Florida State University Journal of Transnational Law & Policy

Volume 13 | Issue 1 Article 8

2003

The Realpolitik of Empire

Tikkun A. S. Gottschalk

The Realpolitik of Empire

Cover Page Footnote

Executive Editor, Journal of Transnational Law and Policy, 2005 J.D. candidate, The Florida State University College of Law.

THE REALPOLITIK OF EMPIRE

TIKKUN A. S. GOTTSCHALK*

Table of Contents

I. INTRODUCTION

The United States approaches the formulation and use of international law from a unilateralist perspective, encouraging foreign compliance, yet stymieing domestic incorporation. Decisions involving customary international law (CIL) are an important part of the business of the U.S. court system. However, the gap between the potential value of CIL to domestic issues and the actual application of CIL to these issues remains wide. Further widening this gap, both the President and Congress continue their opposition to almost all forms of domestic incorporation and international enforcement of CIL. The unique status of the United States on the world stages of power and influence perpetuates a lack of mutual obligation, a vacuum of corresponding incentives to adopt at home what is law abroad. The battery of rights protected through the U.S. Constitution reflects many of the precepts of international humanitarian law, but the United States is still behind the international curve in the protection of human rights. The U.S. judicial system is often a strong advocate of humanitarian law, yet U.S. courts, as well as Congress and the President, fall short of the

* Executive Editor, *Journal of Transnational Law and Policy*, 2005 J.D. candidate, The Florida State University College of Law.

international standard set by other countries. Contrary to the contemporary practice of its allies, the United States has shown limited interest in looking beyond the boundaries of American notions of law, policy, and politics when considering human rights issues.

Despite this imbalance, there are emerging avenues of indirect pressure on the United States from foreign and international bodies. Even if many U.S. politicians remain opposed to broad-based codification of international law, litigation in foreign and international contexts may create a back door to increased compliance with normative humanitarian law. The ever-shrinking impunity of world leaders for crimes against humanity and the growing legitimacy of international courts suggest that the U.S. unilateralist abstention from customary human rights law may begin to erode. With the prospect of individual leaders and political figures facing criminal or civil liability for their actions, the United States may, at the very least, be forced into minimal compliance with CIL.

Similarly, the active participation of foreign and international judicial bodies in the development and enforcement of CIL, as compared with only marginal domestic acceptance of international law, will strengthen efforts to incorporate normative human rights law in an effort to combat a decline in U.S. judicial legitimacy. Even if the United States remains opposed to international judicial institutions, pressure to support the enforcement of international human rights standards will rise out of the War on Terrorism, among other foreign policy agendas, because of the U.S. desire for foreign and international cooperation in the capture and prosecution of terrorist suspects. While it is unlikely that the increased pressure from abroad will trigger the wholesale adoption of CIL into domestic law, it could lead to increased conformity with international human rights standards.

As the point of departure for this essay, Part II discusses the development of CIL in the U.S. court system and the debate over the status of CIL. Part III places CIL human rights claims in modern context, outlining Alien Tort Claims Act[1] (ATCA) litigation and sorting alleged jus cogens[2] violations into a three-tiered analytical framework. Notwithstanding the incorporation of human rights law

1. 28 U.S.C. § 1350 (2000): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

2. "A mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." BLACKS LAW DICTIONARY 864 (7th ed. 1999).

in the ATCA and the Torture Victims Protection Act[3] (TVPA) noted in Part III, Part IV describes political antagonism to ATCA jurisdiction and discusses the related hostility to international law reflected in U.S. foreign policy and Supreme Court jurisprudence. In addition, Part IV argues that this political and judicial opposition to international law threatens to erode the legitimacy of the U.S. court system. Highlighting this erosion, Part V describes international efforts to prosecute leaders for human rights violations, arguing that these efforts put increasing pressure on all countries, including the United States, to conform to international human rights standards. Describing similar external influences on the United States, Part VI discusses international pressure on the United States to conform to international humanitarian standards, arguing that this pressure will force the United States to further conform to international norms. Finally, Part VII concludes that this pressure, compounded by the U.S. desire for international cooperation in the War on Terrorism, will force the United States to back away from the unilateralist approach to foreign policy and force greater judicial and political acceptance of CIL.

II. HISTORICAL BACKGROUND: CIL IN THE U.S. COURT SYSTEM

Ever since *Filartiga v. Peña-Irala*,[4] the role of CIL in the domestic legal framework has been a subject of intense debate, in both the federal courts[5] and in academic circles.[6] In *Filartiga*, the plaintiffs, Dolly M.E. Filartiga and her father Joel Filartiga, sought a civil judgment against Americo Norberto Peña-Irala, the former Inspector General of Police in Asuncion, Paraguay, for the torture and murder of Mrs. Filartiga's brother, Joelito Filartiga.[7] Although the events at issue occurred outside U.S. jurisdiction and all the

3. 28 U.S.C. § 1350 (2000).

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

5. *See, e.g.*, Al Odah v. United States, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (J. Randolph, concurring): "Congress — not the Judiciary — is to determine, through legislation, what international law is and what violations of it ought to be cognizable in the courts." *See also* Kadic v. Karadzic, 70 F.3d 232, 238 (2nd Cir. 1995): "We find the norms of contemporary international law by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." (internal quotations omitted) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820)).

6. *See, e.g.*, Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L. J. 479 (1998); Harold H. Koh, *Commentary: Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). For a discussion of some of the implications of the Bradley/Goldsmith position on human rights litigation in the U.S., see Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 192-93 (2001).

7. *Filartiga*, 630 F.2d at 878.

parties were aliens, the Second Circuit resurrected the long-dormant ATCA to secure jurisdiction over the suit and a cause of action.[8] Embracing an interpretive approach to international law, the court used the ATCA to provide a basis for the enforcement of human rights norms.[9] Expanding the scope of the ATCA to include emerging notions of CIL and humanitarian law, *Filartiga* rejected the static conception of international law.[10] Despite limiting claims to violations of universal norms of international law,[11] *Filartiga* opened the door to domestic punishment for jus cogens violations committed abroad.

Although criticized little for its policy rationale that human rights violations should be punished, *Filartiga* sparked a disagreement over whether CIL is federal common law.[12] *Erie Railroad Co. v. Tompkins,*[13] the foundational case behind this debate, abolished generally applicable federal common law, but the effect that *Erie* had on the status of international law was arguably uncertain at the time.[14] The *Erie* court, in ruling that federal courts must apply state law in cases where there is no constitutional provision or federal statute on point, said little about where its ruling left concepts of CIL not explicitly reflected in congressional enactments or the Constitution.[15]

The uncertainty over the status of CIL was in part allayed through *Banco Nacional de Cuba v. Sabbatino*,[16] where the Supreme Court formally carved out a place for international law within the context of federal "foreign relations law."[17] In considering the plaintiff's claim that the Cuban government's expropriation of property violated international law, *Sabbatino* held that the act of state doctrine[18] prohibited U.S. courts from inquiring into the

---

8. *Id.* at 880.

