International & National Security Law

Domestic Courts and Growing NGO Investment in "International Law": At What Cost and Consequence to Democracy?

*By Donald J. Kochan**

Introduction

Increasingly, United States courts are recognizing various treaties, as well as declarations, proclamations, conventions, resolutions, programmes, protocols, and similar forms of inter- or multi-national "legislation" as evidence of a body of "customary international law" enforceable in domestic courts, particularly in the area of tort liability. These so-called "legislative" documents, referred to herein as customary international law outputs ("CILOs"), are seen by some courts as evidence of *jus cogens* norms that bind not only nations and state actors, but also private individuals. Such enforceability has occurred even where such international CILOs have not been codified or otherwise adopted by Congress.

The most obvious evidence of this trend is in the proliferation of lawsuits against corporations with ties to the United States for alleged violations of customary international law during development projects abroad. Such lawsuits are most often brought under the federal Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, which has seen an evolution in the past 22 years after remaining dormant for nearly 200 years since its passage with the Judiciary Act of 1789. The evolution began in 1980 when the ATS was raised from dormancy and a federal appeals court found that suits based on customary international law for human rights abuses could be heard under the ATS.[1] Use of the ATS expanded most notably again in 1995 when a federal appeals court held that quasi-public and even private actors might be bound by customary international law;[2] and grew again in 1997 when a federal district court held that a private corporation was subject to ATS jurisdiction for alleged human rights abuses abroad.[3] Since then, scores of lawsuits against private actors – principally corporations engaged in natural resources development – have been filed. The September 18, 2002 decision by the U.S. Court of Appeals for the Ninth Circuit in *Doe I v. Unocal Corp.*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), is the latest, greatest expansion of the ATS to allow customary international law tort suits against private actors.

There are several problems with this trend toward enforceability of "customary international law" in U.S. courts. The litigation trend has many infirmities related to the Constitution, foreign policy, national security, and the public policies supporting economic development and its concomitant effect on the advance of democracy and political liberty.[4]

But this essay focuses on the consequences of enforceability of these CILOs arising from four interrelated factors: (1) the lack of bicameralism and presentment associated with the development of the documents associated with this judicially recognized body of customary international law – a process that increases the cost for the production of legislation and thereby checks rent-seeking; (2) the lack of formal elements of law associated with such documents – whereas more formal, specific, and knowingly enforceable legislation is more difficult and expensive for an interest group to produce; and, thus, formality requirements to enforceability decrease production of laws while looser standards are cheaper and more easily produced; (3) unequal expectations of the parties in the bargaining process for the production of such documents – meaning that the parties have not and are not now always cognizant of both the benefits and costs of customary international law document production because enforceability was either unexpected or unknown; and (4) the resulting incentives for nongovernmental organization ("NGO") rent-seeking from international bodies and development of such documents due to an increased value to such documents directly proportional to increased judicial enforceability.

Cutting Congress Out of the Bargaining Process

Many of the documents upon which courts are relying to identify customary international law and which NGOs are using in court to attempt to establish liability have not been acknowledged as binding let alone passed as law by Congress. As James Madison articulated, "[N]o foreign law should be a standard farther than is expressly adopted."[5]

For example, using two Second Circuit decisions – *Filartiga*[6] and *Kadic*[7] – as illustrations, each court looked to various international declarations and resolutions, including the Universal Declaration on Human Rights, to interprete the scope of the "law of nations" under the ATS. Such references create two problems. First, many of the sources relied, or at least partially relied, upon to determine a controlling rule of international law have never been ratified by Congress. Worse yet, Congress considered these declarations and resolutions and specifically chose not to accept them as binding authority. This poses serious questions about the legitimacy of their use as sources of law. In *Filartiga*,

> [T]he Second Circuit alluded to certain international treaties on human rights, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first two of these were among the four treaties on human rights submitted by President Carter to the Senate for its advice and consent in 1978 [and the United States

> was not involved in the third]. Neither in the court's opinion nor in the amicus brief filed in the Filartiga case jointly by the Departments of Justice and State, was reference made to the reservations, declarations, understandings, and statements that President Carter recommended that the Senate include in its resolution of advice and consent. The effect of these qualifications of the two treaties would be to render them non-self-executing for the United States, requiring implementing legislation to become effective as law in the United States.[8]

The *Filartiga* court did not even discuss or recognize either Congress's failure to ratify these documents or the affirmative and explicit concerns voiced by both Congress and the President in relation to the content of these documents. Yet it seems clear, especially in light of Congress's power to define offenses against the law of nations, that these sentiments should restrict the courts' reliance upon such documents as an authoritative statement of the law.[9]

