks, problems such as those brought to the fore by ecological threats, feminism, multiculturalism, and world economic order. Hardly "any of these topics were initially brought up by exponents of the state apparatus, large organizations, or functional systems."²⁰ Communications media make possible a shift in the balance of power between civil society and the political system in periods of mobilization.²¹ However, a "robust civil society can develop only in the context of a liberal political culture" because without "an already rationalized lifeworld . . . populist movements arise that blindly defend the frozen traditions of a lifeworld endangered by capitalist modernization."²² The public sphere lies between the political system and the private sectors. "It represents a highly complex network that branches out into a multitude of overlapping international, national, regional, local, and subcultural arenas."²³

Under certain circumstances, in this view, civil society has influence in the public sphere and the courts, despite the sociology of mass communication which "conveys a skeptical impression of the power-ridden, mass-media-dominated public spheres of Western democracies."²⁴ While groupings of civil society are generally too weak to initiate or redirect decision-making in the short run, "public processes of communication can take place with less distortion the more they are left to the internal dynamic of a civil society that emerges from the lifeworld."²⁵ Communications from within civil society to the public sphere thus become the most powerful instruments of civil society, even more influential than capitalism.

19. JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 367 (1996). This sphere is constituted and preserved by principles of constitutional rights. See *id.* at 368. The U.S. Supreme Court fulfills this civic function in the pluralistic American system.

20. *Id.* at 381.

21. See *id.* at 379.

22. *Id.* at 371.

23. *Id.* at 373.

24. *Id.*

25. *Id.* at 375.

Gellner, who began his work as a cultural anthropologist, emphatically disagreed with excluding private market transactions from the domain of civil society and placing them exclusively within the political realm. He pointed out that institutions of capital and market exchange, being in tension with all governments, should not be entirely subordinated, for they form part of those institutions of civil society which check excesses of each other and of all governments and also create new wealth more efficiently than if controlled from within the public sphere.²⁶ Moreover, in Gellner's view, we cannot return to a preindustrial, prepolitical, agrarian communitarian view of life. Post-industrial technological advance is our destiny.²⁷ Private capitalism once again becomes a valued part of civil society, according to Gellner, but this time within a newly emerging world civil society, one that does not necessarily require a liberal political system, as Habermas' conception does; nor does transnational private capitalism as part of world civil society have to dominate the sovereign states-system.

C. "World Civil Society"

In contrast to civil society within liberal states, "world civil society"²⁸ stands apart from the public spheres of the entire system of sovereign states and international regimes. World civil society is made up worldwide by individuals and groups in voluntary association without regard to their identities as citizens of any particular country, also outside the political and public spheres of the community of nations. These voluntary associations of world civil society include religious organizations, private business organizations, the information and news media, educational and research organizations, and nongovernmental organizations.²⁹ They exist in themselves and for themselves, apart from the state system, but not merely as transmitters of problem-solving discourses inside the public

26. GELLNER, *CONDITIONS OF LIBERTY*, *supra* note 5, at 193. ("Civil Society"—or separation of social and economic institutions from the state through modularity of individuals and their economic productivity through voluntary association—"can check and oppose the state [and] the non-political institutions are not dominated by the political ones, and do not stifle individuals either.").

27. *Id.* at 211-13.

28. DAHRENDORF, *supra* note 1, at 181.

29. See Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107, 125 (1996) (providing a romanticized version of the role of human rights NGO's in a postliberal transnational society). "A high priority would be given to the development of global civil information systems and networks by ensuring that information technology is widely accessible." *Id.* at 135. Just who would ensure this availability and access is left unclear.

spheres, as Habermas sees them. These institutions of world civil society thrive in spaces within and beyond all sovereign states and international organizations both as instruments for the purpose of shaping actions of public spheres and as ends in themselves expressing human dignity and free choice.

A sovereign state is a creation of power by society and can participate in world civil society only outside the community of states which created and recognized it—a highly unlikely possibility. States, too, as Hobbes saw firsthand during the Thirty Years War, need alliances to restrain hostile other states. However, we should not confuse world civil society with an international civil society of sovereign states conceived as if these were persons in a state of anarchy or nature, as Vattel, following Hobbes, did for European nation-states.³⁰ This international society of nation-states operates in the public sphere of balance of power and interests, explained by international relations theory.³¹

The two most powerful demands now pervading global society with the aid of communications and information—transnational free market economics and international human rights movements—have contributed to instability or change in the internal order of most “sovereign” states. With the collapse of the Marxist-Leninist Soviet empire and with increasing economic and social change within the Third World and in some of the most advanced democratic welfare states, the international community of sovereign states no longer can rely upon national systems alone to integrate central control over both the means of production and the social welfare, while also providing a command system for maintaining security and civil order. To Professor Louis Henkin, who made his Presidency of the American Society of International Law the platform for his message, “sovereignty” is nearly obsolete.

30. The late Professor Brierly seemingly rejected this conception, for he severely criticized Vattel for his notion that states were like individuals, free and equal in a state of nature without social bonds. J. BRIERLY, *THE LAW OF NATIONS* 37-40 (Humphrey Waldock ed., 6th ed. 1963). On closer inspection, however, it is clear that Brierly placed states in their own society—a communal or social theory denying the realist’s anarchistic conception of sovereign states, but a form of Aristotelian society for states, nonetheless.

31. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); see also ROBERT O. KEOHANE & JOSEPH NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (5th ed. 1978); *NEOREALISM AND ITS CRITICS* (Robert O. Keohane ed., 1986); *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* (David A. Baldwin ed., 1993); KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335 (1989); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 *AM. J. INT’L L.* 205.

Such a broad conception of world civil society is not exclusively a Western idea, nor did it originate only in Europe. This view sees in the vast sea of human life with its variety of associations and designs a "worldlife" which exists quite apart from governments or international regimes. If we consider how great civilizations and cultures have coexisted with rulers and governments in all societies, more or less assimilated through science, custom, tradition, and religion, we need not conclude that the civil society invented by European social contractarians from the residue of medieval natural law as restraint on absolutism should refer only to a political liberal tradition. In Arab and Chinese civilizations and in Hindu and African cultures, individual social, spiritual, and communal life go on despite the form of a governor's or ruler's edicts.³²

In any serious rejection of the totalitarian view of the state, we find two parallel ideological arguments for world civil society—one from the Right and the other from the Left. Each attacks the dominance of the sovereign state in global society by strong positions favoring voluntary human associations and freedom of expression across borders to support decentralized institutions close to human activities free of arbitrary state interference. These positions symbolize the two most influential forces shaping world civil society. From the pure Right, come demands for the freest transnational form of capitalism, free-market investment, and exchange without trade barriers. From the pure Left, come universal demands for the broadest program of internationally-recognized human rights, including redistribution of social goods.

Always in tension, these polar opposites of world civil society are often thought incompatible. Paradoxically, they have a common bond. Each requires legal protection through governments and regimes with their administrative apparatus—more specifically through the courts—to enforce contracts, preserve property, and guarantee basic human freedoms of association and choice. Cooperation is expected from all governments and international regimes to ensure these background rights. Neither human dignity nor voluntary transactions or investments can thrive in world civil society without credible and legitimate international and national legal systems in which participants may place at least some trust in return for protection. The institutions of world civil society depend upon internalized patterns of behavior from public and private

32. See SINHA, *supra* note 11; see also HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (Abdullahi Ahmed An-Na'im ed., 1992).

decision-makers at all levels of society to promote economic well-being and respect for human dignity.

D. *The Mediation Function of International Law*

International law, mediating between the political community of sovereign states and the institutions of civil society, entrenches these expectations further through state practice and international agreements. To make these decisions effective, all institutions in world civil society rely upon global telecommunications media, language, symbols, or propaganda for exchanging information and opinion, just as civil society does in liberal states. With the aid of the global media, widespread values within world civil society press upon the public spheres through the communication of practical decision backed by horizontal and vertical systems of public order. Horizontal public order systems are reciprocal and cooperative; these prevail under traditional international law and balance of power assumptions such as those underlying recent federal court litigation.³³ Vertical public order systems—those in which a hierarchical command of public power is brought to bear on disputes between private persons or between the state or officials and private persons—also may be found in recent federal court cases.³⁴

When states no longer carry out the process of surplus extraction but may seek to reallocate it for human welfare, the collective system of states asserts a new “centralized monopoly of jurisdiction” through an impersonal rule of law. Public power is now redefined: “[I]t guarantees contracts between private individuals, it keeps the

33. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 248 (1991) (finding that statute is presumed not to extend beyond territory unless made explicit, accepting background interpretation of political independence of territorial states under customary international law); *Argentine Rep. v. Amerada Hess Shipping Co.*, 488 U.S. 428, 440 (1989) (finding that immunity of foreign sovereign in U.S. courts is presumed unless it is explicitly withdrawn by Congress); *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1996) (finding that statutory exceptions to foreign sovereign immunity should be interpreted narrowly and may not be overridden by doctrine of *jus cogens*); *Prinz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994) (stating that foreign sovereign immunity may not be waived implicitly or be overridden by doctrine of *jus cogens*); *LaFontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (visiting head of state immunity implied from customary international law).

34. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (involving jurisdictional challenge by defendant foreign reinsurers to *parens patriae* civil antitrust actions brought by California and other states); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (involving private challenge to official action against refugees on high seas); *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (involving challenge to official conduct abroad in criminal proceeding); *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (involving a treaty challenge to a federal court order requiring defendant French-owned companies to comply with discovery of documents under Federal Rules of Civil Procedure).

peace both internally and externally, it imparts a degree of collective management to the overall social development of the society.³⁵ However, the new public power allocated through the monopoly of jurisdiction by the international political community of states may not engage in the process of surplus extraction. And information now commodified and outside of state control, is part of the profit enterprises of world civil society where the surplus is extracted. The liberal notion that free communication is necessary for political deliberation in the public spheres now must be reconsidered as part of federal court protection of freedom of expression extending beyond the borders.

Since problems flow from the civil to the public sphere, as Habermas points out, courts may be among the first public organs to receive claims from institutions of world civil society. In transnational litigation, these problems often are not amenable to political solution (even when private settlement is possible); nor would political intervention necessarily serve the parties' interests.³⁶ If courts and governments do not cooperate with each other in maintaining primary legal systems with credibility and effectiveness to protect both international human rights and transnational capitalist interests, the alternative would appear soon enough. Primitive systems of private self-help and sanctions often through mercenaries would spread throughout civil society, if they have not already, as gangs or illicit mobs, illegal drug cartels, and global conspiracies run by enterprises for enforcement of bargains and social norms through private customs and informal codes.³⁷ Government officials would be more

35. ROSENBERG, *supra* note 13, at 125-26.

36. For example, the *Bhopal* class action litigation—brought first in federal court, then before the Indian courts after *forum non conveniens* dismissal, with intervention by the Indian government as *parens patriae*—is a case in which the claimants could have received faster payment of greater amounts had the case settlement been supervised by the federal court. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195, 197 (2d Cir. 1987). For further discussion of this case, see *infra* Part III.B.

37. As Harold Lasswell observed:

A competitive market occurs when there is a consensus sustained by violence which safeguards bargaining arrangements. The close connection between violence and bargaining was never obscure to the merchants of the Italian cities, for they were compelled to use their own private forces to open markets, defend depots, protect cargoes, and enforce contracts. As the enterpriser in the British domestic market of the eighteenth century and nineteenth century became emancipated from the necessity of providing his own violence, the close connection between violence and bargaining fell into the background. There were, of course, many surviving indications of the classical relation between brigandage and economics, since the foreign trading companies continued to supply their own violence until quite late, and labor troubles sometimes brought unofficial as well as official violence to the front. Yet the peaceful expansion of the domestic market

easily corrupted, exchanging protection for power and becoming de facto agents of these primitive systems of private exchange under cover of state legitimacy. In enforcing background rights for the institutions of world civil society, courts compose these disputes as arms of world public order.

Professor Thomas Franck has described the diversity of tribal, religious, and traditional social structures for peoples in every culture by which they bond together for protection and identity.³⁸ Any promises of government protection in return for allegiance are viewed with deep suspicion, but government suppression of ethnic or religious violence is certainly part of the Hobbesian tradition of civil society. For Professor Huntington, however, all political and civil associations are deeply imbedded within their own historical roots with all the attendant conflicts in perception, values, and power, which accompany clashes of civilization without respect for state boundaries.³⁹ All political entities experience loss of exclusive control over their populations. Transnational telecommunications, religions, businesses, and nongovernmental organizations alike are all subject to changes and pressures no longer cabined within the territorial boundaries of sovereign states. No longer are voluntary associations in complete subordination to the states to which they are most closely tied in return for state protection. More often private enterprises or associations seek advantage for their goals from alliances negotiated with the most powerful or effective of states for the moment.

We may refer descriptively to these remarkable phenomena as the beginning of world civil society, not in the Western sense that civil society is the *raison d'être* for the liberal state or that civil society includes the state, but rather that a diverse and pluralistic burgeoning of international life as a matter of empirical fact is becoming freer from dominance by the system of sovereign states. Driving these social phenomena are forces of efficient capital markets of transnational exchange and investment and the rapid spread of the international human rights movements in all countries.

furnished the experiential basis for extensive preoccupation with marketing mechanics.

HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* 22-23 (1935).

38. Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996) (stating that individuals worldwide choose multiple identities and loyalties).

39. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (arguing that democratic processes in non-Western societies often do not protect human rights to the same extent as they do commercial interests or cultural traditions).

II. THE TRADITION OF CIVIL SOCIETY IN FEDERAL COURT

A. *Post-Cold War Tensions Between Economic and Human Rights*

We know that world market economies, now aided by international economic institutions such as the International Monetary Fund, the World Bank, the Organization for Economic Cooperation and Development, the new World Trade Organization and other regional and bilateral arrangements, progressively displace those old inefficient command and control economies run by the apparatus of central states and their central banks. At this very same time, however, powerful worldwide demands for human rights (social, economic, environmental, political, and civil) also place onerous international obligations upon central governments to advance human freedoms and the quality of human life within national polities. The ideal model for achieving these goals within the United Nations context generally implies national or regional systems for implementing human rights, usually requiring courts, administrative expertise or national welfare bureaucracies and command systems under some central rule of law and regulation.⁴⁰ In the human rights conception that has held sway since 1945, the ordering arrangements internal to each sovereign state are presumed capable of coping with internal violence, social upheavals, or disruptions of public order while redistributing social and economic goods considered basic human entitlements. Moreover, during the cold war period, the human rights conception, which tolerates economic, cultural, and social diversity, left to each country the decision whether to socialize the economy or to maintain a private market economy. National choices

40. Article 55 of the United Nations Charter states: "[T]he United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." The text refers to the obligation by member states to promote universal respect and observance of human rights and fundamental freedoms, not to an obligation to implement universal human rights and fundamental freedoms. Article 1 lists, among the purposes and principles of the United Nations, "promoting and encouraging respect for human rights and for fundamental freedoms for all . . ."

Respect for the political independence and territorial integrity of another state may include that country's own laws protecting human dignity and self-determination of peoples, even when abused in practice. The Universal Declaration of Human Rights is a "common standard of achievement for all peoples and all nations . . . to secure their universal and effective recognition and observance . . ." Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt.1, pmbL, U.N. Doc. A/810 (1948).

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights refer in identical language to the "obligation of States under the Charter . . . to promote universal respect for, and observance of, human rights and freedoms." International Covenant on Civil and Political Rights, Dec. 16, 1966, pmbL, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, pmbL, 993 U.N.T.S. 3; see also U.N. CHARTER arts. 55-56.

were made internally within a context of a geopolitical struggle between superpowers and blocs. A state's capacity to make choices with relative autonomy depended upon its background alliances as part of strategic coalitions of power, whether focused in the United Nations Security Council, North Atlantic Treaty Organization, Warsaw Pact, Organization of Economic Cooperation and Development, or alliances from the nonaligned powers.

All these relationships are now changing as economic development and world trade become at least as urgent as the struggle for political and civil rights in an integrated global market economy with complex institutions for dispute resolution and arbitration.⁴¹ A growing economy, moreover, is a strong priority in reformulating global security arrangements, the most obvious example being changes in relations between China and the United States and conditions within Hong Kong, now returned to Chinese rule. The human rights conception that a post-World War II community of nations would maintain international peace and security by holding lawless or tyrannical governments and officials to account for external aggression or internal abuse such as genocide, torture, or terror requires each state to maintain domestic public order under United Nations principles, which limit its "sovereignty."⁴² Collective intervention for peacekeeping or enforcement when the Security Council finds a breach of peace⁴³ is still led by the Western coalition with China and Islamic countries having strategic leverage. As internal violence and breach of human rights continue or grow within many countries, the problem of country-building through democracy and human rights is seen by non-Western countries, more now than during the cold war, as an imposition of Western culture contradicting their "sovereignty."⁴⁴

In his work on collisions of civilizations, Samuel P. Huntington reviewed the dilemma through new coalitions at the Vienna Conference on Human Rights, held in the wake of the end of the cold war:

41. See Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993).

42. For a discussion of the International Criminal Court for Rwanda and the former Yugoslavia, see materials cited *infra* note 198. For a discussion of China's triumph in organizing southern hemisphere nations against internal accountability for human rights violations, invoking "sovereignty" before the United Nations Human Rights Commission in Geneva, see *Beijing Again Blocks U.N. Censure on Rights*, WASH. POST, Apr. 24, 1996, at A25.

43. U.N. CHARTER arts. 40-41.

44. See HUNTINGTON, *supra* 39, at 195-98 (reviewing differences between the West and other civilizations on promoting democracy, monitoring human rights, and conditioning economic assistance on human rights performance).

The issues on which countries divided along civilizational lines included universality vs. cultural relativism with respect to human rights; the relative priority of economic and social rights including the right to development versus political and civil rights; political conditionality with respect to economic assistance; the creation of a U.N. Commissioner for Human Rights; the extent to which the non-governmental human rights organizations simultaneously meeting in Vienna should be allowed to participate in the governmental conference; the particular rights which should be endorsed by the conference; and more specific issues such as whether the Dalai Lama should be allowed to address the conference and whether human rights abuses in Bosnia should be explicitly condemned.

Major differences existed between the Western countries and the Asian-Islamic bloc on these issues. Two months before the Vienna conference the Asian countries met in Bangkok and endorsed a declaration which emphasized that human rights must be considered "in the context . . . of national and regional particularities and various historical religious and cultural backgrounds," that human rights monitoring violated state sovereignty, and that conditioning economic assistance on human rights performance was contrary to the right to development. The differences over these and other issues were so great that almost the entire document produced by the final pre-Vienna conference preparatory meeting in Geneva in early May was in brackets, indicating dissents by one or more countries.

The Western nations were ill prepared for Vienna The Vienna declaration contained no explicit endorsement of the rights to freedom of speech, the press, assembly, and religion, and was thus in many respects weaker than the Universal Declaration of Human Rights the U.N. had adopted in 1948. This shift reflected the decline in the power of the West. "The international human rights regime of 1945," an American human rights supporter remarked, "is no more. American hegemony has eroded. Europe, even with the events of 1992, is little more than a peninsula. The world is now as Arab, Asian, and African, as it is Western. Today the Universal Declaration of Human Rights and the International Covenants are less relevant to much of the planet than during the immediate post-World War II era." An Asian critic of the West had similar views: "For the first time since the Universal Declaration was adopted in 1948, countries not thoroughly steeped in the Judeo-Christian and natural law traditions are in the first rank. That unprecedented situation will define the new international

politics of human rights. It will also multiply the occasions for conflict."⁴⁵

B. Protection for Global Wealth Processes and Human Dignity

Federal courts in the United States have struggled with similar tensions early in the context of building a national economy while reconstructing civil rights and, more recently, while adjudicating claims (individual, corporate, or class-action) which extend beyond traditional national boundaries. These claims, at some point, rest upon an assumption of tacit reciprocity, that governments and their courts will cooperate in protecting the most important expectations of world civil society, which may be summarized in two normative statements:

- Regularity in the flow of voluntary economic transactions, trade and investment agreements across national boundaries should not be seriously disrupted or grossly abused.
- Respect for human dignity or for basic human rights should not be callously disregarded or systematically deprived by acts or omissions of governments anywhere.

As a political reality, national officials charged with the function of providing protection or recourse for citizens, corporations, or residents under national law have no direct political allegiance or responsibility to the international community of sovereign states except as directed by the municipal law of their own countries or as they, by conscience or reason, choose independently as part of a more universal social awareness. Because no universal or imperial world government exercises a public power on behalf of world citizens in the sense that the complex of social interactions called identities and loyalties develop, there can be no practical plea by individuals to accessible officials responsible to any such government for protection from private or public injuries.

Pleas for help most often use institutions within world civil society, namely the media or nongovernmental human rights groups, to press political officials of states and international regimes into corrective action. But the United Nations is still an organization of states only, and the status of nongovernmental organizations, once thought recognized in international law, has not received comparable political status. Human rights commissions and courts are not yet independent of national governments, despite the availability of

45. *Id.* at 196-97 (citations omitted).

individual petition. Even the European Union and its institutions is a community of European states, not of European citizens, although private parties do have limited access to the European Court of Justice and free movement within the European Union. Private companies do have limited access to dispute resolution panels of the North American Free Trade Agreement but only for judicial review of national administrative decisions on countervailing duties and antidumping.⁴⁶ Access to the arbitral tribunals of the World Trade Organization, like access to the International Court of Justice, is limited to member states. Public and private international arbitration under special agreements, on the other hand, are conducted with considerable party autonomy, free of court control in most cases.

While a sense of universal right and wrong might arise from shared vicarious experiences of various peoples of the world, through their courts and tribunals, their civilizations and their cultures, this shared experience alone does not mean that national courts easily transcend loyalty to national political institutions. Through methods beyond formal incorporation of international law, national courts adopt various techniques of presumptions, fictions, and common sense in transnational litigation to accommodate the twin expectations of world civil society.

For minimum respect for human rights, governments, through law, are still expected to subordinate to the common good within their jurisdictions those predatory instincts of the rapacious aspects of human nature and private enterprise, as well as to restrain officials from their own abuses and omissions. This respect includes wide freedoms of religion and voluntary or private human associations such as new and traditional families and communities of interest run by nonprofit foundations or public interest groups. In the complex global economy where old businesses are displaced by competitive new technological products and services, the cumulative effects of complex displacement and renewal processes place enormous welfare burdens upon governments and upon traditional cultures and families. Courts here often exercise marginal influence.

46. As Justice O'Connor points out, many important substantive issues need to be addressed by federal courts, including whether Congress has exceeded its authority in delegating power to decide cases and controversies to international panels and tribunals. O'Connor, *supra* note 2, at 19. The "effect international tribunals have on domestic courts may inform the analysis as to whether Congress acted constitutionally" and the "success of multinational tribunals in resolving disputes depends critically on their ability to transcend parochial interests and render legitimate judgments." *Id.*

To minimize social upheaval, governments are pressed by private groups and the media to undertake programs to promote human dignity actively through education, income redistribution, or social intervention to increase individual and group opportunities. Interminable change places many at the mercy of global forces over which they have no control. Inescapable contradictions and tensions arise between governments' function of protecting freedoms in voluntary processes of investment and exchange and the relatively new affirmative functions required of governments for the active protection of human social and individual well-being. While global democratic political processes are a means both necessary and desirable for adjusting these tensions, courts in each country decide the disputes allowed them, but increasingly these are linked to activities of the institutions of civil societies within their own cultures, allowing private grievances a way into the public sphere.

C. *American Federalism and "Civil Society"*

From the time of Tocqueville's observations in the 1830s to the present global society,⁴⁷ American democracy and law have subordinated all governments in the federal system to popular sovereignty and fundamental law, implicitly in service of free associations of civil society. Until recently, this experience had little relevance for the rest of global society. But just as federalism in the United States unified the national economy over time because no state could seriously assume responsibility for the social effects of national commerce, so also in the new global economy no sovereign state has resources to assume by itself responsibility for the effects on its population of transnational capitalism's drive for accumulation of surplus outside the political control of the system of sovereign states. The federalist ideal, according to Justice O'Connor, describes

the proper relationship between domestic courts and transnational tribunals . . . "the federalism of free nations," to use a phrase of the philosopher Immanuel Kant. Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments.⁴⁸

47. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Doubleday ed., 1969).

48. O'CONNOR, *supra* note 2, at 17-18.

As Justice O'Connor explains, U.S. federal courts have "repeatedly recognized the autonomy of the political branches to formulate policy according to their best judgment of the nation's interests."⁴⁹

From the beginning of the American Republic, questions of federalism, popular sovereignty, and fundamental rights—analogs for similar movements now developing in other parts of the world—have engaged the Supreme Court and federal courts.⁵⁰ Courts in other cultures or civilizations, usually with much less independence from political authority, have not experimented with pluralism committed to preserving civil society for as long a time as courts have in the American federal system. Supreme Court decisions have been cited extensively in other countries,⁵¹ possibly as an example as other courts have tried to advance their countries' own attempts to guarantee civil society, though often deferring to local political prejudices.⁵² Now as institutions of civil society begin to develop in each country and globally, federal courts are drawn more extensively into more complex transnational litigation where conscious judicial choices at each stage of the process not only are informed by international and foreign law but have consequences in other countries and courts.⁵³

Courts are not expected to fathom where post-cold war circumstances and technological change will lead; yet, foreign policy which should, often does not.⁵⁴ U.S. federal courts, nonetheless, continue deference to foreign policy dominance by the political branches even in private litigation brought by foreign plaintiffs. Consider, for example, the case of *Sequihua v. Texaco, Inc.*,⁵⁵ in which residents of Ecuador sued Texaco in Texas courts, seeking a remedy for

49. *Id.* at 14 (citing *Chicago & S. Airlines v. Waterman Steamship Co.*, 333 U.S. 103, 111 (1948)).

50. See generally ROBERT McCLOSKEY, *THE AMERICAN SUPREME COURT* (Sanford Levinson ed., 2d ed. 1994).

51. See Louis Henkin, *Constitutionalism and Human Rights*, in *CONSTITUTIONALISM AND HUMAN RIGHTS* 383, 392-95 (Henkin ed., 1990); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537-38 (1988).

52. See Andrew J. Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution*, 43 INT'L & COMP. L.Q. 537, 546-47 (1994) (arguing that English courts ought to follow the example of U.S. courts in incorporating customary international human rights law and not just to buttress decisions under other rules). In *Spycatcher (No.1)*, the judges forcefully decried the ability of the common law to safeguard human rights in England. See *Attorney General v. Guardian Newspapers Ltd.*, [1987] 1 W.L.R. 1248, 1286 (per Bridge, L.J.); see also *id.* at 1321 (per Oliver, L.J.).

53. See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* (3d ed. 1996).

54. See MICHAEL MANDELBAUM, *THE DAWN OF PEACE IN EUROPE* (1996) (cataloguing confusion and self-deception in post-cold war American foreign policy for expanding NATO to Eastern Europe and extending its influence into the Balkans).

55. 847 F. Supp. 61 (S.D. Tex. 1994).

environmental deprivation to their property in Ecuador.⁵⁶ Texaco removed the case to federal court, no doubt trying to escape Texas law, which at that time had abolished or put in doubt state *forum non conveniens* doctrine. The federal judge retained jurisdiction over the claim as a federal question arising from international law but then dismissed the action because it involved important foreign policy implications including the principle that each country has a right to control its own natural resources and that its courts are better situated to decide the case, under federal *forum non conveniens* doctrine.⁵⁷ Here, a federal court created an exclusive federal question from a dispute raising international law questions before a state court. International law was used as a substantive limitation on state court jurisdiction when combined with a federal *forum non conveniens* doctrine.

