American Style in International Human Rights Adjudication

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I. INTRODUCTION

International legal process in cases of human rights abuses reflects conflicting aspects of Americanization. One aspect is a reflection of the American penchant for, and style in, lawsuits. Lawsuits are filed against states and against multi-national corporations as plaintiffs seek remedies for rights abuses. Liability is sought even for indirect involvement in causing harm. Extensive fact-evidence submissions are made, and legal arguments are put forward aggressively and creatively.

At the same time, the government of the United States has taken international legal process in the opposite direction, in an effort to limit the applicability of international law against the United States or its officials. The United States seeks to avoid prosecution of its agents in the new International Criminal Court. It avoids submitting itself to the complaint procedures provided under human rights treaties. It avoids submitting itself to the jurisdiction of the International Court of Justice.

When decisions are rendered against it in the International Court of Justice, the United States refuses to accept them as binding, or construes them artificially in order to evade them. In international fora, the United States construes treaty obligations narrowly to avoid responsibility. It declines to allow itself to be sued in U.S. courts for violation of norms found in human rights treaties. When such cases are justiciable, U.S. courts construe treaty obligations narrowly to sidestep those obligations.

This latter aspect of U.S. practice represents a repudiation of adjudication to resolve rights issues. The United States, thus, is pushing the international human rights process in both a more expansive and a less expansive direction at the same time. This Article explores these two conflicting aspects of the U.S. impact on international process.

II. LITIGATION IN INTERNATIONAL AFFAIRS

A feature of domestic law in the United States is a marked tendency to resort to litigation to deal with problems that in other states are handled by other mechanisms, or are not handled in a public way at all. This tendency is

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reflected in a generalized litigiousness in the United States, with social issues being handled through private litigation to a greater extent than in other states. The widespread use of malpractice insurance by professionals in the United States, as a protection against anticipated litigation, is evidence of this phenomenon.

On the institutional side, U.S. procedure provides for the possibility of class-action lawsuits to deal with problems affecting groups of people.[1] This opportunity, which facilitates suits dealing with a variety of social problems, is not generally available in the courts of other states.[2] Another procedural mechanism that facilitates litigation in the United States is the rule that an unsuccessful plaintiff does not typically have to pay the cost of the defendant's attorney fees. In the United Kingdom, an unsuccessful plaintiff is typically ordered to pay the defendant's costs, including attorney fees.[3] As a result, potential plaintiffs in the United Kingdom must consider, before filing, that a suit might cost them dearly, perhaps even to the point of bankruptcy. In the United States, by contrast, an unsuccessful plaintiff may be forced to bear some of the defendant's costs, but typically will not be responsible for what is often the most substantial cost, attorney's fees for defense counsel.[4]

For example, a group of individuals in Myanmar sued UNOCAL, a U.S. corporation, for its construction of an oil pipeline that, according to the plaintiffs' allegations, involved heavy-handed action by the Government of Myanmar to get rural inhabitants out of the path of the pipeline.[5] The plaintiffs sued for acts in violation of the law of nations, on the theory that although a foreign government carried out the acts, the corporation facilitated them and thus should be held responsible.[6] Even though the theory of recovery was novel, plaintiffs could be confident that they would not bear attorney fees if the suit failed.[7]

In another example, relatives of persons who were killed in the United States on September 11, 2001 filed suit in federal court in 2002 against one hundred Saudi Arabian individuals, charities, and banks, on the theory that

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[1] *See* FED. R. CIV. P. 23.

[2] Richard Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 217–21 (1992).

[3] Ruth Bader Ginsburg, *Access to Justice: The Social Responsibility of Lawyers*, 7 WASH. U. J.L. & POL'Y 1, 6, 7–8 (2001).

[4] *See* FED. R. CIV. P. 54.

[5] Doe v. UNOCAL, No. 00-56603, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002).

[6] *See id.*

[7] *See id.*

they provided financing to Osama bin Laden.[8] This suit would be highly risky if filed in the United Kingdom, even if the evidence were sound as to most of the defendants, since a court might well find insufficient proof that funds from a particular defendant reached bin Laden.

