Loyola University Chicago International Law Review

Volume 8
Issue 1 *Fall/Winter 2010*

Article 4

2010

Prosecuting Charles Taylor's Son for Torture: A Step toward the Domestication of International Law

Thomas J. G. Scott
Stanford Law School, Princeton University

Follow this and additional works at: http://lawecommons.luc.edu/lucilr

 Part of the International Law Commons

Recommended Citation
Thomas J. Scott *Prosecuting Charles Taylor's Son for Torture: A Step toward the Domestication of International Law*, 8 Loy. U. Chi. Int'l L. Rev. 33 (2010).
Available at: http://lawecommons.luc.edu/lucilr/vol8/iss1/4

This Feature Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago International Law Review by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

PROSECUTING CHARLES TAYLOR'S SON FOR TORTURE: A STEP TOWARD THE DOMESTICATION OF INTERNATIONAL LAW

Thomas J. G. Scott*

Introduction

Several federal statutes criminalize conduct by foreigners that has no relation to the United States.[1] These statutes, and the prosecutions conducted pursuant to them, raise questions about Congress's legislative authority and individuals' Due Process rights in a globalized world.[2] In part to avoid thorny issues about the relationship between constitutional law and international law, the U.S. has not pursued any atrocity prosecutions based purely on universal jurisdiction.[3] But despite these challenges, human rights activists remain hopeful that U.S. courts will soon exercise jurisdiction over – and thus end impunity for – atrocities committed abroad. The 2008 conviction of Charles McArthur Emmanuel, son of Liberian warlord Charles Taylor, for his role in torture committed against Liberians in Liberia represents a major step toward this goal.

The Extraterritorial Torture Statute, 18 U.S.C. § 2340A [ETS], makes it a crime for a U.S. citizen or person present in the United States, regardless of whether they are a U.S. citizen, to commit, attempt or conspire to commit torture abroad.[4] The statute applies regardless of the nationality of the victim.[5]

In passing the ETS, Congress incorporated into domestic law the country's obligations as a state party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment [CAT].[6] Skepticism

* J.D., Stanford Law School, and M.P.A., Princeton University, both expected June 2011.

[1] Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C.A. §§ 70501-07 (West 2008) (establishing jurisdiction over stateless vessels); 18 U.S.C. § 2339B(a)(1) (2006), *invalidated by* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1123 (9th Cir. 2007) (allowing extraterritorial jurisdiction over individuals providing material support to terrorist groups, even when neither the support nor the group has any connection to the United States); Child Soldiers Accountability Act of 2008, 18 U.S.C.A. § 2442(c)(3) (West 2008) (allowing extraterritorial jurisdiction over individuals charged with recruiting child soldiers); Genocide Accountability Act of 2007, 18 U.S.C.A. § 1091 (West 2009).

[2] Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149, 150 (2009).

[3] "There is an expansive use of extraterritorial jurisdiction for terrorism, narcotics trafficking, and hostage-taking criminal laws, but similar extraterritorial applications have not yet reached atrocity crimes under U.S. law." David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 NW. U. J. INT'L HUM. RTS. 30, 35 (2009). Further, even these expansive uses of extraterritoriality doctrine have thus far entailed some plausible, if strained, nexus to the United States, such as intent to violate its laws or enter its territory. *See, e.g.*, United States v. Ledesma-Cuesta, 347 F.3d 527, 530-32 (3d Cir. 2003) (affirming the conviction of a man found in international waters and accused of attempting to smuggle drugs into the United States because he had taken a "substantial step" toward committing the crime, and overcoming Due Process concerns because drug-trafficking is universally condemned by law-abiding nations).

[4] 18 U.S.C. § 2340A (2001).

[5] *See id.* § 2340A(b)(2).

[6] S. REP. No. 103-107, at 58-59 (1994); *see* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY

about the U.S.'s commitment to ending impunity for torture grew, however, as more than a decade passed without a single ETS prosecution.[7] One commentator writing in 2002 described the ETS as "a ghost provision that satisfies the United States' obligations under the Torture Convention but does not generate a viable means of meting out individual accountability."[8]

Though most attention to the federal torture statute has centered on prospects for convicting U.S. officials for their role in the so-called War on Terror,[9] *Emmanuel* stands out as the sole case prosecuted under the torture statute since its enactment in 1994.[10] Surprisingly, no one has closely examined the case.[11] Such criticisms subsided on October 30, 2008, when Charles McArthur Emmanuel, the son of former Liberian president Charles Taylor, became the first person convicted under the ETS.[12] The indictment accused Emmanuel of burning victims with molten plastic, cigarettes and an iron; severely beating victims with a firearm; stabbing them; and shocking victims with an electrical device, including on their genitalia.[13] The jury, sitting in federal district court in Miami, found Emmanuel guilty of one count of torture, one count of conspiracy to commit torture, and one count of possession of a firearm during the commission of a violent crime.[14] Three months after Emmanuel's conviction, U.S. District Judge Celia Altonaga sentenced Emmanuel to ninety-seven years in prison, saying that his

---

DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987) [hereinafter Convention Against Torture], *available at* http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-9&chapter=4&lang=en.

[7] *See, e.g.*, WILLIAM J. ACEVES, AMNESTY INT'L, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS 22 (Amnesty Int'l USA 2002), *available at* http://www.amnestyusa.org/stoptorture/safehaven.pdf.

[8] Ellen Y. Chung, *A Double-Edged Sword: Reconciling the United States' International Obligations Under the Convention Against Torture*, 51 EMORY L.J. 355, 374 (2002).

[9] *See, e.g.*, Claire Finkelstein & Michael Lewis, *Should Bush Administration Lawyers Be Prosecuted for Authorizing Torture?*, 158 U. PA. L. REV. 195, 199 (2010); Benjamin G. Davis, *Refluat Stercus: A Citizen's View of Criminal Prosecution in U.S. Domestic Courts of High-Level U.S. Civilian Authority and Military Generals for Torture and Cruel, Inhuman or Degrading Treatment*, 23 ST. JOHN'S J. LEGAL COMMENT. 503, 627 (2008); Scott Horton, *Justice After Bush: Prosecuting an Outlaw Administration*, HARPER'S MAG., Dec. 2008, at 53-54; Jordan J. Paust, *Prosecuting the President and His Entourage*, 14 ILSA J. INT'L & COMP. L. 539, 545 (2008); John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARV. J. ON LEGIS. 487, 496-501 (2006).

[10] Scheffer, *supra* note 3, at n.10.

[11] Though the mainstream media covered the case fairly closely, there seems to be only one article on the subject. It is only a general update on the case and was written before the case was decided. *Charles Taylor Jr. Indicted in United States for Torture Committed in Liberia*, 101 AM. J. INT'L L. 492 (2007). Thus, this Comment will make an important contribution to the literature by highlighting this case as an important, albeit incremental, step in the development of universal jurisdiction doctrine in the United States.

[12] Though the press often refers to Emmanuel as "Charles 'Chuckie' Taylor," I have, for the sake of accuracy, abstained from doing so here because Emmanuel is the defendant's legal name and is used by the Court.

[13] Second Superseding Indictment, United States v. Belfast Jr. a/k/a Charles McArthur Emmanuel, No. 06-20758-CR-Altononga(s)(s), 2007 WL 4969379 (S.D. Fla. Nov. 8, 2007).

[14] John Couwels, *Ex-Liberian president's son convicted of torture*, CNN, Oct. 30, 2008, http://edition.cnn.com/2008/CRIME/10/30/taylor.torture.verdict/.

"sadistic, cruel, atrocious past . . . constituted unacceptable, universally condemned torture."[15]

The United States government and the human rights community hailed the conviction as a major achievement. Then-Attorney General Michael Mukasey said the conviction "provides a measure of justice to those who were victimized by the reprehensible acts of Charles [Emmanuel] and his associates. . . . It sends a powerful message to human rights violators around the world that, when we can, we will hold them fully accountable for their crimes."[16] Elise Keppler of Human Rights Watch, who cooperated with the Department of Justice in preparing the Emmanuel case, called the trial "necessary to demonstrate the U.S.'s commitment to apply laws prohibiting human rights violations committed abroad."[17] She later stated, "when terrible abuses have been committed, justice is critical, not just for the victims but also for rebuilding a society based on the rule of law."[18]

Despite the fanfare, however, the *Emmanuel* case should have been a fairly routine application of U.S. law to an American citizen – a signal of U.S. commitment to prosecuting human rights abuses – and not the impetus behind any notable development in American law. Nevertheless, the *Emmanuel* prosecution may prove an important vehicle for doctrinal consolidation. The Emmanuel defense claimed that the ETS "impermissibly expands the scope and authority of the federal government beyond constitutional parameters" because:

> (1) Congress lacked the authority to pass the ETS, especially since it exceeds the scope of the Convention it implements (prescriptive jurisdiction),
> (2) American courts may not apply the ETS to crimes committed overseas (adjudicative jurisdiction), and
> (3) the ETS violates the accused's constitutional rights.[19]

In addressing the defense's arguments, the court took two major steps: finding the Offences against the Law of Nations Clause as a second constitutional basis for the ETS, and describing torture as a *jus cogens* offence.[20]

---

[15] John Couwels, *Son of ex-Liberian leader sentenced to 97 years in prison*, CNN, Jan. 9, 2009, http://www.cnn.com/2009/CRIME/01/09/taylor.torture.sentencing/index.html.

