

**The Sword Is Mightier Than The Pen:
Might Is Right In International Law**

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Table of Contents

I. Introduction	3
II. Case Analysis	4
A. <i>Nicaragua v. United States</i>	4
B. <i>New Zealand v. France</i> (the Rainbow Warrior Case)	5
C. <i>Paraguay v. United States</i>	10
D. <i>Filartiga v. Pena-Irala</i>	11
E. The <i>North Sea Continental Shelf</i> Cases	13
F. The <i>Yamasita</i> and <i>My Lai Massacre</i> Cases	15
1. The <i>Yamasita</i> Case	15
2. The <i>My Lai Massacre</i> Case	16
3. Justice According to the Victor	17
III. Historical Military Analysis	18
A. Panama	18
B. Grenada	19
C. Chechnya	21
D. Iraq	22
E. Afghanistan	23
IV. Conclusion	25
V. Endnotes	27

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I. Introduction

Might is right in international law. Case analysis shows that stronger nations seem to win more often than weaker nations in international disputes. This paper investigates why stronger nations prevail more often and it concludes that military and economic power strongly influences the outcome of international conflict.

This influence of power is described herein as the “might is right” principle. Although rarely spoken of by legal authorities,¹ the “might is right” principle is not new. Some commentators have referred to it as “the Golden Rule” (he who has the gold rules). In other words, the most powerful economic group controls the laws and the military.

In another example, French kings used the phrase “le roi est droit,” (the king is the law), to enunciate the “might is right” principle. Unsurprisingly, the strong has always governed the weak. But for many, John Locke’s theories have revolutionized the power to the people.

This paper argues that not every country is equal before the law. It seeks to convince the reader, through case analysis and historical examples, that the “might is right” principle exists in international law.

The author does not intend, however, to suggest that the “might is right” principle is the only principle and that the law has no meaning or authority. On the contrary, the

law, beginning with the Magna Carta, has gradually washed away the “might is right” principle like a stream through a canyon’s walls. Until the canyon walls become weak and collapse, we should seek to explain and explore the “might is right” principle. This paper aspires to do just that.

II. Case Analysis

The following cases show that the stronger country often prevails, even when international law seems counter to the outcome.

A. Nicaragua v. United States

In the International Court of Justice, Nicaragua sought injunctive relief and reparations against the United States for American military action against Nicaragua.ⁱⁱ The allegations against the United States included the laying of mines and attacks on Nicaraguan ports, oil installations and a naval base.ⁱⁱⁱ Nicaragua also claimed that the United States recruited, trained, armed, equipped, financed, and supplied rebels fighting against Nicaragua.^{iv}

The Court of International Justice held that the United States violated customary international law in supporting the Contras.^v Had the court applied the United Nations Charter, the United States would have violated its provisions including the Preamble,^{vi} Article One,^{vii} Article Two,^{viii} and Article Thirty-Three.^{ix} Regardless of its source, international law does not permit one country to subvert another through paramilitary action or to violate its sovereignty by laying mines in its harbors. By its actions against Nicaragua, the United States grossly violated international law.

Despite grossly violating international law, the United States got away with it. Nicaragua did successfully get a judgment award of \$12 billion dollars, but Nicaragua never collected the judgment.^x In order to improve relations with the United States, the new regime forgave the judgment.^{xi}

While Nicaragua won the case, the moral victory proved financially hollow. With almost apparent immunity, the United States violated a sovereign nation with armed attacks. So the reality of the Nicaragua case is that the stronger nation can break international law with little consequence. As this paper explores in the second section, a weaker country doing the same activity faces sanctions and military strikes. Thus, the Nicaragua case shows that “might is right” in international law.

B. New Zealand v. France (the Rainbow Warrior Case)

In the Rainbow Warrior case, French secret agents blew up the Greenpeace ship, Rainbow Warrior, docked in New Zealand.^{xii} Consistent with French military history, the agents got caught and sentenced to ten years in a New Zealand jail.^{xiii} France demanded the release of its agents and threatened an embargo against New Zealand goods in the European Union.^{xiv} After significant posturing, France and New Zealand asked the United Nations Secretary-General to mediate the dispute.^{xv}

The mediation resulted in an agreement that France would pay New Zealand \$7 million if France did not pursue the European embargo.^{xvi} The agreement also provided that the agents spend three years of house arrest on a French military island instead of 10 years in a New Zealand jail.^{xvii}

Predictably, the agents served no more than six months before returning to France for “medical reasons.”^{xxviii} New Zealand protested and France thwarted New Zealand’s doctors from examining the agents.^{xxix}

Under the provisions of the mediation, New Zealand brought charges of France’s breach before an arbitral tribunal seeking the return of the agents.^{xx} Although the tribunal found that France breached the mediation agreement, the tribunal only ordered that France pay \$2 million into a fund promoting friendly relations between the two countries.^{xxi}

The tribunal held that the agents need not return to New Zealand custody because the three years of incarceration had expired at the time of the tribunal’s decision.^{xxii} “The reason is that this conduct, namely to keep the two agents in Paris, is no longer unlawful, since the international obligation expired on 22 July 1989.”^{xxiii}

Most courts would probably have required that the three-year sentence be carried out without the absence counting towards time served. But for an economic and military powerhouse like France, the agents need only serve six months house arrest instead of ten years of hard time in a New Zealand jail.