Congress's actions on the International Covenant on Civil and Political Rights,[10] the American Convention on Human Rights, or on the Universal Declaration of Human Rights are not isolated situations. In fact, Congress has failed to ratify the vast majority of human rights treaties sponsored by the United Nations.[11] This record indicates a general unwillingness on the part of the United States to recognize broad principles of human rights as controlling legal authority.[12] For the courts to ignore this reality and insist that these documents form a foundation for ascertaining the "law of nations" component of the ATS is to harm Congress in two ways. First, it ignores Congress's power and prerogative to refrain from codifying certain principles or norms into U.S. law. Second, it restricts congressional power to legislate in a manner contrary to these principles or norms. By proclaiming that this principle or norm is universal and binding upon all states (or, in the case of *Kadic*, all states and some individuals), the court is stating that an obligation Congress has been specifically unwilling to accept will now bind the United States and its Congress.

Lacking Formal Elements of Law and An Expectation of Non-Enforcement by Some Bargaining Parties

Many of these CILOs are merely aspirational commitments between nations, not specific obligations for public or private entities with the formal elements of law. These types of documents are normally drafted with an understanding that they will not act as law, as evidenced by their language being far less precise and much broader than any signatory might normally wish to embody in a statute. Relying on proclamations of international assemblies creates problems because the texts of these documents are liberally drafted and embody general goals or aspirations as opposed to legally binding principles.[13] *Filartiga, Kadic*, and other cases applying the ATS, however, have looked to such documents as supporting authority for their pronouncements on the existence of an international law.[14]

Often the parties drafting the CILOs upon which the courts increasingly rely and upon which NGOs advocate in court simply did not intend for these documents to be construed as law. For example, Rusk has stated that "[t]he simple fact is that this [Universal] Declaration [of Human Rights] was not drafted or proclaimed to serve as law."[15] In fact, Eleanor Roosevelt, Chairman of the Commission on Human Rights, stated when presenting the Declaration to the U.N. General Assembly, that "[i]t is not and does not purport to be a statement of law or of legal obligation ... [it is] a common standard of achievement ...."[16] Rusk further contends that this was the understanding of Congress, the Executive, and even the United States delegates to the United Nations:

> As one of the authors of the instruction that Mrs. Roosevelt received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law. There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.[17]

The Universal Declaration of Human Rights is but one example. Had the drafters intended for many of these documents upon which courts and plaintiffs are relying to become legally binding in the judiciary, many of these documents might not have passed out of the multinational body, might not have been signed by the United States, and had they been accepted in some form, would surely exhibit a dramatically different language and scope than those promulgated with an understanding that the document was merely aspirational. As Rusk has stated, "It should be noted . . . that votes cast [on UN General Assembly Resolutions] with the knowledge that the result will not be law are very different from votes that would be cast if there were a general awareness that the result would be operationally and legally binding."[18]

This conclusion, that universal declarations are not meant to act as controlling law, is strengthened by an examination of the bodies creating these documents. Realizing that the United Nations is to have no sovereign authority, Rusk articulates the nature of its "power" as understood by member states:

> The [UN] Charter . . . did not contemplate that the General Assembly would be a legislative body in the field of international law generally. . . . There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter.[19]

Thus, even if Congress could delegate its power to define offenses against the law of nations to this international body, it clearly did not intend to do so. Similarly, other multinational organizations to which the United States is a party lack a gen-

eral legislative power. They may have the ability to draft treaties, but even these do not become binding upon the United States unless two-thirds of the Senate chooses to give its advice and consent to the ratification of that treaty.[20] Moreover, even when Congress ratifies a treaty, it may often require additional legislation to "execute" provisions of the treaty.[21]

The Increasing Role of NGOs and Its Implications

This essay concludes by discussing the incentives for, and influences of, NGOs in this process. It concludes that, from a public choice perspective, most CILOs should not serve as evidence of judicially enforceable legal obligations.

The examination focuses largely on the supply and demand for production of CILOs, arguing that enforceability of CILOs in U.S. courts in the short run should increase the production of CILOs. The thesis is that non-enforceability of CILOs was a significant demand constraint on production. Increasingly this constraint is being removed as more and more courts recognize CILOs as enforceable in U.S. courts – all without a corresponding increase in supply constraints.