Another U.S. practice that facilitates the filing of suits is the availability of contingency fees, whereby a plaintiff surrenders to the attorney a percentage of any recovery but pays the attorney nothing if the suit fails. The availability of contingency fees makes it possible for an impecunious plaintiff to sue. In most states of the world, plaintiffs bear attorney fees regardless of the outcome of litigation.[9]

Still another procedure that contributes to litigiousness in the United States is the rule of jurisdiction that allows for service of process on a potential defendant who has little connection with the United States, so long as that party can be served there.[10] Thus, a person who acts outside the United States, even against non-U.S. parties, but who subsequently ventures into the territory of the United States for a short-term visit, may be sued.[11]

Suits against foreign governments for rights abuses can more readily be filed in the United States than elsewhere because of a recent amendment to U.S. rules on foreign sovereign immunity. Traditionally, states enjoy immunity from suit in the courts of other states. The United States has been prominent in carving out exceptions, however. In the mid-twentieth century, an exception developed for instances in which a foreign state engaged in commercial activity.[12] Congress provided for this exception by legislation.[13] Congress later provided another exception for certain torts committed by a foreign state in the territory of the United States.[14] Congress then introduced yet another exception, when it amended the statute on foreign-state immunity to allow suit against a foreign state for an act of terrorism, if the state has been designated as a state sponsor of terrorism.[15] Using this exception a number of plaintiffs have sued Iran in federal court, in one case for

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[8] Bob Egelko, *9/11 Families Sue Saudis, Sudan for $3 Trillion*, S.F. CHRON., Aug. 16, 2002, at A1.

[9] Bader Ginsburg, *supra* note 3, at 7.

[10] FED. R. CIV. P. 4(e).

[11] *See* Kadic v. Karadzic, 70 F.3d 232, 246–47 (2d Cir. 1995).

[12] *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, letter from Jack B. Tate, Acting Legal Adviser to Dep't State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) *in* 26 DEP'T ST. BULL., 1952, at 984–85.

[13] 28 U.S.C. § 1605(a)(2) (1994 & Supp. 2003).

[14] 28 U.S.C. § 1605(a)(5); *see also* Letelier v. Chile, 488 F.Supp. 665, 669 (D.D.C. 1980).

[15] 28 U.S.C. § 1605(a)(7).

responsibility in a 1983 bombing of a U.S. Marines barracks in Beirut that resulted in the deaths of 241 U.S. Marines.[16]

III. LIMITATIONS ON ADJUDICATION

The openness to suit over international claims in U.S. courts vanishes, however, when the potential defendant is the government of the United States. The United States has sought to insulate its own courts from treaty-based human rights claims when it ratifies human rights treaties, by filing declarations that such treaties are not "self-executing."[17] These declarations are aimed at impairing the domestic legal effect of human rights treaties. It is not clear whether the intent behind these declarations is to keep human rights provisions from playing any role before the courts, or whether it is only to avoid creating a new cause of action in the federal courts that would be based on these provisions.

The doctrine of "self-execution" is one that the United States Supreme Court developed in the 19th century, in implementing the Supremacy Clause of the Constitution. The Court stated that despite the apparent sweep of the Supremacy Clause, not all treaty provisions operate as domestic law. In particular, provisions that call for legislative action before achieving their intended effect do not operate as domestic law.[18] However, if it appears from treaty language that the parties intended in a particular treaty provision to create a right, then the courts consider such a provision to have operative effect.[19] In the 1990s, when the United States began to ratify human rights treaties of general application, it appended declarations about non-self-execution, but left considerable ambiguity as to the intended meaning of these declarations.[20] Whatever the intent, the U.S. Supreme Court has not yet construed these provisions or determined whether they have any legal effect.

The United States has also protected itself from norms of treaty-based rights by the use of reservations. A state may, when ratifying a treaty, reserve to provisions it deems inappropriate.[21] Extensive reservations have restricted the applicability in U.S. courts of human rights treaties the United States has

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[16] *U.S. Court Blames Iran for Beirut Bombing*, N.Y. Times, May 31, 2003, at A5.

