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The enforcement of international law through private litigation in domestic tribunals has a long historical pedigree.[1] However, the practice's continued viability, proper scope, and general legitimacy are issues of some controversy.[2] Perhaps the single greatest point of controversy arises from a domestic tribunal's determination of customary international law, and the application and management of private rights arising out of that law. Many courts in the United States have severely restricted opportunities for private enforcement of international law by implementing rigid rules of construction regarding treaty self-execution, thereby constraining the sources of evidence available to courts when determining privately enforceable "customary" norms of international law. As a result, private plaintiffs are often prohibited from enforcing customary norms of international law when litigating in domestic tribunals.[3]

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1 See, for example, *An Act to Prevent Infractions of the Laws of Nations*, in *Acts and Laws Passed by the General Court or Assembly of His Majesties English Colony of Connecticut, January 1780–October 1783* at 602–03 (Timothy Green 1783) (authorizing civil actions against citizens violating the law of nations). Similar approaches to private enforcement of international law find support in early analyses of the "law of nations" that envisioned a legal system applicable not only to disputes between nations, but also disputes between individual citizens. See, for example, William Blackstone, 4 *Commentaries on the Laws of England: Of Public Wrongs* 66–73 (1769, facsimile reprint Chicago 1979) (describing the "law of nations" as a system of rules "established by universal consent . . . *in order to decide all disputes*, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith . . . between two or more independent states, and *the individuals belonging to each*") (all emphases added).

2 See notes 6–16 for a summary of recent disagreements regarding the private enforcement of international law in domestic tribunals.

3 See, for example, *Mendonca v Tidewater, Inc*, 159 F Supp 2d 299, 301–02 (ED La 2001), affd 33 Fed Appx 705 (5th Cir 2002) (dismissing claim for racial discrimination in violation of the law of nations because treaties at issue, including Convention on the Elimination of Racial Discrimination, did not "enjoy universal acceptance in the international community") (internal quotes and citations omitted). For a contrasting approach, see *Tachiona v Mugabe*, 234 F Supp 2d 401, 439–40 & n 153 (SDNY 2002) (using identical treaties to reach the opposite conclusion).

In this Development, I argue that a narrow approach to identifying customary norms of international law ignores the legal significance of treaty negotiation. Because a number of countries (including the United States, used herein as an example) traditionally adopt universalist stances during the negotiation of international human rights treaties, domestic tribunals in those nations should look to executive branch pronouncements as indicators of international law norms available for enforcement in domestic tribunals. If a state's executive branch advances a universalist understanding of human rights contained in a treaty, the executive branch's statements on the universality of the legal norm should support private enforcement of the norm, even if the treaty is not self-executing or if the state does not ratify the treaty. Such an approach would speed the adoption of emerging human rights norms by cultural-relativist nations, and would simultaneously allow courts to take advantage of the executive branch's superior institutional competence in the realm of foreign affairs. Given the undeniable importance of executive branch pronouncements in determining international law,[4] courts should begin to take note of universalist and cultural-relativist stances during the negotiation of non-self-executing and non-ratified treaties, and should use those statements to guide their determination of privately enforceable norms in that state's domestic tribunals.

I. PRIVATE ENFORCEMENT OF CUSTOMARY INTERNATIONAL LAW IN THE UNITED STATES

The Alien Tort Claims Act ("ATCA") provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5] The statute arguably contains both jurisdictional and substantive components: the act provides jurisdiction over cases arising under the law of nations, requiring courts to determine the substantive principles governing those suits.[6]

American courts have split in their interpretation of the ATCA's applicability to several sources of the "law of nations" (specifically, non-self-executing treaties and unembodied "customary norms" of international law).

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4 For a discussion of international estoppel and the binding legal effects of executive branch pronouncements during treaty negotiations, see note 33 and accompanying text. See also *American Insurance Assn v Garamendi*, 123 S Ct 2374, 2390–92 (2003) (recognizing the international importance of the executive branch's pronouncements and agreements, and using the public statements of executive branch officials as evidence of an international consensus on dispute resolution procedures).