The thesis that customary international law is part of U.S. law under the Supremacy Clause is not so clearly authoritative as a general principle today, despite prevailing views otherwise.⁵⁸ While lower federal courts have inventively broadened their transnational judicial role, the Supreme Court has furnished practically no guidance for when the oft-cited rhetoric of *The Paquete Habana*,⁵⁹ decided at the beginning of the twentieth century – that international

56. *Id.* at 61-62.

57. *See id.*

58. For a restatement of the prevailing contemporary view, see Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564 (1984); Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59 (1990); and RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmts. a, c (1986) [hereinafter RESTATEMENT OF THE FOREIGN RELATIONS]. For recent doctrinal criticism of this view, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 1205, 1239-40 (1997); Arthur Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1239-40 (1988); and A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 38-44 (1995).

59. 175 U.S. 677 (1900) (sitting in admiralty as the highest prize court in a different era to decide ownership or compensation due for wrongful capture at sea under prize law of the day determined by international customs during time of war). Prize law provided a remedy under ancient custom and usage for wrongful seizure of a private vessel on the high seas during time of war, thereby incorporating customary international law to determine a claim of title or compensation, absent political directives otherwise. The circumstances of *The Paquete Habana* involved no executive directive to seize the vessel on the high seas notwithstanding a violation of international law. The seizure occurred under a general executive order to conduct the war in accord with international law. *See id.* at 677. This distinction, allowing a directive to violate customary international law, was extended to the attorney general acting within discretionary statutory authority in *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986), and its progeny. Commentators are split in their appraisal of this extension.

New customary international human rights law purports to create direct rights and duties between private individuals and individual officials acting under color of state authority within the same state, enforceable in civil litigation before domestic or foreign courts. *See, e.g.,* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

law forms part of United States law⁶⁰—should be taken seriously, even when no statute is available. The *Sabbatino* case (and its progeny) is an important guide for lower court decisions, although arising in the cold war era.⁶¹ It, too, made a state choice of law question into an exclusive federal question—whether state courts should respect a Cuban law authorizing the taking of property of U.S. nationals by the revolutionary socialist government in Cuba subsequently brought to New York. The Cuban government applied to federal courts to “federalize” the claim, then to abstain from deciding it, thus confirming de facto the validity of titles passed under the nationalization decree in Cuba, pending political branch resolution of cold war issues which linger still. In the post-cold war era of *Sequihua v. Texaco, Inc.*,⁶² American transnational corporations use federal courts to “federalize” claims brought by foreign plaintiffs in state court against them for wrongful acts abroad, finding advantage in federal abstention or deference to resolution in foreign courts. Another post-cold war decision, *Hartford Insurance*, took jurisdiction over foreign reinsurers under federal antitrust law in a suit by the states led by California.⁶³ The case demonstrated how vast was an alleged insurance conspiracy by multinational reinsurers

Early in judicial history, Chief Justice Jay’s opinion in *Chisholm v. Georgia*⁶⁴ placed in federal courts the constitutional power to determine the public responsibilities of a nation newly admitted to the family of nations. It held that state courts were not competent to decide questions involving the law of nations or performance of treaties under either the Articles of Confederation or the Constitution because the “United States were responsible to foreign nations for the conduct of each State . . . and . . . the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent.”⁶⁵

The Supreme Court has continued that position whenever transnational litigation between private parties raises important new federal questions. Thus *Banco Nacional de Cuba v. Sabbatino*⁶⁶ restrained New York courts from refusing, for reasons of public policy, to give

60. See *The Paquete Habana*, 175 U.S. at 700.

61. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

62. 847 F. Supp. 61 (S.D. Tex. 1994).

63. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 764 (1993) (considering limits to U.S. jurisdiction to adjudicate or to prescribe governed by principles of international comity or international law).

64. 2 U.S. 419 (1793).

65. *Id.* at 474.

66. 376 U.S. 398 (1964).

respect to Cuban expropriations during the cold war and, in the process of the decision, ironically strengthened the institutions of negotiable titles in international commercial transactions.⁶⁷ After global trade soared in the 1980s and 1990s, the *Sequihua* federal district court announced that federal law did not allow a state court to litigate matters arising in foreign jurisdictions which would present serious foreign relations problems.⁶⁸ Implicitly favoring less forum-shopping in state courts against multinational enterprises, this judicial stance leaves to federal courts the discretionary power to shape outcomes to fit the policy preferences of the free enterprise side of world civil society.

D. Trend in Federal Court Decisions: Nationalization of International Law

Ironically, human rights groups and free-market enterprises alike demand protection from strong national institutions, even as "sovereignty" weakens.⁶⁹ Since individuals and groups have practically no political or military allegiance to international institutions, they cannot expect much legal protection from new international regimes without political and strategic alliances by governments. In the United States, moreover, federal judges have responded variously to cases brought before them, but certain trends emerge. Federal courts have effectively "nationalized" the decision whether to apply international law to protect both sets of expectations, strangely reinforcing the position of the Asian-Islamic coalition. They have developed distinct interpretive devices and presumptions, reflecting differences between economic and personal freedoms, which may run counter to international consensus.

The trend of federal court decisions affirmatively supports transnational production and exchange based upon free markets, trade, and investment whenever the political branches or common law give the slightest grounds for incorporating these expectations as federal law. Beginning in the nineteenth century, federal courts absorbed and nationalized the law merchant, maritime law, and prize law from the law of nations, often without explicit direction from the political branches, as rules of decision.⁷⁰ Protecting universal human rights beyond that which is already provided in the Constitution,

67. *Id.* at 398-99.

68. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 61 (S.D. Tex. 1994).

69. See CHAYES & CHAYES, *supra* note 31.

70. See, e.g., Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 458-62 (1995) (discussing "nationalization" of the customary prize law by U.S. courts).

however, is simply not considered within the judicial power without political direction. Here, the federal courts do not innovate. Access to federal courts or administrative agencies to implement internationally-recognized human rights—either affirmatively by public entitlements or negatively by restraining abuses of public and private power—requires legislation or support from the political branches of government. Private enterprises, however, demand protection through courts and administrative agencies to safeguard investment and provide reasonable regularity in transnational business dealings and risk.

In the U.S., decisional trends in the federal courts have moved away from a cosmopolitan or natural law view of human rights and toward their “nationalization.” We shall see this best in my later analysis of the international preemptory norm, *jus cogens*. For international human rights law this means that while federal courts interpret national standards or principles as consistent with those which are universally accepted, it is universality which bends to national standards. National standards are used as baseline—as if they represent the universally accepted standards. International human rights principles as such are then used to embellish, but not necessarily to control, a national decision in specific human rights cases.⁷¹ Without a political green light, courts here instinctively back away from any judicial intervention into the political relation or bond between citizen and government. Direct communicative discourse from human rights organizations within a world civil society perspective urging courts to recognize the Universal Declaration of Human Rights as U.S. law, for example, is met with federal court resistance. The public sphere first must be galvanized to persuade a reluctant Congress to enact effective human rights rules of decision available for U.S. citizens against government acts or omissions considered wrongful under international law.

Very little, if any, “new” international human rights law has been incorporated in decisions by federal judges without the aid of a statute, despite a tradition in which customary international law is part of U.S. law and treaties are the supreme law of the land.⁷² Prohibitions against genocide, apartheid, slavery, physical torture, or arbitrary murder have been provided by statute or constitutional

71. See Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 477 (Louis Henkin & John Lawrence Hargrove eds., 1994).

72. See Henkin, *supra* note 58, at 1564; Paust, *supra* note 58, at 59; RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 702, cmts. a, c.

provision, but international human rights claims to gender, racial, ethnic, and religious equality are given little attention in U.S. courts from sources of international law, not even in interpreting ambiguous treaties, statutes, or constitutional clauses.⁷³ Affirmative human rights claims for positive public goods such as subsistence, education, employment, health care, and personal security have fared no better.⁷⁴ Likewise, contemporary courts in the United States have not recognized international human rights law as the basis for implied causes of action between private and nonstate parties without a statutory basis.⁷⁵ Rules of procedure or evidence remain largely uninfluenced by international law even in the face of treaties or statutes unless their provisions are explicit and self-executing⁷⁶—an exact replica of the influence on courts of human rights treaties which are ratified with non-self-executing reservations.⁷⁷

In international economic rights cases, the courts also have “nationalized” the protection of private transactions but have done so while moving toward a cosmopolitan view of free markets and exchange—that is, background protection of contract and property are viewed as if they are universally recognized as the backbone of the emerging world civil society. Here, capitalist demands from within world civil society for the public sphere to enforce the private

73. See Anne F. Bayefsky, *General Approaches to Domestic Application of Women's International Human Rights Law*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 351, 361-62 (Rebecca J. Cook ed., 1994); Andrew Byrnes, *Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?* *AUSTL. Y.B. INT'L L.* 12 (1992). For a theoretical critique, see Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 *MICH. J. INT'L L.* 517 (1992).

74. For a less pessimistic review of decisions, see Connie de la Vega, *Protecting Economic, Social and Cultural Rights*, 15 *WHITTIER L. REV.* 471, 478-86 (1994); Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?* 11 *HARV. BLACKLETTER J.* 37 (1994); and Bert B. Lockwood, Jr., *Toward the Economic Brown: Economic Rights in the United States and the Possible Contribution of International Human Rights Law*, in *WORLD JUSTICE?: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 149 (George A. Lopez & Michael Stohl eds., 1991).

75. United States courts almost never exercise federal jurisdiction by implying private causes of action arising under this new customary international human rights law between nonstate private parties without aid of a statute. See *Kadic v. Karadzic*, 70 F.3d. 252 (2d Cir. 1996) (upholding, but under statutes, actions against the de facto head of Bosnian-Serb forces in his private as well as de facto leadership capacity for condoning brutal rapes and human rights violations in former Yugoslavia); see also *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *Tel-Oren v. Libya*, 726 F.2d 774, 792 (D.C. Cir. 1984). But see *Jordan J. Paust, The Other Side of Right: Private Duties Under Human Rights Law*, 5 *HARV. HUM. RTS. J.* 51 (1992) (arguing that private individuals can have direct duties under customary international law).

76. See *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522 (1987).

77. Thus in 1992, ratifying the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, the United States made a number of reservations concerning non-self-execution. See *Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights*, 138 *CONG. REC.* 4781-01 (daily ed., Apr. 2, 1992).

law institutions of contract and property claims—and new claims as “international intellectual property”—both serve and are readily accepted by the legal systems of sovereign states while severely criticized for denying gender equality.⁷⁸

The international economic rights perspective maintains an integrated system of global free market exchange across national borders, one that penetrates national legal orders by vertical enforcement of private ordering systems by agreements and comity and presumes federal court cooperation unless the political branches determine otherwise.⁷⁹ It leaves the private political relationship between individuals and transnational corporations to the global marketplace, unless there is political direction otherwise, subject to international supervision of treaty regimes, such as the World Trade Organization, for discriminatory tariffs and advancing protections for new property rights.⁸⁰

Federal courts hesitate less in giving effect even to ambiguous provisions in economic treaties, however, so long as they do not involve the prerogatives of government (as in tax treaties), sometimes in the face of later, apparently inconsistent civil rights statutes.⁸¹

78. See, e.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, reprinted in OFFICE OF THE U.S. TRADE REPRESENTATIVE, URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: GENERAL AGREEMENT ON TARIFFS AND TRADES 319 (1994); see also JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989). But from a feminist perspective, global privatization denies gender equality. See, e.g., Saskia Sassen, *Toward a Feminist Analytic of the Global Economy*, 4 IND. J. GLOBAL STUD. 7 (1996).

79. This observed difference in baseline presumptions contrasts with Professor Koh's conclusion which equates federal court treatment of transnational human rights litigation with that of transnational commercial litigation. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2479 n.167 (1991). For a comparison of the “cosmopolitan” structure of John Jackson's conception of international economic law with the “metropolitan” architecture of Hans Kelsen's unitary public international law conception, neither of which would permit courts to defer to the political branches, see David Kennedy, *The International Style in Postwar Law and Policy*, 1994 UTAH L. REV. 7 (arguing that both would transform sovereignty—Kelsen's by internationalizing it, Jackson's by displacing it).

80. See Paul E. Geller, *Intellectual Property in the Global Marketplace: Impact of TRIPS Dispute Settlements?*, 29 INT'L L. 99, 104 (1995); see also HANS KELSEN, LAW AND PEACE IN INTERNATIONAL RELATIONS: THE OLIVER WENDELL HOLMES LECTURES: 1940-41 (1942).

81. See *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) (holding that the defendant was not a Japanese company and that, therefore, the conflict between the Treaty of Friendship, Commerce and Navigation (“FCN”) with Japan and U.S. Civil Rights Act was avoided); *Papaila v. Uniden America Corp.*, 51 F.3d 54 (5th Cir. 1995) (holding that FCN Treaty with Japan prevailed over later Civil Rights Act); *Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (construing Civil Rights Act of 1964 to avoid conflict by deferring to treaty which reciprocally protects American and Japanese investments and business operations, including presence of managers and technical personnel, thereby avoiding abrogation of treaty); *Starrett v. Iberia Airlines of Spain*, 756 F. Supp. 292 (S.D. Tex. 1989) (holding that treaty with Spain did not cover discriminatory replacement of U.S. national with national not a citizen of Spain); see also Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme*

International law is influential and recognized in state-to-state public law limitations on jurisdiction such as claims of sovereign immunity or judicial restraint in construing statutes to have extraterritorial reach.⁸² But when market economies, backed by central state coercive power, need protection, antitrust laws and security laws are readily extended to acts abroad with effects within the jurisdiction without explicit statutory authority.⁸³ Treaties—being supreme law of the land when ratified after approval by the Senate—are interpreted as self-executing when private economic or commercial interests are protected but not when fundamental human rights are at stake.⁸⁴ Any international limitation on national powers which federal courts might enforce constitutionally against the executive or legislative branches on behalf of the international community is suspect unless it supports international freedom of the flow of capital, management, products and services, and commercial information (but not labor).

Sometimes, domestic courts avoid a choice of allegiance by incorporating older customary international law, horizontal, interstate law.⁸⁵ In an early example, *Henfield's Case*,⁸⁶ the public law of nations provided the jurisdictional basis from common law to punish U.S. citizens who served as officers on board an armed schooner commissioned by France as a privateer to interrupt British commerce in violation of the law of neutrality. President Washington's proclamation declared, "I have given instructions to those officers to whom it belongs, to cause prosecutions to be instituted against all persons who shall within the cognizance of the courts of the United States, violate the law of nations, with respect to the powers at war,

Court, 11 AM. U. J. INT'L L. & P. 559, 563 (1996) (criticizing Court's narrow interpretation of treaties to permit executive action considered by most international authorities as being outside generally accepted rules of international law).

82. See, e.g., *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 244 (1991).

83. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Alcoa S.S. Co. v. United States*, 338 U.S. 421 (1949); see also Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339 (1990).

84. While the International Covenant on Civil and Political Rights prohibits all forms of discrimination, ICCPR, *supra* note 40, art. 26, 999 U.N.T.S. at 226, federal courts, nonetheless, consistently uphold FCN treaties which allow foreign companies to discriminate on the basis of citizenship. See, e.g., *Fortino v. Quasar, Co.*, 950 F.2d 389 (7th Cir. 1991) (holding that discrimination on basis of Japanese citizenship as authorized by FCN Treaty between the United States and Japan was not actionable under Title VII); see also *MacNamara v. Korean Air Lines*, 863 F.2d 1135 (3d Cir. 1988) (holding that citizenship-based discrimination under FCN Treaty between the United States and South Korea did not conflict with antidiscrimination principles of international law).

85. See generally LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* (2d ed. 1995).

86. 11 F. Cas. 1099 (Cir. Ct. D. Penn. 1793).

or any of them."⁸⁷ The stated reason was to maintain peaceful nation-to-nation relations by enforcing a proclaimed neutrality *against its own citizens*. This older customary international law maintained horizontal equilibrium among sovereign nations, and loyalty to it was the same as loyalty to the state and its sovereignty. Prize law, maritime law, the law merchant, and sovereign or diplomatic immunities did not affect the fundamental relationship of citizen to state and thus did not threaten the political equilibrium between states.⁸⁸

Thus federal courts choose to avoid loyalty to a cosmopolitan international community, when the new customary law might require it, by resorting to an older law of nations, the public law of sovereigns.⁸⁹ They nationalize customary international law, thereby assimilating allegiances. They perform the functions of this liberal state as if it were applied in transnational society regulated by the ideology of a society of liberal states, in effect acting as the "lead State" in Professor Slaughter's multilevel international society.⁹⁰ For example, Judge Weinstein used older customary international law to hold a visiting foreign head of state immune from suit to avoid reaching the substance of a human rights claim against that person under newer customary international human rights law.⁹¹ But even in a society of liberal states, the ideologies of overriding public interest in states to control persons within a single jurisdiction to prevent hostile actions, terrorism, or provocations interfering with a policy of nonintervention may require the invocation of traditional boundaries of responsibility.

These descriptions of decisional trends reflect nationalization of international law by federal courts, but each is explained from

87. *Id.* at 1102. The presidential proclamation warned and exhorted citizens from engaging in hostile actions against a neutral country and declared that any citizens who engaged in such actions would be liable to "punishment or forfeiture, under the law of nations, by committing, aiding, or abetting hostilities against any of the said powers or by carrying to them those articles which are deemed contraband, by the modern usage of nations" and also declared that such persons "will not receive the protection of the United States against such punishment or forfeiture." *Id.*

88. See generally Sweeney, *supra* note 70.

89. See Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991).

90. Slaughter, *supra* note 31, at 205.

91. Note in this regard Judge Weinstein's opinion that the "court has subject matter jurisdiction, but it cannot exercise in personam jurisdiction" because common and international law immunity survived the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994). *LaFontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994); see also *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Siderman de Blake v. Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); *Von Dardel v. U.S.S.R.*, 736 F. Supp. 1 (D.C. 1990).

different theoretical assumptions. Paradoxically, the status of international human rights in federal courts depends upon the traditional political institutions of the states system, which leaves the relationship between the national polity and its citizens or residents to the internal structure of the state. This position requires even greater deference to the political branches. Federal courts nearly always await guidance from the political branches before invoking this law. International monitoring of sovereign behavior by the United Nations Human Rights Committee, the United Nations Human Rights Commission, and regional systems of courts and commissions, or through country reports on human rights issued annually by the United States, is profoundly influenced by parallel work of non-governmental human rights organizations from within the emerging world civil society independent of states.⁹²

These differences simply reflect, as Edwin Dickinson pointed out at the beginning of the Great Depression, that the "law of nations became a source, rather than an integral part, of the national system."⁹³ Like the source of contract or tort law—now found in state not federal law—international or foreign law is chosen for decision by federal courts through its sources. This choice may be made at each phase of litigation but not on the basis of court allegiance to an international legal order or from a syllogism deriving the authority of international law from the Supremacy Clause. The most influential sources are those which reflect a pragmatic analysis of the interests of litigants, governments, the international system, and the independent private relationships and interests now within a rapidly developing world civil society—what Professor Lowenfeld otherwise calls "reasonableness."⁹⁴

When such nationalization occurs in interpreting the sources of international law, whether in the United States or in other countries, national courts invariably may reflect different, perhaps inconsistent, versions of international law. As a consequence, private international law and international conflict-of-laws theory, themselves formerly part of the law of nations and concerned only with choice of law in

92. What federal courts are doing seems at odds with Professor Brilmayer's recommendation that domestic courts should defer to political authority in traditional horizontal state-to-state relationships, such as territorial jurisdiction or sovereign immunity, but should invoke customary international law to adjudicate human rights claims as vertical relationships between individuals and governments. Brilmayer, *supra* note 89.

93. Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 260 (1932).

94. ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW* 15 (1996).

private actions, assume increasing importance to the formulation of rules of decision by forum courts in civil litigation. In itself, this formulation need not offend a cosmopolitan view of a universal human community under a common rule of law.⁹⁵ In these circumstances, choice-of-law analysis by forum courts should broaden beyond governmental interest analysis to include the interests of international systems and public policy, a position consistent with that of the *Restatement (Second) of Conflict of Laws*.⁹⁶ Federal courts have experience with this kind of analysis. As important decisions are communicated among other courts also struggling with disputes with roots beyond sovereignty, within world civil society, U.S. federal court decisions, once thought limited to American pluralism, might serve as model.

A federal cause of action, for example, might be demonstrated and chosen under the Alien Tort Statute⁹⁷ or the Torture Victim Protection Act⁹⁸ for certain "international common law torts," when recognized by universal consensus among nations, a choice permitted but not required by Congress.⁹⁹ Foreign law might provide the

95. See VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS 23-24, 61-64 (1992).

96. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971). This point is illustrated by Judge Nickerson's opinion in the *Filartiga* case on remand to the District Court. *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). Therein, the district court referred to conflict of laws as part of the common law of the United States and shaped a rule of decision from that theoretical premise. *Id.* at 863. Citing the *Restatement (Second) of Conflict of Laws*, *supra*, § 6(1), Judge Nickerson considered the needs of the international system. *Filartiga*, 577 F. Supp. at 863. Clearly, he did not apply any one single rule but constructed a hybrid rule of decision for the particular case beginning first with foreign law, then analyzing its consistency with customary international law and forum law:

The international law prohibiting torture established the standard and referred to the national states the task of enforcing it Congress entrusted that task to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law [A]ny remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe [That] the interests of the global community transcend those of any one state . . . does not mean that traditional choice-of-law principles are irrelevant All these factors make it appropriate to look first to Paraguayan law in determining the remedy for the violation of international law In concert with the other nations of the world Paraguay prohibited torture and thereby reaped the benefits the condemnation brought with it. Paraguayan citizens may not pretend that no such condemnation exists.

Id. at 863-64; see also Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases Under the Second Restatement and Leflar's Choice-Influencing Considerations*, 70 TUL. L. REV. 2465 (1996).

97. 28 U.S.C. § 1350 (1994) (originally enacted as part of the Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1789)).

98. Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1331(a)(2) (1994)).

99. See *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987) (agreeing with Judge Edwards in *Tel-Oren v. Libya*, 726 F.2d 774 (D.C. Cir. 1984)).

rule of decision, as Judge Kaufman carefully explained in the important *Filartiga* case, giving respect to the rule of law in other countries: "Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it is authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness; . . . consequently it looks to wholly different considerations."¹⁰⁰ Forum law also might be chosen, especially if it incorporates the international common law tort standard, avoiding a choice between loyalties by nationalizing the choice. Judge Kaufman's opinion in *Filartiga* made clear that "the district court may well decide that fairness requires it to apply Paraguayan law to the instant case,"¹⁰¹ taking a broad range of factors of *Lauritsen v. Larsen*¹⁰² into account.

E. International Law as Judicial Lawmaking by Federal Courts

Chief Justice Marshall's classic opinion in *Brown v. United States*,¹⁰³ often cited in debating whether the president is constitutionally bound by international law, also deserves a fresh reading on whether international law can be applied by federal courts without Congressional action. That decision refused a claim which arose during the War of 1812 which was that the law of nations, without Congressional authorization, could expand the president's constitutional authority to seize alien property within the United States after a Congressional declaration of war.¹⁰⁴ In the cold war era, with Vietnam and the War Powers Resolution still in mind, Professor Michael Glennon read this case to mean that the president can derive no constitutional power from international law to execute the law of nations when Congress is silent.¹⁰⁵ While Congress was not so clearly

100. *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (citation omitted).

101. *Id.* at 889 n.25.

102. 345 U.S. 571 (1953).

103. 12 U.S. 110 (1814) (holding that federal government seizure of property in U.S. belonging to British nationals is illegal under constitution unless Congress expressly approved by statute, other than declaration of war, a permissible rule authorizing seizure of enemy property under laws of war).

104. *Id.* at 110-11.

105. MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 242-43 (1990). Glennon's syllogism seems to be:

- All authority for the national government derives from the Constitution;
- The president has no power to seize alien property under any provision of Constitution or from a Congressional declaration of war alone, although laws of war may permit it;
- Therefore, the president has no authority to seize alien property even to execute international law without Congressional approval, although permitted under international law.

silent about not confiscating enemy property even then,¹⁰⁶ today the Supreme Court is more likely in foreign affairs to imply tacit consent by Congress to actions of the president following custom, as it did in *Dames & Moore v. Regan*,¹⁰⁷ where a sole executive agreement settling claims arising from the Iranian Hostage Crisis was in the tradition of prior settlements, even though not expressly authorized.¹⁰⁸

In *United States v. Alvarez-Machain*,¹⁰⁹ federal enforcement of U.S. drug laws by abductions in Mexico showed the dark side of transnational society in drug trafficking.¹¹⁰ *Haitian Refugee Centers'* deference to executive orders for the Navy to turn back Haitian refugees on the high seas (so long as not expressly prohibited by treaty or statute) strengthened the president's power to influence the making or changing of customary international law by disregarding it,¹¹¹ as Truman had done by unilaterally extending territorial jurisdiction over the continental shelf at the beginning of the cold war. These decisions gave very little regard to arguments invoking international law as a judicially imposed limitation on executive, congressional, or judicial power but made much of the presumption derived from the territorial principle of international law against extraterritorial extension of the laws.¹¹² They have been criticized extensively.¹¹³ Yet,

Id.

106. In those circumstances, as the Chief Justice Marshall pointed out, Congress had enacted measures delegating power to grant letters of marque and reprisal to the president and also implicitly disapproving the confiscation of alien property, especially when reciprocal measures might endanger American property abroad as retaliation.

107. 453 U.S. 654 (1981).

108. *Id.* at 654-58.

109. 504 U.S. 655 (1992).

110. In this case, the Court refused to interpret ambiguous provision in extradition treaty in light of rule of customary international law and reversed the Ninth Circuit Court of Appeals, *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991). *Alvarez-Machain*, 504 U.S. at 665, 667-68. For an analysis of the Court's decision in *Alvarez-Machain*, see Jonathan A. Bush, *How Did We Get Here?: Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939 (1993); Michael J. Glennon, *State-Sponsored Abduction: A Comment on United States v. Alvarez-Machain*, 86 AM. J. INT'L L. 746 (1992). For an analysis of the Ninth Circuit Court of Appeal's decision, see Mark D. Hobson, Note, *Abducting Foreign Nationals Abroad: United States v. Alvarez-Machain*, 1 J. TRANSNAT'L L. & POL'Y 253 (1992).

111. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (refusing to apply international law of nonrefoulement to limit executive's action returning refugees found on high seas without explicitly clear statute).

112. Justice Blackmun strongly disagreed with the Court's territorial limitations of the Convention Relating to Status of Refugees, July 28, 1991, art. 1, 189 U.N.T.S. 137. See *Sale*, 509 U.S. at 188-94 (Blackmun, J., dissenting).

113. See Thomas D. Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 MICH. J. INT'L L. 77 (1993); Nicholas R. Koberstein, *Without Justification: Reliance on the Presumption Against Extraterritoriality in Sale v. Haitian Centers Council, Inc.*, 7 GEO. IMMIGR. L.J. 569 (1993); Harold Hongju Koh, *The Human Face of the Haitian Interdiction Program*, 33 VA. J. INT'L L. 483 (1993); Robert L. Newmark, *Non-Refoulement Run Afoul: The Questionable Legality of Extraterritorial Repatriation Programs*, 71 WASH. U. L. Q. (1993); Scott M. Martin, *Non-Refoulement of*

they have much to do with the widening influence of the executive in global life and commerce—and in subjecting foreign citizens or companies to U.S. jurisdiction or power.¹¹⁴

Whatever one thinks about the contemporary rhetoric that international law is part of U.S. law, it is clear that most of the earliest Supreme Court cases incorporated the law of nations as special rules of decision dealing with the laws of war, prize law, maritime law, the law of piracy, and perhaps the law merchant.¹¹⁵ Consider how specially tied the questions presented were to the high seas and trade and sovereign prerogative.¹¹⁶ Even early decisions in prize law (under maritime law or laws of war under admiralty jurisdiction) denote a special incorporation of the law of nations under a federal jurisdictional statute in admiralty cases or under the laws of war.¹¹⁷ It was a time dominated by mercantilism and close relations between governments and business within classic nineteenth-century rules of public international law.¹¹⁸ In contemporary transactions, the institutions of private international law embrace those of public international law.¹¹⁹ As Professor Lowenfeld proclaims, "indeed . . . this is

Refugees: United States Compliance with International Obligations, 23 HARV. INT'L L. J. 357 (1983); see also Bush, *supra* note 110; Glennon, *supra* note 105; Fernando R. Tesón, *International Abductions, Low-Intensity Conflicts and State Sovereignty: A Moral Inquiry*, 31 COLUM. J. TRANSNAT'L L. 551 (1994).