Thus, in atonement, France simply paid a small sum and briefly inconvenienced its agents. Put another way, France infiltrated the sovereignty of New Zealand and blew up a ship in its harbor for less than the salary of a French soccer star.

Yet the act itself was egregious. The explosion took a crew member’s life and damaged property.^{xxiv} The explosion also cut at the pride of a nation – France basically slapped New Zealand in the face.^{xxv} “In New Zealand, there was a deep sense of public outrage. It was the first time in New Zealand’s history that such an act of international

violence had been carried out by the armed forces of a foreign state in New Zealand territory."^{xxvi}

New Zealand wanted more than just a few million dollars compensation. Like the United States quest for justice against the Libyan agents who blew up the passenger jet over Lockerbie, New Zealand wanted to see the agents serve punishment.^{xxvii} Instead, New Zealand got a pittance. How did this outcome occur, with New Zealand so clearly the victim and so clearly correct before international law?

In comparing the two countries, France is by far the stronger country. To begin, France's population exceeds New Zealand by 58.3 million to 3.8 million inhabitants.^{xxviii} France has the world's fourth largest economy, at approximately \$1.4 trillion dollars while New Zealand's GNP amounts to only 65 billion.^{xxix} In terms of landmass, France is approximately twice the size of New Zealand.^{xxx} Militarily, France is a nuclear power and a permanent member of the United Nations Security Council. New Zealand is neither.

Obviously, France has much greater economic and military might than New Zealand. By throwing its weight around, France got New Zealand to go to mediation rather than face an embargo in the European Union. According to Don MacKay, New Zealand's International Legal Advisor in the Ministry of Foreign Affairs and Trade, France "placed considerable pressure on New Zealand, including trade and economic pressure, to try to get it to release the two agents."^{xxxi} A weaker country could not have pressured New Zealand into mediation. Thus, the "might is right" principle influenced New Zealand's actions through the threat of an economic embargo.

The threat of a European embargo acted as a lever to maneuver New Zealand to mediation. Without the embargo lever, New Zealand might have ignored France. For example, New Zealand would have ignored a threat from a tiny island nation such as Antigua, but France has a large, attractive, economic market. With the other members of the European Union, France would have successfully shut New Zealand out of one third of world trade. Because of the embargo threat, France successfully used economic might to get New Zealand to mediation.

In comparison, New Zealand had only the lever of public opinion. “New Zealand’s ability to economically or militarily coerce France seemed extremely limited. However, one could argue that France was concerned about how other states, such as members of the European Community, would react or how failure to pay would affect domestic politics.”^{xxxii} In fact, the sinking of the Rainbow Warrior “caused a major political scandal in France. The French government was highly embarrassed, and the Minister of Defense resigned.”^{xxxiii}

At the mediation, France won favorable terms and eventually freed its agents even though international law completely favored New Zealand. Please note that the judges in each mediation had no real power themselves. Any decision that they made must have been acceptable to both parties. Therefore, the mediators carefully crafted their decision with extra consideration towards the stronger country, France. Without France's acceptance, the mediator’s decision amounts to a small victory on paper. For this reason, the second decision particularly favored France when the judges illogically^{xxxiv} commuted the agents’ sentences.

Professor Quigley of the Ohio State College of Law expressed similar thoughts as to his own experience in international mediation. He and a group of judges went to Crimea in 1994 to mediate a situation where Crimea wanted independence from Ukraine under the principle of self-determination.^{xxxv} The group refused to adjudicate the dispute according to international law because Crimea would have won.^{xxxvi} If Crimea would have won, then Ukraine would have resorted to military force.^{xxxvii} To achieve the higher goal of peace, the group of judges declined to hear Crimea's grievance under principles of international law.^{xxxviii}

When judges bypass international law to appease a stronger party, the result shows the "might is right" principle at work. Under a domestic system, victimized parties do not bargain with the murderers for crumbs of justice. The murderer does not get to go to mediation instead of a criminal court. The murderer does not get time on a tropical French island instead of a New Zealand jail. Nor does the murderer get to escape and then get his sentence commuted for time spent out of jail! But that's essentially what happened in the Rainbow Warrior case due to the power and influence of France.

Yet in the absence of international law, New Zealand would have recovered nothing at all. The rapist would have walked away without any punishment. No deterrence against committing future acts would have occurred. So the point of this paper is not that the "might is right" principle transcends international law. Rather, the paper points out that might influences international adjudication such that the result favors the stronger country.

As the above discussion shows, the Rainbow Warrior case illustrates that might influences international adjudication. If the power positions had been reversed, the

French nationals might have been served lengthy prison terms or even been executed. A nice example of such a reverse power position occurred in the following case of Paraguay v. United States.

C. Paraguay v. United States

In a reversal of the Rainbow Warrior case, Paraguay v. United States represents a case where a strong country applied its domestic laws over the international rights of the accused. There would be no tropical French island for Angel Francisco Breard.