9. *See id.*

10. *See* Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 143 (1986).

11. *See* part II., *infra*.

12. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), *with* Koh, *supra* note 6. For a discussion of some of the implications of the Bradley/Goldsmith position on human rights litigation in the U.S. court system, *see* Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 192 (2001).

13. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

14. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1558-59 (1984).

15. *Erie*, 304 U.S. at 78.

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

17. Henkin, *supra* note 14, at 1559; *see also* Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472-73 (1997).

18. *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("[E]very sovereign State is bound

legality of a foreign government's actions within its own territory.[19] Noting that *Erie* limitations on federal common law should not be extended to rules of international law,[20] including the act of state doctrine, *Sabbatino* gave rise to the "modern position,"[21] the notion that international law is federal law.[22] Yet, while *Sabbatino* appeared to settle uncertainty over the status of international law — and while U.S. courts generally accept the "modern position" — the issue is by no means settled.[23]

In their acceptance of the "modern position," federal courts require, under a variety of ATCA precedents,[24] that claims allege a jus cogens violation — a violation of a universal, definable, and obligatory precept of international law.[25] The Supreme Court articulated the principals governing the interpretation and identification of such violations in *The Paquete Habana*,[26] where the Court held that the capture of fishing vessels as prizes of war was a violation of international law.[27] In addition to the probative value of judicial precedent and state practice, *The Paquete Habana* standard, in providing that international law may be ascertained by "consulting the works of jurists and commentators"[28] opens the door

---

to respect the independence of every other sovereign State."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 443 (1987):

> In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.

19. *Sabbatino*, 376 U.S. at 415.

20. *Id.* at 424. See Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939), for the theoretical bases behind the Supreme Court's discussion of *Erie's* applicability to international law.

21. Bradley & Goldsmith, *supra* note 12, at 816; Harold H. Koh terms the other side the "revisionist position." *Supra* note 6, at 1824.

22. Henkin, *supra* note 14, at 1560.

23. *See* Bradley & Goldsmith, *supra* note 12, at 816 (challenging the notion that *Sabbatino* supports CIL as federal common law).

24. *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 184 (D. Mass. 1995):

> [ATCA jurisdiction] require[s] that: 1) no state condone the act in question and there is a recognizable "universal" consensus of prohibition against it; 2) there are sufficient criteria to determine whether a given action amounts to the prohibited act and thus violates the norm; 3) the prohibition against it is non-derogable and therefore binding at all times upon all actors.

Id; see also Kadic, 70 F.3d at 232; In re Estate of Ferdinand Marcos Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994) [hereinafter *Marcos*]; Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987); *Filartiga*, 630 F.2d at 876.

25. Goodman & Jinks, *supra* note 17, at 495.

26. The Paquete Habana, 175 U.S. 677, 700 (1903).

27. *Id.* at 686.

28. *Id.* at 700:

to criticism that CIL is "made up" by federal courts. Despite the squishiness of this standard, there is little evidence that U.S. courts acknowledge anything but the most obvious and discernable CIL violations.[29] The standard, theoretically, could be construed to include certain acts that, while often condemned by international commentators and jurists, are not, realistically, outside the realm of legitimate state practice.[30] Yet U.S. courts continually demonstrate a willingness to recognize the uncertainty of a stipulated jus cogens rule, disallowing the invocation of asserted "norms" of international law where those "norms" do not reflect universal and obligatory practice.[31]

Criticism of *The Paquete Habana* framework for analyzing CIL claims may be more justified outside the realm of the ATCA, in areas where there are no statutes on point. Article I of the Constitution expressly delegates to Congress the authority to define and punish offenses against the law of nations,[32] suggesting that judicial definitions of international law usurp Congress' constitutional authority. Yet this power does not mandate judicial blindness to the guiding principals of international law. Congress has implemented the Article I mandate in diverse contexts, affirmatively delegating its constitutional authority to the courts, as in the ATCA,[33] yet CIL remains important even in areas where Congress has not expressly "defined" international law.[34]

Whether the oft-quoted phrase from *The Paquete Habana,* "international law is part of our law,"[35] should be interpreted to mean that CIL is federal common law is unimportant to the discussion of influences on U.S. policy and practice. Under ATCA precedents and the continued endorsement of the "modern

---

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

See also U.S. v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820).

29. *See infra* Part III, notes 46 through 50.

30. State-sponsored assassination, for example.

31. *See* Goodman & Jinks, *supra* note 17, at 495; *Filartiga*, 630 F.2d at 881. *See infra* Part III discussion of cruel, unusual, and degrading treatment for an example of an uncertain norm.

32. U.S. CONST. art. I, § 8 ("Congress shall have power to...define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.").

33. *See Smith*, 18 U.S. (5 Wheat.) at 157-158.

34. *See* Martha F. Davis, *Lecture: International Human Rights and United States Law: Predictions of a Court Watcher*, 64 ALB. L. REV. 417, 418-419, 432-433 (2000).

35. *The Paquete Habana*, 175 U.S. at 700.

position,"[36] CIL *is* part of our law, at least for the time being. Despite the debate over the application of international law, federal courts continue to make active use of CIL on the human rights stage, under both the ATCA and the TVPA.[37] Further confirming the basic approach of *Filartiga,* Congress, in the passage of the TVPA, noted that the ATCA creates a right of action under "norms that already exist or may ripen in the future into rules of customary international law."[38]

> [The TVPA extended to] U.S. citizens the same right to sue in U.S. court that the ATCA gives aliens to sue for torture or extra-judicial killing. The passage of this act is seen by many legal commentators as bolstering the legitimacy of the ATCA by codifying the right to sue, which courts had previously read into the ATCA.[39]

Some courts are certainly less willing than others to delve into human rights issues through the ATCA,[40] but most accept the *Filartiga* framework for determining whether an act is a violation of CIL.[41] Even with the many barriers to claims brought under the ATCA, including forum non conveniens[42] and the act of state doctrine,[43] the use of the statute is an essential element of U.S. involvement in the enforcement of human rights standards.

---

36. *See, e.g, Xuncax*, 886 F. Supp. at 162; *Kadic*, 70 F.3d at 232; *Marcos*, 25 F.3d at 1475; *Forti*, 672 F. Supp. at 1531; *Filartiga*, 630 F.2d at 876.

37. 28 U.S.C. § 1350 (2000). Congress enacted the TVPA in part as a response to Judge Robert Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, where he stated that the ATCA does not imply a cause of action. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984).

38. H.R. REP. NO. 367, 103d Cong., 1st Sess. 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 84; *see also* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 53 (1996).

39. Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401,415 (2002).

40. *See, e.g. Tel-Oren*, 726 F.2d at 774-801.

41. *See, e.g., Kadic*, 70 F.3d at 232.