114. For Justice Blackmun's parting criticisms, see Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39 (1994); and Harold Hongju Koh, *Justice Blackmun and the "World Out There,"* 104 YALE L. J. 23 (1994). But see Jimmy Gurulé, *Terrorism, Territorial Sovereignty, and the Forcible Apprehension of International Criminals Abroad*, 17 HASTINGS INT'L & COMP. L. REV. 457 (1994); Malvina Halberstam, *In Defense of the Supreme Court Decision in Alvarez-Machain*, 86 AM. J. INT'L L. 736 (1992).

115. Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821-22 (1989).

116. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) (finding that law of the flag state ordinarily governs the internal affairs of a ship under international law); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (finding that choice of law in maritime torts involved weighing the interests of foreign nations in regulation of maritime commerce as part of legitimate concern in international community); *The Neriede*, 13 U.S. 388 (1815) (applying law of nations to rights of capture against belligerents and neutrals on high seas during times of war).

117. Compare Sweeney, *supra* note 70 (advancing narrow incorporation principle) with William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996) (expanding concept of incorporation).

118. The best pre-World War II summaries of incorporation under federal jurisdiction were Edwin D. Dickinson, *supra* note 93, and Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280 (1932) (discussing five grounds for incorporating under federal jurisdiction).

119. See JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* (1996) (arguing that trends indicate that international law was part of U.S. law from beginning of nationhood); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

where the action is."¹²⁰ Rules of cooperation governing the choice of law in complex interactions within a civil society find their roots in a public sphere, one mediated by the courts more than by the political branches.

A Supreme Court custom refusing to extend the reach of a statute to violations of civil rights laws by U.S. companies abroad, however, gives deference to traditional horizontal political relations among sovereign states. Reading the statute strictly, despite fair inferences of Congressional intent, the Court used customary international law as background to reflect the presumption that statutes are territorial (Congress promptly amended the civil rights act to reach U.S. companies abroad).¹²¹ The nineteenth-century era of state positivism and sovereignty carried a presumption against extraterritorial extension of statutes without express language in regulation of markets. The modern Supreme Court sometimes invokes that presumption but often does not, for ambiguous statutes are interpreted to reach conduct abroad with effects in the United States.¹²² As much as the presumption entrenched the law of nations as between independent and equal sovereign states, that canon of interpreting statutes yields when federal courts face complex global conspiracies under loose protective statutes.¹²³

Without explicit legislative directives by the political branches, there is little evidence that federal courts are influenced much by new customary law in the human rights field. A recent report finds that "with few exceptions, U.S. courts have not treated customary international human rights law as binding in domestic litigation."¹²⁴

120. LOWENFELD, *supra* note 94, at 232.

121. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

122. "As *Aramco* and *Hartford Fire* illustrate, the Court's recent approach to the extraterritorial reach of federal legislation leaves much to be desired The result [of confusing different approaches] is confusion for litigants and lower courts, and arbitrary, unpredictable results." BORN, *supra* note 53, at 594-95.

123. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 803 (1993) (Scalia, J., dissenting). Justice Scalia's dissent in *Hartford Insurance* strongly disagrees with Justice Souter's majority opinion and analysis of the application of international comity. In his dissent, he said that "the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence." *Id.* at 818. Justice Scalia cited the *Restatement of the Foreign Relations* and strongly relied upon *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976). *Hartford Fire Ins.*, 509 U.S. at 817-18. By contrast, Justice Souter barely mentioned that case and did not rely upon its reasoning. *Id.* at 798 n.24. He would have merely limited jurisdiction to adjudicate but only after first considering the federal jurisdiction, and then only when a foreign defendant could not comply both with foreign law and U.S. law. The Scalia dissent would have considered limitations from international law in the initial decision prescribing a jurisdiction.

124. Paul L. Hoffman & Nadine Strossen, *Enforcing International Human Rights Law in the United States*, in ACLU INT'L CIVIL LIBERTIES REP., Aug. 1994, at 2.

Even with a statutory basis for jurisdiction, federal courts resist justifying decisions solely on the basis of customary human rights law unless it meets the most stringent substantive requirements. There is little evidence that the new law of human rights even influences judicial interpretation of ambiguous statutes or constitutions. Supreme Court decisions suggest it makes little difference in interpreting existing law.

The circuit courts of appeals that have allowed subject matter jurisdiction for breaches of international human rights law under the Alien Tort Statute limit causes of action to "violations of specific, universal and obligatory international human rights standards which 'confer . . . fundamental rights upon all people vis-à-vis their own governments.'"¹²⁵ The Second Circuit found frivolous one appeal brought after *Filartiga* was decided. That court limited the reach of the Alien Tort Statute to "shockingly egregious violations of universally recognized principles of international law."¹²⁶ The Ninth and Fifth Circuits recognize customary international human rights law under the statute to prohibit official torture, summary executions, murder, causing disappearances, prolonged arbitrary detention, and perhaps inhuman and degrading treatment, in addition to prohibiting slavery and genocide.¹²⁷ However, a violation of free speech "does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations.'"¹²⁸ Claims of privacy,¹²⁹ protection for cultural rights of indigenous peoples,¹³⁰ or fundamental right to education¹³¹ do not state causes of action for violating international law under statutes usually invoked. Government confiscation of property of a citizen and resident "was not a violation of the law of nations, which governs civilized states in their dealings with each other" and thus does not state a cause of

125. *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1994) and recognizing prohibitions against summary execution and disappearances in addition to official torture under the Alien Tort Statute).

126. *Zapata v. Quinn*, 707 F. 2d 691, 692 (2d Cir. 1983). In this case, the Second Circuit Court of Appeals upheld dismissal of an action under the Alien Tort Statute by a Colombian national for deprivation of property for alleged failure to pay promptly the proceeds of a winning lottery prize. *Id.* In a warning against "unreasonable and vexatious . . . proceedings by appellant's attorney," the court found the appeal frivolous and awarded double costs against appellant and her attorney. *Id.*

127. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1466-67; see also *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985).

128. *Guinto v. Marcos*, 654 F. Supp. 276, 280 (D.C. S.D. Cal. 1986).

129. *U.S. v. Covos*, 872 F.2d 805 (8th Cir. 1989).

130. *Inupiat Community of the Arctic Slope v. U.S.* 746 F.2d 570 (9th Cir. 1984) (finding that there is no right to protection of indigenous peoples' subsistence culture).

131. *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 596 (S.D. Tex. 1980).

action.¹³² Judge Kaufman's distinction in recognizing federal jurisdiction for claims by aliens of official torture is based upon a universal consensus that he does not find for deprivations of freedom of expression or property.¹³³

Oscar Schachter proposes a theoretical distinction in customary international human rights law between physical torture or genocide and property rights or freedom of expression. He finds difference in the relative intensity of claims. Individual claims arising from breaches of international law prohibitions against slavery, genocide, torture, or apartheid are recognized for their more powerful intensity, closer to "shocking the conscience" than those arising from censorship or property takings.¹³⁴

Most federal courts resist the use of customary international law as an aid to interpret treaties, statutes, or constitutional provisions or to fill interstices in the domestic law in areas involving human rights, as Justice Blackmun pointed out in his dinner address to the American Society of International Law.¹³⁵ The Court of Appeals for the D.C. circuit has not agreed (nor has it ruled in disagreement) with the Second Circuit's interpretation of the Alien Tort Statute and has declined to use general international law to recognize, in effect, an international tort to U.S. citizens abroad for wrongful injury from terrorist activity.¹³⁶

132. *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976); see also *Jafari v. Islamic Rep. of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982); see also *De Sanchez*, 770 F.2d at 1397 ("[T]he taking by a state of its national's property does not contravene the international law of minimum human rights"). But see *Siderman de Blake v. Argentina* 965 F.2d 699, 711-12 (9th Cir. 1992) (proceeding at trial on a claim that expropriation without compensation of a U.S. citizen's property in Argentina by the Argentine government violates international law).

133. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

134. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* [178 REC. DES COURS] 336-38 (1982). Alston and Simma, though critical of this approach, nonetheless, agree. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 82-85 (1992).

135. Modern jurists . . . are notably lacking in the diplomatic experience of early Justices such as John Jay and John Marshall, who were familiar with the law of nations and felt comfortable navigating by it. Today's jurists, furthermore, are relatively unfamiliar with interpreting instruments of international law 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.

Harry A. Blackmun, *The Supreme Court and the Law of Nations: Owning a Decent Respect to the Opinions of Mankind*, Address at the 1994 Annual Meeting of American Society of International Law (Apr. 1994), in ASIL NEWSLETTER, Mar.-May 1994, at 1, 6-7.

136. *Tel-Oren v. Libya*, 726 F.2d 774, 795-96 (D.C. Cir. 1984) (Edwards, J., concurring).

Would federal courts ever apply customary international law in a civil action when judicial authority from the Supreme Court is wanting or Congress is silent?

If Congress is truly silent about incorporating rules of international law in deciding cases or controversies, how does the federal judiciary obtain its power to apply international law from extraconstitutional sources, those public spheres which respond to the institutions of world civil society, unless it "makes" federal law from those sources? The Supremacy Clause refers to laws "made in Pursuance" of the Constitution, not to preexisting customary international law as if bound by it.¹³⁷ An act of judicial lawmaking which nationalizes any recognized international law is required to satisfy the plain text of that phrase. Also, why should the Supreme Court assume this power to make federal common law without Congressional authorization if the president does not have the power to execute his interpretation of international law?

Glennon relies upon Henkin's and the *Restatement's* position to find a constitutional grant of lawmaking (or nationalization) power in federal courts to receive customary international law if no Congressional authority can be found, where he finds none for a similar exercise of presidential power.¹³⁸ This position rests upon a controversial reading of the phrase in the Supremacy Clause that "Laws of the United States which shall be made in Pursuance [of this Constitution] . . . shall be the supreme Law of the Land . . ." ¹³⁹ The argument is that "Laws of the United States" include federal common law which incorporates customary international law as if part of federal common law.¹⁴⁰ However, this conclusion is dangerously broad, for if these laws are "made in Pursuance" of the Constitution by the international community of states, would they not be made outside constitutional legislative processes and powers? Unless federal courts are bound constitutionally by some dual allegiance to transform this extraconstitutionally made "customary world law" into United States law, any such judicial lawmaking would be purely national lawmaking. Assuming that federal judges do make law on occasion, what is the constitutional justification for federal judges to invoke extraconstitutionally made customary international law rules of decisions as if they were binding (even though the country as a

137. U.S. CONST. art. VI, § 2.

138. GLENNON, *supra* note 105, at 111.

139. U.S. CONST. art. VI, § 2.

140. For the view that customary international law after *Erie* is not federal common law, see Bradley & Goldsmith, *supra* note 58, at 855-56.

whole may be bound in its legal relations to other countries)? For if they have power to nationalize customary international law, they would also have considerable power to modify it.

F. *Making International Law for World Civil Society*

The *Restatement of Foreign Relations* accepts dictum from Justice Brennan that laws of the United States may be made by judicial decision, whose effect is the same as if made by Congress for the purpose of federal jurisdiction under 28 U.S.C. § 1331.¹⁴¹ Using that interpretation together with Justice Sutherland's interpretation that the judicial power in Article III of the Constitution includes international law and agreements in "Laws of the United States" derived from national sovereignty,¹⁴² the *Restatement of Foreign Relations* infers that new customary international law is supreme over at least state law at the mystical moment when it becomes binding as international law. The Supreme Court, in that sense, makes it U.S. law. But in making or "nationalizing" international law for domestic purposes, federal courts following Supreme Court guidance might also help "make" customary international law in the legal process of conducting transnational litigation within the context of world civil society, pragmatically using their own judicial experience from United States federalism.

In making national law under such circumstances, the Supreme Court would not necessarily purport to speak for world civil society, but it would project judicial power outwardly. This creative act of reasoned decision within its own circumstances contains the best realistic balance of pluralistic interests derived from experience in a federal system imbedded in transnational processes. Federal judicial lawmaking easily internalizes all external circumstances, makes a new rule, and then extends that rule into the transnational process of decision without the myth of universality.

Most contemporary international law scholars urge federal courts to recognize the nature and sources of international law as if federal common law, simply bypassing any interpretation limiting judicial power.¹⁴³ Federal courts, they believe, should use these sources of authority to determine the validity of rules of customary

141. RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 11 rpr. note 4 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 393 (1959)).

142. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-21 (1936).

143. See *Major International Judicial Conference to Meet in Washington*, INT'L JUD. OBSERVER, Sep. 1996, at 1 (reporting on the IVth International Judicial Conference for justices of supreme courts and constitutional courts in Europe and discussing the role of the judiciary in democratic market societies during stages of transition and international issues and obligations).

international law, which they should be free to apply in decision as if supreme federal law under the Constitution. At the same time, scholars are questioning whether the very concept of national sovereignty is valid.¹⁴⁴

In an era of world civil society, however, programs encouraging federal judges to use the sources of customary international law (which include writings of academics as well as state practice and decisions of international tribunals) as formal authority for U.S. law, which binds all judges under the supremacy clause of the Constitution without approval first by the appropriate political branches, is likely to encounter profound resistance. More valuable would be a judicial architecture for making decisions in each phase of transnational civil litigation involving foreign and domestic parties whose interests are determined from their international scope and perspectives.¹⁴⁵ Even more important would be a critical analysis of some of the more obvious biases in judicial presumptions and attitudes about the use of international law and treaty interpretation in practical decision-making.¹⁴⁶

Federal courts, under Supreme Court supervision, are already undertaking a more pervasive, decentralized function of judicial leadership than generally recognized because transnational cases of great complexity arise from within the nature of civil life beyond that of any single country. Whether these cases are class actions with worldwide membership, complex international transactions, or international civil conspiracies, federal courts handling them seldom find public international law as relevant as private international law, party autonomy in forum selection (pervasively, arbitration), and choice of law. In these cases, federal courts pragmatically advance the decentralized values of world civil society as against the system of sovereign states as a whole—in the same structural relationship as they have in the federal system—to ensure a flourishing civil society,

144. See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* [216 REC. DES COURS] 24 (1990) (arguing that the notion of sovereignty is mythology which should be avoided as tool of precise thinking); Luzius Wildhaber, *Sovereignty and International Law*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 425 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983) (arguing that "sovereignty" adaptable to new situations and exigencies is a relative notion).

145. See discussion *infra* Part IV.D.

146. There is a growing literature on the incoherence and underlying biases in treaty interpretation by federal courts. See, e.g., David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 *UCLA L. REV.* 953 (1994); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 *VA. J. INT'L L.* 281 (1988); Rogoff, *supra* note 81, at 559; Detlev F. Vagts, *Treaty Interpretation and the New American Ways of Law Reading*, 4 *EUR. J. INT'L L.* 472 (1993).

one whose freedoms are not consumed by any government or private monopoly at any level.

Let us now turn from a conceptual presentation of the role of federal courts in an emerging world civil society to some concrete hypothetical situations in which decision-making has to consider the interpenetrating rules of public and private international law. After we have a practical sense of some problems, I shall return to continue exploring the decision functions of the federal courts when they adjudicate these kinds of questions in this new era where sovereignty is changing but not disappearing and where world life is becoming a social fact.

III. JUDICIAL REMEDIES FOR INJURIES TO INTERESTS BASIC TO WORLD CIVIL SOCIETY

For federal courts operating within world civil society, we might best visualize their functions through specific categories of relationships in which there is a perceived conflict or gap between the protection or remedies afforded by the law of the country of injury or jurisdiction, on one hand, and international law aimed at protecting against persistent wrongs or gross abuse of power by states, on the other hand. We might imagine at least four primary sets of relationships requiring judicial protection in a world civil society that moves beyond the present system of sovereignty: (i) where aliens, while within U.S. jurisdiction, claim injury by a U.S. state or local authority; (ii) where aliens claim, in a federal forum, injury by officials of their own country; (iii) where U.S. nationals claim violation of international law by U.S. officials; and (iv) where third parties claim violation of international law on behalf of injured parties.

These four scenarios vary in approaching the above questions concerning the best rules of decisions for federal courts when foreign or domestic state and local law is in tension with transnational economic expectations and international human rights law. They are, however, at the heart of a civil society, which transects boundaries and cultures while instructing the public spheres about interpreting existing law.

A. National Treatment of Aliens Fails Expectations Within a World Civil Society

Illustrating the first relationship, an alien or foreign national or corporation within the territorial jurisdiction of the United States, claims injury to personal or economic interests by a U.S. state or local

official in violation of a rule of customary international law.¹⁴⁷ A remedy is sought by the alien within federal jurisdiction, because it is claimed that any remedy available under state or federal (usually, 42 U.S.C. § 1983) law is less than required by customary international law. Local and national authorities claim otherwise. One example of such a claim in federal court would be that a regulatory taking for environmental purposes not compensated under the Fifth Amendment to the Constitution arguably falls within the international rules governing prompt, adequate, and effective compensation for the taking of property in violation of international law. If an alien seeks a remedy under the Alien Tort Statute or the Tucker Act¹⁴⁸ (a remedy preserved, for example, in *Dames & Moore*¹⁴⁹), the federal courts (or state courts) will exercise "quasi-international jurisdiction" over the subject matter of the claim because it is a wrong that might also violate international law. This jurisdictional threshold thereby serves the important federal policy of avoiding an international dispute which may arise were a diplomatic claim to be presented by the alien's government because it is not remedied domestically.

The policy for world civil society is one of maximizing voluntary associations across national boundaries and of maintaining the cooperation of all governments to ensure minimum interference in these activities. A federal remedy to forestall such violations, thereby serving the interests of world civil society as well as governments, seems to have been an underlying principle for the passage of the original Alien Tort Statute.¹⁵⁰ If, in exercising quasi-international jurisdiction to remedy a potential international wrong, the federal courts denied an appropriate remedy, the claim would pass to the international plane and enter traditional international jurisdiction for the resolution of an international dispute state-to-state. Federal jurisdiction is necessary for attribution of any denial of justice of states of the United States to the national government. Failure of the national government and federal courts to protect an alien lawfully present in a political subdivision (a state or local government) within a decentralized federal system, would be attributable to the national

147. This was an original reason for the transitory tort cause of action. See Dodge, *supra* note 117.

148. Tucker Act of 1887, 24 Stat. 505 (codified as amended at 28 U.S.C. § 1346 (1994)).

149. *Dames & Moore v. Regan*, 453 654 (1981).

150. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 523 n.3 (1833); see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 490 (1989); William R. Castro, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 467-91 (1986); J. Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 COLUM. HUM. RTS. L. REV. 315, 316-17 n.7 (1992).

government (here, to the United States as a member of the international community of states) under the international law of state responsibility.¹⁵¹ Governments and courts have interests in restraint in order to capture surpluses from voluntary transactions and to avoid sanctions for violations of human rights deterring the flow of voluntary transactions that maximize wealth production and distribution.

B. Aliens Claim Violation of International Law by Officials in Their Own Countries

To illustrate the second relationship important to protect world civil society, an alien or class of aliens claims in a federal forum that wrongs done by officials, usually foreign officials in the alien's own country, breach the obligations of international human rights law between the officials and their own citizens. An adequate remedy is denied or is unavailable in that country, even though the applicable domestic law is also breached because the official acted outside domestic legal authority. Being under color of law, the act or omission implicates the state, which cannot be brought before U.S. courts unless immunity is waived or the action falls within the restrictive theory of sovereign immunity under the Foreign Sovereign Immunities Act.¹⁵² In the United States, federal courts have possible quasi-international subject matter jurisdiction, whereby a cause of action might be determined under customary international law. At the very least, a court could assist in the international administration of justice by choosing to apply foreign or domestic law to provide a remedy.

In this relationship, cases or controversies arising under customary international law of human rights provide at least the threshold constitutional basis for a federal interest sufficient to sustain a jurisdictional statute, also providing a cause of action for events taking place solely abroad and not involving U.S. citizens.¹⁵³ The Alien Tort Statute and the Torture Victim Protection Act provide such jurisdiction in federal court for the exercise of quasi-international subject matter jurisdiction. Nothing in the Alien Tort Statute requires federal courts to apply international law as the substantive rule of

151. See Gordon A. Christenson, *The Doctrine of Attribution in State Responsibility*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 321, 333-35 (Richard B. Lillich ed., 1983); see also RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 111 rptr. notes.

152. Pub. L. 94-583, 90 Stat. 2898 (1976) (codified as 28 U.S.C. §§ 1330(a), 1441(d), 1602-1611 (1994)). See *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); see also *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

153. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d. Cir. 1980).

decision, however, and a judge might decide the case using private international law or choice of law principles to formulate the rule of decision, as well as to consider consistency with customary international law. Whether the rule of decision formulated would be foreign law or international law is within the district court's discretion, using a fairness and interest analysis, as the Second Circuit Court of Appeals in the *Filartiga* case made clear.¹⁵⁴

The interest analysis or minimum contacts analysis normally would consider the *lex loci delicti* as one appropriate substantive rule of decision, respecting the state creating those rights under the policy of its political institutions, for the protection of all of its citizens. When a universal basis of jurisdiction to adjudicate is also present, U.S. interests may prefer international law to foreign law where there is a gap in law, or if domestic law falls short of customary or general human rights law standards and upsets the peace of nations by gross human rights violations (as in genocide, apartheid, torture, arbitrary executions, disappearances, or mass expulsions). However, the choice of rules of decision in a case is at least shaped by the general policies of customary international law, whose rules are often difficult to identify or apply. The public policy of the forum court, assigned the task by Congress, provides the theoretical basis under choice of law principles for shaping a rule of decision to incorporate extant obligations under customary international law in addition to other sources for judicially constructed rules of decision. If the law of the place of the wrong does not afford an adequate remedy, customary human rights law could become the sole rule of decision under federal court jurisdiction, as instruments designated by Congress to serve international public order. In other cases, foreign law may provide a standard more protective of individual rights than that afforded in customary international law. The best choice of substantive law is not necessarily reflected in the principle of selecting the law which gives most favored treatment to the victim.¹⁵⁵ A court may wish to consider international relations among independent and equal sovereign states, respecting the choice of national authority to provide better treatment than afforded under customary international law. It may also wish to choose international law as the rule of decision when, for example, the law of the place provides punitive damages not considered appropriate under customary international law.

154. *Id.* at 889.

155. Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 27 (1992).

These distinctions in rules of decision between domestic law and international human rights law may seem hollow if the result is the same. Why not use international law directly? One reason why international law is not used directly is because initial deference to the place of the wrong gives respect to the political system of the country in which the grave breach occurred. It also supports a federal interest by encouraging the government of that state to take full responsibility for bringing its laws into compliance with the legal expectation of the community of states, which requires every state protect all citizens or residents within its jurisdiction at least to the minimum standards of international law. Justification for the principle that domestic remedies must be exhausted before resorting to international remedy is also grounded in mutual respect. C. F. Amerasinghe concludes his appraisal as follows:

The rule sprang up primarily as an instrument designed to ensure respect for the sovereignty of host States in a particular area of international dispute settlement. Basically this is the principal reason for its survival today and also for its projection into international systems of human rights protection

. . . .

In some areas . . . the rule has been developed in the direction of giving more recognition to the interests of the individual. However, the general application of the rule in this area does not show a reduced respect for the sovereignty of the respondent State.¹⁵⁶

When courts in another country apply customary international human rights law as the sole rule of substantive decision to determine liability of a former official without first looking to the law of the place, this choice would deny respect, for example, to a newly emerging democracy whose former officials, by definition, exceeded their own law.¹⁵⁷ It was to moderate the extremes of the doctrines of act of state and sovereign immunity that federal courts interpreted the Alien Tort Statute to apply to foreign officials acting under color of law (implicating the state under the law of nations) but not on behalf of the state (giving the state the benefit of the doubt that its officials did not follow its own law).

When foreign court paternalism displaces the law of the place without initial deference, it chooses not to respect the expectation

156. C. F. AMERASINGHE, LOCAL REMEDIES IN INTERNATIONAL LAW 359, 364 (1990).

157. For a discussion of this issue within the context of the *Siderman de Blake* case, see Tim Golden, *Argentina is Reported to Settle Rights Suit in the U.S.*, N.Y. TIMES, Sept. 4, 1996, at A5.

that a country (perhaps a developing democracy) will interpret its own laws to meet international human rights standards. In human rights or economic matters, this kind of predilection hints at returning to an era of consular courts in the Near East or extraterritorial jurisdiction for federal courts sitting in China, which lasted well into the twentieth century.¹⁵⁸ Initial deference at least reduces the unseemly appearance of federal courts in the United States applying fundamental human rights standards to a foreign official's treatment of the foreign state's own citizens while resisting application of the same standard in the United States for its own citizens.

Similar analysis extends to choice of law in rules for determining general and punitive damages. The law of damages in most jurisdictions and in international law is not as favorable to plaintiffs as in the United States. Punitive damages have very little support in international law, with other countries looking askance at United States civil antitrust or other actions which impose punitive treble damages for acts arising in those countries with effects in the United States. Is it sound judgment for U.S. courts to apply forum law punitive damages for human rights abuses abroad without considering their status under the law of the place or in international law generally?¹⁵⁹ In the litigation against Ferdinand Marcos' estate, the trial judge bifurcated damages, allowing a jury to award \$1.2 billion in exemplary damages against the estate before trying the issue of actual damages of the entire class.¹⁶⁰ Philippine law allows punitive or exemplary damages.¹⁶¹ If no punitive damages are allowed under applicable foreign law, however, they might still be justified in the forum if customary or general international law would allow them in an international forum under the policy of legal deterrence in any state-to-state remedy.

This policy is not so clearly established, however, even though it should be considered as an outside check against a collective policy of no punitive damages in the customary law of the community of nation-states, also supports of the values of a world civil society whose institutions ought not necessarily be bound by U.S. tort law. Recognition and enforcement of the *Marcos* judgment against estate

158. See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 644-53, 662-722 (1906) (discussing principles of extraterritorial jurisdiction in Chinese and Turkish law).

159. See Richard B. Lillich, *Damages for Gross Violations of International Human Rights Awarded by US Courts*, 15 HUM. RTS. Q. 207 (1993) (cataloging actual and punitive damage awards in judgments under Alien Tort Statute and questioning choice of law of forum to govern punitive damages).