[16] Couwels, *supra* note 14.

[17] Human Rights Watch, *Q & A: Charles 'Chuckie' Taylor, Jr.'s Trial in the United States for Torture Committed in Liberia*, Sept. 23, 2008, http://www.hrw.org/en/news/2008/09/23/q-charles-chuckie-taylor-jr-s-trial-united-states-torture-committed-liberia.

[18] Human Rights Watch, *A Trial Sends a Message Around the World*, Dec. 24, 2008, http://www.hrw.org/en/news/2008/12/24/trial-sends-message-around-world.

[19] Defendant's Motion to Dismiss the Indictment, and Memorandum of Law in Support Thereof, Based on the Unconstitutionality of 18 U.S.C. § 2340A, Both on its Face and as Applied to the Allegations of the Indictment, United States v. Emmanuel, No. 06-20758-CR-Altononga, 2007 WL 980550 at *6 (S.D. Fla. Mar. 2, 2007) [hereinafter Defendant's Motion to Dismiss Indictment]. The Emmanuel defense also asserted sovereign immunity, on the grounds that Emmanuel headed Liberia's Anti-Terrorist Unit during his father's presidency. The defense claimed the prosecution amounted to a U.S. government effort "to oversee, through the open-ended terms of federal criminal law – the internal and wholly domestic actions of a foreign government." *Id.*

[20] United States v. Emmanuel, No. 06-20758-CR, 2007 WL 2002452 at *9 (S.D. Fla. July 5, 2007).

Taken together, these two steps enable future courts to link the international legal doctrine of *jus cogens* with the congressional lawmaking authority under the Constitution's Offences Clause. Linking *jus cogens* to the Offences Clause would "overcome any potential constitutional obstacles to the extraterritorial application of U.S. law to the perpetrators of 'universal' crimes under international law."[21]

The *Emmanuel* court's findings make possible a coherent, expansive, extraterritoriality doctrine. This would be a major doctrinal development enabling prosecutions in the "harder" atrocity cases, such as when a non-U.S. citizen perpetrator commits acts entirely abroad against other non-U.S. citizens. The hardest of these cases would be exercises of universal jurisdiction where the prohibition of conduct has "no obvious treaty basis," as is the case with MDLEA or the child soldier statute.[22] These prosecutions would need to rely solely on Offences Clause.[23] Thus, if adopted by future courts, the *Emmanuel* approach will dramatically expand the U.S. government's ability to prosecute human rights abuses abroad.

The first section of this article reviews the court's finding of dual constitutional bases for Congress's enactment of the ETS. The second section describes the court's analysis of Congress's ability to apply the ETS to conduct committed entirely outside the U.S. and evaluates the court's reasoning in light of prior precedent on the subject of extraterritorial criminal law. The third section explains how the court's findings overcome concerns about the individual's Due Process rights. The next section links these strands and argues that *Emmanuel* paves the way for future applications of the ETS against non-citizens and perhaps for jurisdiction to be imposed for other universally condemned crimes as well. The final section considers how this doctrinal innovation would impact America's national interest, particularly as the U.S. continues its resistance to the application of universal jurisdiction against its own citizens for their actions abroad.

I. Congress' Power to Enact the ETS

All statutes, including those regulating in the realm of foreign affairs, must be passed pursuant to a valid exercise of congressional power.[24] The Emmanuel court found two constitutional bases for the ETS: the Necessary and Proper

---

[21] Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 123 (2007).

[22] INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, HARD CASES: BRINGING HUMAN RIGHTS VIOLATORS TO JUSTICE ABROAD 38 (1999), *available at* http://www.ichrp.org/files/reports/5/201_report_en.pdf.

[23] Kontorovich, *supra* note 2, at 155.

[24] *See, e.g.*, Ex Parte Quirin, 317 U.S. 1, 25 (1942) ("Congress and the President, like the Courts, possess no power not derived from the Constitution."); *see also* Reid v. Covert, 354 U.S. 1, 18 (1957) ("It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."); *but see* US v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (stating that the "investment of the federal government with the powers of external sovereignty did not depend upon affirmative grants of the Constitution").

Clause and the Offences against the Law of Nations Clause.[25] By including the Offences Clause as a second basis for the ETS, the court fashioned a broader textual basis from which Congress can project laws such as the ETS extraterritorially.

A. The Necessary and Proper Clause

The Necessary and Proper Clause allows Congress to enact legislation pursuant to the country's treaty obligations.[26] The *Emmanuel* court found the ETS valid under the Necessary and Proper Clause, passed as an adjunct to the Executive's Art. II Treaty Power.[27] The court noted that the ETS is intended to effectuate the CAT, and that Article V of the Convention specifically requires states to establish jurisdiction over offenders regardless of where their conduct occurred.[28] According to the court, treaties "can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'"[29] Validity under the Necessary and Proper Clause means that, at the very least, the ETS can claim extraterritorial jurisdiction over torture (as defined in the CAT) occurring in CAT signatory states.[30] The court's findings seem largely consistent with precedent, which suggests a strong presumption in favor of the validity of legislation passed pursuant to a treaty.[31]

i. A Broad View of Holland*'s Demarcation of the Treaty Power*

The Emmanuel court heavily cited *Missouri v. Holland* – the 1920 Supreme Court case containing some of the broadest language regarding Congress' power pursuant to treaties – in reaching its decision.[32] *Holland* is generally cited for the proposition that, so long as a treaty is valid, "there can be no dispute about the validity of the statute [passed pursuant to the treaty] under Article I, § 8, as a necessary and proper means to execute the powers of the government."[33] But

---

[25] *Emmanuel*, 2007 WL 2002452 at *6.

[26] U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.").

[27] *Emmanuel*, 2007 WL 2002452 at *6.

[28] *Id.* at 3.

[29] *Id.* at 6 (citing U.S. v. Lara, 541 U.S. 193, 201 (2004)).

[30] Colangelo, *supra* note 21, at 152 ("[B]ecause the aim of the treaty is to prohibit the conduct in question within the territories of all the signatory states, Congress legitimately may extend the prohibition into the foreign territories of other states parties to the treaty, even absent any direct U.S. connection to the conduct.") (citing U.S. v. Yousef, 327 F.3d 56, 108-10).

[31] *See* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (citing De Geofroy v. Riggs, 133 U.S. 258, 266 (1890)) ("The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.").

[32] *Emmanuel*, 2007 WL 2002452 at *6; *see also* Missouri v. Holland, 252 U.S. 416, 432 (1920).

[33] *See, e.g.*, Edward T. Swaine, *Putting Missouri v. Holland on the Map*, 73 MO. L. REV. 1007, 1010 (2008); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005) (acknowledging that "the canonical *Missouri v. Holland* holds that Congress has power to enact legisla-

Holland could also be construed to limit the application of the ETS extraterritorially.[34]

Holland's precedent is limited to matters of "the sharpest exigency for the national well-being" implicating "national interest[s] of very nearly the first magnitude" which "can be protected only by national action in concert with that of another power."[35] Thus, a narrow reading of *Holland* could be interpreted to mean that, as a practical matter, the U.S. does not possess an interest "of the first magnitude" in preventing torture committed against Liberians in Liberia.[36]

The U.S. may, though, have an interest in complying with (or at least in being viewed internationally as complying with) the CAT. Supreme court jurisprudence provides little guidance as to whether that type of second-order effect is sufficient to constitute a matter of the "sharpest exigency" under *Holland.* In an analogous context, the Supreme Court hinted that compliance with international law could be recognized as establishing the compelling interest required to vindicate content restrictions in the First Amendment context.[37] Given the volume of materials discussing *Holland*'s relevance to human rights treaties, the dearth of authority on this point comes as something of a surprise.

