Giving Content to International Human Rights – the US Perspective

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The United States has an uneasy relationship with international human rights norms. The US approach to international human rights norms and standards might even be called reluctant or even dismissive. These attitudes are to a large extent grounded on the US perception of its own "exceptionalism," a remarkably durable belief that the United States is different from other countries and to a large extent exempt from international norms.[1]

Of the two most direct avenues for incorporation of international human rights standards – through treaty obligations or membership in a super-national human rights tribunal – the United States is an outlier: the US has refused to join most major international human rights treaties[2] and is not subject to any super-national tribunal. To be sure, the US Constitution makes adoption of a foreign treaty difficult, discouraging international accountability in its own right: acceptance of a treaty requires the President's signature and a vote of two-thirds of the senate,

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[1] For examples of the extensive literature on the connection between American exceptionalism and human rights, see, *American Exceptionalism and Human Rights* (Michael Ignatieff ed., 2005); Mugambi Jouet, *The Exceptional Absence of Human Rights as a Principle in American Law*, 34 Pace L. Rev. 688 (2014); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich. L. Rev. 391 (2008); Harold Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2002).

[2] Of the eleven major human rights treaties, The United States is a signatory on only three: The International Covenant on Civil and Political Rights (ICPRR), signed in 1977 and ratified in 1992; The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), signed in 1966 and ratified in 1994; and The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), signed in 1988 and ratified in 1994. International Covenant on Civil and Political Rights, art. 10(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 172, (entered into force Mar. 23, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, *entered into force Jan. 4, 1969*, 660 U.N.T.S. 195; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *entered into force* June 26, 1987, 1465 U.N.T.S. 85.

It is also a signatory of the Convention on the Prevention and Punishment of the Crime of Genocide, signed in 1948 and ratified in 1988. It has signed but not ratified the Convention on the Rights of Persons with Disabilities (CRPD), The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and The Convention on the Rights of the Child (CRC). It has neither signed nor ratified The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), The International Convention for the Protection of All Persons from Enforced Disappearance (CED), and The Convention on the Rights of Persons with Disabilities (CRPD).

a supermajority that is difficult to secure.[3] Once properly ratified and made enforceable, treaties are as binding as domestic law, but, of course, their terms are subject to interpretation.[4] Of the treaties it has joined, the US has maintained several significant reservations.[5] Although other countries remain under the formal jurisdiction of super-national human rights tribunals,[6] the United States is not subject to the jurisdiction of any international or super-national court. In addition, during the Trump administration, the US distanced itself from international human rights responsibilities by withdrawing from the UN Human Rights Council[7] and the UN Education Scientific and Cultural Organization (UNESCO),[8] suspending cooperation with UN rapporteurs about potential domestic human rights violations,[9] and rejecting the legitimacy of the International Criminal Court.[10]

Despite this resistance to accountability under international human rights norms, the US legal system does find itself contending with international human rights standards in several ways. First, as a signatory on the ICCPR,[11] the United States is subject to international human rights norms through the United Nations Human Rights Commission and its Universal Periodic Review.[12] Second, the US has signed some treaties, although often with major reservations, including extradition treaties. Third, the US Supreme Court has recognized human rights norms in interpreting the US Constitution, specifically the eighth amendment prohibition against "cruel and unusual punishment." Fourth, human rights advocates have increasingly articulated