160. See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1467-68 (9th Cir. 1994).

161. See *id.* at 1472.

assets abroad will put exemplary damages in question, and the reasonableness of choosing between either the law of the Philippines or customary international law could be central to an *ordre publique* challenge. Unless considered a legitimate countermeasure against a "crime of state" authorized for unilateral action under the emerging international law of state responsibility, why would a foreign court recognize or enforce a U.S. forum court's award of punitive damages?¹⁶²

Would procedure follow forum law, too, as in the certification by U.S. federal courts of a plaintiffs' class comprised of all those aliens wrongfully injured in another country? The award of \$1.2 billion in exemplary damages to the class of 10,000 Filipinos in the suit against the estate of Ferdinand Marcos is the first judgment involving a large class exclusively of aliens against a former head of their government under the Alien Tort Statute.¹⁶³

The class action brought in the United States against Union Carbide for damages to Indian nationals and residents arising under Indian law from the Bhopal incident might have presented similar questions of whether procedure always is determined by forum law, even if it might implicate foreign relations. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*¹⁶⁴ was dismissed upon the court's acceptance of defendants' motion for *forum non conveniens*.¹⁶⁵ This case resulted in a rather unusual situation in that while courts are generally concerned with avoiding the "delicate problem of foreign relations,"¹⁶⁶ the court decided to dismiss an action on behalf of those injured at Bhopal, despite the fact that the Indian Government wished to keep the case in U.S. courts.¹⁶⁷

In examining the *forum non conveniens* question, the *Bhopal* court followed the defendants' argument and relied on *Piper Aircraft Co. v. Reyno*.¹⁶⁸ In *Piper*, the Supreme Court held that a court should "determine first whether the proposed alternative forum is 'adequate' . . . [t]hen, as a matter within its 'sound discretion,' the district

162. For codification of "crimes of state" in the law of state responsibility, see *International Law Commission Draft Articles on State Responsibility: Report of the International Law Commission on the Work of Its 28th Session*, U.N. Doc. A/CN.4/SER.4/1976, addendum 1, pt. 2.

163. See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (affirming jurisdiction over subject matter and injunctive relief).

164. 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195, 197 (2d Cir. 1987).

165. *Id.* at 867.

166. *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir. 1975) (citing *Investment Properties Int'l, Ltd. v. IOS, Ltd.*, [1970-1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,011 (S.D.N.Y. Apr. 21, 1971)).

167. See *In re Bhopal*, 809 F.2d at 198; see also JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* 130 (1993).

168. 454 U.S. 235 (1981).

court should consider relevant public and private interest factors . . . in order to determine whether dismissal is favored."¹⁶⁹ Following the *Piper* holding, the court in *In re Bhopal* explained that the presumption in favor of the plaintiff's choice of forum is significantly lessened when the plaintiff is foreign.¹⁷⁰ After establishing that the Indian forum was indeed adequate,¹⁷¹ the court balanced public and private interests and conditionally dismissed the action.¹⁷² Although the conditions on which the action was dismissed were modified, the dismissal was upheld.¹⁷³

Judge Keenan explained that "to retain the litigation in this forum . . . would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation."¹⁷⁴ Despite Judge Keenan's honorable intentions in dismissing the case, the resulting litigation and settlement in India, as well as the disbursement of settlement funds, are hard to view positively. The length of time required to organize the case, gather information from the injured, reach the settlement, and appeal the settlement was overwhelming. "By the time the final compensation package was determined, increased numbers of victims and the effects of inflation had severely eroded the funds and, predictably, award levels were once again revised downwards."¹⁷⁵

Recent settlements of class action suits in federal courts where the class is international—as in the heart valve implant settlement or the breast implant settlement¹⁷⁶—will be certain to raise not only

169. *Id.* at 257.

170. *In re Bhopal*, 634 F. Supp. at 845 (citing *Piper*, 454 U.S. at 256).

171. See Mark A. Chinen, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multinational Corporations: In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, in December, 1984, 28 HARV. INT'L L.J. 202 (1987). Chinen explains that "the threshold question . . . is whether the defendant is amenable to process," *id.* at 203, and then explains that the U.S. court considered the Indian court's use of innovative procedure, the potential for delay, whether there would be adequate representation in the alternate forum, whether the law of India could handle the complexity of the case, and whether procedural law, including discovery procedures would preclude an adequate trial. *Id.* at 204-05. The *Bhopal* court found all of these factors met and granted the dismissal. *Id.* at 203-05 (citing *In re Bhopal*, 634 F. Supp. at 845, 847-50).

172. See *In re Bhopal*, 809 F.2d at 199-201.

173. *Id.* at 206.

174. *In re Bhopal*, 634 F. Supp. at 867.

175. CASSELS, *supra* note 167, at 247.

176. See *New Zealand Women Challenge Breast Implant Settlement*, N.Y. TIMES, Sep. 19, 1994, at A12 (national edition) (reporting an appeal of class action settlement in *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. 1469 (1995), in which foreign members of the class claimed procedural unfairness in rules governing settlement: denial of participation, inadequate representation, and an arbitrarily decided amount of compensation to foreign members of the class).

private international law questions of proper choice of procedure but also public international law questions. Should the country whose citizens form a substantial part of the class object to the intrusive settlement techniques wholly governed by U.S. procedural law?¹⁷⁷ If a country's attorney general were to assert a *parens patriae* interest in public representation of a class, a direct conflict with federal procedure could be elevated to the international level, with jurisdiction assuming public international law dimensions and remedies taking on classic international claims dimensions, made more complex by the technology of class action settlement claims management.

In a suit to recognize and enforce in another foreign country any judicial class action settlement or judgment against, for example, unnumbered bank accounts in the *Marcos* case, what rules of procedure and decision would govern or regulate the emerging international class action litigation?¹⁷⁸ Normally, forum law in an action to recognize or enforce a foreign judgment includes questions of public policy. A federal forum should be willing to consider all interests, including international public order and compensating victims of human rights abuses.

C. U.S. Nationals Claim Violation of International Law by U.S. Officials

The third situation is the most troublesome for constructing a cause of action purely from customary international human rights law. In a federal forum, a U.S. citizen or national seeks compensation from U.S. state or federal officials for gross violations of customary international human rights or international economic rights law by those officials acting under the color of law either within U.S. territory or outside it.¹⁷⁹ This case is purely theoretical because under U.S. statutes adequate remedies are available in any foreseeable case. Nevertheless, the question should be asked: Would

177. See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992).

178. An enforcement action in the judgment against Marcos' Estate is now under active litigation in Switzerland. See *Phillipine Marcos Victims Protest Swiss Court Decision*, Agence France-Press, Feb. 27, 1997, available in WESTLAW, 1997 WL 2067298. In this litigation, the Swiss government is taking a cooperative position but the Swiss banks are resisting the penetration of their secret accounts. See *id.*; see also *Swiss Government Helps out on Marcos Fund*, BUSINESS WORLD (MANILA), Apr. 3, 1997, at 8, available in WESTLAW, 1997 WL 10161624.

179. This is not the question raised in the civil suit brought by Alvarez-Machain against former agents of the Drug Enforcement Agency for injuries suffered in Mexico at or about the time of his abduction to the United States. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). There, Alvarez-Machain, a Mexican national, brought suit under the Alien Tort Statute and the Federal Tort Claims Act, 28 U.S.C. § 2671 (1994). See *Alvarez-Machain v. United States*, 107 F.3d 696, 696 (9th Cir. 1996). He might have also prevailed under the Torture Victim Protection Act if it were extended retroactively.

customary international law provide a remedy if there were no adequate remedy available under U.S. law? The short answer is almost certainly not. Under comity or reciprocity principles, why, then, should the federal forum provide a remedy for wrongs by foreign officials against their own citizens abroad? Why does the Alien Tort Statute provide an international law remedy different from that provided by 42 U.S.C. § 1983, which allows private causes of actions for deprivations of civil rights under color of law?¹⁸⁰ Might a federal court choose to construe the two statutes consistently with customary international human rights law as a policy of the forum developed by common law reasoning?

D. Third Party Champion Claims Violation of International Law on Behalf of Any Person or Class

In the fourth situation, a third party, either public or private, claims in a domestic or international forum that a state is treating any legal or natural person under domestic norms which fall short of customary international human rights law, thereby breaching a duty *erga omnes*, one owed to all. Is legal standing available for a third party to request an international remedy under customary international law on behalf of an injured foreign citizen against her own government? In a class action suit, may a private attorney general—an entrepreneurial lawyer or human rights litigation group—adequately champion an international class? A human rights commission or, now, the United Nations High Commissioner for Human Rights,¹⁸¹ might afford functional structures of protection under international agreement. Is there a counterpart under the customary international law of state responsibility? Might laws governing international class actions and lump sum international claims settlements merge in effect?

In the third party champion relationship, neither a public (another state or international organization) nor a private (a

180. Section 1983 of Title 42 of the United States Code provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994). Is protection based solely upon the bond of national allegiance considered outmoded in a world civil society?

181. See G.A. Res. 48/141, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/141(1994) (creating a High Commissioner for Human Rights). For a discussion of the High Commissioner position, see ROGER CLARK, *THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS* (1972).

nongovernmental human rights organization) entity has standing under customary international law of human rights to pursue or perfect a legal remedy on behalf of a national injured by the claimant's own government in breach of that law.¹⁸² Under the Federal Rules of Civil Procedure, class actions are being used to achieve the same result.¹⁸³ The legal basis of citizen-claimants' international remedies against their own states under customary international law of human rights, according to the *Restatement of Foreign Relations*, rests on dictum in the *Barcelona Traction* case, that each state owes an obligation *erga omnes* for its breach of a fundamental human rights norm under customary international law, even against its own citizens.¹⁸⁴ The normal self-help remedies would apply to this situation according to the *Restatement's* reporters.¹⁸⁵

Though it is not impossible to imagine a kind of quasi-espousal representation theory were there to develop a political relationship or allegiance of the citizen to the community of states as a whole (a kind of federalism), at present, a citizen has no international legal relationship through a third party state or private organization allowing legal protection. The theoretical basis for recognizing such legal responsibility under a political bond is highly problematic in customary or general international law for the simple reason that there is no effective political bond of citizen to a higher polity as there would be in a federal system. In fact, on a critical evaluation of the *Barcelona Traction* case, despite the concept of *jus cogens*, the theory of protection moves in the opposite direction toward the formal bond of nationality, or corporate nationality as a condition of international standing or a claim to protection.

Oscar Schachter reasons that the acceptance of the doctrine of obligations *erga omnes* by the International Court of Justice in the *Barcelona Traction* case, lays the groundwork for a remedy by a third state before the court or by special measure on the Roman law procedure of *actio popularis*, whereby any Roman citizen could

182. Some commentators think espousal of an international claim for compensation for violation of a fundamental human right is available as a remedy against a citizen's own government when presented formally by any nation under the theory that the obligation is *erga omnes*, owing to all states by each state not to violate fundamental human rights of anyone. See AMERASINGHE, *supra* note 156, at 76-95. However, state practice invoking international law as a formal matter is absent in these matters, although as a diplomatic and political measure minorities often are subject of outside pressure.

183. FED. R. CIV. P. 23.

184. See RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 703 rptr. notes 2, 3 (citing *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5)).

185. *Id.*

enforce Roman law by maintaining claim to the penalty.¹⁸⁶ In Roman law, however, no citizen could bring such an action without a proper procedure tantamount to authorization. The prior procedure seems equivalent to Congressional authorization of self-help by letters of marque and reprisal¹⁸⁷ or public acquiescence in private bounty-hunting practices, such as those in *qui tam* procedures recently revived in U.S. law, which allow bounties for disinterested whistleblowers who find fraudulent claims against the government.¹⁸⁸ Private claimants are authorized to bring suit, subject to being taken over by the Department of Justice, but are entitled to a percentage of recovery. An international remedy by a third state against another state's abuse of its own citizens in violation of an obligation *erga omnes*, by analogy, would require permission from some international body, for example the Security Council or Human Rights Commission, before standing would lie to take or bring such an action.¹⁸⁹

If *actio popularis* type remedies are unavailable state-to-state to collect a penalty,¹⁹⁰ what international legal remedy, then, is available to U.S. citizens against their own government other than under domestic law through domestic courts?¹⁹¹ Later, we shall consider

186. See SCHACHTER, *supra* note 134, at 196-201.

187. See U.S. CONST. art. 1, § 8.

188. See 31 U.S.C. 3730 (1994). A number of cases have been brought under this section. See, e.g., *Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio 1988) (allowing a *qui tam* private party to recover against corporate employer who had been overcharging the government).

189. See SCHACHTER, *supra* note 134, at 199-201. For an able justification from doctrine and practice for third state remedial action for such breaches, see MENNO T. KAMMINGA, *INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 171-90* (1992). Kamminga explains the development by the International Law Commission of the concept of "international crime" as injury to all states, thereby authorizing noncoercive special measures for violations of fundamental human rights by a state of its own citizens without needing the anachronistic metaphor, *actiones populares*. *Id.* at 73-77.

190. The Permanent Court of International Justice laid down the old rule of standing in *Panevezys-Salditiskis Railway*:

[W]here the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse.

Panevezys-Salditiskis Ry., 1939 PCIJ, (ser. A/B) No. 76, at 16 (Feb. 18); see also *International Status of South-West Africa*, 1950 I.C.J. Rep. 128 (July 11) (rejecting expressly the remedy of *actio popularis*).

191. "[A]buses are much more likely to occur when a state is exercising protection on behalf of its own nationals than when it is acting on behalf of foreign nationals." KAMMINGA, *supra* note 189, at 189. The attack on internal protection and allegiance systems echoes feminist and critical legal studies attacks on structural repression within the states system itself. Less convincing is Kamminga's observation that "victims of human rights violations who are nationals of the offending state may benefit from wider protection—that is, from more than 170

the unsuccessful attempts to invoke *jus cogens* to incorporate universal customary norms as part of U.S. law to redress the most grievous internal abuses of human rights law. Consider how civil societies might have developed practical means of protecting privileges and immunities of persons when they were attempting to break out of feudal or other structures.

IV. HORIZONTAL AND VERTICAL STRUCTURES OF WORLD CIVIL SOCIETY

An underlying principle for national political allegiance in a hierarchical federal structure is that subordinate states lack power to abridge certain privileges and immunities of persons derived from the status of national citizenship. In external relations, the principle is the responsibility of the political superior for acts of subordinate political entities.¹⁹² This structure is identical to that of the hierarchical protection given by the liege lord in the feudal era in favor of certain outsiders, mainly merchants and traders, from the lesser lord's jurisdiction. These immunities and privileges grew from different economic and political milieu but served the same common function of protection of individuals against a subordinate power, based either on allegiance or on economic and political advantage. They formed the backdrop for later protection of the beginning institutions of civil society—markets, the great fairs and commerce, the break-up of feudalism, and the stirring of revolution through peasants revolts and religious protest in Europe.

A. Central and Local Structures in History

Horizontal and vertical structural relationships which evolved finally to protect the institutions of civil society used what are now constitutional concepts of privileges and immunities. There were roughly six different periods through which this evolution took place in the West. The first, during the feudal era, is dated from the Magna Carta in 1215 until the emergence of the centralized territorial nation-state, conveniently fixed at the time of the Treaty of Westphalia in 1648. This period is marked by a rearrangement of hierarchical relationships, with a shift of loyalty and protection from the lord ultimately to the central state and the king, who protected commerce and travel by merchants and others, the loosening of

states—than may be enjoyed by victims who are nationals of the interceding state under the old system of diplomatic protection." *Id.* at 188.

192. This principle is implicit in Chief Justice Jay's reasoning in *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793).

feudal bonds by alienation of free-hold estates, and a freer civil society.¹⁹³

The second period overlaps the first, and is also noted for the central protection of individual privileges and immunities from the power of the charter companies by the king. It begins with the European discovery of America in 1492 and ends with the American Revolution in 1776. In this colonial period, the British Privy Council protected the privileges and immunities of "Englishmen" from abuse by the chartered colonial governments. The charters made provision for a type of quasi-judicial review.

The third period is a brief time (1776-1781) of horizontal relationships among the thirteen newly sovereign American states, whose relationships, even with a common heritage, were based on the concept of sovereign equality of states under a law of nations, then being shaped in a European setting, in the tradition of Suarez, Vitoria, Grotius, and Vattel. The dominant structure was formed in 1781 by the Articles of Confederation, whose weak vertical and strong horizontal organization led to the invention of union seven years later in the Constitution. Through the comity clause, equal treatment in one state of citizens of the several states did no favors for free states in the handling of citizen status of former slaves or of fugitive slaves. In the community of purely sovereign states (for only a five year period), ironically, if a fugitive slave went to a free state, there was no impediment under the law of nations against the state's granting freedom and citizenship to the former slave if it chose. A price of union, however, was the infamous Fugitive Slave Clause of Article IV of the new constitution requiring return of fugitives slaves to the owners in another state. Freed slaves could not form part of civil society unless they remained within the free state.

The fourth period, which emerged from the Constitution of 1787, introduced a more perfect union with greater central powers, while still basically horizontal in the treatment of privileges and immunities of citizens of one state while in another, but with central or vertical enforcement of slavery as exception. This fourth period, exacerbated by the *Dred Scott* decision,¹⁹⁴ lasted until the Civil War and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments.

The fifth period reintroduces a central hierarchical protection of citizens of the states by the national government through the

193. See generally 1-2 WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* (1897).

194. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Fourteenth Amendment, empowering the national government to interpose itself between state and citizen. This period lasted from 1868, when the Fourteenth Amendment was ratified, through the New Deal transformation, in which national protection was powerfully extended, and until the end of World War II, when the United Nations Charter sought to interpose the international community's interest in the protection of human and economic rights between the sovereign nation-state and its citizens or nationals.¹⁹⁵ It was complicated by the cold war struggles, which came to a close in 1991, leading into an era of increased anxiety and uncertainty both from devolution of national power and from globalization.¹⁹⁶

The sixth period—formation of world civil society post-cold war—is an era of rapid technological change and complex global interconnectedness, made up of both hierarchical and vertical structures infused with information from the media and computer networks. As we enter the twenty-first century, the international community of states is in transition, without any clear juridical or theoretical assimilation by effective international regimes which might protect international privileges and immunities, or international human rights of individuals and groups in return for their allegiance. Yet, powerful movements outside state control, including messages in cyberspace, press upon the public spheres for decentralized protection of developing civil societies whose interests in global markets and human rights penetrate all states.

Effective international protection for human rights develops haltingly and within spheres of core civilizations when common interests coalesce.¹⁹⁷ International economic institutions are far more integrated. Without credible and reliable effective power to protect hated minorities from their own governments, free from the cynicism that the major powers will abandon them when other interests prevail or power fades, local groups and factions turn to their own forms of self-protection and self-help, hostage to the equilibrium of

195. See Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt.1, at 71, U.N. Doc. A/810 (1948).

196. ERIC HOBSBAWM, *THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991*, at 8, 16, 257-86 (1994) (noting that unprecedented Golden Age of 1947-1973, followed by age of crisis after the cold war ended in 1991, led "the most profound revolution in society since the stone age").

197. Compare Slaughter, *supra* note 31, at 226-38 (discussing an imagined society of liberal states, whose ideological assumptions for transnational society flow from foundations of Western civilization) with HUNTINGTON, *supra* note 39 (discussing a hypothetical clash of civilizations, in which the coming world order will have to focus on the conflicts between core civilizations rather than upon notions of competing territorial sovereignty or traditional realist international relations theory centered upon coalitions of autonomous states based upon their purely statist interests outside any bonds of common culture).

power calculation that the strong take what they can and the weak yield what they must.¹⁹⁸ British world civil society contains a streak of anarchism. U.S. federal courts, from their own tradition beginning with Chief Justice Marshall, and most recently Justice O'Connor, instinctively have understood that to be effective in judicial protection of human rights of citizens against their own governments and powerful transnational companies, the judges cannot be seen as transferring their own allegiance away from democratic national institutions.

One way judges have ensured this protection while exercising their function of political allegiance is by nationalizing public and private international law deciding transnational cases as if federal courts were setting the example within world civil society. To understand how this ironic movement might contribute to a freer global life, we first have to come to grips with the problem of dual loyalties and federal court resistance to any constitutional loyalty to the political collective of sovereign states who make international law, which is supposedly part of U.S. law.

B. *The Problem of Dual Loyalties*

In a decentralized state system, courts remain instruments in service of the policies and values of national political institutions through a domestic rule of law. Events, things, and processes may be global; however, the dominant system of protection and allegiance for individuals and groups—the architecture for their civil society—is still centered in nation-states.¹⁹⁹ All international human

198. For a discussion of problems confronting the War Crimes Tribunal for the Former Yugoslavia and Rwanda and proposals for a permanent tribunal, see Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. 77 (1994); Robert F. Drinan, *Is a Permanent Nuremberg on the Horizon?*, 18 FLETCHER F. WORLD AFF. 103 (1994); Jeri Laber & Ivana Nizich, *The War Crimes Tribunal for the Former Yugoslavia: Problems and Prospects*, 18 FLETCHER F. WORLD AFF. 7 (1994).

The protection of the Kurdish minorities in the region of the Middle East from regional powers, for example, does not readily lead the Kurdish factions to give allegiance to an international regime or coalition in return for protection offered in international law from the international community backed up in a domestic constitutional arrangement. Juridical protection and allegiance for minorities, which depend upon a national or international judiciary's own allegiance to the political community to which it owes its power, seems currently to be beyond the realm of the possible in situations such as these, despite advances toward a permanent international tribunal for crimes against humanity.

199. "Notwithstanding their international thrust and flavor, international human rights are, at bottom, national rights." Louis Henkin, *A Post-Cold War Human Rights Agenda*, 19 YALE J. INT'L L. 249, 249 (1994); see also Louis Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 425 (1979). But see Nicholas Onuf, *The Constitution of International Society*, 5 EUR. J. INT'L L. 1, 19 (1994) (theorizing about postmodern conversation towards universal international society from within the structure of a modern states system).

rights rhetoric operates on states in the state system. All private international contracts and property interests ultimately require protection through national judicial systems, even when covered by international treaty regimes. While international regimes facilitate compliance, they succeed through influencing decisions in states and transnational organizations.²⁰⁰ Nongovernmental organizations often parallel the interpenetration of regimes and national bureaucracies, influencing them from the stance of a separate world civil society.²⁰¹

According to Richard Falk, domestic courts necessarily function both as national institutions and as agents of international legal order.²⁰² In cases raising international human rights questions, we have seen that federal courts struggle with the pragmatics of dual loyalties, refusing to incorporate a rule of customary international law without approval of the political branches. Yet, in cases raising international economic questions of free markets and exchange, domestic courts seem to struggle less with dual loyalties than with merging national protection of property and contract within an integrated global economy.²⁰³ Questions of dual loyalty arise most often when domestic courts are faced with incorporating international law as municipal law²⁰⁴ or deciding cases within general or quasi-international jurisdiction.²⁰⁵ Here, I mean the power to decide a question in a case the outcome of which is governed by substantive sources of international law or where public or private international legal arguments will influence or have consequence to the outcome

200. CHAYES & CHAYES, *supra* note 31, at 278-85 (arguing that transnational communities or "epistemic communities" insinuate themselves into policy-making processes, but the resources and public spheres for decision remain, nonetheless, within the power of states).

201. *See id.* at 281.

202. RICHARD A. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 428, 433, 441-42 (1970) (arguing in favor of (i) maximum judicial independence from executive supervision when the "reality of dual membership in specific instances" cannot be compromised or otherwise avoided and (ii) normative autonomy of international law to lessen dependence of judicial outcome on provincial orientation and outlook of the forum); *see also* Anne Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT'L L.* 503, 516 (1995) (rejecting dualism in favor of a multifaceted series of functional and ideological relationships in an imagined world of liberal states between individuals and groups in transnational society, state institutions in relation to these social actors).

203. Shapiro, *supra* note 41, at 61-64.

204. For a fresh look at the relationship between international and municipal law, see HEISKANEN, *supra* note 95, at 83-88. The now classic postrealist exposition of this problem is Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 *S.D. L. REV.* 25 (1959) (discussing inclusive and exclusive decision-making by participants who project certain perspectives of authority or lawfulness purporting to allocate various systems of competence for decision-making between general community of states and particular states in world power process).

205. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 *HARV. L. REV.* 610 (1988).

of the decision. This meaning differs from that of general jurisdiction or "dispute-blind" jurisdiction exercised when a cause of action is unrelated to a defendant's "presence" in the forum.²⁰⁶

The doctrines of incorporation and transformation are devices constructed to adjust anticipated tension between international and municipal law or to avoid it.²⁰⁷ Neither objective is satisfactory for making international law part of U.S. municipal law. This is because to incorporate new customary human rights law, statutory authority is required. Yet, human rights treaties, reservations, or conditions imposed by the political branches and a general judicial reluctance to view them as self-executing undercut the treaty as supreme law of the land.²⁰⁸ For international economic law, however, customary principles have long been incorporated through comity and the law merchant. Commercial treaties generally are self-executing. Trade agreements seldom are made under the treaty power and generally are made law by executive-congressional agreement and enactment, often under fast-track authority.²⁰⁹

Incorporation of customary international law into municipal law through common law is the dominant doctrine in common law countries, developed first as a monist theme to unify international and municipal law.²¹⁰ Common law monist doctrine is usually—but not always—opposed by the continental theorists of dualism because it "shows the dualist theory to be inconsistent with existing law."²¹¹ A political and moral choice about the hierarchy of rules is forced by semantic and syntactical formalism in doctrines of incorporation, but without clarifying substantive values in decision processes,

206. *Id.*

207. See ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 206 (1994) (arguing that domestic court responses to clash between international and domestic law is often instinctive with little discussion of monist or dualist approaches to incorporation).

208. See, e.g., *Core Document Forming Part of States Parties*, U.N. Doc. HRI/CORE/1/Add. 49 (1994).

209. Compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (challenging strict interpretation of the U.S. Constitution Treaty Clause, according to which a treaty, including NAFTA, must be approved by two thirds of the Senate) with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (arguing that it is unconstitutional to bypass the Senate's required 2/3 vote).

210. See GERALD FITZMAURICE, *THE GENERAL PRINCIPLES OF INTERNATIONAL LAW CONSIDERED FROM THE STANDPOINT OF THE RULE OF LAW* [92 REC. DES COURS] 71-72 (1957); see also HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 446-47 (1952); J.G. Starke, *Monism and Dualism in the Theory of International Law*, 17 BRIT. Y.B. INT'L L. 66 (1936).

211. 1 HERSCH LAUTERPACHT, *INTERNATIONAL LAW* 221 (1970); see also Ferrari-Bravo, *International Law and Municipal Law: The Complementarity of Legal Systems*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 715 (R. St. J. MacDonald & Douglas M. Johnston eds., 1983).

according to Myres McDougal, who, in a superb treatment of the subject, rejected the pluralist-dualist-monist controversy.²¹² He assailed this characterization of the relationship of international to municipal law as nothing more than a formalistic quibble over some mystical "incorporation" or "transformation," inadequate to understanding actual social and power processes involving the interpenetration of complex patterns of authority and control that affect shared values across all boundaries.²¹³ To McDougal, the continentalist Hans Kelsen was the "master monist" of hierarchical formalism.²¹⁴ Kelsen himself characterized the normative structure of his formal choice of systems of legal order as the primacy of norms of "internationalism and pacifism" over those of "nationalism and imperialism."²¹⁵ He subordinated all domestic norms to international law, using the syntax of hierarchy, the *grundnorm*, as the apex norm from which the validity of all lesser norms is derived.²¹⁶ His law was an international metropolitan law, as David Kennedy has shown in comparing Kelsen's structure with that of John Jackson's cosmopolitan transnational economic structure.²¹⁷

The doctrine requiring transformation of one system of rules into those of the other reflects a dualist premise that the two legal systems are completely different and incommensurable, with some mystical operation needed to integrate them in decision. This doctrine is no more satisfactory to U.S. realists and pragmatists than the one of incorporation.²¹⁸ Recent commentators also think that the monist-dualist-pluralist discussion is quite meaningless.²¹⁹

A domestic process in aid of world civil society is not helped by characterizing the choice for domestic courts as one between loyalty to national political authority or loyalty to the authority of international community of states as a whole, without central institutions. When domestic courts are faced with such a stark choice, they invariably resist subordinating any ambiguous national norms or silence to

212. MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 439-42 (1981).

213. *Id.*

214. *Id.*

215. See generally KELSEN, *supra* note 210.

216. See MCDUGAL & REISMAN, *supra* note 212, at 439-42.

217. See Kennedy, *supra* note 79, at 7-19 (arguing that the new pragmatism of Jackson replaces a Kelsenian public order of sovereign states with an integrated market of economic actors).