In April 1998, the Virginia executed Paraguay national Angel Francisco Breard, a convicted murderer, despite the International Court of Justice's granting of provisional measures to the Republic of Paraguay.^{xxxix} The ICJ granted the provisional stay because the Mr. Breard did not receive a Miranda-like warning that he had the right to contact his consulate as required by Article 36, subparagraph 1 (b), of the Vienna Convention.^{xi}

The United States Supreme Court denied Breard's writ of habeas corpus.^{xli} According to the Court, Breard failed to raise the issue in state court. "By not asserting his Vienna Convention claim in state court, Breard failed to exercise his rights under the Vienna Convention in conformity with the laws of the United States and the Commonwealth of Virginia. Having failed to do so, he cannot raise a claim of violation of those rights now on federal habeas review."^{xlii}

So by not raising an issue of which he was not aware and by Virginia failing in its obligation to inform him, Breard loses his life. On the geopolitical scale, the United States Supreme Court thumbed it's nose at Paraguay and the International Court of Justice by basically stating that neither has jurisdiction over the sovereignty of the United States. "As for Paraguay's suits ... neither the text nor the history of the Vienna

Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of consular notification provisions.”^{xliii}

After the execution, the international community expressed outrage at the United State’s blatant disregard of international law. One commentator found the Paraguay case as a test to whether a superpower must abide by international law.^{xliv} What is "absurd", its seems, is to actually expect a global empire [the United States], no matter what [t]reaties it signs, to actually abide by [i]nternational [l]aw.”^{xlv} Amnesty International also called the execution a violation of human rights.^{xlvi}

Commentator Abu-Jamal finds it ironic that the United States bombed Iraq for violations of international law but then ignore an order from the International Court of Justice.^{xlvii} America’s arrogance comes from its position of power. Not only can the United States execute a Paraguay national against Paraguay’s pleas, but it can also supercede the International Court of Justice, flaunt its treaty obligations, and anger the international community. In this case, might is like the playground bully. Legally and morally, the bully breaks the rules. But with the power to do so, the bully goes unpunished and thereby plays by his own rules. Once again, might won.

D. Filartiga v. Pena-Irala

While the Supreme Court ruled that a country like Paraguay does not have a private right of action to contest a criminal conviction in United States Courts, the Second Circuit ruled that a Paraguay national can sue an official of the government of Paraguay in a United States Court in Filartiga v. Pena-Irala.^{xlviii}

Joelito Filartiga was kidnapped and tortured to death by Pena, the Inspector General of Police in Asuncion, Paraguay.^{xlix} Pena later attempted to move to the United States on a visitor's visa.¹ Interestingly enough, Filartiga's sister Dolly had previously immigrated to the United States and consequently learned of Pena's illegal habitation in the United States.^{li} Dolly then contacted the Immigration and Naturalization Service, which began deportation proceedings against Pena.^{lii} In addition, she brought suit against Pena in his official capacity as an agent of Paraguay for the murder of her brother.^{liii}

The Filartiga court first approved federal jurisdiction of the case under the Alien Tort Statute^{liv} which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."^{lv}

After reviewing the United Nations Declaration of All Persons from Being Subjected to Torture and the constitutions of 55 nations, the court then held that torture violated the law of nations.^{lvi} "[I]nternational law confers fundamental rights upon all people vis-à-vis their own governments. While the scope of those rights will be subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them."^{lvii} On remand, the district court issued a judgment for \$10,385,000 against Pena-Irala.^{lviii}

The Filartiga case shows the double standard of international law. Weak countries such as Paraguay can be held accountable for their actions in the domestic courts of a world superpower ("international law confers fundamental rights on all people vis-à-vis their own governments), but powerful countries such as the United States can ignore claims by countries (the Nicaragua case) and orders by the International Court of

Justice (the Paraguay case). Such a double standard further illustrates that “might is right” in international law.

E. The North Sea Continental Shelf Cases

The North Sea Continental Shelf cases involve a dispute between Denmark, the Netherlands, and Germany about how to divide the ownership of the continental shelf between the countries.^{lix} The parties had previously signed the Geneva Convention, which in Article 6 requires using the equidistance method for continental shelf disputes.^{lx} The problem, however, is that the equidistance method provides Germany with a much smaller share of the continental shelf.^{lxi}

Because Germany is a dominant European country, both economically and militarily, Germany can successfully complain to the ICJ and receive relief. In a normal case, Germany signed the convention and the equidistance principle appears equitable. So Germany should not have a case. The ICJ lets Germany out of the Geneva Convention because Germany did not ratify it. However, international law has held countries to treaties for much less. For example, the ICJ’s predecessor, the Permanent Court of International Justice, held that Greenland belonged to Denmark because of a mere verbal statement of the Norwegian Minister for Foreign Affairs in the Eastern Greenland case.^{lxii}

Based on the Eastern Greenland case, the Geneva Convention should bind Germany. Even without the Eastern Greenland case, customary international law should bind Germany, but the court did not think that the Convention had yet reached the status of customary international law.^{lxiii}

The Permanent International Court of Justice further disregarded principles of equity to Germany's benefit.^{lxiv} According to the court, "equity does not necessarily imply equality."^{lxv} So Germany, with its smaller coast but bigger landmass should not have to abide by international law (the equidistance principle) because that would not be "equitable."^{lxvi} When Germany has the advantage of a larger landmass, Denmark and the Netherlands should have the advantage of their larger coastlines.

