

Note

Domesticating International Criminal Law: Bringing Human Rights Violators to Justice

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Consider the following dilemma. The former head of a Chinese prison is visiting the United States for his daughter's wedding. A number of former prisoners whom he personally tortured¹ before their release and subsequent emigration to the United States would like to file a civil suit against him under the Alien Tort Claims Act (ATCA)² and the Torture Victim Protection Act (TVPA)³ in an effort to obtain monetary compensation. Meanwhile, the Justice Department is compiling evidence that might allow an indictment under the new U.S. anti-torture criminal law⁴ within a few months of his visit. The President, however, is trying to conclude a major treaty negotiation with China and fears the political repercussions of either suit, especially the criminal one. Should either action go forward?

This example illustrates the potential complexities arising from Congress's beginning to accept national criminal jurisdiction over severe human rights violations. In 1994, the United States changed its criminal code to provide that any U.S. national or person physically located within the United States could be held criminally liable for torture he or she commits anywhere against anyone.⁵ This statutory change, part of the U.S. ratification of the Convention

1. The practice of torture in Chinese prisons is widespread. See AMNESTY INT'L, CHINA. NO ONE IS SAFE 63-84 (1996).

2. 28 U.S.C. § 1350 (1994).

3. *Id.*

4. See 18 U.S.C.A. § 2340 (West Supp. 1997).

5. See Foreign Relations Authorization Act, Fiscal Year 1994 and 1995, Pub. L. No. 103-236, § 506 (a), 108 Stat. 382, 463-64 (1994) (codified at 18 U.S.C.A. § 2340 (West Supp. 1997)) Behavior is considered torture only if it is committed in an official capacity or under the color of state law. See § 2340 (“[T]orture’ means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”).

Against Torture and Other Cruel Inhuman and Degrading Treatment,⁶ represents a watershed in the evolution of U.S. human rights protection. Not only can torturers face civil liability for their abuses under the ATCA and the TVPA, but they also can be jailed for up to twenty years or even receive life imprisonment or the death penalty if their behavior resulted in death.⁷

This statute thus expanded U.S. reliance upon universal jurisdiction. International law recognizes five grounds upon which states can base their jurisdiction: Territorial jurisdiction stems from wrongs occurring within a nation's territory; nationality jurisdiction is based on an offender's being a national of the state taking jurisdiction; passive personality jurisdiction occurs when a victim is a national of the state; protective jurisdiction is based on the acts impinging upon important state interests or national security; and universal jurisdiction stems from the notion that some international prohibitions are so important that a violation of them by anyone, anywhere, warrants any nation's taking jurisdiction.⁸ This universality principle is the jurisdictional base for nations to prosecute human rights offenders; their violations are such egregious wrongs that their behavior is of every nation's concern.

Although the U.S. criminal law regarding torture represents an important new vehicle for bringing human rights offenders to justice, it is a natural evolution of the existing international and domestic criminal law. Unlike the early human rights conventions, more recent treaties contain specific provisions requiring prosecution or extradition of offenders within their borders.⁹ Both international treaty and customary law recognize many human rights norms as conferring universal jurisdiction. Likewise, U.S. statutes increasingly have provided for national criminal jurisdiction in areas connected to human rights, such as terrorism and hostage taking.¹⁰ In addition to the traditional territorial base, judicial decisions have recognized nationality, universality, and passive personality jurisdictional bases in a criminal context. The courts also have given great leeway in cases involving forcible abduction of defendants in other countries and have denied many constitutional protections to alien

6. G.A. Res. 46, U.N. GAOR, 39th Sess., Annex, U.N. Doc. E/CN.4/1984/72, 23 I.L.M. 1027 (1984), revised by 24 I.L.M. 535 (1985) [hereinafter Torture Convention]. The Torture Convention entered into force for the United States on November 20, 1994. See 2 GUIDE TO THE UNITED STATES TREATIES IN FORCE 700 (Igor I. Kauass ed., 1996 ed.).

7. See 18 U.S.C.A. § 2340(a).

8. For an analysis of these five jurisdictional bases, see IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300-05 (4th ed. 1990); LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1048-86 (3d ed. 1993); and Ved P. Nanda, *International Human Rights and International Criminal Law and Procedure: Judicial Remedies in United States Courts for Breaches of Internationally Protected Human Rights*, in INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 483, 490-93 (Ved P. Nanda & M. Cherif Bassiouni eds., 1987) [hereinafter INTERNATIONAL CRIMINAL LAW]. Kenneth Randall provides an extensive discussion of universal jurisdiction. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988).

9. For a discussion of this evolution, see *infra* Section I.A.

10. For a discussion of the existing U.S. statutory regime, see *infra* Section I.B.

defendants.¹¹ Together, these developments indicate a growing U.S. assertiveness and recognition of its international obligations in the criminal jurisdictional sphere.

Not surprisingly, these changes have had their critics. Scholarly literature in particular has questioned the judicial acceptance of forcible abduction and denial of rights to defendants abroad.¹² Many scholars have discussed how far national criminal jurisdiction should reach, with particular exploration of nationality, passive personality, and universal jurisdiction.¹³ Despite all of this commentary, no systematic analysis of national criminal jurisdiction over human rights violators has occurred

This Note aims to fill that gap by tracing the development of national criminal jurisdiction in international human rights law and its manifestation in U.S. law. It advocates an expanded statutory regime and a systematic approach to prosecution. After considering some of the potential pitfalls of broader criminal jurisdiction over international human rights violations, it recommends statutory and litigative approaches to address them. Part I describes the evolution of international human rights law toward the recognition of national criminal jurisdiction and the United States's implementation of such jurisdiction. Part II analyzes policy reasons for expanding national criminal jurisdiction: the need to enforce universal norms, the limitations of international mechanisms, and the incompleteness of national civil jurisdiction. Part III considers some problems that might result from broader jurisdiction, such as sovereignty and legitimacy concerns, undermining of civil redress mechanisms, ambiguities of scope, and difficulties of accessing prosecution. Part IV suggests statutory criminalization of clearly established international human rights violations and discretionary use of criminal litigation based on a comparative forum conveniens analysis. International criminal jurisdiction, the Note concludes, provides an important mechanism of justice beyond that provided by civil law but should be expanded carefully.

I. DEVELOPMENT OF NATIONAL CRIMINAL JURISDICTION OVER INTERNATIONAL WRONGS

From the early recognition of pirates as enemies of mankind whom any nation had jurisdiction to prosecute, international law has evolved to contain explicit treaty provisions requiring national criminal jurisdiction for particular human rights violations. These provisions represent a shift from post-World War II international criminal law, which provided for much more limited national jurisdiction or no explicit discussion of such jurisdiction. U.S. law

11. See *infra* notes 63-68 and accompanying text.

12. See *infra* note 65.

13. See *supra* note 8 and accompanying text.

gradually has followed this evolution, with the criminalization of torture representing an important expansion. To explore the international basis for U.S. criminal jurisdiction over human rights offenders, this part reviews the growth of national jurisdiction through human rights treaties and custom and discusses the U.S. implementation of these norms in the criminal context.

A. *Evolution of International Law*

The use of universal jurisdiction in a national criminal context has expanded greatly in the latter half of this century. Traditionally, international law has recognized five bases for national jurisdiction: territoriality, nationality, passive personality, protectiveness, and universality.¹⁴ Until the middle of the twentieth century, however, domestic exercise of criminal jurisdiction was based almost exclusively on territorial grounds. Both public and private international law indicated that criminal law should apply primarily to crimes occurring within a nation's territory.¹⁵ Piracy served as an important exception to this rule and thus as the progenitor of some of the later jurisdictional expansions.¹⁶

Even before the growth of human rights law following World War II, international criminal law and universal jurisdiction existed in the form of piracy prohibitions. Pirates were considered "*hostis humanis generis*,"¹⁷ enemies of mankind, and any nation could take jurisdiction over them. This approach toward piracy, however, did not stem from the expansive views of national criminal jurisdiction embodied in modern treaties. Instead, the peculiar character of piracy probably accounted for its internationalization as a crime; pirates committed offenses on the high seas, which were not within the jurisdiction of any country.¹⁸

The conception that some acts occurring within national borders are so unacceptable that they violate international law came with the end of World War II. Through the Charter of the International Military Tribunal¹⁹ and the

14. See *supra* text accompanying note 8.

15. See Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 8-9 (1992).

16. See BROWNIE, *supra* note 8, at 238-49 (describing the expansion of jurisdictional rules governing pursuit and capture of pirates to cover submarine warfare, blockades, and actions necessary to maintain order on the high seas).

17. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); see also BROWNIE, *supra* note 8, at 238-39.

18. Although pirates entered national territory by boarding a flag ship, this "territory" could then be moved throughout the high seas. If the nation owning the ship were the only one that could assume jurisdiction, pirates could easily escape capture and prosecution by boarding ships far from their home ports and keeping them beyond the reach of the home navies. National criminal jurisdiction over all pirates allowed nations to cooperate in fighting this common scourge. See generally BROWNIE, *supra* note 8, at 238-39 (discussing the international regime for maintaining order on the high seas).

19. Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; see also BROWNIE, *supra* note 8, at 561-63 (discussing the Charter's war crimes provisions).

Convention on the Prevention and Punishment of the Crime of Genocide (also known as the Genocide Convention),²⁰ the international community established crimes against peace, war crimes, crimes against humanity,²¹ and genocide²² as international crimes.

This recognition, however, did not include particularly expansive notions of national jurisdiction over these crimes. The Charter for the International Military Tribunal did not mention national jurisdiction at all, and the Genocide Convention specified two possible places for a trial: the country in which the abuses occurred or an international tribunal.²³ In accord with this limited national jurisdiction, the world community held trials at international tribunals established in Nuremberg and Tokyo.²⁴ While numerous national prosecutions of German and Japanese war criminals occurred, they did not rest on these international conventions' granting universal jurisdiction.²⁵ For example,

20. Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

21. Crimes against peace, war crimes, and crimes against humanity were recognized in the Charter of the International Military Tribunal, *supra* note 19, 59 Stat. at 1547, 82 U.N.T.S. at 288. The Charter's article 6(a) defines crimes against peace as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." *Id.* Article 6(b) defines war crimes as "violations of the laws or customs of war," *id.*, and then details the exact violations included, *see id.* Crimes against humanity are defined in article 6(c) as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecutions on political, racial or religious grounds . . ." *Id.*

22. *See* Genocide Convention, *supra* note 20, at 280. The Convention defines genocide as acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such," including killing, causing mental or physical harm, purposely inflicting unacceptable living conditions on a group, birth prevention, and forcibly transferring children to another group. *Id.* It punishes "genocide," "conspiracy to commit genocide," "direct and public incitement to commit genocide," "attempt to commit genocide," and "complicity in genocide." *Id.*

23. *See* Genocide Convention, *supra* note 20, at 280-82.

