On the Need for an International Civil Court

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We live in a revolutionary age, as evidenced by the avalanche of international human rights law and standards that have been created over the course of the past half-century. Prior to this time, there simply was no international law to protect individuals from the cruelties of their own government, and whatever atrocities states carried out within their own borders were treated as purely domestic matters, beyond the purview of the international community.

All of this has now been stood on its head. In one area after another—refugees, landmines, torture, the rights of children, and so on—states have agreed to be bound by the provisions of international law and their domestic practices subject to at least some form of international scrutiny. In fact, international human rights law has progressed to the point where someone who was only familiar with the law itself and not with actual state practice (the proverbial visitor from Mars) would readily conclude that human beings everywhere enjoy complete freedom and security.

International human rights law has started to return to its universal roots, requiring not simply enumeration of rights but placing emphasis on the duty to meet those rights.

What is also in the process of changing, albeit in a slower and much less certain fashion, is the responsibility for meeting these human rights. Although we commonly think of human rights as being universal in scope, there has been a decided tendency to limit duties solely to the domestic realm. Under this restrictive but erroneous reading of international human rights law, children in Uganda might possess a "right" to an education, but the duty to meet this right rests with the Ugandan government and that government alone. What happens if this right (or any other) is not met by the Ugandan government? All too often, the silence of the international community has been deafening.

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Fortunately, this way of thinking has begun to change and international human rights law has started to return to its universal roots, requiring not only enumeration of rights but also an emphasis on the duty to meet those rights. We are beginning to see glimpses of what I will call the "brother's keeper" syndrome.[1] One manifestation of this concern with "others" has been through the practice of humanitarian intervention. It should be noted that this principle of international law has been around for centuries. However, it has only been in the recent past—in places like Somalia, Bosnia, Haiti, East Timor, and Kosovo—that the international community has shown any kind of willingness to intervene in states in order to halt human rights violations. To put this into perspective, there were more instances of humanitarian intervention in the past decade alone than in all of human history before.

States have shown virtually no interest in pursuing and prosecuting those who have committed human rights abuses. They have no incentive to do so.

Economic sanctions have also become increasingly popular. In fact, any number of states and even international organizations, such as the United Nations, have readily taken to punishing countries that are thought to be responsible for carrying out human rights abuses. While this concern for "others" is commendable enough, far too many sanctions have harmed those who they were intended to help, bringing about a perverse double victimization. That economic sanctions invariably come at no cost to the sanctioning state, and instead have often been an economic plus, calls into question the moral basis of such a policy.[2]

We presently live in the age of universal jurisdiction, best exemplified in the unprecedented international effort to prosecute General Pinochet. Although the concept of universal jurisdiction goes back centuries—the pirates of old were considered *hosti humani generis* (the enemy of all)—this principle has now started to take on an entirely new meaning. Some of the best evidence of this is the inclusion of universal jurisdiction provisions in international treaties.[3] Perhaps the most far-reaching example of universal jurisdiction is to be found in the Torture Convention.[4] Article 5 mandates jurisdiction when offenses occur within a state's territory; are committed by a national or against a national (when deemed appropriate); or are committed by an offender located within a state's territory if extradition does not occur. In an effort to ensure that all possible jurisdictional bases are available, the treaty also permits any criminal jurisdiction allowed by internal law.

On this basis, our Martian visitor might easily be convinced that torture does not exist, and that if it does, those who are responsible for directing or carrying out torture are instantly brought to justice either at home or in some other country. Of course, the law has had little relationship with reality. Instead,

Amnesty International reports that torture is still practiced in some 125 countries in the world.[5] Moreover, although the perpetrators of torture must surely number somewhere in the thousands, if not tens of thousands, there have been precious few prosecutions either in the state where the torture was carried out or anywhere else for that matter.

Not all of the news is bad and, in fact, there have been nascent moves to prosecute those responsible for directing or carrying out human rights abuses, at least in a few particular areas of the globe. I refer to the International Criminal Tribunals for the Former Yugoslavia and Rwanda and the proposed court for Sierra Leone. Finally, there is the International Criminal Court, which will prosecute individuals accused of committing certain international crimes.