For example, NGOs have a considerable advantage in bargaining for CILOs because the development of these documents lacks the interest group competition that keeps rent-seeking in check – *e.g.*, to date, globalization and international development lobbies have a noticeably lesser presence during production of customary international law documents, although with greater awareness this may be changing. The NGO advantage is further buttressed by the fact that the decision makers in the bargaining process: (a) did not or do not now approach the bargaining process as though the resulting standards would be enforceable; and (b) among themselves do not face equal burdens (e.g., not all nations or their constituents have equal risk of adverse consequences of enforcement of the international standards in a domestic court).

NGOs have taken note of, and exploited the possibilities in, this judicial trend. First, NGOs appear to be recognizing the benefits to their agendas that can be gained through tort litigation based on customary international law. It is no coincidence that anti-globalization, environmental, sustainable development, labor rights, and other human rights NGOs are the principal parties spearheading recent lawsuits on behalf of plaintiffs who have allegedly suffered as a result of development projects in underdeveloped and developing countries.[22] These NGOs have also found an ally in the domestic plaintiffs' bar – including some of the most influential trial lawyers from the tobacco, asbestos, breast implant, and other high profile mass tort suits of late – who are often partners in this emerging body of lawsuits.[23] The theories advanced in these suits appear not only to be attempts to take advantage of the increased recognition of customary international law but also to drive the law forward to further shape federal law as embracing a broad body of federally recognized international torts. Aside from developing law and resolving particular cases, NGOs are also taking advantage of such litigation and the threat thereof to pressure corporations to accept and adopt industry-wide international standards for certain activities. It will be interesting to discover whether these industry commitments will be revocable at some point in the future or if they may indeed inform (and accelerate) the development of customary international law further, legally binding industries to such standards in future litigation.

Second, the greater the chance that international "legislative" documents will create domestically enforceable norms in United States courts, the greater incentive NGOs have to invest in the development of CILOs. NGO investment in developing CILOs should be expected to increase as the documents' values are increased as a result of domestic court recognition of liability for conduct contrary to the standards contained therein.

Through production of CILOs and judicial enforceability, NGOs can not only subvert bicameralism and presentment for the creation of federal tort law but they might also achieve something perhaps more valuable – a declaration by a United States court of a universal law binding on all nations, including the United States, without surviving the rigors of bicameralism and presentment or constitutional amendment. Inherent in Congress's power to legislate is the authority to choose not to legislate. When a court decides to look beyond Congress for controlling regulations or for controlling definitions of "law", it may be usurping Congress's power to refrain from regulating or defining.[24] Stated another way, the court may create a regulation or definition where Congress clearly wishes to refrain from regulating or refrain from creating a controlling rule of law.[25]

At the same time that these demand constraints are weakened as a result of greater enforceability of CILOs, it is quite possible that supply constraints will remain stable, or at best tighten slowly. For one thing, NGO capture of CILO production centers – often single purpose units with longstanding relationships with NGOs – has meant that there is limited competition in the production process. The lack of serious opposition from diffuse interests means that increasing demand from NGOs for CILO production will not significantly checked – at least not in the short run. Although corporations and others subject to potential liability from enforceable CILOs may recognize that they need to become engaged opposition interest groups in the supply of CILOs, several barriers including entrenched capture will make it difficult for such groups to operate as a serious constraint on increased supply that will be motivated by increased demand.

Conclusion

As courts accord greater weight to customary international law outputs as establishing norms enforceable in litigation, many, including NGOs, will have an incentive to push for the production of CILOs that embody the principles that advance their interests. In the absence of courts stemming the tide toward CILO enforceability, Congress may have to affirmatively act to deliver a clearer signal to courts that certain CILOs not adopted into law by Congress must not be deemed so adopted by the courts.

* Donald J. Kochan is a Visiting Assistant Professor of Law at George Mason University School of Law.

Footnotes

[1] In *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980), Dolly Filartiga, a citizen of the Republic of Paraguay, brought suit against Americo Norberto Pena-Irala, formerly an Inspector General of Police of Paraguay, for allegedly kidnaping, torturing, and killing her brother while holding that office. The alleged action took place in Paraguay. The district court dismissed the action for lack of subject matter jurisdiction. The Second Circuit reversed and remanded, holding that deliberate torture by state officials violates international law, and that alleging such torture creates jurisdiction under the ATCA. The Second Circuit held that courts ascertaining the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881.

[2] Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 2524 (1996).

