

HUMAN RIGHTS ENFORCEMENT IN THE 21ST CENTURY

The international human rights system enters the 21st Century facing a profound anomaly. Despite remarkable normative and institutional developments since the system's inception,¹ the world remains mired in widespread violations of human dignity. Genocidal episodes have repeatedly scared the consciousness of human kind since World War II.² Floods of refugees and simmering ethnic conflicts continually challenge the international community's capacity to respond³ and grotesque forms of physical abuse, such as torture and summary execution, remain commonplace.⁴ Despite a promising trend toward democratic governance around the world, basic civil liberties for countless

¹ It is beyond controversy that the international system has developed a legal regime for the protection of human rights once thought improbable. In addition to an extensive network of widely adopted treaties covering nearly all aspects human life, the international system boasts an elaborate institutional framework for protecting human rights. *See generally* Steiner and Alston, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (Oxford, 1996).

² *See, e.g.*, Committee on the Elimination of Racial Discrimination, 65th Session, Summary Record of the Second Part of the 1665th Meeting, 17 August 2004, Dialogue with Juan Mendez, Special Advisor on the Prevention of Genocide, CERD/C/SR.1665/Add.1, 20 August 2004 (Committee Member Shahi observing that "Regrettably, the United Nations itself had been ineffective in preventing genocide. There had been at least 55 genocides since the Organization's founding, in which approximately 75 million people had died."). *See also* <http://www.genocidewatch.org/genocidetable2003.htm> . The persistence of genocidal episodes prompted Michael Scharf's wry observation that: "[T]he pledge of 'never again' quickly became the reality of 'again and again'...." Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861, 861-62 (1997).

³ The most recent example involves the crisis in Darfur, Sudan. *See* Report Of The International Commission of Inquiry on Darfur, 25 January 2005 (*available at* <http://www.ohchr.org/english/docs/darfurreport.doc>); Report of United Nations High Commissioner For Human Rights, Situation Of Human Rights In The Darfur Region Of The Sudan, E/CN.4/2005/3, 7 May 2004 (reporting a "pattern of massive and gross human rights violations"); Human Rights Watch Report: *Darfur Destroyed, Ethnic Cleansing By Government And Militia Forces In Western Sudan*, Vol. 16, no. 6(a), May, 2004.

⁴ Amnesty International believes that as many as 150 Governments continue to practice torture. *See* <http://www.amnestyusa.org/stop torture/index.do> . Recent events at the Abu Ghraib Prison during the war in Iraq reflects a cold reality for Americans that torture is neither a relic of the dark past nor something perpetrated solely by barbaric foreign despots. *See* Amnesty International Report, *United States of America, Human Dignity Denied, Torture and Accountability in the 'War on Terror'*, *available at* <http://web.amnesty.org/library/Index/ENGAMR511452004> ; Editorial, *Legalizing Torture*, Washington Post, June 9, 2004 at A20; Seymour Hearsh, *Torture at Abu Ghraib*, New Yorker, January 27, 2005.

millions remain only an empty promise.⁵ Most disheartening of all, the two greatest enemies of human dignity, armed conflict and poverty, relentlessly plague the vast majority of human kind.⁶ It seems undeniable that the elaborate international human rights edifice, now often rhetorically central in international relations, has and can make some difference. Yet, it is equally undeniable that the system has yet to fulfill its promises or significantly reduce violations of human rights worldwide.⁷

The apparent inability of the human rights system to deliver effectively on its lofty and noble promises is not, in many ways, surprising. It is, after-all, a system designed with significantly limited enforcement capacity. Both Pollyannaish and cynical, the international system heavily relies upon the dubious premise that governments will faithfully implement international human rights standards within their own domestic

⁵ See e.g., Freedom House, <http://www.worldaudit.org/civillibs.htm> .

⁶ The “On War Project,” for example, lists over 70 events during the 1990’s that could fairly be described as “armed conflicts.” See <http://www.onwar.com/aced/chrono/index.htm> visited February 23, 2005. See also Ploughshares Project, Armed Conflicts Report 2003, available at <http://www.ploughshares.ca/content/ACR/ACR00/ACR04-Introduction.html> (providing descriptions of 28 armed conflicts on-going in 2003 in which at least 1000 deaths were reported); Center for the Study of Civil War (Uppsala University) <http://www.prio.no/cwp/ArmedConflict/> (providing a detailed database concerning 228 armed conflicts between 1946 – 2003). The U.N. Food and Agricultural Organization and World Health Organization estimate that 25,000 people die everyday from hunger and the effects of poverty, while nearly 1,000,000,000 people are malnourished or hungry. See <http://www.fao.org/english/newsroom/news/2002/9703-en.html> . The Ploughshares Project also provides a map detailing the correlation between armed conflict and high percentages of under-nourished populations. See <http://www.ploughshares.ca/images/articles/ACR02/hungermap.02.pdf> .

⁷ There is scant empirical evidence regarding whether the international human rights system is effectively achieving its objectives. Oona Hathaway’s recent work is a rare example of empirically oriented legal research in human rights. See Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935 (2002) (examining the correlations between ratification of human rights treaties and violations); Oona Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003). See also L. Helfer & A. Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 345 (1997) (analyzing state compliance with the decisions of human rights institutions); Randall Peerenboom, *Show Me The Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 DUKE J. COMP. & INT’L L. 75 (2004)(surveying and discussing attempts to quantify human rights performance with an emphasis on Asia); Ryan Goodman & Derek Jinks, *Measuring The Effects Of Human Rights Treaties*, 14 EUR J. INT’L L. 171 (2003)(critiquing the premises and design of Hathaway’s study). Improvement in human rights conditions are difficult to quantify and causal relationships nearly impossible to demonstrate convincingly given the number and elusive nature of relevant variables.

systems and provide adequate domestic remedies to redress violations.⁸ This reliance on voluntary compliance is theoretically bolstered by a network of international mechanisms and institutions that are, in reality, anemic at best. Although not without exceptions,⁹ most international human rights institutions are generally limited to monitoring state compliance and promoting adherence to underdeveloped international standards through dialogue, condemnation and moral suasion. Most of these institutions suffer from limited or ambiguous decision-making authority and lack effective, independent enforcement mechanisms.¹⁰

Thus constrained, the international system has generally failed to check the abuse of repressive governments and meaningfully deliver the promise of human rights to those most in need of protection. In essence, the international system's approach to enforcement and implementation of human rights has proven unrealistic in a world characterized by oppression, autocratic governments, poverty and armed conflict. Although there is no clear consensus regarding what enforcement of international human rights should look like, few would disagree that existing enforcement mechanisms remain the weakest link in the international human rights system.

In this essay I consider some explanations for this enforcement gap and suggest that traditional approaches to enforcement, while serving some important functions, are inadequate to meet the challenge of effectively realizing human rights in the 21st Century.

These inadequacies include a variety of institutional, conceptual and jurisprudential

⁸ See *infra* notes 33-40, 44-45 and accompanying text.

⁹ See *infra* notes 115-36, 137-43 and accompanying text.

¹⁰ See *infra* notes 67-80 and accompanying text. It is important to recognize that limitations on the decision-making authority of international institutions may serve far more important and less cynical purposes than preserving sovereign power. In the context of functioning democracies, such limitations may reflect appropriate concessions to competing interests such as preserving domestic democratic choice, local autonomy and self-governance. See generally Douglas Lee Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WISC. INT'L L.J. 1 (2003).

weaknesses, some of which are inherent in the system's current design. The most important of these interrelated weaknesses include: (1) failure to develop a coherent overall structure with institutions whose attributes are likely to promote the legitimacy of international decision-making and encourage state respect; (2) refusal to make important distinctions among rights with regard to enforcement methods; (3) failure to adequately pursue individual versus governmental accountability for violations; and (4) inability to develop adequate economic, political, and social incentives that might render voluntary state compliance a more realistic possibility.

Reform of existing institutions is essential and alternative approaches to enforcement should be developed. It is time to rethink the approach and role of international institutions regarding enforcement of human rights. Some important lessons, in this regard, can be drawn from several evolving alternative approaches to human rights enforcement and the success of the European Court of Human Rights (ECHR).¹¹ In this regard, there are three developing enforcement alternatives that are particularly important by virtue of their shared emphasis on individual accountability for a fairly narrow range of egregious, universally understood human rights violations.¹² The first two involve the increased use of "foreign" domestic legal processes,¹³ both civil and criminal, to seek individual accountability against human rights abusers outside of their state of origin. These enforcement approaches might be described as the 'Filartiga'¹⁴ and 'Pinochet'¹⁵ paradigms, based upon the seminal cases that exemplify them. The third

¹¹ See *infra* notes 137-43 and accompanying text.

¹² See *infra* notes 88-136 and accompanying text.

¹³ "Foreign" in this sense means reliance on domestic processes outside of the country in which the alleged violations occurred.

¹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2^d Cir. 1980). See *infra* notes 90, 102-114 and accompanying text.

¹⁵ See *infra* notes 89, 93-101 and accompanying text.

enforcement alternative, of which the Pinochet paradigm is arguably also a part, is the international criminalization of human rights violations.¹⁶ A critical part of this trend is the evolution of meaningful international criminal law processes, such as those being developed by the International Criminal Court and ad hoc war crimes tribunals in the former Yugoslavia and Rwanda.¹⁷

Although these developing alternatives are not themselves the answer to anemic human rights enforcement and each presents its own problems,¹⁸ their shared characteristics provide important reform insights.¹⁹ In particular, these alternatives approaches suggest an important departure from traditional institutional frameworks by recognizing critical distinctions among rights with regards to appropriate enforcement methodologies.²⁰ Each focuses upon individual accountability.²¹ Each takes advantage of forums with clearly established decision making authority and effective enforcement mechanisms that are external to the violating state, yet jurisdictionally constrained. Each focuses on a fairly narrow range of well-defined and egregious human rights violations.

¹⁶ See *infra* notes 91, 115-36 and accompanying text

¹⁷ See *infra* notes 115-36 and accompanying text.

¹⁸ Increased acceptance of alternative methodologies will, in its own right, improve human rights enforcement options for victims and increase the deterrence of wrongful behavior. See *infra* notes 144-152 and accompanying text. Some have argued, however, that applying domestic processes to foreign human rights violations poses problematic issues concerning foreign relations and the role of courts. These might include the dangers of retaliation, political manipulation and disruption of foreign policy. See, e.g., Curtis Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001)(suggesting that these concerns are raised by international human rights litigation generally); Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433 (2002) (summarizing and responding to such concerns). Moreover, for a variety of reasons, it is unlikely that the alternatives will reach significant number of defendants. See *infra* notes 149-52 and accompanying text.

¹⁹ See *infra* notes 152-155 and accompanying text.

²⁰ See *infra* notes 88-136, 152-53 and accompanying text.

²¹ Filartiga style cases are technically not limited to individual defendants. In the United States, for example, a foreign government may also be subjected to civil liability under the narrow exceptions to sovereign immunity authorized by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (a)(5) and (7). The narrowness of this relatively recent exception and other complications in suing foreign governments has caused most litigation in the United States to focus on individual defendants.

These three characteristics sharply distinguish these enforcement alternatives from more traditional approaches to human rights enforcement.

The most important of these characteristics is a focus on egregious violations of largely uncontested human rights standards, such as those commonly associated with *jus cogens* and universal jurisdiction. This focus serves two related and critical purposes. First, it recognizes important distinctions among rights in terms of enforceability that sets the groundwork for desperately needed improvements in the credibility and institutional legitimacy of international decision-making. As a practical matter, governments are more likely to create international institutions with meaningful enforcement powers *if such powers are jurisdictionally constrained to enforce rights for which true international consensus exist.*

Second, appropriate distinctions among rights may also serve to preserve and enhance domestic democracy by reserving the resolution of controversial and genuinely contestable human rights issues to more accountable and democratically legitimate local institutions, subject to relatively weak international supervision. Such distinctions reduce the potential for future, undesirable external interference in domestic democratic choice by international institutions that lack the credentials, accountability and authenticity to render democratically legitimate decision-making regarding controversial moral issues. Correspondingly, such prudential constraints should allow incremental improvement in the credibility and stature of existing international human rights institutions whose effectiveness is ultimately vital to achieving universal adherence to human rights standards.

The persistent, historical refusal of the international system to recognize that not all rights should be implemented or enforced in the same ways has been a mistake.²² It may well be that a relatively weak system of international supervision on the global level is the most appropriate model for those rights involving highly contested moral issues because that model best supports our common interest in democratic governance and self determination. In contrast, strong enforcement mechanisms, including authoritative international criminal law and regional processes, are both more feasible and appropriate for other rights over which international consensus regarding meaning is clear, such as torture, genocide and other egregious violations of basic human dignity.²³ In essence, the international system must develop a more rational, nuanced and practical approach to human rights enforcement if it hopes to fulfill the promise of human rights in the 21st Century.

Although an unrealistic model for international enforcement generally,²⁴ the success of the ECHR provides additional, related insights regarding reform of existing international institutions.²⁵ The court's development of effective institutional characteristics and a carefully crafted jurisprudence defining its role vis-à-vis democratic member states, have been critical components of its successful enforcement record. Important lessons also may be drawn from the Court's regional focus and reliance on independently created economic, political and cultural incentives to induce state compliance. The ECHR's success in navigating the inherent tension between

²² The ECHR has developed a sophisticated jurisprudence recognizing the importance of such distinctions as appropriate to the circumstances of Europe. See Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391, 450-64 (2001) .

²³ See *infra* notes 153-55 and accompanying text.

²⁴ See *infra* notes 139-41 and accompanying text.

²⁵ See *infra* notes 141-43, 153-55 and accompanying text.

international enforcement and national sovereignty has positive implications for the still uncertain and evolving relationship between international institutions and domestic democracy.

In the following parts of this essay, I first provide an overview and critique of the traditional paradigms for enforcing international human rights standards. The purpose of this overview is to clearly identify existing enforcement alternatives and pinpoint their fundamental weaknesses and limitations. In Section II, I briefly describe the developing enforcement trends identified above and important characteristics of the ECHR that highlight lessons for reforming other existing institutions. The remainder of the essay is devoted to sorting out the implications of these trends and alternatives for the future of human rights enforcement, with a particular emphasis on the evolving relationship between international human rights and domestic democracy.