42. Forum non conveniens provides that a court, although otherwise an appropriate forum, may dismiss the litigation if "it appears that the action should proceed in another forum in which the action might originally have been brought." BLACK'S LAW DICTIONARY 665 (7th ed. 1999). For a thorough discussion of forum non conveniens issues in relation to human rights litigation see Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493, 507-510 (2002).

43. For further discussion of the act of state doctrine's effects on ATCA litigation, *see* Aaron Xavier Fellmeth, Note From the Field, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International Law in U.S. Courts?* 5 YALE H.R. & DEV. L.J. 241 (2002); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002).

III. LITIGATION UNDER THE ATCA

As Ryan Goodman and Derek P. Jinks outline in their article defending *Filartiga* and the modern position, there are three general categories of claims under the ATCA.[44] Ranging from least successful to most they are as follows: (1) claims that, while commonly prohibited by domestic law, are not within the scope of international law; (2) claims that, while based on general principles of CIL, lack consistent definition and application in the international community; and (3) claims alleging established, well recognized jus cogens violations.[45] Discussed below, these three categories define the bounds of ATCA litigation, separating human rights claims into a tripartite framework.

The first category, where rights are codified in domestic law but not universally protected in CIL, includes many of the rights that are enshrined in the U.S. Constitution. Although generally protected by many nations, these rights are not reflected in international law. For example, certain nations actively protect private property from uncompensated governmental seizure, but others (such as communist nations) do not, resulting in divergent views and a lack of consensus in international law.[46] Similarly unenforceable within the scope of the ATCA and international law are claims based on fraud,[47] free speech rights,[48] and libel,[49] among others.[50] Although many of these claims are often adjudicated in federal court using other jurisdictional bases besides the ATCA, the ATCA remains constrained to the more insidious, violent offenses. Beyond the realm of rights that have no expression in international law or no demonstrable consensus supporting their enforcement, the second category is where the principle of CIL is universal, but the definition is not. International agreements and state practice might demonstrate a consensus, an agreement that a certain type of conduct is universally condemned, but the degree of protection

---

44. Goodman & Jinks, *supra* note 17, at 498-513.

45. *Id.*

46. *Sabbatino*, 376 U.S. at 428 ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.").

47. *See* ITT v. Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975) (concluding that, while fraud may be of individual concern for all nations, it is not a "mutual" concern of the community of nations); Trans-Continental Inv. Corp., S.A. v. Bank of the Commonwealth, 500 F. Supp. 565, 566 (C.D. Cal. 1980) (noting that the universal condemnation of fraud does not mean that it is within the scope of the international law).

48. Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that first amendment rights to free speech are not universal and therefore are not part of international law).

49. Akbar v. New York Magazine Co., 490 F. Supp. 60, 63 (D.D.C. 1980) (libel not within the scope of judicial interpretations of international law).

50. *See* Goodman & Jinks, *supra* note 17, at 509.

afforded to the right associated with that condemnation varies from nation to nation. The most notable of such rights is the prohibition against cruel, inhuman, or degrading treatment.[51] "The norm, broadly speaking, satisfies the requirements of universal condemnation and obligatory prohibition,"[52] but the range of behavior and practice that the norm prohibits is uncertain and subject to intense debate.[53] This "twilight zone" is arguably where CIL prohibitions spend their time before they either become universal norms or return to the arena of legitimate practice through active use or lack of international support.[54]

While encompassing more venerable prohibitions, such as slavery, the third category includes the more modern prohibitions against official torture, extrajudicial killing, prolonged arbitrary detention, genocide, disappearances, and war crimes.[55] The typical case in the *Filartiga* line, raising one or more of these "incontrovertible"[56] jus cogens violations, involves an individual defendant found and served in the United States, who allegedly perpetrated various human rights abuses "under color of law." The defendant is usually a former government official who exceeded the authority of the office in committing the human rights violations.[57] Although the *Filartiga* line is not limited to jus cogens violations

---

51. *See id.* at 506; *Forti*, 672 F. Supp. at 1543 (although evidence sufficient to prove "disappearance" is a jus cogens violation, there is no similar consensus on a "right to be free from 'cruel, inhuman and degrading treatment'") (citing plaintiffs', Forti and Benchoam, complaint paras. 47-48.); *but see* Xuncax, 886 F. Supp. at 162 (certain claims within the "cruel, inhuman, or degrading" classification are in fact universally condemned, and therefore actionable as jus cogens violations).

52. Goodman & Jinks, *supra* note 17, at 506-7 ("While nations may agree that certain grotesque practices fall within the category, they are unable to agree, with the requisite precision, on the definitional parameters of the norm involved").

53. *See infra* Part VI (discussion of death penalty and extradition).

54. By way of analogy, see Michael J. Kelly, *Time Warp to 1945, Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law,* 13 FLA. ST. J. TRANSNAT'L L. & POL'Y 1, discussing the preemption doctrine — a doctrine that, while denounced by many nations, may be moving out of the "gray area" and into a realm of greater legitimacy.

55. Goodman & Jinks, *supra* note 17, at 498-506.

56. *Id.*

57. *E.g., Forti*, 672 F. Supp. at 1531 (involving a suit against former Argentine general for the disappearance of plaintiff's mother during the "dirty war"). Conceptually, the defendant is deemed to be a state actor acting outside his legal authority (as defined by the law of the country), thus the term "under color of law," yet this terminology can be deceptive. The average defendant in a *Filartiga*-like case is simply one of many individuals who have taken part in widespread, systematic human rights violations in their home country — they just had the bad luck of being caught in the U.S. Ostensibly, viewed from a purely legal standpoint, the acts exceed the constitutional or statutory authority of the country where they took place, but the cultural or political climate in the country was such that a de facto authority existed.

involving state action, the majority of such claims deal with official or semi-official conduct.[58]

Litigation in the "incontrovertible" category began with a line of suits against individuals, as in *Filartiga,*[59] but has recently been more common in suits against corporations.[60] Often based on clear violations of CIL, suits against corporations, usually multinationals with significant assets in the United States,[61] fall into a unique subcategory, distinct from the *Filartiga* line in their particularity. These cases, such as *Doe v. Unocal,*[62] where Myanmar residents alleged corporate involvement in forced relocation, enslavement, rape, and torture in connection with the building of a pipeline,[63] generally deal with corporations that contract with governments in resource exploitation and infrastructure projects in developing countries.

Hinging more on whether there is a sufficient connection between the corporation's activities and the violations carried out by the state than on whether the acts violate jus cogens norms, such suits strike to the heart of the primary beneficiaries of human rights violations. Because multinational corporations (MNCs) are increasingly more powerful in economic activity between and within states, especially developing countries acutely vulnerable to human rights violations, MNCs are a prime target for human rights groups seeking to remove the economic incentives to human rights abuses. Thus, if the cost of doing business with the Myanmar government, for example, includes defending multiple suits under the ATCA, then avoiding similar countries with poor human rights records becomes more cost-effective, which in turn encourages all countries to pay more attention to how they treat their citizens.