[17] David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L. L. 129, 166 (1999) (stating "that the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing").

[18] Foster & Elam v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829).

[19] U.S. v. Percheman, 32 U.S. (7 Pet.) 51, 88–89 (1833).

[20] Sloss, *supra* note 17, at 148–49, 158–59 (1999).

[21] Vienna Convention on the Law of Treaties, May 23, 1969, art. 19, 1155 U.N.T.S. 331, 336–37.

ratified. Prior to U.S. ratification, the Department of Justice parses treaties in search of provisions that might require a change in U.S. practice, then formulates a reservation, or other language, to file along with its ratification instrument. The United States has filed more reservations to human rights treaties than any other state.[22]

Even apart from impediments emanating from the manner of ratification, courts in the United States have been extremely reluctant to apply human rights provisions against the United States. In a series of cases, the United States Supreme Court has declined to vindicate rights that appeared to be guaranteed by treaty.

When Haitians sailing in small boats sought to migrate to the United States in the early 1990s, the United States intercepted them on the high seas and returned them to Haiti.[23] Although many of these Haitians planned to seek political asylum, the United States failed to inquire whether they might be persecuted in Haiti. A court challenge was mounted to this practice on the ground that the U.N. Convention Relating to the Status of Refugees forbids a state to return asylum seekers to their states of origin in the face of persecution. Article 33(1) of the Convention provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers or territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[24] At the time, this provision was effective as domestic law in the United States, having been incorporated by Congress into the Federal Immigration and Nationality Act.[25]

In its defense to the Haitians' pleas, the United States argued in court that an obligation not to "expel or return" would arise only if the asylum seeker entered U.S. waters, and that these individuals were intercepted on the high seas. The U.S. Supreme Court agreed, stating that the U.N. Convention did not protect the Haitians in this circumstance.[26] This conclusion deprived the Haitians of their guaranteed rights under the U.N. Convention, because the Convention obligates a country to refrain from returning a person who is at risk of persecution. The Convention does not specify that a person must enter

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[22] *See, e.g.*, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL; STATUS AS AT 31 DECEMBER 2002, at 175–76, U.N. Doc. ST/LEG/SER.E/21 (2002) [hereinafter MULTILATERAL TREATIES] (detailing reservations and other limitations to ratification of International Covenant on Civil and Political Rights).

[23] Sale v. Haitian Centers Council, 509 U.S. 155 (1991).

[24] Convention Relating to the Status of Refugees, July 28, 1951, art. 33.1, 19 U.S.T. 6259, 189 U.N.T.S. 150, as incorporated in Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

[25] 8 U.S.C. § 1253(h) (1999) (repealed 1996).

[26] *Haitian Centers Council*, 509 U.S. at 187–88.

national territory before the prohibition against return attaches, but simply forbids a state party to "expel" or "return" a person at risk of persecution. While "expel" may imply that a person is in the national territory, "return" does not. The United States obviously "returned" the Haitians by intercepting them on the high seas and sending them back, as was pointed out by the sole dissenting judge of the U.S. Supreme Court in the case.[27]

The United States Supreme Court similarly ignored the clear mandate of an extradition treaty between the United States and Mexico when it refused to block the prosecution in the United States of a Mexican national.[28] The Mexican national had been kidnapped from Mexico by persons hired by the Drug Enforcement Administration of the United States.[29] The extradition treaty provided procedures for the surrender of persons sought on criminal charges; it specifically allowed Mexico to refuse extradition of its own nationals, if it so chose in a particular case. By kidnapping the Mexican national, the United States evaded Mexico's right to refuse extradition of its own national and its right to have surrender handled within the stipulated extradition procedures.[30] Additionally, the United States violated the human rights norm that protects against arbitrary detention.[31] This provision in the International Covenant on Civil and Political Rights[32] on arbitrary detention has been construed to forbid such international abductions.[33]

U.S. courts have liberally invoked their doctrine of political question to avoid lawsuits challenging government action. For example, a suit questioning the congressional authorization of military action in Iraq was dismissed as a political question.[34] In Germany, by contrast, a court sanction is needed for the use of troops abroad. Because of a constitutional limitation on use of German troops outside state territory, the German government was

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[27] H.A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 43–45 (1994).