II. The Prevailing Paradigm: Traditional Approaches to Human Rights Enforcement

Accurately generalizing about human rights enforcement is not a simple task. The international human rights system is neither unified nor static. Over its relatively brief evolution, the system has generated a rather complicated structure comprised of numerous institutions of varied decision-making authority, enforcement capacities and mechanisms.²⁶ The success of these institutions' enforcement efforts, at least if measured in practical consequences, has also varied widely. Enforcement within the highly functional European System of Human Rights, for example, hardly resembles that of

²⁶ The international system's complexity reflects a lack of coherent overall structure and a pressing need for reorganization and rationalization that has persisted for many years. *See, e.g.,* Douglas Lee Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 MICH. J. INT'L L. 827, 839-50, 859-64 (1993).

other international human rights institutions, such as those promoted by the U.N. treaty structure or the other regional systems. Indeed, as explained below, it is somewhat of a misnomer to describe the current work of many international human rights institutions as involving enforcement at all.²⁷

Complicating matters, there is considerable disagreement among governments, scholars and the institutions themselves over the appropriate role and authority of many human rights bodies. Some of these basic differences in viewpoint, prompted by lingering ambiguities over legal mandate,²⁸ are reflected in the subtle linguistic distinctions between words such as monitoring, supervision, implementation and enforcement. To monitor or supervise may, for example, imply authority to suggest change but not necessarily the power to bind states in any technical legal sense. Similarly, even when human rights institutions are given technically “binding” legal authority, states may refuse to create mechanisms by which to effectuate implementation of their decisions. Such decisions are, in this sense, binding yet unenforceable.

The term “enforcement” is also subject to ambiguity due to the myriad forms it may take and the imprecise ways in which it is commonly used.²⁹ For example,

²⁷ See *infra* notes 32, 46-51 and accompanying text.

²⁸ See *infra* notes 67-80 and accompanying text.

²⁹ The dictionary definition of the word “enforce” reflects these various meanings: “1: to give force to: STRENGTHEN 2: to urge with energy 3: CONSTRAIN, COMPEL 4: to effect or gain by force 5: to carry out effectively (~laws)...” Webster’s New Collegiate Dictionary (1981). Enforcement issues are endemic to the international legal order, which is characterized by institutions that generally lack direct mechanisms to compel compliance with their decisions. The problems of enforcement and compliance have continued to generate a steady stream of sophisticated academic literature. See, e.g., Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Derek Jinks & Ryan Goodman, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L. J. 621 (2004); David Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW U. L. REV. 879 (2003); Andrew Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Jose Alvarez, *Why Nations Behave*, 19 MICH. J. INT’L L. 303 (1998); Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997). See generally, William Bradford, *International Legal Compliance: An Annotated Bibliography*, 30 N. C. J. INT’L L. AND COM. REG. 379 (2004).

international institutions and governments increasingly bring pressure to bear on a transgressing government in order to induce a change in behavior or policy through public condemnation. Such pressure is often described as enforcement although it seldom involves mandatory sanctions, rarely induces any change in behavior and can usually be ignored entirely without serious consequence.³⁰ In the discussion that follows, “enforcement” is generally used in the more limited sense to describe *authoritative* mechanisms that are designed and expected to *compel* direct consequences, such as changes in governmental policy, payment of civil compensation, or criminal penalties, under the *threat of meaningful sanction*.³¹ Enforcement is, of course, only one of the many ways in which state compliance and implementation of human rights might be induced. As described below, enforcement in this sense forms only a small part of the existing international human rights regime.³²

³⁰There is no doubt that enforcement of human rights takes place in a more indirect sense on many other levels. For example, it is not unreasonable to think of state-to-state posturing over human rights in international relations as a form of enforcement. This is particularly true when such posturing takes place before international institutions that may condemn a state’s human rights performance with subtle consequences for that state’s economic prospects and standing in the international community. Similarly, some states have linked, at least on paper, their grants of foreign aid or trade benefits to certain human rights standards. *See, e.g.,* Remark, *Corporate Responsibility Within the European Union Framework*, 23 W. INT’L L. J. 541, 543-43 (2005); Hathaway, *Integrated Theory*, *supra* note 29 at 504-05. This is undoubtedly enforcement on some level since such linkages are designed to induce changes in the human rights performance of other states.

³¹This definition appears analogous to Hart’s position that law, by its nature, essentially requires the command of the sovereign, backed by meaningful sanctions compelled through the coercive power of the state. *See* H.L.A. Hart, *THE CONCEPT OF LAW* (1961). However, the definition is used here solely in a pragmatic fashion to provide a meaningful benchmark for evaluating whether and how the international human rights system may generate practical consequences from legal norms.

³²Promotional activities of international organizations, for example, potentially play an important role in encouraging state “internalization” of rights through national implementation of legal norms and empowerment of local populations. The literature regarding state compliance with international law also suggests that international legal and institutional processes play a subtle role beyond coercion in developing compliance over time. *See generally* Jinks & Goodman, *supra* note 29 (disputing the “premise” that effective international legal regimes must either coerce or persuade state actors and suggesting that regime design must account for complex “social” factors that influence state behavior, most prominently “acculturation”); Moore, *supra* note 29 at 882-99 (discussing human rights compliance as a form of “signaling” to other states regarding, among other things, readiness and capacity for diplomatic and economic relations). *See generally*, Thomas M. Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* 183-94 (1990) (concept of “legitimacy” as an explanation of the “compliance pull” of international norms).

It is reasonably accurate to characterize the traditional model for implementing international human rights as involving the interplay of domestic and international authority along two related paths. The first path rests on the traditional premise that initial and primary authority for implementing and enforcing international standards lies with domestic institutions. The second path involves the participation of international institutions, most commonly through supervision and monitoring of state compliance.

A. Voluntary Compliance and Domestic Primacy

Under the text of most multilateral treaties, domestic institutions have primary and original responsibility to “give effect” to international human rights and provide an effective remedy for violations.³³ This approach to human rights enforcement, which might be described as the “domestic primacy” path, emphasizes and relies upon voluntary government compliance.

In this regard, it is important to recognize that international law does not require states to authorize direct enforcement of human rights obligations in domestic

³³ Article 2 (2) of the Covenant on Civil and Political Rights, International Covenant on Civil and Political Rights, adopted by the General Assembly Dec. 16, 1966, art. 1, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR], is illustrative. It provides: “2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” The primacy of national implementation is also reflected in the ubiquitous requirement that domestic remedies be exhausted as a prerequisite to invoking the jurisdiction of international human rights institutions. *See, e.g.* Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, 302-46; American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673 (entered into force July 18, 1978), [hereinafter American Convention] art. 46(1)(a). *See also* Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies, Arts. 46(1), 46(2)(a), and 46(2)(b) of the American Convention on Human Rights, Inter-Am. Ct. H.R. (ser. A) para. 2, 14 (Aug. 10, 1990). *See* Pasqualucci, *Preliminary Objections Before the Inter-American Commission of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 VA. J. INT’L L. 1, 60-61 (1999).

institutions.³⁴ Traditionally, states have been categorized as either “monist” or “dualist” in this regard, depending upon whether international obligations are automatically treated as operable domestic law or, rather, only incorporated into domestic law through specific executive or legislative action.³⁵ Monist states follow a “direct” or “automatic” incorporation approach that essentially treats international law obligations, ipso facto, as part of the domestic legal system enforceable like any other source of domestic law. Such direct incorporation would arguably reflect the pinnacle of enforceability since international standards would be directly applied and violations remedied, at least in functioning democracies, by independent and effective domestic institutions.³⁶

So-called “dualist” states, in contrast, generally choose to implement international human rights obligations solely (or primarily) through legislative or executive intercession. Under a dualist conception, international obligations gain the status of domestic law only when affirmatively incorporated into the domestic system. Thus, for

³⁴ Most international human rights treaties include an obligation to provide effective remedies for the rights recognized in the treaty, but do not require direct incorporation of the treaty itself. *See, e.g.*, Human Rights Committee, Gen. Comment 31, Nature of the General Legal Obligation on State Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004).

³⁵ *See, e.g.*, Mark Janis, AN INTRODUCTION TO INTERNATIONAL LAW, Ch. 4 (Aspen, 4th Ed. 2003). *See* Harold Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 52-57 (2004); Curtis Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 530-31 (1999); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 864 (1987).

³⁶ The actual enforceability of an international obligation would, even under a monist approach, depend on additional factors. For example, two distinct and critical issues in this regard are the precise legal status of the directly incorporated international obligation and, allocation of final authority over interpretation of the precise meaning of the obligation once incorporated. In some states, like Germany, international law is treated, at least theoretically, as superior to other forms of domestic law. *See generally* Janis, *supra* note 35 at 85-86, 97-102, 105-09. In the United States, an incorporated treaty (self-executing) has the constitutional status of federal law and therefore trumps inconsistent state law but not federal statutes subsequently enacted. *Id.* The status of customary international law, while often debated, see note *infra*, appears to be lower than either treaties or federal law. *See* *The Paquete Habana*, 175 U.S. 677, 700, 708 (1900). Direct incorporation raises yet unanswered questions regarding the authority of domestic versus international institutions to interpret and authoritatively apply international standards. At least in the United States, it seems apparent that domestic institutions would assert ultimate authority over interpretation of an incorporated international obligation. *See, e.g.*, Brad Roth, *The Enduring Significance Of State Sovereignty*, 56 FL. L. REV. 1017, 1029-34 (2004)(asserting that “the treaty interpretations that prevail are those of United States courts, not international or foreign courts...”).

example, a dualist state may selectively create domestic laws and remedies that are designed to protect certain internationally based rights, although the originating treaty or customary principle is not itself directly actionable.³⁷ In essence, international legal obligations must pass through a “domestic filter” in order to become an enforceable part of the domestic legal order.

While useful descriptively, these distinctions fail to capture the complicated nuances of actual state practice, which most often appears to reflect subtle variations on the dualist conception.³⁸ Although there is little empirical evidence regarding the prevalence of either approach to international human rights obligations, it is commonly thought that dualism is far more common than truly monist approaches.³⁹ Under these widespread dualist approaches to international law, the enforceability of international human rights obligations via domestic institutions ultimately depends on the discretionary

³⁷ See *infra* notes 35-36 and accompanying text.

³⁸ See Malcolm N. Shaw, INTERNATIONAL LAW 100-01, 127 (4th Ed. 1997); Henkin, *supra* note 35 at 865 (“Few if any nations are either strictly monist or strictly dualist.”); Janet Koven Levit, *The Constitutionalization of Human Rights in Argentina: Problem or Promise?*, 37 COLUM. J. TRANSN’L L. 281, 293-309 (1999)(reviewing incorporation practices of various Latin American states). The U.S. legal system is an excellent example of these nuances. At least nominally, the United States Constitution appears to create a monist approach. See U.S. Const. art. VI, §1, cl. 2; *The Paquete Habana*, 175 U.S. 677, 700 (1900). In reality, however, United States law reflects a hybrid of monist and dualist characteristics by virtue of the judicially created doctrine of self-executing treaties and our sometimes ambiguous treatment of international customary law. “Self-executing” treaties may be directly incorporated into the domestic legal system and actionable without prior legislative authorization. However, no significant international human rights treaty has ever been held self-executing in the United States. This is due, at least in part, to the Senate’s consistent practice of attaching a declaration of non-self-execution to such treaties. See Curtis Bradley, *International Delegations, The Structural Constitution, and Non-Self-Executing Treaty*, 55 STAN. L. REV. 1557 (2003); Lori Fischer Damrosch, *the Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI-KENT L. REV. 515, 515 (1991). Customary law, in contrast, is generally treated as an actionable part of the domestic legal system, but with a status below that of most other forms of domestic law. See *Paquete Habana*, *supra*; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). The precise legal status of customary law, particularly whether its violation is actionable in the federal courts, is still subject to intense debate. See generally Ehren Brav, *Recent Developments, Opening The Courtroom Doors To Non-Citizens: Cautiously Affirming Filartiga For The Alien Tort Statute*, 46 HARV. INT’L L.J. 265 (2005)(summarizing the debate over the status on customary international law and the implications of the *Sosa* decision). See *infra* notes and accompanying text

³⁹ See Janis, *supra* note 35 at 85-86, 97-102, 105-08.

actions of national authorities. Thus, effective domestic implementation essentially rests upon the voluntary, discretionary actions of each government.⁴⁰

B. The Traditional Role of International Institutions

Most international human rights institutions have, at minimum, responsibility to “monitor” or “supervise” the presumed national implementation of international obligations by state parties. In this sense, the traditional model for effectuating international rights necessarily also implicates international authority. Thus, a second major path of human rights enforcement involves the work of international human rights institutions and the response of domestic legal systems to that work product. The critical considerations in this regard involve the authority of international institutions and mechanisms for enforcement.

Theoretically, the international side of rights enforcement could take place under a vertical or “top-down” model in which authoritative international human rights institutions would directly compel compliance with human rights standards, utilizing means ranging from an “international marshal’s office” to binding economic sanctions.⁴¹ As currently situated, however, international human rights institutions do not enjoy the

⁴⁰ One might presume that states ratify human rights treaties with a commitment to voluntarily comply with their provisions for the good of their people. More cynical explanations for state ratification of treaties are, sadly, more plausible. Many states undoubtedly join human rights treaties precisely because they expect few consequences from doing so. How else can one explain widespread adoption of human rights treaties among the world’s most egregious violators?

⁴¹ Arguments favoring “linkages” between human rights compliance and participation in international economic institutions such as the IMF, World Bank and WTO are creative extensions of this basic idea. See generally, David Leebron, 2002 Symposium: *The Boundaries of the WTO : Linkages*, 96 AM. J. INT’L L. 5 (2002); Jagdish Bhagwati, Symposium: *The Boundaries of the WTO, Afterword: The Question of Linkage*, 96 AM. J. INT’L L. 126, 132 (2002); Frank Garcia, 1998 Symposium: *Trade and Justice: Linking the Trade Linkage Debate*, 19 U. PA. J. INT’L ECON. L. 391 (1998).

capacity to directly enforce their own decisions.⁴² Lacking their own enforcement powers and mechanisms, these institutions must instead rely on the domestic enforcement capacities and good will of domestic governments.

Because of this, the theoretical apex of enforceability for international institutions would occur if and when states recognized international decisions as authoritative and binding, and allowed the direct enforcement of such decisions by domestic institutions. In essence, states could choose to give the decisional output of human rights institutions “direct effect”⁴³ without requiring prior legislative or executive action or approval. The reality is, however, that international law does not require that states adopt this approach to international decision-making and few, if any, states appear to have done so.⁴⁴ For the vast majority of the international community, the decisions of international human rights institutions are simply not treated as binding or authoritative within the domestic legal order, even if technically “binding” under the relevant treaty regime.⁴⁵

⁴² Even international criminal law institutions such as the ICTY and the ICC are generally forced to rely on the existing institutional enforcement mechanisms of member states. The ICTY may indict, issue arrest warrants, prosecute and sentence perpetrators of crimes against humanity, and has the imprimatur and authority of the United Nations Security Council. Yet, it has no means of directly effectuating any of these powers. Rather, the ICTY relies on enforcement capacity of member states that agree to carry out its orders and ultimately even punish those convicted. *See* United Nations, Rome Statute of the International Criminal Court, Overview, available at <http://www.un.org/law/icc/general/overview.htm>; William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 176 (2001).

⁴³ Recognition of the decisions of international institutions presents distinct issues from the question of incorporation of international obligations generally. *See* note 36 *supra*.