Just because Germany got geographically shorted on its coastline, does not mean that equity should take continental shelf rights away from Denmark and the Netherlands. The only reason Germany's case should not have been thrown out in summary judgment style is that Germany has the might. Recognizing that might, the court structures its holding to favor Germany.

The conclusion that the court would favor Germany due to its economic and military might may seem preposterous, but judges are often influenced by externalities outside the law.^{lxvii} For example, American election constituencies often influence elected judges.^{lxviii} In other parts of the world such as India, judges *routinely* take payments to decide in the paying parties favor.^{lxix} So while the judges may try to adjudicate impartially, they undoubtedly recognize that international adjudication provides an alternative to war.

For the adjudication to work, the decision must satisfy the dominant country. So either unconsciously or knowingly, the judges favor the more powerful country. Otherwise a decision such as the North Sea Continental Shelf case would not so obviously favor the stronger country when the law strongly favors the weaker countries.

F. The Yamasita and My Lai Massacre Cases

In comparing the Yamasita case and the My Lai Massacre case, the results clearly show that international law favors the stronger nation.

1) The Yamasita Case

The facts of the Yamasita case showed that General Yamasita was an honorable soldier, but that he fell victim to circumstances. “Yamashita worked diligently to have the basics of city life restored. He also understood the importance of decent treatment of prisoners of war.”^{lxx}

When Yamasita took over, “[t]he situation in the Philippines was bleak ...he did not know his staff and had little time to mold them to his ways; he had only a superficial understanding of the problems facing his command; had too few troops that were trained; and deficiencies in supplies were woefully apparent.”^{lxxi}

To gain control over these problems, “he personally visited units, inspected training, and observed logistical operations.”^{lxxii} Despite his efforts, “it would often appear that each commander had his own agenda.”^{lxxiii}

At the same time, the Filipino guerilla forces increased their attacks.^{lxxiv} This led to Yamasita making the statement, “In the Philippines today, the war has come to a situation of kill or be killed. No matter who the person is, a Filipino or not, if we hesitate, we ourselves will be killed.”^{lxxv} Some of those independent commanders took his statement to heart and numerous atrocities occurred.^{lxxvi}

The charge against General Yamasita stated that “while commander ... [he] unlawfully disregarded and failed to discharge his duty as commander to control the

operations of the members of his command, permitting them to commit brutal atrocities ... and he ... thereby violated the law of war.”^{lxxvii}

The charge basically amounts to the tort of negligent supervision. The tort apparently becomes a capital crime when his agents killed thousands of Filipinos. Yet one might think that the crime would be moderated by 1) the fact that killing is a part of war; and 2) that his command and communications were undoubtedly disrupted by the allied forces.

But perhaps General Yamasita was not so innocent. Hearsay testimony claimed that he was in close proximity to mass executions.^{lxxviii} Not only was he allegedly in proximity, but the hearsay evidence suggested that lines of communications remained open such that the atrocities occurred with his approval.^{lxxix}

After a trial of minimal due process, the adjudicating commission sentenced Yamasita to death by hanging.^{lxxx} Perhaps the real reason for Yamasita’s quick execution was atonement and a reprisal for the rape of the Philippines and the humiliating defeat suffered by British General Percival.^{lxxxi}

2. The My Lai Massacre Case

While the Yamasita case consisted of atrocities committed by a surrendering military power, the My Lai Massacre atrocities were committed by a world superpower. Interestingly enough, both parties lost their wars (Japan lost World War II and the United States lost in Vietnam).

Like Yamasita’s problems from Filipino guerillas, the United States suffered numerous casualties from guerilla-style Viet Cong forces.^{lxxxii} “On two previous

operations in the area, units of TF Barker had received casualties from enemy fire, mines, and booby traps, and had not been able to close effectively with the enemy.”^{lxxxiii}

United States troops swept into My Lai with no resistance.^{lxxxiv} The troops “were involved in widespread killing of Vietnamese inhabitants (comprised almost exclusively of old men, women, and children).”^{lxxxv} Americans committed several rapes of the civilians and shot large groups execution-style before large ditches.^{lxxxvi} In the killing of nearly 400 Vietnamese, only three or four were confirmed as Viet Cong.^{lxxxvii} To hide their misdeeds, the officers reported few civilian casualties, gave false testimony and withheld information.^{lxxxviii}

Because of the cover-up, the military murderers escaped justice for many years. But after Life Magazine published a photo of the atrocities, a more serious inquiry into the My Lai incidents began.^{lxxxix} Ample evidence revealed at the trial on twenty-two counts of murder showed that the atrocities did occur.^{xc} But of the soldiers involved, only 6 underwent court martial proceedings and only one (Lt. Calley) resulted in a murder conviction.^{xcii} But even his sentence was dramatically reduced.^{xciii}

3. Justice According to the Victor

The Yamasita and the My Lai Massacre cases show that justice for war crimes depends on who is trying them. Yamasita was tried by the victorious Americans and was sentenced to death. Had the Japanese won the war, Yamasita probably would be awarded medals for his heroics and might have had General MacArthur executed for war crimes.