In sum, we live in a world where all individuals are protected by an impressive array of international human rights laws, yet this same world continues to be afflicted with extraordinarily high levels of human rights abuses, as the global-wide practice of torture indicates. We should explore why this dichotomy exists, but more than that, what might be done to eliminate it. The facile reply is to dismiss international law as not really "law" because there is no enforcement mechanism. A more nuanced view, however, sees enforcement mechanisms all over the world. In the case of torture, to return to that example, each one of the state parties has legally bound itself to enforce the provisions of the convention by proscribing torture domestically, but also by prosecuting (or extraditing) any individual who practiced torture who is found within that state's territorial boundaries. This is, or at least should be, a formidable international constabulary.

The lesson that emerges from actual state practice is very clear: individuals must be given the means to enforce and protect their own rights.

Yet, practically all states have shown virtually no interest in pursuing and prosecuting those who have committed human rights abuses.[6] This is because they have no incentive to do so. For one thing, states have already shown that they are not particularly keen on policing themselves, and this has been true even (perhaps especially) in situations where a state has attempted to transform itself from a dictatorship into some kind of democratic state. As bad as this has been, the track record of "outside" states has not been any better and in many respects has been worse, the Pinochet matter being the rarest of counter-examples. In short, the reality of universal jurisdiction has not come anywhere near its promise. Perhaps the Pinochet case will fundamentally change this, or perhaps hope will come in the form of the International Criminal Court. This, however, is not very likely.

The problem is that the interests of states continue to receive attention at the

expense of the interests of individuals, especially those who have been the victims of human rights abuse.[7] At its core, the human rights revolution is about the primacy of the individual. Yet, while international law has provided individuals with a litany of human "rights," this same law has not given individuals any effective means by which to protect these rights.[8] Instead, the enforcement of these rights has remained some place else—either with states or with international institutions—and the result has not been very encouraging if not downright disastrous. The lesson that emerges from actual state practice is very clear: individuals must be given the means to enforce and protect their own rights. To see how this might be done we turn, surprisingly, to developments under U.S. law.

THE INCENTIVES OF VICTIMS VERSUS THE (DIS)INCENTIVES OF STATES

Long before the international effort to prosecute General Pinochet, U.S. courts served as a vital international forum for those who have been victims of human rights abuses in other lands. The seminal case in this area is *Filartiga v. Pena-Irala.*[9] This case revolved around the torture and killing of a young man in Paraguay whose family had been outspoken critics of the Stroessner military dictatorship. When the family's attempts to bring the perpetrators to justice in Paraguay were brutally rebuffed, the case looked like one more instance where the dictatorship could take retributive measures with impunity. All this changed when Dolly Filartiga, the deceased's sister who was living in the United States, discovered that a Paraguayan official (Pena-Irala) who had participated in the torture and murder of her brother was visiting New York. Filartiga proceeded to file a civil suit against this individual based on an otherwise obscure statute from the very first Congress in 1789, the Alien Tort Statute (ATS), which reads in its entirety: "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or of the United States."[10] Although the district court dismissed the plaintiffs' case, the Court of Appeals overturned this decision. After reviewing international and domestic law (including that of Paraguay and the United States), the court held that under the law of nations there was a "clear and unambiguous prohibition against official torture." The court went on to hold that the statute provided federal jurisdiction when an "alleged torturer is found and served process by an alien within our borders." On remand the district court awarded the Filartiga family a default judgment of $10 million.

Filartiga opened up the floodgates of human rights litigation in American courts and victims from all over the globe: Guatemala,[11] the Philippines,[12] Bosnia,[13] East Timor,[14] Ethiopia,[15] Rwanda,[16] Haiti,[17] Indonesia,[18] China,[19] Zimbabwe,[20] Japan,[21] Burma,[22] and Argentina[23] have sought justice in American

courts. The larger point is that victims have shown a far greater interest in seeing that justice is served than states have. In order to see this, one may contrast the plethora of ATS suits that have been brought in U.S. courts with the sorry record of the U.S. Justice Department. In 1994 Congress changed the federal criminal code to provide that any U.S. national or person physically located within the United States could be held criminally liable for torture that he or she commits against anyone anywhere.[24] This criminal provision was part of the U.S. ratification of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment. Unfortunately and inexplicably, however, there has never been a single criminal action that has been brought under the law notwithstanding the presence of torturers within the United States (many of whom have been defendants in ATS suits),[25] and despite the obligations that the U.S. government has willingly taken on under the Torture Convention to "prosecute or extradite" any torturers within its territorial midst.