218. See MCDUGAL & REISMAN, *supra* note 212, at 441-42; see also Blakesley, *supra* note 198.

219. See David Kennedy, *Theses About International Law Discourse*, 23 GER. Y.B. INT'L L. 361-62 (1980); see also MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 40-41 (1989).

those of the international legal order. Instead, U.S. federal courts will effectively subordinate sources of international law to the national public order even if their rhetoric denies it.²²⁰ Federal judges in the United States nationalize international law sources and extend them, whether they are human rights or economic rights, from baseline assumptions. They reject the theory that choice of law means grounding that choice in the subordination of the national polity to that of the international legal order, or choosing which political authority issuing rules ought to be the controlling coercive order. An emerging world civil society, however, does not compel federal judges to make that "either/or" choice in litigation.

The "proper" function of U.S. domestic courts in the international legal order has been a familiar question for a long time.²²¹ If a domestic court holds the political organs or officials of its own state accountable to the larger community of states for gross abuses of human rights of citizens of the state without legislative authorization, the claim would be to recognize a redistribution of constitutive power.²²² If U.S. courts choose to internalize these expectations, should they do so solely on their own judicial authority? Federal question jurisdiction originating in 1876 does not grant such general power by the constitutional text without a jurisdictional grant by Congress.²²³ Should U.S. federal courts continuously restate a cosmopolitan political relationship of all citizens to all states as independent judicial agent loyal to an emerging international legal order? Should they recognize dual loyalties, both to the domestic polity and to the international legal order? We considered earlier the

220. See Nathaniel Berman, *But the Alternative Is Despair: European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

221. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), focused the discussion when, as a matter of federal law, it prohibited New York conflict of laws principles that would apply the policy or law of the forum from determining the validity of an act of a foreign state done within its own territory. See RICHARD A. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 75 (1964) (deference to foreign law is proper when diversity is legitimate—as in economic or social laws; when diversity of values of two national societies is illegitimate—as in allowing abuse of genuinely universal human rights—domestic courts properly fulfill their role by refusing to further the policy of foreign or domestic law and by giving maximum effect to universality or international law); Richard B. Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 33 (1970) (preferring an activist role of domestic courts both in economic and in human rights questions by refusing deference either to foreign law or to the domestic executive and by applying international law directly in litigation).

222. Internal accountability of political branches under international law through their domestic courts differs conceptually from the easier question of external international responsibility of one state to all other states for its human rights abuses of its own citizens. See KAMMINGA, *supra* note 189, at 171-90.

223. See *Finley v. United States*, 490 U.S. 545, 547-48 (1989).

constitutional problem of looking to extraconstitutional sources were international law to be considered formally part of U.S. law under the Supremacy Clause. Here, we ask whether federal courts should recognize their own national role as an example or model for world civil society.

We know that major claims to recognition of their own international competence by domestic courts without authority from Congress would deeply offend domestic political authority and introduce a problem of judicial supremacy in the United States as old as *Marbury v. Madison*.²²⁴ We have already noted the skeptical reception of these kinds of questions when federal courts consider human rights claims based upon the concept that customary international law is an extraconstitutional limitation on national power as well as a rule of substantive decision.²²⁵

As we shall see in greater detail later, federal courts do not give more than passing recognition to the contemporary concept of *jus cogens* of human rights invoked before federal courts, and have never used it doctrinally to create causes of action or trump statutory sovereign immunity recognized among sovereigns when a breach of international law is alleged.²²⁶ *Jus cogens* claims are the most hierarchical and peremptory of all norms of international public order and, as argued, would force a structural choice of loyalty to an emerging international public order of international society over that of the horizontal state-to-state legal order. Judges faced with that stark choice of loyalties between a national public order and a nascent international public order invariably will choose loyalty to their own constitutional authority unless the international override is explicitly recognized by Congress.²²⁷ This problem of protection and allegiance is an old structural problem of federalism in the United States.

C. Preemption by International Law as Supreme Federal Law

If the decision whether international law is part of United States law is a federal question — whether exclusive or not — it should follow from the Supremacy Clause that if the Supreme Court does recognize a rule of international law as federal law, then any inconsistent state

224. 5 U.S. 137 (1803).

225. See *supra* text accompanying notes 182-83.

226. See *Siderman de Blake v. Argentina* 965 F.2d 699, 717 (9th Cir. 1992); see also Karen Parker & Lyn B. Nelson, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 441-42 (1989).

227. *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994).

constitution or law would be preempted.²²⁸ But federal courts seldom invoke international law directly to preempt state law mainly because the Supreme Court's early reasons for dormant foreign power preemption are so ill defined.²²⁹ Decentralization of political institutions, moreover, is accelerating with the Court's post-cold war cut-back of such preemption doctrine in *Barclays Bank*, a new judicial devolution respecting state sovereignty.²³⁰

1. Federalization of Civil and Human Rights

Professor Lea Brilmayer argues that customary international law (including international human rights law) as federal law is exclusively a federal interest within the cognizance of federal courts, which preempts any inconsistent state constitutions or laws and must be applied by the states under the Supremacy Clause.²³¹ "Brilmayer's syllogism" reads:

1. All federal laws preempt inconsistent state law under the Supremacy Clause;
2. International law is federal law;
3. Therefore, international law preempts contrary state law.²³²

Her resolution is "a presumption that Congress will ordinarily want the states to comply with international law unless it has explicitly stated otherwise; state law inconsistent with international law will, therefore, typically be preempted."²³³ However, as we have seen, federal court jurisprudence is not so friendly to that presumption. What matters more than the syllogism is whether international law substantively concerns economic and sovereign rights or human rights. The key question is whether federal courts are justified in presuming the former as federal law but not the latter, is an underlying trend which is revealed in actual decisions reminiscent of the

228. See Lea Brilmayer, *Federalism, State Authority and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295 (arguing that international law as federal law should be supreme and preempt inconsistent state law).

229. *Zschernig v. Miller*, 389 U.S. 420 (1968). In this case, Justice Douglas suggested (during cold war) a new dormant foreign relations preemption of a state statute without Congressional preemption by statute. But that doctrine is in doubt. See Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Law Matters*, 5 VAND. J. TRANSNAT'L L. 133, 140 (1971).

230. *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994) (finding that absent Congressional action, California could tax multinational corporations on basis of worldwide combined reporting method without national preemption).

231. *Id.*

232. *Id.*

233. *Id.* at 299.

constitutional era of *Lochner v. New York*.²³⁴ It is striking to note how closely the current federal court presumptions in incorporating international law resemble the *Lochner* era's baseline of national protection against state interference with freedom of contract and property under the Due Process Clauses of the Fifth and Fourteenth Amendments, but not of national protection of fundamental rights of citizens from state interference. Until the New Deal transformation reversed those substantive presumptions, federal courts refused to interfere in civil rights between citizen and state, except when legislatures or Congressional enactments burdened property or contract without the strictest justification from the police power.

The apparent contradiction in the presumptions about incorporating international law as part of U.S. law cannot be answered without considering where the allegiance of federal judges lies. Arguments for federal judges to protect universal human rights and freedoms under international law from any deprivation by a citizen's own government at any political level are structurally similar to the interposition of the federal courts between the states and its citizens or residents for protection of fundamental rights under the Constitution as it evolved from the *Slaughter House* era. There is one profound difference, admittedly tautological—under the Supremacy Clause, all judges have sworn loyalty only to the Constitution and not to a law of nations made pursuant to a world constitution. Might the founders have envisioned the kind of international community of 185 independent countries whose practice, if accepted as law, would become automatically part of United States law by operation of the Supremacy Clause, without any process of ratification through the process of representational democracy except for the participation of an elected president acting on behalf of the country under the foreign relations power in the development of customary international law by state practice?²³⁵

One of the few protections incident to national citizenship left by the *Slaughter House Cases*,²³⁶ which first narrowed the Fourteenth Amendment's Privileges and Immunities Clause to the point of extinction, is that of diplomatic protection of citizens,²³⁷ a distinct

234. 198 U.S. 45 (1905).

235. See Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 718-23 (1986) (arguing that the process for making customary international law, which includes foreign governments and other non-U.S. participants, is not representative of the American political community nor responsive to it).

236. 83 U.S. 36 (1873).

237. Section 1 of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S.

practice under customary international law of state responsibility. Among the privileges and immunities of national citizenship which are protected against abridgment by any state in the United States, in contrast to those of Article IV which remain within the province of the several states, the Court included diplomatic protection explicitly from nineteenth-century practice:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government [A]ll rights secured to our citizens by treaties with foreign nations are dependent upon citizenship of the United States, and not citizenship of a State.²³⁸

Except as provided in the Thirteenth and Fifteenth Amendments or in other clauses of the Fourteenth Amendment or Constitution, the national government has no power to protect citizens of a state against acts of the state government which deprive them of privileges and immunities accorded under state law, and does not discriminate between residents and nonresidents. Justice Miller rejected the argument that the Fourteenth Amendment transferred "the security and protection of all the civil rights [which are considered fundamental] from the States to the Federal government [or] to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States."²³⁹ In his famous dissent, however, Justice Field noted:

CONST. amend. XIV, § 1. *Slaughter House Cases* distinguished privileges and immunities of citizens of the United States from those of citizens of a state.

238. *Slaughter House Cases*, 83 U.S. at 79-80. Diplomatic protection in the law of state responsibility for injury to aliens was the principle which Chief Justice Marshall used in *The Charming Betsy* to interpret a statute to avoid conflict with international law. *Murray v. The Schooner Charming Betsy*, 6 U.S. 677 (1804). The statute prohibited commercial transactions between persons under U.S. protection and those residing in French territory and authorized privateers to enforce it by seizure. *See id.* at 677-78. He held that it did not apply to the seizure by an American, Captain Murray, of the Schooner *Charming Betsy*, then owned by a former U.S. citizen under Danish protection but thought to be trading with French territories under a ruse. *See id.*

239. *Id.* at 77. Justice Miller explained why the apparently clear meaning of the clause should not be interpreted so radically:

But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

The question presented . . . is nothing less than the question whether the recent Amendments to the Federal Constitution protect the citizens of the United States against the deprivations of their common rights by State legislation. In my judgment the Fourteenth Amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.²⁴⁰

These fundamental rights, implied in the Bill of Rights and elsewhere, have been incorporated and made applicable against state action by the Equal Protection and Due Process Clauses, effectively ensuring protection by the national government of all individuals—both aliens and citizens—and corporations against infringements by state governments. Justice Bradley, dissenting in *Slaughter House Cases*, had made it clear that the Fourteenth Amendment also aimed at disloyalty by some of the states to the national government.²⁴¹ Further, Justice Swayne, also dissenting, viewed the Amendments as a new Magna Carta: "By the Constitution, as it stood before the war, ample protection was given against oppression by the Union, but little was given against wrong and oppression by the States. That want was intended to be supplied by . . . [the Fourteenth] Amendment."²⁴² These protections against the states have included many of the same freedoms guaranteed under the Universal Declaration of Human Rights.²⁴³

It took the Supreme Court over a century to develop a jurisprudence of incorporation of provisions of the federal Bill of Rights as against the states within the context of an organic federal polity under a written constitution. Allegiance by federal judges to an international legal order which guides the incorporation of universal international law under the Supremacy Clause is a far more radical shift of political allegiance and structure than finally occurred through the Civil War Amendments. Since all principles of customary international law are supposedly treated with the same respect

We are convinced that no such results were intended by the Congress which proposed these Amendments, nor by the Legislatures of the States which ratified them.

Id. at 78.

240. *Id.* at 89 (Field, J., dissenting).

241. The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National Government which had troubled the country for so many years in some of the States, and that intolerance of free speech and free discussion which often rendered life and property insecure, and led to much unequal legislation.

Id. at 123 (Bradley, J., dissenting).

242. *Id.* at 129 (Swayne, J., dissenting).

243. See *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt.1, at 71, U.N. Doc. A/810 (1948).

by federal courts, only one explanation—other than a judicial substantive preference of values—seems at all plausible. Where does the federal judiciary's political allegiance in fact lie? Brilmayer's beginning syllogism, as she readily concedes, begs that question. What principles or interpretive canons short of enactment by the political branches should federal courts rely upon to justify invoking sources of international law as supreme federal law, thereby preempting all inconsistent state law and prevailing over prior inconsistent federal law?

2. Federal Devolution of Sovereignty

Supreme Court Justice Sandra Day O'Connor, who is most sympathetic to the rule of international law, has little difficulty subordinating judicial branch loyalties to policies of the representative political branches in saying whether any international law should be recognized as domestic law.²⁴⁴ Early federal court decisions incorporating international law relied upon a special jurisdictional statute, such as in the alien tort or admiralty provisions of the Judiciary Act of 1789,²⁴⁵ to imply federal judicial power to decide.²⁴⁶ When customary international law was invoked, it was mainly to preserve the sovereign prerogatives of the states system as in defenses of sovereign immunity, an objection of one sovereign being subjected to the jurisdiction of another sovereign, a horizontal privilege or right ousting courts of jurisdiction.

Recent cases interpreting the Eleventh Amendment, however, strengthen the quasi-sovereign powers of state governments as against claims of violation of federal law. Supreme Court cases interpreting treaties or deciding international law questions try to avoid preemption of state prerogatives.²⁴⁷ Using "sovereignty" of states in a federal system whose autonomy is grounded in classic law of nations, the Supreme Court adopts Justice Sutherland's centralizing principle of sovereignty,²⁴⁸ ironically, to resist the supremacy of

244. O'Connor, *supra* note 2, at 13. Justice O'Connor's plea emphasized the building of new international institutions under a rule of law influenced by federalism and sustained by the consensual treaty power or executive acts under the control of the political branches, with deferential judicial review. *Id.* at 17-18.

245. 1 Stat. 73 (1789).

246. For a survey, see Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969).

247. See *Barclays Bank PLC v. Franchise Bd.*, 512 U.S. 298 (1994) (reversing tendency of dormant preemption in *Zschernig v. Miller*, 389 U.S. 420 (1968)).

248. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). That foreign relations power of the president is grounded in external sovereignty inherent in the law of nations, and that external sovereignty passed from the former colonies when they became

an explicitly controlling federal statute.²⁴⁹ By implication or analogy, if Congress has limited or narrowed power to preempt a sovereign act of a state, why should international law as part of federal law fare any better? Political devolution within a "sovereign" nation-state is becoming more common, as in the Scottish claim to restoring its parliament, Quebec's claim to autonomy within a Canadian confederation, Puerto Rico's claim to Commonwealth status, if not independence, and Taiwan's claim to autonomy while remaining within China. Judicial devolution seems uniquely an American phenomenon. This judicial devolution of "sovereignty" to the states does not remotely consider applying international law to limit the traditional structures of national sovereignty, as modern critics of national territorial sovereignty have theorized.²⁵⁰ Instead, the structure of devolution means a nationalizing tendency of U.S. courts toward insulating intermediate political institutions from law made by the international community of states.²⁵¹ Federal law here acts as a buffer, preventing international law from entering U.S. constitutional law as preemptive of state law. This judicial devolution perversely gains support by an argument invoked in *Skiriotes v. Florida*²⁵² that since international law as part of U.S. law permits the U.S. to regulate conduct of its own citizens on the high seas, Florida, likewise, could regulate the conduct of its citizens upon the high seas.²⁵³

independent states to the national government when the Constitution was ratified. *See id.* at 316-21.

249. The tribal claims of Native Americans against a state or local government, for example, are barred by the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1122 (1996) (stating that "each State is a sovereign entity in our Federal system," which Congress has no authority to subject to the jurisdiction of federal courts for vindication of individual rights under federal law).

250. *See generally* CHAYES & CHAYES, *supra* note 31.

251. Another possibility—holding intermediate political institutions responsible as quasi-sovereign entities under customary international law, subject to supervisory responsibility of the central state—is not a new idea either, even if current thinking of the Supreme Court might not face up to it. *See* Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312, 357-60, 367-68, 370 (1991).

The concept of "intermediate responsibility" would pierce through the fictional personhood of a State and attribute both acts and omissions to autonomous but politically connected subdivisions of a modern State. Rather than holding the State accountable for failure to control its political subdivisions and parastatals, this concept would entail direct accountability under international law of intermediate political and, perhaps, parastatal entities. The central State properly should be held responsible as well; but for its failure of supervision or control on behalf of the community of States rather than for the direct acts or omissions of the political subdivision or parastatal.

Id. at 357-58 (footnotes omitted). For a critique of recent Supreme Court decisions refusing to give domestic effect to treaty provisions, *see* Rogoff, *supra* note 81.

252. 313 U.S. 69 (1940).

253. *Id.* at 77.

The argument cited *The Paquete Habana* to the effect that international law is "a part of our law and as such is the law of all States of the Union. . . ."254 So long as there is no conflict with acts of Congress, the argument maintained, the state can invoke international law.²⁵⁵

International law, emanating from the political community of sovereign states, does not automatically or formally reach governments closest to many human institutions of world civil society. If these institutions check the power of the international community of states, surely the Supreme Court in this federalist guardian's role also acts to strengthen world civil society by decentralizing the public spheres within a federal system. The Supreme Court has every reason to know exactly what is at stake in its judicial reluctance to recognize as supreme federal law the lawmaking acts of the international political community of nation-states law without approval—tacit or otherwise—by the representative institutions of the presidency and the Congress.²⁵⁶ These are the institutions which translate problems from the private political sphere of a pluralistic civil society into the public political spheres at all levels.²⁵⁷

The syntactic and semantic leap from syllogisms—that international law as part of U.S. law preempts state law in conflict—hides a deeper leap downward for the most powerful national judiciary in the world. The Supreme Court's recent decisions restate values favoring structural devolution as an analogy or example of a decentralized public order, embryonic for a diverse global community with an emerging civil society of its own. This contemporary reinterpretation is wholly consistent with the Court's present understanding of the founding political philosophy of United States federalism.

254. *Id.* at 72-73 (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

255. *Id.* at 73-77.

256. The tradition of states rights, dual sovereignty, and the proposed constitutional amendment curtailing the treaty power during the cold war reveal this strong structural resistance to international law. Diplomatic correspondence during the nineteenth century asserted that the national government of the U.S. could not constitutionally interfere with the sovereign powers of the states. As recent as in the reservations, conditions, and understandings accompanying ratification of the International Covenant of Civil and Political Rights, the United States Senate and president continued the tradition of resisting interference with the federalist principle of state sovereignty. Moreover, in *Verdugo-Urquidez*, the Chief Justice outlined a view of certain rights of "the people" (including the Fourth Amendment) as pertaining to a class of persons who are part of the national community by citizenship or connection. *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990). This relationship does not apply to limit the power of the national government in relation to the seizure of evidence from aliens abroad, since they are not part of the national polity and have no voluntary connection with the United States. *See id.*

257. *See generally* ROSENBERG, *supra* note 13.

This article sees a major shift in purpose and function for federal courts in international litigation, one which differs from pervasive recommendations by commentators for using international economic or human rights law as common law rules of decision or guides to statutory interpretation in the federal judicial process.²⁵⁸ In the emerging approach, federal courts will be compelled by argument and communication by computer to consider the international interests and purposes to be served at each phase of a case, whether jurisdiction, substantive or procedural rules of decision, or enforcement of judgment. They should resist choosing these jurisdictional or decisional rules purely on the basis of loyalty to an international political order. The emerging purpose and function of these decisions projects the United States federalist experiment outwardly, as an authentic example from within its own judicial integrity of a participant in a world civil society.

D. Federal Courts' Architecture for World Civil Society

Traditional and contemporary international law regimes exist alongside one another to help protect economic and human rights expectations of individuals and associations in world civil society.²⁵⁹ Whether cases or controversies arise from horizontal state-to-state relations, such as claims of extraterritorial jurisdiction, acts of state or sovereign immunity, or from vertical relations between government and individuals or between private individuals (as in human rights or economic freedoms claims), federal courts decide them by choosing which rules of decision to apply from among available sources of foreign and traditional or new international law. The resulting patterns of judicial decisions produce a three-part legal conception of world civil society. First, it is deferential in interstate political relations, except when a foreign sovereign enters the market economy as participant or abuses fundamental human rights. Second, it is transnational in recognizing economic private ordering systems of contract and property across borders backed by municipal law. Third, it is national in defining and incorporating human rights law.

258. The Act of June 25, 1948 (Rules of Decision Act), Pub. L. No. 80-773, 62 Stat. 869 (codified at 28 U.S.C. 1652 (1994)), first distinguished between federal rules of court procedure and statutory or common law rules controlling the substantive decision. The law of nations was considered part of common law of the entire country. See 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 626-27 (1953).

259. See CHAYES & CHAYES, *supra* note 31, at 1-3; STEPHEN D. KRASNER, *STRUCTURAL CAUSES & REGIME CONSEQUENCES: REGIMES AS INTERVENING VARIABLES IN INTERNATIONAL REGIMES* 2 (1983).

The structure for this three-part federal court conception of world civil society is in five descriptive axioms.

1. *Federal Courts Internalize the Political Structure of Nation-State Systems*

Global society functions transnationally by coexisting within the whole community of sovereign nation-states, while exerting considerable independent "hydraulic pressure" upon national institutions and international regimes to bring the public force to bear on compliance with international expectations of human dignity, environmental safeguards, and prudent enterprise.²⁶⁰ Even strong, developed countries are revising their capacities for providing economic and social entitlements for their own people in light of complexities of global technological innovation and enterprise. Central state planning and control of the means of production are in a process of retrenchment, if not reformation, on every continent, with regulation becoming more international. Transnational production and exchange place severe pressures upon central state structures of redistribution in the democratic social welfare states as well. Rapid social and technological change may trigger political instability, violence, joblessness, and predatory or opportunistic behavior in advanced democracies as well as in newly democratized nations of Eastern Europe and Asia or in the developing formerly Third World countries.

Paradoxically, both demands of international human rights organizations upon national officials or courts and demands by transnational associations representing private enterprises for free market exchange and reduction of trade barriers challenge any tight internal control within each sovereign state.²⁶¹ The international system of states protects itself from these pressures by continuing to recognize the immunity of foreign states and political heads of states in the courts of other states, subject to narrow exceptions such as when sovereign functions enter the commercial markets. Under Supreme Court guidance, federal courts interpret the Foreign Sovereign Immunities Act restrictively, in deference to the political branches, with the presumption that any foreign state involuntarily sued in any court in the U.S. is entitled to immunity unless explicitly provided otherwise in one of the statute's exceptions. Summarizing the well-developed law on this subject is beyond the scope of this

260. CHAYES & CHAYES, *supra* note 31, at 1-29.

261. For a description of trends of recent decisions in federal courts, see *supra* Part II.D.

article; however, it is interesting to note that the courts do not use any of the available tools of customary international law, such as *jus cogens* norms, to influence this presumption in any significant way. Even special amendments to the statute to allow suits against certain states for acts of terrorism are interpreted restrictively.²⁶² The net effect is to subject foreign states to federal court discipline when they become market participants, but to immunize foreign states for human rights abuses. Federal courts, moreover, defer to the political branches whenever foreign policy may be involved. This means that the underlying political structure of the states system has been made part of federal law, including the presumptions of territoriality implicit in statutes, based upon traditional international law.

Within this matrix, federal courts are fashioning methods to guide decisions at each stage of transnational civil litigation. Old strategies and policy arguments which have in the past favored a dual allegiance—that domestic courts simultaneously serve both the international and the domestic legal orders—place federal courts in the position of choosing among various sources of law on the basis of political loyalty to lawmaking authorities when there is tension between international law and municipal law. This characterization of choice is somewhat of a deception, for as we have just seen, federal courts do not always resist applying international law in appropriate cases or controversies without a statutory basis. More accurate is the conclusion that federal courts find structural or doctrinal approaches to protect transnational economic rights more effectively than they do so-called universal human rights, just as federal courts first protected property and freedom of contract from state action under the Fourteenth Amendment before they protected civil rights from state encroachment. Thus any preference in choice between loyalty to the metropolitan order and loyalty to a cosmopolitan vision on the basis of a hierarchy of norms becomes analytically meaningless, avoiding substantive choices.²⁶³ It allows judges to duck responsibility for using and integrating public and private international law within the new circumstances of world civil society.²⁶⁴

262. *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1996).

263. See, e.g., *Kennedy*, *supra* note 79, at 7-9.

264. See Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 GA. J. INT'L & COMP. L. 225, 226, 233-37 (1996).

2. Federal Courts Federalize "Up" and Nationalize "Down"

The American Law Institute holds as black letter that "[i]nternational law and international agreements of the United States are law of the United States and supreme over the law of the several States."²⁶⁵ The first structural choice federal courts have to make, accepting that view, is whether to "nationalize" the question of loyalty between the international legal order and national political authority and "federalize" the accompanying subordination of political authority of the states. During the nineteenth and early twentieth centuries, using the Fourteenth Amendment, the federal judiciary nationalized portions of the law of nations of the eighteenth century, such as the law merchant, maritime law, prize law, and private international law, and federalized domestic civil rights between a state and its citizens. Today, post *Erie* and post cold war, federal courts nationalize international law "down" to the locus of decentralized judicial loyalty to political power and federalize "up" to the locus of loyalty to centralized political power. By analogy, simultaneous globalization and devolution in international relations symbolize the idea of pluralism or federalism through overlapping and proliferating functional jurisdictions, within the larger world power processes, entirely consistent with world civil society and its demands.

Federal courts by removal "federalize" state decisions which attempt to interfere with values of an emerging world civil society recognized as national interests. The *Erie* doctrine first announced antipathy for general common law (which included the law of nations).²⁶⁶ Federal judges struggled with this decentralized reception of public international law into municipal law.²⁶⁷ Professor Jessup sounded the first alert on the eve of World War II.²⁶⁸ The *Lauritzen*²⁶⁹ and *Sabbatino*²⁷⁰ decisions in the international era following victory by the Allies attempted to accommodate public and private international law to the *Erie* doctrine in federal decisions

265. RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 111(1).

266. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Just after deciding *Erie*, however, Justice Brandeis described the law governing apportionment of water in an interstate stream between two states as "federal common law," which prevails over statutes or decisions of either state, a clear indication the public international law principles were part of federal common law under the judicial power in certain cases without statute. See *Hinderlinder v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

267. See *Erie R.R. Co.*, 304 U.S. at 78.

268. Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

269. *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

270. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

recognizing a paramount national interest in international relations, but without recognizing customary international law as federal common law. That U.S. forum courts should make this attempt explicit by reintegrating international conflict of laws (private international law) theory and public international law sources theory was not well understood, as Professor Henkin explained.²⁷¹

As federal judges remove federal questions from state courts, they find themselves deciding questions of jurisdiction, *forum non conveniens*, substantive claim, procedure, remedies, and aiding enforcement when either international economic issues or human rights law is invoked in U.S. courts as the basis for decision in civil cases. They select among substantive policies contained within the various rules of decision from diverse sources, choosing as they always do in practice anyway, from practical trade-offs, reasonableness, and intuition.²⁷²

Once a federal court has jurisdiction over an international economic or human rights law claim, it should not necessarily—unless required by statute—choose international law as the sole operational rule of decision in either human rights or economic rights claims to the exclusion of valid foreign or domestic law. Likewise, the selection of forum rules of procedure, evidence, or remedies should not exclude consideration of questions of international comity or consequences to international cooperation when the forum judge has discretion in shaping decisions. Federal courts have chosen principles of interpretation and presumptions differently to reflect substantive preferences that do not readily appear from the adage that international law is part of the law of the United States²⁷³ or that statutes should be construed to avoid conflict with international law.²⁷⁴

For example, in an important recent case, *Jaffee v. Redmond*,²⁷⁵ the Supreme Court created a strong psychotherapist-patient evidentiary privilege in all federal cases, announcing a new federal common law rule under Rule 501 of the Federal Rules of Evidence.²⁷⁶ This new

271. Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1976).