24. Many of the issues that arose during the Nuremberg and Tokyo trials—sovereignty, chains of accountability, lack of international structures, psychological pain, appropriate prosecution of massive human rights violations—are unfortunately still salient today. Numerous scholars have extensively grappled with the meaning of these trials in international law. For an excellent discussion of international law concerns arising from the Tokyo trials, see Knut Ipsen, *A Review of the Main Legal Aspects of the Tokyo Trial and Their Influence on the Development of International Law*, in *THE TOKYO WAR CRIMES TRIAL. AN INTERNATIONAL SYMPOSIUM* 37 (C. Hoyasa et al. eds., 1986). The recent 50th anniversary of Nuremberg served as an important reflective point for evaluating the international community's progress on these issues. *See, e.g.*, Graham T. Blewitt, *Ad Hoc Tribunals Half a Century After Nuremberg*, 149 *MIL. L. REV.* 101 (1995) (discussing the importance of building on the Nuremberg legacy, analyzing the ad hoc tribunals as important steps, and arguing for an international criminal court); *Judgments on Nuremberg: The Past Half Century and Beyond—A Panel Discussion of Nuremberg Prosecutors*, 16 *B C THIRD WORLD L.J.* 193 (1996) (describing personal experiences and reflections on Nuremberg by six of the prosecutors at the trials); Henry T. King, *Nuremberg and Sovereignty*, 28 *CASE W. RES. J. INT'L L.* 135 (1996) (analyzing Nuremberg's piercing of sovereignty and its subsequent impact on individuals, state sovereignty, and regional human rights law); Fred L. Morrison, *The Significance of Nuremberg for Modern International Law*, 149 *MIL. L. REV.* 207 (1995) (analyzing Nuremberg as symbolizing the transition from the Westphalian model of state sovereignty to the modern one); Michael P. Scharf, *Have We Really Learned the Lessons of Nuremberg?*, 149 *MIL. L. REV.* 65 (1995) (analyzing the extent to which the Yugoslav tribunal has avoided the four main criticisms of Nuremberg: being a victor's tribunal, ex post facto prosecution, lack of due process, and the absence of appeals).

25. In addition to the international tribunals, the victors held trials either in their occupation zones or under international auspices and directly before their national tribunals. Often, the war criminals had injured nationals of the prosecuting state, creating passive personality jurisdiction. *See* JORDAN J. PAUST ET AL.,

although Israel was able to try Adolph Eichmann for genocide on universal jurisdiction grounds,²⁶ the initial human rights conventions did not provide explicitly for national jurisdiction over international crimes.

An important step toward an increased national role in policing human rights abuses came in 1956 with the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.²⁷ This Convention criminalized the "act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto . . ."²⁸ Article 3 of this Convention required the national criminalization of the slave trade, "effective measures" to prevent mechanisms of trade within the territory of signatories, and international cooperation regarding the commission and prosecution of the slave trade.²⁹ While this Convention does not indicate that trade occurring within other countries can be punished in a third nation, its provisions suggest that national courts are an appropriate forum for this international crime.

With the International Convention on the Suppression and Punishment of the Crime of Apartheid in 1973,³⁰ the potential role of national courts in prosecuting international crimes expanded once again. The Convention criminalizes apartheid, defining it as certain "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."³¹ Articles IV and V of the Convention mandate judicial, legislative, and administrative measures against people committing apartheid in a state regardless of residence or nationality and indicate that any state party with personal jurisdiction can try any person charged.³² This approach represents a shift toward the international recognition of national criminal universal jurisdiction. Although the Convention does not explicitly mention universal jurisdiction as its basis, this is the only one of the five bases for jurisdiction that would apply to apartheid not specifically tied to the prosecuting nation.³³

The international community's attempt to deal with international terrorism in its various forms during the 1970s provided another extension of these modern conceptions of national criminal jurisdiction.³⁴ Article 4 of the 1970

INTERNATIONAL CRIMINAL LAW 719-21 (1996).

26. See HENKIN ET AL., *supra* note 8, at 1083-86.

27. Sept. 4, 1956, 266 U.N.T.S. 3.

28. *Id.*, 266 U.N.T.S. at 42.

29. *Id.* This Article does not specifically indicate the provision's jurisdictional base.

30. *Adopted* Nov. 30, 1973, 1015 U.N.T.S. 244.

31. *Id.* art. II, 1015 U.N.T.S. at 245. Article II more specifically describes both legislative measures and violations of living conditions, life, and liberty that contravene the Convention. See *id.*

32. See *id.*, 1015 U.N.T.S. at 246.

33. The provision granting national jurisdiction does not discuss links of territory, the nationality of victim or offender, or national security concerns. Given the human rights context, universal jurisdiction, the only base remaining, seems to be the assumed ground for jurisdiction.

34. See generally B.J. George, Jr., *Federal Anti-Terrorist Legislation*, in INTERNATIONAL CRIMINAL LAW, *supra* note 8, at 15.

Convention for the Suppression of Unlawful Seizure of Aircraft, for example, indicates that aircraft hijackers are subject to extradition or prosecution by the state whose aircraft was hijacked or in whose territory they landed or were present and that no "criminal jurisdiction exercised in accordance with national law" is excluded.³⁵ Article 5 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation has an identical provision.³⁶ Article 5 of the 1979 International Convention Against the Taking of Hostages³⁷ goes further, mandating jurisdiction if the offense occurs in the territory of the state (territoriality), if the offender is a national (nationality) or stateless resident, if the act was committed to compel the state (passive personality), if the victim is a national of the state when deemed appropriate (protectiveness), or if the offender is present in the territory and not being extradited (universality).³⁸ This movement toward more expansive extraterritorial provisions over the course of the 1970s reflects the trend in the international community to allow national criminal jurisdiction on a growing number of grounds.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁹ which came into force in 1987, is the most expansive treaty explication of national criminal jurisdiction over human rights offenders. Article 5 mandates jurisdiction when offenses occur within the territory (territoriality), are committed by a national (nationality), are against a national, as deemed appropriate by the prosecuting state (protectiveness), or are committed by an offender located within the state's territory if extradition does not occur (universality).⁴⁰ It further permits any criminal jurisdiction allowed by internal law.⁴¹ These broad jurisdictional requirements solidify the proposition that international law demands expansive national jurisdiction in the case of torture.

35. *Opened for signature* Dec. 16, 1970, 10 I.L.M. 133, 134. The Convention defines a hijacker as someone who "unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act," or "an accomplice" of such person. *Id.* art. 1, 10 I.L.M. at 133. While the convention does not explicitly discuss bases of jurisdiction, territoriality applies if a hijacking occurs in a state's aircraft or upon landing in a particular state. *See id.* art. 4, 10 I.L.M. at 134. The sufficiency of the presence of the offender with no other ties, however, suggests a recognition of universal jurisdiction.

36. *Opened for signature* Sept. 23, 1971, 10 I.L.M. 1151, 1154. The Convention includes in its definition of sabotage a variety of types of violence against aircraft, navigation facilities, and people. *See id.* art. 1, 10 I.L.M. at 1152.

37. *Adopted* Dec. 12, 1979, G.A. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 99, U.N. Doc. A/34/819, 18 I.L.M. 1456 (1979) [hereinafter Hostage Taking Convention]. The Convention describes an offender as "[a]ny person who seizes or detains and threatens to kill or to injure or to continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage." *Id.* art. 1, 18 I.L.M. at 1457. The various forms used to establish jurisdiction indicate that any of the five bases would be appropriate.

38. *See id.* art. 5, 18 I.L.M. at 1458.

39. Torture Convention, *supra* note 6.

40. *See id.* art. 5, 23 I.L.M. at 1028.

41. *See id.*

In addition to these conventions' codification of national criminal jurisdiction, customary international law now recognizes universal jurisdiction over a broader range of abuses. The primary difficulty in determining the appropriateness of expanding jurisdiction based on customary international law is that it is much more ambiguous than treaty law. Traditionally, customary norms have been defined as the general and consistent practices of nations that they themselves view as legally binding.⁴² A mixture of sources is used to determine what falls into this category, including international conventions and other international documents, state behavior, and the work of scholars and jurists.⁴³ As this Note indicates in its recommendations,⁴⁴ clear international consensus of universal jurisdiction exists only with regard to a few norms, most of which are also established through treaties.

B. *Limited U.S. Implementation of International Criminal Jurisdiction*

U.S. incorporation of this expanded national criminal jurisdiction over severe human rights violations occurring abroad is in its nascent stages. The three branches of the U.S. government together implement its treaty and customary law obligations. When the Senate ratifies treaties and creates implementing statutes, clear legal obligations exist for interpretation by the courts. Because the United States has ratified and executed few human rights treaties, however, most of its recognition of these rights has come through judicial acknowledgment of customary law in civil litigation under the ATCA.⁴⁵ In the implementation of human rights obligations, the primary basis for criminal jurisdiction (when no territoriality or nationality links exist or are legally required) is universal jurisdiction. Basic human rights serve as foundational norms of the international community that transcend national borders. Because these obligations are universal, any state can prosecute their violation.

Although extraterritorial criminal jurisdiction has emerged in a commercial

42. See BROWNLIE, *supra* note 8, at 4-11. For scholarly discussions of sources analysis in a human rights context, see John S. Gibson, *International Human Rights Law: Progression of Sources, Agencies, and Law*, 14 SUFFOLK TRANSNAT'L L. REV. 41 (1990); and Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GA. J. INT'L & COMP. L. 147 (1995/1996). See also Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. (forthcoming Oct. 1997) (manuscript at 15-19, on file with the *Yale Law Journal*) (discussing the difficulties of determining customary international law).

43. See BROWNLIE, *supra* note 8, at 5; see also Osofsky, *supra* note 42 (manuscript at 15-19).

44. See *infra* Part IV.

45. 28 U.S.C. § 1350 (1994); see Karen E. Holt, *Filartiga v. Pena-Irala After Ten Years: Major Breakthrough or Legal Oddity?*, 20 GA. J. INT'L & COMP. L. 543 (1990); Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995); Jeffrey Rabkin, Note, *Universal Justice: The Role of Federal Courts in International Civil Litigation*, 95 COLUM. L. REV. 2120 (1995).

context over the course of the twentieth century,⁴⁶ the statutory basis in a human rights context is a product of the last three decades.⁴⁷ These statutes criminalizing terrorism and torture remain largely untested in U.S. courts, with only a few cases addressing the extraterritorial reach of antiterrorism criminal legislation. This section explores the current state of the law providing for criminal jurisdiction over human rights, both through explicit statutory protection and through nonstatutory judicial recognition.

1. *Statutory Implementation*

Despite its only recent prominence, Congress's criminal codification of universal jurisdiction began almost 200 years ago. In 1819, Congress criminalized piracy, defined it according to the law of nations, made it punishable by death, and applied the law to anyone found in or brought to the United States.⁴⁸ The basis for this law flowed directly from Article I of the Constitution.⁴⁹ It was upheld by the Supreme Court in *United States v. Smith*.⁵⁰

After this early beginning, the year 1974 marked the first time that the U.S. Congress explicitly codified universal jurisdiction in a criminal context related to modern human rights. The Antihijacking Act,⁵¹ passed to implement U.S. obligations under the Convention for the Suppression of Unlawful Seizure of Aircraft,⁵² allowed prosecution of offenders in U.S. custody regardless of where the act occurred or of the nationality of the people involved.⁵³ By allowing such a jurisdictional approach, Congress for the first time moved well beyond the strict territoriality of criminal law in a context related to human rights.

46. See Born, *supra* note 15, at 8-9 (discussing primarily territorial approach to jurisdiction until mid-20th century).

47. Telephone Interview with Steven Weglian, Trial Attorney, Terrorism and Violent Crimes Section, Criminal Div., Department of Justice (Aug. 25, 1997) (describing the development of extraterritorial jurisdiction with regard to terrorism beginning in the 1970s).

48. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 154 n.a (1820). The Court quoted from the Act of Mar. 3, 1819, ch. 76, § 5, which stated

[t]hat if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into, or found in, the United States, every such offender or offenders shall, upon conviction thereof, before the Circuit Court of the United States, for the District into which he or they may be brought, or in which he or they shall be found, be punished with death.

Id.

49. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . .")

50. 18 U.S. (5 Wheat.) 153, 163 (1820).

51. Antihijacking Act of 1974, Pub. L. No. 93-366, 88 Stat. 409 (codified in scattered sections of 49 U.S.C.).

52. *Opened for signature* Dec. 16, 1970, 10 I.L.M. 133, 134.