5 28 USC § 1350 (2000).

6 Compare *Textile Workers Union of America v Lincoln Mills of Alabama*, 353 US 448, 456–57 (1957) (holding that the Labor Management Relations Act provides not only federal jurisdiction over labor disputes, but also an implicit grant of authority to develop substantive federal common law governing those disputes).

The majority of courts provide plaintiffs with a substantive right of action for violations of the "law of nations" under the ATCA.[7] When faced with disputes arising under the ATCA, domestic tribunals in these jurisdictions attempt to "ascertain customary international law 'by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'"[8] In addition to these sources, courts also look to non-self-executing treaties and other international agreements to discern universally accepted norms of international law.[9] Once an international law norm has been identified, the majority of courts provide private plaintiffs a right of action for violations of that international norm under the ATCA's "substantive component," using normal standing principles to determine whether a specific plaintiff can bring a civil action for violations of that customary international norm.[10]

A smaller group of courts, using the supposition that "[i]nternational treaties are not presumed to create rights that are privately enforceable,"[11]

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7 See *Alvarez-Machain v United States*, 331 F3d 604, 612 (9th Cir 2003), cert granted, *Sosa v Alvarez-Machain*, 124 S Ct 807 (2003) and cert granted, 124 S Ct 821 (2003) (recognizing a right of action under the substantive component of the ATCA for violations of customary international law); *Wiwa v Royal Dutch Petroleum Co*, 226 F3d 88, 103–05 (2d Cir 2000), cert denied, 532 US 941 (2001) (accepting the argument that the ATCA "reflects a United States policy interest in providing a forum for the adjudication of international human rights abuses," because "the law of nations is incorporated into the law of the United States" and "a violation of the international law of human rights is (at least with regard to torture) *ipso facto* a violation of U.S. domestic law"); *Abebe-Jira v Negewo*, 72 F3d 844, 848 (11th Cir 1996) (holding that the ATCA gives domestic tribunals the power to "fashion domestic common law remedies to give effect to violations of customary international law"). See also *Filartiga v Pena-Irala*, 630 F2d 876, 880–85 (2d Cir 1980) (incorporating "customary international law" into federal common law and granting aliens a substantive right of action under the ATCA).

8 *Siderman de Blake v Republic of Argentina*, 965 F2d 699, 714–15 (9th Cir 1992), quoting *United States v Smith*, 18 US (5 Wheat) 153, 160–61 (1820).

9 See *Alvarez-Machain*, 331 F3d at 618–19 (examining a number of non-self-executing treaties and non-binding declarations to determine customary international law, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, and the American Declaration of the Rights and Duties of Man); *Sarei v Rio Tinto PLC*, 221 F Supp 2d 1116, 1161–62 (CD Cal 2002) ("Although the United States has not ratified [the United Nations Convention on the Law of the Sea], it has signed the treaty. . . . Because [that convention] reflects customary international law, plaintiffs may base an ATCA claim upon it."). See also *The Paquete Habana*, 175 US 677, 700 (1900) (using the "customs and usages of civilized nations" to determine customary international law "where there is no treaty, and no controlling executive or legislative act or judicial decision").

10 See *Alvarez-Machain*, 331 F3d at 615–16 (using ordinary standing principles to determine plaintiff's ability to sue for violations of customary international law).

11 *Goldstar (Panama) S.A. v United States*, 967 F2d 965, 968 (4th Cir 1992). See also *United States v Thompson*, 928 F2d 1060, 1066 (11th Cir 1991) ("We have held that a treaty must be self-executing in order for an individual citizen to have standing to protest a violation of the treaty. . . . A treaty is self-executing if it creates privately enforceable rights."); *Tel-Oren v Libyan Arab Republic*, 726 F2d 774, 808 (DC Cir 1984) (Bork concurring) ("Treaties of the United States,

interprets the ATCA as a purely jurisdictional statute providing a forum, but not a cause of action, for aliens suing in tort.[12] Self-executing treaties and statutes explicitly granting a private right of action are the only sources used to determine a plaintiff's ability to sue for violations of the "law of nations" under the ATCA. Absent a clear and convincing intent to allow private litigants to enforce a norm of international law in domestic tribunals, the minority position will not permit a civil action to go forward under the ATCA.[13]