[3] U.S. CONST. art. II § 2.
[4] U.S. CONST. art. VI, cl. 2 ("The laws of the United States… and all Treaties…shall be the supreme Law of the Land and the Judges in every State shall be bound thereby…..").
[5] For a complete list of the US human rights treaty reservations, *See U.S. Reservations, Declarations, and Understandings to Human Rights Treaties*, UNIVERSITY OF MINNESOTA HUMAN RIGHTS LIBRARY, http://hrlibrary.umn.edu/usdocs/usres.html (last visited Jan. 19, 2021).
[6] *See, e.g.*, the European Court of Human Rights, the International Court of Justice, the International Criminal Court, and the Inter-American Commission on Human Rights.
[7] Gardiner Harris, *Trump Administration Withdraws US from UN Human Rights Council*, N. Y. TIMES, (June 19, 2018), https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html.
[8] Eli Rosenberg & Carol Morello, *US withdraws from UNESCO, the UN's cultural organization citing anti-Israel bias*, WASH. POST., (Oct. 12, 2017), http://www.washingtonpost.com/news/post-nation/wp/2017/10/12/u-s-withdraws-from-unesco-the-u-n-s-cultural-organization-citing-anti-israel-bias/?utm_term=.5cc4e3a47b19.
[9] Ed Pilkington, *US halts cooperation with UNJ on potential human rights violations*, GUARDIAN, (Jan. 4, 2019), https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations.
[10] Mark Landler, *Bolton Expands on His Boss's Views, Except on North Korea*, N.Y. TIMES, (Sept. 10, 2018), https://www.nytimes.com/2018/09/10/us/politics/trump-plo-bolton-international-criminal-court.html; Jordan Fabian, *Bolton threatens sanctions against International criminal Court*, HILL, (Sept. 10, 2018), https://thehill.com/homenews/adminisration/405871-bolton-threatens-sanctions-against-international-criminal-court.
[11] International Covenant on Civil and Political Rights, art. 10(1), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 172, (entered into force Mar. 23, 1976).
[12] UN General Assembly Resolution 60/251 (2006).

and relied on international human rights norms in their grassroots advocacy, including for example, death penalty abolitionists and even workers' rights organizations.

Finally, the Alien Tort Statute (28 U.S.C. § 1350) ("ATS") gives federal courts jurisdiction to hear claims brought "by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." However, in a series of cases, the most recent in June 2021, the US Supreme Court has severely limited the reach of this explicit statutory authority for US courts to adjudicate human rights claims and hold US actors accountable.

This essay will explore and evaluate the role of each of these avenues for bringing international human rights standards to bear in the United States.

1. The ICCPR and the Universal Periodic Review (the "UPR")

The UPR process, begun in 2008, invites the United Nation's 193 member states to review the human rights record of each other member state on a four-and-one-half-year cycle. The review is based on the Charter of the United Nations, the Universal Declaration of Human rights, the treaties to which the examined state is party, voluntary commitments, and international humanitarian law.[13] Running contrary to the notion of US exceptionalism, the UPR process is intended to "ensure equal treatment for every country when their human rights situations are assessed."[14] The review invites all member states to submit recommendations to the other member states about how they can improve their human rights records.

The process produces four underlying documents: the National Report prepared by the state under review; the Compilation of information, an overview of conclusions and recommendations of other UN bodies; and the Summary of Stakeholders' information, which summarizes the recommendations submitted by other members and interested parties, which usually includes NGOs and human rights institutions. The Compilation Report and the Stakeholder Report are limited to ten pages each, as is each stakeholder's submission. The results are collated into an Outcome Report to which the state under review must respond, and

[13] UN General Assembly Resolution 5/1 (18 June 2007), para 1.
[14] Office of the High Commissioner for Human Rights, 'Universal Periodic Review," www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

is also adopted at a public plenary session in Geneva. Before the plenary session, member states can submit questions to be answered orally by the state under review.[15] On the other hand, the state under review has no obligation to respond during the interactive dialogue.[16] Recommendations are accepted or noted, or supported in part, with noted recommendations amounting to rejections.[17] Any accepted recommendations must be implemented and will be the focus of the state's next review.

The process is based on cooperation among the member states to generate ideas to improve national policies, to share best practices, and to offer assistance to members in complying with human rights norms.[18] It has succeeded in attracting 100 percent cooperation of member states. As a cooperative, peer review process, the UPR differs from treaty compliance bodies, which provide review by experts and are directed at compliance by specific countries.[19]

The US has received more recommendations than any other member state.[20] During the first periodic review, which was begun in 2010, fifty-six government delegations made statements primarily focusing on the US refusal to ratify core international human rights treaties, e.g., the ICESCR and the Rome Statute, as well as on capital punishment, juvenile life without parole sentencing and the failure to close Guantanamo Bay. Of the 228 recommendations compiled by the Working Group, the US agreed, in whole or in part, to adopt 173. Ten of those recommendations related to the rights of indigenous peoples. In 2010, although the US had originally opposed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it reversed its position and expressed its conditional support of UNDRIP as a "moral and political force," although not a legally binding treaty or statement of current international law."[21] The following year the US announced its support for the Native Hawaiian Government Reorganization Act, which extends the concept of self-governance to