53. See Antihijacking Act of 1974 § 103, 88 Stat. at 410-11; see also Terry Richard Kane, *Prosecuting International Terrorists in United States Courts: Gaining the Jurisdictional Threshold*, 12 YALE J. INT'L L. 294 (1987).

In 1984, statutory recognition of universal jurisdiction with regard to international terrorism was expanded further. The Hostage Taking Act,⁵⁴ the passage of which implemented U.S. obligations under the International Convention Against the Taking of Hostages,⁵⁵ provided that even if the hostage taking occurs outside of the United States, U.S. courts still have criminal jurisdiction if the offender or victim is a U.S. national (nationality and passive personality jurisdiction), "the offender is found in the United States" (universal jurisdiction), or the offender seeks to compel the U.S. government to act or to abstain from acting as a release condition (protective principle jurisdiction).⁵⁶ The fact that mere presence in the United States is sufficient grounds for invoking jurisdiction suggests U.S. incorporation of universal jurisdiction; the Act specifically allows for prosecution even if no territoriality or nationality ties exist beyond the present location of the offender.

Beyond these statutes implementing international conventions, other U.S. antiterrorism laws have provided for jurisdiction over acts occurring outside of the United States. For example, in 1986, Congress passed a statute providing criminal liability for homicide and serious bodily injury of U.S. nationals abroad.⁵⁷ The Antiterrorism and Effective Death Penalty Act of 1996 criminalized conduct outside of the United States that created harm or risk of harm to people and property in the United States.⁵⁸ It also expanded provisions regarding maritime jurisdiction⁵⁹ and domestic conspiracies to harm people and property abroad,⁶⁰ increased penalties including those with regard to explosives,⁶¹ and clarified aircraft piracy jurisdiction.⁶²

Little case law interprets the international reach of these statutes; in *United States v. Yunis*,⁶³ the D.C. Circuit, however, reinforced the idea that the jurisdictional base of these antiterrorism statutes is divorced from territoriality. In this case, the nationality of two unharmed passengers was the only tie to a U.S. forum, and the court ruled that these Acts provided jurisdiction over the defendant even though he was forcibly brought to U.S. territory.⁶⁴ People who have not chosen to enter U.S. territory voluntarily still can be viewed as

54. Act for the Prevention and Punishment of the Crime of Hostage-Taking (Hostage Taking Act), Pub. L. No. 98-473, 98 Stat. 2186 (codified in scattered sections of 18 U.S.C.).

55. Hostage Taking Convention, *supra* note 37.

56. See Hostage Taking Act § 1203, 98 Stat. at 2186 (codified in scattered sections of 18 U.S.C.).

57. See Pub. L. No. 99-399, § 1202(a), 100 Stat. 896, 896-97 (1986) (codified at 18 U.S.C. § 2332 (1994)).

58. Pub. L. No. 104-132, § 702(a), 110 Stat. 1214, 1291 (1996) (codified at 18 U.S.C.A. § 2332b (West Supp. 1997)).

59. See 18 U.S.C.A. § 1363 (West Supp. 1997).

60. See 18 U.S.C.A. § 956 (West Supp. 1997).

61. See 18 U.S.C.A. §§ 114, 755, 756, 878(a), 1113, 2332, 844, 842(h), 3295 (West Supp. 1997).

62. See 49 U.S.C.A. 46502(b) (West Supp. 1997).

63. 924 F.2d 1086 (D.C. Cir. 1991).

64. See *id.* at 1090-93.

present for jurisdictional purposes, the court held.⁶⁵ Other cases have explored the meaning of "found in the U.S." and followed the *Yunis* decision.⁶⁶ Although forcible abduction is a problematic mechanism for exercising jurisdiction, these cases indicate U.S. recognition of jurisdiction beyond traditional territorial grounds. Additional opinions have mentioned the growth of universal jurisdiction⁶⁷ and the broad geographic reach intended by the Antihijacking Act.⁶⁸

In November 1994, the U.S. Congress moved beyond terrorism to one of the most traditionally repudiated human rights violations: torture. As discussed above,⁶⁹ Congress implemented its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by passing a statute that, much like the Hostage Taking Act, provided for jurisdiction based on the nationality of the offender or that person's presence in the forum. Although the statute has not been judicially tested, its explicit jurisdictional grant makes a broad judicial interpretation probable.

2. Nonstatutory Implications

Since the Supreme Court struck down prosecution based on common law crimes in the 1812 decision *United States v. Hudson & Goodwin*,⁷⁰ no court has convicted a defendant of a crime not enumerated in a statute.⁷¹ Some of

65. *See id.* Ironically, the United States, in protecting people's rights against terrorism, has not applied many of the Bill of Rights provisions extraterritorially. *See id.* at 1092-93. This practice has been criticized as a problematic precedent in international relations. *See, e.g.,* Mason H. Drake, Note, *United States v. Yunis: The D.C. Circuit's Dubious Approval of U.S. Long-Arm Jurisdiction over Extraterritorial Crimes*, 87 Nw. U. L. REV. 697 (1993). The U.S. Supreme Court, however, has held that forcible abduction is an acceptable mechanism of obtaining jurisdiction, even when an extradition treaty exists. *See United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992). Not surprisingly, this decision has received much criticism as violative of international law and other nations' sovereignty. *See* Manuel R. Angulo & James D. Reardon, Jr., *The Apparent Political and Administrative Expediency Exception Established by the Supreme Court in United States v. Humberto Alvarez-Machain to the Rule of Law as Reflected by Recognized Principles of International Law*, 16 B.C. INT'L & COMP. L. REV. 245, 257-74 (1993); Jonathan A. Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 939-46 (1993); Alfred Paul LeBlanc, Jr., Note, *United States v. Alvarez-Machain and the Status of International Law in American Courts*, 53 LA. L. REV. 1411, 1413-16 (1993).

66. *See, e.g., United States v. Yousef*, 927 F. Supp. 673, 680-81 (S.D.N.Y. 1996); *United States v. Rezaq*, 908 F. Supp. 6, 7-8 (D.D.C. 1995).

67. *See Yousef*, 927 F. Supp. at 681.

68. *See United States v. Basic*, 592 F.2d 13, 20 (2d Cir. 1978).

69. *See supra* notes 5-7 and accompanying text.

70. 11 U.S. (7 Cranch) 32 (1812). As the Court wrote:

The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence

Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . [B]ut all exercise of criminal jurisdiction in common law cases we are of the opinion is not within their implied powers.

Id. at 34.

71. In two cases decided shortly after *Hudson & Goodwin*, the Supreme Court acknowledged it as good law. *See United States v. Ortega*, 24 U.S. (11 Wheat) 467, 475 (1826); *United States v. Coolidge*, 14 U.S. (1 Wheat) 415, 415-17 (1816). For scholarly discussion of the implications of *Hudson & Goodwin*, see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1194 n 283 (1991); and

the most deeply imbedded principles of American criminal law undergird this codification requirement. First, as mentioned twice in the Constitution⁷² and in numerous Supreme Court judgments,⁷³ ex post facto punishment is forbidden; this prohibition ensures that individuals have fair and reliable warning of when the United States can punish their behavior.⁷⁴ Second, the rule of lenity, which first appeared in sixteenth-century English courts, requires that ambiguity in penal statutes be strictly constructed; this rule similarly aims to ensure fair warning.⁷⁵ Third, the principle of legality, derived from Enlightenment thinking, posits that only the legislative branch undergirded by popular sovereignty can criminalize behavior.⁷⁶ According to this principle, judge-created crime violates the separation of powers by usurping the legislature's power to make laws as the representative of the people's will.⁷⁷ Given these strong bases for requiring statutory criminalization, it thus seems highly unlikely that the United States would prosecute human rights violators simply on the basis of a treaty or customary international law.⁷⁸

Gary D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin, The Jeffersonian Ascendancy, and the Abolition of Federal Common Law Crimes*, 101 YALE L.J. 919 (1992). The statutory basis of criminal law distinguishes it from civil law, which may proceed based on common law alone. In fact, the ATCA jurisprudence discussed in greater detail later, *see infra* Section II.C, rests on a statute allowing suits based on torts in violations of a treaty or the law of nations. Not only are the definitions of torts themselves based on the common law, but the law of nations, as discussed earlier, *see supra* text accompanying notes 42-43, does not rely on explicit codification.

72. U.S. CONST. art. I, § 9, cl. 3; *id.* art. I, § 10, cl. 1.

73. *See, e.g.*, *Weaver v. Graham*, 450 U.S. 24, 28-31 (1981); *Kring v. Missouri*, 107 U.S. 221, 227 (1883); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 386-95 (1798).

74. For extensive discussion of the ex post facto prohibition and its history in U.S. jurisprudence, *see Weaver*, 450 U.S. at 28-31; PETER W. LOW ET AL., *CRIMINAL LAW* 39-41 (2d. ed. 1986); and *Extraterritorial Application of Criminal Law*, 85 AM. SOC'Y INT'L L. PROC. 383 (1991).

75. *See* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 197-99 (1994).

76. For a description of the evolution of the principle of legality in the American legal system, *see* LOW ET AL., *supra* note 74, at 36-45. Low et al. define the principle of legality as "the desirability in principle of advance legislative specification of criminal conduct." *Id.* at 34 (emphasis omitted). They explain that this Enlightenment conception slowly took hold in the American legal system because it competed against the English common law tradition, which provided for common law crimes. *See id.* at 36; *see also* Steven B. Duke, *Criminal Procedure Commentary—Legality in the Second Circuit*, 49 BROOK. L. REV. 911, 911 (1983) (describing the retroactivity, void-for-vagueness, and rule of lenity doctrines as supporting the principle of legality).

77. *See id.* at 36-45.

78. The U.S. codification requirement may actually be somewhat stricter than international law requires. One possible justification for a looser ex post facto requirement was made in the context of the Nuremberg and Tokyo tribunals, amid the controversy over whether they were fairly punishing individuals without prior warning of criminality. Because all people everywhere are prohibited from engaging in these egregious abuses of human rights, it was argued, ex post facto concerns should not arise in these contexts. Offenders should know that violations of these foundational norms are not acceptable and that prosecution of them is possible. For example, this reasoning was used with regard to crimes against peace at the Nuremberg tribunal:

[T]he maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

In re Goerring, 13 Ann. Dig. 203, 208 (Nuremberg, Int'l Mil. Trib. 1946).

Although the United States regards as a crime the behavior comprising serious human rights violations when it occurs within the United States, this codification is insufficient to create jurisdiction for these abuses abroad. The United States criminalizes many of the behaviors that are component parts of human rights abuses through domestic statutes against murder, assault and battery, rape, etc. This existing codification eliminates a concern that criminals might think that the United States would regard their actions as legally permitted despite being morally reprehensible.⁷⁹ The courts still would not allow prosecution for these component crimes, however, due to the strong prohibition against applying laws extraterritorially without specific statutory authorization.⁸⁰

Despite the strict codification requirement, Congress can incorporate international law directly into the statutory regime. U.S. courts have repeatedly accepted statutes that rely on customary international law to define terms within them. In its 1820 decision *United States v. Smith*,⁸¹ for example, the Supreme Court upheld a statute which used the law of nations to define piracy. Similarly, *Ex parte Quirin*⁸² relied on *Smith* to allow a presidentially established military tribunal to try people for World War II violations of the law of war. Analogously, in domestic contexts courts have reaffirmed the principle that undefined terms in criminal statutes will be given their common law meaning if such a meaning exists.⁸³

The previous discussion of prosecution should be distinguished from the U.S. approach to extradition. Although a double criminality requirement exists (the offense must be a crime in both states) in order for extradition to occur,⁸⁴

Further extending this reasoning, a student note explains that the *ex post facto* prohibition should not apply to international crimes over which the United States has universal jurisdiction because people committing these crimes have fair warning from the international community. See Eric S. Kobrick, Note, *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 COLUM. L. REV. 1515, 1529-30 (1987). Kobrick explains that an additional justification for the jurisdiction of the Nuremberg Tribunal is based in the character of international law. Since no international legislature exists, international criminal law originates from a gradual evolution. Applying the *ex post facto* prohibition would thus thwart the growth of international criminal law. See *id.* at 1533.