The *Emmanuel* court seems to have made the plausible inference that such a second-order effect would be sufficient. This might be because, in another passage in *Holland*, Justice Holmes also argued for the necessity of the treaty because it was "not sufficient to rely on the states" to protect migratory bird species.[38] If this passage is construed broadly to refer to the "insufficiency" of alternative enforcement methods, rather than the insufficiency of state efforts without federal intervention, Liberia's inability to prosecute Emmanuel may further bolster the argument for the ETS under the Necessary and Proper Clause.

---

tion to implement a treaty, even if it would lack the power to enact the same legislation absent the treaty" but arguing that it was wrongly decided).

[34] 252 U.S. at 432.

[35] *Id.* at 433-34.

[36] Due to the difficulty of determining whether broader humanitarian concerns are indeed of "the first magnitude," and the separation of powers consequences for such decisions, some scholars hold the view that human rights treaties are analytically distinct from more traditional bilateral treaties, such as those involving joint military, environmental or economic interests, and that the constitutionality of human rights treaties should therefore be evaluated differently. *See, e.g.*, Brad R. Roth, *Understanding the "Understanding": Federalism Constraints on Human Rights Implementation*, 47 WAYNE L. REV. 891, 899-900 (2001) ("The real question is . . . under what circumstances a Congressional interpretation of human rights treaty obligations can serve to extend federal authority over matters otherwise reserved to the states."); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 402 (1998) ("There are numerous instances in which Congress might use human rights treaties to overcome federalism restraints on its lawmaking power.").

[37] Peter J. Spiro, *Treaties, International Law and Constitutional Rights*, 55 STAN. L. REV. 1999, 2019-20 (1988) (citing Boos v. Berry, 485 U.S. 312, 324 (1988) (suggesting but not deciding that an interest recognized by international law could give rise to a compelling interest in support of a speech restriction, while striking down a measure limiting protests within range of foreign embassies in Washington on the ground that the speech restriction was not narrowly tailored)).

[38] 252 U.S. at 435.

ii. Extending the ETS Beyond the CAT

The defense also argued that the ETS cannot rely solely on the Necessary and Proper Clause because the definition of "torture" in the ETS is broader than that in the CAT, encompassing conduct regardless of whether it was "inflicted for purposes of obtaining a confession, for punishment, or for intimidation or coercion."[39] The court rejected this argument, and similarly dismissed the argument that Emmanuel cannot be found guilty of torture committed during Liberia's civil war since the CAT is not intended to apply in times of conflict.[40]

In allowing the ETS to apply more broadly, the *Emmanuel* court followed a long line of precedent stretching back 190 years to the Supreme Court's opinion in *McCulloch v. Maryland.* Describing the test for legislation implementing treaties, Justice Marshall wrote in that case: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[41] The courts have since construed *McCullough*'s language to permit implementing legislation to regulate more broadly than its underlying treaty so long as the legislation bears some rational relationship to a permissible constitutional end.[42] The *Emmanuel* court further asserted that this decision makes practical sense because Congress should be afforded some measure of flexibility in carrying out its delegated foreign affairs responsibilities.[43]

More controversially, the *Emmanuel* court stated a second (albeit, perhaps *dicta*) basis for allowing the ETS to extend to cases beyond that covered by the

---

[39] The ETS incorporates into domestic law the CAT, not as it is understood internationally, but as it is understood according to the reservations and understandings—including the statutory definition of torture—under which it garnered the consent of the Senate. *Cf.* Convention Against Torture, *supra* note 6, art. 1 (requiring that torture be committed "for such purposes as obtaining a confession, for punishment, or for intimidation or coercion"), *with* Extraterritorial Torture Statute, *supra* note 4 (imposing no requirement that torture be committed for any functional purpose).

[40] In its Reply Brief, the defense quoted a U.S. government official for the proposition that the CAT does not apply in times of armed conflict. As a doctrinal matter, the opinion of this U.S. official would only bear on this issue if the opinion reasonably sheds light on Congress' intent and understanding of the scope of the CAT in passing the ETS. Thus, the court reached the right result on this question. Even if the CAT itself does not apply during situations of armed conflict, Congress can certainly pass a statute pursuant to that treaty that exceeds its scope and covers armed conflicts as well. It is interesting to note, though, the ways in which the court tried to avoid political entanglement on such questions. For instance, here, the court somewhat puzzlingly said it could not consider the claim because the facts underlying the argument had not been included in the initial indictment. *See Emmanuel*, 2007 WL 2002452 at *9.

[41] McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

[42] *See* United States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (finding that the "plainly adapted" standard of *McCullough* "requires that the effectuating legislation bear a rational relationship to a permissible constitutional end"). Though largely correct as a matter of legal precedent, the use of the "rational relationship" standard for finding congressional authority under the Necessary and Proper Clause warrants further consideration. By covering a broader spectrum of conduct than the CAT itself, the ETS starts to resemble prophylactic legislation from the 14th Amendment, § 5, context. Indeed, the language of congressional "flexibility" is reminiscent of that context as well. If this perspective were adopted in evaluating instances when Congress exceeded the scope of the treaties under which they passed legislation, that legislation would then be subject to a heightened standard requiring the measure to be "congruent" and "proportional"—rather than just rationally related—to its goal.

[43] *Emmanuel*, 2007 WL 2002452 at *7.

CAT. The court states that the ETS's broader definition of torture "is consistent with the international community's near universal condemnation of torture," and with "repeated calls for the international community to be more effective in the struggle against torture."[44] Critics might contend that, if the international community did support a broader definition of torture, the definition should be found in the CAT itself (or some progeny thereof). Most likely, the court relies on the development of the definition of "torture" in finding a "rational relationship" and justifying the ETS's reach beyond the CAT. In doing this, the court probably determined that the international community's view of torture has evolved in the roughly twenty-five years since the CAT was opened for signature."[45]

Aside from that more debatable finding, the Necessary and Proper Clause provides a firm basis for the ETS. It affords future courts with a developed body of jurisprudence from which to draw in making the vast majority of ETS decisions, extending its reach at a minimum to the conduct covered in the CAT and to the CAT's 146 signatory countries. But the Necessary and Proper Clause alone does not provide a satisfactory blueprint for other exercises of extraterritorial jurisdiction, particularly for the harder questions that emerge when the prohibited conduct occurs in a foreign state not party to the underlying treaty.

B. The Offences Against the Law of Nations Clause

The Offences Clause represents another means by which Congress can claim prescriptive jurisdiction abroad, and can permit extraterritorial jurisdiction beyond that provided by the Necessary and Proper Clause.[46] Though "the subject of little commentary and judicial treatment,"[47] the Offence Clause is most commonly viewed as vesting in Congress the power "to either enact regulatory statutes governing the conduct of individual persons who violate international law, or to constitute tribunals to adjudicate the conduct of such individuals."[48] Significantly for extraterritoriality doctrine, "[n]othing on the face of the Offences

---

[44] *Id.* at 8.

[45] The notion that customary international law surrounding torture has evolved, expanding to encompass a wider set of conduct, in the last quarter century seems reasonable. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 134 (2005) ("At the ICTY and ICTR, several trial chambers have adopted this definition but have also unilaterally expanded its list of prohibited purposes."). Further, the statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as the ICC's Rome Statute, affirmatively list torture as a crime against humanity. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 3, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994); Rome Statute of the International Criminal Court, art. 7, U.N. Doc. A/CONF.183/9 (July 17, 1998).

[46] U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power to "define and punish . . . offences against the Law of Nations.").

[47] Colangelo, *supra* note 21, at 137.

[48] J. Andrew Kent, *Congress' Under-appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 849 (acknowledging that the Offences Clause is a tool for punishing individuals, but also arguing that the clause empowers Congress to punish foreign states who violate international law).