[3] Jon Doe I v. Unocal Corp., 963 F.Supp. 880 (C.D. Cal. 1997) (upholding subject matter jurisdiction under ATCA based on allegations that an American oil company, acting in concert with the Burmese government, committed various civil and human rights abuses), *aff'd in part & rev'd in part*, ___ F.3d ___, 2002 WL 31063976 (9th Cir. Sep 18, 2002).

[4] *See, e.g.*, Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 Cornell Int'l L.J. 153 (1998); Donald J. Kochan, After Burma," Legal Times, Aug. 21, 2000, at 54; Donald J. Kochan, "Foreign Policy, Freelanced: Suits brought under Alien Tort Claims Act undermine federal government's authority," The Recorder (Cal.), Aug. 23, 2000, at 5; Donald J. Kochan, "Rein in the Alien Tort Claims Act: Reconstituted Law of Nations Standard Needs Defining by Congress," Fulton County Daily Report (Ga.), Aug. 24, 2000.

[5] 2 The Records of the Federal Convention of 1787, at 316 (Farrand ed., 1986).

[6] Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

[7] Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996), *cert. denied*, 116 S. Ct. 2524 (1996).

[8] Dean Rusk, *A Comment on Filartiga v. Pena-Irala*, 11 Ga. J. Int'l & Comp. L. 311, 315 (1981) (citations omitted). Hassan provides a similar conclusion:

> [T]he President also inserted various reservations, declarations and understatings [sic], thereby further decreasing the efficacy of those treaties [including the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; and the American Convention on Human Rights], quo the USA, when eventually those treaties are ratified by the USA.

Farooq Hassan, Note, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 Int'l & Comp. L.Q. 250, 255 (1983) (also adding that the Genocide Convention, submitted to the Senate in 1948, has still not been ratified).

[9] *See* Mark P. Jacobsen, Comment, *28 U.S.C. 1350: A Legal Remedy for Torture in Paraguay?*, 69 Geo. L.J. 833, 834, 849 (1981) (arguing that, "the court might have effectively curtailed the Senate's ability to set policy in the area of human rights.").

[10] The International Covenant on Civil and Political Rights awaited Senate action since 1978, *id.* at 847, eventually entering into force for the United States in late 1992 with five reservations, five understandings, four declarations, and one proviso. *See generally* John Quigley, Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights, 6 Harv. Hum. Rts. J. 59 (1993).

[11] Jacobsen, *supra* note 6, at 847-48 ("[T]he Senate has been unwilling to extend international law to encompass the protection of human rights.").

[12] *See id.* at 849. *See also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 869 (1997) (stating that "the political branches have made clear that they do not want the new CIL [customary international law]to have domestic law status").

[13] One court in a case where plaintiffs sought jurisdiction under the ATS, for example, granted *a Fed. R. Civ. P. 12(b) (1)* motion on the basis that the international principles relied upon, the Stockholm Principles on the Human Environment,

> do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders. Nor does the Restatement of Foreign Relations law constitute a statement of universally recognized principles of international law.

Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668 (S.D.N.Y. 1991).

[14] The *Filartiga* court cited as authority a number of international treaties, "to which the United States is not a party," to establish a universal norm against torture in modern usage and practice. Louis B. Sohn, *Torture as a Violation of the Law of Nations*, 11 Ga. J. Int'l & Comp. L. 307, 308 (1981).

[15] Rusk, *supra* note 5, at 313.

[16] *Id.* (quoting (XIX Bulletin, Dep't St. Bull., Dec. 19, 1948, No. 494, at 751)).

[17] *Id.* at 314.

[18] *Id.* at 315.

[19] *Id.* at 314.

[20] U.S. Const. art II, §2, cl. 2.

[21] This is the distinction between self-executing and non-self- executing treaties. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 808-19 (D.C. Cir. 1984) (Bork, J., concurring).

[22] *See, e.g.,* Robert Vosper, *Conduct Unbecoming; No Longer Satisfied With Destroying the Reputations of Corporations That Get Entangled in Human Rights Abuses Overseas, Activist Groups are Seeking Retribution in U.S. Courts*, Corp. Leg. Times, October 2002, at 35.

[23] *See id.* For example, Steve W. Berman, the attorney who represented over a dozen states in the tobacco litigation, was lead counsel for a group of Papua New Guinea residents who sued, among others, Rio Tinto PLC for abuses alleged in conjunction with its mining operations in Papua New Guinea. *See* Sarei v. Rio Tinto PLC, 221 F.supp.2d 1116 (C.D. Cal. 2002).

[24] *See* Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J. Int'l L. 1, 38-44 (1995).

[25] Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand. L. Rev. 1205, 1255-56 (1988).