---

58. *See* Hall, *supra* note 39, at 413.

59. See description of *Filartiga*, *supra* Part II. *See also Kadic*, 70 F.3d at 232 (suit by two groups of plaintiffs alleging president of "Srpska" directed the genocide, forced prostitution and impregnation, torture, and summary execution carried out by Bosnian-Serb military forces).

60. *E.g.*, Doe v. Unocal, 963 F. Supp. 880 (C.D. Cal. 1997); *see generally* Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level,* 1999 B.Y.U.L. REV. 1139 (This is arguably at least one area where the U.S. has successfully promoted human rights: the dearth of recent cases against individuals for state-sponsored jus cogens violations may indicate that similarly culpable individuals are no longer "retiring" in the U.S. For corporations, on the other hand, it is likely much more difficult to avoid being found (for jurisdiction purposes) in the increasingly interconnected global economy.)

61. In contrast to the majority of suits against individuals under the ATCA, where judgments generally go uncollected, successful suits against corporations provide victims of human rights abuses with something more than abstract justice. *See* Boyd, *supra* note 60, at 1144-1145.

62. *Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) *vacated, rehearing granted en banc by* John Doe I v. Unocal Corp., 2003 Cal. Daily Op. Service 1388 (9th Cir. 2003).

63. *Unocal*, 963 F. Supp. at 883.

IV. RESISTING INTERNATIONAL LAW: U.S. PRACTICE AND POLICY

As civil suits against corporate and individual human rights violators continue in U.S. courts, all three branches of the government are laying the groundwork for a coming crisis of legitimacy, undermining the professed status of the United States as the world's preeminent crusader for liberty and justice. U.S courts sometimes recognize the importance of international law, yet these courts often show only marginal acceptance of international trends and foreign precedents.[64] U.S. courts acknowledge the importance of non-domestic case law in some circumstances, but the gap between the probative value and actual usage of international law is, at times, embarrassingly obvious.

The disparity between international precedent and Supreme Court jurisprudence can be extreme. For example, in *Miller v. Albright*,[65] the Supreme Court rejected an equal protection challenge to 8 U.S.C.S 1409, a law establishing differential criteria based on gender for obtaining citizenship. If a person born abroad and out of wedlock seeks to gain U.S. citizenship through their mother, 8 U.S.C.S 1409 imposes certain residency, nationality, and maternity requirements.[66] If, on the other hand, citizenship is sought through the father, the same statute not only requires residency, nationality, and paternity, but also mandates that the claimant "produce a written statement of support prior to the child's eighteenth birthday and ... formally legitimate or acknowledge paternity prior to the child's eighteenth birthday."[67] The Court's decision in *Miller*, which allowed the law to stand on the basis that it reflected real differences between "mothers' and fathers' opportunities to transmit the value of citizenship,"[68] may merit criticism for its reasoning. However, it is more noteworthy for what it fails to cite, distinguish, or even acknowledge: that a then-recent Canadian case, directly on point, came to the opposite conclusion.

In *Benner v. Canada*,[69] the Canadian Supreme Court held that a law that distinguished between fathers and mothers in a child's citizenship claim reflected unwarranted stereotypes, not real differences meriting gender discrimination.[70] In contrast to U.S.

---

64. *See e.g.* Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (J. Breyer dissenting) (dismissing Justice Breyer's argument that, even though the Court was interpreting the U.S. Constitution, foreign "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

65. Miller v. Albright, 523 U.S. 420 (1998).

66. 8 U.S.C.S 1409 (2003); Davis, *supra* note 34, at 434.

67. Davis, *supra* note 34, at 434. *See also* 8 U.S.C.S 1409 (2003).

68. *Miller*, 523 U.S. at 438.

69. [1997] 1 S.C.R. 358.

70. *See id.* at 365.

law,[71] the Canadian law at issue made it easier to establish citizenship through paternity rather than maternity, a difference that only emphasizes the absurdity of the Supreme Court's ignorance of *Benner*.[72] While the Supreme Court may think "a comparative analysis [is] inappropriate to the task of interpreting a constitution,"[73] such blatant disregard for informative international case law offers a glimpse of the latent isolationism that lurks beneath the surface of Supreme Court jurisprudence.[74] Cases like *Lawrence v. Texas*,[75] where Justice Kennedy used international precedents to support the expansion of the right of privacy to cover consensual sexual conduct, offer hope that the Supreme Court will look to international law for guidance in uncertain domestic issues. *Benner*, on the contrary, shows the degree to which domestic myopia and judicial disinterest in international precedents can infect the U.S. court system.

Notwithstanding judicial disinterest in international law, the Bush Administration is attempting to widen the gap between international law and domestic practice through recent efforts to undermine the ATCA. Even though the ATCA has been a powerful tool in the enforcement and solidification of human rights law in the United States, the Executive branch, in a recent brief submitted by the Department of Justice (DOJ) in *Unocal*,[76] states that the courts should "reconsider" their approach to the statute.[77] In an attempt to "undo 20 years of legal precedent,"[78] the DOJ suggests that

---

71. 8 U.S.C.S 1409 (2003).

72. *See* Davis, *supra* note 34, at 435.

73. Printz v. United States, 521 U.S. 898, 921 n.11, 977 (1997) (J. Breyer dissenting) (dismissing Justice Breyer's argument that, even though the Court was interpreting the U.S. Constitution, foreign "experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem").

74. Davis, *supra* note 34 at 435-36, makes a similar argument:

> Placed side by side, the Canadian law and United States law demonstrate that both laws rest on culture-bound stereotypes rather than biological truths. No country is closer to the United States in temperament or social practices, yet Canada assumed that fathers as patriarchs were best able to transmit the values of citizenship while the United States assumed that mothers, as caretakers, were best able to. Taking this into account, the members of the Supreme Court would be hard-pressed to find that the United States law did not reflect gender-based stereotypes, a finding that would in all likelihood change the result of the case.

75. Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003).

76. The same brief was filed by the defendants in Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

77. Brief of Amici Curiae Department of Justice at 4, *Unocal*, 248 F.3d 915 (2001) (Nos. 00-56603, 00-56628) [hereinafter DOJ Brief], *available at* http://www.lchr.org/Issues/ATCA/atca_02.pdf.