Clause, or that might be built into it judicially, suggests extraterritorial [sic] restrictions on Congress'[s] lawmaking authority."[49]

Congress can legislate universally under the Offences Clause "only when international law has made punishment of the regulated conduct universally cognizable" through the general consent of nations.[50] By hinging on universal cognizability, the Offences Clause relies on customary international law[51] – composed of both treaties *and* state practice – in delineating the bounds of Congressional lawmaking power. The clause can therefore allow for a wider claim of prescriptive jurisdiction abroad than the Necessary and Proper Clause alone. To find this, a judge must "undertake a rigorous and bona fide inquiry into the status of customary law" and find that international norms have, since the signing of the CAT, evolved in such a way as to permit that further reach.[52] The most plausible exposition of the Offences Clause, therefore, "suggests that Congress can fill in interstitial questions or resolve particular disputes and uncertainties about the elements of an offense, but it cannot punish primary conduct that is not an international crime."[53] In *Emmanuel*, if the ETS exceeds some rational relationship to the CAT, applying to states not party to the CAT or to a much wider set of conduct than that covered in the CAT, the Offences Clause can form the ETS's Constitutional basis.[54]

This approach to the Offences Clause accords with the international notions of universal jurisdiction, in which universal prescriptive jurisdiction (authorizing all states to subject an offender to judicial process) depends upon the definition of the crime as contained in customary international law.[55] Currently, this category of crimes includes piracy, slavery, genocide, crimes against humanity, war crimes, and "perhaps certain acts of terrorism," such as the hijacking and bombing of aircraft.[56] Though this process is uncertain in its direction and pace, the

---

[49] Colangelo, *supra* note 21, at 137; *see* H.R. REP. No. 48-1329, at 1-2 (1884) ("[T]he Constitution vests in Congress power to define and punish offences against the law of nations, everything . . . which is contrary to the integrity of the foreign country in its essential sovereignty, or which would disturb peace and security."); *see also* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 335 (2001) ("Although the founders may not have envisioned that this power would be used to regulate conduct on foreign soil, I am not aware of any evidence showing that they meant to disallow such power if and when international law evolved to allow for its exercise.").

[50] Kontorovich, *supra* note 2, at 151 (arguing for two possible interpretations of the Offences Clause, namely, that "Congress can legislate only when international law has made punishment of the regulated conduct universally cognizable" or, most narrowly, that Congress' power under the clause is limited solely to piracy).

[51] *Id.* at 203.

[52] Anthony J. Colangelo, *The Legal Limits of Universal Jurisdiction*, 47 VA. J. INT'L L. 149, 180 (2006).

[53] Eugene Kontorovich, *Beyond the Article I Horizon: Congress' Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1222 (2009).

[54] *Id.* at 1224 ("The Offenses Clause is implicated when there is no treaty basis for the law, and so one must determine whether Congress's offense roughly corresponds to CIL."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) ("International agreements have provided for general jurisdiction for additional offenses. . . . Such agreements are effective only among the parties, unless customary law comes to accept these offenses as subject to universal jurisdiction.").

[55] Colangelo, *supra* note 21, at 158.

[56] *Id.* at 151.

category may also expand to include "human sex trafficking, nuclear arms smuggling, and perhaps other characteristically transnational offenses."[57]

Emmanuel's defense, surely aware of the Offence Clause's potentially expansive nature, objected vigorously to the clause as a basis for the ETS.[58] Calling its application to the ETS "unprecedented and contrary to the context and ordinary meaning of the terms used in the clause," the defense argued that the actions of foreign governments within their own jurisdiction are beyond the scope of the Offences Clause and that the clause only covers offences taking place within the United States or on the high seas.[59] The issue, then, is whether, under the clause, torture committed in another country constitutes an offence against the Law of Nations.[60]

i. Torture as an Offence Under the Law of Nations

In its admittedly limited treatment of the clause, the Supreme Court suggests that the "Law of Nations" encompasses "an evolving body of norms against which congressional action is measured at the time Congress legislates."[61] For example, the Court found in the *Arjona* case of 1887 that, although currency counterfeiting was not an offense against the law of nations at the time of the Founding, developments in international finance required that the law of nations be "extended to the protection of this more recent custom among bankers of dealing in foreign securities."[62] The *Arjona* standard for recognizing an offence is liberal: "If the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offence against the law of nations."[63]

More recently, the Court in *Sosa v. Alvarez-Machain* interpreted the Alien Tort Statute [ATS] to allow claims based on the present-day law of nations, though it required that those claims possess a specificity equal to that of claims recognized when the statute was passed in 1789.[64] In particular, the majority in *Sosa* stated that "any claim based on the present-day law of nations" must "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigms."[65]

If applied beyond the ATS, the Court's approach in *Sosa* could limit *Arjona*'s deferential view of the Offences Clause, restricting Congress' power to define offenses only to those already exhibiting a "specificity comparable to the features

---

57 *Id.*

58 Defendant's Motion to Dismiss Indictment at 3, *Emmanuel*, 2007 WL 980550.

59 *Id.*

60 *Id.*

61 Colangelo, *supra* note 21, at 138.

62 United States v. Arjona, 120 U.S. 479, 486 (1887).

63 *Id.* at 488.

64 542 U.S. 692, 724 (2004) ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

65 *Id.* at 725.

of 18th century paradigms."[66] This heightened standard would make it much more difficult for recent human rights statutes to pass constitutional muster. It is not at all clear, though, that this will happen. In *Sosa*, the Court described the law of nations as "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."[67] The notion of "judge-made" causes of action surely raised separation-of-powers concerns among some conservatives on the Court.[68] But laws passed pursuant to the Offences Clause do not raise this separation of powers concern. They represent instances when a political department creates a right of action pertaining to a specific determination of the substantive law on certain conduct.[69] Such a step by the legislature is also arguably less problematic from the comity perspective.[70] For instance, Anthony Colangelo argues that, "if the judicial competence to recognize offenses against the law of nations comprehends an evolving notion of that law in the 'cautious' context of the Alien Tort Statute, Congress'[s] legislative power to do the same in enacting anti-terrorism laws must be at least equally as large."[71] If Colangelo is correct, Congress would have an equally expansive power to define international crimes in other realms, including crimes grounded in international human rights law.

Despite the liberality of the *Arjona* standard, congressional power under the Offences Clause is not unlimited. Congress may not simply manufacture certain offenses, labeling them "offences against the law of nations."[72] Rather, Congress has a "second-order authority to assign more definitional certainty to those offenses already existing under the law of nations at the time it legislated."[73] Thus, in *United States v. Furlong*, the Court rebuffed Congress's attempt to label a murder, committed by a foreigner upon foreigners aboard a foreign vessel on the

---

66 *Id.*

67 *Id.* at 715.

68 *Id.* at 739 [Scalia, J., concurring in part and concurring in judgment] ("There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. . . . [T]he judicial lawmaking role [the majority opinion] invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.").

69 Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, CATO SUP. CT. REV. 2004, 209, 223-26 (arguing that "textual evidence suggests *Congress* has the primary power to incorporate international law into our domestic law"); *see also* James G. Vanzant, *No Crime Without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053, 1074 (2010).

70 *See generally Alvarez-Machain*, 542 U.S. at 761 (2004) (Breyer, J., concurring) (suggesting that the Court should consider whether asserting jurisdiction would be consistent with the principle of comity); Banco Nacional v. Sabbatino, 376 U.S. 398, 416 (1964) (citing Underhill v. Hernandez, 168 U.S. 250, 252 (1897)) ("the courts of one country will not sit in judgment on the acts of the government of another, done within its territory."); U.S. v. Belmont, 301 U.S. 324, 328 (1937) (citing Oetjen v. Cent. Leather Co., 246 U.S. 297, 303 (1918)) (finding the conduct of foreign relations committed to the political departments, and stating "that the conduct of one independent government cannot successfully be questioned in the courts of another").

71 Colangelo, *supra* note 21, at 138.

72 United States v. Arjona, 120 U.S. 479, 488 (1887) ("[W]hether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress.").

73 Colangelo, *supra* note 21, at 141.

high seas, as "piracy."[74] As the Court put it, "If by calling murder 'piracy,' it might assert a jurisdiction over that offence committed by a foreigner in a foreign vessel, what offence might not be brought within their power by the same device?"[75]

More infamously, in the case of *The Antelope*, Justice Marshall concluded that slaves captured from Portuguese and Spanish ships must be returned to the slave-holding nations, despite Congress's prohibition of the slave trade.[76] Though Chief Justice Marshall, writing for a unanimous Court, "did not clearly disentangle the international and constitutional strands" of his argument,"[77] he asserted that a sufficient consensus among civilized nations had not yet emerged that would allow slave trading to be considered an offense against the law of nations.[78]

Within these limits though, Congress still possesses "substantial flexibility" in deciding whether to regulate an activity under the Offences Clause.[79] In a recent case considering Congress's ability to label terrorism as an offence against the law of nations, a federal court required only that "some members of the international community" recognize the conduct as such.[80] This liberal standard corresponds to the sentiment expressed by the *Emmanuel* court in its analysis of the Necessary and Proper Clause that Congress should have some flexibility in this realm.[81]

If courts approach atrocity cases in the same narrow way the *Sosa* Court approached the ATS, the statutes would be evaluated according to the paradigms of international law at the time the laws were passed. For the ETS, passed in 1994,[82] this is a particularly favorable time at which to evaluate the state of international law regarding torture. It lies after roughly eighty countries had already adopted the CAT but before any international consensus was arguably ruptured by the post-9/11 emphasis on the necessity of torture (or, at least, techniques

---

[74] United States v. Furlong, 18 U.S. 184, 184-85 (1820).