⁴⁴ *See generally* Jenny S. Martinez, *Towards An International Judicial System*, 56 STAN. L. REV. 429, 491-95 (2003). There are, of course, exceptions such as Costa Rica. *See* H. Jarmul, *The Effect Of Decisions Of Regional Human Rights Tribunals On National Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 311, 317-18 (1997) *citing* Annual Report of the Inter-American Commission 16, 26 OEA ser.L/III.6, doc. 13 rev. (1982)(legislation ratified by the Legislative Assembly of Costa Rica on September 9, 1983, Law No. 6889). Even within the highly effective European system, both the European Court of Justice of the European Union and the ECHR primarily rely on the willingness of member states to voluntarily comply with and enforce their judgments. *See* Slaughter & Helfer, *Supranational Adjudication*, *supra* note 7 at 297.

⁴⁵ A good example of this is the Inter-American Court of Human Rights. *See* note *infra*. Although the Court’s decisions under the American Convention’s individual petitioning process are technically binding on the state defendant, *See* Constitutional Court (Peru), Provisional Measures, Order of Aug. 14, 2000, Inter-Am. Ct. H.R. (ser. E), P 14 (2000), States have often simply ignored the Court, inevitably without

Ultimately, most governments choose to enforce international decisions, if at all, solely through discretionary domestic legislative or executive action. Governments have generally reserved to themselves final discretion regarding the actual manner and method for enforcement of international institution decisions, if they enforce them at all. The key element to effective enforcement once again lies with each government's discretionary voluntary compliance, in this instance whether to treat the output of international human rights bodies as authoritative and translate those decisions into action.

It is fair to say that the traditional model for human rights enforcement involves a rather murky convergence between the two enforcement paths described above.

International human rights treaties generally place primary responsibility for implementation and enforcement in the hands of national authorities subject to typically ambiguous international supervisory powers. International institutions monitor state compliance and may offer alternative forms of redress when the national system fails. These international processes are not generally authoritative, however, and even when technically binding lack clear enforcement mechanisms. The effectiveness of international remedies is, in turn, almost always dependent on the subject government's willingness to voluntarily comply. Since international institutions lack both authority and independent enforcement capacities, actual enforcement of international remedies

serious consequences. *See, e.g.,* H. Jarmul, *supra* note 44 at 317-18. *See also* Lawrence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1870-94 (2002) (discussing the withdrawal from HRC's jurisdiction by three Caribbean nations after adverse rulings). In contrast, virtually all parties to the European Convention on Human Rights have acknowledged the binding nature of the ECHR's decisions. *See* Slaughter & Helfer, *Supranational Adjudication*, *supra* note 7 at 276, 295-97. National courts may, of course, sometimes choose to follow the decisions of international tribunals as persuasive authority. *See* Martinez, *supra* note 44 at 491-95 (describing the occasional persuasive influence of international decision making on national courts, including the controversial influence of international and foreign law on the U.S. Supreme Court).

ultimately depends upon the willingness of the perpetrators to meaningfully implement rights and comply with international supervisory authority.

C. Institutional Failures and Ambiguous Authority

It is important to recognize initially that much of the work product of the current international human rights system is not designed for enforcement, at least in the sense described above. Rather, existing institutions are designed primarily to promote human rights through disclosure, dialogue and technical assistance. For example, the United Nations Charter based system, which primarily involves the politically dominated work of the Commission on Human Rights and its various subsidiary organizations,⁴⁶ does not seek to enforce human rights in any direct manner.⁴⁷ Institutions created under the U.N. sponsored network of multilateral human rights treaties are also primarily involved in work better described as promotion rather than enforcement. Each of the seven major multilateral human rights treaties sponsored by the U.N. creates a “committee” of experts

⁴⁶ See generally, Weissbrodt, Fitzpatrick & Newman, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS, Ch.6 (3rd Ed., 2001). Commonly referred to in Western press as “discredited,” the Commission was replaced on March 27, 2006, by a reformed “Human Rights Council.” See <http://www.un.org/apps/news/infocusRel.asp?infocusID=114&Body=human%20rights%20council&Body1=> . The U.N. High Commissioner for Human Rights has become increasingly important as a spokesperson and promoter of human rights and often provides a rapid response to developing human rights crises. The Commissioner’s office has also organized and provided a more visible and centralized face to the U.N.’s important human rights activities. Thus far, however, the High Commissioner serves no direct enforcement role and has no overt authority in that regard.

⁴⁷ With some minor exceptions, these U.N. “Charter-based” institutions essentially provide for a forum for public condemnation of friendless states guilty of a “consistent pattern of gross violations.” With no authority to provide individual redress and no history of pursuing organized consequences for violating states, the work of these U.N. Charter-based institutions simply doesn’t involve enforcement in any meaningful sense, even though the CHR has the authority to refer matters to the U.N. Security Council.

who primarily serve fact finding and promotional roles, reviewing state periodic reports on implementation and issuing “general comments.”⁴⁸

Although there has been some effort to assert authority to bind states pursuant to the general comments,⁴⁹ it would be a misnomer to refer to such work as “enforcement,” at least in the sense described above.⁵⁰ The promotional activity of human rights institutions focuses almost exclusively on encouraging states to voluntarily change their behavior through dialogue, confrontation and exposure regarding alleged violations of international standards. This activity has important benefits but cannot, at least in the short term, be relied upon as a meaningful way to compel compliance with rights where needed most.⁵¹

Enforcement is probably more apropos and relevant to the various individual petitioning processes created by the regional systems and four of the major multilateral treaties.⁵² Each of the three regional human rights systems – the Inter American,

⁴⁸ See generally Donoho, *Institutional Critique*, *supra* note 26 at 859-862 (1993); Alston & Steiner, *supra* note 1.

⁴⁹ The Human Rights Committee appears to believe that General Comments issued by the Committee are authoritative and binding on the state parties. See, e.g., Human Rights Committee, General Comment 24 (52), General Comment On Issues Relating To Reservations Made Upon Ratification Or Accession To The Covenant Of The Optional Protocols Thereto, Or In Relation To Declarations Under Article 41 Of The Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

⁵⁰ See *supra* note and accompanying text. In some instances, the line between enforcement and “monitoring” is somewhat blurry. For example, the Commission on Human Rights has, since 1985, appointed a “Special Rapporteur on Torture” who has the authority to not only conduct fact-finding but also release “urgent appeals” to governments regarding the treatment of specific individuals at risk of torture. See <http://www.ohchr.org/english/issues/torture/rapporteur/>.

⁵¹ See *supra* note 32, *infra* note 154-55 and accompanying text.

⁵² There are currently seven major treaty-based monitoring institutions operating under the United Nations system. Each of these “committees” is entrusted with monitoring state compliance with the rights recognized in their respective treaty texts. These seven major treaties comprehensively cover civil and political rights (ICCPR, *supra* note 33), economic and social rights (International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, (entered into force Jan 3, 1976), [hereinafter ICESCR]), racial discrimination (International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A (xx), 20 UN GAOR, Supp. (No. I) 47, UN Doc. A/6014, 21 Dec. 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter CERD]), gender discrimination (Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979), 1249 U.N.T.S. 13 [hereinafter CEDAW]), torture (Convention

European and African – administer individual petitioning processes under which human rights victims may bring their complaints, after exhaustion of domestic remedies, before a judicial or quasi-judicial body for resolution.⁵³ ICCPR, CAT, CERD and CEDAW create similar processes that apply to any state that has voluntarily agreed to the relevant committee’s petitioning jurisdiction.⁵⁴

Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/Res/39/46 (1984)[hereinafter CAT]); children’s rights (Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR 44th Sess., Supp. No. 49, U.N. doc. A/RES/44/25 (1989) [hereinafter Children’s Convention]; and the rights of migrant workers, (Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. 45/158 (1990).

⁵³ The three regional systems are each designed to promote adherence to comprehensive regional human rights treaties covering a wide variety of human rights concerns. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, *as amended* by Protocol 11, Nov. 1, 1998, (European Convention); American Convention on Human Rights, Nov. 22, 1969, arts. 61, 63, 68, 1144 U.N.T.S. 123; Banjul Charter on Human and Peoples' Rights, June 27, 1981, art. 24, OAU Doc. CAB/LEG/67/3 rev. 5, (entered into force Oct. 21, 1986). *See generally* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, (3rd Edition, H. Hannum, ed. 1999) at Chs. 7-9. The OAS has empowered the Inter-American Commission on Human Rights, which must be distinguished from the Inter-American Court of Human Rights, to serve monitoring functions under the OAS Charter and the American Declaration on the Rights and Duties of Man. The Commission also serves a quasi-judicial function, along with the Inter-American Court, under the Inter-American Convention on Human Rights. *See* Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439 (1990); V. Rodriguez & M. Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and A Modern-Day Critique*, 16 N.Y.L.S. J. H. RTS 593 (2000). In 1998, the Organization of African Unity (OAU) adopted a Protocol to the African Charter which established an African Court on Human Rights to complement the work of the pre-existing African Commission on Human and Peoples' Rights. The court is not yet operational and may be merged with the African Court of Justice. *See* Curry, Cevra & Palmer, *Updates From the Regional Human Rights Systems*, 12 HUM. RTS BRIEF 23 (2005); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), art. 27(2) (June 9, 1998). Each provides, with variations, a petitioning process that allows individuals to seek redress for alleged violations of the relevant treaty by their government. For a general description of these various processes generally Alston & Steiner, *supra* note 1.

⁵⁴ Apart from the American Convention, each relevant treaty authorizes the petitioning process only for those state parties that specially consent. *See e.g.*, Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171,(302-46); CERD, *supra* note 52 at art. 14; CAT, *supra* note 52 at art. 22. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, U.N. Doc. A/Res/54/4 (1999). As of March, 2006, 78 states had become parties to the Protocol. <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>. By March, 2006, the Committee had rendered views concerning 3 communications. *See* <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>. The Committee on Migrant Workers (CMW), which held its first session in 2004, will have competence to hear individual complaints once 10 state parties declare themselves subject to the process authorized in Article 77 of the Convention. *See* <http://www.ohchr.org/english/bodies/petitions/index.htm>.

A draft optional protocol that would create an individual communications process under the ESCRC is now under consideration by a special working group of the CHR. *See*

There are, of course, variations in the precise operation of these various petitioning systems. In general, however, each essentially provides an international forum before which individuals, from those states that have specially consented, may allege that the government has violated treaty based human rights standards. In each system, those states consenting to the process have authorized international decision makers to examine such allegations and, at minimum, present their views as to whether the government has complied with the relevant international agreement. As described below, the most critical question regarding these petitioning processes lies in the authoritativeness and enforceability of the various institutions' decisions.

The European system, under the leadership of the ECHR, has undoubtedly the most impressive enforcement record of these various individual petitioning systems.⁵⁵ Consent to the ECHR's jurisdiction is mandatory for all 41 members of the European Convention and the Council of Europe.⁵⁶ Although not without exceptions, the decisions of the ECHR are generally respected and implemented by the state parties of the European Convention.⁵⁷ In some senses, the European system provides evidence

<http://www.ohchr.org/english/bodies/cescr/index.htm> . Parties to the American Convention subject themselves to the Convention's individual petitioning process before the Inter-American Commission by virtue of joining the treaty. American Convention, *supra* note 33 at Art. 44. They may also, in their discretion, subject themselves to the jurisdiction of the Inter-American Court, which reviews decisions made by the Commission regarding individual petitions. *See id* at Art. 62.

⁵⁵ *See generally* Andrew Drzemczewski and Meyer-LeDwig, *Principle Characteristics of the New ECHR Control Mechanism, As Established by Protocol 11*, 15 AM. RTS. L.J. 81, 82 (1994); Slaughter & Helfer, *Supranational Adjudication*, *supra* note 7 at 282-337.

⁵⁶ European Convention, *as amended* by Protocol 11, Art. 34, *supra* note 53.

⁵⁷ *See infra* notes 137-43 and accompanying text. Most commentators, and the ECHR itself, *see* Effects of Judgments or Cases, http://www.echr.coe.int/eng/edocs/effectsof_judgments.html , suggest that there is a very high rate of state compliance with the Court's decisions. *See, e.g.*, Slaughter & Helfer, *Supranational Adjudication*, *supra* note 7 at 276, 296. Professors Yoo and Posner, however, suggest that there is insufficient empirical data to support such assertions regarding compliance with ECHR decisions. *See* Posner & Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 64-66 (2005). *But see* Helfer & Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005) (challenging Posner & Yoo on methodology and conclusions).

regarding how traditional approaches to human rights enforcement might work under the right circumstances.⁵⁸

The ECHR's success in securing compliance, while not unblemished,⁵⁹ stands in sharp contrast to the record of other international petitioning systems. The Inter-American system, for example, has had limited success in enforcing the decisions of its Commission and Court, even though those decisions are also technically "binding" under the American Convention on Human Rights.⁶⁰ The enforcement record regarding decisions of the treaty-based bodies, such as the Human Rights Committee, is even more disappointing.⁶¹

There are undoubtedly many reasons why it has proven difficult to enforce the adjudicatory decisions of international human rights institutions outside the context of Europe. Most significantly, however, states have found it easy to ignore such decisions as the result of three related factors: (1) ambiguous mandates and limited legal authority; (2) lack meaningful legal or practical incentives to induce state compliance; and (3) insufficient institutional legitimacy to induce voluntary compliance.⁶²

Governments have not found it particularly painful to ignore the views and recommendations of most international human rights institutions because there are few, if any, serious consequences associated with doing so. Most governments comply with

⁵⁸ See *infra* notes 137-43, 139-41 and accompanying text.

⁵⁹ See Christian Tomuschat, *Quo Vadis Argentoratum? The Success of the European Convention on Human Rights and a Few Dark Stains*, 13 HUM. RTS. L.J. 401 (1992) (discussing problems with delay, implementation and enforcement); Paul Mahoney, *New Challenges for the European Court of Human Rights Resulting From the Expanding Case Load and Membership*, 21 Penn. St. Int'l L. Rev. 101, 101-102 (2002) (continuing problems with caseload and delay).

⁶⁰ See, e.g., H. Jarmul, *supra* note 44 at 317-18 (1997); Kimberly King-Hopkins, *Inter-American Commission on Human Rights: Is Its Bark Worse Than Its Bite in Resolving Human Rights Disputes?* 35 TULSA L. J. 421, 432-43 (2000).

⁶¹ Indeed, given the ambiguous legal status of such decisions and the absence of independent international enforcement mechanisms, it is perhaps more accurate to describe the lack of compliance with HCR decisions as a lack of voluntary compliance rather than a failure of enforcement.