[15] For example, in 2015, Belgium, Germany, Norway, Sweden and Switzerland all submitted advance question to the US regarding preventing the execution of the intellectually and mentally disabled. Storey, p 19.
[16] In 2015, for example, Germany, Azerbaijan, Sweden and Belgium each asked questions relating to the death penalty that were not responded to. Id. at 20.
[17] Id. at 8.
[18] Hilary Charlesworth & Emma Larking, Human Rights and The Universal Periodic Review 214 (Cambridge University Press 2014)
[19] Id.
[20] UPR Info, 'Database of Recommendations' www.upr-info.org/database.
[21] Charlesworth & Larking, supra, n. 18 at 218, n 26.

native Hawaiians. In 2015, the US received 343 recommendations of which 150 were accepted, 83 noted, and 110 supported in part. [22]

Two recommendations (from Uruguay and Australia) addressed the US record of discrimination against LGBTQ persons. Since then, the US has repealed the "Don't Ask, Don't Tell" policy and the Defense of Marriage Act, which defines marriage as a heterosexual union, has been declared unconstitutional. Migrants' rights and racial profiling were also subjects of complaint. Twenty-one countries made recommendations concerning the abolition of capital punishment, a recurring issue in the second periodic review, as was juvenile life without parole sentencing.

After the first review cycle, which ended in 2012, the overall reaction to the process was a "cautious endorsement,"[23] with then-Department of State Legal Advisor Harold Koh describing it as a "useful tool to assess how our country can continue to improve in achieving its own human rights goals."[24]

In the second cycle, which was in 2015, the US received 343 recommendations, 43 of which were with respect to the death penalty. It accepted 10 of the 43 in whole or in part, including 23% of the death penalty recommendations. It also received three recommendations regarding climate change, including rescinding its withdrawal from the Paris Agreement, which has now been accomplished. Arguments were made that the right to a safe environment is a human right and that the right to life, water, sanitation, food, health, housing, self-determination, culture and development are all linked to climate and environmental safety. There were also recommendations regarding ensuring the human rights of people in custody, including reforming mandatory minimum sentences, ending life without parole for juveniles and non-violent offenses. These were partially supported by the United States. The US also accepted recommendations to improve conditions in its prisons and to enhance health care generally and with respect to vulnerable populations, including prisoners.

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[22] Alice Storey, *Challenges and Opportunities for the United Nations' Universal Periodic Review: A Case Study on Capital Punishment in the USA* 25 (2021) (unpublished manuscript) (on file with the University of Missouri Kansas City Law Review).
[23] Charlesworth & Larking, supra, at 7 n 32.
[24] Harold Hongju Koh, "Statement upon adoption of Universal Periodic Review Report," Human Rights Council, Geneva, 18 March 2011.

The third cycle has just been completed. The Summary of Submissions addresses many of the same areas that were raised in the earlier reviews, including racial and gender inequality, the death penalty, climate change and the absence of effective fossil fuel control measures, and work and health-related conditions. It also included recommendations in other areas, for instance, the excessive use of force by law enforcement, gun violence, mass incarceration and sentencing reform, immigration, the absence of statehood for Washington, D.C. and US territories, voting identification requirements, and suppression of political dissent.

As an international accountability mechanism, the UPR has at least resulted in an international dialogue concerning member states' per performance on human rights, including the United States.[25] While it is difficult to document a causal connection, in the United States, the UPR process has at the very least coincided with progress in the rights of indigenous Americans, barriers to LGBTQ rights, and limitations on capital punishment and on juvenile life-without-parole sentencing. It has been observed that the UPR process seems to be most successfully implemented if the recommendations relate to issues attributed to the executive branch and to a lesser extent by the courts addressing domestic constitutional standards. Issues requiring legislative action seem to be more entrenched.