[75] *Id.* at 198.

[76] 23 U.S. 66, 124 (1825).

[77] Kontorovich, *supra* note 2, at 198.

[78] 23 U.S. at 122 ("A right, then, which is vested in all by the consent of all, can be devested only by consent.").

[79] Bradley, *supra* note 36, at 335 n.51.

[80] United States v. Bin Laden, 92 F. Supp. 2d 189, 220-21 (S.D.N.Y. 2000) ("[E]ven assuming that the acts [of terrorism] . . . are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power *to define* offenses against the law of nations.").

[81] *See* Colangelo, *supra* note 21, at 142 ("We might assume nonetheless that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is.").

[82] 18 U.S.C.A. § 2340 (1994); *see also* 1994 U.S. Code Cong. and Adm. News at 302 (describing Senate Report No. 103-107 and House Conference Report No. 103-482).

approaching torture) in the name of national security.[83] Given the expressed general consensus that torture is always illegal,[84] it seems straightforward to conclude that, under *Arjona*'s "due diligence standard," torture constitutes an offense against the law of nations within the meaning of the clause.

The *Emmanuel* court further concluded, consistent with past courts, that torture is a *jus cogens* offense, a norm not dependent on the consent of specific nations and from which no derogation is permitted.[85] The status of torture as a *jus cogens* offense does little to bolster the constitutionality of Congress's enactment of the ETS under the Offences Clause. Importantly, though, classifying conduct as *jus cogens* is probably necessary to allow the imposition of universal jurisdiction.

II. Congressional Authority to Apply Statutes Extraterritorially

In promulgating two Constitutional bases for the ETS – a familiar basis in the Necessary and Proper Clause, and the lesser-used Offences Clause – the *Emmanuel* court creates the opportunity for a future court reviewing a human rights case to definitively link the Offences Clause doctrine and the international legal principle of *jus cogens*. This section describes how the *Emmanuel* court viewed Congress's authority to apply the ETS extraterritorially. Here, too, the court leaves open the possibility for a broader application of the universality principle in American law.

Though the defendant's nationality provided a well-established basis for jurisdiction in the *Emmanuel* case, the territorial scope of offences over which the ETS claims jurisdiction truly is novel. The law allows criminal sanctions for offences committed by non-citizens entirely outside the United States and against non-U.S. citizens, simply because of the defendant's subsequent physical pres-

---

[83] *See* Thomas P. Crocker, *Overcoming Necessity: Torture and the State of Constitutional Culture*, 61 SMU L. REV. 221, 222 (2008) ("[T]here may now be an academic consensus that in extreme circumstances one could justify the practice of torture as a lesser evil to avoid the greater evil of many thousands, or even millions, of innocent deaths. What is interesting about this growing cacophony (one hesitates to call it a chorus) is that in the very few years following the events of September 11, 2001, the focus on human rights, which included a near-universal consensus on the prohibitory norm against torture, could dissipate so quickly.").

[84] Courts seem to accept countries' declarations, rather than examining their actions, in deciding whether a consensus exists. *See* Kontorovich, *supra* note 5, at 202 ("The traditional definition of customary international law required clear, repeated, and near universal state practice to establish a norm. The standard may be higher than one under which offences are dubbed 'universal' in contemporary scholarship and some jurisprudence. Today, norms are often proclaimed as universal jurisdiction without broad state practice; proclamations and resolutions are used in place of longstanding national conduct."); s*ee, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) ("That states engage in official torture cannot be doubted, but all states believe it is wrong, all that engage in torture deny it, and no state claims a sovereign right to torture its own citizens."); Filartiga v. Peña-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 980) ("The fact that the prohibition against torture is often honored in the breach does not diminish its binding effect as a norm of international law.").

[85] *Emmanuel*, 2007 WL 2002452 at *10 (citing Siderman de Blake v. Argentina, 965 F.2d 699, 714 (9th Cir. 1992)); s*ee also* Filartega v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

ence in the United States.[86] The *Emmanuel* case stretches the doctrine in a way that will make these tough cases easier to prosecute in the future.

Citizenship is a well-established basis for exerting jurisdiction over an individual accused of committing a crime abroad. As early as 1808, the Supreme Court virtually assumed as much, stating "It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens."[87] The Court confirmed this view in *United States v. Bowman*,[88] a case described as marking the "emergence of a modern theory of extraterritorial jurisdiction."[89] Since *Bowman*, jurisdiction has been imposed over U.S. nationals for committing extraterritorial sexual exploitation,[90] assisting in the illegal immigration of alien contract laborers,[91] and even for a murder committed on an uninhabited guano island.[92] Thus, alongside territorial jurisdiction, nationality jurisdiction of the type applied in the *Emmanuel* case remains on the firmest of doctrinal footing.[93]

The court found nationality alone sufficient to apply the ETS against Emmanuel.[94] Other bases for applying criminal laws abroad did not seem to apply. Though territoriality jurisdiction has been broadened to apply almost prophylactically in contexts such as drug trafficking, where it has been used even where a defendant only intended to violate U.S. law or enter U.S. territory,[95] it would not

---

[86] 18 U.S.C.A. 2340A(b)(2).

[87] Rose v. Himley, 8 U.S. 241, 279 (1808).

[88] United States v. Bowman, 260 U.S. 94, 102 (1922) (allowing jurisdiction over fraudulent acts committed by three U.S. citizens on the high seas). The Court in *Bowman* stated that "[t]he three defendants who were found in New York were citizens of the United States . . . Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold [the defendants] for this crime against the government to which they owe allegiance." *Id.* Interestingly, *Bowman* itself seems to suggest that the state must also possess a protective motive in order to claim jurisdiction over a national for crimes committed abroad. The Court refers to "the right of the government to defend itself against obstruction, or fraud wherever perpetuated" and later finds the defendants "subject to such laws as [the United States] might pass to protect itself and its property." *Id.* Such a requirement would, of course, have made claiming jurisdiction over Emmanuel more difficult. Regardless, subsequent precedent has since indisputably extended nationality jurisdiction beyond merely protective statutes; *see also* Blackmer v. United States, 284 U.S. 421, 437-38 (1932); Skiriotes v. Florida, 313 U.S. 69, 73.

[89] Christopher Blakesley & Dan Stigall, *The Myopia of U.S. v. Martinelli: Extraterritorial Jurisdiction in the 21st Century*, 39 GEO. WASH. INT'L L. REV. 1, 11 (2007).

[90] United States v. Clark, 435 F.3d 1100, 1106-07 (9th Cir. 2006) (upholding a statute making it illegal for U.S. citizens to travel to a foreign country and engage in commercial sex acts with minors).

[91] United States v. Craig, 28 F. 795, 797 (E.D. Mich. 1886).

[92] Jones v. United States, 137 U.S. 202, 224 (1890).

[93] *See* Nieman v. Dryclean U.S.A. Franchise Co., Inc., 178 F.3d 1126, 1129 (11th Cir. 1999) ("[I]t is undisputed that Congress has the power to regulate the extraterritorial acts of U.S. citizens."); *see also* United States v. Harvey, 2 F.3d 1318, 1329 (3d Cir. 1993) ("No tenet of international law prohibits Congress from punishing the wrongful conduct of citizens, even if some of that conduct occurs abroad.").

[94] *Emmanuel*, 2007 WL 2002452 at *3.

[95] *See, e.g.*, United States v. DeWeese, 632 F.2d 1267, 1271-72 (5th Cir. 1980) (upholding the conviction of an alleged drug trafficker after finding sufficient a ship's navigational charts and prior course as evidence establishing the United States as his intended destination); *but see* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 820 (1993) (Scalia, J., dissenting) (arguing in a transnational antitrust case that the majority, in concluding that concerns about adjudicative jurisdiction would only exist where "compliance with United States law would constitute a *violation* of another country's law," is a "breathtakingly

be appropriate given that Emmanuel's actions occurred entirely in Liberia. Nor would the effects doctrine likely apply since acts of torture in Liberia cannot be said to have had any impact within the United States.[96] Nor do the protective[97] or passive personality[98] principles apply since the torture conducted in Liberia posed no threat to the United States and the victims were not U.S. citizens. Last, and perhaps because it did not need to, the court expressly disclaims that it finds universal jurisdiction as a basis for jurisdiction in the case.[99]

Yet, despite claiming not to find universal jurisdiction, the court seems to base its work on an assumption that universal jurisdiction applies. With the exception of universal jurisdiction, all jurisdictional bases are subject to a "reasonableness" standard of application.[100] As it was put in a recent Foreign Commerce Clause case: "Even if principles of international law serve as bases for extraterritorial application of the law, international law also requires that such application of the law be reasonable."[101] Though the jurisdictional basis in *Emmanuel* is indisputa-

broad proposition, which contradicts [precedent], will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries-particularly our closest trading partners."); *see generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) (stating that "a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory").