⁶² See *infra* notes 67-80 and accompanying text.

such decisions only when it is politically expedient to do so.⁶³ Lacking mechanisms that compel compliance through sanction or other meaningful practical incentives, enforcement of international decisions depends entirely on the political goodwill of the government concerned. Given that the government is, by definition, the perpetrator of the alleged violation; it is hardly surprising that compliance is the exception, especially in states ruled by oppressive regimes. There is, in this sense, an inherent contradiction built into the system's approach to enforcement, which leaves compliance largely within the discretion of the perpetrators.

Reliance on voluntary compliance does not, of course, doom the human rights system to failure. Indeed, voluntary compliance with the decisions of respected international institutions should, ideally, have a central role in a rationally designed international enforcement regime.⁶⁴ Even in functioning domestic legal systems, it is primarily respect for the authority of the institution that ultimately renders judicial decisions readily enforceable, not any inherent power wielded by the court itself.⁶⁵

Voluntary compliance has also been essential to the success of the European system.⁶⁶

⁶³ Australia's compliance with the HRC's controversial Toonen decision is a good example of this. Tasmania stood alone among Australian states in its outdated condemnation of consensual homosexual conduct and the Australian federal government was in full agreement with the HRC on the merits. *See Steiner & Alston, supra* note 1 at 740. Other countries such as Canada and Finland, however, have frequently chosen to comply with HRC decisions with which they disagreed. These successes demonstrate again that compliance depends upon the political good will of the state, leaving enforcement least likely where it is needed most.

⁶⁴ *See infra* notes 154 and accompanying text.

⁶⁵ President Andrew Jackson's alleged response to the United States Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), which would have potentially conflicted with a federal policy of forcibly removing Native Americans from their ancestral lands, highlights this point. Faced with the prospect of using federal authority to enforce the decision against state officials, Jackson is alleged to have said: "Marshall has made his decision, now let him enforce it." *See* Encyclopedia Britannica On Line, available at <http://www.britannica.com/presidents/article-9116896>

⁶⁶ In Europe, the failure to comply with the decisions of the ECHR may lead to action by the Council of Europe but the ECHR itself has no direct enforcement powers. Under Article 46 of the Convention member states pledge to "abide by" the Court's judgments. The Committee of Ministers, the central decision making body in the Council of Europe, has the authority to "supervise" compliance. It serves this function in a systematic fashion by placing judgments on the public agenda of its regular meetings and

Although it operates under *sui generis* circumstances, the European system relies heavily on national enforcement and voluntary government compliance with the decisions of the ECHR. In this regard, the European system appears to thrive by virtue of a happy coincidence of mutually reinforcing incentives and the respect that the ECHR has earned over time. Similarly, a critical reason for the dearth of voluntary compliance outside Europe undoubtedly lays in the fundamental lack of respect that states exhibit toward the authority of most other existing human rights institutions and the paucity of incentives to induce such respect and compliance.

This apparent lack of respect for the authority of international human rights institutions is undoubtedly related to ambiguity regarding their legal mandate⁶⁷ and doubts over the legitimacy of “external” international decision-making regarding domestic practices.⁶⁸ The problem in this sense is two-fold. On the one hand, most international institutions have ambiguous or ill-defined legal authority that potentially could be interpreted as including authoritative jurisdiction over an extremely wide-range

inviting the member state to report on compliance. See Committee of Ministers Web Site on Execution of Judgments, http://www.coe.int/T/E/Human_Rights/execution/ See also Committee Rules on Application of Article 46 (2)(Enforcement of Judgments), <https://wcd.coe.int/ViewDoc.jsp?Ref=736/4.2&Sector=secCM&Language=lanEnglish&Ver=appendix5&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

On a practical level, effective enforcement also depends upon each state’s approach to incorporation of treaty obligations and the decisions of international bodies, with national courts playing a prominent role. See, e.g., John Cary Sims, *Compliance Without Remands; The Experience Under The European Convention on Human Rights*, 36 ARIZ. ST. L. J. 639, 643-44 (2004). There are many political, economic and cultural incentives within the European system that promote what is essentially voluntary compliance. See e.g., Scott Stephans, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WISC. L. REV. 551, 605-611 (2004) (discussing how human rights norms in Europe are “embedded” within a network of mutually beneficial reciprocal state interests). See also Yoo & Posner, *Judicial Independence*, *supra* note at 64-66. These circumstances clearly distinguish the European system from other international human rights institutions. See *infra* note 139-41 and accompanying text.

⁶⁷ See *infra* notes 71-76 and accompanying text. Unresolved ambiguities over authority have plagued international institutions from their inception. In many ways, the lack of human rights enforcement has been defined by the persistent unresolved tension between international and domestic authority regarding the status of international institutions, human rights treaties and international law itself. Most human rights treaties reflect this unresolved tension by leaving the respective roles of international and domestic institutions ill defined and ambiguous.

⁶⁸ See Donoho, *Democratic Legitimacy*, *supra* note 10 at 50-51.

of human rights issues including those with highly debatable or controversial substantive content. At the same time, these institutions lack the attributes of institutional legitimacy that might engender widespread state trust and respect. Virtually all of these international institutions, outside of Europe, suffer from politicized appointment processes, lack of financial resources, poorly defined legal authority, failure to utilize full-time professional judges and flawed fact finding processes.⁶⁹ These international decision makers are generally unaccountable in the most literal sense, and render decisions that are, by definition, external to the body politic where the alleged violations occurred.

More significantly, these institutions have also failed to carefully and incrementally develop their own legitimacy and credibility over time in light of practical limitations on their powers and capacities.⁷⁰ They have, in essence, failed to evolve an appropriate and realistic relationship vis-à-vis domestic authority and democratic institutions. The circumstances of the Human Rights Committee (HRC), created by the International Covenant on Civil and Political Rights (ICCPR), are representative.

On the one hand, the substantive scope of human rights issues covered by the ICCPR is enormous, including both rights over which little legitimate dispute is possible (torture) as well as those raising morally charged issues that are highly contested in domestic societies (privacy, free speech, gay marriage). At the same time, the HRC's

⁶⁹ See Donoho, *Democratic Legitimacy*, supra note 10 at 36, 51-52; Donoho, *Institutional Critique*, supra note 26 at 854-68.

⁷⁰ One might, in this regard, contrast the historically incremental development of the ECHR's authority with the recent controversial assertions of authority (whether legally justified or not) by the HRC. Compare H. Yourow, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* 196 (1996) (reviewing the incremental growth in the ECHR's legitimacy and authority) with L. Helfer, *Backlash*, supra note 45 (describing the controversy over decisions by the HRC regarding application of the death penalty among Caribbean states). See also Helfer & Slaughter, *Supranational Adjudication*, supra note 7, at 315-17, 355-56, 367, 336-68 (also providing a general overview of similarities and contrasts between the characteristics and circumstances of the HRC and the ECHR); Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 *BUFF. HUM. RTS. L. REV.* 211, 214-37, 252-60 (1998).

authority over this potentially wide range of issues is poorly defined. Article Two of the ICCPR endorses the primacy of national implementation and enforcement of rights, suggesting that domestic institutions have primary authority to implement and remedy rights recognized in the covenant.⁷¹ Yet, the Committee is required in its consideration of state periodic reports and in “general comments” to monitor state compliance with the treaty and provide guidance to the parties. Similarly, under the individual petitioning process created by the ICCPR’s Optional Protocol, the HRC is called upon to render its “views” and recommend appropriate remedies for violations.⁷² Thus, while the HRC has no explicit authority to render binding interpretations of the covenant itself,⁷³ its functions obviously require some implicit authority to interpret the meaning of rights.

What role is the HRC to have? Here reasonable differences of opinion are possible if not encouraged by the treaty. The Committee itself has essentially taken the position that states are bound by their treaty obligations to implement the Committee’s decisions.⁷⁴ However reasonable this position may be, it has only minimal textual support and there is no evidence that the Committee’s decisions are treated as

⁷¹ CCPR, *supra* note 33 at Art. 2.

⁷² See Optional Protocol, *supra* note 33 at Art. 5(4) (“receive and consider” communications from individuals and “forward its views to the State Party concerned and to the individual.”)

⁷³ Neither of the two general powers given to the HRC, to review state periodic reports and issue general comments, include textual support for authoritative supervisory powers. CCPR, *supra* note 33 at Art. 40 (“study” periodic reports of state parties and “transmit its reports and such general comments as it may consider appropriate” to the parties). See also Mutua, *Looking Past*, *supra* note 70 at 235-39.

⁷⁴ In 1994, the HRC declared in General Comment 24(52) that it had the authority to determine the validity of state reservations. See William Schabas, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child*, 3 WM. & MARY J. WOMEN & LAW 79, 90-95, 109 (1997); Robert Rosenstock, *Current Development: The Forty-Ninth Session of the International Law Commission*, 92 AM. J. INT’L L. 107, 110 (1998). More controversial, the HRC also announced that reservations found invalid, such as the U.S. reservations on the death penalty, were legally “severable” such that the reserving state was a full party to the treaty as if no reservation had been entered. Human Rights Comm., General Comment No. 24, Nov. 2, 1994, para. 18, U.N. Doc. CCPR/C/21/Rev./Add.6. More recently, the HRC has declared that Canada violated the ICCPR by refusing, pursuant to an HRC interim measure, to stay the deportation of a man seeking review before the HRC. *Ahani v. Canada*, U.N. Human Rights Comm., 80th Sess., para. 1.2, 5.3, U.N. Doc. CCPR/C/80/D/1051/2002 (2004) (available at <http://www.worldlii.org/int/cases/UNHRC/2004/20.html>).

authoritative within the domestic systems of the various state parties.⁷⁵ Indeed, it seems probable that many state parties never intended to create such authority and some major governments, including the United States, have expressly disavowed its existence.⁷⁶

Moreover, the HRC is sorely lacking in institutional attributes that might enhance its legitimacy and engender state respect for its authority. The 18 part-time “experts” who serve on the committee come from diverse backgrounds and cultures.⁷⁷ The process for selecting such experts is largely political with virtually no democratic domestic involvement.⁷⁸ The committee has no real fact finding processes, no appellate review process and virtually no oversight.⁷⁹ Under these circumstances, it is simply not surprising that governments have been slow in legitimizing the HRC’s work product and

⁷⁵ The judgments of the H.R.C. under the individual petitioning system, for example, are not generally thought to be enforceable in the domestic courts of state parties. *See e.g.*, *Ahani v. Canada* (Att’y Gen.), [2002] 58 O.R.3d 107, 108, 117-21 (Canada not bound to stay deportation proceedings based on the views of the HRC). Perhaps more significantly, States have tended to ignore the recommendations of treaty-based monitoring bodies. *See* Report of the Human Rights Committee 2002, Vol 1, para. 95, UN Doc. A/57/40 (2002) para. 225 (estimating only 30% compliance); Report of the Human Rights Committee 2004, Vol I, para. 256 (2004)(noting trend of non-compliance and expressing “deep concern” over the “increasing number of cases where states parties fail to implement” Committee’s final views on individual petitions). *See also* Dana D. Fischer, *International Reporting Procedures*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 188 (Hurst Hannum ed., 1994).

⁷⁶ *See* Government Responses, Observations on General Comment No. 24 (52), on Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations Under Article 41 of the Covenant, United States of America, CCPR A/50/40/Vol.1, Annex VI (1995) (HRC has no power to issue binding interpretations). *See also* Sylvia Brown Hamano, *Incomplete Revolutions and Not So Alien Transplants: The Japanese Constitution and Human Rights*, 17 U. PA. J. CONST. L. 415, 469-70, n. 253 (1999)(suggesting that Japanese courts have generally accepted government arguments that Japan is not bound by HRC interpretations of the ICCPR); L. Helfer, *Backlash*, *supra* note 45 at 1870-1882 (describing the refusal of some Caribbean states to comply with decisions of the HRC regarding capital punishment and eventual renunciations of the ICCPR itself).

⁷⁷ *See* Web Site of the Human Rights Committee, <http://www.ohchr.org/english/bodies/hrc/members.htm> Geographic diversity is ensured by the requirement that experts are selected in accordance with the usual UN regional groupings. *Id.*

⁷⁸ *See* Donoho, *Democratic Legitimacy*, *supra* note 10 at 17-18, 32-33, 32 n. 101, 36-37, 36 n. 110. *See also* Anne Bayefsky, *Direct Petition in the UN Human Rights Treaty System*, 95 ASIL PROC. 71, 74 (2001)(asserting that 50% of the 950 experts sitting on the four UN Treaty institutions with petitioning mechanisms over a 20 year period had full time jobs with their home government).

⁷⁹ Most cases before the HRC do not turn on factual disputes but rather involve legal disputes regarding consistency of government action with the treaty. Nevertheless, individual petitions are considered solely based on documentation provided by the petitioner and responding state, leaving little room for accurate resolution of factual conflict.

reluctant to concede its authority. The circumstances of the HRC are typical of international human rights institutions. Outside of the context of Europe, the status and legal authority of international decision-making in human rights is ambiguous at best and international human rights forums typically lack important institutional attributes that might boost their legitimacy.

The ambiguous authority and weak institutional characteristics of international human rights institutions itself reflects the deeper underlying causes of their current ineffectiveness. Useful contrasts may be drawn between the European system and the other human rights institutions. The European Court of Human Rights has been successful not just because it enjoys clear mandates and strong institutional attributes, or because of its intelligent decision-making. Rather, the Court also owes its success to the generally favorable political conditions within the member states, cultural and social affinities, rational jurisprudential limits on its authority and the political and economic incentives that are associated with compliance and membership in the system.⁸⁰ None of these factors are present in the larger more diverse international community and are not likely to develop in the near future.

D. Distinctions Among Rights, Institutional Legitimacy and Practical Incentives

There is, in a certain sense, a degree of incoherence built into the international system's general approach to enforcement. This incoherence implicates the very

⁸⁰ See Donoho, *Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 STAN. J. INT'L L. 345, 463-65 (1991). Cf., Posner & Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 61-62 (2005) (characterizing the "institutional setting" of the European Court of Justice as more like a "domestic court" because of the "bonds" created by the European Union).

rationale for developing an international system of human rights in the first place. Lacking democratic safeguards, oppressive regimes face few domestic constraints on their treatment of people. The international human rights system seeks to create constraints in the form of international institutions and rules that might limit or temper government abuse of people. The internationalization of rights is, in essence, the search for higher authority to constrain the repressive power of abusive governments.⁸¹

Yet, no such higher authority currently exists.⁸² The international legal system is generally still deeply committed to state sovereignty, and legal obligations depend almost exclusively upon state consent.⁸³ Nor is the development of such authority in human rights institutions likely in the foreseeable future. Outside of the relatively cohesive regional context of Europe, there are currently few incentives to create and adhere to broad grants of unambiguous international authority over human rights.⁸⁴

Governments, whether progressive and enlightened, or oppressive and corrupt, naturally resist the idea of binding authoritative decision-making by “external” international institutions, particularly independent ones -- at least with regard to their own actions. Within functioning constitutional democracies that generally respect basic

⁸¹ There are of course other important motivations for maintaining the international system of rights, such as the progressive improvement in social and economic conditions. Such goals, however, don't imply or require authoritative legal status for international institutions.