While this reasoning provides some justification for why, as a matter of international law, prosecution might be acceptable, it does not address the domestic law difficulty. Because the codification requirement is so deeply embedded in the U.S. legal system, overcoming the unfairness issue still would not make it part of the written U.S. law.

79. The Sixth Circuit reinforced this reasoning by allowing, for the purposes of extradition, murder to provide double criminality with regard to genocide. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-83 (6th Cir. 1985); see also Monroe Leigh, *Judicial Decisions*, 80 AM. J. INT'L L. 645, 656-58 (1986)

80. See Bom, *supra* note 15, at 1.

81. 18 U.S. (5 Wheat) 153, 157-63 (1820).

82. 317 U.S. 1, 29-30 (1942).

83. See, e.g., *United States v. Turley*, 352 U.S. 407, 411 (1957); *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943).

84. See PAUST ET AL., *supra* note 25, at 328-29 (describing the contours of the U.S. double criminality requirement). The U.S. extradition process involves a preliminary hearing regarding bail, followed by an extradition hearing examining the identity of the offender, whether the charges meet the double criminality requirement, whether probable cause exists, and whether there are any grounds for denying extradition. Appeal mechanisms are limited. See *id.* at 287-95.

the United States has found criminalization of the underlying behavior sufficient to meet the requirement. The Sixth Circuit in particular has recognized another nation's criminal jurisdiction with regard to human rights violations even when no explicit statutory or treaty basis for such jurisdiction exists. In an appeal from an extradition order against John Demjanjuk, for example, whom Israel sought for alleged participation in Nazi genocide, the court accepted Israeli jurisdiction over genocide on universal grounds and U.S. double criminality based on the prohibition of murder.⁸⁵ Since the Genocide Convention does not provide for universal national jurisdiction, the customary international law prohibition is the only ground upon which the court could have rested its recognition of Israeli jurisdiction.⁸⁶

II. POLICY REASONS FOR EXPANDING NATIONAL CRIMINAL JURISDICTION

Having traced the evolution of national criminal jurisdiction under international and U.S. law, this Note now turns to an exploration of policy justifications and limitations. In large part, the jurisdictional expansion has resulted from changed views of national sovereignty under human rights doctrine. As international law increasingly has recognized that some norms transcend national borders, governments can no longer lend legitimacy to terrible abuses.⁸⁷ With this shift, a need for institutional enforcement structures has arisen. The practical limitations of the international system, which lacks accessible, effective judicial forums and enforcement mechanisms, have reinforced the need to use national courts.⁸⁸ Together, these developments have changed the conception of national courts' role in the enforcement of international human rights.

This description, however, does not fully capture the complexities of the U.S. approach to punishing human rights offenders and allowing redress for victims. The criminal measures are formed against the backdrop of a well-established civil regime under the ATCA.⁸⁹ While criminality adds a dimension of individual accountability that goes beyond civil torts, it also potentially could harm the civil regime. Traditionally, when criminal and civil suits address the same harms, the civil suit is stayed pending the end of the

85. See *Demjanjuk v. Petrovsky*, 776 F.2d 571, 583 (6th Cir. 1985).

86. As Judge Lively stated:

The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.

Id.

87. See generally BROWNIE, *supra* note 8, at 564-80 (discussing the development of human rights norms).

88. See Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 42-44 (1990).

89. 28 U.S.C. § 1350 (1994).

criminal prosecution.⁹⁰ If this happens whenever the U.S. government is considering a human rights prosecution, particularly if these criminal measures are not brought rapidly, victims may be less able to gain monetary redress through using the ATCA. On a policy level, therefore, a careful balancing is necessary to ensure that expansion of criminal jurisdiction does not undermine the potentially more effective human rights civil suits. This part and the next one consider the policy justifications for and potential problems of criminal jurisdictional expansion.

A. *The Need to Enforce Universal Norms*

The previously described evolution of national criminal jurisdiction occurred in the context of changing notions of states' roles within the international community. Traditionally, states governed all activity within their borders. International law was conducted between states and bound them as the primary actors.⁹¹ These sovereign states generally served as the enforcers of international law.⁹² In dealing with "enemies of mankind" who violated foundational norms, the nation apprehending them would either prosecute them, or extradite them to another interested nation.⁹³ Even following World War I, when the first efforts to establish an international criminal tribunal began, prosecutions of war criminals occurred in domestic courts.⁹⁴

With the development of the international human rights regime, state sovereignty diminished. Universal jurisdiction was no longer confined to violations on the high seas, but rather extended to behavior occurring purely within a state's borders. International law began to recognize that some norms were so fundamental that they could not be legally violated anywhere and that all nations had jurisdiction over their violation.⁹⁵ This expansion has created

90. See *infra* notes 143-145 and accompanying text

91. Ian Brownlie describes the international law conception of the sovereignty and equality of states as having three main components: jurisdiction over their territory and permanent population, a duty not to intervene with other states' exclusive jurisdictions, and the recognition that international law obligations depend on sovereign consent. See BROWNIE, *supra* note 8, at 287

92. See Randall, *supra* note 8, at 791-800.

93. See *id.*

94. For a discussion of the almost nonexistent pre-Nuremberg international prosecution efforts, see PAUST ET AL., *supra* note 25, at 707-10.

95. Numerous scholars have described the evolution of the modern human rights regime. See, e.g., BROWNIE, *supra* note 8, at 564-80 (discussing the development of human rights norms), JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS (1993) (discussing the emergence of human rights norms within political constraints); HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES (Theodor Meron ed., 1984) (compiling a scholarly discussion of global and regional human rights issues), HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE (Kathleen E. Mahoney & Paul Mahoney eds., 1993) (compiling a scholarly analysis of numerous human rights norms); RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE (2d ed. 1991) (analyzing a variety of human rights problems); MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980) (discussing various human rights protections). For a discussion of the evolution of universal jurisdiction in particular, see generally Randall, *supra* note 8.

jurisdictional rights and enforcement needs that did not exist previously. Since some level of state complicity often underlies severe human rights violations, the state with the greatest number of connections to the violation is not necessarily the best place for prosecution or a place in which prosecution would be likely to occur.⁹⁶ The concurrent growth of international commerce has increased the likelihood that any given incident has transnational implications.⁹⁷ The international system, however, still lacks the institutional capability to enforce its standards.

These developments have created the need for national criminal jurisdiction to enforce human rights norms. In order for human rights protections to have any real meaning, they must be enforced; if violators escape punishment, the prohibitions are merely declaratory. While international resolution of these universal norm violations might be ideal, the limitations of international mechanisms make such an approach unlikely in the foreseeable future.⁹⁸ Given that human rights violations are of a universal character, prosecution in any adequate national judicial forum is acceptable, even if not preferable. Until international mechanisms develop much further or states begin to hold their officials who violate human rights accountable, neutral state prosecution remains one of the only mechanisms for enforcing international norms. Since the international community views fundamental human rights as norms so important that they should be subject to national criminal jurisdiction, nations have an international law basis and obligation to prosecute offenders.

B. *Limitations of International Criminal Mechanisms*

The need for enforcement of international human rights norms explains why national jurisdiction has grown as international human rights law has developed. Due to the limitations of international institutions, national courts often provide the only effective method of implementation. The International Court of Justice allows only for states to bring claims against other states, greatly limiting the standing of human rights victims and making prosecution

96. In describing reasons that international tribunals could be useful, U.S. Lieutenant Colonel Steven Lepper explained that "when the state itself is responsible for the crimes, it may not be appropriate to allow it to prosecute the offenders." Panel, *Identifying and Prosecuting War Crimes: Two Case Studies—The Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 654-55 (1996) [hereinafter *War Crimes Case Studies*] (remarks of Lt. Col. Lepper).

97. For a discussion of the growth of international commerce and the resulting legal questions, see JOSEPH M. LOOKOFKY, *TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION* 1-9 (1992).

98. Numerous scholars and policymakers have discussed the many difficulties that arise in trying to enforce international norms and the importance of enforcing them. See, e.g., RICHARD B. LILICH, *INTERNATIONAL ASPECTS OF CRIMINAL LAW: ENFORCING UNITED STATES LAW IN THE WORLD COMMUNITY* (1981) (discussing enforcement issues); REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT OF THE AMERICAN BAR ASSOCIATION (Alaire Bretz Rioeffel ed., 1994) [hereinafter *TASK FORCE REPORT*] (discussing the state of development of plans for an international criminal court); Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355 (1993) (discussing difficulties that victims have obtaining redress).

of individuals impossible.⁹⁹ Although international and regional human rights tribunals provide for greater involvement of private actors, they (unlike a national criminal prosecution supported by a police and jail system) have little power to enforce any sort of substantive penalty.¹⁰⁰ There have been some efforts at ad hoc and systematic international criminal prosecution. The International Military Tribunals at Nuremberg and for the Far East provided for adjudication of World War II atrocities, the Yugoslav and Rwandan Tribunals are trying to address the violations in those countries, and a draft statute exists for an international criminal court.¹⁰¹ As discussed in more detail below, however, none of these efforts has provided a comprehensive solution to criminal prosecution of human rights offenders, and each of them assumes the existence of supplementary national prosecution. Thus national court jurisdiction is necessary to ensure that human rights offenders are prosecuted with enforceable judgments.

The international community first began to discuss international criminal prosecution following World War I. Despite articles of the Treaty of Versailles providing for an ad hoc tribunal to prosecute Kaiser Wilhelm II and other war criminals and the establishment of investigatory committees, no such tribunal was ever established, and prosecutions occurred in national courts. The League of Nations made an effort to create an international criminal tribunal to enforce the 1937 terrorism convention, but it failed with the League.¹⁰²

Following World War II, the victors established the International Military Tribunals at Nuremberg and for the Far East through treaties. These transnational tribunals, still supplemented by national courts, prosecuted egregious human rights violations that occurred during the war, including genocide, war crimes, crimes against peace, and crimes against humanity.¹⁰³ In addition to these ad hoc efforts, the U.N. General Assembly in 1947 mandated that the International Law Commission (ILC) create a statute for an international criminal court and a codification of offenses.¹⁰⁴ Despite the ILC's creation of the draft code of offenses in 1954, however, the United Nations did not begin to move forward significantly with the project until 1989, in part due to the Cold War.¹⁰⁵ After many years of work by the ILC

99. See Statute of the International Court of Justice, art. 34, para. 1, 59 Stat. 1055, 1059 (1945) ("Only states may be parties in cases before the Court."). In addition to these standing limits, the court has jurisdiction only if states commit to compulsory jurisdiction or a convention provides for it. See *id.* art. 36, 59 Stat. at 1060.

100. See generally HENKIN ET AL., *supra* note 8, at 26-42 (discussing enforcement of international law).

101. See *infra* notes 107-109 and accompanying text.

102. For a description of these post-World War I developments, see M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 51-55 (1995). See also PAUST ET AL., *supra* note 25, at 844-45.

103. For a discussion of the Nuremberg and Far East Tribunals, see PAUST ET AL., *supra* note 25, at 710-23. See also Bassiouni, *supra* note 102, at 55-56.