96 Official torture has been said to entail a "complete disregard for the will of the people" that "undermines the very foundations and principles of the current world order." Winston P. Nagan & Lucie Atkins, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 HARV. HUM. RTS. J. 87, 90 (2001). From that consequentialist perspective, any instance of official torture impacts the United States in some way. Nonetheless, the links between torture committed in Liberia and downstream effects felt in the United States would be far too remote for legal purposes.

97 The protective principle allows jurisdiction over conduct posing a threat to the interests or functions of the state, often those related to sovereignty or security. "Its purpose is to safeguard the political independence of the state exercising jurisdiction but not to serve as a means of enforcing the state's policy abroad." Recently, it has been used as a basis for jurisdiction in terrorism cases. Puttler Adelheid, *Extraterritorial Application of Criminal Law: Jurisdiction to Prosecute Drug Traffic Conducted by Aliens Abroad, in* EXTRATERRITORIAL JURISDICTION IN THEORY AND PRACTICE 108 (Karl M. Meessen ed., 1996); *see, e.g.*, United States v. Plummer, 221 F.3d 1298, 1305 (11th Cir. 2000) ("finding jurisdiction over "foreign offenses that cause domestic harm," such as importing drugs); *see also* United States v. Pizzarusso, 388 F.2d 8, (2d. Cir. 1968) (applying protective principle to allow jurisdiction over individual making false statements to a U.S. consular official in Canada); United States v. Yunis, 924 F.2d 1086,1091-92 (D.C. Cir. 1991) (affirming the convictions of an alleged airplane saboteur because two victims were U.S. citizens, but also mentioning that aircraft piracy and hijacking are regarded as among the offenses that the international community condemns under the universality principle); United States v. Layton, 509 F. Supp. 212, 216 (N.D. Cal. 1981) (applying protective principle to allow jurisdiction over those who attacked Congressional fact-finding delegation at Jonestown, Guyana).

98 The passive personality principle applies when the victim is a national of the state asserting jurisdiction. *See, e.g.*, United States v. Neil, 312 F.3d 419, 422-23 (9th Cir. 2002) (upholding, under the passive personality principle, the conviction of a foreign cruise ship employee for engaging in sexual conduct with an American minor while the ship was in international waters).

99 *Emmanuel*, 2007 WL 2002452 at *15. Universal jurisdiction exerts jurisdiction solely on the basis of "the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction." THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, para. 1 (2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

100 Colangelo, *supra* note 21, at 130.

101 *E.g.*, United States v. Clark, 315 F. Supp. 2d 1127, 1132 (W.D. Wash. 2004) (undertaking reasonableness inquiry in upholding conviction of U.S. citizen in foreign commerce, stating "Even if principles of international law serve as bases for extraterritorial application of a law, international law also requires

bly subject to this reasonableness requirement, the court does not even address the question.[102]

In part, the court did not address the reasonableness requirement because Congress so clearly evinced an intent that the ETS apply extraterritorially.[103] But this intent would not alone have dispatched with the reasonableness question since, after a court determines that Congress intended a statute to apply extraterritorially, it must still address whether the defendant's specific conduct falls within Congress' intent.[104]

More significantly, the court engages in an elision of sorts, the type of which often drives doctrinal innovation. At this stage in its analysis, the court has already described torture as a *jus cogens* offence and established the Offences Clause as a constitutional basis for Congress' power to enact the statute.[105] By glossing over the reasonableness requirement, which does not apply for offences subject to universal jurisdiction, the Emmanuel court seems to suggest that universality can be a basis for jurisdiction in future ETS, and perhaps other human rights-based, cases. Thus, even under a conservative approach viewing the propriety of exercising universal jurisdiction as exclusively determined by Congress, the Emmanuel court's opinion can be viewed as creating an important precedent – or at least the opportunity – for future U.S. usage of universal jurisdiction.[106]

III. Due Process under the ETS: An Opportunity Born

Due process interests, embodied in the Fifth Amendment, do not restrict Congress's authority to make and project law abroad, but "act instead to shield the individual accused from the application of an otherwise constitutional enact-

that such application of the law be reasonable."); *see generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987).

[102] *Emmanuel*, 2007 WL 2002452 at *11.

[103] Though the defense disputed this point, the text of the statute itself—applying to offences "outside the United States"—and the fact that the law was passed pursuant to a treaty requiring states to combat torture wherever it takes place, leave little doubt that Congress intended § 2340 to apply extraterritorially. Courts will enforce statutes intended by Congress to apply extraterritorially, even where the exercise of jurisdiction conflicts with customary international law. *See, e.g.*, *Yunis*, 924 F.2d at 1091 ("[O]ur duty is to enforce the Constitution, laws and treaties of the United States, not to conform the law of the land to norms of customary international law."); United States v. Yousef, 327 F.3d 56, 86 (2d Cir. 2003) ("In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States in excess of the limits posed by international law.").

[104] *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165-68 (2004). The *Emmanuel* court does not seem to have engaged in an *Empagran*-style analysis of whether it is reasonable, to paraphrase *Empagran*, to apply "this law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the" action. *Id.* at 167.

[105] *Emmanuel*, 2007 WL 2002452 at *9.

[106] Bradley, *supra* note 36, at 333.

ment."[107] The Due Process analysis in the extraterritorial context parallels the 14th Amendment's choice of law doctrine, and generally requires that there be a sufficient nexus between the defendant and the United States so that application of the law would not be "arbitrary or fundamentally unfair."[108]

In *Emmanuel*, the Defendant's nationality provided a sufficient nexus to fulfill the constitutional requirements of Due Process.[109] But establishing adjudicative jurisdiction in future human rights abuse cases may not prove so simple.[110] It is in the Due Process context, then, where the *Emmanuel* court's seemingly superfluous intermediate conclusions – its promulgation of the Offences Clause as a second basis for the ETS and its description of torture as *jus cogens* – hold their real value for future atrocity cases.

To the extent that the proscription of certain conduct is *jus cogens* and a defendant's actions fall squarely within the bounds of the international community's understanding of what constitutes that conduct, the defendant can be said to be on notice for Due Process purposes:"[O]n notice not only of the illegality of his conduct and the governing law, but also that he is subject to the adjudicative jurisdiction of all states' courts."[111] For this approach to hold, "the offense must in fact be universal, and the U.S. law must reflect faithfully the international prohibition – that is, it must embody the substantive definition of the crime as prescribed by international law."[112] Still, while other federal courts are moving in this direction for cases involving stateless vessels,[113] applying universality

---

[107] Colangelo, *supra* note 21, at 136; *see also* Boos v. Berry, 485 U.S. 312, 324 (1988) (finding that Congressional efforts to implement treaty obligations remain subject to individual rights provisions of the Bill of Rights).

[108] The Eleventh Circuit, whose precedent controls in the Southern District of Florida where the *Emmanuel* court sat, applies the less stringent "notice test" when deciding whether a particular extraterritorial application of a statute conforms to Due Process. Nonetheless, the *Emmanuel* court applied the more stringent "nexus test" used by the Ninth and Second Circuits. The nexus test requires a territorial nexus between the proscribed conduct and the defendant, while the notice test only requires that the defendant had notice that his conduct was illegal. *See* Brian A. Lichter, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-terrorism Prosecutions*, 103 NW. U. L. REV. 1929, 1941 (2009).

[109] *Emmanuel*, WL 2002452 at *11 (citing United States v. Clark, 435 F.3d 1100, 1108 (9th Cir. 2006) (stating "the longstanding principle that citizenship alone is sufficient to satisfy Due Process concerns still has force.")).

[110] Colangelo, *supra* note 21, at 164-65 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 426 (2003)) ("Even the defendant's voluntary presence or residence at some later point in the United States would not create sufficient contacts to allow the application of U.S. law to conduct that otherwise had no U.S. nexus.").

[111] *Id.* at 165 n.262. *Cf.* Flatow v. The Islamic Republic of Iran, 999 F. Supp. 1, 14 (D.D.C. 1998) ("As international terrorism is subject to universal jurisdiction, Defendants had adequate notice that their actions were wrongful and susceptible to adjudication in the United States.").

[112] Colangelo, *supra* note 21, at 125.