[28] Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T. 5059.

[29] United States v. Alvarez-Machain, 504 U.S. 655, 657–58 (1992).

[30] *Id.* at 672–75 (Stevens, J., dissenting).

[31] John Quigley, *Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain*, 68 NOTRE DAME L. REV. 723, 736–38 (1993).

[32] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

[33] *Celiberti v. Uruguay, Communication no. R.13/56, Report by the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 185, 188, U.N. Doc. A/36/40 (1981); *Burgos v. Uruguay, Communication no. 12/52, Report by the Human Rights Committee*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 176, 183, U.N. Doc. A/36/40 (1981).

[34] Doe v. Bush, 322 F.3d 109, 109 (1st Cir. 2003).

unable to send a peace-keeping force to Bosnia until it got a ruling from the Federal Constitutional Court.[35]

U.S. courts have declined to consider suits alleging violation by the United States of humanitarian law, on the rationale that the Geneva Conventions are not self-executing.[36] In reaching that conclusion, they have used dubious analysis, treating the Geneva Conventions in their entirety, rather than examining particular provisions to determine whether they are self-executing.[37] The courts have narrowly construed their role when a person is held, allegedly in violation of humanitarian law, at a location outside the territory of the United States. On this basis, U.S. courts have declined to consider suits by persons seized in Afghanistan and transported to the U.S. naval base at Guantanamo, Cuba and who are attempting to file for a writ of habeas corpus to determine whether they are prisoners of war.[38] In declining to consider these suits, the U.S. courts rationalized that persons other than the actual detainees could not seek a ruling on whether habeas corpus would lie.[39]

IV. LIMITATIONS ON SUITS AGAINST THE UNITED STATES IN INTERNATIONAL FORA

The United States has also protected itself from suits in international fora. Jurisdiction before international adjudicative bodies is based on the consent of states. States do not submit themselves generally to the process of such bodies. Rather, jurisdiction before each such body is handled separately. Many treaties dealing with human rights give states the option of submitting themselves to adjudicatory or quasi-adjudicatory procedures. To a greater extent than most states, the United States has refrained from submitting itself to such procedures.

States may subject themselves to the jurisdiction of the International Court of Justice for any breach of international law, including human rights violations, by filing a declaration in the Court in which they agree to be sued.

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[35] *German Government Welcomes Court Ruling on 'Out of Area' Missions*, Deutsche Presse-Agentur, July 12, 1994, LEXIS, Nexis Library, UPI File.

[36] Hamdi v. Rumsfeld, 316 F.3d 450, 468–69 (4th Cir. 2003).

[37] *Id.*; *cf.* United States v. Noriega, 808 F.Supp. 791, 797–800, n.8 (S.D. Fla. 1992) (finding a private cause of action based on the Geneva Convention and stating that individual provisions of the Geneva Convention need to be examined to determine whether they are self-executing).

[38] Odah v. United States, 321 F.3d 1134, 1146–47 (D.C. Cir. 2003); Coalition of Clergy v. Bush, 189 F.Supp. 2d 1036, 1047–49 (C.D. Cal. 2002).

[39] Coalition of Clergy v. Bush, 310 F.3d 1153, 1163–64 (9th Cir. 2002).

The United States filed such a declaration in 1946,[40] but withdrew it in 1986, after criticizing the Court for ruling against it in a case brought by Nicaragua.[41] Early on at the United Nations, the United States had been a major proponent of an international court to hear suits between states.

States may also subject themselves to the jurisdiction of the International Court of Justice by adhering to treaties that provide for referral of disputes to the Court in the event of treaty violations. The United States is a party to several such treaties dealing with human rights. It has typically protected itself, however, from possible referral of cases to the International Court of Justice. Under such treaties, states may establish a monitoring committee, with which aggrieved individuals may file complaints. The United States has protected itself from being subject to such complaints by individuals.