⁸² One could certainly argue reasonably that the ECHR is an example of such higher authority and its potential for human rights enforcement. However reasonable this viewpoint, it is equally clear that Europe and the ECHR are in many significant ways, *sui generis*. See *infra* notes 139-41 and accompanying text.

⁸³ It has become almost cliché to assert that traditional notions of sovereignty have changed significantly over the last 50 years. Extravagant claims about the demise of sovereignty, however, seem exaggerated when one considers actual state practice. International obligations still ultimately rest on state consent that can be withdrawn or altered within each state's discretion. And, even in the context of highly developed international legal regimes such as the GATT 94, states have surrendered sovereignty only cautiously and provisionally, retaining discretion whether to bear the economic consequences of non-compliance with international dispute settlement and decision-making processes. What can be said is that absolute state sovereignty, to the extent that it ever actually existed, has been eroded in the sense that there is increased international cooperation among states and expanded reliance on international norms and institutions to resolve some of their mutual concerns and problems.

⁸⁴ See *supra* notes 59-61, *infra* notes 85-86 and accompanying text. [check out goldsmith book....]

rights, the incentives to create and comply with authoritative international human rights institutions are limited and the downside significant. Such states generally have their own extensive domestic safeguards to protect individual rights. However imperfect these domestic protections may sometimes be, delegation of authority over such issues to international institutions carries with it a potentially troubling loss of self-governance and accountability vital to democracy.⁸⁵

Among repressive authoritarian governments, the reasons to resist the creation of effective international authority are more obvious. Authoritative international institutions would threaten not only the undemocratic government's prerogatives but also could challenge its legitimacy and hold on power. Indeed, all states have certain cynical incentives in maintaining a human rights system that lacks authoritative institutions capable of binding, enforceable decision-making. Such arrangements allow states to appear righteous, appease critics and avoid undesirable international pressure while avoiding the real prospect of meaningful change.

Perhaps most importantly, the international community also currently lacks practical incentives to create an effective system of international enforcement of human rights. Any system that effectively enforces human rights against recalcitrant governments will involve sanctions that pose potentially significant costs to other competing interests such as trade, security, or foreign relations. History has shown that

⁸⁵ See Donoho, *Democratic Legitimacy*, *supra* note 10 at 49-64. There are undoubtedly significant human benefits that derive from involvement in an international human rights system even in the context of well functioning constitutional democracies. In many instances, the international community may provide incentives for improvement, and a prevailing international consensus might induce changes in social attitudes. The point here is simply that the case for providing international institutions with authoritative enforcement powers over contested moral issues is not compelling in the context of constitutional democracies in light of the accompanying losses of democratic accountability and self governance. In contrast, when governments abuse fundamental rights relating to physical integrity or central political rights, the need for effective outside interference is obviously greater and the potential losses to local democratic choice and autonomy minimal. *See id.* at 61-64.

political and economic power is a better indicator of which governments may face international condemnation than actual human rights conditions. Virtually all states generally place their own economic self-interest above principled responses to human rights conditions outside their own territory.

Under these circumstances, governments of all stripes have strongly favored an emphasis on national enforcement and implementation of human rights via domestic institutions, conceding only limited and ambiguous authority for international bodies to supervise that process. They have correspondingly limited international institutions to anemic enforcement capacities leaving voluntary compliance the order of the day.

This reliance of national enforcement and volunteerism creates the unfortunate irony that the international human rights system is most needed where it is least effective and most effective where it is least needed. In oppressive states, domestic institutions are incapable of enforcing human rights. Thus, where most needed – under oppressive regimes violating the most fundamental and universally accepted rights – the international system’s traditional emphasis on voluntary domestic compliance with toothless international supervision is utterly inadequate and doomed to failure. Where potentially most effective – in those democratic states which respect the rule of law – an authoritative international system is least needed and poses significant costs to democracy.⁸⁶

These competing forces have produced a complex and ill-defined balance between international and domestic authority that is still evolving but hardly satisfactory or even rational. The international system uneasily straddles the competing goals of

⁸⁶ See *supra* notes 153-54 and accompanying text.

preserving democratic sovereignty and autonomy and effectively enforcing human rights against repressive regimes. Two of the most significant components in this dilemma are the legitimacy deficit of international human rights organizations described above and the broad scope of issues potentially under their jurisdiction. There is an important correlation here between these factors and the human rights system's historical refusal to distinguish among different categories of rights for enforcement purposes.

Human rights institutions (and many states) have historically resisted recognition of a hierarchy among rights even for enforcement purposes. This resistance has been based primarily on the ideological position that economic and social rights are of equal importance to civil and political rights.⁸⁷ Whatever the relative merits of that debate, it fails to address the practical realities of enforcement. Indeed, distinctions among rights for purposes of enforcement are not hierarchies in the sense of importance at all. Rather, the point of such distinctions are that some rights enjoy a consensus over meaning that lends itself to successful international enforcement and the potential development of more meaningful international institutional arrangements and incentives for compliance.

⁸⁷ Historically, many non-Western nations have taken the position that economic and social rights have priority over civil and political rights. *See generally*, Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 469 (1983). *See also* Melannie Civic, *A Comparative Analysis of International and Chinese Human Rights Law—Universality Versus Cultural Relativism*, 2 BUFF. J. INT'L L. 285, 320-22 (1996)(describing China's continuing adherence to the argument that economic rights take priority over civil and political liberties). Western states have uniformly rejected that position while at the same time cast doubt about the justiciability of economic and social rights. *See generally*, M. Dennis & D. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be An International Complaints Mechanism To Adjudicate the Rights To Food, Water, Housing, and Health?* 98 AM.J. INT'L L. 462, 472-74 (). These divergent positions, largely political and rhetorical, initially resulted in the creation of separate international covenants for these two groups of rights. Later, the tension between these viewpoints led to numerous United Nations pronouncements about the "indivisibility" and "interdependence" of human rights and a clear aversion to any distinctions among rights, however rational. *See, e.g.*, *Indivisibility and Interdependence of Economic, Social, Cultural, Civil, and Political Rights*, G.A. Res. 44/130, U.N. GAOR, 44th Sess., Supp. No. 49, at 209, U.N. Doc. A/44/49 (1990).

In the context of our complex and diverse world community, the international enforceability of all rights is not the same. Certain violations, such as torture and most crimes against humanity, have a relatively non-controversial and universal meaning. They involve conduct that is readily identifiable, easily proved and universally condemned by all. For these reasons, such violations are highly suitable for authoritative international enforcement mechanisms. Moreover, an enforcement focus on this limited range of universally accepted rights substantially enhances the potential for improving institutional legitimacy and alleviating fears about usurpation of democratic prerogatives.

The failure to distinguish among rights for enforcement purposes also relates directly to the more general problem of institutional legitimacy and credibility noted earlier. Existing human rights bodies lack institutional capacity and characteristics of legitimacy that can engender the trust and respect necessary to support either voluntary compliance or allocation of meaningful enforcement authority. A central aspect of this problem is a failure of human rights institutions to develop an appropriate role that accounts for differences among rights and respect for genuine democratic choice.

Both voluntary compliance and authoritative vertical enforcement by international institutions have important and mutually reinforcing functions in a world characterized by diversity and conflict. For some rights, an approach emphasizing promotion and voluntary compliance with international standards rather than authoritative enforcement makes sense. For genuinely contestable rights whose meaning or application is subject to public debate within functioning democratic societies, authoritative international enforcement is unnecessary, impractical and counterproductive given its implications for democracy. Conversely, for universally accepted and uncontestable rights like torture,

authoritative international enforcement is both necessary and achievable. A failure to recognize this practical reality has inhibited the development of meaningful international enforcement mechanisms.

The international system's traditional approach to enforcement has failed, at least in part, because of a failure to recognize such distinctions. Already saddled with weak institutional characteristics and ambiguous grants of authority, international human rights bodies are unlikely to engender sufficient state respect to create more authoritative enforcement mandates absent a more practical and nuanced approach regarding different categories of rights.

What can and should be done to address these weaknesses and create a meaningful system of human rights enforcement in the 21st Century? There are, of course, no easy answers to this question. Reforms should, however, focus on the weaknesses and practical limitations described above. In this regard, important insights can be drawn from developing alternatives to the traditional enforcement model and from the success of the ECHR.

III. Modern Developments in Enforcement: The Evolving Paradigms

Last decade has witnessed the continuing development of important alternatives to the traditional model of human rights enforcement.⁸⁸ These alternatives include the

⁸⁸ There is a significant body of literature exploring each of these developments, some of which categorizes and evaluates them together as "transnational" law and process. See, e.g., W. Aceves, *Liberalism And International Legal Scholarship: The Pinochet Case And The Move Toward A Universal System Of Transnational Law Litigation*, 41 HARV. INT'L L. REV. 129 (2000); W. Burke-White, *A Community Of Courts: Toward A System Of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1 (2002).

use of domestic criminal processes as reflected in the Pinochet litigation,⁸⁹ the use of domestic civil processes following the *Filartiga* line of cases,⁹⁰ and the development of international criminal law processes such as the ad hoc tribunals for Rwanda and Bosnia, and the permanent International Criminal Court.⁹¹ Each of these alternatives has its problems and none is an enforcement panacea.⁹² As detailed below, however, these

⁸⁹ The Pinochet case and its implications have produced divergent perspectives regarding the appropriate limits of human rights litigation and use of domestic criminal processes. *See, e.g.*, Aceves, *supra* note 88; Curtis A. Bradley & Jack Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999); Jonathan I. Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452 (1999).

⁹⁰ *Filartiga v. Pena Irala*, 630 F. 2d 876 (1980). The Second Circuit's decision in *Filartiga* has generated a tremendous outpouring of scholarly work. Among many helpful articles arguing for expansive use of the Alien Tort Statute *see, e.g.*, Beth Stephens, *Translating Filartiga: A Comparative and International Human Rights Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002); Beth Stephens, *Taking Pride in International Human Rights Litigation*, 2 CHI. J. INT'L L. 485 (2001); Ryan Goodman & Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORD. L. REV. 463, 514 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORD. L. REV. 371 (1997); and Beth Van Schaack, *In Defense of Civil Redress: the Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Convention*, 42 HARV. INT'L L. J. 141 (2001). Critics of the *Filartiga* paradigm include Curtis A. Bradley, *The Costs of International Human Rights Litigation*, *supra* note 18; Jack Goldsmith & Curtis Bradley, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORD. L. REV. 319, 356-68 (1997). The case has also spawned considerable litigation including lawsuits against multi-national corporations. *See* Beth Stephens, *Individuals Enforcing International Law*, *supra* note 18 at 437-38 (approximately 100 cases leading to published decisions under the ATCA); Gregory Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359 (1999) (describing and arguing in favor of litigation aimed at multinationals). The Supreme Court's recent decision in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) placed significant, although yet to be fully elaborated, limitations on actions brought under the ATCA. *See infra* note and accompanying text. *See generally*, The Supreme Court, 2003 Term, *Leading Cases*, 118 HARV. L. REV. 446 (2004); Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004).

⁹¹ Perhaps the best places to find factual and legal background information on the United Nations' ad hoc tribunals for the former Yugoslavia and Rwanda are their respective websites. *See* <http://www.un.org/icty/> (ICTY) and <http://www.icttr.org> (ICTR). Much has been written, of course, about these tribunals and how they have functioned. For a thought provoking critique of these tribunals focused on Rwanda, *see* Jose Alvarez, *Crimes Of States/Crimes Of Hate: Lessons From Rwanda*, 24 YALE J. INT'L L. 365 (1999). *See also* Makau wa Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMPLE INT'L & COMP. L. J. 167 (1997). A third ad hoc tribunal with distinct characteristics was created 2001 by agreement between the Security Council and Sierra Leone regarding human rights crimes committed during that country's recent civil conflict. S.C. Res. 1315, U.N. SCOR, 54th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000). *See generally*, Laura Hall & Naha Kazemi, *Prospects For Justice And Reconciliation In Sierra Leone*, 44 HARV. INT'L L. J. 287 (2003). The "mixed" domestic and international process of this "Special Court for Sierra Leone" recently served as a model for similar institutions in East Timor and Cambodia. *See* Antonio Cassese, *INTERNATIONAL CRIMINAL LAW* 343 (Oxford Press, 2003).

⁹² *See infra* notes 149-52 and accompanying text.

alternative approaches do provide some direct advantages over existing approaches to human rights enforcement and, more significantly, provide important insights regarding potential reform of the existing international system. These advantages and insights stem primarily from three characteristics shared by each alternative. The first is a common focus on a fairly narrow range of well defined and universally agreed upon human rights norms. The second is reliance on, or creation of, generally neutral judicial institutions with clearly defined and appropriately constrained legal authority over these universally understood and non-controversial rights. The third is recognition of individual accountability for the violation of such rights.

A. National Criminalization of International Law Violations: The Pinochet Model

In 1996, Spanish judicial authorities accepted jurisdiction to conduct a criminal investigation regarding alleged human rights violations committed by government authorities in Argentina and Chile during military rule.⁹³ In October 1998, Judge Baltazar Garzon requested that the United Kingdom extradite former Chilean dictator Augusto Pinochet to Spain to face criminal charges resulting from this investigation. The relevant indictment charged Pinochet with conspiracy to commit torture, hostage taking, genocide and summary execution of both Chilean and Spanish citizens during his 17 year reign of terror that began with a September 11, 1973 coup. This request for extradition asserted not only jurisdiction based on alleged crimes against Spanish citizens, often

⁹³ For a clear account of the factual background of the case see Richard Wilson, *Prosecuting Pinochet in Spain*, 6 *Hum. Rts. Brief*, Issues 3 (1999). See also Diane Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction With Democratic Principles*, 92 *GEO. L. J.* 1057, 1070-1086 (2004)(providing a detailed description of the Pinochet case from factual background through the extradition process); Naomi Roht-Arriaza, Symposium: Universal Jurisdiction: *Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 311-15 (2001).

referred to as “passive jurisdiction,”⁹⁴ but also for crimes against Chilean citizens under a theory of universal jurisdiction.⁹⁵ The British courts denied extradition as to many of the alleged crimes on technical legal grounds relating to the requirement of dual criminality.⁹⁶ The British House of Lords, however, ultimately approved the extradition request as to a limited number of crimes alleged to have occurred after British accession to the Torture Convention. U.K. foreign minister Jack Straw ultimately denied the extradition request on discretionary grounds related to the Pinochet’s allegedly failing mental health.⁹⁷

⁹⁴See Roht-Arriaza, *supra* note 93 at 314-15; Orentlicher, *supra* note 93 at 1074. See Restatement (Third) of the Foreign Relations Law of the United States, § 402 cmt. G (1987) (providing the commonly accepted definition of passive personality jurisdiction).