272. McDougal, *supra* note 96, at 2483-85.

273. See *The Paquete Habana*, 175 U.S. 677 (1900); see also *Sweeney*, *supra* note 70, at 446-47.

274. *Murray v. The Schooner Charming Betsy*, 6 U.S. 677 (1804).

275. 116 S. Ct. 1923 (1996).

276. *Id.* at 1924. Rule 501 provides:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common

judge-made rule eliminated trial court discretion whether to follow state law in a diversity case. In dissent, Justice Scalia questioned the wisdom of the privilege in civil litigation, which in his view seriously affects justice and search for truth through a new federal common law rule justified from the often contradictory authority of substantive statutes creating the privilege in the fifty states, a task he would rather leave to Congress.²⁷⁷ Referring obliquely to the *Erie* doctrine, he hinted that the evidentiary privilege was more than merely procedural.²⁷⁸ This case has important international implications not considered in any of the reasoning which helped formulate the new rule (there was no foreign or international interest involved).

When international litigation is before federal courts, even stronger arguments than Justice Scalia's favor trial court discretion in shaping the rules of decision. Evidence of privileged communication which might be taken abroad under the Hague Evidence Convention²⁷⁹ would not be allowed under the Federal Rules of Evidence applicable as forum rules of procedure.²⁸⁰ Strong evidentiary and procedural law of the federal forum in such a case would preclude any flexibility to choose a different rule of evidence in any litigation before a federal court involving evidence from abroad that might be produced under foreign law without an absolute privilege. Why

law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

277. *Jaffee*, 116 S. Ct. at 1940 (Scalia, J., dissenting).

278. In his dissent, Justice Scalia alluded to a perversion of the *Erie* doctrine:

The Court suggests one last policy justification: since psychotherapist privilege statutes exist in all the States, the failure to recognize a privilege in federal courts "would frustrate the purposes of the state legislation that was enacted to foster these confidential communications." This is a novel argument indeed. A sort of inverse pre-emption: the truth-seeking functions of federal courts must be adjusted so as not to conflict with the policies of the States Moreover, since . . . state policies regarding the psychotherapist privilege vary considerably from State to State, no uniform federal policy can possibly honor most of them. If furtherance of state policies is the name of the game, rules of privilege in federal courts should vary from State to State, a la *Erie*.

Id. at 1935-36 (citations omitted).

279. Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1977, 1144 U.N.T.S. 249.

280. At present, a federal judge has discretion whether to control discovery under the Federal Rules of Civil Procedure or allow discovery under the Hague Evidence Convention under the *Aérospatiale* case. Arguably, *Jaffee* eliminates any discretion in the discovery of privileged communication which occurred abroad. See *Société Nationale Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 536-37 (1987) (preserving federal court's discretion not to use the Hague Evidence Convention for discovery abroad when foreign parties to litigation are proper parties before the court).

shouldn't a federal court be able to avoid a potential conflict with a treaty by choosing to admit evidence under a qualified privilege grounded in substantive policies of other political communities when the substantive law of decision is the applicable foreign law? Might not the application of foreign substantive law under conflict of laws analysis also entail a choice of foreign privilege as well, rather than characterizing it as the procedural law of the forum? By federalizing the privilege "up," the Supreme Court may also have nationalized it "down," creating a procedural rule which in effect might largely determine the substantive rule of decision in transnational litigation by eliminating any discretion.

3. *Federal Courts Protect Transnational Economic Freedoms Liberally*

A second construct, which reinforces the value of global enterprise, is that federal courts interpret international economic law liberally to protect capital markets and voluntary market exchange, unless instructed otherwise by Congress. Transnational enterprises need national institutions to protect private expectations of contract and property in investment and exchange across national borders, including national courts and administrative agencies, to enforce decisions and arbitrate disputes. These national institutions must be backed up by international cooperation through national courts and agencies. Even international regimes require national administration and judicial machinery to implement international regulation.²⁸¹ Free-market capitalists seek private control over production and exchange while demanding protection under the coercive state legal order for transnational contracts and property. Free-market enterprises seek freedom from national barriers or regulatory controls through internationally supervised free trade agreements, deregulation, cuts in transfer payments, and protection of contract and property expectations (including newer intellectual property) across national boundaries to minimize economic risk.

Giving respect both to international comity and to economic agreements between sovereign nation-states, federal courts have extended judicial enforcement of private economic ordering across national boundaries. Treaties of Friendship, Commerce and Navigation are interpreted to avoid conflict with later civil rights statutes and give effect to the protection of the flow of capital and investments.²⁸² Judicial enforcement of foreign judgments and arbitral

281. *See id.*

282. *See* *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180-85 (1982); *Papaila v. Uniden America Corp.*, 51 F.3d 54, 55 (5th Cir. 1995); *Fortino v. Quasar Co.*, 950 F.2d 389 (7th

awards by federal courts tacitly recognizes an effective public system of cooperation among nation-states for sustaining and regularizing productivity and consumption through global free markets and private exchange protected by contract and property rights enforced from mutual respect among national courts. Federal statutes are liberally interpreted to enforce party autonomy, especially in private arbitration provisions in agreements ousting national courts of jurisdiction through party choice of law and forum in international transactions and investment arrangements.²⁸³ Unless directed otherwise by statute, a national judiciary which sanctions such voluntary defections from judicial protection of the public or community's interests also makes legitimate its own escape from a judicial function which internalizes the external surplus or externalizes the internal costs in supervising a public interest in private transactions affecting the national economy.²⁸⁴

4. *Federal Courts Protect New International Human Rights Only When Authorized by Congress*

The architectural guide for protecting human rights in federal courts shifts to respect the political relationship between states and citizens yet would begin to open federal jurisdiction by reinterpreting existing statutes to remedy the most serious abuses of internationally recognized human rights.²⁸⁵ Human rights demands, for example, seek to hold state officials accountable for deprivations

Cir. 1991) (deferring to treaty which reciprocally protects American and Japanese investments and business operations, including presence of managers and technical personnel, thereby avoiding abrogation of treaty by subsequent Civil Rights Act of 1964); *Starrett v. Iberia Airlines of Spain*, 756 F. Supp. 292, 295 (S.D. Tex. 1989) (holding that treaty with Spain does not cover discriminatory replacement of U.S. national with national not a citizen of Spain).

283. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); see also *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996).

284. See Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991); see also THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION: MELTING THE LANCES AND DISMOUNTING THE STEEDS* 119-20 (1989).

285. See THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 118-32 (1989); Jeffrey H. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Thomas Buergenthal, *The US and International Human Rights*, 9 H. RTS. L.J. 141 (1988); Anthony D'Amato, *What Does Tel-Oren Tell Lawyers?: Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985); Henkin, *supra* note 58, at 1561-67; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 393 (1985); Paust, *supra* note 58; *Human Rights Law Symposium*, 4 HOUS. J. INT'L L. (1981); *Symposium, Federal Jurisdiction, Human Rights and the Law of Nations: Essays on Filartiga v. Pena-Irala*, 11 GA. J. INT'L & COMP. L. 305 (1981); see also RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 703 rptr. note 7.

without the protection of official immunities.²⁸⁶ Thus federal courts should extend the federal judicial power to incorporate and sanction new human rights expectations of the international community when they find the slightest congressional authorization.²⁸⁷ Without direction from the political branches, however, federal courts do not easily recognize or incorporate new customary international human rights law from sources of international law.²⁸⁸ Liberal interpretation of jurisdictional statutes is urged by prominent human rights advocates with experience in bringing human rights problems first into the public sphere.²⁸⁹ When customary international law or treaties create or recognize international legal obligations among nation-states to protect their own nationals according to international standards in conflict with those provided under domestic law, federal courts will not exercise the judicial power to enforce the international human rights standards. They refuse to recognize such law under the Supremacy Clause unless the obligation is explicitly incorporated by statute or treaties that are expressly made self-executing by the political branches.²⁹⁰ Even then, federal courts tend to construe treaties affecting human rights quite narrowly.²⁹¹

Incorporation through a narrowly construed statute or treaty, but not solely by judicial recognition, appears to be the structural

286. See, e.g., *Board of County Comm'rs v. Umbehr*, 116 S. Ct. 2342, 2347-2348 (1996); see also *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996); *Siderman de Blake v. Argentina*, 965 F.2d 699, 711 (9th Cir. 1992).

287. See Hoffman & Strossen, *supra* note 71; Bayefsky & Fitzpatrick, *supra* note 155, at 27-28; John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988); Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L. J. 1 (1993). Contrast this pessimism or skepticism with Professor Lillich's optimistic appraisal as recent as 1985, that "there is plenty of international human rights law extant, that domestic courts increasingly are being briefed on such law, and that they either are taking or should take this law into account in reaching their decisions." Lillich, *supra* note 285, at 367.

288. Bayefsky & Fitzpatrick, *supra* note 155, at 27-28.

289. In the brief *amicus curiae* in *Negewo v. Abebe-Jiri*, arguments claim that the Alien Tort Statute and the Torture Victim Protection Act confer both subject matter jurisdiction and a cause of action over tortious acts of torture, arbitrary arrest and detention, cruel and inhuman and degrading treatment in Ethiopia in violation of the law of nations, as the Second and Ninth Circuits have held. Brief for Appellant, *Negewo v. Abebe-Jiri*, 72 F.3d 844 (11th Cir. 1996) (No. 93-9133). While these statutes surely created federal subject matter jurisdiction, the rules of decision that shape the litigation are generally left for the trial judge and always involve a mix of forum, international, and foreign law. Nothing in the brief suggests otherwise; nor could it in light of Judge Kaufman's explicit and narrow holding in *Filartiga* that the rules of decision governing a cause of action are not necessarily to be guided by only one source. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

290. Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 684 (1986) ("American courts have rarely applied customary international law, and have almost never applied it as a direct restraint against a government or a governmental interest.").

291. Rogoff, *supra* note 81, at 559-63.

principle for federal courts in handling questions of international human rights law.

5. *Federal Judicial Devolution Limits Congressional Preemption of State Law*

While federalizing certain questions of foreign relations law before state courts, the Supreme Court is beginning to rethink several aspects of what might be viewed as structural devolution within the system of nation-states. This architectural structure has several parts. First, by recognizing the "sovereignty" of the states of the union through the Tenth Amendment, the Court might curtail the national power to preempt states either directly or by the dormant foreign and domestic commerce clause.²⁹² Second, the theory of international responsibility of political subdivisions entails possibly new supervisory responsibility by the central government, which is accountable to the international community of states for acts of the intermediate political subdivisions considered "sovereign" and, therefore, directly responsible under international law.²⁹³ New questions arise: Does the national government continue its exclusive privilege and power to protect U.S. citizens diplomatically? What is the *parens patriae* power of state attorneys general to bring class actions on behalf of injured citizens? What is the power of the U.S. Attorney General?

The U.S. position in the nineteenth century in free speech and criminal libel cases against foreign diplomats was that, under the Constitution, the federal government could not interfere with state

292. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 729 (1995) (striking Arkansas' term limitation amendment).

293. The dilemma of the national authority in a federal or decentralized system is that it either must be responsible without complete control over local authorities (as in the United States) or must create a fiction of local autonomy and self-determination while in fact increasing State complicity and control Just as in the possibility of purely private responsibility, attribution doctrine also might allocate to political subdivisions certain autonomy of responsibility by foreclosing attribution of certain acts of local officials to the central government. Allowing intermediate responsibility under international law solves a practical problem, but no State under the present system would accept its limitation of State power and interposition of international law internally. Intellectually, however, free political association and self-determination are ideas closely allied to the theory of private responsibility. Attribution doctrine can help promote these movements by preventing full State entry into private spheres and by showing the way toward intermediate responsibility for unusual subpolitical entities, which themselves have claim to recognition by the international community but are not insurrectional movements.

Christenson, *supra* note 151, at 333-35.

law and remedies.²⁹⁴ This position seems inconsistent with Chief Justice John Jay's 1793 opinion in *Chisholm v. Georgia*,²⁹⁵ which even for the Confederation spelled out a theory that the political organization of states as a confederated or federated whole entailed the central responsibility of each state to all states collectively (the United States) or to its national government, which in turn was responsible to other nations under the law of nations for any breach by one of its states. Interestingly enough, this concept was at the heart of the *erga omnes* doctrine of the International Court of Justice in 1972—some obligations are of such fundamental interest to the international society that they entail an obligation by each state to the international community of states as a whole for abuses even within the jurisdiction of such state.²⁹⁶ Whether such a concept of international public order would provide the justification sufficient for a federal judge to trump state and federal law, even the Constitution, is quite a different matter, one we take up next.

Architecturally, the most unifying and universal of all the abstract modern myth structures of international law is the concept of *jus cogens*, which might yet come to symbolize not only the political order of the international community of sovereign states as a whole, but the interests fundamental to international society—or those now identified as within the sphere of world civil society together with those of the public spheres informed by it. How have the federal courts handled their encounters with claims which invoke this peremptory norm of the highest status in international law?

V. *JUS COGENS* IN U.S. COURTS: NATIONALIZING SUPER-NORMS OF WORLD CIVIL SOCIETY

In questions of allegiance and protection in an emerging world civil society, the vitality of the speculative peremptory norm *jus cogens* in international law might best illustrate a wise judicial stance of abstention or deference to the political branches. Invoking this super-norm in any of the communities where law may be made (the universal human community, the political community of sovereign states, and the polity of citizens in a sovereign nation-state) is metaphor for overriding any public order system in conflict.²⁹⁷ This means doctrinally that recognizing the validity of such a supernorm by the federal

294. MOORE, *supra* note 158, at 163-64.

295. 2 U.S. 419, 474 (1793).

296. *Barcelona Traction, Light and Power Co., (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5).

297. Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT'L L. 585 (1988).

courts might trump the law of a particular community by a supposedly universal law with no constitutional foundation, a fantasy no less powerful than St. Augustine's universal human community in time and space, an image of comfort and security with compulsory effect.

Professor Ackerman makes a similar argument from a dualist democracy, distinguishing between fundamental choices people make by extraordinary processes to create a "higher lawmaking" and choices or decisions made by government every day, such as elections, legislation, and "normal lawmaking," not to confuse a normal electoral victory with a mandate to overturn by normal legislation the "considered judgments previously reached by the People."²⁹⁸ This legitimacy of supernorm lawmaking is like a norm of *jus cogens*, but the question whether it can be imported from the international community is different. Ackerman nearly reaches an absolute *jus cogens* principle based upon fundamental human rights norms when he argues that in any new peoples' choice of constitutional reform, there should be introduced possibly a *jus cogens*-type norm, for example, preventing constitutional amendment of certain of the provisions of the Bill of Rights. This would foreclose the possibility of a peoples' revision of fundamental rights in derogation of them. Virtually no theoretical justification is offered by Professor Ackerman for that kind of assertion, not even an argument from international norms such as those of *jus cogens*, and his proposal is doubly dangerous, as we shall see.²⁹⁹

The foundational order of such an international public law concept, if accepted even theoretically, may impose even greater duties on federal systems. In place of a dual set of constitutional loyalties of federal judges—one to national and another under *Erie*—to state or local political authority, each within its own jurisdiction under a written domestic constitutional order, an international preemptory norm entails a triadic hierarchy of loyalties, with the conceptual, if not real, possibility of an overriding allegiance to a truly universal "people's" law. In the United States, as we shall see, if preemptory rules of international law were accepted as U.S. law, the Supremacy Clause would preempt any inconsistent state constitutions and laws and

298. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991).

299. Professor D'Amato points out the difficulty with this kind of argument in the context of an absolute *jus cogens* norm within the community of sovereign states. D'Amato, *supra* note 285, at 92. Even more difficult is the argument from within a polity without the use of an external system of reason as a principle of reference. Either way, the principle from international law would be counterdemocratic if used as the limiting structure denying derogation from such fundamental norms by a people intent upon a fundamental revision of their basic law, but then the concept itself is antidemocratic. See Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 *CONN. J. INT'L L.* 1 (1990).

perhaps limit the U.S. Constitution itself.³⁰⁰ This idea does not have wide support in the U.S. Circuit Courts of Appeals and is far too radical a doctrine to merit Supreme Court consideration on the merits.³⁰¹ Moreover, if the analogous decisions of the U.S. Supreme Court in its newly found respect for state sovereignty were extended, even Congress might be disabled from incorporating a peremptory rule of international law prohibiting, for example, the execution of juveniles convicted of capital crimes or limiting the First Amendment's prohibition of bans on hate speech, in effect a reconstruction of "intermediate sovereignty."

Much scholarly commentary in the United States accepts and advocates the incorporation by federal courts of *jus cogens* norms in implementing customary international human rights law.³⁰² Some norms are so universally compelling, the argument goes, that such a norm of international public order should be maintained as a principled basis for shaping domestic rules of decision governing violations of the most important human rights of citizens by their own governments.³⁰³ The value of a peremptory norm of *jus cogens* quality is that conceptually it would override any other rule of international law in conflict (such as the old customary law of sovereign immunities) and—it is contended—domestic law in conflict as well. To be effective, however, this kind of norm requires the public power of the international community or a single power acting on behalf of that community as a whole to bring the norm to bear to change the internal political relationship between citizen (or minority) and government.³⁰⁴

Antinomies, therefore, abound. Using the concept of *jus cogens* as the basis for protecting a person's judicial claim against a government from a judicial defense of sovereign immunity (either directly or through an implied waiver of sovereign immunity) converts an abstract concept into an overriding principle of international public order. In the classic foundation of the traditional system of nation-states, each state retains its propensity to subordinate another state through its own nationalized conception of international law in its own courts (or the

300. ACKERMAN, *supra* note 298, at 6-8.

301. *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994).

302. See MYRES MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 274 (1980); SCHACHTER, *supra* note 134, at 339-42 (accepting incorporation conceptually, but cautious about implementation in practice); see also RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 703 rptr. note 3. For an extensive bibliography on the issue, see *Princz*, 26 F.3d at 1180-82 (Wald, J., dissenting).

303. See David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332 (1988).

304. This point has been long made clear by Myres McDougal and Reisman. See generally MCDOUGAL & REISMAN, *supra* note 212.

propensity for a powerful state to intervene in another's internal affairs under the guise of protecting minorities from atrocities such as genocide by their own government under principles of international law, perhaps justified as *jus cogens*), without an adequate consensus of the community of states as a whole. Citing a number of cases in federal courts that have invoked and accepted the concept abstractly, both activists and scholars, nonetheless, reason that the *jus cogens* principle has now been incorporated into U.S. law.³⁰⁵

The invocation of these norms as peremptory in domestic human rights litigation in the United States began in 1988.³⁰⁶ Decisions are beginning at least to discuss substantive questions fundamental to international society as seen by forum courts. Nonetheless, I see no basis in *jus cogens* concepts for deriving any meaning favorable to a theory of incorporating international human rights by domestic courts without a statutory enactment or constitutional delegation. No U.S. court has invoked the international prohibition against official torture as a peremptory or *jus cogens* norm to justify a cause of action by itself, except by possible dictum. In fact, courts in the United States have uniformly rejected application of an asserted *jus cogens* norm as the sole basis for a cause of action.

Norms of the status claimed for *jus cogens* are so powerful, proponents argue, that they overcome immunity defenses and may even limit constitutional powers internally, as if they were a new, higher natural law. This argument favors *jus cogens* as authority for federal jurisdiction in causes of action for the most egregious and unconscionable international wrongs (as if a constitutional tort). For instance, *jus cogens* was invoked (but found not established) as basis for U.S. citizens' civil suit against their own government to recover for injuries growing from U.S. responsibility for its breach of important peremptory norms in the use of coercion in Nicaragua.³⁰⁷ While some language in several decisions of courts of appeal states that U.S. courts have recognized the concept of *jus cogens* as part of U.S. law, not a single case has been decided on that basis alone without having been overturned.³⁰⁸ This kind of advocacy is highly risky, for the effective

305. See, e.g., Cunningham, *supra* note 52, at 544.

306. At that time, I published a comprehensive critical study considering all aspects of the concept as symbolic of an emerging international public order. See generally Christenson, *supra* note 297.

307. Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (D.C. Cir. 1988).

308. The best example is *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994), which overturned Judge Sporkins' reliance on *jus cogens*. Judge Ginsburg's answer, *see id.* at 1174 n.1, to Judge Wald's dissent seems to represent the dominant view of federal judges, that absent federal statute, *jus cogens*, even if shown valid in international law, does not confer jurisdiction. Judge

result of being overwhelmingly rejected in particular cases has been to raise to an almost impossible threshold the human rights victims' task of demonstrating the existence of norms of customary international human rights law when a statutory basis exists. Several U.S. courts of appeals seem to have adopted the exceedingly onerous burden of proving the existence of a norm of *jus cogens* quality as the threshold to limit claims under the Alien Tort Statute.³⁰⁹ The burden upon human rights victims is now to establish that the tortious breach of the law of nations "must be of a norm that is specific, universal, and obligatory,"³¹⁰ and the statute may apply only to "shockingly egregious violations of universally recognized principles of international law."³¹¹ The Alien Tort Statute, however, does not contain this language. Its text refers only to tortious breach of a treaty or the law of nations, a norm shown by reference to traditional sources of international law whether custom, treaty, or general principles.³¹²

A more likely explanation for this resistance is that domestic courts do not want to enforce the new customary obligation when it directly affects a government's relations with its own citizens without direction from the political branches while keeping the door open for the most egregious of these wrongs. Ironically, then, *jus cogens* becomes the device for limiting actions under the Alien Tort Statute. Thus domestic courts may retain credibility against internal political attack and stave off an onslaught of litigation from home and abroad. Conflict of laws theory would deepen that deference, allowing a judge more easily to consider the public interest represented best by balancing policies

Wald's dissent strongly favored the incorporation of *jus cogens* norms as customary international law providing both in personam and subject matter jurisdiction. *Id.* at 1180-83.

309. When the Ninth Circuit clearly joined the Second Circuit in concluding that the Alien Tort Statute creates a cause of action for violations of "specific, universal and obligatory international human rights standards" conferring fundamental rights upon all people in relation to their own governments, it linked its justification to *jus cogens*. See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994). The court included prohibitions against torture, summary execution, or causing disappearances but linked this holding with its own dictum in *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), that under international law "official torture violates *jus cogens*" and satisfies "the specific, universal and obligatory standard . . ." *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1479 (9th Cir. 1994). "[T]he right to be free from official torture is fundamental and universal, a right deserving of the highest stature under international law, a norm of *jus cogens*." *Id.*

310. *In re Estate of Ferdinand Marcos*, 25 F.3d at 1479 (citing to *jus cogens* as a reason torture violates customary international law). Note the ambiguity in whether the burden is to demonstrate the universality of the norm or universality of respect for the norm, a semantic quibble, perhaps, but one that could make even more difficult the threshold burden if interpreted by a judge to mean a norm of universal quality.

311. *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983).

312. 28 U.S.C. § 1350 (1994).

underlying federal or international interests to guide the forum court in shaping its rules of decision.

In addition to actions in federal courts authorized by statutes, the strategy of appealing to external authority to remedy alleged human rights abuses in the United States has reached regional forums such as the Inter-American Commission on Human Rights, where individuals may present petitions against their own governments, including decisions of national courts.³¹³ Consider the *Roach* case brought by petition before the Inter-American Human Rights Commission by a juvenile under capital sentence in the United States.³¹⁴ The Commission determined that the United States had violated a norm of *jus cogens* in sentencing a juvenile to death.³¹⁵ Does this recommendation and practice stand for anything?³¹⁶ Does it represent recognition (*opinio juris*) of a general rule of state practice against executing juveniles convicted of murder, or does it, when the United States rejected and ignored the decision, represent, in a broader context, evidence of state practice rejecting that general norm for a domestic rule that permits a state to try vicious juvenile offenders as adults, even for capital

313. See Rick Wilson, *Report No. 6: Litigation at the Inter-American Human Rights Commission and Court*, in INTERNATIONAL CIVIL LIBERTIES REPORT 28, 29-33 (1994).

314. Case 9647 (Roach & Pinkerton v. United States), Inter-Am. C.H.R. 147, OAE/SER.L./V./II.71, doc. 9, rev. 1 (1987).

315. See *id.*; see also Christenson, *supra* note 297, at 638. In reviewing the Inter-American Commission on Human Rights conclusion that the United States had violated a *jus cogens* norm by executing juveniles convicted of murder, I pointed out: "[P]eremptory norms in the past have worked to the advantage of established power. The Commission's decision, if accepted, would reverse that tendency." *Id.* The Commission's new peremptory norm reaching individuals in the Inter-American system surely would limit a powerful state's treatment of its own citizens when it "shocks the conscience of mankind and the standards of public morality." *Id.* I wondered, however, if the claim, which reached into the internal relationship of federal to state power, might not actually have the opposite effect—reinforcing the "traditional ways of interpreting treaties and limiting the emergence of new customary international law concerning a nation's treatment of its own citizens." *Id.* My skeptical but not entirely pessimistic conclusion was:

[T]he use of collective coercion against the human person under assumptions of state sovereignty poses cosmopolitan questions. What justification must officials and elites provide without the immunity of official orders? *Jus cogens* norms increase the need for justification for otherwise legitimate, collective coercion to be made directly to the larger international society whose demands and expectations may not be reflected adequately by governments

Even so, they should act as if they seek to hold the nation-state system of international law itself accountable to a global society whose fundamental interests are not the survival of the states system but the security and well-being of all people. *Jus cogens* symbolizes that paradox.

Id. at 638, 647.

316. As Bodansky points out, the opinion by the Inter-American Commission on Human Rights is a political recommendation and has no binding authority. *The Role of International Law in Human Rights Litigation in the United States*, in AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE EIGHTY-SECOND ANNUAL MEETING 456, 472 (1988) [hereinafter ASIL EIGHTY-SECOND MEETING] (remarks by Daniel Bodansky) [hereinafter Bodansky].

offenses? This conduct in interpreting customary practice by a major power scarcely convinces persistent objectors that they may not object to the community's recognition of an emerging rule simply by classifying it as a *jus cogens* norm.³¹⁷ Why wouldn't this specific event—quite apart from the morality of the domestic rule—demonstrate state practice that juvenile violence in particular cultures as a matter of customary international law should be left to the domestic polity under principles of democratic self-determination so long as procedural fairness is accorded? Absent gross violations approaching international crimes or breaches or threats to peace, legal intervention from outside has no forum or process to provide a legal remedy such as injunctive relief in the particular case under customary international law of *jus cogens*.

In any event, this theory of allegiance is unlikely to succeed as a strategy to expand jurisdiction of the federal forum or subject matter jurisdiction.³¹⁸ Domestic courts loyal to the national constitution are in effect being asked to choose between loyalty to the authority of the national state or allegiance to international public policy and law fundamental to international society. In my interpretation, the opening wedge has led not to the internationalization of domestic law in important matters, but to the nationalization of *jus cogens*. We should also consider its influence from that angle. Just as domestic law has nationalized other customary international human rights law in the United States, so also have the federal courts captured and domesticated *jus cogens*. For that very reason, among others, Professors Bruno Simma and Philip Alston have rejected the customary international law approach and favored use of *jus cogens* principles and of general principles from more universal sources such as the United Nations Charter, resolutions, conventions, and general principles of law.³¹⁹ The substance of the discussion before federal courts is really quite similar, but it is reasoned from within the practical context of a democratic federal

317. See Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993); see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 62-66 (2d ed. 1993). Under Charney's and Janis' positions, if the rule against capital execution of juveniles is a *jus cogens* nonconsensual norm, the United States would be compelled to follow the norm despite its persistent objection to it. However, because it disagreed with the decision of the Commission and rejected the norm as a matter of state practice, one could fairly say that the United States nationalized *jus cogens* by subordinating it to the constitution. Every nation is likely to do the same when its constitution is at odds with an emerging peremptory norm.