104. See Bassiouni, *supra* note 102, at 58.

105. See PAUST ET AL., *supra* note 25, at 844-47; Bassiouni, *supra* note 102, at 56-63.

and an American Bar Association task force to develop the framework for such a body, the U.N. General Assembly passed a resolution in 1992 requesting that the ILC provide a draft statute for an international criminal court.¹⁰⁶

The creation of the ad hoc Yugoslav and Rwandan Tribunals has helped push forward the international criminal court project. Unlike the post-World War II tribunals constituted through multilateral agreement, these are truly international tribunals developed through U.N. Security Council Resolutions. The establishment of the Yugoslav Tribunal, especially followed by the United Nation's structural improvements in its creation of the Rwandan tribunal, indicated the international community's institutional capability to create a permanent criminal tribunal.¹⁰⁷

Despite the increased optimism and progress that have followed, however, an international criminal court still does not exist. Although a draft statute and report were completed in 1993 and the U.S. Senate called for advancement of such a court, many unsettled issues of substantive reach and procedure remained.¹⁰⁸ An ad hoc committee in 1995 and a preparatory committee in 1996 failed to produce a consolidated draft statute despite their efforts. A 1997-1998 preparatory committee is continuing the project to create a draft.¹⁰⁹ Even assuming that these issues are finally resolved and a court is constituted, the ICC will still have to sort out over time its identity in the international community. Thus, while an international criminal court would help address some of the institutional inadequacies of the international system,

106. See *Report of the International Law Commission on the Work of the Forty-Fourth Session*, U.N. GAOR 6th Comm., 47th Sess., U.N. Doc. AJ/47/584 (1992) (proposing a General Assembly Resolution); M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 399 (1997) (describing passage of the resolution); see also TASK FORCE REPORT, *supra* note 98, at 4.

107. For a tracing of this interactive history, see PAUST ET AL., *supra* note 25, at 844-57. Many scholars and policymakers have discussed these tribunals. Much analysis compares the Yugoslav and Rwandan tribunals. See *War Crimes Case Studies*, *supra* note 96 (providing prosecutorial, governmental, and nongovernmental organizational perspectives on issues of identification and approach in prosecuting genocide, war crimes, and crimes against humanity); Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 BROOK. J. INT'L L. 111 (1996) (comparing subject matter jurisdiction, violations involved, and the approach of the United Nations). Other sources discuss the progress of the Yugoslav tribunal thus far. See SECTION OF INT'L LAW AND PRACTICE, ABA, REPORT ON THE PROPOSED RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES IN THE FORMER YUGOSLAVIA (Karen Tucker ed., 1995) [hereinafter PROPOSED RULES] (describing the work of the Task Force, the state of the proposed rules, and areas for further resolution); Ruth Wedgwood, *War Crimes in the Former Yugoslavia: Comments on the International War Crimes Tribunal*, 34 VA. J. INT'L L. 267 (1994) (describing three obstacles to the effectiveness of the Yugoslav tribunal: U.N. unwillingness, the absence of relevant legal sources, and the political ramifications upon the peace process). Still others analyze the Rwandan Tribunal and the progress that it represents. See Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for Rwanda*, 9 FLA. J. INT'L L. 421 (1994) (providing background on the Rwandan tribunal and analyzing its legal innovations); Payam Akhavan, *Current Development, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996) (describing the history of the Rwandan tribunal and comparing it to the Yugoslav tribunal).

108. See TASK FORCE REPORT, *supra* note 98, at 4.

109. See Bassiouni, *supra* note 106, at 399-402.

it is not clear exactly when such a body will begin to exist and function effectively.

Even when (or if) an international criminal court does come into existence, it will not eliminate the need for national prosecution. For example, although many agree that financial sanctions would be inadequate, imprisonment raises logistical difficulties not found within a national prison and court system.¹¹⁰ The proposed International Criminal Court (ICC) thus may not be able to provide a full enforcement of decisions, leaving a gap for national courts with their established criminal enforcement mechanisms to fill. Additionally, the ICC's inherent subject-matter jurisdiction currently includes only aggression, genocide, crimes against humanity, and war crimes;¹¹¹ many severe human rights violations, such as torture, thus are not included directly.

More importantly, the ICC is being formulated to have concurrent jurisdiction with states' courts. The relationship between the ICC and national courts has been characterized by the word "complementarity."¹¹² Although the precise meaning of this term has been much disputed, it seems to indicate that states should have some say in how the ICC seizes a matter. Further debate has occurred over whether the ICC will have primacy over national courts.¹¹³ The existence of concern about jurisdictional interaction reinforces that the ICC is not intended to supplant entirely national jurisdiction over international human rights matters.

C. *The Incompleteness of National Civil Jurisdiction*

At a first view of U.S. law, one might wonder why a criminal human rights regime is even necessary. After all, the civil regime for addressing severe human rights violations is quite well developed. Since the Second Circuit's decision in *Filartiga v. Pena-Irala*¹¹⁴ to allow a noncitizen to sue another noncitizen for torture that occurred in Paraguay, U.S. courts have allowed numerous suits against human rights offenders under the ATCA¹¹⁵ for customary international law violations. The TVPA¹¹⁶ and the amendment of the Foreign Sovereign Immunities Act¹¹⁷ through the Antiterrorism and

110. See TASK FORCE REPORT, *supra* note 98, at 37-39

111. See Bassiouni, *supra* note 106, at 411.

112. For complementarity analysis, see *id.* at 411-12; and Lara Ballard, *The U.S., the ICC, and the Bottom Line: The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. (forthcoming 1997) (manuscript at 16-17, on file with the *Yale Law Journal*).

113. See Bassiouni, *supra* note 106, at 409-10.

114. 630 F.2d 876 (2d Cir. 1980).

115. 28 U.S.C. § 1350 (1994).

116. Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) For discussion of the impact of the TVPA, see Rachael E. Schwartz, "And Tomorrow?" *The Torture Victim Protection Act*, 11 ARIZ. J. INT'L & COMP. L. 271 (1994); and Kathryn L. Pryor, Note, *Does the Torture Victim Protection Act Signal the Imminent Demise of the Alien Tort Claims Act?*, 29 VA. J. INT'L L. 969 (1989)

117. 28 U.S.C.A. §§ 1330, 1602-1611 (West Supp. 1997)

Effective Death Penalty Act of 1996¹¹⁸ have reinforced this regime statutorily.

The ATCA, a relic of the Judiciary Act of 1789,¹¹⁹ provides U.S. district courts with "original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States."¹²⁰ This Act has been found to provide a cause of action for customary international law violations abroad, including torture;¹²¹ prolonged arbitrary detention;¹²² summary execution;¹²³ disappearances;¹²⁴ cruel, inhuman, or degrading treatment (when constitutionally proscribed);¹²⁵ genocide; and war crimes.¹²⁶ Since the torts being adjudicated often have no connection to the American forum, the only applicable jurisdictional base is universal. Thus, in the civil context, universal jurisdiction through an implementing statute has been used to allow foreign plaintiffs to obtain judgments against foreign defendants based on customary international law.

This jurisprudence has not expanded in a completely unfettered way. Until the passage of the TVPA, the D.C. Circuit's 1984 decision in *Tel-Oren v. Libyan Arab Republic*¹²⁷ called into question the viability of the ATCA as a litigation tool.¹²⁸ In addition, ATCA monetary awards have been difficult to enforce; very few of the judgments have proved collectible thus far.¹²⁹ Thus victories have been largely symbolic and have resulted in little restitution for the victims.

Moreover, the range of possible defendants is unclear, but likely limited in a way that prevents comprehensive relief. Based on the Second Circuit's

118. 28 U.S.C.A. § 1605 (West Supp. 1997) (creating a human rights exception to sovereign immunity).

119. Ch. 20, § 9(b), 1 Stat. 73, 77 (1789).

120. 28 U.S.C.A. § 1350 (1994).

121. *Filaritiga* serves as the lead case in the ATCA jurisprudence, clarifying that the statute provides a cause of action for official torture as a violation of the law of nations. See 630 F.2d at 881-85. Numerous opinions have followed *Filaritiga* and held that official torture violates the law of nations. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995); *In re Estate of Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994); *Siderman de Blake v. Argentina*, 965 F.2d 699, 716 (9th Cir. 1992); *Linder v. Portocarrero*, 963 F.2d 332, 336 (11th Cir. 1992); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996); *Xuncax v. Gramajo*, 886 F. Supp. 162, 177, 185 (D. Mass. 1995); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987), *modified*, 694 F. Supp. 707 (N.D. Cal. 1988).

122. See *Forti*, 672 F. Supp. at 1541-42 (establishing prolonged arbitrary detention as actionable under the ATCA); *Fernandez-Roque v. Smith*, 622 F. Supp. 887, 901-04 (N.D. Ga. 1985) (establishing that prolonged arbitrary detention violates international law and mentioning *Filaritiga* as an example of courts' recognizing customary international law violations).

123. See *Forti*, 672 F. Supp. at 1542.

124. See *Forti*, 694 F. Supp. at 709.

125. See *Gramajo*, 886 F. Supp. at 184-89.

126. See *Kadic*, 70 F.3d at 242-43. For an in-depth analysis of the ATCA jurisprudence, see BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (1996). See also Osofsky, *supra* note 42 (manuscript at 19-34) (tracing the ATCA recognition of these norms).

127. 726 F.2d 774 (D.C. Cir. 1984).

128. See *id.* at 801 (Bork, J., concurring) (claiming that Act does not provide a cause of action).

129. See STEPHENS & RATNER, *supra* note 126, at 218-24. In a criminal prosecution, in contrast, often the state has custody of the offender and can thus enforce judgment by imposing imprisonment.

decision in *Kadic v. Karadzic*,¹³⁰ probably only certain offenses constitute human rights violations when committed by private actors.¹³¹ On the other end of the spectrum, the Foreign Sovereign Immunities Act,¹³² even with its recent amendment to allow a very limited human rights exception to immunity,¹³³ has served as a bar to most human rights suits brought directly against foreign states.¹³⁴ Even with these obstacles, however, the United States has provided many human rights victims with a forum for civil redress.

Despite the existence of strong civil law remedies in the United States, they cannot and are not meant to play the same role as criminal prosecution. Civil law focuses fundamentally on one person's compensating another for a wrong committed. With the exception of punitive damages (which are more criminal in character), civil law penalties attempt mainly to make the victim whole.¹³⁵ Criminal prosecution, in contrast, focuses on punishing the offender rather than on providing the victim with redress. Theorists justify the importance and appropriateness of such punishment on the grounds of retribution, protecting social norms, and enhancing social utility in various ways.¹³⁶

Both types of legal sanctions have roles to play in human rights protection. Victims should be able to gain compensation when they have suffered terrible harms. Although no amount of money can make them as they were before, civil damage awards can aid physical and psychological healing. A nation also should be able to acknowledge egregious human rights abuses as offenses against both the international community and its own social order. Criminal punishment serves the role of reinforcing foundational global values and, one would hope, of providing a deterrent. Material compensation of the victim does not indicate fully the destructiveness of human rights violations to the fabric of society or the need to indicate the intolerability of the offender's behavior. Thus, even if human rights violations are offenses against the foundational norms of the international community, neither a civil or criminal remedy alone can address comprehensively all of the damaging aspects.

130. 70 F.3d 232 (2d. Cir. 1995).

131. *See id.* at 238-44. The opinion analyzes only a few offenses, leaving the state actor requirement ambiguous for numerous other human rights violations. *See id.*

132. 28 U.S.C.A. §§ 1330, 1602-1611 (West Supp. 1997).

133. *See* Antiterrorism Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (1996) (codified at 28 U.S.C.A. § 1605(a)(7) (West Supp. 1997))

134. *Cf.* Hari M. Osofsky, *Foreign Sovereign Immunity from Severe Human Rights Violations. New Directions for Common Law Based Approaches*, 11 N.Y. INT'L L. REV. (forthcoming 1998) (on file with the *Yale Law Journal*) (proposing a systematic approach to foreign sovereign immunity and human rights)

135. *See* RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 863-64 (6th ed. 1995) (discussing this theory of damages).