⁹⁵See, e.g., Orentlicher, *supra* note 93 at 1073-74. See also Restatement (Third) of the Foreign Relations Law of The United States § 404 (1987)(providing definition and description of universal jurisdiction); Princeton University Program In Law And Public Affairs, The Princeton Principles On Universal Jurisdiction 23 (2001), available at http://www.princeton.edu/~lapa/unive_jur.pdf. Professor Orentlicher points out that there are few clear prior examples of national courts relying on principles of universal jurisdiction to justify prosecution of criminal conduct that took place outside of their territorial jurisdiction. *Id.* Israel’s prosecution of Eichmann is a commonly cited example. Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 18, 26 (Isr. Dist. Ct. Jm. 1961), *aff’d*, 36 I.L.R. 277, 298 (Isr. S. Ct. 1962). See also United States v. Yunis, 681 F. Supp. 896, 901 (D. DC 1988) *aff’d*, 924 F. 2d 1086 (D.C. Cir. 1991). Originally developed in response to piracy, see United States v. Smith, 18 U.S. (5 Wheat) 153, 156 (1820) (“[P]irates being hostes humani generis, are punishable in the tribunals of all nations. All nations are engaged in a league against them for the mutual defence and safety of all.”), universal jurisdiction played a central role in the Nuremberg prosecutions and remains a critical concept in contemporary international criminal law. See notes *infra*. See also Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV INT’L L. J. 183 (2004) (critiquing the analogy to piracy as a justification for modern applications of universal jurisdiction).

⁹⁶ Regina v. Bow St. Metro. Stipendiary Magistrate, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L. 2000). See Frank Sullivan, Jr., *A Separation Of Powers Perspective On Pinochet*, 14 IND. J. INT’L & COMP. L. 409, 415-37 (2004) (providing a detailed description of the legal proceedings in the United Kingdom, including the legal analysis provided by the House of Lords) .

⁹⁷ See Sullivan, *supra* note 96 at 437-40. A commonly cited problem with utilizing universal jurisdiction to prosecute individuals having little or no connection to the forum involves resistance in the home nation to outside interference. See, e.g., A. Sammons, *The "Under-Theorization" Of Universal Jurisdiction: Implications For Legitimacy On Trials Of War Criminals By National Courts*, 21 BERK J. INT’L L. 111, 140-43 (2003); Henry Kissenger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF., July/ August 2001 at 86. The exercise of universal jurisdiction also raises legitimate fears of bias, violations of due process, politically motivated prosecutions and increased international conflict. See, e.g., Madeline Morris, *Universal Jurisdiction In A Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 340, 352-59 (2001). See K. Lee Boyd, *Universal Jurisdiction And Structural Reasonableness*, 40 TX. J. INT’L L. 1, 1-2, (2004)(suggesting that traditional constraints on judicial action alleviate many concerns).

The Court's decision, although more limited than many advocates hoped, directly supported the proposition that universal jurisdiction may justify domestic criminal prosecution of certain violations of international human rights in states other than the one in which the offending acts were committed.⁹⁸ More controversially, the decision also recognized important limitations on public official immunities.⁹⁹ The British and Spanish courts, in essence, recognized that Pinochet, and others like him, could be prosecuted for certain universal crimes through the domestic criminal processes of any state that obtains personal jurisdiction over him. Citing criminal investigations or complaints brought in Belgium, Senegal, Austria, Canada, Denmark, France, Germany, the Netherlands, Spain, Switzerland, and the United Kingdom, Professor Dianne Orentlicher reports that a "raft of countries have walked through the door the Pinochet case opened."¹⁰⁰ Enthusiasm for Pinochet styled prosecutions has apparently waned, however, in light of controversial criminal complaints brought against prominent current or former public officials such as Israeli Prime Minister Ariel Sharon, former President Bush, Colin Powell, General Tommy Franks and Dick Cheney, among others.¹⁰¹

⁹⁸ Orentlicher, *supra* note 93 at 1074; Aceves, *supra* note 88 at 169-171.

⁹⁹ See *Ex Parte Pinochet*, *supra* note 96 at 206-24. See Orentlicher, *supra* note 93 at 1080-89. Spanish judicial authorities also separately ruled against Pinochet's claims of immunity. See Roht-Arriaza, *supra* note 93 at 313. Among the primary reasons that judicial refusal to recognize traditional immunities is controversial involves alleged interference with national reconciliation compromises and foreign affairs. See Diane Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L. J.* 2537, 2543-46 (1991). The International Court of Justice, however, recently reaffirmed immunities in the case of *The Congo v. Belgium*, at least for incumbent public officials. Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), 2002 ICJ General List No 121 (Feb 14, 2002) available at <http://www.icj-cij.org/icjwww/idocket/icoBE/icoBEframe.htm>. See Sarah Rispin, *Implications of Democratic Republic of Congo v. Belgium on the Pinochet Precedent: A Setback for International Human Rights Litigation?* 3 *Chi. J. Int'l L.* 527, 527-30, 535-36 (2002). See also *Certain Criminal Proceedings in France (Republic of the Congo v. France)* available at http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-37_xx_20021209.htm (challenge to the legality of France's pursuit of criminal charges against the Congolese Interior Minister Pierre Oba).

¹⁰⁰ Orentlicher, *supra* note 93 at 1059-60.

¹⁰¹ See Steven Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 *A.J. Int'l L.* 888, 891-94 (2003); Damien Vandermeersch, 3 *J. Int'l Crim. Just.* 400, 404-09; Glenn Frankel, *Belgian War Crimes Law*

B. The Filartiga Civil Litigation Paradigm

In 1980, the Second Circuit upheld federal district jurisdiction over a civil claim brought by a Paraguay citizen against a Paraguay public official for torture that occurred in Paraguay.¹⁰² Building slowly over subsequent years, the Filartiga model for civil liability against human rights violators has now generated a substantial number of cases,¹⁰³ recently including those directed at multinational corporations.¹⁰⁴ Much written

Undone by its Global Reach; Cases Against Political Figures Sparked Crises, Wash. Post, Sept. 30, 2003, at A1. See also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 147-48 (2004). Spain's high court has also apparently retreated somewhat from the implications of Magistrate Garzon's pursuit of General Pinochet, imposing limitations on potential applications of universal criminal jurisdiction in Spanish courts. See Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUSTICE 589, 590 (2003) (Spanish high court suggests that universal jurisdiction is "subsidiary" to prosecution in the home state and that additional links to Spain will normally be required).

¹⁰² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁰³ Professor Stephens, an experienced human rights litigator who has written extensively on the ATCA, has reported that "approximately one hundred cases leading to decisions available online have alleged jurisdiction under the ATCA and related statutes..." Stephens, *Individuals Enforcing International Law*, *supra* note 18 at 437-38. See also Sandra Coliver, Jennie Green, Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 173 (2005) (citing "at least sixteen" successful suits); Boyd, *supra* note at 3, n.6 & App. A (cataloguing 92 cases, nearly 80% of which resulted in summary judgment or dismissal). Two organizations, the Center for Justice and Accountability (<http://www.cja.org>), and the Center for Constitutional Rights (http://www.ccr-ny.org/v2/legal/human_rights/human_rights.asp) have served prominent roles in bringing actions against human rights violators before U.S. courts. Although many cases have been brought, relatively few have resulted in judgments and almost none in actual collection of damages. See note 150 *infra*. But see Alfonso Chardy, *Torture Lawsuit Halts Lotto Winnings*, Miami Herald, March 31, 2006 at A-1 (state court orders that annual lottery payments of former Haitian Army Colonel Carl Dorelien be placed in escrow pending resolution of Alien Torts Claims Act litigation in federal court).

¹⁰⁴ See, e.g., *Doe I v. Unocal*, 395 F.3d 932, 952-54 (9th Cir. 2002) (denying summary judgment on claims that Unocal was liable under the ATCA for aiding the Myanmar Military in acts of murder, rape, and forced labor); *Wiwa v. Royal Dutch Petroleum*, 226 F. 3d 88 (2d Cir. 2000); *Jota v. Texaco*, 157 F. 3d 153 (2d Cir. 1998) (later dismissed on forum non conveniens grounds in *Aguinda v. Texaco*, 142 F. Supp. 2d 534 (S.D. N.Y. 2001)). See generally Recent Developments, *Corporate Liability for Violations of International Human Rights Law*, 114 HAR. L. REV. 2025 (2001); Case Note, *Wiwa v. Royal Dutch Petroleum: A New Standard For Enforcement Of International Law In U.S. Courts?* 5 YALE H. R. & DEV. L. J. 241 (2002). The Unocal case was recently settled. See Center for Constitutional Rights, http://www.ccr-ny.org/v2/legal/corporate_accountability/corporateArticle.asp?ObjID=lrRSFKnmmmm&Content=45 (visited Sept. 23, 2005). Although no cases brought against corporate defendants under the ATCA have resulted in an adverse final judgment see International Labor Rights Fund Web Page, <http://www.laborrights.org/projects/corporate/ATCA%20summaries.htm> (providing a summary of cases brought against corporate defendants under the ATCA), the business community and the Bush administration have launched a frontal assault on such suits. See *Bush v. Alien Torts*, available at

about,¹⁰⁵ this enforcement alternative essentially envisions opening regular domestic civil courts to human rights victims seeking redress for violations occurring outside of the forum.

In the United States, where such remedies have been most prominently pursued, jurisdiction is conferred by statute and subject to significant limitations.¹⁰⁶ These limitations include tight restrictions on suing foreign government defendants,¹⁰⁷ due process requirements regarding personal jurisdiction that essentially require, as a practical matter, the physical presence of individual defendants in the United States,¹⁰⁸ and significant restrictions on available causes of action. Given the limited legal status of U.S. human rights treaty commitments,¹⁰⁹ customary international law has played a

http://www.motherjones.com/news/dailymojo/2003/08/we_522_03a.html ; Harold Koh, *Wrong on Rights*, available at <http://yaleglobal.yale.edu/display.article?id=2121> (criticizing the Bush administration's position).

¹⁰⁵ There is a mountain of excellent literature regarding the ATCA ranging from discourse over its history to the policy implications of utilizing customary international law to remedy human rights violations with no direct nexus to the United States. See authorities cited in note 90, *supra*.

¹⁰⁶ Alien Tort Statute, 28 U.S.C. § 1350; Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2)(2000). It is standard practice in U.S. human rights litigations to allege alternative bases for subject matter jurisdiction including federal question jurisdiction under 28 U.S. C. § 1331 and universal jurisdiction as a matter of customary international law.

¹⁰⁷ The Foreign Sovereign Immunities Act, 28 U.S. C. § § 1330, 1605, has made it nearly impossible to successfully sue foreign government and their instrumentalities in U.S. courts for violations of human rights. See Coliver, et al, *supra* note 103 at 188. The only potentially viable exception to immunity under the act relates to violations against U.S. citizens by foreign governments designated as state sponsors of terrorism. See 28 U.S.C. § 1605 (7); *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997). See also *Letelier v. Chile*, 488 F. Supp. 665 (D.C. Cir. 1980) and *Liu v. Republic of China*, 892 F. 21d 1419 (9th Cir. 1989)(cases in which a foreign state committed a human rights violation on United States territory thereby losing its immunity under § 1605(5)).

¹⁰⁸ See Beth Van Schaack, *In Defense of Civil Redress*, *supra* note 90 at 153-55, 176, 194-96 (describing the importance of “presence” as a basis for personal jurisdiction in ATCA litigation and its role during negotiations of the Hague Judgments Convention). Van Schaack describes significant opposition to so-called “tag” jurisdiction that has served as the basis for some ATCA lawsuits such as the Kadic case. *Id.*

¹⁰⁹ The United States has ratified several major international human rights treaties but, without exception, declared each of these to be “non-self-executing.” See Curtis Bradley & Jack Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA L. REV. 399, 416-23 (2000). The United States has also attached a series of “RUD’s” (reservations, understandings or declarations) to each human rights treaty it has ratified. These provisions are designed to systematically eliminate potential conflicts with pre-existing U.S. law and practice. See, e.g., Louis Henkin, *U.S. Ratification of Human Rights Conventions: the Ghost of Senator Bricker*, 89 A.J. INT’L L. 341, 345-48 (1995); Krisina Ash, Comment, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW U. J. INT’L H. R. 3 (2005). Elizabeth Mayer, *Reflections on Proposed United States Reservations to*

central role in the development of the Filartiga paradigm.¹¹⁰ Since only a small number of human rights violations are considered part of customary international law,¹¹¹ lower federal courts have recognized a limited number of actionable violations. The Supreme Court has recently placed further, potentially significant limits on the types of violations that may be actionable under the ATCA.¹¹² Although United States legislation specifically authorizes causes of action for certain foreign victims of torture and summary execution,¹¹³ the Supreme Court's narrow interpretation of the ATSC essentially suggests that recognition of remedies for other violations will be limited to those comparable to 18th Century customary international law paradigms, such as piracy.¹¹⁴

CEDAW: Should the Constitution Be An Obstacle to Human Rights, 23 HAST. L. Q. 727, 747-67 (1996). Such treaty obligations are, therefore, unenforceable under domestic law and U.S. courts have refused to remedy their violation under the ATCA unless the violation alleged can be established as part of customary international law. See, e.g., *Filartiga*, *supra* note at 880-85; *Jama v. INS*, 343 F. Supp. 338, 357-61 (D.N.J. 2004).

¹¹⁰ *Filartiga* and the ATCA have, for example, figured prominently in the academic debate over the legitimacy of customary international law as a source of U.S. domestic law. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Goodman & Jinks, *Filartiga's Firm Footing*, *supra* note 90. See also *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 at 2770-76 (Scalia, concurring).

¹¹¹ See Restatement of Foreign Relations, Third, § 702 (1987)(listing seven violations including genocide, torture, murder or causing disappearance, slavery, systematic racial discrimination, prolonged arbitrary detention and a "consistent pattern of gross violations").

¹¹² In *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2755-64 (2004), the Supreme Court upheld use of the ATCA to litigate alleged human rights violations occurring overseas but placed significant limits on which violations could be actionable. In many ways consistent with lower court rulings, the Court found that the ATCA is purely a jurisdictional statute under which only those violations that share certain characteristics with claims judicially cognizable when the statute was adopted in 1787, such as piracy, can be brought. *Id.* While the precise meaning of this standard is debatable, it is consistent with lower court decisions that have only recognized claims involving "specific, universal and obligatory" norms of international law. See *In re Estate of Marcos Human Rights Litigation*, 25 F. 3d 1467, 1475 (9th Cir. 1994); Harvard Law Review, *The Supreme Court, 2003 Term Leading Cases*, 118 HARV. L.REV. 446 (2004); Beth Stephens, *Sosa V. Alvarez-Machain: "The Door Is Still Ajar" For Human Rights Litigation In U.S. Courts*, 70 BROOK. L. REV. 533 (2004-2005)(reviewing the history of the ATCA and its future after the *Sosa* decision). See also Kontorovich, *Implementing Sosa*, *supra* note 95.