78. *Justice Department Seeks to Reverse Two Decades of Progress Under Important U.S. Human Rights Law*, LAWYERS COMMITTEE FOR HUMAN RIGHTS (May 23, 2003), *at* http://www.lchr.org/media/2003_alerts/0523.htm.

foreign policy concerns and the War on Terrorism,[79] among other issues, merit changing the course of human rights litigation in the United States. This stance has emerged despite the DOJ's active support of the ATCA in *Filartiga* and many other human rights cases.[80]

Even as the Bush Administration pursues a war in Iraq to bring relief from tyranny and oppression abroad, it simultaneously seeks to undermine the limited avenues of domestic enforcement of international humanitarian norms at home. In the face of executive opposition to the International Criminal Court (ICC) and other international judicial bodies, ATCA litigation is one of the few high-profile forums in which the United States demonstrates its underlying belief in humanitarian law. By attempting to remove the cause of action implied in the ATCA since *Filartiga*,[81] the Bush administration shows the chameleon nature of U.S. human rights policy. Eliminating the efficacy of the ATCA will only further erode judicial acceptance of CIL and the perceived legitimacy of U.S. courts.

In addition to attacks on ATCA jurisprudence, the White House is also undermining efforts to bring the accused to justice in foreign courts. Shoring up the waning impunity of world leaders for human rights abuses, the United States recently pressured Belgium into revising its universal jurisdiction law, thus altering the provision that allowed Belgian courts to prosecute war crimes committed in other countries.[82] Protesting complaints filed against western leaders, including former President George Bush Sr., Tony Blair, and Ariel Sharon, the United States succeeded in convincing Belgium to further restrict the application of the war crimes law, even though Belgian courts had already dismissed many suits brought against foreign leaders.[83] The Belgian law "has brought little but headlines and political embarrassment,"[84] but the U.S.

---

79. DOJ Brief at 3.

80. *See* Brief Amici Curiae of International Law Scholars and Human Rights Organizations in Support of Plaintiffs at 1, Presbyterian Church of Sudan, 244 F. Supp. 2d 289 (2003) (No. 01 Civ. 9882), *available at* http://www.lchr.org/workers_rights/wr_other/ATCA%20Talisman%20Amici%20Brief.pdf.

81. *Id.* at 4.

82. *Belgian Lower House Approves Revision of War Crimes Law*, HAARETZ, July 30, 2003 (on file with the Florida State University Journal of Transnational Law & Policy).

83. *See id.*; Ian Black, *Judges Decide Belgian War Crimes Law Cannot Be Used to Try Sharon*, THE GUARDIAN, June 27, 2002, *available at* http://www.guardian.co.uk /international/story /0,3604,744644,00.html. In the ten years since its inception, the Belgian war crimes law has only tried and sentenced four individuals (all of whom were involved in the Rwandan genocide). *Id.*

84. Black, *supra* note 83.

pressure dealt the fatal blow, eliminating universal jurisdiction from one of the few countries willing to exercise it.[85]

Opposition by the United States to human rights prosecutions continues on other fronts as well. As part of a program designed to limit the reach of human rights law and protect American interests and military personnel abroad,[86] Congress passed the American Servicemembers' Protection Act (ASPA).[87] Popularly known as "The Hague Invasion Act,"[88] the ASPA authorizes the use of force to secure the release of any American held by the ICC.[89] Championed by Senator Helms,[90] the ASPA passed as a response to the growing support for the ICC within the international community.[91] Going beyond a measured response to fear of politically motivated prosecutions, the ASPA prohibits all U.S. involvement in the ICC, even minimal cooperation with investigations and extraditions.[92] In public, the White House says that concern over American soldiers being subject to prosecution under a politicized process is the impetus behind its opposition to the ICC, but privately the government suggests that it is more concerned about claims against public officials.[93]

In another move aimed at undermining international adjudication of human rights abuses, the United States announced

---

85. *See* M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 82-86 (2001). Universal jurisdiction is the only legal theory that allows a domestic court to prosecute CIL crimes that have no "nexus" or connection with the forum state. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001). The *Nuremburg*, *Pinochet*, and *Argentina* cases all involved elements of universal jurisdiction. *Id.* at 324.

86. *See* Roseann M. Latore, Note, *Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court*, 25 B.C. INT'L & COMP. L. REV. 159, 160 (2002).

87. American Servicemembers' Protection Act of 2002, Pub. L. No. 107-206, §2001-2012, 116 Stat. 899 (2002).

88. Jonathan D. Tepperman, *American Opposition to the International Criminal Court*, CRIMES OF WAR PROJECT (Mar. 6, 2002), *at* http://www.crimesofwar.org/onnews/news-Tepperman.html.

89. Latore, *supra* note 86, at 169-170; Remigius Chibueze, *United States Opposition to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L. 19, 48-49 (2003).

90. *See* Press Release, American Servicemembers' Protection Act Receives Approval, Coalition for the International Criminal Court (Dec. 11, 2001), *at* http://www.iccnow.org/html/pressrelease20011211.pdf.

91. *See* Chibueze, *supra* note 89, at 48.

92. § 2004, 116 Stat. 899.

93. Elizabeth Becker, *Kissinger Watch #10-02: On World Court, U.S. Focus Shifts to Shielding Officials*, INTERNATIONAL CAMPAIGN AGAINST IMPUNITY (Sept. 7, 2002), at http://www.icai-online.org/68735,KW_Detail.html. In most of their public utterances, administration officials have argued that they feared American soldiers might be subject to politically motivated charges. But in private discussions with allies, officials say, they are now stressing deep concerns about the vulnerability of top civilian leaders to international legal action. *Id.*

in 2002 that it no longer supports the U.N. system of international war crimes tribunals.[94] Citing a desire to have the accused tried in the country where the abuses occurred,[95] the United States wants the tribunals phased out because "they foster 'a dependency on international institutions.'"[96] Although the United States continues to profess its support for humanitarian law, in its opposition to the ICC, it now stands firmly with such other champions of human rights as China, Iran, Iraq, Israel, and Libya.[97]

V. JUSTICE FOR HUMAN RIGHTS VIOLATORS: IT'S NO LONGER JUST FOR LOSERS

Ever since the Nuremberg trials, international justice is most often meted out by the winners and suffered by the losers, delivered by the righteous, the powerful, and received by the wicked, the weak. These "losers" have always faced universal condemnation, their punishment and public prosecution well deserved; yet, the winners have never faced similar castigation for their abuses. Similarly, leaders and regimes are often not punished until they *become* losers in one sense or another, as in Iraq with Saddam Hussein and Liberia with Charles Taylor. The international community did little to castigate Saddam Hussein when he murdered thousands of Kurds in Northern Iraq at the end of the Iran-Iraq War.[98] Rather, only after he had outlived his usefulness, through the invasion of Kuwait, did the United States and world leaders highlight his human rights record.[99] Similarly, an international judicial body did not indict Charles Taylor[100] until he was on the verge of political and military defeat, even though he began his reign of violence more than ten years ago.[101] Regardless

---

94. Stacy Sullivan, *United States Calls for Dissolution of U.N. War Crimes Tribunals*, CRIMES OF WAR PROJECT (Mar. 6, 2002), *at* http://www.crimesofwar.org/onnews/news-dissolution.html.