136. For a description of these theories of punishment, see 4 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1337-46 (Sanford H. Kadish ed., 1983). *See also* HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 6-33 (1979) (discussing varying conceptualizations of criminal justice); C.L. Ten, *Positive Retributivism*, *SOC PHIL. & POL'Y*, Spring 1990, at 194, 200-08 (describing theories of punishment as "penance" and "deterrence").

III. POTENTIAL PITFALLS OF BROADER NATIONAL CRIMINAL JURISDICTION

Unfortunately, expanding national criminal jurisdiction has a number of potential downsides. If a criminal act occurs in a country other than the United States, the nation with territorial jurisdiction may claim that U.S. prosecution invades its sovereign control over its territory regardless of the international community's recognition of universal jurisdiction. It may argue that the United States lacks sufficient ties to the wrong to become legitimately involved. Within the United States, an expanding criminal regime may cause massive delays in parallel civil suits, denying already victimized people swift redress. Beyond these structural problems, practical difficulties abound. The appropriate scope of national criminalization is unclear, reflecting the ambiguity of international law. In addition, human rights victims and nongovernmental organizations may face cumbersome bureaucratic hurdles in attempting to convince the government to initiate criminal proceedings. This part explores these difficulties, each of which must be addressed to achieve a comprehensive and effective human rights regime in the United States.

A. *Sovereignty and Legitimacy Concerns*

Almost all applications of universal jurisdiction conflict with assertions of sovereignty. Except for hypothetical human rights violations that occur in the middle of the high seas on floating pieces of wood that belong to no nation, abuses are committed within the territory of a nation. Given the strength of the territorial principle of jurisdiction, the nation in which the harm occurred usually has some interest in it regardless of whether it is too complicit to provide a fair prosecution. Thus, when a country takes jurisdiction on universal grounds over events occurring in another nation, this grant probably impinges upon the territorial interests of that other country and therefore upon its sovereign realm.¹³⁷

Although many human rights abuses, as a matter of international law, provide a basis for universal jurisdiction, they still involve a particular person harming another in a particular place, sometimes with the purpose of promoting a policy objective. Given the four bases of jurisdiction in addition to universal jurisdiction, the jurisdictional ties of some forums to such behavior will be stronger than those of others.¹³⁸ When a nation with weaker ties to the abuse takes jurisdiction, it indicates that it considers itself a more appropriate forum. Unless its reasons for assuming jurisdiction are particularly sound (such as the lack of a more appropriate forum in which the suit might

137. See generally BROWNIE, *supra* note 8, at 287-97 (discussing state sovereignty).

138. See *supra* text accompanying note 8.

proceed), the trial may raise international questions of legitimacy, the universal base for jurisdiction notwithstanding.¹³⁹

All of these issues become particularly acute in the criminal context because, as the Supreme Court indicated in a case involving human rights violations, police power is “peculiarly sovereign in nature.”¹⁴⁰ One of the most fundamental functions of a state is to make law and punish its breach. When one state interferes with criminal violations of another state’s law occurring in that other state, it opens itself to sovereignty and legitimacy criticisms.¹⁴¹ Thus any policy decision to expand jurisdiction must proceed in a way that minimizes sovereignty concerns and maximizes legitimacy.

B. *Risk of Undermining the Civil Regime*

The comprehensive approach to civil and criminal jurisdiction proposed above will work only if the United States exercises its prosecution power in an expeditious and minimally interfering way. Parallel proceedings can cause many difficulties for both the criminal and the civil suit. A defendant’s success in the civil suit may depend on the provision of information that could undermine Fifth, Sixth, and Fourteenth Amendment rights. Meanwhile, the withholding of information to protect those rights in the criminal suit may affect a civil defense adversely. Because the civil and criminal proceedings are likely to be dealing with interrelated issues, holding them simultaneously also might cause inefficiencies and slow down both proceedings.¹⁴²

To address these issues, civil suits are often stayed until the termination of criminal proceedings. As the Supreme Court said in *United States v. Kordel*,¹⁴³ “Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such an action, sometimes at the request of the prosecution . . . sometimes at the request of the defense.”¹⁴⁴ In applying this balancing test, courts generally stay civil proceedings when the two suits involve the “same matter” and a “serious offense.”¹⁴⁵ Since human rights

139. See, e.g., *supra* notes 63-67 and accompanying text (describing the controversy over *Yunis*)

140. *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993).

141. See *id.*

142. For a detailed examination of the difficulties of parallel civil and criminal proceedings, see Note, *Using Equitable Powers To Coordinate Parallel Civil and Criminal Actions*, 98 HARV L REV 1023 (1985). For a discussion of how civil and criminal actions can become intertwined, see *Campbell v Eastland*, 307 F.2d 478, 480 (5th Cir. 1962), in which a civil action for a tax refund was closely tied to a criminal prosecution for fraud.

143. 397 U.S. 1 (1969).

144. *Id.* at 12 n.27.

145. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (1980) The opinion clarifies that stays are not constitutionally required, see *id.* at 1375, but states:

Other than where there is specific evidence of agency bad faith or malicious governmental tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil

violations are very serious crimes and would arise out of the same behavior as the parallel ATCA suits, a civil stay seems probable.

The nature of human rights violations creates the risk that civil stays could be particularly lengthy and thus burdensome. A prosecutor generally requests a stay when an indictment looks likely. As Alan Tieger, prosecutor at the International Criminal Tribunal for the former Yugoslavia from 1994 to 1996, stated, the investigation in a complex international human rights prosecution probably will be longer than in a domestic criminal one.¹⁴⁶ First, the scale is typically different; investigators often must address a widespread pattern of abuse. In addition, he indicated that the dispersion of witnesses means that numerous governments may be involved in the production and discovery of evidence. Finally, the offenders may not be in the United States when grand juries indict them, causing further delays.¹⁴⁷

Thus, while a normal delay from a civil stay rarely would last much more than a year, delays in the human rights context could conceivably amount to several years. One can imagine a situation in which the civil suit is stayed pending the resolution of possible prosecution, which is stayed in turn pending the determination of a foreign court or tribunal. Although the criminal mechanism provides an important tool of punishment unavailable under ATCA suits, its expansion could damage the civil law regime by making the completion of such suits more difficult. While international law and the need for completeness suggest the value of an expanded criminal regime, it will increase justice only if it does not reduce opportunities for redress.

C. *Ambiguities of International Law*

Due to the evolution of international law described in Part I, some human rights treaties provide for national criminal jurisdiction and some do not. While the universality of the prohibition against genocide is as well (or even better) developed in customary international law as the norm against torture, the Torture Convention provides much more extensive jurisdiction than does the Genocide Convention.¹⁴⁸ The U.S. statutory regime reflects this disparity in treaty law. Statutory criminal jurisdiction includes torture, hostage taking, aircraft terrorism and hijacking, but not genocide, war crimes, or crimes

or administrative action involving the same matter. The noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case. If delay of the noncriminal proceeding would not seriously injure the public interest, a court may be justified in deferring it.

Id. at 1375-76.

146. Telephone Interview with Alan Tieger, Special Investigative Counsel, Department of Justice (Aug. 22, 1997).

147. *See id.*

148. *See supra* Section II.A.

against humanity.¹⁴⁹ Because explicit congressional authorization is the only viable basis for criminal prosecution, comprehensive and equal justice for victims of these similarly unacceptable atrocities is currently unlikely.

In order to expand the U.S. regime with regard to customary international law norms, Congress must try to establish when universal jurisdiction should become part of the criminal code. As discussed further in Section IV.B, the lack of consensus beyond the most clearly established norms conveying universal jurisdiction would make establishing a truly comprehensive schema quite difficult. This lack of consensus stems from difficulties in ascertaining the state of customary international law due to its inherently ambiguous nature. The ATCA civil law regime, which to date is based entirely on customary international law, reflects these difficulties; the courts have yet to develop a precise methodology for determining when norms fall within their reach.¹⁵⁰ Since determinations of customary international law are based on a compilation of evidence that is highly susceptible to interpretation, an appropriate, comprehensive justice may be limited further by confusion or disagreement about which international criminal law violations deserve national jurisdiction.¹⁵¹

D. *Difficulties of Accessing Prosecution*

Assuming that the above problems have been overcome, the nature of prosecution itself provides a further obstacle to obtaining justice in such cases. Unlike a civil suit in which anyone may bring a claim, only representatives of the executive branch (generally U.S. Attorneys) have the authority to prosecute criminals federally.¹⁵² In order to initiate a prosecution against a torturer who happens to be visiting or residing in the United States, people who represent the government must be convinced to bring the case. Even if the government agrees to prosecute, the bureaucratic processes involved may be slower than simply filing a civil suit.¹⁵³ These practical difficulties pose particularly challenging obstacles when the offender is within the United States for only a brief period of time. By the time an indictment is obtained, the offender may be abroad and difficult to bring back to the United States.

149. See *supra* Section II.B.

150. Scholarly discussion of the requirements for norms under the ATCA tends to take the form of stating the ambiguous international law standards. See, e.g., STEPHENS & RATNER, *supra* note 126, at 49-62; see also Osofsky, *supra* note 42 (manuscript at 11-34) (proposing a framework for approaching new norms in the ATCA context).

151. See PAUST ET AL., *supra* note 25, at 3-15 (discussing various sources and approaches to international criminal law).

152. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 1-11 (6th ed. 1995) (describing the initiation of a criminal case).

153. Criminal prosecution generally involves investigation, arrest, possible pre-trial release, plea, trial, and sentencing. For felonies, a grand jury indictment occurs after arrest but before trial. See *id.*

The experience of human rights advocates in the United Kingdom illustrates this difficulty. Like the United States, the United Kingdom passed a criminal statute implementing its obligations under the Torture Convention. Section 134 of the Criminal Justice Act of 1988¹⁵⁴ allows a criminal action against a "public official or person acting in official capacity whatever his nationality" for committing torture in the United Kingdom or elsewhere.¹⁵⁵ The main limitation upon proceedings is that they require the consent of the Attorney General for England and Wales, the Attorney General for Northern Ireland, or the Solicitor General, depending on the specific case.¹⁵⁶

Because of this requirement, any analysis of the U.K. Act, other than of the difficulties in bringing cases under it, is almost entirely theoretical at this time. When General Augusto Pinochet of Chile visited the United Kingdom in 1994, human rights groups requested that the Attorney General prosecute him,¹⁵⁷ but the government asked for more evidence, and Pinochet left before further steps could be taken.¹⁵⁸ While more attempts to invoke the Act may occur in the future, the fact that this law has remained dormant for nine years despite the efforts of advocates suggests that governmental involvement in the criminal process may greatly limit opportunities for such prosecutions. If the bureaucratic obstacles in the United States are at all similar, even existing statutory regimes with explicit statutory jurisdiction may not lead to extensive prosecution. The paucity of prosecutions to date under the existing laws granting criminal jurisdiction related to human rights may reflect some of these constraints.

IV. RECOMMENDATIONS FOR AN INTEGRATED NATIONAL APPROACH

The previous part's discussion of policy issues raises several normative questions: How should the U.S. government approach the prosecution of international human rights crimes? What range of abuses should it codify? When should prosecutors and courts make the discretionary decision to exercise the existing criminal jurisdiction? One answer to these questions, based on realism and sovereignty concerns, is that the United States should do whatever the international community decides. This answer begins with the premise that international law arises through the voluntary agreement of states

154. Criminal Justice Act of 1988, ch. 33, § 134.

155. *Id.*

156. *See id.* § 135. The *Code for Crown Prosecutors* describes in detail the criteria for instituting criminal proceedings: sufficiency of admissible and reliable evidence to afford realistic prospect of conviction. *See generally, e.g., Charging the Right Driving Offence*, 146 *NEW L.J.* 414 (1996) (describing these criteria).