For example, the United States is a party to the Convention on the Prevention and Punishment of the Crime of Genocide,[42] but has reserved to Article 9, which subjects a state party to suit in the International Court of Justice at the initiation of another state party.[43] When Yugoslavia, along with nine other NATO states, tried to sue the United States for genocide in connection with NATO's bombing of Yugoslavia, the International Court of Justice dismissed Yugoslavia's suit against the United States on the basis of the U.S. reservation to Article 9.[44]

The United States has also ratified the International Convention on the Elimination of All Forms of Racial Discrimination,[45] but has reserved to Article 22, which provides that disputes between states regarding compliance are subject to the jurisdiction of the International Court of Justice.[46] Additionally, the United States has declined to file a declaration under Article 14 of the Convention that would allow individuals to file complaints before a monitoring committee established under the Convention.[47]

The United States has ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[48] but by declaration

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[40] 46–47 I.C.J. Y.B. 112.

[41] *U.S. Terminates Acceptance of ICJ Compulsory Jurisdiction*, 86 DEP'T ST. BULL., Jan. 1986, at 67.

[42] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, T.I.A.S. 1021, 78 U.N.T.S. 277.

[43] MULTILATERAL TREATIES, *supra* note 22, at 124.

[44] Legality of Use of Force (Yugo. v. U.S.), 1999 I.C.J. 916, 962–63 (June 2).

[45] International Convention on the Elimination of All forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195.

[46] MULTILATERAL TREATIES, *supra* note 22, at 139.

[47] *Id.*

[48] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

has exempted itself from Article 30, which makes disputes between states regarding compliance subject to the jurisdiction of the International Court of Justice.[49] Although the United States has filed a declaration under Article 21 to allow other state parties to file complaints against it with a monitoring body established under the Convention, it has declined to file a declaration under Article 22 that would allow individuals to file complaints against it with the monitoring body.[50]

The United States is also a party to the International Covenant on Civil and Political Rights,[51] but it has not ratified the Optional Protocol of the Covenant, whereby states authorize a monitoring committee established under the Covenant to entertain complaints from individuals alleging that the state has violated their rights.[52] Under the International Covenant on Civil and Political Rights, the United States has filed a declaration under Article 41 that allows other state parties to complain to the monitoring body,[53] but that procedure has never been used by any state party to the International Covenant.

The United States is a member of the Organization of American States, but it has declined to ratify its human rights treaty, the American Convention on Human Rights.[54] The Convention covers a full range of human rights and establishes an Inter-American Court of Human Rights, which has jurisdiction over complaints against state parties filed by other state parties.[55] Not being a party, the United States may neither sue, nor be sued in the Court over human rights issues.

The United States has declined to ratify two other major human rights treaties, each of which has a committee that monitors compliance by state parties. These are the Convention on the Elimination of All Forms of Discrimination Against Women[56] and the Convention on the Rights of the Child.[57]

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[49] MULTILATERAL TREATIES, *supra* note 22, at 264.

[50] MULTILATERAL TREATIES, *supra* note 22, at 273.

[51] International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

[52] MULTILATERAL TREATIES, *supra* note 22, at 212.

[53] *Id.* at 185.

[54] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

[55] *Id.* arts. 33, 61–62.

[56] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1971, 1249 U.N.T.S. 13.

[57] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; MULTILATERAL TREATIES, *supra* note 22, at 283 (showing signature, but no ratification by U.S.).

One treaty with a human rights provision, under which the United States is subject to international suit, is the Vienna Convention on Consular Relations.[58] The United States is a party, not only to the Convention,[59] but to an optional protocol that provides for jurisdiction in the International Court of Justice upon a complaint filed by another state party.[60] The Convention, which regulates the status and functions of consuls, includes a clause that gives a foreigner detained on a criminal charge a right of access to a home-state consul for assistance in defending against the charge. The Convention requires, in particular, that police inform a detainee of the right of access to a consul.[61]

A number of foreign nationals, and their governments, have attempted to enforce this provision against the United States, in particular in cases in which a foreign national was not informed of the right of consular access and was then convicted of a capital crime and sentenced to death. The United States was sued by Paraguay in 1998[62] and by Germany in 1999,[63] in both instances to stop the imminent execution of a national sentenced to death in the United States. In each case, the national had not been advised of the right to approach a consul and the Court issued an interim order asking the United States to forego execution pending the Court's decision on the merits of the case.[64] In both cases, the United States failed to comply, and the foreign national was executed.