[113] *See, e.g.*, United States v. Martinez-Hidalgo, 993 F.2d 1052 (3d Cir. 1993) (holding that the Maritime Drug Law Enforcement Act meets Fifth Amendment Due Process requirements when applied to a stateless vessel, since the crime of drug smuggling is "universal in nature"); United States v. Caicedo, 47 F.3d 370, 372 (9th Cir. 1995) (finding that Due Process was met for a stateless vessel); United States v. Vargas-Medina, 203 Fed.Appx. 298 (11th Cir. 2006); *see also* 46 U.S.C. 70501 (West 2008) ("trafficking in controlled substances aboard vessels is a serious international problem and is universally condemned").

principles to an individual for offenses committed on foreign soil would surpass these previous applications in the scope of conduct over which it potentially allows Congress to exert legislative control.

The *Emmanuel* court's review of the ETS's dual constitutional bases, along with its description of torture as a *jus cogens* offense, ensures that these Due Process requirements are securely met. In short, this incorporation of international law into the Fifth Amendment Due Process analysis has the potential to greatly expand the United States' ability to extend its laws to conduct occurring outside U.S. territory.[114] Though the *Emmanuel* court did not need to go that far itself, it has provided the doctrinal material for future courts who decide to take this groundbreaking step.

IV. A Pause to Consider Whether We Ought To: Possible Consequences of U.S. Exercise of Universal Jurisdiction In Criminal Cases

Extraterritoriality doctrine, as consolidated by the *Emmanuel* court, seems poised to allow the application of American criminal law (at least insofar as that law reflects universally condemned practices) against non-U.S. citizens acting against non-U.S. citizens outside the United States. But should U.S. courts take this step? There are at least three reasons that should offer some pause. The first, perceived hypocrisy on human rights, is unique in its relevance for the United States; while the second and third, the potential for politically-driven prosecution and the undermining of domestic judicial capacity development, are commonly levied against the International Criminal Court and other employers of universal jurisdiction.[115] Indeed, these final two critiques have been made by the United

---

[114] Colangelo, *supra* note 21, at 167.

[115] *See, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, FOREIGN AFFAIRS, July-Aug. 2001, at 94 (expressing concern that the "prosecutorial discretion without accountability" could "turn into an instrument of political warfare"); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 304 (2003) ("[A] purely international process that largely bypasses the local population does little to help build local capacity. . . . [A] system run completely by the international community—whether physically located inside or outside the territory in question—will do little to help improve the capacity of the local population to establish its own justice system."); Géraldine Mattioli & Anneka van Woudenberg, *Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo* 55, 58, 62 *in* ROYAL AFRICAN SOCIETY, COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA (Nicholas, Waddell & Clark ed., 2008), *available at* http://www.globalpolicy.org/images/pdfs/0301courting.pdf (describing Congolese judicial officials' "disappointment and frustration" that cooperation with the ICC has thus far "been in only one direction," and pointing to "a broader need for the ICC to determine, whenever possible, how to promote credible investigations and fair trials for serious crimes in the national courts of countries where it is active"); William Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279, 317 (2008) (observing that, in its first decade, the ICTY had little impact on the development of domestic judiciaries due to "the incentives created by jurisdictional relationships of international primacy and then absolute international primacy, the shared interests of domestic and international officials in a weak national judiciary, and a lack of norm leadership"); Eileen Simpson, *Stop to the Hague: Internal Versus External Factors Suppressing the Advancement of Rule of Law in Serbia*, 36 GA. J. INT'L & COMP. L. 1255, 1266-67 (2005) (arguing that international tribunals can disempower domestic courts, allowing them to "forfeit" the resolution of thorny national questions to outsiders while diminishing public confidence in the local judiciary); *but see* Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 222-35 (2002) (setting forth arguments for the ICC's contribution to domestic judicial capacity building).

States in arguing against the potential application of universal jurisdiction against its own citizens.[116] By employing universal jurisdiction, the United States may undercut its ability to continue objecting to such uses of universal jurisdiction.

First, the United States may worry, at least in the short-term, about the apparent hypocrisy of prosecuting crimes against humanity while itself being suspected of committing those same crimes. Though the *Emmanuel* court reached a fairly sound outcome doctrinally, the Prosecution's task was surely made more difficult by Bush Administration officials' parsing of the definition of "torture." The Defense tried to raise this issue, citing the so-called Torture Memos to claim that Administration officials disputed the applicability of the CAT to situations of armed conflict and that certain threats to national security permitted the "infliction of mental and related pain, such as simulated drowning (waterboarding)."[117] After all, Emmanuel himself claimed that his actions related to putting down the Liberians United for Reconciliation and Democracy (LURD) rebel movement.[118] The arguments were significant enough to the Prosecution that, during jury selection, prosecutor Karen Rochlin felt compelled to ask potential jurors their opinions on allegations of torture by U.S. officials, asking, "Is it okay for the U.S. to investigate torture overseas, if parts of the U.S. government, according to reports, have not behaved so well?"[119]

Second, there exists some concern about the potential for such prosecutions to be influenced by political considerations. The Department of Justice [DoJ], part of the executive branch, "has wide discretion to decide not to prosecute a given case, and a decision to prosecute or not to prosecute is non-reviewable" in all atrocity cases.[120] For instance, the first attempt to invoke the ETS actually involved a former Peruvian intelligence officer, Maj. Tomas Ricardo Anderson Kohatsu, who entered the U.S. to attend a human rights conference in 2000.[121] That prosecution was ultimately abandoned because of "political sensitivities."[122]

There is, in fact, some speculation that political considerations helped make prosecuting Emmanuel a DoJ priority. For instance, Emmanuel may have been suspected of recruiting Liberian immigrants to destabilize the new pro-American

---

116 John B. Bellinger, III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and other Approaches*, 42 VAND. J. TRANS. LAW 1, 8 (2009) (noting "the fact that the U.S. often argues vigorously against the assertion by foreign courts of universal jurisdiction to hear cases involving U.S. officials").

117 Defendant's Motion to Dismiss the Indictment, *Emmanuel*, 2007 WL 980550 at 4.

118 *Defendant's* Second Motion to Dismiss the Indictment on Grounds of Sovereign Immunity and Act of State, United States v. Emmanuel, 2007 WL 5159003; *see generally* Johnny Dwyer, *American Warlord*, ROLLING STONE, Sept. 18, 2008, at 91, *available at* http://johnnydwyer.net/clips/pdf/American_Warlord_Johnny_Dwyer.pdf (describing Emmanuel's establishment and administration of the Anti-Terrorist Unit beginning in 1999, when the LURD rebel group, "intent on unseating [President] Taylor, crossed over the Guinean border").

119 John Couwels, *Taylor Jr. to Stand Trial on Charges of Torture Abroad*, CNN, Sept. 27, 2008, http://www.cnn.com/2008/CRIME/09/27/taylor.torture.trial/index.html.

120 Human Rights Watch, *supra* note 17.

121 Siobahn Morrissey, *Torture Law Gets First Test*, 5 No. 49 A.B.A. J. E-REPORT 3, Dec. 15, 2006 (quoting former U.S. Immigration and Customs Enforcement official Bill West).

122 *Id.*

Liberian government.[123] And, according to Emmanuel himself, the DoJ was angered and decided to pursue a criminal prosecution because he declined offers of use immunity in exchange for information implicating his father in his trial before the Special Court for Sierra Leone.[124] With torture universally condemned and still practiced by some, the risk of selective prosecution remains a concern.[125] But the perception of selectivity, well-grounded or otherwise, could damage long-term efforts to end impunity for human rights abuses.

Third, such a broad expansion of extraterritorial jurisdiction may be undesirable from the perspective of participation. Though there was domestic pressure (primarily from NGOs such as Human Rights Watch) in the United States to arrest and prosecute Emmanuel, this type of extraterritorial jurisdiction has the potential to pervert ordinary channels of accountability within the country where the violation occurred.[126] Even if they regret the decimated state of Liberia's justice system,[127] they nevertheless argue that diverting political pressure away from domestic institutions will only prolong this regrettable situation – reorienting "populations from demanding change on the national level to appealing for intervention on the international level"[128] and creating the possibility of "perpetual international oversight—at once unsustainable in practical terms, and dubious in moral terms, given its inherent imperialism."[129]

Despite these three concerns – perceived hypocrisy, politically-driven prosecution, and participation – it may very well be that the United States' pursuit of atrocity prosecutions is still desirable. Thought these concerns are legitimate, they should not be overblown. There are at least two reasons to expect that American use of universal jurisdiction in atrocity cases will be incredibly rare.

---

123 Human Rights Watch, *supra* note 17 ("While it is not clear why he was detained, he may have been on a US watch list as there had been reports that he was involved in arms trafficking or might be looking to recruit Liberian immigrants to destabilize the new Liberian government.").