Despite the prevailing status of the majority position, the minority position has increasingly gained popularity among legal academics.[14] This position finds support in the institutional competence of domestic tribunals, as well as separation of powers concerns; given their domestic orientation, courts are poorly equipped to identify international law norms,[15] and by constitutional design, courts must defer to the executive branch's role as head of state in matters of foreign concern.[16] The Supreme Court has recently strengthened this view of a domestic tribunal's proper deference to the institutional competence of coordinate branches.[17]

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though the law of the land, do not generally create rights that are privately enforceable in courts."); *United States v Fort*, 921 F Supp 523, 526 (ND Ill 1996) ("As a general proposition, individuals do not have standing to assert private rights in domestic courts on the basis of international treaties.").

12 See *Al Odah v United States*, 321 F3d 1134, 1146–47 (DC Cir 2003) (Randolph concurring), cert granted, *Rasul v Bush*, 124 S Ct 534 (2003), cert granted in part, 124 S Ct 534 (2003) (arguing that the ATCA does not, and should not, provide a cause of action); *Tel-Oren*, 726 F2d at 801, 808 (Bork concurring) (same).

13 *Tel-Oren*, 726 F2d at 808 (Bork concurring) ("Absent authorizing legislation, an individual has access to courts for enforcement of a treaty's provisions only when the treaty is self-executing, that is, when it expressly or impliedly provides a private right of action."); *Macharia v United States*, 238 F Supp 2d 13, 29 (DDC 2002), affd, 334 F3d 61 (DC Cir 2003), cert denied, 124 S Ct 1146 (2004) ("A treaty that is not self executing requires further action by Congress to incorporate it into domestic law and without such action courts may not enforce such a treaty.").

14 For a seminal statement of the argument, see Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997). See also John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum L Rev 1955 (1999).

15 See Bradley and Goldsmith, 110 Harv L Rev at 861 (cited in note 14) (arguing that "federal political branches, and not the courts, are constitutionally authorized and institutionally competent to make foreign relations judgments").

16 See id at 861 (using the "political branch hegemony in foreign affairs" to justify a retreat from judicial enforcement of international law).

17 See *Garamendi*, 123 S Ct at 2387 (noting that executive pronouncements and agreements are on par with valid international treaties for purposes of foreign affairs preemption of state law); id at 2390–92 (using public statements by executive branch members to identify an international consensus on dispute resolution procedures).

II. CULTURAL RELATIVISM AND UNIVERSALISM IN TREATY NEGOTIATIONS

Given the minority position's emphasis of the executive branch's "hegemony in foreign affairs,"[18] it is important to understand the process of negotiating the agreements that organize foreign affairs and give rise to international law. When negotiating treaties that specify the rights of citizens (and occasionally, private rights of action), national perspectives on those rights can be divided into two camps: cultural-relativist outlooks and universalist outlooks.

A. CULTURAL-RELATIVIST APPROACH

The cultural-relativist approach views individual rights as dependent upon the decisions of a territorial sovereign, and requires a sovereign to recognize "international" rights only if those rights coincide with its morals and culture.[19] In this sense, rights are not truly international, but relative; as cultures differ across borders, so will the rights of a sovereign's citizens differ relative to their cultural, moral, and religious norms. Because cultural-relativist thinkers believe that "a universal definition of human rights infringes on a State's right to autonomy,"[20] the sovereign state is free to exercise its autonomy by selectively recognizing emerging or established norms of international law.