The UPR process suffers from several weaknesses. Among those weaknesses are its reliance on collaboration and voluntary commitment, a lack of transparency about what recommendations actually are included in the Summary to which the member state must respond, and the process by which those ultimate recommendations are selected. Given its weaknesses, concern remains about the UPR's efficacy as a regulatory mechanism and whether the process has produced meaningful changes in human rights in practice.[26]

[25] See, e.g., Recommendations on Criminal Justice, Universal Periodic Review of the United States of America, May 2015, recommendations 176.165 through 176.213 (41 recommendations related to capital punishment).
[26] *See, e.g.,* Emma Hickey, *The UN's Universal Periodic Review: Is It Adding Value and Improving the Human Rights Situation on the Ground?* 7 Vienna J. on Int'l Const. L. 4 (2013), https://perma.cc/724C-YA7F; Constance de la Vega and Tamara N Lewis, "Peer Review in the Mix: How the UPR Transforms Human Rights Discourse, in M. Cherif Bassiouni and William A. Schabaas (eds,) New Challenges for the UN Human Rights Machinery What future for the UN Treaty Body System and the Human Rights Counsel Procedures? (Intersentia 201); Roland Chauville, "The Universal Period Review's First Cycle: Successes and Failures," in Hillary Charlesworth and Emma Larking (eds,)Human Rights and the Universal Period Review: Rituals and Ritualism (CUP 2015).

2. Extradition Treaties

In addition to the ICCPR, the United States maintains extradition treaties with over 100 countries that at least indirectly subject it to international human rights norms. That is, a US request for extradition of a foreign national may be denied on human rights grounds. Most frequently these refusals have been based on the existence of the death penalty in the United States.[27] Indeed, the European Court of Human Rights has held that the UK could not extradite a UK citizen to the United States unless the US agreed not to impose the death penalty.[28] Arguments have also been made that the proliferation of criminal charges and the plea bargaining process effectively violate the defendant's right to trial.[29] Moreover, as demonstrated for example by the UK's refusal to extradite Wikileaks' founder Julian Assange, treaty members are seriously concerned with whether the US prison system will adequately protect their own citizen's human rights, in that case the defendant's mental health.[30]

3. Recognizing International Human Rights Norms in Constitutional Interpretation

Another way in which the US recognizes international human rights norms is through the still-controversial view on the US Supreme Court that the Court's constitutional interpretation may properly include consideration of international norms and global practices.[31] This view was put forth by Justice Anthony Kennedy, almost twenty years ago in interpreting the requirements of substantive due process to declare the criminalization of consensual adult sodomy to be unconstitutional.[32] More well known, perhaps, was the consistent reference to international human rights norms in the series of decisions he authored interpreting the eighth amendment prohibition against cruel and unusual punishment.[33] In Roper v. Simmons, for example, declaring capital punishment of juveniles to be unconstitutional, Justice Kennedy

[27] http://www.mjilonline.org/federal-death-penalty-international-obligations-and-extradition-agreements
[28] Soering v. United Kingdom, 161 Eur. Ct. H.R (ser. A) (1989).
[29] https://lawprofessors.typepad.com/comparative_law/2014/05/extradition-a-new-perspective-on-the-us-plea-bargaining-process.html.
[30] Jill Lawless, *UK judge refuses extradition of WikiLeaks founder Assange*, A.P. NEWS, (Jan. 4, 2021), https://apnews.com/article/julian-assange-uk-refuses-us-extradition-5b148b0b6b9f72a20eedad4218e8227a.
[31] See e.g., Lawrence v. Texas, 539 US 558 (2003) (substantive due process prohibits the criminalization of consensual adult sexual conduct); Roper v. Simmons, 543 US. 551 (2005) (the execution of under-eighteen-year-old juveniles violates the eighth amendment prohibition against cruel and unusual punishment).
[32] Lawrence v. Texas, n. 12 supra.
[33] Miller v. Alabama, 567 US 460 (2021); Graham v. Florida, 560 US 48 (2010); Roper v. Simmons, supra n. 12