95. *Id.*

96. *Id.* (quoting Pierre-Richard Prosper, U.S. Ambassador for War Crimes).

97. *See* Chibueze, *supra* note 89, at 21; Ruth Wedgwood, Harold K. Jacobson & Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124 (2001).

98. *See* Aryeh Neier, *Putting Saddam Hussein on Trial*, NEW YORK REVIEW OF BOOKS, Vol. 40, No. 15, (Sept. 23, 1993) *at* http://www.nybooks.com/articles/2466; *Iraq: Crimes Against Humanity, Leaders as Executioners*, U.S. DEPARTMENT OF STATE, *at* http://usinfo.state.gov /regional/nea/iraq/crimes/.

99. *See Michael Wines, Confrontation in the Gulf; U.S. Aid Helped Hussein's Climb; Now, Critics Say, the Bill is Due*, N.Y. TIMES, Aug. 12, 1990, at A1; A. M. Rosenthal, *On My Mind; The Iraqi Nightmare*, N.Y. TIMES, Nov. 6, 1990, at A23.

100. Taylor was indicted by the Special Court for Sierra Leone, "an independent treaty based institution, established by an Agreement between the United Nations and Sierra Leone." Official Web Site of the Special Court for Sierra Leone, *at* http://www.sc-sl.org/.

101. Press Release, Testimony of Janet Fleischman, Washington Director for Africa, on the Human Rights Situation in Liberia Before the Congressional Human Rights Caucus (July 9,

of the body count on either side, the individual acts of cruelty and disregard for human life evoke the same abhorrence whether the perpetrator is a winner or a loser when the conflict, political or military, ceases.

This is not to argue that any modern international criminal tribunal is unjust or that the punishment of individuals responsible for human rights abuses is illegitimate. Simply put, human rights abuses perpetrated by one side are no less evil because worse abuses were committed on the other. The Japanese deprived of their liberty by the U.S. during WWII were not comforted by the knowledge that the Jews in Europe were deprived of their liberty *and* their life — both acts were based on racism. Punishing the bank robber does not make the pickpocket less guilty of being a thief.

Despite inconsistent enforcement and continued U.S. opposition, the cost to governments directly responsible for jus cogens violations is increasing through efforts by foreign and international courts. Although justice for regimes defeated in armed conflicts is often swift, the impunity of former and current leaders not so defeated is ever more uncertain, even for those who have significant political insulation within their own country.[102] Beginning with Spain's extradition request for Augusto Pinochet,[103] the former dictator and "senator for life" of Chile, a few foreign courts have shown an increasing willingness to indict former and current leaders accused of human rights abuses using universal jurisdiction.[104] Spain failed to secure Pinochet's extradition,[105] but the international attention the case garnered was arguably the impetus behind legal proceedings against him in his own country.[106] The court presiding over Pinochet's prosecution in Chile suspended the case due to his health,[107] but the case arguably fueled other prosecutions of former leaders.

2003), *available at* http://hrw.org/press/2003/07/liberia-test070903.htm.

102. *See, e.g.*, Bill Cormier, *Argentina OKs "Dirty War" Extraditions*, ASSOCIATED PRESS (July 25, 2003), *available at* http://www.herald-sun.com/nationworld/14-374977.html. Following in Argentina's footsteps, Peru also appears to be laying the groundwork for prosecution of past human rights abuses. *See* Monte Hayes, Peru *Truth Panel Report Upsets Military*, ASSOCIATED PRESS (Aug. 28, 2003), *available at* http://news.findlaw.com/wires/apwires.html.

103. *See* R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 3), [1999] 2 All E.R. 97 (H.L.) [hereinafter *"Ex Parte Pinochet"*]; Amnon Reichman, *"When We Sit to Judge We Are Being Judged:" The Israeli GSS Case, Ex Parte Pinochet and Domestic / Global Deliberation*, 9 CARDOZO J. INT'L & COMP. L. 41, 71-74 (2001).

104. *See supra* note 85.

105. *Ex Parte Pinochet*, 2 All E.R. at 85.

106. *See Pinochet Decision Lamented, But Rights Group Says Case a Landmark*, HUMAN RIGHTS WATCH (July 9, 2001), *at* http://www.hrw.org/press/2001/07/pino0709.htm.

107. *Id.*

Following the *Pinochet* trend, Argentine President Nestor Kirchner eliminated the immunity of military leaders involved in Argentina's "dirty war" and allowed their extradition to Spain,[108] providing another sign of the growing legitimacy of human rights prosecutions. Although Kirchner's decision did not display the same degree of domestic accountability seen in the *Pinochet* case, the trend toward prosecution of jus cogens violations in foreign jurisdictions may provide more of a deterrent to future regimes. Even though some commentators warn that universal jurisdiction has the potential to be used illegitimately,[109] foreign venues are in some ways more legitimate than domestic ones. A foreign court is uniquely capable of providing legitimacy because of its physical and political distance from the country where the alleged abuses occurred. While the exercise of universal jurisdiction in Belgium may be near political failure, the movement is by no means dead.

In contrast to Pinochet and Argentina's military junta leaders, who were not indicted until they left office and suffered a fair degree of political isolation, perhaps placing them in the "loser" category, efforts to prosecute and highlight the abuses of leaders while they are in office are growing. Such efforts began with the indictment of Slobodan Milosevic during his tenure as head of state,[110] and continued through the recent indictment of Charles Taylor by the Special Court for Sierra Leone.[111] Both Milosevic and Taylor were near the losing point of their international and internal conflicts. However, the timing of the charges against them demonstrates increased international support for leader accountability and appears to bring prosecutions of jus cogens violations closer to the abuses and the abuser. It is unlikely that an abusive leader who enjoys broad international support will be similarly indicted while in office, but the willingness to indict sitting presidents begins the divorce of such prosecutions from the political or military defeats that often accompany them. This divorce in turn makes the

---

108. Cormier, *supra* note 102. Although the Spanish government aborted the extradition proceedings against Argentina's former military leaders at the end of August 2003, Argentina appears to be seeking similar accountability efforts in its domestic courts. *See* Oscar Serrat, *Top Former General Detained in Argentina*, ASSOCIATED PRESS (Sept. 23, 2003), *available at* http://news.findlaw.com/ap_stories/i/1102/9-23-2003/20030923133008_15.html. This is arguably another instance of foreign pressure leading to domestic prosecution of human rights abuses.

109. *See, e.g.*, Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86 (Jul.-Aug. 2001); Curtis A. Bradley, *The "Pinochet Method" and Political Accountability*, 3 THE GREEN BAG 2d 5 (1999).

110. *See* Bassiouni, *supra* note 85, at 84.