¹¹³ Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2)(2000). The TVPA has been described as "codifying" the holding of *Filartiga*. See *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D. N.Y. 1994). Its primary impetus, however, was to dispel any doubt about the existence of a cause of action under the ACTA for torture and summary execution. See *Torture Victim Protection Act of 1991*, S. Rep. 102-249, 102nd Cong. (Nov. 19, 1991); Goodman & Jinks, *supra* note 90 at 467.

¹¹⁴ *Sosa*, 124 S. Ct. at 2761. See note 112 *supra*.

C. The Developing Use of International Criminal Law Processes

A third significant development in human rights enforcement involves the continuing evolution of international criminal law and its processes. Between Nuremberg and the dissolution of Yugoslavia in 1980, international criminal law remained mired in world politics with little practical salience to human rights victims. The prospects for an effective international criminal law process for human rights violations were kept alive only in academic circles and on the backburners of a few obscure international institutions.

Atrocities in the former Yugoslavia and Rwanda, however, revived the prospects for creating an effective international criminal enforcement regime. Viewed as a threat to peace, these atrocities prompted the U.N. Security Counsel to establish two ad hoc tribunals with a mandate to deploy international humanitarian law in the defense of human rights.¹¹⁵ Despite substantial obstacles,¹¹⁶ the International Criminal Tribunal for Yugoslavia (ICTY) has indicted 161 alleged perpetrators of serious violations of

¹¹⁵ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *annexed to* Report of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. SCOR, 3175th mtg., U.N. Doc. S/25704 (1993); International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/Res/ 955 (1994). Each tribunal has the authority "to prosecute persons responsible for serious violations of international humanitarian law" committed in limited geographical areas and time frames. (Art. 1) However, due to distinctions drawn by international humanitarian law between international and internal civil conflicts, there are differences in the subject matter jurisdiction of the two tribunals. See Mark R. Von Sternberg, *A Comparison Of The Yugoslavian And Rwandan War Crimes Tribunals: Universal Jurisdiction And The "Elementary Dictates Of Humanity*, 22 BROOK. INT'L L. J. 111, 113-21 (1996). In particular, only the ICTY is technically empowered to enforce grave breaches of the 1949 Geneva Conventions, while both Tribunals may prosecute customary international law violations involving war crimes (Art.3), genocide (Art. 4) and crimes against humanity (Art.5). *Id.*

¹¹⁶ See Gabrielle Kirk-McDonald, 25 NOVA L. REV.464, 468-70 (2001)(former President of the tribunal describing the initial lack of support for its work); Mutua, *supra* note 91 at 180-85 (citing lack of resources and inadequate cooperation has serious impediments to the tribunals' work)

humanitarian law.¹¹⁷ The Tribunal has found approximately 50 defendants guilty and 40 are currently serving their sentence or awaiting transfer.¹¹⁸ More than 70 other defendants are on trial, in detention or under provisional release. Until his recent death, these included the former leader of Serbia, Slobodan Milosevic.¹¹⁹ The International Criminal Tribunal for Rwanda has completed 17 prosecutions, primarily of public officials, for crimes relating to the 1994 genocide in Rwanda.¹²⁰ As of March, 2005, twenty-five additional defendants were on trial.¹²¹ Although subject to legitimate criticisms,¹²² these ad hoc tribunals have, without doubt, exceeded most expectations.¹²³

The success of these ad hoc tribunals provided the needed political will to revitalize long standing U.N. plans to establish a permanent international criminal court.¹²⁴ Since the ICC began operations in 2002,¹²⁵ it has received 4 requests to

¹¹⁷ See ICTY At A Glance, <http://www.un.org/icty/glance/index.htm> .

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See Achievements of the ICTR, <http://www.ictcr.org/default.htm> .

¹²¹ *Id.*

¹²² See generally Jose Alvarez, *Crimes Of States/Crimes Of Hate: Lessons From Rwanda*, 24 Yale Int'l L. J. 365 (1999)(providing an insightful critique of the premises which prompted the ad hoc tribunals and potential ill-effects of primary international jurisdiction); Todd Howland & William Calathes, *The U.N.'S International Criminal Tribunal, Is It Justice Or Jingoism for Rwanda? A Call For Transformation*, 39 Va. J. Int'l L. 135 (1998)(critiquing failures to develop coherent vision of the tribunal in relation to human rights generally and to national processes); Jacob Katz Cogan, *International Criminal Courts And Fair Trials: Difficulties And Prospects*, 27 Yale J. Int'l L. 111, 116-37 (2002)(critiquing deficiencies relating to presenting an effective defense).

¹²³ Perhaps in response to the perceived successes and failures of the first two ad hoc tribunals, the international community has participated in the creation of "hybrid" or "mixed" tribunals to address human rights violations in Sierra Leone, Kosovo and East Timor. See generally Laura Dickinson, *The Promise of Hybrid Courts*, 97 Am. J. Int'l L. 295, 296-300 (2003); Casese, *supra* note 91 at 343-46 (Oxford, 2003); Hall & Kazemi, *supra* note 91. Unlike the ICTY and ICTR, these new tribunals are designed as "mixed" tribunals in the sense that they incorporate and rely on both domestic and international law and are staffed by both domestic and international decision-makers. See Dickinson, *supra* at 296-300.

¹²⁴ Casese, *supra* note 91 at 341. The initial impetus for a permanent international criminal court came from the U.N. General Assembly after World War II. See G.A. Res. 260B, U.N. GAOR, 3d Sess., pt.1, at 177, U.N. Doc. A/810 (1948). For an account of these earlier efforts to establish the court and a brief history of modern international criminal law leading to the U.N. ad hoc tribunals, see M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 Harv. Hum. Rts J. 11 (1997). See also Casese, *supra* note 91 at 327-346.

¹²⁵ The treaty establishing the Court came into force after receiving its sixtieth ratification in 2002. See Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the

investigate situations alleged to involve crimes under the treaty.¹²⁶ Although important aspects of the Court's jurisdiction are distinct from its predecessors,¹²⁷ the Court was clearly modeled after currently existing ad hoc tribunals. Like the ad hoc tribunals, the Court is essentially designed to address "serious crimes of international concern" in the general categories of genocide, war crimes and crimes against humanity.¹²⁸ Each category of crime is further defined in the Treaty to include a variety of egregious violations of human rights committed in the context of armed conflict, such murder, ethnic cleansing, rape and torture.¹²⁹ The Treaty also creates a process for defining the required elements to the crimes.¹³⁰ While some important and difficult disputes over the definition of such crimes have and will arise,¹³¹ the Court's substantive focus is limited to the most egregious forms of human rights violations over which an international consensus generally exists.

Establishment of an International Criminal Court, art. 8, U.N. Doc. A/CONF.183/9 (1998)[hereinafter ICC Treaty]. See Official Website of the ICC, About the ICC, available at <http://www.icc-cpi.int/about.html>

¹²⁶ The Congo, Uganda and the Central African Republic have each referred situations occurring within their territory to the ICC Prosecutor for investigation and possible prosecution. The Prosecutor is also now investigating the situation in Darfur, Sudan pursuant to U.N. Security Council Resolution 1593 (2005). See Official Website of the ICC, Situations and Cases, available at <http://www.icc-cpi.int/cases.html>.

¹²⁷ See *infra* note 115 and accompanying text.

¹²⁸ See ICC Treaty, *supra* note 125, art. 5. The Court will eventually also exercise jurisdiction over the "Crime of Aggression," once the state parties reach agreement over the definition of that controversial concept.

¹²⁹ ICC Treaty, *supra* note 125 at Art. 6, 7, 8.

¹³⁰ ICC Treaty, *supra* note 125 at Art. 9.

¹³¹ Opponents of the ICC have cited, in addition to potential third-country jurisdiction over U.S. military personnel, definitional ambiguity over critical concepts such as military necessity, proportionality, military targets, and the crime of aggression. See Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. Chi. L. Rev. 89, 95-96 (2003); Ruth Wedgwood, *The Irresolution of Rome*, 64 Law & Contemp. Prob. 193, 209-13 (2001)(discussing the crime of aggression among other definitional issues); See also Symposium: *The International Responses to the Environmental Impacts of War*, 17 Geo. Int'l Env'tl. L. Rev. 565, 625-26 (comments of Mark Drumbl) (2005); Valerie Oosterveld, *The Definition Of "Gender" In The Rome Statute Of The International Criminal Court: A Step Forward Or Back For International Criminal Justice?*, 18 Harv. Hum. Rts J. 55 (2005); Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005). But see David Hunt, *The International Criminal Court: High Hopes, Creative Ambiguity and An Unfortunate Mistrust in International Judges*, 2 J. Int'l Crim. Justice 56 (2004) (criticizing an overly restrictive use of detailed definitions that undermine flexibility).

Unlike the ad hoc tribunals, however, the ICC has broad geographic jurisdiction but only complementary or subsidiary jurisdiction over the prosecution of accused war criminals.¹³² In effect, the ICC is designed to prosecute violations of a clearly defined set of international crimes only when the state of origin is unable or unwilling to do so in good faith.¹³³ The Rome Treaty also allows for the ICC to exercise jurisdiction over non-party nationals when that defendant commits prosecutable offenses in the territory of a state party.¹³⁴ The Court may also exercise jurisdiction over a non-party national who commits prosecutable crimes in a non-party state if that state specially agrees to such jurisdiction.¹³⁵ This provision, and allegedly insufficient Security Council oversight power, has caused considerable controversy and figures prominently in the Bush administration's active campaign to undermine the ICC and its potential jurisdiction over Americans.¹³⁶

D. Lessons From the ECHR: Institutional Legitimacy and Practical Incentives

The ECHR is neither new, nor in the strict sense of the word, a developing alternative to the traditional model of human rights enforcement. Originally created just after WWII,¹³⁷ the ECHR has had a longer history than most international human rights

¹³² ICC Treaty, *supra* note 125 at Art. 17.

¹³³ *Id.* at Art. 17-19.

¹³⁴ *Id.* at Art. 12 (2).

¹³⁵ *Id.* at Art. 12 (3)

¹³⁶ See Goldsmith, *supra* note 131 at 90-98; Casey and Rivkin, *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L L. 63,63-64 (2003); William Schabas, *United States Hostility To The International Criminal Court: It's All About The Security Council*, 15 EUR. J. INT'L L. 701, 714-19 (2004)(like Goldsmith, also attributing independence from the U.N. Security Council as part of U.S. opposition to the ICC).

¹³⁷ Created under the Council of Europe, the Court was formed through the adoption of the European Convention of Human Rights by Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5, 213 U.N.T.S. 221. The Convention preamble emphasizes

bodies and considerably more success. In many ways, the ECHR represents the only example of a traditional international enforcement paradigm that functions effectively, albeit only on a regional level.¹³⁸

There are, of course, many reasons to doubt whether the sui generis circumstances of the ECHR qualify it to serve as a realistic model for other more global institutions.¹³⁹

The community of nations that the ECHR serves has been, at least until recently, significantly homogeneous with shared cultural, social and political affinities.¹⁴⁰ More importantly, the region has a shared history and future, not the least of which involves the extraordinary economic, social and political entanglements of the European Union.

Although technically and legally distinct from the European Human Rights system and the ECHR, the institutions of the EU have adopted significant commitments to human rights, following the direction and guidance of the ECHR.¹⁴¹ These linkages create

the parties' commonalities, describing members as "like-minded and hav[ing] a common heritage of political traditions, ideals, freedom and the rule of law..."

¹³⁸ See generally Helfer & Slaughter, *Supranational Adjudication*, *supra* note 7 (promoting the European system as a model of effective international adjudication of human rights).

¹³⁹ Donoho, *Universalism*, *supra* note 80 at 463-66.

¹⁴⁰ Membership in the Council of Europe has increased dramatically in recent years, especially due to the addition of former socialist states from Central and Eastern Europe. Since 1990, membership in the Council has increased to 46 states, with 26 new members from Central and Eastern Europe. Web site of the Council of Europe, available at http://www.coe.int/T/e/Com/about_coe/ (last visited March 3, 2006). All of these states have also ratified the European Convention on Human Rights as an unwritten precondition for membership in the Council. David Seymour, *The Extension of the European Convention on Human Rights to Central and Eastern Europe: Prospects and Risks*, 8 CONN. J. INT'L L. 242, 250 (1993). See also Rudolf Bernhardt, *Current Development: Reform of the Control Machinery Under the European Convention on Human Rights: Protocol 11*, 89 AM. J. INT'L L. 145, 147 n. 10 (1995). The addition of states such as Bulgaria, Russia, Albania, Romania and Slovenia, has added significant new diversity to the European human rights system. See Seymour, *supra* at 244-47.

¹⁴¹ Over the course of many years, the European Court of Justice has slowly incorporated human rights law as developed and interpreted by the ECHR, into EU jurisprudence. See generally Dinah Shelton, *The Boundaries Of Human Rights Jurisdiction In Europe*, 13 DUKE J. INT'L & COMP. L. 95, 111-118 (2003). The ECJ has, however, declared that EU may not become a member of the European Convention: "As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field..." Case 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 1996 E.C.R. I-1759 (advisory opinion). Recent revisions to the EU treaty regime directly reference protection of human rights. See

vitally important incentives for compliance that are currently absent outside of Europe. Despite these important differences in circumstances, the ECHR's successes provide important insights regarding reform of international enforcement generally.

First, the ECHR serves as proof positive that there are many advantages to regional rather than global approaches to human rights enforcement. Regionalism may not only take advantage of cultural and social affinities (in developing culturally sensitive interpretations of rights) but also profit from critical economic and political linkages that create practical incentives for state compliance. A regional focus also has advantages for institutional legitimacy by increasing connections between decision-makers and local populations.

Second, although the ECHR currently renders judgments over a wide range of human rights issues including controversial topics,¹⁴² it has arrived at this point incrementally over time as its prestige and credibility warranted. More importantly, it has imposed on itself important jurisprudential limits that avoid overreaching and undesirable interference with legitimate cultural and policy preferences of its constituent national democracies. Primary among these are the principles of subsidiary, European supervision and the margin of appreciation doctrine that utilizes European consensus to

Shelton, *supra* at 113-14. In 2000, the EU proclaimed a new Charter of Fundamental Rights and Freedoms. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1. The proposed European Constitution would directly incorporate the Charter and human rights into the EU legal structure. See Stephen Sieberson, *How the New European Union Constitution Will Allocate Power Between the EU and Its Member States—A Textual Analysis*, 37 VAND. J. TRAN'L L. 993 (2004).