124 Dwyer, *supra* note 118, at 92 (quoting a letter from Emmanuel to the article's author, in which Emmanuel writes, "Clearly this indictment is meant to smoke me out . . . for me to talk or to create a clearer picture, there is intense anger due to my declines, based upon there Several request, thru what is called queen for a day letter aka use of immunity, a five day debrief, before this indictment was ever pursued.").

125 Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 360-63 (2008) (expressing concern about selectivity in the "sense that international prosecutions are instituted mainly against citizens of states that are weak actors in the international arena or fail to enjoy the support of powerful nations"); William A. Schabas, *Prosecutorial Discretion vs. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 736-48 (2008) (discussing criticisms of ICC case selection).

126 *See, e.g.*, Adam Branch, *International Justice, Local Injustice*, 51 DISSENT 22, 24 (2004) (arguing that ICC pressure to amend Uganda's Amnesty Law contradicted the will of the people of northern Uganda and made subduing the Lord' Resistance Army more difficult).

127 Chernor Jalloh & Alhagi Marong, *Ending Impunity: The Case for War Crimes Trials in Liberia*, 1 AFR. J. OF LEG. STUD. 53, 68-72 *available at* http://www.africalawinstitute.org/ajls/vol1/no2/Jallohand Marong.pdf (arguing that the "devastation of legal institutions and structures in Liberia" makes it "unrealistic" to rely on domestic courts to prosecute atrocities committed during the civil war).

128 Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFF. 179, 196 (2007).

129 Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 358 (2006).

First, there seems in these cases to be a tacit assumption of passive complementarity – the notion that American atrocity laws will only be applied in instances where no international tribunal or appropriate domestic forum can bring the perpetrators to justice.[130] For instance, proponents of Emmanuel's prosecution claimed that Liberia's civil war "had devastated the Liberian judicial system, leaving no immediate prospect of any prosecution in Liberia for past human rights abuses, and no international court could try the case."[131] Significantly, though, this passive complementarity requirement is not contained in the text of the ETS itself.

Second, atrocity laws will prove much less relevant for crimes committed after the start of the International Criminal Court's mandate on July 1, 2002.[132] For post-2002 crimes, the availability of ICC jurisdiction over cases where domestic courts are "unable or unwilling" to prosecute crimes will make it harder to argue that the intervention of U.S. courts is necessary.[133] U.S. prosecutors attempting to prosecute human rights abuses will need to focus on cases that the international community (insofar as the ICC represents the will of the international community) has declined to prosecute. Or, they will seek to prosecute cases that the ICC could otherwise handle, and will thus have to assert that prosecution in U.S. courts is somehow more appropriate. Neither of these options seems particularly desirable for the United States' international relations. It seems more likely that, if the United States wanted to prosecute a case not being considered by the ICC prosecutor, it would pursue United Nations Security Council referral rather than act unilaterally.[134] If nothing else, the U.S. DoJ would probably try to muster at least some support in the international community before pursuing the prosecution.[135]

---

[130] *Cf.* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L. J. 53, 56 (2008) ("Passive complementarity suggests that the ICC would step in to undertake its own prosecutions only where national governments fail to prosecute and where the Court has jurisdiction.").

[131] Human Rights Watch, *supra* note 18.

[132] Rome Statute of the International Criminal Court, art. 126, U.N. Doc. A/CONF.183/9 (July 17, 1998) (providing that the Statute would enter into force "on the first day of the month after the 60th day following the date" that the sixtieth State party ratified the instrument). On April 11, 2002, ten states ratified the Statutes, crossing the sixty signature threshold and causing the Statute to enter into force on July 1, 2002. Amnesty International, *The International Criminal Court – a historic development in the fight for justice*, AI Index IOR 40/008/2002, *available at* http://www.amnesty.org/en/library/asset/IOR40/008/2002/en/13d7a383-fafa-11dd-9fca-0d1f97c98a21/ior400082002en.pdf.

[133] Rome Statute of the International Criminal Court, art. 17(1)(1) U.N. Doc. A/CONF.183/9 (July 17, 1998).

[134] David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 90 (2002) (outlining the ways in which the Security Council can shape ICC action, and arguing that the U.S. would be able to exert greater influence on this process if it were to ratify the Rome Statute); *see also* Rome Statute of the International Criminal Court, art. 13(b) U.N. Doc. A/CONF.183/9 (July 17, 1998) (allowing ICC jurisdiction in a "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations").

[135] *Cf.* Sasha Markovic, *The Modern Version of the Shot Heard 'Round the World: America's Flawed Revolution Against the International Criminal Court and the Rest of the World*, 51 CLEV. ST. L. REV. 263, 279-80 (2004) (detailing earlier U.S. efforts to undermine the effectiveness of the ICC by accumulating bilateral immunity agreements with allies pursuant to Article 98 of the Rome Statute).

Thus, the most likely set of ETS cases comes from crimes committed prior to the start of the ICC mandate. The crimes committed by Emmanuel in Liberia fall into this category, of course. Numerous other potential prosecutions may lie ahead for crimes committed in Latin America during the 1980s and 1990s, especially since there is no statute of limitations for acts of torture that "resulted in, or created a foreseeable risk of, death or serious bodily injury to another person."[136] However, as time passes, causing the perpetrators of those pre-2002 crimes to die or disappear and public attention to shift, the need to prosecute this set of crimes will diminish.

However, even if American use of universal jurisdiction to prosecute perpetrators of human rights violations is limited, the U.S. DoJ should be mindful of the downstream consequences of pursuing human rights prosecutions. For instance, the possibility that American citizens (especially U.S. soldiers) could be prosecuted before foreign courts or tribunals such as the ICC might be "the United States' most serious concern" about the increasing use of extraterritorial prosecutions.[137] The decision for U.S. courts to employ universal jurisdiction to criminal matters may impact the U.S.'s ability to object to the application of universal jurisdiction against its own citizens for their actions abroad.[138]

V. Conclusion

In July 2010, a three-judge panel on the Eleventh Circuit Court of Appeals affirmed Emmanuel's conviction, finding that the ETS was a valid exercise of Congress' power to effectuate the CAT under the Necessary and Proper clause.[139] The Eleventh Circuit's decision confirms that the value of the *Emmanuel* prosecution lies not in any doctrinal innovation *per se*. How could it, in a case that was by most accounts relatively straightforward? Instead, the *Emmanuel* District Court used the occasion of the first ETS prosecution to consolidate two strands of doctrine: the constitutional doctrine pertaining to the extraterritorial application of U.S. law and the international legal principle of *jus cogens*. The Offences Clause enables Congress to legislate beyond America's borders, and *jus cogens* has the potential to overcome any Due Process constraints. Oper-

136 Elizabeth de la Vega, *Prosecuting Torture: Is Time Really Running Out?*, ANTEMEDIUS, May 10, 2009, *available at* http://www.antemedius.com/content/prosecuting-torture-time-really-running-out (citing 18 U.S.C. Section 2332b(g)(5)(B)).

137 Elizabeth C. Minogue, *Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court*, 61 VAND. L. REV. 647, 677 (2008) (citing BUREAU OF POLITICAL AND MILITARY AFFAIRS, U.S. DEPT. OF STATE, THE INTERNATIONAL CRIMINAL COURT, FACT SHEET (Aug. 2, 2002), *available at* http://www.state.gov/t/pm/rls/fs/23426.htm (listing the objections that the United States has to the Rome Charter)).

138 Regina Horton, *The Long Road to Hypocrisy: The United States and the International Criminal Court*, 24 WHITTIER L. REV. 1041, 1062-64 (2003) (citing examples where the U.S.' exercise of federal jurisdiction over actions committed abroad to argue that the U.S. position is "contradictory and exaggerated," and ultimately constitutes hypocrisy; *but see* Michael Ignatieff, *No Exceptions? The United States' Pick-and-Choose Approach to Human rights is Hypocritical: But that's not a Good Reason to Condemn it*, LEGAL AFF., May-June 2002, ("[I]t's not clear that the effective use of American power in fact depends on being consistent, or on being seen by others as legitimate. . . Being seen as hypocritical or double-dealing may impose some costs on a superpower, but these costs are rarely prohibitive.").

139 U.S. v. Belfast, 611 F.3d 783, 807 (11th Cir. 2010).

ating together, these doctrines would potentially enable the United States' first true exercise of universal jurisdiction. With the pieces put in place by *Emmanuel*, future courts handling atrocity cases could allow the reach of American law to be limited only by the extent to which Congress acknowledges – and courts concur with the acknowledgement of – offenses against the law of nations. Concerns about perceived hypocrisy and consequences for domestic participation argue that courts should tread carefully in taking such a step.