111. Press Release, Human Rights News, West Africa: Taylor Indictment Advances Justice, Liberian President Must Be Arrested (June 4, 2003), *at* http://hrw.org/press/2003/06/westafrica060403.htm.

prosecutions themselves more legitimate by removing the precondition of defeat from the enforcement paradigm, thereby ratcheting up the pressure on all world leaders to conform to international human rights norms. Whether this pressure will begin to function as a significant deterrent remains unclear, but international movement to bring abusive leaders to justice is a growing force in world politics.[112]

VI. TOWARDS GREATER LEGITIMACY: EXTERNAL INFLUENCES ON THE INCORPORATION OF CIL INTO U.S. LAW

In the move towards greater U.S. legitimacy through the incorporation and recognition of CIL and international human rights norms, the United States need only yield to existing domestic and international influences. Even as the Supreme Court turns a blind eye to many international precedents, certain members of the Court are beginning to recognize the need to look beyond national boundaries.[113] As Ruth Bader Ginsburg recently noted in a lecture on affirmative action, "[e]xperience in one nation or region may inspire or inform other nations or regions in this area, as generally holds true for human rights initiatives."[114]

---

112. *See id.*

113. *See* Ruth Bader Ginsburg & Deborah Jones Merritt, *Fifty-first Cardozo Memorial Lecture: Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 281-82 (1999); Davis, *supra* note 34, at 419. *See also Lawrence*, 123 S. Ct. at 2481 (discussed *supra* Part IV); *Printz*, 521 U.S. at 977 (J. Breyer dissenting) (described *supra* note 73).

114. Ginsburg & Merritt, *supra* note 113, at 281-2. Ginsburg & Merritt describe the use of international law in foreign jurisdiction, as compared to Supreme Court disinterest in CIL:

> India's Supreme Court, for example, has considered United States precedents when judging the constitutionality of affirmative action measures. Defenders of Germany's tie-breaker preferences invoked several international covenants before the European Court of Justice. Opponents of affirmative action, too, have referred to U.S. decisions noting, pointedly, that "affirmative action seems to be [in] a state of crisis in its country of origin." (Quoting Case C-450/93, Kalanke v. Freie Hansestadt Breman, 1995 E.C.R. I-3051, I-3058 n.10 (1995) (opinion of Advocate General Tesauro).
>
> The same readiness to look beyond one's own shores has not marked the decisions of the court on which I serve. The United States Supreme Court has mentioned the Universal Declaration of Human Rights a spare five times, and only twice in a majority decision. The most recent citation appeared twenty-eight years ago, in a dissenting opinion by Justice Marshall. Nor does the U.S. Supreme Court invoke the laws or decisions of other nations with any frequency. When Justice Breyer referred in 1997 to federal systems in Europe, dissenting from a decision in which I also dissented, the majority responded: "We think such comparative analysis inappropriate to the task of interpreting a constitution." (Quoting Printz v. United States, 521 U.S. 898, 921 n.11 (majority opinion).

Even if American politicians remain opposed to all forms of international accountability for human rights abuses, the rest of the world may force the United States to begin to conform to international expectations. As the prosecution of jus cogens violations gathers momentum in foreign courts and the ICC, U.S. leaders are beginning to feel the same legal heat felt by leaders like Pinochet and Taylor. Although the United States continues to pressure governments like Belgium to remove legal methods for indicting U.S. officials, activities in a number of courts are opening the door to increased U.S. compliance with CIL. These pressures from abroad, compounded with the U.S. desire for international cooperation in the War on Terrorism, may force the United States to reconsider its unilateralism and trigger a shift in the realpolitik winds.

A. Nicaragua and Yugoslavia

Compliance with and participation in international courts is not entirely foreign to U.S. experience. For example, even though the United States was no less enamored of international judicial bodies in the 1980's than it is now, it was forced to comply with a ruling by the International Court of Justice, which held that the mining of a Nicaraguan harbor in support of the Contras was illegal under international law.[115] The ruling itself did not result in immediate U.S. compliance, but it indirectly caused the end of mining, thereby bringing the United States into compliance with international law.[116] More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) opened an investigation in response to a complaint filed against General Wesley Clark and NATO.[117] The central claim in the complaint was that "NATO's policy of targeting power generation and water systems was illegal under the Geneva Conventions."[118] The United States attempted to pressure the ICTY to end the investigation, but, when that effort failed, it was forced to respond with a legal, rather than a political, defense to the

---

> In my view, comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights.

115. Harold H. Koh, *Address: The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 644 (1998).

116. *Id.* Although the U.S. had veto power over all rulings issued by the International Court of Justice, the decision supporting the Nicaraguan claim galvanized efforts in Congress to stop the clandestine support of the Contras.

117. Nicole Barrett, Note, *Holding Individual Leaders Responsible for Violations of Customary International Law: The U.S. Bombardment of Cambodia and Laos*, 32 COLUM. HUM. RTS. L. REV. 429, 472-3 (2001).

118. *See id.*

charges.[119] The ICTY investigation threatened little more than political embarrassment, since it was unlikely that such a suit would succeed. Yet similar complaints filed against the United States in the future, such as allegations of war crimes in Iraq, may result in increased compliance with international law through fear of prosecution. Compliance is not certain, but rulings similar to the Nicaragua case may lead to further internalization[120] of international law.

B. Soering

The incorporation of international human rights into domestic practice may come through more subtle influences than the prosecution of leaders and presidents. In *Soering v. United Kingdom*,[121] for example, the European Court of Human Rights (ECHR) conditioned the extradition of the defendant to the United States on an agreement that he would not face the death penalty.[122] In the years after it was decided, *Soering* received significant attention for its potential to influence the use of the death penalty in the United States,[123] but "predictions that the case would spur change in U.S. policy or possible crisis have not become reality."[124] Though its ruling did not identify the death penalty itself as prohibited by CIL, the ECHR noted that the "very long period of time spent on death row" might violate the European Convention for the Protection of Human Rights and Fundamental Freedoms,[125] which prohibits inhuman or degrading treatment or punishment.

Although the United States can sidestep extradition conflicts by agreeing to not pursue the death penalty, as one commentator argues, *Soering* may signal a more fundamental challenge to the U.S. penal system.[126] "Read as a case about prison conditions... *Soering* becomes a much more intrusive basis for forcing the U.S. government to consider its criminal justice policies in light of international human rights norms."[127] While U.S. courts may still treat allegations of cruel and inhuman treatment as uncertain international law claims[128] and proscribe little beyond outright

119. *See id.*
120. Koh, *supra* note 115, at 642-644.
121. 161 Eur. Ct. H.R. (1989).
122. Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOKLYN L. REV. 719, 732 (2002).
123. *See id.* at 721.
124. *Id.* at 738.
125. *Soering*, 161 Eur. Ct. H.R. at para. 44.
126. Sharfstein, *supra* note 122, at 723.
127. *Id.*
128. *See id.*

torture under the 8th Amendment,[129] extradition challenges based on prison conditions posit a significant challenge to U.S. practice. For the time being, the United States may successfully resist the pressure to conform to international standards in some areas. Yet a broader willingness to criticize U.S. prisons[130] and block extraditions because of prison conditions will force increased acceptance and incorporation of international definitions of cruel and unusual treatment, moving the prohibition closer to universal international support.