Historically, non-secular sovereigns have been the main proponents of cultural-relativist viewpoints.[21] However, the United States has occasionally adopted a cultural-relativist approach to treaty negotiation and implementation. For example, the United States has long adopted this approach with respect to the juvenile death penalty; although the practice is outlawed by a number of international agreements and is in violation of "universal" human rights, the United States has justified its continued execution of minors on cultural-relativist grounds.[22] Similar objections have been used to justify non-ratification of treaties

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18 Bradley and Goldsmith, 110 Harv L Rev at 861 (cited in note 14).

19 See generally Douglas Lee Donoho, *Relativism versus Universalism in Human Rights: The Search for Meaningful Standards*, 27 Stan J Intl L 345 (1991).

20 Susannah Smiley, *Taking the "Force" Out of Enforcement: Giving Effect to International Human Rights Law Using Domestic Immigration Law*, 29 Cal W Intl L J 339, 344 n 51 (1999).

21 See generally Edna Boyle-Lewicki, *Need World's Collide: The Hudad Crimes of Islamic Law and International Human Rights*, 13 NY Intl L Rev 43 (Summer 2000); Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry*, 3 Harv Hum Rts J 13 (1990).

22 See Connie de la Vega and Jennifer Brown, *Can a United States Treaty Reservation Provide a Sanctuary for the Juvenile Death Penalty?*, 32 USF L Rev 735, 752 (1988) (describing cultural-relativist behavior by the United States, including statements by Department of State representatives when defending the juvenile death penalty).

granting "universal" human rights to women in the United States.[23] And in the face of emerging norms of sexual orientation as a "universal" right, the United States has expressed cultural, religious, and moral opposition to the emerging norm, implicitly endorsing a cultural-relativist approach.[24]

B. UNIVERSALIST APPROACH

In stark contrast to the cultural-relativist perspective, the universalist approach views individual rights as applicable to all persons regardless of citizenship, religion, morals, or culture.[25] According to universalists, "human rights norms transcend cultural boundaries,"[26] meaning that sovereigns are not permitted to pick and choose the rights applicable to (and enforceable by) their citizens. Increasingly, "[t]he international legal community posits universality as a central characteristic of modern international law."[27] Using this approach, a nation's relativist rejection of universal international rights is inapposite for the enforcement of those rights; sovereignty cannot be used to deny universal rights to individuals, regardless of cultural or moral concerns.

Despite occasional statements to the contrary, the United States traditionally adopts an avowedly universalist stance during treaty negotiations.[28] For example, at the 1993 Vienna Conference, the United States proclaimed that

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23 Consider the Convention on the Elimination of All Forms of Discrimination against Women, UN Doc A/RES/34/180 (1979). The United States has not ratified the treaty, and the executive branch has expressed reservations on the treaty's full-fledged ratification. See Catharine A. MacKinnon, *Sex Equality* 49–50 (Foundation 2001) (discussing executive objections to CEDAW's ratification).

24 For evidence that a right to sexual orientation is emerging as a customary norm of international law, see *Lustig-Prean and Beckett v United Kingdom*, 29 Eur Ct HR 548 (1999) (voiding ban on gays in the military on human rights grounds); United Nations Human Rights Commission, Draft Resolution, *Human Rights and Sexual Orientation*, reprinted in National Gay and Lesbian Task Force, *Action Alert: U.N. Resolution Needs Your Support: First-Ever Resolution Opposing Sexual Orientation-Based Human Rights Violations Set for Consideration April 23* (Apr 18, 2003), available online at <http://www.ngltf.org/news/release.cfm?releaseID=533> (last visited Mar 28, 2004). For evidence of American rejection of the emerging norm on cultural, religious, and moral grounds, see Neil A. Lewis, *From the Rose Garden: Same-Sex Marriage; Bush Backs Bid to Block Gays from Marrying*, NY Times A1 (July 31, 2003); *Lantos and Frank Denounce Administration's Opposition to UN Resolution on Human Rights and Sexual Orientation*, available online at <http://www.house.gov/lantos/releases/PR_unresolution_admin_opp_030430.pdf> (last visited Feb 25, 2004). See generally Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U Chi L Rev (forthcoming 2004).