cited to the UN Convention on the Rights of the Child, even though the US was not a party, and to Article 6(5) of the International Covenant on Civil and Political Rights, even though the US had lodged a reservation against article 6.[34] Justice Kennedy, writing for the majority in striking down the death penalty for juveniles as unconstitutional, noted [it] is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty."[35] He also referred to the UK's having removed the juvenile death penalty decades before it abolished capital punishment, observing that "[t]he United Kingdom's experience bears articular relevance here in light of the historic ties between our countries."[36] This pattern continued in Miller v. Alabama and Graham v. Florida, which held unconstitutional the mandatory sentencing of juveniles to life without parole and the imposition of a life-without-parole sentence on a juvenile for a non-homicide crime, respectively. In those opinions, the Court did not hold that the Court was bound by international agreements and human rights standards in its interpretation of the Eighth Amendment, but clearly found some persuasive value in the overwhelming international consensus against the US's harsh treatment of juveniles. In these opinions he was uniformly joined by Justice Ginsberg, although they were not the only two justices to do so.

Indeed, as long ago as 1982, in Enmund v. Florida,[37] the Court, in an opinion by Justice White, struck down the death penalty for felony murder stating, inter alia, that it was "worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe."[38] In Atkins v. Virginia,[39] in striking down imposition of the death penalty on the mentally retarded, Justice Stevens cited to an amicus brief that acknowledged that the "world community" overwhelmingly disapproves of executing mentally retarded persons.[40] Justices Breyer and Sotomayor have both argued that a recognition of international standards and practices is appropriate, but so far neither has authored an opinion specifically doing so.[41]

[34] See, Senate Executive Report No. 102-23, 11 (1992).
[35] Roper. 593 US at 575.
[36] Id. at 577.
[37] Enmund v. Florida, 458 US 782 (1982).
[38] Id. at 458 n. 22.
[39] Atkins v. Virginia, 536 US 304 (2002).
[40] Id. at n. 21
[41] Stephen Breyer, America's Courts Can't Ignore the World, The Atlantic, Oct. 2018; Clive Crook, Foreign Law and Sotomayor, The Atlantic, August 7, 2009; Collin Levy, Sotomayor and International Law, Wall Street Journal, July 14, 2009.

4. Using International Human Rights Norms in Grassroots Advocacy

A fourth avenue for bringing international human rights norms and mechanisms to bear in the United States is through their use by grassroots advocates.[42] Historically, in the United States, social reform comes about not by official government but rather from the ground up. This is what occurred with the innocence/wrongful conviction movement, for example, where groups like the Innocence Project worked through advocacy and the court system to secure the adoption of measures to prevent and cure wrongful convictions.[43] In contrast, when the problem of wrongful convictions was first recognized, the UK responded by creating the Criminal Cases Review Commission, an official non-governmental body created for the same purpose.[44] Similarly, in the United States organizations, such as Amnesty International and the US Human Rights Network, have used international human rights norms in their advocacy strategy.[45] Some of these organizations are part of international networks, a fact that in several ways can enhance their impact.[46] Prison Reform Advocates have invoked international norms and the Convention against Torture, one of the three human rights treaties the US has joined, to argue for reform of prison conditions, in particular against solitary confinement.[47]

Recently, the invocation of international human rights norms has expanded in interesting ways. For example, international human right norms were invoked to support race-neutral admissions procedures at the University of Texas;[48] reform of conditions for Vermont's dairy workers:[49] The "Milk with Dignity" program advocates for worker safety and fair wages to protect workers' human rights at all levels of the dairy industry.[50] Similarly, The Vermont