Unlike most other states that are party to the Vienna Convention on Consular Relations, the United States has taken the position that when a foreign national is not advised upon arrest of the right to approach a home-state consul, a conviction and sentence of such a person remains valid.[65] Also in contrast to most other states, the United States has taken the position that the provision on advising an arrestee creates no right that the arrestee can

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[58] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[59] MULTILATERAL TREATIES, *supra* note 22, at 102.

[60] Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, April 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487; MULTILATERAL TREATIES, *supra* note 21, at 112.

[61] Vienna Convention on Consular Relations, *supra* note 58, art. 36.

[62] Case Concerning the Vienna Convention on Consular Relations (Paraguay v. U.S.), 1998 I.C.J. 248.

[63] LaGrand (F.R.G. v. U.S.), 1999 I.C.J. 9 (Mar. 3).

[64] Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9); LaGrand (F.R.G. v. U.S.), 1999 I.C.J. 9 (Mar. 3).

[65] Avena and Other Mexican Nationals (Mex. v. U.S.), 2003 I.C.J. 15–17, paras. 2.11–2.15 (Jan. 21).

enforce in the courts of the receiving state.[66] Both the International Court of Justice and the Inter-American Court of Human Rights, which issued an advisory opinion on the subject, have held that an individual's rights are involved and that restorative action is required.[67]

The United States has acted aggressively to shield its personnel from the possibility of being prosecuted in the International Criminal Court.[68] Not only has it declined to ratify the Statute of the Court, but it has persuaded a number of states to agree that if a U.S. national sought by the International Criminal Court is found in their territory, they will decline to surrender the person to the Court.[69] European Union officials have complained that the United States has put undue pressure on east European states to sign such bilateral agreements.[70]

The United States has developed its stance against the International Criminal Court due to a concern that, since it deploys military units abroad more than other states, its personnel would disproportionately be at risk of being prosecuted.[71] The United States actively participated in promoting the elaboration of the court's statute until it appeared that other states would insist on a prosecutor's office that would not be controlled by the U.N. Security Council, where the United States enjoys veto power. As a Security Council member, the United States actively promoted the founding of two ad hoc criminal courts to deal with the aftermath of conflict in Rwanda and Yugoslavia.[72]

The United States has aggressively argued inadmissibility to keep the International Court of Justice from hearing cases filed against it, even if the case is within the Court's jurisdiction. The Court does decline to hear cases within its jurisdiction if it finds an impediment of another type. In Nicaragua

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[66] U.S. v. Nai Fook Li, 206 F.3d 56, 63 (1st Cir. 2000).

[67] LaGrand (F.R.G. v. U.S.), 2001 I.C.J. 466, 513–14 (June 27); The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Op. OC-16/99, Inter-Am. C.H.R. (Ser. A) No. 16, at para. 137 (Oct. 1, 1999).

[68] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998), *reprinted in* 37 I.L.M. 999 (1998).

[69] *U.S. ICC Request Again Tests United Caribbean Front*, INT'L PRESS SERVICE, May 30, 2003, LEXIS, Nexis Library, UPI File.

[70] Judy Dempsey, *U.S. Turns Up Heat Over World Criminal Court*, FIN. TIMES, Apr. 8, 2003, at 14.

[71] David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 87 (2002).

[72] Statute of the International Criminal Tribunal for the Former Yugoslavia, appended to S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, appended to U.N. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

v. U.S.A.,[73] the United States argued that the Court could not adequately ascertain the facts relevant to a situation of military hostilities and that the Court should therefore decline to hear the case. Additionally, it argued that the issue of war and peace is within the competence of the U.N. Security Council, and therefore not a proper subject for adjudication in the Court, even though the court had jurisdiction over international law issues between the parties. The Court decided against both of these arguments and determined that the case was admissible.[74]

V. STYLE OF LITIGATION IN INTERNATIONAL FORA

Even though the United States has not fully subjected itself to international adjudication, American style has impacted the litigation style in international courts. This has occurred through litigation in which the United States has been a party, as well as through litigation on behalf of other states and conducted by U.S.-based attorneys. This impact is visible, in particular, in the International Court of Justice.