25 See Donoho, 27 Stan J Intl L at 345 (cited in note 19).

26 See Smiley, 29 Cal W Intl L J at 344 n 51 (cited in note 20).

27 Kurt Taylor Gaubatz and Matthew MacArthur, *How International Is "International" Law?*, 22 Mich J Intl L 239, 240 (2001).

28 See generally Mark Weston Janis, *International Law as Fundamental Justice: James Brown Scott, Harold Hongju Koh, and the American Universalist Tradition of International Law*, 46 SLU L J 345 (2002) (discussing the long tradition of universalist thinking in American history).

human rights law should set a single, universal standard of acceptable behavior around the world, arguing that '[w]e cannot let cultural relativism become the last refuge of repression."[29] Similarly, at the United Nations Cairo Conference on Population and Development, the United States pushed for universal protection of reproductive rights while Islamic states argued for cultural exceptions.[30] This universalist outlook on international human rights norms has recently begun to influence legal decisionmaking within the Supreme Court,[31] emphasizing the importance of universalist perspectives in domestic tribunals.

III. PRIVATE ENFORCEMENT OF CUSTOMARY INTERNATIONAL LAW: A UNIVERSALIST DEFENSE

This understanding of cultural-relativist and universalist perspectives on international human rights can be used to bridge the gap between the minority and majority positions on private enforcement of international law within domestic tribunals. By taking the minority position's institutional arguments into account, domestic tribunals can improve their system of enforcement and recognition of universal human rights, achieving improved formal and functional consequences.

A. INTEGRATING THE EXECUTIVE'S UNIVERSALIST PERSPECTIVE INTO DOMESTIC ENFORCEMENT REGIMES

Despite the minority position's skeptical assessment of the judiciary's ability to interpret and apply the precepts of all non-self-executing treaties,[32] the reality is that not all treaties entered into by the United States are negotiated in the same way. The executive branch's position when negotiating a treaty reflects a considered judgment on the substance and applicability of that international agreement. When the "hegemons" of foreign affairs declare, as part of their treaty negotiations, that a proposed human right is a universal right applicable to

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29 See Elaine Sciolino, *U.S. Rejects Notion That Human Rights Vary with Culture*, NY Times A1 (June 15, 1993) (quoting Secretary of State Warren Christopher).

30 Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 Mich J Intl L 1, 16 (2000) (discussing cultural-relativist positions adopted by several Islamic states demanding a sovereign right to interpret standards based on cultural and moral prerogatives).

31 See, for example, *Lawrence v Texas*, 123 S Ct 2472, 2483 (2003) (citing decisions by European Court of Human Rights as evidence of emerging international rights for homosexuals, and using those ECHR decisions to demonstrate that the "values we share with a wider civilization" now support a "right of homosexual adults to engage in intimate, consensual conduct . . . as an integral part of human freedom").

32 See generally John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 Colum L Rev 2218, 2220 (1999) (suggesting, on interpretive and democratic grounds, that courts should not enforce treaties unless "treatymakers [ ] issue a clear statement [that] they want a treaty to be self-executing").

the citizens of all nations, their statements reflect a careful analysis of the right's status as a customary norm of international law.[33] Accordingly, domestic tribunals should give appropriate deference to those pronouncements when determining private rights of action under customary norms of international law. A nation's universalist stance during the negotiation of a non-self-executing or non-ratified treaty should serve as strong (indeed, conclusive[34]) evidence of a customary international norm enforceable in that nation's domestic tribunals. Conversely, a nation's relativist stance during treaty negotiations would serve as strong (though not conclusive[35]) evidence that the emerging norm is not yet enforceable as the "law of nations." Accordingly, the executive branch's universalist statements would be a sufficient (but not necessary) condition for establishing privately enforceable norms of international law.