In addition to ignoring their international obligations, there are other ways in which states obstruct justice rather than facilitate it. Certainly the most obvious and most intractable is the fact that states continue to enjoy sovereign immunity in the same fashion as they have for centuries, the present-day human rights revolution notwithstanding. To capture the baffling and unjust nature of the law in this area consider the case of Scott Nelson, an American citizen who was recruited to work in a state-run hospital in Saudi Arabia. Nelson accepted the position, moved to Saudi Arabia, and began his job. When he complained about certain practices at the hospital, Nelson was imprisoned and subjected to torture by Saudi security personnel. Nelson was eventually able to win his release (mainly through the efforts of a U.S. senator), and when he returned to the United States he filed a lawsuit. If Nelson's torturers had somehow been found in the United States, he would have been able to sue them (as individuals) on the basis of the Torture Victim Protection Act,[26] which is essentially the Alien Tort Statute for American citizens.

It is important not to lose sight of the larger point, which is that there has been a fundamental weakening of the principle of sovereign immunity.

Presumably, those who tortured Nelson never traveled to the United States, but in any event, what Nelson did was to sue the Saudi Arabian government itself—the entity that had recruited him, the entity that had employed him, and finally, the entity for which the torturers worked. The problem is that foreign states generally enjoy sovereign immunity in U.S. courts, subject to a few exceptions.[27] The nearest possible exception that Nelson could come up with was that the Saudi government had engaged in "commercial activities" in the United States when it recruited him.

However, the U.S. Supreme Court rejected this argument (as it should have) and it dismissed Nelson's suit against Saudi Arabia. In sum, an American citizen who has been imprisoned and tortured by a foreign government outside the United States was not be able to sue that state, at least not in U.S. courts.[28] Whether Nelson ever contemplated suing the Saudi government in Saudi court is not known.

Although Nelson lost, his case did attract attention in Washington. Partly in response to this, in 1996 the U.S. Congress passed the inelegantly titled Antiterrorism and Effective Death Penalty Act (AEDPA)[29] which, among other things, amended the Foreign Sovereign Immunity Act (FSIA)[30] to allow suits against foreign states for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or for the provision of material support or resources for such an act if the act or provision of support is engaged in by an official agent of the foreign state.

Such a development appears to be a step in the right direction. Countries certainly have far more resources and assets for plaintiffs to pursue than do individuals who work for the state, and it is much more difficult for a "state" to walk out of an American courtroom and simply disappear, with assets in tow, as has become commonplace in ATS suits. In fact, already plaintiffs have been successful in suits brought against Cuba,[31] Iraq,[32] Libya,[33] and Iran.[34] But what also has to be noted about the AEDPA is that the only countries that suit can be brought against are those that have been designated as "terrorist" states by the U.S. State Department. Saudi Arabia is not on this list and thus it would be immune from suit, despite the fact that its brutal practices helped to facilitate this change in U.S. law. There is little question that Saudi Arabia carries out "terror." Certainly the multitude of its victims, including Scott Nelson, would think so. However, Saudi Arabia (and most other countries in the world save a few) is protected from suit by the provisions of the FSIA. Beyond that, the exclusions in sovereign immunity that have been created by the AEDPA are only applicable when the claimant or victim is a national of the United States. This, of course, flies in the face of *Filartiga* and its progeny where foreign victims have been provided a forum in U.S. courts to remedy violations of the law of nations. Still, as short-sighted and self-serving as these limitations are, it is important not to lose sight of the larger point, which is that there has been a fundamental weakening to the principle of sovereign immunity, at least with respect to particular states.

The point is simple but urgent: all of the international human rights law in the world will not amount to much without the means to enforce this law.