[42] For an excellent description of this phenomenon, *See* Amy C. Finnegan, et al., *Negotiating Politics and Culture: The Utility of Human Rights for Activist Organizing in the United States*, 2 J. of Hum. Rts. Prac., 307 (2010).
[43] Innocence Project, https://innocenceproject.org/.
[44] See, Jon Robins, *University innocence projects: where are they now?*, GUARDIAN, (Apr. 27, 2016), https://www.theguardian.com/law/2016/apr/27/university-innocence-projects-where-are-they-now.
[45] https://www.amnesty.org/en/what-we-do/detention; https://ushrnetwork.org/membership/miats/prisoners-human-rights-miat
[46] *See* Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy networks in international and regional politics*, 51 Int'l. Soc. Sci. J., 89 (1999).
[47] Alvin J. Bronstein & Jenni Ginsborough, *Using International Human Rights Laws and Standards for US Prison Reform*, 24 Pace L. Rev. 811 (2004) https://www.amnestyusa.org/reports/entombed-isolation-in-the-us-federal-prison-system/ .
[48] https://prrac.org/pdf/Fisher_Amicus_-_Intl_Human_Rights.pdf.
[49] JoAnn Kamuf Ward, *Vermont Dairy Workers Demand Justice and Human Rights- Will Ben & Jerry's Respond?,* HUMAN RIGHTS AT HOME BLOG, (June 28, 2017), https://lawprofessors.typepad.com/human_rights/2017/06/vermont-dairy-draft-workers-demand-justice-and-human-rights-will-ben-jerrys-respond.html.
[50] https://milkwithdignity.org/about.

Workers Center's "health-care-is-a-human right" campaign led, in 2011, to Vermont being the first state to establish universal health care. [51] The organization's successful strategy has been described as follows:

> (1) by learning about the human right to health care and sharing experiences, Vermonters were motivated to demand universal health care; (2) mobilizing Vermonters around a unified message on the right to health care made universal health care politically important; (3) using the human rights framework to assess new proposals enabled the Vermont Workers' Center to respond quickly to new policy proposals; (4) framing health care as a human right provided an alternative to the dominant economics-based discourse; and (5) while economics continues to dominate discussions among Vermont leaders, both legislative committees on health care use the human rights principles as guiding norms for health care reform. Importantly, the principles have empowered Vermonters by giving them more voice in policymaking and have been internalized by legislators as democratic principles of governance.

The process of relying on international human rights norms and mechanisms has also historically included amicus curiae briefs in the US Supreme Court by international human rights groups.[52] The inclusion of international human rights norms through amici submissions has been hastened by the explosion in the US Supreme Court's amicus curiae practice.[53]

5. The Alien Tort Statute

Interestingly, the United States has a statute that explicitly empowers the US courts to entertain claims by aliens based on international human rights violations by US actors. The Alien Torts Act (18 USC § 1530) gives federal courts jurisdiction to hear claims brought "by an alien for a tort only committed in violation of the law of nations or a treaty of the United States." However, the US Supreme Court has interpreted this statute very narrowly. Thus, while

[51]Gillian MacNaughton, et al., *The Impact of Human Rights on Universalizing Health Care in Vermont, USA*, 17 Health and Hum. Rts. J., (2015), https://www.hhrjournal.org/2015/12/the-impact-of-human-rights-on-universalizing-health-care-in-vermont-usa/.

[52] *See, e.g.*, list of filings in Lawrence v. Texas, 539 US 558 (2003). https://www.theyoungcenter.org/stories/2021/1/27/rights-organizations-file-amicus-supreme-court-brief-telling-the-stories-of-children-harmed-by-the-remain-in-mexico-policy; https://1.next.westlaw.com/Document/I2b6d51fe45d911e1aa95d4e04082c730/View/FullText.html?listSource=RelatedInfo&list=Filings&rank=18&docFamilyGuid=I2b6d51ff45d911e1aa95d4e04082c730&ppcid=bd5a782fd1af409bb9e070944675d56e&originationContext=filings&transitionType=FilingsItem&contextData=%28sc.UserEnteredCitation%29 (Amnesty International amicus brief in Miller v. California, in support of petitioners); https://www.aclu.org/sites/default/files/field_document/chart_of_amicus_briefs_filed_in_support_of_government_in_zubik_v._burwell_final.pdf (center for Reproductive Rights amicus setting forth international human rights law and practices with respect to contraceptive availability).

[53] Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 Va. L. Rev. 1901 (2016); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. Rev. 175 (2018).

it theoretically could hold US defendants accountable for international human rights violations, it has not and is not likely to have a major impact in the United States.

The US Supreme Court's most recent interpretation of the statute is Nestle USA, Inc. v. Doe.[54] In *Nestle*, the plaintiffs alleged they were victims of child slavery practices at the Ivory Coast cocoa farms that supply Nestle and Cargill Inc. with their cocoa. They claimed that the corporations provided training, equipment, and cash to the farms in exchange for the exclusive right to buy cocoa and knowingly aided and abetted those child slavery practices. The Court held five-to-four, that the statute did not permit the claim.