The proposed approach to determining privately enforceable international law norms is sympathetic to important arguments advanced by the minority approach to interpreting the ATCA. By including the executive branch's universalist or cultural-relativist pronouncements on human rights into an analysis of the current "law of nations," courts would recognize the institutional competence of the executive branch in determining international law. If one accepts the minority position's arguments regarding the institutional competence of the executive branch when determining norms of international law, one

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33 These pronouncements must necessarily follow substantial analysis and careful consideration, since executive branch pronouncements constitute legally binding statements that can (and do) give rise to international estoppel. See Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 Cal L Rev 1777, 1777 (1986) (stating that "[i]nternational law has long recognized the doctrine of estoppel, a principle which prevents states from acting inconsistently to the detriment of others," and noting that the ICJ has applied the doctrine against the United States twice when finding jurisdiction over an international dispute). See generally Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U Miami L Rev 369 (1996).

34 Because a universalist stance necessarily entails a declaration that the rights at issue are universally applicable to all nations and individuals, such a stance requires a determination that the executive branch believes the norm to be part of the "law of nations," even if relativist states refuse to recognize the norm. Therefore, when the executive branch's statements reflect a considered judgment that an emerging norm is universally applicable, courts can defer to the executive branch's increased institutional competence by taking those statements as dispositive evidence of a privately enforceable norm of international law.

35 While relativist statements by the executive branch reflect a desire not to recognize (much less enforce) an emerging norm of international law, that relativist opposition is not the only form of evidence available to courts determining the substantive "law of nations." If executive branch pronouncements do not conclusively establish that a norm is part of the "law of nations," courts should also make reference to those evidentiary sources, including "the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law." *Smith*, 18 US (5 Wheat) at 160–61. If these other evidentiary sources each recognize an emerging international norm, such a norm could become a privately enforceable precept of the "law of nations," despite the executive branch's relativist opposition to the recognition of such a right.

should support a greater role for executive statements when determining privately enforceable norms of international law. Doing so only recognizes the "hegemony" of the executive branch in this legal realm, and its "primacy" in determining the foreign affairs of a sovereign state.[36] In that sense, the proposed system would encourage domestic tribunals to "piggyback" on the executive branch's increased institutional competence in the realm of foreign affairs, thereby addressing the non-trivial institutional criticisms levied by proponents of the minority position.[37]

Beyond this institutional rationale for increased deference to the executive branch, the proposed approach promises evidentiary improvements. Increased attentiveness to universalist perspectives would provide more up-to-date sources of evidence for domestic tribunals asked to evaluate new and emerging norms of international law. Even in the absence of self-executing or ratified treaties, an emerging norm may become "universal" and enforceable prior to its formal acknowledgement through treaty ratification; even before treaties are ratified and implemented, their basic precepts may have been acknowledged as universally applicable by signatory nations.[38] Courts can take that reality into account by looking to executive branch perspectives on emerging rights to determine their "universal" status. Once these "universal" rights have been identified, they can be consistently enforced through private litigation in domestic tribunals. Courts could greatly increase the quality and quantity of available evidence on substantive law in ATCA disputes, improving the accuracy and uniformity of judicial outcomes, if they took notice of universalist and cultural-relativist executive branch pronouncements in treaty negotiations.

Moreover, such an approach to determining international legal norms would mirror the legal standards already in place: courts currently permit private enforcement of norms that have "ripened . . . into 'a settled rule of international law' by 'the general assent of civilized nations.'"[39] Because universally applicable human rights constitute "settled rules of international law" binding on all nations, it is altogether appropriate to permit private enforcement of norms

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36 See *Garamendi*, 123 S Ct at 2398 (discussing "[t]he President's primacy in foreign affairs").

37 See Bradley and Goldsmith, 110 Harv L Rev at 861 (cited in note 14) (arguing that "federal political branches, and not the courts, are constitutionally authorized and institutionally competent to make foreign relations judgments").

38 For example, a *jus cogens* norm of international law constitutes "[a] mandatory norm of general international law from which no two or more nations may exempt themselves or release one another." *Black's Law Dictionary* 864 (7th ed 1999). Such a norm may develop even in the absence of treaties or international agreements specifically acknowledging and binding nations to that norm. See Louis Henkin, *International Law: Politics and Values* 38–39 (Kluwer Law Intl 1995).