Ironically, there has hardly been any dent in the doctrine of sovereign

immunity with respect to the United States itself. In other words, U.S. law not only protects other states, but it most assuredly protects itself as well. In fact, many of the same federal courts that have so willingly opened their doors to victims of human rights violations committed by foreign officials have been quick to dismiss any and all suits alleging responsibility on the part of the United States. Thus, in *Sanchez-Espinoza v. Reagan* the Court of Appeals for the District of Columbia relied on the doctrine of sovereign immunity to dismiss a suit brought by Nicaraguan civilians alleging that the U.S. government was responsible for human rights violations committed by the contra rebel forces, a revolutionary group that was armed and trained by the United States.[35] The same result was reached in suits brought by civilians (or their decedents) in Panama[36] and Libya[37] who were killed or injured during the course of U.S. military operations in those countries. And finally, lawsuits brought by the heirs of those killed when the U.S.S. Vincennes mistakenly shot down a civilian Iranian airliner over the Persian Gulf in 1988 were readily dismissed.[38] In all of these cases, American courts employed a litany of ill-conceived and embarrassing rationales for dismissal, most notably the repeated idea that orders were being followed (orders were being followed in *Filartiga* as well), thereby providing these courts the cover to completely ignore the suffering of civilian populations. In fact, one court *(Koohi)* went so far as to hold that the result would have been no different even if U.S. military personnel had purposely downed the civilian airliner.

Criminal prosecutions alone have not—and will not—provide the solution.

In sum, justice has its limits, and those limits are invariably demarcated by state borders. However, as we have seen, all states cannot be trusted. They cannot be trusted to protect human rights, which is why international human rights law was created in the first place. But they also cannot be trusted to pursue, let alone provide, justice to those whose human rights have already been violated. Of course, this impunity only leads to more violence, and the whole ugly cycle keeps repeating itself time after time. The point here is a simple one, but it is also a most urgent one: all of the international human rights law in the world will not amount to very much without the means to enforce this law.[39]

AN INTERNATIONAL CIVIL COURT

The previous section examined the experience of human rights litigation in the United States, and two main points emerged from that discussion. The first is that victims of human rights abuses have a much greater incentive to pursue those who commit human rights abuses than does the U.S. government or any other state. Notwithstanding the fact that each one of these *Filartiga* "victories" has been sym-

bolic in the sense that not one plaintiff has been able to collect on the judgment rendered, still, there continues to be an ongoing rush toward such litigation, and the only apparent limiting principle (large as it is) is that more human rights violators have not been found within the territorial boundaries of the United States. The second point that emerged from the previous discussion is that states have enormous difficulties acknowledging their own wrongdoing. Certainly the United States is not exempt from this charge, at least with respect to the claims of foreign nationals.

Despite this result, present efforts should not be abandoned. However, we may derive an additional conclusion from the above evidence: criminal prosecutions alone have not and will not provide the solution.[40] Certainly, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda have only enjoyed a modicum of success.[41] Moreover, assuming that the International Criminal Court works to perfection, such a court still would not come anywhere near to addressing most of the atrocities that are committed in the world, most notably the practice of torture.

The problem is that there has been too much emphasis on individual violators while there has not been nearly enough emphasis on individual victims. In other words, we have completely lost sight of state policy and have only focused on the actions of individual state actors. Return to the *Filartiga* case for a moment. Certainly the torturer/murderer, Pena-Irala, should be called to account for his actions. However, what we have lost sight of is the fact that Pena-Irala was nothing more than a state official carrying out state policy. To hold him accountable—civilly, criminally, or both—but not the state of Paraguay is wrong. Yet, this is typical of the manner in which both international and domestic law continue to deny state responsibility. In this vein, it is noteworthy that the International Criminal Court perpetuates this dichotomy by limiting its jurisdiction to individuals, thereby avoiding the issue of state responsibility altogether.

Victims in the United States have a civil remedy whereby the individual initiates and controls the legal proceeding. The same kind of thinking should apply in the international sphere as well.

At the same time that the law has focused solely on the actions of individuals and ignored the crimes and responsibilities of states, individual victims have no effective means to enforce their rights. Unfortunately, what international law has done, as it has done so often in the past, is to subsume the interests of the individual to that of the state. Once again, the International Criminal Court would only perpetuate this passive role for victims by not allowing for any means by which victims could initiate legal proceedings.[42]

In addition to criminal sanctions initiated by the state, victims in the

United States also have a civil remedy whereby the individual initiates and controls the legal proceeding. The same kind of thinking should apply in the international sphere as well. We could, of course, place the entire burden on the American judiciary. As a better alternative, the international community should begin to think about creating an International Civil Court.

Using the United States as a model, such a court would allow victims to bring a civil suit in an international forum against those officials who directed or carried out atrocities against them.[43] Moreover, (again, using the United States as a basis for a model) such a court would also allow victims to sue their own state,[44] as well as other states,[45] that violated their human rights. In short, we can continue to maintain the fiction that individuals enjoy human rights, or we can create a mechanism that would allow individuals to actually possess those rights.