Litigation in the International Court of Justice traditionally has emphasized the legal side of issues over the factual, although the court functions simultaneously as a trial court and as a court of last resort. The Court has the power to hear witness testimony, but rarely do the parties call witnesses, limiting themselves instead to legal argumentation.[75]

In three major cases, litigation led by U.S. lawyers brought fact evidence to the Court in ways not typically seen in the Court. In the case of United States Diplomatic and Consular Staff in Tehran, the United States gave the Court 163 articles from the press about the hostage-taking episode in Tehran, in support of various aspects of its claim against Iran.[76] The United States also cited statements by its personnel demonstrating the mistreatment they received while confined.[77]

In Nicaragua v. U.S.A., both sides were represented by U.S. lawyers and presented the court with documentary material in great volume. This presentation of evidence was sufficiently unusual that the Court noted the fact in its judgment of the case. The attorneys, the Court maintained, introduced "[a] large number of documents . . . in the form of reports in press

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[73] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) (Jurisdiction and Admissibility).

[74] *Id.* at 442.

[75] SHABTAI ROSENNE, THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 130 (1995).

[76] Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

[77] *Id.* at 14.

articles, and some also in the form of extracts from books."[78] The Court indicated its own initial indecision on whether to entertain such evidence and how to assess it. Noting that press reports might not necessarily be accurate, the Court stated it would consider this material nonetheless.[79]

To show a role by the United States in organizing and financing the Contra rebel group, lawyers for Nicaragua called as witnesses a former C.I.A. operative and a Nicaraguan who had been part of a Contra leadership group.[80] This evidence, the import of which was sharply contested by the United States, was central to the Court's conclusion that the United States was responsible for various activities carried out by the Contra rebel group.[81]

In a case filed by Bosnia-Herzegovina against Yugoslavia over ethnic cleansing in Bosnia, U.S. lawyers representing Bosnia-Herzegovina similarly introduced extensive factual material to demonstrate the role of Yugoslavia in promoting the ethnic cleansing carried out by Bosnian paramilitary units. They also filed successive supplemental legal arguments in support of their request for a second order on provisional measures against ethnic cleansing.[82] These filings led to a protest by lawyers for Yugoslavia of an "unending flood of sometimes heavy documentation," and a request that the Court strike certain of these filings.[83]

The Court agreed with Yugoslavia that "the submission by the Applicant of a series of documents, up to the eve of, and even during, the oral proceedings . . . is difficult to reconcile with an orderly progress of the procedure before the Court." However, in light of "the urgency and other circumstances of the matter,"[84] the Court decided to accept the evidence.

VI. IMPACT OF U.S. STANCE

The overall impact of the United States on the adjudication of international rights claims is mixed. U.S. procedures encourage suit against private parties and against foreign states. U.S. courts have seen a great deal of litigation of international claims. Moreover, U.S. lawyers litigate

[78] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 40 (June 27).

[79] *Id.* at 41.

[80] *Id.* at 42.

[81] *Id.* at 63–65.

[82] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia (Serb. and Mont.)), 1993 I.C.J. 325, 335 (Sept. 13).

[83] *Id.* at 336.

[84] *Id.* at 336–37.

aggressively in international fora, influencing those fora to expand the ways in which they find facts and decide the law.

However, the United States has generally refused to subject itself to international procedures, whereby complaints may be brought against it. This refusal has a negative impact, not only in limiting the adjudication of complaints against the United States, but also in limiting the ability of the United States to file complaints against other states. Moreover, since the United States is the world's major power, its refusal to accept international jurisdiction effects more disproportionate harm on the international system of rights enforcement. The United States could significantly promote human rights in the world by participating fully in the institutions that have been created to decide rights cases.