39 *Filartiga*, 630 F2d at 881, quoting *The Paquete Habana*, 175 US at 694. See also *Filartiga*, 630 F2d at 880 (discussing "the universal condemnation of torture in numerous international agreements, and the renunciation of torture . . . by virtually all of the nations of the world" as evidence of "established norms of the international law of human rights, and hence the law of nations").

deemed "universal" by a sovereign state's executive branch, even in the absence of a self-executing treaty (or in the face of a cultural-relativist denial of the right in other nations), because those pronouncements undoubtedly represent "the general assent of civilized nations."

Importantly, such an approach would also achieve the aims of the executive branch[40] by levying civil penalties against cultural-relativist offenders ignoring the avowedly universal nature of the rights at issue. By authorizing civil penalties as an element of international pressure to recognize universal human rights, the proposed approach would increase the cost of violating universal norms through cultural relativism, thereby accelerating the recognition of universal standards by cultural-relativist nations. This accelerated adoption of universal human rights norms by cultural-relativist nations would benefit not only the citizens protected by those rights, but also the nations undertaking a commitment to enforce them.[41]

B. Implications of the Approach: An Elevated Executive and the Accelerated Adoption of Universal Norms

Several examples are useful illustrations of the proffered approach's effects. When faced with private litigation over violations of a customary norm recognizing reproductive freedom and sexual autonomy,[42] courts in the United States would look not only to non-ratified and non-self-executing treaties to delineate the boundaries of the norm; executive branch pronouncements on the scope of the right would also be used to determine a private litigant's right to sue for forced abortions, genital mutilation, or unreasonable denials of access to reproductive technologies.[43] Similarly, executive branch statements on international environmental rights and standards might support private rights of action for violations of those standards.[44]

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40 See note 28 for a discussion of the United States' traditional universalist stance towards human rights laws.

41 For an interesting argument to this effect, see Daniel A. Farber, *Rights as Signals*, 31 J Legal Studies 83, 84–85 (2002) (discussing the signaling effects of a nation's decision to recognize and enforce human rights, and suggesting that increased recognition and enforcement of these rights may lead to higher levels of investment by international businesses).

42 See generally Beth Stephens, *The Civil Lawsuit as a Remedy for International Human Rights Violations against Women*, 5 Hastings Women's L J 143, 155–62 (1994) (discussing a variety of ATCA and TVPA claims based on violations of a right to reproductive and sexual freedom).

43 See generally Paul, 22 Mich J Intl L at 16 (cited in note 30) (outlining the United States' universalist stance on reproductive rights at the United Nations Cairo Conference on Population Development).

44 At present, courts have been loath to take notice of the United States' stance on international environmental standards. See, for example, *Beanal v Freeport-McMoran, Inc*, 197 F3d 161, 166–67,

Conversely, when faced with private litigation over sexual orientation discrimination, the United States' cultural-relativist stance on current international agreements[45] would stand in opposition to universalist statements by other governments, weighing against (although not necessarily prohibiting[46]) domestic enforcement of emerging norms against sexual orientation discrimination. Using such an approach, domestic tribunals would give additional deference to the executive branch's expertise in the realm of foreign affairs, and might eventually come to recognize other norms of international law not embodied in self-executing treaties.[47]

C. A CRITICAL SELF-ASSESSMENT OF INCREASED DOMESTIC ENFORCEMENT

The suggested approach is not immune to criticism. By focusing on executive branch statements rather than on subsequent treaty ratification by the legislature, some might argue that the courts would impermissibly alter the legislature's importance in the process of determining norms of international law.