318. Christenson, *supra* note 297, at 632-33 (arguing that new purpose for *jus cogens* may be at odds with its historic function as a keeper of order as against disruptive personal freedoms, placing its functions in contradiction if forced to choose between allegiance to emerging international society or the states system itself).

319. Simma & Alston, *supra* note 134, at 103 (arguing that threshold requirement for emergence of *jus cogens* norms is at least as high as for development of general customary law).

union, one of whose purposes is to deter the corruption of government through factions. Tyranny from *a priori* transcendental universals is just as corrupting as if it were unabashedly the result of pure selfish greed.

There have been a fair number of relevant federal cases.³²⁰ In the *Princz* case, the District of Appeals Court of Appeals overturned District Judge Sporkins's incorporation and reliance on *jus cogens*. In an important footnote, Judge Ginsburg summarized the dominant view in the federal courts in his answer to Judge Wald's dissent.³²¹

While it is true that "international law is a part of our law" . . . it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. Judge Wald finds that grant through a creative, not to say strained, reading of the FSIA against the background of international law itself.

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading . . . would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day — unless disrupted by our courts, that is.³²²

Jus cogens is also a public order concept, which can be invoked in support of the status quo of the system of independent and autonomous states, through Articles 2(4) and 51 of the United Nations Charter or through customary norms against forcible intervention or illegal aggression, all norms thought to be of *jus cogens* quality, though horizontal in structure.³²³ Antimonies arise in *jus cogens* concepts just as they do in traditional international law, requiring careful analysis of interests.

320. See *Smith v. Libya*, 101 F.3d 239 (2d Cir. 1996); *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994); *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).

321. *Princz*, 26 F.3d at 1174 (Wald, J., dissenting) (strongly urging the incorporation of *jus cogens* norms as customary international law as a basis for both in personam and subject matter jurisdiction).

322. *Id.* at 1174 n.1 (citation omitted).

323. Christenson, *supra* note 297, at 596-98.

In no case has *jus cogens* formed the basis for a rule of decision not overturned on appeal. It has, however, substantially increased the justification required for establishing a rule of customary international human rights law cognizable under the Alien Tort Statute. As explained elsewhere, I believe that its use as a domestic rule of decision requires skill and great care, less as a direct rule of decision limiting or overriding government power and more as public policy requiring the state to bear a heavy burden of justification when it breaches fundamental human rights norms universally respected.³²⁴ As a guide to choosing rules of decisions to achieve the fundamental goals of international society in human dignity and economic freedoms, federal courts might use it more effectively than if invoked directly.

Most new claims involving customary international human rights law, not already accepted as creating federal causes of action, now encounter a much stiffer burden than is required to establish traditional customary international law, from evidence of state practice and *opinio juris*. The burden of justification for a statutory federal cause of action for tortious breach of the law of nations has been stood on its head. Prohibitions against slavery, genocide, torture, and arbitrary murders or disappearances are actionable for aliens because they are recognized as *jus cogens* norms, apparently now the criterion for when tortious wrongs violate the law of nations. It is practically impossible to demonstrate a norm of *jus cogens* quality for tortious wrongs such as taking of property or censorship of free expression, but there may be a strong argument demonstrating such a rule under ordinary customary international law. However, the federal forum threshold now seems to be the higher one, reinforcing the traditional public order principles of restraint in exercising jurisdiction through incorporating new rules of customary international law. Under the test of when a tort in violation of a rule of international law amounts to a cause of action under the Alien Tort Statute, would discrimination against women or racial discrimination short of apartheid³²⁵—each a violation of human rights law—be recognized as such under the statute? If a cause of action will lie under a rule of customary international law against official torture abroad, might failure to prevent domestic violence and torture within a family or private group be any less gross an abuse of the dignity of the human person? Does vigilantism need to rise to the level of death

324. *Id.* at 626-30. “[B]ecause a peremptory norm is not easily demonstrated, there is danger that the Court could convert a *jus cogens* argument into a nearly impossible test of when to give domestic effect to international human rights standards.” *Id.* at 627.

325. The prohibition against discrimination is now accepted as a legal obligation under Article 55 of the United Nations Charter.

squads to merit civil responsibility under international law? Do disappearances, arbitrary murders, and inhumane punishment of men by enemies in power warrant international jurisdiction for remedy? What about rape or torture of women under an averted eye, or theft of domestic property, or censorship of expression which is considered seditious by a foreign government and its friends?

Especially inventive, but going nowhere, are the recent claims that a violation of a *jus cogens* norm by a recognized government constitutes an implied waiver of sovereign immunity for purposes of domestic suits against that government.³²⁶ Another claim is that peremptory norms place limits upon certain constitutional powers granted under the Constitution. Not only are these claims misguided in international law, but the citation of dictum as if established doctrine has affected seriously the credibility of human rights advocacy. Ironically again, each citation of *jus cogens* as justification for jurisdiction or a cause of action has turned against the proponent and has been used as justification for refusal to imply a cause of action from customary international human rights law. Thus, even when there is a statutory authority to remedy a violation of the law of nations, the *jus cogens* argument has narrowed the statutory remedy already granted.

Putting aside the dubious reception given emerging customary international human rights norms, no court of appeals has affirmed any finding on a rule of decision based solely upon a rule derived from *jus cogens*. The Ninth³²⁷ and D.C. Circuit³²⁸ Courts of Appeals have reversed district courts that have decided cases solely upon *jus cogens* principles. Recently, boldly asserted challenges to the very core of the states system, namely sovereign equality and reciprocal respect, have failed. As a result, the recent cases relying upon *jus cogens* to support implied waiver of sovereign or visiting head of state immunities, now invoked under customary international law, have actually strengthened the defense.³²⁹ Judge Newman's recent opinion in *Smith v. Libya*³³⁰ gave full and respectful treatment to the *jus cogens* claim by representatives of two victims of the Lockerbie air disaster. They had argued that the sovereign immunity defense of Libya was impliedly waived or overridden by *jus cogens* norms,³³¹ especially in light of Congress'

326. See *Siderman de Blake v. Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992); see also *Princz*, 26 F.3d at 1174 (citing Adam Belsky et. al, *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989)).

327. See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994).

328. See *Princz*, 26 F.3d at 1116.

329. See *LaFontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

330. 101 F.3d 239 (2d Cir. 1996).

331. See *id.* at 242.

amendment to the Foreign Sovereign Immunities Act allowing jurisdiction for certain acts of state terrorism under narrow conditions (the amendment did not apply to economic damages claimed and did not revive the earlier wrongful death actions brought personally by the family).³³² Judge Newman construed the statute narrowly, favoring immunity of a foreign sovereign, unless specifically withdrawn by statute: "Congress can legislate to open United States courts to some victims of international terrorism in their suits against foreign states without inevitably withdrawing the entire defense of sovereign immunity for all *jus cogens* violations."³³³

It is easy to see how *jus cogens* arguments are attractive in suits against foreign sovereigns. Other than peremptory norms of international law, so universally compelled that they override all treaty or customary law in conflict with such powerful norms, we have no theory of international public policy adequate to the task of displacing, limiting, or interpreting the domestic exercise of constitutional powers delegated within a state, thereby affording international protection. What universal sources from a global human community of citizens can possibly lead to that result? The most we now can agree upon as a legitimate source of general or customary international human rights law is shared consensus about interests fundamental to a society of independent nation-states. Even a *jus cogens* norm conceptually comes into existence only when accepted or recognized by the international community of states as a whole. Human beings, except as they influence their own governments, have no direct relationship of citizenship or participation in such a community despite movement toward according the individual status and protection under the international order now emerging.³³⁴

In a critical review, before the spate of cases reached the federal courts, this author maintained:

The content of a peremptory norm, having no prior meaning apart from decision, must flow from some authority or political leader informed by the deepest expectations of international society. Whoever has power to negate the claim to prescribe or change an ordinary norm on that basis has control of the super-norm's content. The empirical analysis then becomes an inquiry

332. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (to be codified at 28 U.S.C. § 1605(a)(7)).

333. *Smith*, 101 F.3d at 244.

334. See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

into political power and the demands and expectations from within the entire international community, beyond the system of States.³³⁵

In plainer words, before the rule of customary international human rights law against torture or disappearances or arbitrary state executions could be justified as preemptory, some political power would have to be seen as credible enough to intrude into the domestic affairs of a powerful state, such as China or India, to compel a change in official policy. In view of all the litigation in U.S. federal courts that has followed this inquiry, my conclusion needs only slight revision. It should be modified to support choice of law analysis by forum courts with split allegiance. By refusing to make the false choice between state sovereignty, to which they traditionally defer, and an emerging international legal order not yet here, forum courts should use *jus cogens* analysis as an instrument of judicial choice for reaching the substance of the important conflicts among inclusive and exclusive communities. By seeing these conflicts in transnational litigation within federal jurisdiction and weighing them through the prisms of both pragmatic interest analysis and universal respect for human dignity, federal judges will decide on the facts, as they always have, when they have discretion. Forum courts should choose a rule of decision "as if" a truly global society whose interests are the most inclusive of all interests they might imagine would accept it, even as they serve the nation-state system by remaining deferential to their own political authority.

Where does this leave federal courts? It leads them not to formal incorporation of public international law norms, nor to a single canon aimed at interpreting domestic law to avoid conflict with international law, but toward the craft of transnational litigation.

VI. FEDERAL COURT DECISION PROCESS AS EXAMPLE FOR WORLD CIVIL SOCIETY

The questions most troublesome to federal judges in the United States do not grow from the general principle that customary international law is part of U.S. law "like, if not as," federal common law by analogy.³³⁶ They stem from such difficulties as: (1) locating sources of customary international law; (2) finding sources of foreign law and determining the applicable international conflict of laws principles; (3) recognizing state practice and usage as law; (4) identifying and applying new customary law as codified or crystallized in United Nations declarations, resolutions, and conventions; and (5) determining

335. Christenson, *supra* note 297, at 645.

336. See generally Henkin, *supra* note 58.

when to defer to the political branches, foreign courts, or to decide as common law judges. These are authentic concerns that echo similar choices in conflicts of law jurisprudence.³³⁷ As Falk puts the central issue, it "depends on the capacity of these courts to withstand internal political influence when confronted with an issue of international law."³³⁸ To the extent that municipal courts find ways to avoid applying international law to serve the foreign relations interests of the national government, "they confirm cynical perceptions of international law as a body of law that is subordinate to or a rationalization of national policy."³³⁹

Federal courts seldom choose international law as the law governing liability between private parties, but they do provide a forum by which the parties may argue about which rules of decision or principles ought to govern the case. Should federal forum law always govern procedure and remedies, especially when litigation is between foreign parties and foreign officials? As the era of interpenetration advances, national courts might function quite well without having to choose in civil matters between loyalty to the status quo of state sovereignty or an imaginary international government that does not exist. The new conditions within which world civil society now functions reinforces federal courts in their consideration of interests of governments and the international system in stability, cooperation, and effectiveness. Achieving the goals of human rights and economic enterprise and freedoms with security according to law, without having to choose allegiance to a community of sovereign states acting as if it were the world polity, is a worthy task for the federal judiciary.

A. *Choice of Law and Public International Law*

Conflict of laws theory merges most easily with public international law theory in U.S. domestic courts when government interest analysis, as developed by Brainerd Currie, is expanded to include international public interest.³⁴⁰ That analysis should balance, or at least consider in a reasoned justification, any overriding policies of the international community of states, the values of human dignity contained in emerging international human rights law, the economic

337. See generally BRILMAYER, *supra* note 85; see also Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991).

338. FALK, *supra* note 202, at 433.

339. *Id.*

340. See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

values of international wealth production and distribution, and respect for the stability and predictability of the interstate system.³⁴¹

International choice of law problems in civil litigation between private parties and their relationship to public international law are no easier than choosing to incorporate international law into domestic law, making it law of the United States.³⁴² Choosing between foreign and domestic rules of decision to justify a decision in "international" litigation, especially when working within the framework of the *Erie* doctrine, has never been simple.³⁴³ Federal and state judges handle these problems frequently, however, when federal common law allows a choice between state and federal law as well as in intrastate choices.³⁴⁴ Whether relying on interest or policy analysis, comity and reciprocity, better law principles, or the greater certainty of vested positive rights in *lex loci delicti* doctrines, U.S. judges, beginning with Judge Story, have handled similar questions realistically by analyzing interests to shape rules of decisions. Only in the last several decades, however, have federal courts faced choices involving conflicts between foreign or domestic internal rules of decision and those emerging from the "new" customary international human rights law, invoked in actions asserting federal diversity or subject matter jurisdiction.³⁴⁵

341. See generally BRILMAYER, *supra* note 85.

342. See John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561 (1952).

343. Judge Learned Hand's mistake in *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), was grounded solidly in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938): "[A]lthough the courts of [New York] look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves." *Bergman*, 170 F.2d at 360; see also Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States* [Part II], 101 U. PA. L. REV. 792 (1953).

344. See Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883 (1986) (remarking that power to create federal common law is, and should be, broader and more discretionary with federal judges than generally assumed).

345. Judge Kaufman in *Filartiga* explicitly left this choice of law problem to the trial judge on remand, commenting later in an article in the *New York Times Magazine* that the broad response to torture is best left to the policy makers and cautioning that the Alien Tort Statute should not be read as "engaging in messianic moral imperialism." Irving Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES, Nov. 9, 1980, § 6 (Magazine), at 44, 52.

On remand, District Judge Nickerson began his underappreciated opinion by stating that the

Court of Appeals decided only that Section 1350 gave jurisdiction. We must now face the issue left open . . . namely, the nature of the "action" over which the section affords jurisdiction. Does the "tort" to which the statute refers mean a wrong "in violation of the law of nations" or merely a wrong actionable under the law of the appropriate sovereign state? The latter construction would make the violation of international law pertinent only to afford jurisdiction. The court would then, in accordance with traditional conflict of laws principles, apply the substantive law of Paraguay. If the "tort" to which the statute refers is the violation of international

The temptation of U.S. courts, following contemporary conflict of laws analysis, is to accept the realist proposition that all decisions before domestic courts are made finally by forum law.³⁴⁶ The realist dilemma states that if all decisions are those of forum policy, then by incorporating customary international law or by comity and reciprocity, independent norms of universal respect are negated. International law will be nationalized by court deference, and, even if courts do internalize by analogy what they view as universal norms, the basis for that subjective choice is ultimately national policy presided over by a deferential Supreme Court nationalism.

The most basic doctrinal and theoretical relationships between domestic rules of decision and customary international law in the United States might be rethought more modestly and less chauvinistically, when the purpose for each is the protection of human dignity and economic liberty within the context of an individual's allegiance to different and changing political communities.³⁴⁷ These relationships are undergoing rapid change, both conceptually and empirically.

The vested rights analysis prefers stability and predictability, promoting a forum's loyalty to the state's political institutions.³⁴⁸ This respect for rights vested under foreign law allows, as in Europe, for the use of private international law to give maximum deference to the law of the place governed by those institutions. When U.S. legal realists abandoned the vested rights analysis and adopted the interest analysis along the lines of Brainerd Currie's theory,³⁴⁹ the preference was justified because the interest analysis was more responsive to balancing fairness to the parties with government interests through legislative purposes. Yet in choosing between a

law, the court must look to that body of law to determine what substantive principles to apply.

Filartiga v. Pena-Irala, 577 F. Supp 860, 862 (E.D.N.Y 1984).

This reasoning was decidedly not "messianic moral imperialism" because the forum court gave full respect to the law of Paraguay and simply used the customary international law of human rights to prevent the hypocrisy of denial by Pena, the Paraguayan citizen official, that Paraguayan law did not cover official torture because it had not been applied in the past. The court then proceeded to apply the law of Paraguay to include moral damages adding punitive damages under international law and public policy of the forum court, a somewhat more controversial determination. See *id.* at 864.

346. See Maier & McCoy, *supra* note 337, at 249-54.

347. Whether individuals are now properly subjects of international law (as the standard treatises now proclaim) and whether international law first must be incorporated or transformed into municipal law (the old monist-dualist debate) before it can be applied as a domestic rule of decision are questions that should be revisited, but this paper does not make that attempt.

348. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1930).

349. CURRIE, *supra* note 340.

rule of decision based upon foreign law of the place of residence of both parties in an Alien Tort Statute action and one based upon customary international human rights law preferred by the plaintiff, why shouldn't the interest analysis prefer the foreign law as an expression of the legislative purpose of local policy-makers so long as it meets the international human rights standard?³⁵⁰ Otherwise, the decision would amount to a choice between U.S. forum law or international law, and what practical difference does it make whether or not U.S. law incorporates the new international human rights law in that event? Forum court law might apply in an actual conflict, but only if the legislative expression has clearly incorporated international law. Without such expression, foreign law might be closer to legislative policy so long as it does not offend international law. But there are other interests to weigh, including those of the international community in balancing human dignity with stability and respect for other democratic states within a developing world civil society.

A comparative impairment conflicts theory at one point asked whether the long-run interests of states as a whole might be better furthered by applying the law of the state with the more serious governmental concern. In human rights litigation, a three-way conflict of laws might arise between the United States, the foreign state of human rights abuse, and the international community of states as a whole. Admittedly, in theory, this tension might not pose a true conflict, and forum courts tacitly or consciously will take into account other interests as well.

Choice also involves, for example, the interests of classes of foreign plaintiffs represented by entrepreneurial lawyers who choose a federal forum for advantage when forum law allows international class actions, punitive damages, and equitable remedies to preserve defendant's foreign assets (and the advantage of lead counsel

350. Bodansky argues that federal interests prefer international standards that both countries have accepted over either forum or foreign law.

[A] state has a much greater interest in the enforcement of international standards than it has in enforcing the legal standards of a foreign state. Thus, if a state has a sufficient interest to adjudicate a transitory tort, based on foreign law, it also should have a sufficient interest to adjudicate a tort committed in violation of international law.

Bodansky, *supra* note 316, at 472.

Yet, a state may also have an interest to promote the universal respect by other states themselves to recognize and enforce such standards as provided in the United Nations Charter and other human rights documents, *see supra* note 41. Those interests require balancing international law from two perspectives—horizontal and vertical—in shaping rules of decision under my arguments.

attorneys fees).³⁵¹ The more serious government concern is to balance the availability of a remedy with deterrence as forum policy, considering both the states system and abuses by particular states. Inevitably, forum court law decides the issue, making common law judges vulnerable to political attack.

Robert Leflar's "better law" theory³⁵² generally fares no better in international human rights analysis, for the better law nearly always turns out to be forum law, which incorporates and restates international law according to forum policies. The "better law" theory requires a court to decide if forum law or foreign law is superior, in theory resolving true conflicts in a way that would not depend on the law of the forum where the cause of action is litigated.³⁵³ But better for whom or for what? Better for the state's interests, for the interests of the international community of states as a whole, for the human rights victims' interests in justice, or for the defendant former official's interest in fairness? In human rights litigation such as presented above in the second hypothetical (suit by an alien against a foreign official present in the United States), better law analysis might begin with the use of customary international human rights law in U.S. law for the purpose of a cause of action under a jurisdictional statute, but not for determining punitive damages or limitations of actions, depending on the facts. International law might not be preferred as the better law in all cases.³⁵⁴ The net effect could be that the forum court would resist exercising subject matter jurisdiction, or recognize a universal cause of action without statutory authority. Once the jurisdictional threshold is crossed, however, the forum court would apply its own rules of decision for damages and procedure. This mish-mash is likely to produce a negative reaction in other countries when enforcement of a judgment abroad is necessary. Similarly, when an evaluation of the interests of the international community suggests that the choice of law flowing from U.S. realism is not so much international interest analysis or

351. In *In re Estate of Marcos*, forum law applied to certification of an international class of victims in the Philippines, to equitable remedies to preserve the estate's assets, and to the survival of action. Philippine law was applied to allow punitive damages, but interests of international community as a whole were not evaluated. In *re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1477 (9th Cir. 1994). When international law provides no limitation of action in a claim of torture and genocide, forum law was used as limitation. See, e.g., *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994).

352. See Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 56 CAL. L. REV. 1584 (1966) [hereinafter Leflar, *Conflicts Law*].

353. See Leflar, *Conflicts Law*, *supra* note 352, at 1587-88.

354. For the use of forum law as limitation of action when international law provides none, see *Princz*, 26 F.3d at 1166, and Lillich, *supra* note 159.

better law analysis as it is an Americanized version of customary international human rights law, federal courts should make the choice as if the values of world civil society, not the interests of states alone, are taken into account. Otherwise, a national version of a better law is a paradoxical gloss of avoidance and resistance coupled with a plaintiff's forum of great imagined advantage for damages and procedure once in the door.

If the choice of law analysis truly considers both the interests of the international community of states (one of the elements outlined in the *Restatement (Second) of Conflicts*) and the values of world civil society, measured by developing standards of human decency and enterprise, does it matter whether the forum state has incorporated customary human rights law into its municipal law? The effectiveness of economic and human rights law normally requires international cooperation and national enforcement (unless outside sanctions are provided through Security Council action). The predominant interest and expressed preference of the international community are that domestic legal orders progressively be revised to achieve international standards. Theorists of new customary human rights law properly insist that the choice of the rule of substantive decision applied in U.S. courts should be at least the international standard, if that is more protective of victims of abuse within the United States.³⁵⁵

However, if U.S. statutory law which incorporates international law by reference affords better remedies only for aliens, then there would be no possible way, short of Congressional enactment, for courts to incorporate international human rights standards into actions for citizens and residents alike, a strange anomaly. The consequence is not likely to promote universal respect and observance of fundamental human rights. It may promote the opposite—the choice of domestic law to reject international law remedies for citizens against domestic officials before domestic courts and choice of international law for aliens who sue officials of their own countries in U.S. courts.

The better choice of law strategy is to encourage courts to use international law to inform statutory causes of action under 42 U.S.C. § 1983, or at least the enactment of statutes to accomplish the same thing. The national judicial interest should not seek to limit court access, but increase it in these matters, for it is uniquely equipped to address the international legal process claims that arise from global

355. See, e.g., Bayefsky & Fitzpatrick, *supra* note 155.

participation, which is both a national political goal and reality. With symmetrical and consistent judicial behavior among the national tribunals of the most influential countries, human rights might then be expected to gain as much credibility as economic freedoms. For the time being, U.S. courts operate on the assumption that domestic law is at least as good as universally recognized international human rights law. Litigators question that assumption because a cause of action may be better under international law and the remedy may be better under U.S. law. However, such a result is not necessarily good public or private international law.

If there are legitimate choice of law questions, given that federal jurisdiction and causes of action are open to aliens, the question of substantive law would be whether the forum court provides a more adequate remedy under domestic tort law. Because forum law in the United States facially meets the international law standard in the eyes of federal courts, why wouldn't it be in the paramount interest of the international community and also in the federal interest to expect foreign law to be held to the same standard and either chosen or interpreted to achieve that end?³⁵⁶ Not needing to replace foreign law with international law, with the internal resistance generated, domestic courts will promote peace and security of the entire international system in the long run by prudential use of choice of law principles instead of the either/or dichotomy from the incorporation debate. For these reasons, I think the choice of law analysis of new customary international law as the primary rule of decision governing liability, but the choice of U.S. law to govern punitive damages and equitable relief, is unlikely to be acceptable to the international community or its interests in the long run. When assets of the defendant may be in the banks of a third state, the enforcement of foreign awards in that state will be less vulnerable when the interest of the international community is part of the court's reasoning in awarding damages to an entire class of aliens.

Theoretically, constructing doctrine from conflicts jurisprudence is compatible with an overlapping juridical consensus for respecting fundamental human rights among a community of states while also respecting municipal law governing the primary relations of citizens and government that reflect each nation's culture and political identity internal to the polity.³⁵⁷ A mutual reciprocal respect of those

356. See Bodansky, *supra* note 316, at 472.

357. Universality does not deny these concerns. For textual references to "universal respect" for observance, see materials cited *supra* note 40. For overlapping consensus among

horizontal political relationships by domestic courts reinforces a court's allegiance to its own state's political institutions. Overlapping recognition of universal respect for human rights reinforces each.

A strong legal realist tradition in the United States, reflected in government interest, minimum contacts, and policy analyses of conflicts of laws questions, recognizes that jurisdiction is the central question. All other questions involve forum choices about law and policy. Once the court has jurisdiction over persons and subject matter, these choices become forum law questions subject to constitutional requirements, such as giving full faith and credit.³⁵⁸

When universal respect for human rights begins to suggest to federal judges that their loyalties also run to an emerging world legal order (but within the jurisdiction of federal courts) to address questions arising from customary international human rights law, a potentially revolutionary idea may be unleashed and quite naturally will be resisted. The legal realist might answer that all international law is domestic law because only decisions made by a forum with coercive power over the parties count as law to guide other decisions.³⁵⁹ But that answer is also instrumental and inadequate as Lasswell and McDougal first explained at the outset of World War II when they proposed a comprehensive postrealist process of decision in service of human dignity.³⁶⁰ At all stages of functional realist analysis, questions of substance, not merely of loyalty to the polity authorizing coercion, have to be faced—including the questions of consequences of a forum decision when the parties are not completely subject to the forum polity's coercive powers. A sound choice of law analysis would not attempt to resolve any conflict among rules of decision, but rather, would seek the best balance of policies and interests at stake to guide decisions functionally within an emerging world civil society.

society of societies, see John Rawls, *The Law of Peoples*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 41 (1993).

358. Maier & McCoy, *supra* note 337, at 25-55.

359. Harold G. Maier, *Baseball and Chicken Salad: A Realistic Look at Choice of Law*, 44 VAND. L. REV. 827, 838 (1991). Disagreeing with Professor Brilmayer's political rights basis for applying a foreign rule of law, Maier states:

There can be no burden and no political right not to be burdened until some authoritative decisionmaker realistically contemplates applying the rule to a party in a case, and the only authoritative decisionmaker that can apply it is the forum court. The court derives that authority solely from its own body politic.

Id.

360. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

When domestic courts in the United States exercise international jurisdiction, they can best avoid the stark either/or choice of allegiance between two artificially incommensurate public order systems by considering customary international law in choice of law analysis for shaping rules of decision in which the new human rights law or economic freedoms collide with the old horizontal states system. "Indeed, in its modern version," Dickinson pointed out over a half-century ago, "the doctrine [of incorporation] is essentially like the modern Anglo-American doctrine underlying the so-called conflict of laws or private international law."³⁶¹ In the post-World War II and post-cold war periods, the United Nations system has not changed this attitude in the federal courts for human rights, although it may have for global economic free markets.

The best way to approach "international jurisdiction" is by analogy to "federal jurisdiction" in a federal system such as in the United States, where both federal and state courts may have judicial competence to decide federal questions arising under the laws or Constitution of the United States when not exclusive to federal courts.³⁶² In a federal system, special problems of dual sovereignty are better understood and accepted than problems of dual loyalty between national state institutions and the international community of states or international society.

In federal systems such as Germany, Canada, or Nigeria, an observer might notice the beginnings of "triple loyalties": first, to the law of the laender, province or state; second, to federal or national law; and third, to the law of regional or international communities. In the United States, most federal and state courts do not view international law as emanating from a political community to which they owe allegiance. The reason they will respect and choose to apply foreign law under principles of comity or give full faith and credit or respect to state law not their own, is membership in the political community to which they owe allegiance and which gives advantages or burdens by coercion. International law, however, does not command the independent allegiance of judges in the United States unless it is first politically domesticated by actions more explicit than the abstract argument that the phrase, "laws of the

361. Dickinson, *supra* note 93, at 260.

362. "Domestic jurisdiction" is the concept establishing the boundary in the conflict between state autonomy and the limits on autonomy imposed by international principles of human rights, one of Schachter's antimonies in international human rights law. SCHACHTER, *supra* note 134, at 329-30.

United States" in the Supremacy Clause includes customary international law as part of federal common law.