In an opinion by Justice Thomas, the Court acknowledged that the statute authorized US courts to create private rights of action. However, relying on its prior precedent establishing that the ATS does not apply extraterritorially,[55] it noted that plaintiffs' injuries all occurred in the Ivory Coast. Plaintiffs' claim that the ATS applied because the defendants made "major operational decisions" in the US was characterized as alleging "general corporate activity" that was insufficient to create a cause of action.[56]

The Court went further, however, to limit the extent to which ATS permits the courts to create private rights of action rather than deferring to Congress's authority to do so. Again relying on a prior decision,[57] the Court limited the courts to recognizing only the three causes of action that existed in 1789, when the ATS was enacted: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[58] It interpreted its own post-*Sosa* precedent[59] to require that the courts "refrain from creating a cause of action whenever there is even a single sound reason to defer to Congress."[60] Significantly, as the Court noted, it has never found that demanding standard to authorize judicial creation of a cause of action under the statute.[61]

[54] Nestle USA Inc. v. Doe, 593 US_____ (2021). Justices Gorsuch, Alito and Kavanaugh, concurred; Justice Sotomayor, joined by Justices Breyer and Kagan, concurred in part and concurred in the judgment.
[55] Kiobel v. Royal Dutch Petroleum Co., 569 US 108 (2013).
[56] Nestle, n. 54 supra at 1935
[57] Sosa v. Alvarez-Machain, 542 US 692 (2004).
[58] Id. at 724
[59] Hernandez v. Mesa, 140 S. Ct. 735 (2020).
[60] Id. at 747
[61] Id.

In a separate decision Justice Sotomayor concurred in part and concurred in the judgment, joined by Justices Breyer and Kagan. While she agreed that the plaintiffs had failed to allege sufficient US conduct to support domestic application of the ATS, she refused to join Justice Thomas's limitation of the ATS to the three international law torts that existed in 1789 and that to do so "contravenes both this Court's express holding in Sosa and the text and history of the ATS."[62] Quoting *Sosa*,[63] Justice Sotomayor explained that "'courts should require any claim based on a present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms' contemplated by the First Congress (i.e., norms regarding safe conducts, the rights of ambassadors, and piracy."[64] Justice Sotomayor quoted the two-step process laid out in Jesner v. Arab Bank, PLC[65]: "whether a plaintiff can demonstrate that the alleged violation is 'of a norm that is specific universal and obligatory (citation omitted)." "If so, then it must be determined further whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion."[66]

6. Conclusion

The United States sense of its own exceptionalism continues to restrict the extent to which it can be held accountable for violation of international human rights norms. Its limited assumption of treaty obligations is the best example. On the other hand, its ratification of the ICCPR permits other UN member states to critique its human rights performance and to require a US response, raising the level of human rights discourse to include awareness of US accountability for international human rights. The US has also run into difficulty in achieving its extradition goals based on its inability to protect international human rights. It remains to be seen whether Justice Kennedy's willingness to rely on international human rights documents and norms will continue now that he has left the court. And clearly, the Supreme Court's

[62] Id. at 758-59.
[63] Sosa, n. 57 supra, 542 US at 725.
[64] Nestle, n. 54 supra, 593 US ____ (2021), opinion of Sotomayor concurrent in part and concurring in the judgment at 3.
[65] Jesner v. Arab Bank, PLC, 584 US____ (2018).
[66] Nestle, n. 54, supra, opinion of Sotomayor, J. at 4, quoting Jesner v. Arab Bank, n. 65 supra (plurality opinion), slip op at 11-12.

evisceration of the ATS severely curtails the accountability of US corporations for international human rights violations.

At the same time, human rights advocacy has increased in the United States as social justice advocates increasingly invoke international human rights norms to challenge domestic conditions. The increased reliance on the judiciary for resolution of major social and political problems, and the accompanying increase in amicus practice in the Supreme Court have provided an additional avenue for raising international human rights norms. What will happen over the next few years with the change in administration should be interesting to watch.