However, such an objection ignores the severe limitations inherent in the proffered approach. Although executive branch pronouncements would become increasingly important in the judicial analysis of the "law of nations" privately enforceable in domestic tribunals, the legislature's power to alter or end such an analysis would remain unchanged. For example, if the legislature believes its power has been impermissibly usurped by the courts and by the executive, it could easily correct those actions by amending the provisions of the ATCA. The statute's substantive component could be eliminated, requiring explicit congressional authorization of the "law of nations" through passage of substantive statutes before plaintiffs could sue to enforce rights granted by a

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167 (5th Cir 1999) (arguing that "federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments"). Using the proposed approach, were the United States to make strong universalist statements on environmental standards in the future, the concern for foreign sovereignty voiced in *Beanal* would likely give way to a domestic recognition of new international environmental norms, paving the way for private enforcement of those norms.

45 For a discussion of the emergence of sexual orientation as a human right, and United States opposition to that right, see note 24 and accompanying text.

46 See notes 34–35 and accompanying text.

47 See Courtney Shaw, *Uncertain Justice: Liability of Multinationals under the Alien Tort Claims Act*, 54 Stan L Rev 1359, 1369–70 (2002) (noting that universal condemnation of various activities, including "censorship, libel, stealing, fraud, embezzlement, conversion, tortious interference with business relationships, refusal to pay moneys due, misrepresentation, negligence, unseaworthiness, wrongful picketing, and environmental harms" has not given rise to private enforcement of those norms under the ATCA).

self-executing treaty. Alternatively, the statute's jurisdictional component could be limited to cases arising under a ratified treaty of the United States.

Given these opportunities for legislative action, constitutional criticisms of the proposed approach ring hollow. Although the proposed approach would allow private enforcement of emerging and universal international norms absent treaty self-execution or even treaty ratification, democratic processes and opportunities for statutory reform provide effective remedies for separation of powers concerns. Increasing the importance of executive pronouncements or the availability of avenues for judicial relief does nothing to reduce the legislature's power to control or eliminate private litigation enforcing norms of international law.

Ultimately, the strongest criticism of the proffered approach is one directed at its limited applicability. It may be extremely difficult for courts to determine whether executive officials have taken universalist or cultural-relativist stances on particular issues. In many treaty negotiations, there may be an absence of avowedly universalist or relativist executive branch pronouncements, leaving courts no better off when defining the boundaries of privately enforceable international law. The problems of sparse, conflicting, or vague executive branch statements will likely be all the worse when dealing with customary international law that has developed outside the context of international treaties; without a need for bargaining over treaty language and substance, executive officials might never weigh in on the arguably universal status of international norms emerging through the customary practice and policy of nations.

But just as the approach outlined above might leave courts none the better when executive pronouncements are unclear, it should leave courts none the worse. Executive branch pronouncements would be only one of several factors used to determine the law of nations. In the worst case, courts could disregard executive statements and proceed with the same evidence available under current tests for determining customary international law. In the best case, clear executive pronouncements on the universal nature of emerging human rights would short-circuit other analyses of the "law of nations," allowing courts to uniformly and accurately proceed with the enforcement of customary international law.

IV. CONCLUSION

By taking note of the important role played by universalist statements in the treaty negotiation process, domestic tribunals in the United States and beyond could improve their understanding of privately enforceable norms of international law. Such an approach is especially important for emerging norms that have not been formally recognized in self-executing or domestically ratified treaties. At present, domestic tribunals examine scholarly works, treaty texts, and

prior precedents to determine privately enforceable norms of international law.[48] An incorporation of universalist bargaining positions into that evidentiary mix would only improve judicial analyses in this complex field. Such an approach would acknowledge the important institutional arguments advanced by the minority position while maintaining the majority position's stance on the ATCA's substantive component. Moreover, by emphasizing universalist outlooks on human rights, domestic tribunals in the United States and abroad could speed the adoption of avowedly universal human rights norms, thereby serving the policy goals set forth by the executive officials initially adopting universalist stances in the original treaty negotiation. Courts should begin to take note of universalist statements by executive officials in their attempt to allow private enforcement of international legal norms.

48 *Smith*, 18 US (5 Wheat) at 160–61.

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