Similarly, had the Viet Cong caught Calley, they would have undoubtedly executed him for the My Lai Massacre. Instead, an American court tried Calley and his cohorts. Most consider their punishment a mere slap on the wrist.^{xciii}

In comparing the punishments, the weaker country's soldier (Yamasita) got the death penalty and the stronger country's soldiers (Calley and company) got off with demotions and a little jail time. If international law treated powerful and weak countries equally, then the results should have been similar. Yet international law does not treat countries equally before the law.^{xciv} International law, or at least its application, favors the stronger country. Therefore, the Yamasita and My Lai Massacre cases provide yet another example where “might is right” in international law.

While the “might is right” principle strongly influenced the outcome, the law still functioned. In the very least, Calley received some punishment and Yamasita received some due process. To this extent, the law has improved from the time when law did not balance out might. In the future, the scales may tip such that the law replaces might and justice rules with equal eyes.

III. Historical Analysis

The cases discussed above show that might strongly influences the outcome of international adjudications. But an even stronger indication that “might is right” can be found among the various military actions of the United States. This section reviews historical examples of military action which illustrate that “might is right” in international law.

A. Panama

Panama provides perhaps the best example that “might is right” in international law. American military might created the country of Panama out of Columbia.^{xcv}

In June, 1902 the United States offered to buy the Panama Canal Zone from Columbia for \$10,000,000 but Columbia refused.^{xcvi} In October, Panama separatists traveled to Washington to devise a U.S.-backed revolution in the Canal Zone.^{xcvii} On November 3, the Colombian garrison in the Canal Zone laid down their arms after receiving bribe payments.^{xcviii} That same day, the U.S.S. Nashville steamed into Colon harbor and the junta proclaimed Panamanian independence.^{xcix}

Three days after Panama's declaration of independence, the United States recognized Panama as a sovereign state.^c Less than two weeks later, the United States and Panama signed the Panama Canal Treaty.^{ci}

As the above history shows, the United States planned to create a canal across Panama. After Columbia thwarted these plans, the United States simply took a large portion of Columbia's territory under the guise of a junta. With a new sovereign power in place, the parties signed the Panama Canal Treaty.

At the time of the junta, the United States probably successfully skirted international law. Under today's standard, the holding of the Nicaragua case shows that the United States would have violated international law. But under either standard, the United States successfully avoids any international sanctions. Not only does might prevail at the beginning of Panamanian history, but recently as well in the Noriega incident.

General Noriega, a former C.I.A. informant, got indicted by a United States court for drug trafficking.^{cii} President Bush turned down an offer for Noriega to leave in exchange for dropping the drug trafficking charges.^{ciii} After diplomatic efforts to remove Noriega to Bush's satisfaction failed, preparations for "Operation Just Cause" began.^{civ}

The detainment of four United States military commanders at a roadblock and the subsequent killing of a marine provided all the excuse the United States needed to send in 2,300 airborne troops to supplement the 13,000 troops already in the Canal Zone. Within three days, Noriega surrendered after taking refuge in a church.^{cv}

It took only three days for the United States to remove the leader of a sovereign nation. That is power; that is might. The United States justified the invasion of Panama under Article 51 of the United Nations Charter which permits self-defense.^{cvi} In claiming self-defense, the United States pointed to Panama's (frequent) declarations of war against the United States and the killing of the marine lieutenant.^{cvi}

While the pretense seems slightly justifiable under international law, it echoes the German excuse for invading Poland in 1939. Whatever the justification, the result remains the same. A powerful country, the United States, successfully invaded a smaller country and suffered no penalty or punishment from the international community. So whether right or wrong under international law, the result shows that might is right once again.

B. Grenada

Like the invasion of Panama, the United States used a pretense to invade a much smaller country. The pretense again fell under Article 51 as the United States claimed that political turmoil endangered 1,000 United States medical students^{cviii} To protect the medical students, the United States invaded.

The medical students probably never considered themselves in danger.^{cxix} Instead, the real concern of the United States was the presence of another leftist government in the Caribbean.^{cx}

According to American policy, the invasion was legal because of the concern for the student's welfare. The international community disagreed and the United Nations General Assembly condemned the United States by a vote of 108 to 9. But once again, the condemnation did not matter because no punishment followed. The most powerful nation in the world can invade another country without penalty because "might is right" in international law.

C. Chechnya

But the United States is not the only country that can invade others with impunity. The Russians, still a military superpower, invaded Chechnya, a small country roughly the size of Connecticut, with little more than muted international criticism.^{cxix}

Chechnya, with a population of around 1.2 million, declared independence when the Soviet Union collapsed in 1991.^{cxii} Russia concerned itself with the loss of Chechnya oil fields and the possible spread of independence among the former Soviet republics.^{cxiii} Russia ruthlessly invaded, leveling Chechnya's two major cities and killing over 40,000 Chechans.^{cxiv} In addition, "human rights organizations accused Russian forces of mass executions, bloodthirsty reprisals, and widespread torture."^{cxv}

To prevent the rape of this small nation, the United Nations did not call to arms as it did over the Iraqi invasion of Kuwait. Instead, the United States and the International Monetary Fund loaned Russia \$10 billion to finance the war against Chechnya.^{cxvi}

Not only did Russia get international money to finance the war, but Russia also got the endorsement of the other military superpower, the United States. “Clinton publicly endorsed the war by saying he backed Russia's need to ‘maintain its territorial integrity.’”^{cxvii}

So if you are a military superpower like Russia, not only do you get away with mass murder, you get paid to do it. Such a contrary result to international law and human rights law can only occur because of the “might is right” principle.