157. *See* Hella Pick, *Scotland Yard Investigating Pinochet Torture Claims*, *GUARDIAN* (London), June 15, 1994, at 8.

158. *See* Annika Savill, *Inside File: Pinochet's Shopping Spree Gets Green Light in Britain*, *INDEP.* (London), June 16, 1997, at 11.

over time. Since universal jurisdiction involves a ceding of states' territorial control, states should determine what offenses should be prosecutable and how much other states should be able to punish them. Under this view, a state's national criminal jurisdiction is appropriate when its exercise reflects both the obligations and limitations accepted by that state as a member of the international community.¹⁵⁹

Although this first answer accurately reflects international law, it effectively sidesteps the normative question. States should follow international law and do have the power to create it, but what approach should they take in subjecting human rights offenders to national criminal jurisdiction? When should they exercise the jurisdiction that international law gives them? The following sections address these foundational questions by proposing that Congress create a statute to criminalize severe human rights violations and that prosecutors follow a comparative *forum conveniens* approach to exercising their discretion.

A. *Comprehensive Criminal Codification*

This section proposes that Congress statutorily criminalize well-defined human rights violations over which universal jurisdiction clearly exists internationally. Such an approach is necessary to address the sovereignty and legitimacy concerns detailed above in Section III.A. If a terrible wrong occurring in another country does not actually violate international law and therefore constitute an international crime, the United States would be impinging on another state's internal policing were it to exercise jurisdiction and prosecute. Even when the government in the place of occurrence supports the abuse in question and is unlikely ever to prosecute, the United States has grounds for interference only if a basis for jurisdiction exists. While nationality, passive personality, and protective principle connections to the harm may give the United States additional legitimacy for its claim in some instances, in other circumstances human rights violations occurring abroad do not deserve U.S. criminal jurisdiction unless it is clearly established that they provide a universal jurisdictional basis for prosecution by national courts.

A comparison between civil and criminal jurisdiction further reinforces this point. In a civil trial, the government is a neutral party that simply provides a forum for adjudication and enforcement. When the United States allows suits against foreign human rights violators under the ATCA, it is merely assuring that private parties have a place to determine compensation for wrongs.¹⁶⁰ In a criminal context, however, the United States is a real party of interest in the

159. See generally BROWNLIE, *supra* note 8, at 287-97 (discussing state sovereignty)

160. Even in the civil ATCA context, there still is a requirement of a customary international law or treaty violation. See 28 U.S.C. § 1350 (1994).

suit. The fact that the executive is prosecuting indicates that the harm sufficiently impacts the foundational norms of society to be considered an affront to the United States itself.¹⁶¹ Given this active governmental role, it becomes particularly critical that the issue involved provide a clear basis for governmental involvement based on universal jurisdiction.

What violations fall into this category? Clearly, if an international convention exists in which numerous nations have agreed to national criminal jurisdiction, a right enumerated within the convention provides such a basis. As described earlier, conventions with broad jurisdictional provisions exist with respect to terrorism, torture, slavery and apartheid.¹⁶² These violations are thus the most obvious ones to include in a criminal statutory regime.

Even in the context of explicit treaty provisions, however, the United States has not been particularly vigilant. Because the United States ratifies few human rights treaties, it thus far has provided criminal statutes only for torture and a variety of terrorist activities.¹⁶³ Its ratification and implementation of the Torture Convention came six years after the United Kingdom's.¹⁶⁴ Hence, U.S. implementation of universal jurisdiction in the human rights realm thus far has lagged behind the international establishment of its appropriateness in the treaty regime. Although recognizing these wrongs is a good start, the United States should be more vigilant about timely ratification of future treaties regarding international human rights criminal violations.

The more difficult dilemma occurs with respect to customary international norms. As a domestic law matter, criminalization should not be controversial since it has a basis in the U.S. Constitution. Article I grants Congress the power to "define and punish . . . Offences against the Law of Nations."¹⁶⁵ Since customary international law is essentially the modern successor to the law of nations, this provision provides clear grounds for statutory authority.

The problems arise from international relations concerns and the difficulty of defining the content of customary international law. To avoid raising sovereignty and legitimacy complaints, a criminal regime must target only those violations that are most clearly accepted in the international community as providing a basis for universal jurisdiction. In another article, I address a similar question with respect to human rights exceptions to foreign sovereign immunity, focusing on four criteria: whether the abuse violates an established legal norm of the international community; whether international recognition of national courts' jurisdiction exists; whether the norm has a clear,

161. This approach flows naturally from a theory in which punishment aims to protect morality and deter heinous behavior. *See supra* note 136 and accompanying text.

162. *See supra* Section I.A.

163. *See supra* Section I.B.

164. *Compare supra* notes 5-7, with *supra* note 154.

165. U.S. CONST. art. I, § 8. Professor Louis Henkin discusses the limited judicial interpretation of this provision in LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 68-70 (2d ed. 1996).

international definition; and whether the norm applies to all states.¹⁶⁶ I conclude that torture, genocide, war crimes, crimes against humanity, slave trade, piracy, and aircraft hijacking and attacks meet these four criteria. These abuses all have been repudiated and clearly defined in international conventions or through consistent state practice over many years.

International scholarship and U.S. policy produce very similar lists of norms for which universal jurisdiction exists. Kenneth Randall, for example, describes the reasonably high level of consensus regarding universal jurisdiction over piracy, slave trade, war crimes, hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture, and genocide, as well as the continuing debate over prolonged arbitrary detention and disappearance.¹⁶⁷ The *Restatement (Third) of Foreign Relations Law* recognizes universal jurisdiction over "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism,"¹⁶⁸ but notes that this is an expanding category.¹⁶⁹ The high level of consensus regarding these particular acts thus suggests that criminalization of them would not be internationally controversial.

Codifying these well-developed customary norms seems necessary for basic justice and fairness; excluding norms not explicitly recognized by treaty would devalue customary international law and treat equally well-established violations dissimilarly. It also would ignore the civil jurisprudence under the ATCA that recognizes a customary international law basis for universal jurisdiction over a much wider range of offenses than the criminal statutory regime currently encompasses.¹⁷⁰ Given that U.S. courts have recognized that both genocide and torture provide a basis for universal jurisdiction in the civil context, it is unjust that torturers currently can be criminally prosecuted, while those who perpetrate genocide cannot.

This injustice is particularly profound given the limitations of international and civil mechanisms. Unless the violations happened to have been committed within the context of the former Yugoslavia or Rwanda and the perpetrator is

166. See Osofsky, *supra* note 134 (manuscript at 34-47).

167. See Randall, *supra* note 8, at 834-38; see also Osofsky, *supra* note 134 (manuscript at 34-47).

168. *Id.* § 404.

169. See *id.* § 404 cmt. a. Although it is the nonbinding expression of the American Law Institute, this comment is helpful in elucidating how the United States views universal jurisdiction:

This section . . . recognize[s] that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law. Universal jurisdiction for additional offenses is provided by international agreements, but it remains to be determined whether universal jurisdiction over a particular offense has become customary law for states not party to such an agreement.

Id.

170. For a discussion of the extent of the civil regime, see *supra* Section II.C

in the custody of these tribunals, the violation will not be prosecuted internationally.¹⁷¹ While the civil law regime would allow a suit for money damages, enforcement will be difficult and the international community's interest in punishing the offender will not be realized. Thus, by limiting its statutory regime to a few explicit treaty provisions, the United States is not simply preventing prosecution in its courts, but is also severely diminishing the likelihood that these egregious offenders will ever be brought to justice.

How should such a statute be constructed? Because of the need for fair warning, criminal law must be much more precise than civil law.¹⁷² An appropriate statute, however, need not be terribly cumbersome. It simply should specify which human rights norms it covers, define them by customary international law, and indicate its reach beyond U.S. borders. The violations specified in treaties or well-defined in customary international law would be appropriate for inclusion; for each of them, international law provides a clear basis for universal and thus U.S. jurisdiction. As mentioned previously,¹⁷³ the approach of defining norms through customary international law is well-established in U.S. jurisprudence. The statute that codifies violations not already criminalized thus might read:

Genocide, war crimes, crimes against humanity, slave trade and slavery, and apartheid as defined by customary international law shall henceforth be considered federal crimes within the United States if the act occurred in U.S. territory, if U.S. nationals were involved as victims or offenders, if important national interests were threatened, or if the offender is present in the United States. Offenders may be sentenced to a maximum of life imprisonment.¹⁷⁴

This proposed language includes only the violations from the above list of uncontroversial norms that have not already been codified. Although such a law would need further refinement, this basic approach would provide for an appropriately expanded criminal regime. As international law continues to

171. For a description of the limitations of international mechanisms, see *supra* Section II.B.

172. Thus, simply creating a much more specific criminal version of the ATCA—"Human rights violations that constitute international crimes for which universal jurisdiction exists (either by customary international law or a treaty of the United States) shall henceforth be considered federal crimes within the United States if the act occurred in U.S. territory, if U.S. nationals were involved as victims or offenders, if important national interests were threatened, or if the offender is present in the United States"—would likely be too vague. The vagueness doctrine requires the striking down of statutes that are too imprecise. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-71 (1972) (striking down criminal law against vagrancy on vagueness grounds); see also RICHARD J. BONNIE ET AL., *CRIMINAL LAW* 43-57 (1997) (discussing *Kolender v. Lawson*, 461 U.S. 352 (1983), and subsequent development of vagueness doctrine).

173. See *supra* notes 81-83 and accompanying text.

174. This statute would differ from the act criminalizing torture in its exclusion of the death penalty. The death penalty has been repudiated in the context of human rights. See Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res.44/128, U.N. GAOR, 44th Sess., Annex, Supp. No. 49, U.N. Doc. A/Res.44.128, 29 I.L.M. 1464 (1990). Given that U.S. law punishes heinous criminal acts with the death penalty, however, parallelism to other statutes might dictate its inclusion as a punishment for these violations or amendment of the other laws to exclude it.

develop and additional offenses are added with time, the United States, to avoid sovereignty and legitimacy concerns, should aim to include only well-developed violations for which clear universal jurisdiction exists.

B. *Prosecutorial Discretion: Comparative Forum Conveniens*

Simply because a crime exists does not mean that criminal charges should be brought. Nonprosecutorial discretion is a well-established executive privilege.¹⁷⁵ In the context of severe human rights violations occurring abroad, numerous situations might arise in which prosecution would be ill-advised. A national forum with more ties to the harm may be preparing to prosecute. An international tribunal like those established for the former Yugoslavia or Rwanda may be created specifically to address these crimes. The International Criminal Court may wish to initiate a prosecution. Custody of the perpetrator might seem unlikely, and a civil suit with a high probability of success might already be proceeding. The United States thus needs to develop a systematic approach to evaluating when it should attempt prosecution.

The civil law doctrine of forum non conveniens could be helpful in crafting such an approach for prosecutors. Courts use this mechanism when making a venue choice between a U.S. and a foreign forum. They weigh public and private interest factors after an initial determination of an adequate alternative forum. The court constructed this balancing test in *Gulf Oil Corp. v. Gilbert*¹⁷⁶ and established its modern form in *Piper Aircraft Co. v. Reyno*.¹⁷⁷ *Piper* describes public interest factors as including "local interest in having localized controversies decided at home," judicial familiarity with the governing law, and avoiding court congestion.¹⁷⁸ *Gilbert* discusses the private interest factors as involving location of proof, witnesses, site of harm, and "all other practical problems that make trial of a case easy, expeditious and inexpensive."¹⁷⁹

This balancing test is not a perfect fit for criminal human rights prosecutions. It is not designed to handle an international tribunal with primacy or a domestic court with a pending civil action as the alternative forum. It does not address the difficulties of obtaining custody since the question does not arise in a civil context. The fundamental approach, however, of balancing public and private interests and of considering whether an adequate alternative forum exists, provides a starting point for a prosecutorial approach.