Incorporated long ago, however, are international expectations with deep constitutional underpinnings coextensive with the law of nations, such as principles of territorial independence, nationality, sovereign immunity, jurisdiction, and nonintervention.³⁶³ For my purposes, a domestic court exercising international jurisdiction with dual loyalties cannot escape deciding among conflicting policies. U.S. courts often escape by deferring to the political branches unless the executive or legislative branches have incorporated the international rule of decision into municipal law. Deference is basically a judge's substantive choice of state autonomy over human rights limitations, a choice to preserve political loyalty to the state over that to the international human community. Where customary international law is of the traditional kind treated as part of U.S. law and self-executing by courts, the conflict with dual loyalty is resolved also to favor the state, but only because the government's interests are supported by the underlying assumptions of customary international law.

The reason that the law merchant, maritime law, and natural law, in addition to the law of piracy,³⁶⁴ have been recognized and applied without statutory incorporation is because they reinforce loyalty to the state based on the bond of nationality. Domestic courts will apply these habitually observed allocations of judicial power axiomatically as incorporated into municipal law, unless the political branches explicitly provide otherwise, because they maintain the integrity of constitutionalism in which the national judicial power is maintained in balance with the political powers.³⁶⁵ This equilibrium forms the baseline structure for the old horizontal customary international law tradition incorporated by the method of looking to state practice and usage recognized as law by *opinio juris communis*. However, in world civil society, this notion is false because a nation cannot internalize the costs of global economic displacements that

363. See Turley, *supra* note 83, at 343-49.

364. See *United States v. Smith*, 18 U.S. 153 (1820) (holding that piracy *jure gentium* constituted a prosecutable crime under law of nations without requiring precise statutory incorporation); see also Sweeney, *supra* note 70, at 458-62.

365. The Supreme Court's canon against construing statutes to have extraterritorial reach unless explicitly clear is based upon the law of nations' principle of territorial sovereignty and independence. See *EEOC v. Arabian. Am. Oil Co.*, 499 U.S. 244 (1991); see also *LaFontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) (finding that visiting head of state immunity from customary international law survived the Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994), not explicitly covering it).

have effect internally without an international regime to prevent free-riding by other nations.

The identification, clarification, and application of international economic and human rights norms strain the allegiance of domestic courts to the state's political organs far more than when traditional customary law norms are applied. Because choices of rules of decision or procedure made by domestic courts in the legal realist view are always forum law decisions, they bend to the reality of interest analysis in the case at hand and respect the power to make the decision effective.³⁶⁶ Thus I reluctantly agree that international law questions before domestic courts always are forum law questions for common law judges, absent political directives.³⁶⁷

B. Deciding Questions of International Law When Presented

The traditional view of international law is that it is made by a normative consensus of the political community of states, accepted as law by governments presumably representing their populations.³⁶⁸ Consensus in this view scarcely claims to maintain legitimacy from linkage to the workings of civil society within all countries as it does in a democratic republic.³⁶⁹ To avoid counter-majoritarian difficulties in democracies, this consensus may be accepted as municipal law by domestic courts only after political direction (through ratification or enactment) or constitutional mandate.³⁷⁰ We have seen that contemporary federal judges in the United States seldom fashion decisions from simplistic syllogisms constructed from a formal premise that international law is part of United States law or that foreign law should be applied under conflict of laws principles of comity and reciprocity. Such doctrines often mask other biases, sometimes deeply hidden in political assumptions.

366. See Maier & McCoy, *supra* note 337, at 249-51.

367. See generally ASIL EIGHTY-SECOND MEETING, *supra* note 316, at 456-78.

368. See RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, § 101.

369. See THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

370. Brilmayer rejects the countermajoritarian argument when international law is the basis for invalidating inconsistent state law. Brilmayer, *supra* note 228, at 329-32. Koh rejects it for reasons that seem to say that universal agreement among governments entails consensus among peoples or for reasons of neonatural law entrenching fundamental human rights. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-88 (1996). Turley rejects it for similar reasons. Turley, *supra* note 83, at 340-42.

1. *Bringing International Norms into Public Awareness*

Lucid opinions by federal judges often articulate important consensual norms of international law, while still refusing to turn them into rules of decision until given approval by the political branches.³⁷¹ In *Smith*, Chief Judge Newman, whose opinion dismissed a suit against Libya under the Foreign Sovereign Immunities Act, considered whether Article 25 of the United Nations Charter created an obligation to abide by decisions of the Security Council.³⁷² Plaintiffs had argued that a Security Council decision had committed Libya to pay compensation to the victims of the Lockerbie Pan Am Flight 103.³⁷³ In rejecting that argument, Judge Newman wrote:

Such a contention would encounter a substantial constitutional issue as to whether Congress could delegate to an international organization the authority to regulate the jurisdiction of United States courts. It would take an explicit indication of Congressional intent before we would construe an act of Congress to have such an effect.³⁷⁴

Sometimes, federal courts accept a nonstatutory defense of international law to dismiss a claim or otherwise to decide one, or to articulate a rule under international choice of law principles. District Court Judge Weinstein invoked customary international law of head of state immunity to deny personal jurisdiction over a suit against Haiti's ousted visiting head of state, President Aristide.³⁷⁵ International law will not be used to override such a defense, however, unless authorized by Congress. Further, Court of Appeals Judge David Ginsberg declined to consider whether a peremptory norm of international law might overcome Germany's claim of sovereign immunity from suit under Nuremberg principles unless given the green light by Congress.³⁷⁶ We explain these apparently incoherent decisions³⁷⁷ by the simple fact that federal courts "nationalize"

371. See *Smith v. Libya*, 101 F.3d 239 (1st Cir. 1996).

372. *Id.* at 246.

373. See *id.* at 246-47.

374. *Id.* at 247. Note that Justice O'Connor even suggests that the Supreme Court might have to decide whether any Congressional delegation of federal powers to an international organization is unconstitutional. O'Connor, *supra* note 2; see also Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441 (1994).

375. See *LaFontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

376. See *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994)

377. Traditional theories of incorporation of international law into municipal law—monism and dualism—are of little help in multistage processes of decision involving pluralistic interests. For a discussion of the competing concepts, see Starke, *supra* note 210. An example of the American pragmatic approach is found in Louis Henkin, *The Constitution and U.S. Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987).

international law. Thus it is well understood that international law is recognized as United States law only when made by the treaty power under authority of the United States or "made pursuant to the Constitution" by action of the political branches (as statutes or executive directives) or by decision of federal courts by analogy (as judge-made federal common law).³⁷⁸ If a federal court is to guard interests of its civil society under constitutional powers, it checks the claims invoking international law (whose source is agreement of states or custom) against authority from domestic political institutions closer to the democratic processes. This constitutional function (as rule of recognition) guards the pedigree of any claimed rule of international law before a court moves inside any complex transnational litigation to apply rules of procedure and obligation.³⁷⁹

2. *Guardians of Pedigree*

When international law is invoked, the first decision is constitutive. A federal court acts as constitutional guardian of pedigree, deciding whether or not to recognize the constitutional (or statutory) validity of a rule of international law invoked. World civil society has little relevance here, for the constitutive decision is part of the public sphere of the states system, which itself recognizes the legitimacy of internal constitutional integrity of each state. Is a treaty provision valid law, self-executing, and not in conflict with later federal law?³⁸⁰ Have Congress and the president acted within their shared or exclusive powers and with sufficient specificity to prescribe or incorporate a rule from international law?³⁸¹ Has the Supreme Court adopted a rule of customary international law as

378. See RESTATEMENT OF THE FOREIGN RELATIONS, *supra* note 58, §§ 111-115; see also Henkin, *supra* note 58.

379. See H.L.A. HART, *THE CONCEPT OF LAW* 208-31 (1961). Hart thinks of international law as a set of customs, practices, and agreements (primary rules of obligation) governing relations among states. *Id.* He does not believe that international law has yet developed secondary norms of recognition that determine the validity of primary rules and the process of changes in them. *Id.* at 230-31. In transnational litigation under federal jurisdiction when international law may be invoked, federal courts as guardians of pedigree perform the recognition function first, which then triggers the use of sources of primary rules to shape rules of decision in the case. The domestic question of constitutional or statutory validity fulfills the function of Hart's secondary rule of recognition in the absence of central international authority. *Id.*

380. See *Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (finding that a commercial agreement made by the president under authority of an act of Congress was a "treaty" within the federal judicial power); *United States v. Percheman*, 32 U.S. 51 (1833) (determining that the treaty in question was self-executing); *Foster v. Neilson*, 27 U.S. 253, 314 (1828) (finding earlier that the same treaty was not self-executing).

381. See *Brown v. United States*, 12 U.S. 110 (1814).

judge-made federal common law taking judicial notice of sources?³⁸² Does the Supreme Court require application of foreign law under principles of comity with or without reciprocity?³⁸³

Commentators often maintain the theoretical possibility that "a case presenting claims based on customary international law may arise under federal question jurisdiction."³⁸⁴ Yet, I have searched in vain for any such case, brought successfully by a private party under federal question jurisdiction alone, which has affirmed a cause of action arising solely under customary international law without the aid of a statute.³⁸⁵ Theoretically, it is possible for a rule of customary international law to develop with direct applicability by private parties in national courts. Whether federal question jurisdiction in such circumstance (say, involving grave offenses against the global environment) would be available without a more specific statute remains an open question.³⁸⁶

382. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972) (finding that federal common law is as authoritative as same federal statute); *Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 891 F.2d 486, 492 (2d Cir. 1968) (stating that laws created by federal judicial decisions as well as by Congressional enactment are "laws of the United States" supporting federal cause of action under 28 U.S.C § 1331); see also Field, *supra* note 344, at 890.

383. See *Hilton v. Guyot*, 159 U.S. 113 (1895) (recognizing validity of enforcement of foreign judgments guided by mutuality and reciprocity of civilized nations); see also ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 237-54 (1965) (stating that reciprocity should not be used to refuse to apply laws of another state but may be used to bring a wayward state or nation "to come into line with the civilized community").

384. George Slyz, *International Law in National Courts*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 71, 90 (Thomas M. Franck & Gregory H. Fox eds., 1996).

385. Judge Kaufman's suggestion that the general federal question provision of 28 U.S.C. § 1331 "might also sustain jurisdiction" on the basis of a rule of customary international law was in a footnote in the *Filartiga* opinion, which explicitly preferred to rely upon the Alien Tort Statute. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.22 (2d Cir. 1980). *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), reserved the question. The *Kadic* court found that included crimes against humanity and war crimes fell under the scope of specific statute but stated that general federal question jurisdiction was an "issue of some uncertainty that need not be decided in this case." *Id.* at 246. A number of recent cases rested upon a more specific statute, although citing federal question jurisdiction. See, e.g., *Abebe-Jiri v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

386. In *Sequihua*, Judge Black maintained federal question jurisdiction over questions involving international relations which are incorporated into federal common law, presenting a question under 28 U.S.C. § 1331, and refused a remand, but then dismissed the case on grounds of interference with foreign relations and *forum non conveniens*. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61, 61-62 (S.D. Tex. 1994). In *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d. Cir. 1986), the claim of a sovereign state in U.S. courts presented a clear federal question but was backed by constitutional provisions envisioning suits by foreign sovereigns based upon international law.

3. Federal Interest in Complex Transnational Adjudication

The interests of world civil society have more relevance in the second judicial function, transnational litigation of the case. Here, as we saw in the original hypothetical problems, there is practical interest in the transnational process of adjudication by which federal courts choose among competing jurisdictional, procedural, substantive, remedial, and enforcement rules in cases in which international law or comity is invoked to influence at least one of those stages of litigation. Federal courts may be less inclined to contrive to avoid that highly generalized, often mouthed and seldom applied maxim that "international law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."³⁸⁷ The difference is that federal courts might use principles of both public and private international law to support the values of world civil society, which are not necessarily coextensive with interests of the international community of states.

Federal courts need flexibility and reasonableness to choose or shape rules of jurisdiction and decision by weighing important interests at stake in international litigation. From the viewpoint of world civil society outside formal dominance of the system of sovereign states, federal common law adjudication honors the premises of federalism and popular sovereignty which value pluralistic institutions in domestic civil society. Comparable institutions of human enterprise operate and coexist transnationally, alongside or residually within the political system of nation-states as a whole. A federal judge is likely to be influenced more by arguments within familiar traditions of jurisdiction, choice of law, and judicial discretion than by formal arguments derived from law made by the international community of states and applied directly to individuals in litigation.³⁸⁸

As we have seen, it is nearly always fatal to argue to federal judges that the Constitution requires them to accept international law as providing a private cause of action or a rule of decision

387. *The Paquete Habana*, 175 U.S. 677, 700 (1900) (applying customary international prize law while sitting as the highest prize court in the United States under admiralty jurisdiction).

388. See Elliot E. Cheatham & Willis L.M. Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962 (1952) ("[S]mooth functioning of the interstate and international systems in private law matters should be the basic consideration in the decision of every choice of law case"); see also Hessel E. Yntema, *The Objectives of Private International Law*, 35 CAN. B. REV. 721, 734 (1957) (arguing that two objectives of international conflict of laws are "cooperation among states" and "respect for interests of other states").

without direction by the political branches or prior decision by the Supreme Court.³⁸⁹ Without statutory guidance or a treaty in force, as summarized above, the modern Supreme Court has given very little recent guidance to lower courts for determining whether new international law is part of United States law and virtually no guidance on recognizing any customary international law of human rights as federal law.³⁹⁰ Learned lower federal court judges, however, are often freer to craft transnational law of the case in both economic and human rights disputes. They have sufficient discretion to domesticate relevant international public and private law in each phase of the processes of decision as if pluralistic values favoring the kind of civil society served by federalism with a bill of rights ought to govern as well the implementation of similar processes for resolving disputes within a larger world civil society.

Professor Koh's Roscoe Pound Lecture at Nebraska explains such processes as normative and transnational:

Transnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.

Transnational legal process has four distinctive features. First, it is nontraditional: it breaks down two traditional dichotomies that have historically dominated the study of international law: between domestic and international, public and private. Second, it is non-statist: the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well. Third, transnational legal process is dynamic, not static. Transnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again. Fourth and finally, it is normative. From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over

389. Consider the unfavorable treatment by most federal courts of arguments invoking as sole authority the most compelling rules of international law, the so-called peremptory norms (*jus cogens*). See, e.g., *Prinz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994) (rejecting, in the absence of a statute, incorporation of *jus cogens* norms against inhumane treatment as a basis for in personam and subject matter jurisdiction).

390. For example, the Supreme Court has not ruled upon the validity of Judge Kaufman's opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), recognizing new customary international human rights law as within the subject matter jurisdiction of the Alien Tort Statute. However, the specific norm addressed by the Second Circuit was made precise by Congress in the Torture Victim Protection Act.

again. Thus, the concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey.³⁹¹

C. Questions Federal Courts Should Ask

Decisions within the embrace of transnational legal process are normative because they should reflect the values of the larger world civil society. Thus federal courts are not free from weighing international and foreign consequences of decisions once jurisdiction has been exercised. They still must choose the best law to govern specific decisions on liability, procedure, compensatory, and punitive damages or equitable relief. There is abundant experience in transnational litigation in economic and commercial cases, but not as much when international human rights law has been invoked as the basis for a cause of action or other complaint: (i) anticipating the reasonableness for any claims of limitations to jurisdiction to prescribe law or to adjudicate; (ii) furnishing the threshold basis for triggering subject matter jurisdiction under a federal jurisdictional statute; (iii) shaping the substantive rule of decision for the case from all sources of law, including its procedure, damages, and other remedies; and (iv) considering the reasonableness of decision to maximize the recognition and enforceability of judgments abroad from the viewpoint of cooperation and comity.³⁹²

Less formalistic and more dynamic decision processes are important for the free institutions of world civil society. Conscious and comprehensive decision-making opens questions in all aspects of transnational litigation for federal judicial craft.³⁹³ The following summarizes those questions federal courts should ask as guardians of their own civil society and as example for world civil society.

1. Jurisdiction

Should courts ever invoke customary international law alone as federal law for the purpose of exercising federal jurisdiction over civil cases or controversies arising under laws of the United States or federal common law? Without a clearly applicable statute, recent trends say no. Peremptory norms of customary *jus cogens* quality by themselves do not confer federal question jurisdiction. Customary

391. Koh, *supra* note 370, at 184.

392. See Christenson, *supra* note 264, at 251-53.

393. See Koh, *supra* note 79.

international law does provide a base for Congress to exercise federal jurisdiction to prescribe or adjudicate issues within international jurisdiction. It also may be used in determining the jurisdictional threshold under a specific jurisdictional statute such as the Alien Tort Statute or the Torture Victim Protection Act, but why not also under a general jurisdictional statute such as 28 U.S.C. § 1331, the Federal Tort Claims Act³⁹⁴ or 42 U.S.C. § 1983?

Federal courts should exercise removal jurisdiction to create an exclusive federal *forum non conveniens* doctrine in litigation likely to have adverse impact on foreign relations or best decided in other courts.³⁹⁵ Here, the discretion of federal courts is broad to consider the interests not just of the nation state system, but of the separate civil society representing world life beyond those interests.³⁹⁶ As in *Bhopal* litigation³⁹⁷ or the *Sequihua* case,³⁹⁸ trust in another court system would decentralize decision-making, requiring other legal cultures to handle the litigation for reasons of fairness or convenience. Federal jurisdiction is asserted in order to defer to those other public spheres, creating need for courts to cooperate or at least communicate.

Once U.S. courts take jurisdiction of a dispute involving a question of international law, the empirical reality is that the federal court architectural structure effectively domesticates an international norm when it shapes rules of decision, whether viewed as vertical (between individuals or individuals and officials) or horizontal (between states), even if statutes have not. Choice of law principles become, then, more relevant for judges to select among the various rules of international or foreign law.

2. Substantive Rules of Decision

Assuming a federal court has subject matter jurisdiction over a transnational case or controversy, should customary international law by itself ever determine the law governing the cause of action? So far, U.S. courts will not incorporate a cause of action from customary international law, even in a diversity action, without a

394. Pub. L. No. 79-601, 60 Stat. 842 (1946) (codified at 28 U.S.C. § 2671-2680 (1994)).

395. *But see* Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 671-72 (1992) (arguing that suits abroad are not as affordable—and not as favorable to plaintiffs—as those in the U.S., which often prevents any recovery at all).

396. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456 (1991).

397. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 634 F. Supp. 842, 867 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195, 197 (2d Cir. 1987).

398. *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

statutory base. Even with a statutory jurisdictional basis, choice of law principles do not require the application of customary international human rights law and often might prefer foreign law or forum law for reasons of forum choice of law policy. Although traditional customary international law has been incorporated as the rule of decision in prize, maritime, or commercial cases when no controlling executive or legislative policy intercedes, domestic courts resist extending this to human rights law between individuals and officials or between individuals without political or legislative directive. *Jus cogens* norms of substantive customary human rights law at least raise the awareness of the problem of international public policy in the choice of new customary norms when authorized by statute. So far, *jus cogens* principles have served to constrain choices by increasing the strictness of the criteria for allowing causes of action for international common law torts under the Alien Tort Statute and other jurisdictional statutes.

3. Procedural Rules Governing the Case

Should U.S. forum law alone continue to govern procedure and evidence in civil or human rights litigation with important effects in other countries, especially in global class action suits which include class members from other countries? Federal *forum non conveniens* doctrine is a rule of federal procedure and applies in diversity actions involving state law, without offending *Erie* principles.³⁹⁹ Choice of law principles should apply to limitations of actions brought by foreign plaintiffs or certification of class actions comprised largely of claimants in other countries.⁴⁰⁰ Procedure, especially in class actions with large numbers of members in many countries should be shaped by the forum court within its discretionary authority to anticipate consequences that might offend principles of fairness in international litigation or of the international system or

399. See *American Dredging Co. v. Miller*, 114 S. Ct. 981 (1994) (finding that in state admiralty proceeding federal *forum non conveniens* doctrine does not preempt state procedure as substantive matter); *Sibaja v. Dow Chemical Co.* 757 F.2d 1215 (11th Cir. 1985) (finding that federal court application of doctrine was not substantive and did not transgress *Erie's* constitutional prohibition).

400. In *Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988), Justice Scalia reaffirmed the Court's reliance on international law to hold that the Full Faith and Credit Clause permits a state to apply its own procedural rules to actions before its courts which apply the substantive law of another state, as when a statute of limitations of the forum is longer or shorter than that of the state whose substantive law applies. *Id.* at 717-18. But where, under *Erie*, procedure may become substantive for the purpose of predicting uniformity of substantive outcome, so also when international law or foreign law is asserted as a substantive basis for a cause of action or otherwise, perhaps a federal court should have discretion to evaluate procedure for its impact on substantive outcome in transnational litigation.

yield easy objections to the recognition and enforcement of judgments abroad.⁴⁰¹

4. Choice of Law Governing Remedies

What law should govern the choice of remedies sought or allowed, including compensatory and punitive damages, equitable relief and injunctions in aid of future enforcement. For example, in *In re Estate of Ferdinand Marcos*, before a federal district court in Hawaii, where subject matter jurisdiction and cause of action were governed by customary international law of human rights against torture under the Alien Tort Act, the question whether plaintiffs' class action claims survived the death of Marcos was governed by state common law.⁴⁰² Both foreign and forum law determined compensatory and punitive damages. Federal forum law, however, guided equitable relief in the form of a preliminary injunction to freeze defendant's assets (whether within or without the United States) when plaintiffs were awarded punitive damages at trial and a danger exists that the estate might transfer or conceal its funds, thereby denying recovery to the class. Merely because customary international law of human rights provides subject matter jurisdiction and shapes the substantive rules of decision in federal court does not mean that no other international or foreign law questions should be considered during the course of litigation. The reasonableness at each stage of the proceeding would determine the credibility of the ultimate outcome within the civil society of institutions and states which also have interests in the outcome.

5. Anticipating Transnational Enforcement of Judgments

Most scholars in the United States address the law and policy of federal and state courts primarily in the recognition and enforcement of foreign judgments or arbitral awards in the United States.⁴⁰³ They raise questions about American public policy of the forum doctrine and whether there is imbalance in favorable enforcement policies in federal courts⁴⁰⁴ compared with unfavorable treatment perceived in

401. For criticism of judicial reluctance to take foreign procedure into account sufficiently, see Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 *LAW & CONTEMP. PROBS.* 103 (1994).

402. See *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994).

403. See BORN, *supra* note 53, at 933-86, 987-1052.

404. See, e.g., *Ackermann v. Levine*, 788 F.2d 830, 845 (2d Cir. 1986) ("[I]ncreasing internationalization of commerce requires 'that American courts recognize and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice and fair play.'" (quoting *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981)).

foreign court enforcement of American court judgments.⁴⁰⁵ In the transnational legal process, federal courts might consider the global implications of decisions at the earlier stages of litigation. In questions of jurisdiction, procedure, and choice of law, federal judges have enough discretion to prepare any judgments for acceptance abroad by paying close attention to principles of international law. For example, what principles of public or private international law or comity might a federal judge use in anticipation of enforcement of a final judgment rendered for breach of customary international human rights law arising in another country against assets sought through courts of a third state?⁴⁰⁶ Within the ongoing activities of the global society, are the interests of the international community of states harmed or furthered by a judgment for punitive damages awarded to a class that includes foreign citizens who were inadequately represented before the federal judgment forum? What is the best law for the human rights victims? Will the representative of the class as third party champion be allowed financial incentive to protect members of the class internationally, thereby to become an important actor beyond any particular country's dominance?

Enforcement of judgments based upon international torts when defendant's assets are located abroad is not yet reflected in human rights law. If the basis for judgment is breach of the customary norm against torture, for example, does a foreign court have to give it respect if certain other aspects of the U.S. judgment contravene the policy of the forum where assets are found? Would there be any argument from prudence or comity to persuade a foreign forum to interpret its policy generously? If the federal court judgment is based upon the law where the wrong occurred, would the enforcement of the judgment in a third country be any easier? In suits under the Alien Tort Statute involving exclusively foreign classes, would a foreign court recognize or enforce a judgment of punitive damages (from which attorneys fees would be paid) or honor the award of minor damages, with members of the class bound by the judgment? Even if American due process were satisfied in constituting the class, might another government interested in protecting its own citizens claim that the federal court did not proceed fairly under international standards? Members of the class, for example, might mount a collateral attack through their own government. An

405. For suggested remedies, see Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 *LAW & CONTEMP. PROBS.* 271 (1994).

406. See discussion of the hypothetical problem *supra* Part III.B.

attorney general might nationalize the class as India did in the Bhopal litigation. Would victims of human rights abuses benefit ultimately from those procedural struggles?

Merely allowing litigation to proceed to judgment and award under customary international human rights law means little by itself beyond symbolism if the judgment is vulnerable.⁴⁰⁷ Decision-makers acting within their discretion as judicial members should identify and select rules of procedure and decision from domestic, foreign, and international law that most effectively advance the goals of world civil society—human rights and international commerce.

6. *Factors of Interest Analysis*

At each functional point in litigation, a forum federal court should begin its analysis with the interests and purposes for each rule of procedure or decision selected. Choices should reflect reasonableness in balance among international interests for stability and predictability and effectiveness in achieving the values of world civil society. When universally recognized international human rights norms and a reasonable free market system for investment and trade, subject to statutory and constitutional limitations, are the means and ends most important for civil societies beyond the sovereign state, federal courts have the tradition and competence to play a prominent leadership role in articulating these values in the processes of decision.

VII. CONCLUSION: INTEGRATING PUBLIC WITH PRIVATE INTERNATIONAL LAW

A comprehensive process of decision at each stage in transnational litigation cannot escape the integration of public and private international law within domestic law by federal courts.⁴⁰⁸ Such consciousness in domestic court decision-making at each phase of the case should eliminate a problem for judges on making a hard choice between loyalty to a sovereign political community, to some vague allegiance to a states system that is changing, or a new loyalty to a cosmopolitan world community not yet here. Arguing for “a

407. In *Paul v. Avril*, 901 F. Supp. 330, 336 (S.D. Fla. 1994), an award of \$41 million, including punitive damages assessed under forum law, was made to six Haitians tortured by the military regime of former dictator Prosper Avril. The search for assets in hidden foreign accounts is under way. If a foreign court or government refuses enforcement on the grounds that punitive damages are neither provided under international law nor under the law of the place, would the United States have grounds under international human rights law to seek an international remedy against that state?

408. See generally LOWENFELD, *supra* note 94.

shared approach to international law—private international law as here defined,” Professor Lowenfeld’s approach best serves to achieve this integration. His commitment to reasonableness as a guide in international litigation persists—“reasonable expectations, genuine links, the duty to evaluate and balance, the distinction between overlap in regulation and direct conflict and between potential conflict and actual clash.”⁴⁰⁹ Lowenfeld adopts Story’s view that private international law cannot escape being public, concluding that “it is now clear that public law is no longer out of bounds for international lawyers, that private international law embraces public law, and indeed that this is where the action is.”⁴¹⁰ His views would strengthen the function of federal courts in hearing about public concerns from the perspective of world civil society and not from the perspective of a public international law formed by states by which these concerns are rendered out of bounds—the so-called public law taboo. Similarly, when federal courts “nationalize” public international law, they make it amenable to criteria of reasonableness in choosing whether or not to apply it in civil litigation.

However, rather than relying only upon “reasonableness” as an international legal argument or doctrine to internalize restraints from the international system, might not a federal judge prefer to link reason to the important substantive ends of an emerging world civil society—universal respect for human rights and protection for human enterprise in capital investment and voluntary market exchanges? These are surely the primary ends to maximize when deciding rules of decision, questions of fairness, presumptions, remedies, and effective enforcement in cooperation with international and foreign courts! When federal judges want to assume leadership, the architecture for those decisions is already in place to support these purposes.

409. *Id.* at 230.

410. *Id.* at 232.