D. Iraq

When a country is not among the economic and military elite, how does international law treat it? Iraq found out when it invaded Kuwait.

In August 1990, Iraq invaded Kuwait.^{cxviii} Unlike the American invasion of Grenada or Panama, the United Nations went beyond condemnation. The Security Council authorized multinational force to oust Iraq from Kuwait.^{cxix} The American-lead bombardment destroyed Iraq’s “vaunted”^{cxx} military power and cost about 200,000 Iraqi lives. In addition, the United Nations imposed a trade embargo that is still in force today, 8 years later.^{cxxi}

As a middleweight in the international community, Iraq tried to plan the game of the superpowers. But unlike America’s invasion of Panama and Grenada or the Russians invasion of Chechnya, Iraq did not escape punishment by the international community. But perhaps due to its middleweight status, Iraq did not lose its leadership. Unlike Noriega, Saddam Hussein kept his position of power.

So the case of Iraq shows just how pervasive power is in international law. While the superpowers can do as they please, the middleweights fair better than smaller countries because their power shields them from total domination. As the power continuum advances towards parity between each country's might, then the more the result is based on equity and law, less on power. This continuum, in essence, validates the "might is right" principle.

Having recognized this principle, smaller countries have joined together into the "Group of 77" to create greater leverage in international adjudication, treaty making, and conferences.^{cxxii} "Newly emerging states have formed themselves into the so-called 'Group of 77' (now with over a hundred members), which uses its large bloc-voting strength in the United Nations General Assembly and international conferences to exercise enormous influence."^{cxxiii}

Smaller countries are also banding together into trading blocks, such as the European Union and the Asian Free Trade Area. Recognizing the value of economic might and the social benefits of a large, tariff-free market, these countries have traded in large parts of their sovereignty for greater might.

E. Afghanistan

On August 20, 1998, the United States sent dozens of cruise missiles into sovereign Afghan territory to destroy the terrorist base of Bin Laden.^{cxxiv} President Clinton described the base as "one of the most active terrorist bases in the world ... a training camp for literally thousands of terrorists from around the globe."^{cxxv} Upon this premise, the United States justified itself again under Article 51.

Unlike the Rainbow Warrior case, where France blew up the ship of the “terrorist” group Greenpeace, Afghanistan has not demanded review by an international tribunal.^{cxxvi} It appears once again that the United States, the mightiest of the mighty, has grossly violated the sovereign rights of another country without consequence.

But perhaps even more instructive on the “might is right” principle is to turn the situation around. What if Afghanistan sent cruise missiles into Lima, Ohio to blow up the tank manufacturing plant there?^{cxxvii} Under Article 51, they might have the same justification (albeit more tenuous). The United States might respond by nuking Afghanistan or at least doing a massive conventional bombardment.

Afghanistan’s only hope would be for support from the Russians, but the Russians would probably have lingering distaste for Afghanistan and would find the goodwill of the United States more important than the welfare of a third-world neighbor.

Thus, the situation of Bin Laden and Afghanistan shows the reality of international law. Although the pen has created mechanisms for dispute resolution under the United Nations and the ICJ, the sword settles the dispute. Whoever has the best sword wins. Or returning to the introduction, he who has the gold rules. However described, the reality remains in international law that might strongly influences the outcome of international conflict.

IV. Conclusion

The above cases and historical examples illustrate that the “might is right” principle strongly influences international law. When in international law, “a state is bound only by law to which it has itself consented,”^{cxviii} the most powerful states rule the day.

Perhaps when the power continuum reaches parity, a system of checks and balances among the states will occur. In other words, when the world is not dominated by one or two superpowers, the “might is right” principle could fade in importance. When China, the European Union, the Group of 77, India, and the Pacific Rim countries reach military and economic parity with the United States, then international law could come closer to the checks and balance system within the United States that permits law to govern over might.

While such a future may occur, law always has and always will be influenced and governed by the “might is right” principle. Even in the United States, arguably the most free country in the world, the “might is right” principle governs. It governs when Roosevelt’s court packing plan intimidates the Supreme Court to interpret the constitution to Roosevelt’s liking.

It governs when insurance companies invent a false crisis and convince the legislature to pass tort reform to increase their profits at the expense of invalids.^{cxix} Even when the courts find such tort reform illegal, the legislature simply passes it anew at the insurance industry’s request.^{cxx}

Might continues to be right in the United States when powerful corporations can commit crimes that go mostly unpunished.^{cxxi} As estimated by the Bureau of National

Affairs, corporate crime is ten times greater than the combined larcenies, robberies, burglaries, and auto thefts committed by individuals.^{cxxxii}

Although might often remains right in America, it's influence is much less in American law than in international law. Americans at least have the constitution, the jury, and the trial lawyers to provide the meek leverage against the great. Even Bill Gates does not completely escape justice (or at least not until after he's made his billions at competitors and consumer's expense^{cxxxiii}).

The protections against might that Americans enjoy are not evident in disputes between countries. Until they are, might will remain a dominant force in international law.