C. *Henry Kissinger*

Outside the realm of domestic incorporation of international standards, the prosecution of individual U.S. leaders for jus cogens violations may be on the horizon. Although the Belgian indictments of former President Bush and the ICTY investigation of General Clark were arguably aimed at promoting general compliance with CIL and the Geneva Conventions[131] and not the specific punishment of Bush and Clark, the movement to prosecute Henry Kissinger[132] for crimes against humanity offers evidence that impunity for dominant world leaders may soon end. Accused of a long list of jus cogens violations,[133] Kissinger is unlikely to be prosecuted any time soon, yet he is beginning to feel the heat of domestic and international vilification. Whether Kissinger feared being held for prosecution or being forced to reveal incriminating information, he fled Paris abruptly rather than respond to a warrant for his testimony in a French case.[134] He similarly eluded questioning from French and Chilean judges while he was in England.[135] "It is known that there are many countries to which he cannot travel at all, and it is also known that he takes legal advice before traveling anywhere."[136] He has yet to be formally charged by any foreign or

---

129. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989).

130. *See* Sharfstein, *supra* note 122, at 762.

131. *See* Barrett, *supra* note 117, at 473.

132. *See* Christopher Hitchens, *The Case Against Henry Kissinger*, HARPER'S MAGAZINE (Feb. 2001) *available at* http://www.icai-online.org/files/hitchens_harpers_kissinger.pdf.

133. *See id.* Christopher Hitchens, one of the leading critics of Kissinger, accuses him of directing and supporting a variety of war crimes and human rights violations in Vietnam, Cambodia, Laos, Bangladesh, Chile, and East Timor. *See also* CHRISTOPHER HITCHENS, THE TRIAL OF HENRY KISSINGER (2001).

134. Christopher Hitchens, *The Latest Kissinger Outrage*, SLATE (Nov. 27, 2002), *at* http://slate.msn.com/?id=2074678.

135. Jonathan Franklin & Duncan Campbell, *Kissinger May Face Extradition to Chile*, THE GUARDIAN (June 12, 2002), *available at* http://www.guardian.co.uk/international/story/0,3604,735723,00.html.

136. Hitchens, *supra* note 132.

international court[137] — he is dodging investigations, not indictments — and he is not on the run at home,[138] but he is at least finding no safe haven abroad.

Instead of seeking to alter U.S. foreign policy, present or future, the move to prosecute Kissinger seeks to extend punishment for human rights abuses to all world leaders who are complicit, not just those who are politically or militarily defeated.[139] The prosecution of Kissinger may only succeed in the court of public opinion, yet it provides support for international efforts to prosecute all human rights violations and violators, bringing punishment for jus cogens violations ever closer to the most politically immune. Just as the prosecution of Pinochet gathered steam in a foreign arena before moving to his home country, the move to hold U.S. officials accountable for war crimes and other human rights violations may begin in other countries, but it will eventually find greater support at home.

VII. CONCLUSION

While some victims and activists may seek a certain amount of retribution through human rights prosecutions, the goal of such prosecutions is not limited to punishment. Rather, it is aimed at achieving a long-term commitment to human rights through broader incorporation of normative international law into domestic practice. Greater acceptance of jus cogens norms would not necessitate a fundamental change in U.S. ideology because CIL and human rights law reflect many of the values and ideals already present in the cultural and political identities of American society. The gap between domestic acceptance and international practice does not exist because of an ideological disconnect between domestic and

---

137. Kissinger might soon face at least one civil suit in connection with his (alleged) past involvement in human rights abuses. *See* CBS News, 60 Minutes, *Family To Sue Kissinger For Death* (Sept. 9, 2001), *available at* http://www.cbsnews.com/stories/2001/09/06/60minutes/main309983.html; *Kissinger Watch #9 - Chile: Complaint Against Kissinger*, INTERNATIONAL CAMPAIGN AGAINST IMPUNITY (July 22, 2002), *at* http://www.icai-online.org/60238,KW_Detail.html.

138. The most recent, high profile vilification of Kissinger came when he agreed to head the 9/11 independent investigation commission, then refused to comply with congressional financial-disclosure rules. These rules would have required him to disclose the names of international clients his firm, Kissinger & Associates, advises. Kissinger resigned the post rather than comply. *See* Romesh Ratnesar, Matthew Cooper, & Michael Weisskopf, *Kissinger's Fast Exit*, CNN.com (Dec. 16, 2002), *available at* http://www.cnn.com/2002/ALLPOLITICS/12/16/timep.kissinger.tm/. More a public-relations misstep than an admission of a guilty conscience, the refusal to identify his clients casts shadows of suspicion over Kissinger's current involvement with foreign governments.

139. *See generally Kissinger Watch #1, International Campaign Against Impunity*, *at* http://www.icai-online.org/54175,55541.html.

foreign cultures — it exists because of the preeminence of U.S. economic and military power. "The United States declines to embrace international human rights law because it can."[140]

Whether or not the United States maintains its dominance of world affairs may be irrelevant to future incorporation of CIL and U.S. acceptance of international judicial processes. To counteract the danger of international irrelevancy, U.S. courts may be forced to seek greater legitimacy through the recognition of foreign precedents that inform, distinguish, and support the American conception of justice. Further incorporation of CIL may come through enforcing the same CIL standards litigated in the ATCA and the TVPA against domestic actors as well as international actors. Short-term solutions that avoid addressing the underlying conflicts between domestic and international practice, such as individual extradition agreements, offer little hope of continued success when the challenges to U.S. policy become more fundamental.

Apart from domestic internalization of international law, other influences may emerge in the realm of U.S. foreign policy, leading to further compliance with international norms. While the United States undermines efforts to bring former leaders to justice for their human rights violations, the War on Terrorism may force U.S. leaders to reconsider their objections to international courts (such as the ICC), given their desire for future cooperation in the apprehension and prosecution of terrorist suspects. American power may insulate Congress and the court system from criticism for promoting the human rights "double standard,"[141] but it will not protect the United States from reciprocated recalcitrance in the War on Terrorism and the pursuit of other foreign policy goals. In the past, a realpolitik approach to foreign policy may have justified U.S. unilateralism. The future, however, will require the United States to trade more than monetary and military aid for foreign support. In efforts to protect and sustain American society, U.S. politicians could be forced to reinvest in international legal processes, backing off their blanket opposition to international cooperation.

---

140. Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 THE GREEN BAG 2d 365, 371 (1998).

141. *Id.* at 369; "[T]he U.S. government uses the international human rights system to measure the legitimacy of foreign governmental acts, but it systematically declines to hold domestic acts to the same legal scrutiny."