175. See *United States v. Cox*, 342 F.2d 167, 171-73 (5th Cir. 1965)

176. 330 U.S. 501 (1947).

177. 454 U.S. 235 (1981).

178. 454 U.S. at 241 n.6 (quoting *Gilbert*, 330 U.S. at 509)

179. 330 U.S. at 508.

Building upon forum non conveniens analysis, a three-step process could help to systematize the decision of whether to prosecute. I term this process "comparative forum conveniens" because it focuses on comparing alternatives at the initiation stage rather than dismissing for inconvenience. First, the prosecuting authority should determine whether another government considering criminal or civil action exists. This initial assessment would establish potential barriers to the appropriateness of prosecution. If no other cases exist or are likely to be brought, the prosecutor simply can evaluate the criminal case as a singular entity. This step is not part of forum non conveniens analysis, which always involves some sort of alternative forum in the comparison; it should occur in the prosecutorial context, however, since parallel litigation is not a given.

Second, the prosecutor should assess the adequacy of the other forums taking action. This examination flows directly from the forum non conveniens approach. A real danger of injustice exists when prosecutorial discretion is used; victims may lack other viable vehicles of redress, and offenders may escape unpunished. The forum with strongest ties to the crime may, through inaction or inadequacy, be unlikely to provide for appropriate prosecution. In the civil context, forum non conveniens dismissal has usually resulted in a denial (or significantly diminished prospects) of plaintiff redress.¹⁸⁰ Although some of this impact in a civil context is due to differing substantive and procedural law that may be less applicable to criminal prosecution,¹⁸¹ prosecutors should conduct their discretionary analysis with this concern in mind.

In particular, those conducting the appraisal should determine whether the forum to which they are deferring actually will expeditiously bring justice. Even after discretionary nonprosecution has occurred, prosecutors should track whether the other forum is proceeding and, if no progress occurs, should reconsider its comparative forum conveniens analysis. Such an approach will prevent the possibility that statutory expansion would become meaningless because of overcautious use of discretion.

This adequacy assessment is particularly important when the state in which the offense occurred prosecutes. States often have some level of responsibility for the human rights violations occurring within their borders. Governmental instability and complicity or a judiciary lacking in independence might make the prospects of obtaining a just prosecution slim. In such a case, the United States should consider asserting jurisdiction even if its connections to the

180. See Molly M. White, Comment, *Home Field Advantage: The Exploitation of Federal Forum Non Conveniens by United States Corporations and Its Effects on International Environmental Litigation*, 26 LOY. L.A. L. REV. 491, 510-26 (1993).

181. The Court has held that an unfavorable change in the substantive law does not preclude a forum non conveniens dismissal. See *Piper*, 454 U.S. at 247 ("The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.").

violations are less strong. This type of reasoning flows well from the U.S. forum non conveniens jurisprudence in a civil context. If a balance of public and private factors weighs in favor of another forum, the U.S. court will dismiss on forum non conveniens grounds, but only if that other judicial system will provide an adequate alternative forum.¹⁸² This approach prevents potentially unfair situations in which victims cannot obtain redress because they are forced to use court systems that provide no prospect of relief. In order for international human rights criminal norms to have meaning, some basis must exist for the prosecution of violators. Assuming jurisdiction when more connected forums are not adequate ensures this implementation of internationally codified values.¹⁸³

Third, the prosecutor should conduct a balancing test. In addition to the traditional forum non conveniens factors, prosecutors should consider the level of jurisdictional ties to the United States. Even if universal jurisdiction exists over a violation, the United States nevertheless may not be the most appropriate forum for the prosecution. When an international criminal law violation occurs within another country, involves nonnationals who are not located in the United States, and does not directly threaten U.S. interests, the case for taking jurisdiction may be less strong than that of another state. If all states granted jurisdiction for every international criminal law violation, the absurd result of hundreds of parallel prosecutions might occur. Universal jurisdiction thus is a necessary but not a sufficient condition for the appropriateness of prosecution.

Although this test is useful, the criminal context makes other considerations important as well. Unlike in a contract or tort dispute, crimes neatly involve offenders and victims. The forum non conveniens criteria are not directed toward criminal prosecutorial discretion and thus could use some supplementation. The four other traditional bases for jurisdiction could help establish the comparative connectedness of various possible forums to the crime. Territoriality is clearly the most traditional and well-accepted basis for jurisdiction.¹⁸⁴ If an act occurs within the United States or if the offender is located within the United States, a strong forum tie exists. As discussed

182. See *Piper*, 454 U.S. at 254; *In re Union Carbide Corp Gas Plant Disaster*, 809 F.2d 195, 202-03 (2d Cir. 1987).

183. While this adequacy requirement seems to promote justice, defining its contours is more difficult. In a forum non conveniens context, U.S. courts have used a low threshold for adequacy, clarifying that favorableness and adequacy are distinct concepts. See, e.g., *Union Carbide*, 809 F.2d at 198 (discussing the district court's analysis of the procedural safeguards of the Indian legal system). Given the peculiar sovereignty concerns of international criminal adjudication, the United States should provide clear standards for how it evaluates other judiciaries. Although a full discussion of this requirement is beyond the scope of this Note, I suggest judicial independence and substantive and procedural adequacy as the relevant categories to consider in such an analysis.

184. See Born, *supra* note 15, at 6-21; Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 883-84 (1989)

before,¹⁸⁵ U.S. courts have pushed this principle of connectedness to its limits, allowing one's presence within the country to be a sufficient basis for the territorial connection. Such an approach seems to corrupt the concept of territoriality and provide a basis for the absurdity that any country could develop a legitimate territorial link simply by abducting its target. Regardless of how one views this American extension, however, territoriality more generally provides the strongest way to show a forum's additional connection beyond the universality of the crime.

Nationality of offender provides the next strongest secondary jurisdictional base. Countries have an interest in regulating the behavior of their nationals. When such a person violates foundational international norms, his or her home country suffers some level of international embarrassment and injury to the social fabric.¹⁸⁶ The protective and passive personality principles provide a somewhat more controversial supplementary basis for making a universal jurisdiction grant situationally appropriate. Although an injury to the United States through harm to nationals or threats and manipulation provides it with a stake in the prosecution, its capacity to regulate the offender in question is weaker than that of a country with a territoriality or nationality connection.¹⁸⁷

Beyond this assessment of ties, the analysis should consider the needs of the victims. The decision to prosecute could very well undermine the remuneration efforts of those who have personally suffered. The prosecutors should thus assess the comparative merits of civil and criminal suits and the potential impact of a civil stay, considering questions such as the following: Do the victims or concerned nongovernmental organizations plan to bring a civil suit? What is their likelihood of success and recovery? What impact would such a decision have on the development of jurisprudence and thus future victims' potential for redress? How high is the probability of collecting enough evidence for indictment? How lengthy will that collection process likely be? What are the possibilities for bringing the offender within U.S. custody? The answers to these questions will help prosecutors balance the benefits of the criminal trial against the possible harm to victims' civil efforts.

Finally, foreign policy and political feasibility considerations should (and always will) enter into the prosecutorial assessment. The prosecutor may decide that overriding policy and national security concerns supersede his or her desire to bring a violator to justice. Such determinations fall squarely within the executive branch's authority and are thus appropriate for a

185. See *supra* notes 63-67 and accompanying text.

186. See Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 *YALE J. INT'L L.* 41, 65 (1992).

187. See Monika B. Krizek, Note, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 *B.U. INT'L L.J.* 337, 339-40 (1988) (discussing the fact that not all states accept the principle of protective jurisdiction).

prosecutor to make.¹⁸⁸ If the executive branch decides not to bring a criminal action, it should endeavor to avoid unnecessarily interfering with other efforts to bring a person to justice, both civilly or criminally. In addition, while these concerns provide legitimate grounds for nonprosecution, they should not be used as an excuse for the United States to avoid international responsibilities.

The application of the comparative forum conveniens approach to the scenario with which this Note began exemplifies how it might work in practice. The prosecutor first would consider whether another potential litigative forum exists. In this case, the only other action is the U.S. civil one about to be initiated. The next step would be an adequacy analysis of criminal alternatives to U.S. prosecution. Since the Chinese government was complicit in the torture and no other forums have expressed an interest in prosecution, the U.S. prosecutor likely would conclude that no adequate alternative forum for criminal prosecution exists. Finally, the prosecutor would apply the relevant portions of the comparative forum conveniens case, considering the civil suit and the political considerations. He or she would weigh the potential success of a civil suit against the difficulties of indictment in time to bring the former Chinese prison head into custody during his visit. In addition, the prosecutor would consult throughout the executive branch (in particular, with the State Department and White House) to evaluate whether the prosecution is politically possible given the treaty negotiation and other U.S. relations with China. While the ultimate decision of whether to initiate prosecution would rest on the case-specific determinations made in these three steps, the process provides a systematic mechanism for evaluation.

By assessing the prosecution within international and domestic realities, the comparative conveniens analysis would help avoid the potential pitfalls of more extensive jurisdiction. It would ensure that U.S. incursions upon state sovereignty are appropriate and legitimate in the context of other international efforts. This approach also would include civil remedies within the prosecutorial calculus, providing more protection for victims, who have the greatest personal stake in addressing the violations. Finally, a systematic approach would increase the efficiency of the prosecutorial decision and thus minimize unnecessary bureaucracy and delays.

V. CONCLUSION

Currently, any analysis of U.S. prosecution of international human rights violations is necessarily theoretical. Despite its well-developed civil

188. Support for the executive's foreign affairs and national security power can be found in the U S Constitution and case law. See U.S. CONST. art II, § 2 (making the President the Commander-in-Chief of the armed forces); *United States v. Curtiss-Wright*, 299 U.S. 304, 319-22 (1936) (discussing the President's authority over foreign affairs); see also *United States v. Nixon*, 418 U.S. 683, 706 (1974) (discussing executive privilege with respect to "sensitive national security secrets")

jurisprudence, the United States only recently has acquired statutory bases to begin imposing criminal sanctions upon offenders. While its prosecution of terrorism cases over the last ten years indicates a willingness to implement these laws, U.S. methods of seizing offenders, though allowed by the courts, are inappropriate. Indeed, there is a deep irony in using means that arguably violate human rights to achieve the end of prosecuting those who have committed violations.

As the United States develops its statutory regime, it should avoid its current inconsistent implementation of universal jurisdiction based simply on treaty ratification. Instead, it should establish a regime that actually reflects a recognition of the state of international law, just as U.S. courts do in the ATCA context. Withholding jurisdiction should depend on the inappropriateness of a particular action rather than on spotty codification.

The United States is merely at the first stages of developing a criminal human rights jurisprudence. Political realities and instructive muddling will likely characterize the developments over the next few years. This Note's recommendations provide a starting point for systematization as the United States begins to develop a comprehensive domestic regime for human rights redress. Through a balanced and realistic approach, the United States can play a proper role in ensuring that egregious human rights violators are treated as the "enem[ies] of all mankind"¹⁸⁹ that the international community recognizes them to be.

189. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980). The above use of the term seems particularly appropriate in light of *Filartiga*, which expanded the use of this term from piracy to torture in an inspirational passage:

Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

Id. The proposed new criminal jurisdiction over torture perhaps could do in the criminal realm what *Filartiga* did in the civil one.