¹⁴² See, e.g., *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622 (1991); *B. v. France*, 16 Eur. H.R. Rep. 1 (1993)(transsexualism); *X v. United Kingdom*, 24 Eur. H.R. Rep. 143, 169 (1997) (state refusal to register transsexual as father of child conceived through artificial insemination); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)(homosexual sodomy); *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. 1, 6-17, 19-21 (1997) (upholding government refusal to license video based on blasphemous content).

limit the court's interpretive alternatives.¹⁴³ This reliance on consensus over the meaning of rights has been a crucial component in the evolution of the court's legitimacy and, correspondingly, its ultimate success in enforcement.

Third, the court's institutional practices, ranging from selection of judges to litigation procedures, are far more professional and credible than those of most other international human rights enforcement institutions. The full time employment of highly trained professional judges and staff, vetted by the domestic political processes of the state parties and provided with adequate financial resources, is fundamental to the ECHR's success. Finally, as previously noted, the ECHR benefits enormously from social, political and economic linkages, which provide substantial incentives for compliance with the Court's decisions. The development of such incentives, tied to the decisions of reformed international institutions focused on universally understood rights, may prove crucial to the eventual enforceability of international rights generally.

IV. The Future of Human Rights Enforcement

Both the success of the ECHR and developing enforcement alternatives described above potentially have two significant implications for the future of human rights enforcement. First, these developments have some potential for creating effective alternatives to more traditional approaches to enforcement. As noted below, however, there are certain problematic aspects to these alternatives that may limit their potential usefulness in this regard. Second, and perhaps more importantly, these developing

¹⁴³ See generally Donoho, *Autonomy, Self-Governance and the Margin of Appreciation*, *supra* note 22 at 450-66.

alternatives may provide critical insights regarding how to remedy critical weaknesses in existing approaches and institutions.

A. Providing Effective Enforcement Alternatives

How might the enforcement alternatives described above directly advance the effectiveness of human rights? In the first instance, all three alternatives have some potential for enhancing deterrence against violations of international standards. Traditional enforcement techniques, aimed almost exclusively at governments, currently provide limited deterrence against human rights violations. It is true, of course, that the dearth of realistic practical incentives and consequences for governments is central to this lack of effective deterrence and most ultimately be addressed.¹⁴⁴ However, it seems equally rational to believe that an increased focus on individual accountability should improve deterrence by creating significant personal disincentives for individual perpetrators of abuse. Although currently only a potential, an optimist could easily envision a network of states utilizing universal jurisdiction to provide criminal and civil remedies in a fashion that denies “safe haven” to individual human rights violators.¹⁴⁵ An important first step in preventing violations is eliminating the perception of individual impunity generated by current conditions.

This focus on individual accountability also tends to circumvent the paucity of government incentives to effectively enforce international standards against other governments. Both the Filartiga and Pinochet style remedies are dependant to some

¹⁴⁴ See *supra* notes 80, 84-86, 141-43 and accompanying text.

¹⁴⁵ This is a common theme of those who advocate use of transnational litigation. See, e.g., Colliver, Green & Hoffman, *Holding Human Rights Violators Accountable By Using International Law in the U.S. Courts*, 19 EMORY INT’L L. REV. 169, 177-79 (2005).

degree on the political will of the host forum which must, in the first instance, generally authorize such remedies.¹⁴⁶ However, if appropriately limited to avoid overt political abuse and conflicts with national foreign policy, neither remedy should depend directly on case by case government bound motivations, which are inevitably linked to competing policy and political interests. Once such actions are authorized by domestic law, particular cases are at least partly isolated from competing national interests. This, and increased victim access and control over remedies, should lessen the potential for political manipulations—a problem that has often plagued the work of international human rights bodies.

Finally, although in distinct ways, each of these developing enforcement alternatives avoids some of the institutional weaknesses reflected in the traditional mechanisms for enforcement.¹⁴⁷ Domestic institutions utilized under the *Filartiga* and *Pinochet* paradigms will usually enjoy well-established authority and effective means for effectuating their decisions. Domestic courts, for example, are more likely to be staffed by independent professional judges and their jurisdiction defined and controlled by legislation. Also subject to a degree of public accountability, such institutions enjoy attributes of legitimacy and credibility currently lacking in most existing international forums.¹⁴⁸

¹⁴⁶ The host forum legal system must authorize or approve such remedies, typically through legislative or judicial action. Similarly, criminal prosecutions such as in *Pinochet* will typically depend on discretionary judgments made by government prosecutors or judges. *See, e.g., supra* notes 93-97, 100 and accompanying text.

¹⁴⁷ International institutions currently have many built-in limitations on their enforcement capacity, some of which are inherent. *See supra* notes 42-54, 60-63, 74-77 and accompanying text. Reliance on well-established and respected domestic institutions with regularized enforcement capacity helps avoid some of these limitations.

¹⁴⁸ There is, however, at least one sense in which foreign domestic institutions will lack an important component of legitimacy. Decisions rendered by foreign domestic processes regarding extraterritorial events possess neither intrinsic connections nor elements of local accountability to the people and culture of

It is easy, however, to overstate the potential enforcement value of these alternatives. The options described above are, at least for now, not sufficiently widespread or accepted to make significant advances towards alleviating human rights abuses.¹⁴⁹ Put into perspective, it is difficult to view the limited number of civil judgments against foreign defendants brought before U.S. courts as anything other than symbolic.¹⁵⁰ Similarly, the reality is that there have been no successful domestic criminal prosecutions following the Pinochet model and Belgium's recent experiment with full scale adoption of universal jurisdiction, has revealed problematic implications and distinct practical limitations on its use.¹⁵¹

There also appears to be significant limits on the potential effectiveness of international criminal processes. The number of actual defendants that will appear before

the place where the relevant violations occurred. *See supra* notes 97, 99 and accompanying text. This lack of "connectivity" makes it critical that such foreign or extrinsic remedies focus on the narrow range of rights that enjoy universal acceptance and clear definitions susceptible to culturally neutral applications. *See* Donoho, *Autonomy, Self-Governance and the Margin of Appreciation*, *supra* note 22 at 450-66.

¹⁴⁹Evidence about the potential spread of Filartiga style civil remedies to countries outside of the United States is somewhat murky. There is at least some evidence that similar remedies are increasingly available in Europe in the form of reparations relating to criminal charges for extraterritorial human rights violations. *See* Van Schaak, *supra* note 90 at 144-47.

¹⁵⁰ While many claims have been brought under the ATCA and TVPA, *see* Stephens, *Individuals Enforcing International Law*, *supra* note 18, only a modest number have resulted in judgments, mostly through default. *See* Colliver, *supra* note 145 at 176 (citing 16 litigations resulting in judgments); Beth Stephens, *Sosa v. Alvarez-Machain "The Door is Still Ajar" for Human Rights Litigation*, 70 BROOK. L. REV. 533, 534 (2004-2005) ("interest [in ATCA] far outstrips the actual results of the litigation: most ATS cases have been dismissed, only about two dozen cases have produced final judgments under the statute, and only one judgment has led to the collection of significant damages."). *See also* Van Schaak, *supra* note 90 at 170; The requirements of jurisdiction essentially ensure that only a limited number of defendants -- those who travel to the United States-- will ever be brought to justice before U.S. courts. *But see* Colliver, *supra* note 145 at 175 (Center for Justice and Accountability estimates that "several hundred" potential defendants currently reside in the United States). Similarly, the potential for victims to ever in fact receive compensation is probably limited in that most defendants do not have significant assets. *See, e.g.*, George Stavis, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-Profit Litigators?*, 31 COLUM. H. RTS L. REV. 209, 214-16 (1999); Colliver, *supra* note 145 at 179. Whether such suits provide any realistic deterrence against human rights violations remains correspondingly uncertain. However, as many have pointed out, symbolism and intangible benefits to those limited number of victims who find their way to U.S. courts have real value if for no other reason than preventing the United States from becoming a safe haven for human rights abusers. *Id.* at 175-86.

¹⁵¹ *See* Steven Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 A.J. INT'L L. 888, 891-94 (2003); Damien Vandermeersch, 3 J. INT'L CRIM. JUST. 400, 404-09.

such tribunals, if the ICTY's experiences hold true, will be quite limited. Like the ad hoc tribunals before it, the ICC will undoubtedly have difficulty apprehending future defendants and the subsidiary role of the ICC will limit its prosecutions to those where political conditions become favorable and domestic alternatives are impossible.¹⁵²

Yet, despite these limits and other potential downsides, these developing alternatives should be lauded as potentially useful tools for enforcing human rights. Each has, in essence, opened new frontiers in the quest for accountability. Their importance does not lie in their current effectiveness but rather in their potential. The Filartiga and Pinochet approaches create potentially vibrant enforcement precedents by opening neutral domestic courts to victims of human rights violations occurring in places where local domestic redress is implausible or ineffective. Widespread adoption of such remedies grounded in appropriately limited universal jurisdiction, especially among Western industrialized democracies where former human rights abusers are most likely to hide, would undoubtedly increase the potential that human rights victims will have access to neutral and effective judicial redress.

B. Insights for Reform: Defining Appropriate Roles for International Institutions

What lessons for improving existing institutional frameworks may be drawn from the enforcement alternatives described above and the successes of the ECHR? Initially, it should be recognized that effective international human rights institutions are critical to world-wide realization of human rights. Enforcement of human rights is ideally the job of domestic institutions where alleged violations occur. We live, however, in a less than ideal world where effective domestic protection of individual rights will continue to be

¹⁵² See generally Goldsmith, *supra* note 131.

often impossible. In our imperfect world, international human rights bodies must and should play a vital role in enforcing rights and providing redress.¹⁵³

The central characteristics of the enforcement alternatives described above provide insights into how a remodeled international system might more effectively fulfill these functions. First and most importantly, the international community should make critical distinctions among rights with regard to enforceability. Enforcement mechanisms regarding well defined, universally accepted rights for which international consensus over meaning exists will be more palatable and more readily accepted by governments. This is true not only for accused governments, but also for the international community generally, whose cooperation in creating meaningful incentives for compliance is vital. Mandatory sanctions through recourse to Security Council, or economic incentives linked to the WTO or IMF are, for example, far more likely to be accepted if limited to violations of universally understood and accepted rights.

Similarly, this more nuanced approach to the enforceability of different categories of rights, if coupled with other institutional reforms, would significantly enhance the perceived legitimacy of international human rights institutions. Attempts to authoritatively interpret and enforce specific applications of human rights that are subject to genuine cultural and political dispute inevitably raise concerns about over-reaching, lack of accountability and usurpation of local choice. By focusing enforcement efforts (as opposed to non-binding promotional activity) on universally understood and relatively uncontroversial rights, concerns over institutional legitimacy are greatly ameliorated.

¹⁵³ These international institutions also serve many valuable roles apart from enforcement. The work of promoting rights awareness, exposing violations and responding to human rights crises is vital, and in critical ways, distinct from the work of authoritative enforcement.

Such distinctions among rights also lend themselves to important institutional reforms that could prompt governments to accept more authoritative enforcement mandates. For example, the newly created ICC has enormous potential for engendering state respect for its authority that is typically missing with existing international human rights institutions. Unlike most existing institutions, the ICC has been created with a clearly defined and circumscribed mandate and relatively narrow subject matter focus. Fears of over reaching or politicized decision making should be generally alleviated by the subsidiary nature of the Court's jurisdiction. While the ICC's ultimate legitimacy and credibility will depend in part on whether it earns the respect of states incrementally over time, it is legally well situated to accomplish that goal. The jurisdiction and mandate of existing institutions should be amended and clarified, or new institutions created, to reflect such distinctions.

Such distinctions and limits on jurisdictional mandate will not only greatly improve the perceived legitimacy of human rights institutions; they may help mediate the inherent tension between authoritative international enforcement and domestic democratic prerogatives. I have argued elsewhere that the preservation of democratic values and our concerns over the democratic legitimacy of human rights decision making should shape how the international community approaches enforcement, particularly regarding the authority of international institutions.¹⁵⁴ Indeed, in a perfect world populated by functioning democratic states with reasonable domestic institutional

¹⁵⁴ Donoho, *Democratic Legitimacy*, *supra* note 10.

safeguards, authoritative international remedies might reasonably be seen as inappropriate or counterproductive to democratic ideals.¹⁵⁵

A key consideration in this regard once again involves jurisdictional constraint and distinctions among rights. Enforcement focused on international consensus, universal jurisdiction and *jus cogens*, for example, sharply reduces concerns over the democratic authenticity and accountability of international decision making. Violations subject to universal jurisdiction, like those that justify the prosecution of war crimes by the ICC, are not “foreign” or “external” to the world’s domestic legal systems and societies. Rather, parallel legal norms exist within virtually all domestic legal systems and are deeply interwoven into the cultural and social fabric of every society. A new name for an old wrong like “ethnic cleansing” doesn’t imply that the Bosnian Serbs had a different moral or legal code on that subject before international standards were developed by the ICTY. The traditional norms and morals of virtually all societies, including Serbian, were violated by the atrocities committed in Bosnia.

The creation of new or revised enforcement mandates, limited to rights over which true international consensus exists, should be coupled with other institutional reforms designed to promote credibility and respect. Models for such institutions reforms should include the ECHR and ICC. Although imperfect, both institutions possess

¹⁵⁵ *Id.* at 56-64. It must be acknowledged that the developing enforcement alternatives described above, if used without constraint, are not entirely consistent with this outlook. For example, the most troubling objections to the Pinochet case have centered on the policy implications that arise when foreign courts indict former heads of states or other public officials, particularly when the originating jurisdiction has granted amnesties or is attempting other forms of national reconciliation. Foreign litigation and prosecutions under these circumstances have the potential to usurp the originating state’s domestic processes and prerogatives. This potential for external interference with domestic democratic choice is similar to that created by authoritative international decision making. In this sense, the Pinochet and Filartiga paradigms create variants on the inherent tension between international and domestic authority. Thus, these enforcement paradigms create new and distinct accountability issues since each involves decision makers external to the people, cultural and context in which the violations took place.

generally credible and neutral procedures for selecting judges or “experts,” professional and regularized rules of evidence and procedures, and plausibly sufficient staffs and budgets.

Finally, the reforms described above must be accompanied by efforts to link resulting international decisions to practical economic and political consequences that create practical incentives for voluntary compliance. Such incentives, crucial to the success of the ECHR, are only likely to develop, however, with regard to decisions limited to enforcement of a fairly narrow range of universal rights over which true concerns exists.

Conclusion

Enforcement remains the weakest component of the international human rights system. Designed around the implausible premise of voluntary state compliance, existing international institutions outside of Europe currently lack the capacity to meaningfully enforce human rights in a world characterized by conflict and diversity. Already hobbled by institutional weaknesses, existing human rights bodies have failed to develop incrementally their legitimacy and earn the respect of governments by developing a nuanced approach to enforcement that recognizes distinctions among rights regarding enforceability. Lessons for reform should be drawn in this regard from the ECHR and developing enforcement alternatives which focus on individual accountability for a fairly narrow range of rights over which international consensus exists.