ⁱ The idea that power influences the law goes contrary to the bedrock belief that everyone is equal under the law. There is, however, a distinction between what the law should be and how the law actually works. Gerry Spence, in his book, With Justice For None, argues that the structure of American law favors the powerful and hinders the weak. *See* GERRY SPENCE, WITH JUSTICE FOR NONE 81 (1989). Just as the powerful tobacco companies in America escaped liability until they met lawsuits by equally powerful states, powerful countries of the world often escape liability for their actions unless they are confronted by an equally powerful presence.

ⁱⁱ *See* *Nicaragua v. United States*, 1986 I.C.J. 14 (1986).

ⁱⁱⁱ *See id.* at para. 227.

^{iv} *See id.* at para. 228.

^v *See id.*

^{vi} *See* United Nations Charter, Preamble, 59 Stat. 1031 (1945) (stating that signatory nations aim “to practice tolerance and live together in peace”).

^{vii} *See id.*, Article 1 (requiring nations “to maintain peace ... develop friendly relations”).

^{viii} *See id.*, Article 2 (“settle their international disputes by peaceful means ... refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state”).

^{ix} *See id.*, Article 33 (“parties to any dispute ... likely to endanger ... peace ... shall ... seek a solution by negotiation, inquiry, mediation, conciliation, arbitration ... or other peaceful means”).

^x See MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW CASES AND COMMENTARY 445 (1997).

^{xi} See John Quigley, Lecture *in* International Law class, Ohio State College of Law (1998).

^{xii} See *New Zealand v. France* *in* INTERNATIONAL LAW CASES AND COMMENTARY, *supra* note 9 at 225 *citing* 82 INT'L LAW REP. 500 (1990).

^{xiii} *See id.*

^{xiv} *See id.*

^{xv} *See id.*

^{xvi} *See id.*

^{xvii} *See id.*

^{xviii} *See* *New Zealand*, *supra* note 11, at 228.

^{xix} *See id.*

^{xx} *See id.*

^{xxi} *See id.* at 231.

^{xxii} *See id.* at 229.

^{xxiii} *See id.*

^{xxiv} *See id.* at 225.

^{xxv} *See* Quigley, *supra* note 11.

^{xxvi} Don MacKay, *Essay: International Security in the Post-Cold War Era: Can International Law Truly Effect Global Political and Economic Stability? Nuclear Testing: New Zealand and France in the International Court of Justice*, 19 FORDHAM INT'L L.J. 1857, 1867 (1996).

^{xxvii} *See id.*

^{xxviii} *See* statistical comparisons in <http://www.france.com/culture/figures.html> and <http://www.stats.govt.nz/statsweb.nsf>.

^{xxix} *See id.*

^{xxx} *See id.*

^{xxxi} Don MacKay, *supra* note 26.

^{xxxii} John A. Barret, Jr., *Recent Development: International Legal Education in the United States: Being Educated for Domestic Practice While Living in a Global Society*, 12 AM. U.J. INT'L L. & POL'Y 975, 978 n.20 (1997).

^{xxxiii} Don MacKay, *supra* note 26.

^{xxxiv} Time outside of jail does not equal time served in any judicial system that I know, but that is exactly the holding of the second mediation.

^{xxxv} *See* Quigley, *supra* note 11.

^{xxxvi} *See id.*

^{xxxvii} *See id.*

^{xxxviii} *See id.*

^{xxxix} *See, e.g., Paraguayan National Executed in United States Despite Court's granting of Provisional Measures*, <http://www.law.cornell.edu/icj/breard.htm>.

^{xl} *See* Paraguay v. United States, Request for the Indication of Provisional Measures Order, para. 2, April 9, 1998, <http://www.icj.cij.org/idocket/ipaus/ipausorder/ipausorder090498.HTM>.

^{xli} *See* In Re Angel Francisco Breard; Republic of Paraguay et al., 1998 U.S. LEXIS 2465, *12.

^{xlii} *See id.* at *7.

^{xliii} *See id.* at *10.

^{xliv} *See* Mumia Abu-Jamal, *Where International Law Ain't Law*, 4/20/98,

<http://www.iacenter.org/lawaint.htm>.

^{xlv} *See id.*

^{xlvi} *See* Amnesty International, *United States of America: the Execution of Angel Breard: Apologies Are Not Enough, Summary of Report*, AMR, May 1998 <http://www.amnesty.it/ailib/aipub/1998/SUM/25102798.htm>.

^{xlvii} *See* Abu-Jamal, *supra* note 34.

^{xlviii} 630 F.2d 876 (2d Cir. 1980).

^{xlix} *See id.* at 878.

^l *See id.*

^{li} *See id.* at 879.

^{lii} *See id.*

^{liii} *See id.*, at 878.

^{liv} *See id.*, at 888.

^{lv} *See* 28 U.S.C. sec. 1350.

^{lvi} *See* *Filartiga*, *supra* note 38, at 885.

^{lvii} *See id.*

^{lviii} *See* *JANIS & NOYES*, *supra* note 10, at 18 *citing* *Filartiga v. Pena-Irala*, 577 F.Supp. 860, 867 (E.D.N.Y. 1984).

^{lix} 1969 WL 1.

^{lx} *See id.*

^{lxi} *See* JANIS & NOYES, *supra* note 10, at 133.

^{lxii} 3 World Ct Rep. 151 (1933).

^{lxiii} *See* JANIS & NOYES, *supra* note 10, at 140.

^{lxiv} *See id.* at 143.

^{lxv} *See id.* at 143.

^{lxvi} *See* Quigley, *supra* note 11.

^{lxvii} *See* Duncan, Lectures, The Process of Judging, Ohio State College of Law (1997).

See also Stone Et Al, CONSTITUTIONAL LAW 215 (3d ed. 1996) (discussing the Roosevelt Court Packing Plan).

^{lxviii} *See id.*

^{lxix} *See* Terry Paul, *Lecture*, International Marketing 757, Ohio State University (October 14, 1998).

^{lxx} William R. Branch, *The Yamashita Decision*, p.3 in My Lai Case Study in Course 1, Strategic Leadership (1990).

^{lxxi} *Id.* at 5.

^{lxxii} *Id.* at 6.

^{lxxiii} *Id.*

^{lxxiv} *See id.*

^{lxxv} *Id.* at 7.

^{lxxvi} *See id.* at 11.

^{lxxvii} *Id.* at 10-11.

^{lxxviii} *See id.* at 14.

^{lxxix} *See id.*

^{lxxx} *See id.* at 15.

^{lxxxii} Even though General Percival commanded no units in the Philippines, he participated in accepting Yamasita's surrender because "MacArthur felt it appropriate and fitting that Percival's earlier humiliating surrender now be cleansed." *See id.* at 8.

^{lxxxiii} *See* United States v. Calley, 46 C.M.R. 1131, 1196 (1973).

^{lxxxiii} *See* My Lai Case Study *in* Course 1, Strategic Leadership at 1 (U.S. Army War College).

^{lxxxiv} *See id.* at 2.

^{lxxxv} *Id.*

^{lxxxvi} *See id.*

^{lxxxvii} *See id.*

^{lxxxviii} *See id.* at 8.

^{lxxxix} *See* Duncan, *supra* note 67.

^{xc} *See id.*

^{xcii} *See* Aspin v. Department of Defense, 491 F.2d 24, 26 (D.C. Cir. 1973).

^{xcii} *See* Duncan, *supra* note 67.

^{xciii} *See id.*

^{xciv} Especially when the same country's courts adjudicate both cases; there appears to be a definite bias towards the adjudicating country. But if the United States were not the most powerful country in the world, perhaps Calley's trial would have occurred in The Hague.

^{xcv} *See* PHILIP R. CATEORA AND JOHN L. GRAHAM, INTERNATIONAL MARKETING 59 (10th ed. 1998) *citing* Bernard A. Weisberger, *Panama: Made in U.S.A.*, AM. HERITAGE 24-25 (Nov. 1989).

^{xcvi} *See id.*

^{xcvii} *See id.*

^{xcviii} *See id.*

^{xcix} *See id.*

^c *See id.*

^{ci} *See id.*

^{cii} *See Duncan, supra note 67.*

^{ciii} *See id.*

^{civ} *See id.*

^{cv} *See id.*

^{cvi} *See id.*

^{cvi} *See Duncan, supra note 67.*

^{cviii} *See id.*

^{cix} *See id.*

^{cx} *See id.*

^{cx} *See Charles Overbeck, IMF, U.S. Fund Russian War in Chechnya,*

<http://www.parascope.com/mx/chech1.htm>

^{cxii} *See id.*

^{cxiii} *See id.*

^{cxiv} *See id.*

^{cxv} *Id.*

^{cxvi} *See id.*

^{cxvii} *Id.*

^{cxviii} See Duncan, *supra* note 67.

^{cxix} See *id.*

^{cxx} Before the war, Iraq's army was recognized as the largest in the Middle East and the third largest standing army in the world.

^{cxxi} See Duncan, *supra* note 67.

^{cxxii} See LAKSHMAN GURUSWAMY & BRENT HENDRICKS, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 4 (1997). See also Professor Murphy, Lectures, International Environmental Law, Ohio State College of Law (1998).

^{cxxiii} Horace B. Robertson, Jr., *Contemporary International Law Relevant to Today's World?*, NAVAL WAR COLLEGE REV. 97.

^{cxxiv} See Deborah Orin, Missiles Hammer Terrorist Targets, The New York Post (August 21, 1998).

^{cxxv} See *id.*

^{cxxvi} See ICJ docket, <http://www.icj-cij.org/idocket.htm>.

^{cxxvii} See Duncan, *supra* note 67.

^{cxxviii} Louis Henkin, *Making International Law In A State System: Autonomy And Consent in INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS* 45-46 (Martinus Nijhoff Pub. 1990).

^{cxxix} See Morris v. Savoy, 61 Ohio St. 3d 684 (1991).

^{cxxxx} See *Tort Reform Is Here To Stay*, PERSONAL INJURY VERDICT REV. Vol. 6, No. 11 (May 25, 1998).

^{cxxxi} See GERRY SPENCE, WITH JUSTICE FOR NONE 198 (1989).

^{cxxxi} See *id.* citing Jenkins, 44 U.S.L.W., April 13, 1976 at 2.

^{cxxxiii} Economists uniformly agree that monopolists reap great profits at the expense of consumer welfare. Nonetheless, we all love Microsoft products.