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No doubt, this proposal seems so ideal that it almost traverses to the surreal, but the seeds for such a venture already exist. The U.S. precedent in terms of suing state agents and states has already been mentioned. The International Civil Court that is being proposed would simply universalize this concept. In addition, through its work under the Optional Protocol, the Human Rights Committee has itself been evolving into something like the judicial body that is envisioned here.[46] However, the Human Rights Committee does not hear oral testimony and its adjudicatory powers are limited to expressing the "views" of the committee. In contrast, an International Civil Court would truly operate like a court of law: oral testimony would be heard, a decision on the merits would be reached, and a judgment would be rendered. To the charge that states would simply ignore such rulings—the omnipresent bogeyman that is constantly invoked against international law—the only response one may give is that this is the position that the European Court of Human Rights (ECHR) was in when it was originally conceived. However, through rather remarkable judicial stewardship as well as through the cooperation of states, the ECHR has been able to evolve in a way that would have been unimaginable when the court began its work.[47]

CONCLUSION

What states give states can also take away. In the field of international law states have "given" individuals a panoply of human rights. Unfortunately, these same states have not provided any effective means by which individuals can

enforce "their" rights. In practice, this has meant that states have taken away the rights that they have given and that we continue to live in a world that is short, nasty, and brutish for many people.

This article has proposed the creation of an International Civil Court that would complement, and in many ways supercede, the efforts of human rights enforcement that exist at present. Such a court is premised on the simple idea that individuals should (finally) be empowered to enforce their own rights. ■

NOTES

1 Perhaps the most resounding affirmation of this principle can be found in the United Nations' Millennium Report: "[S]tates need to develop a deeper awareness of their dual role in our global world. In addition to the separate responsibilities each state bears towards its own society, states are, collectively, the custodians of our common life on this planet—a life the citizens of all countries share." Kofi Annan, *We the Peoples: The Role of the United Nations in the 21st Century. Millennium Report of the Secretary-General of the United Nations,* <http://www.un.org/millennium/sg/report/> (accessed March 31, 2002).

2 See generally, Katarina Tomasevski, *Between Sanctions and Elections: Aid Donors and Their Human Rights Performance* (London: Pinter, 1997); *Responding to Human Rights Violations 1946-1999* (The Hague: Martinus Nijhoff, 2000).

3 An important first step toward an increased role in policing human rights abuses through the principle of universal jurisdiction came in 1956 with the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, September 4, 1956, 266 UNTS 3. Article 3 of this Convention required the national criminalization of the slave trade, "effective measures" to prevent mechanism of trade within the territory of signatories, and international cooperation requiring the commission and prosecution of the slave trade. With the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted November 30, 1973, 1015 UNTS 244, the potential role of national courts in prosecuting international crimes expanded even more. The Convention criminalizes apartheid, defining it as certain "inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them." Articles 4 and 5 mandate judicial, legislative, and administrative measures against people committing apartheid in a state regardless of residence or nationality, and indicated that any state party with personal jurisdiction can try any person charged. Article 4 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature December 16, 1970, 10 I.L.M. 133, indicates that aircraft hijackers are subject to extradition or prosecution by the state whose aircraft was hijacked or in whose territory they landed or were present and that no "criminal jurisdiction exercised in accordance with national law" is excluded. Article 5 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, opened for signature September 23, 1971, 10 I.L.M. 1151, has an identical provision. Article 5 of the 1979 International Convention Against the Taking of Hostages, adopted December 12, 1979, G.A. Res. 34/146, UN GAOR, 34th Sess., Supp. No 99, UN Doc. A/34/819, 18 I.L.M. 1456, goes further, mandating jurisdiction if the offense occurs within the territory of the state, if the offender is a national or stateless resident, if the act was committed to compel the state, if the victim is a national of the state (when deemed appropriate), or if the offender is present in the territory and not being extradited. For an excellent discussion of these issues see Hari Osofsky, "Domesticating International Criminal Law: Bringing Human Rights Violators to Justice," *Yale Law Journal* 107 (1997): 191.

4 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, UN GAOR, 39th Session, Annex, UN Doc. E/CN.4/1984/72, 23 I.L.M. 1027, revised by 24 I.L.M. 535.

5 Winston P. Nagan and Lucie Atkins, "The International Law of Torture: From Universal Prescription to Effective Application and Enforcement," *Harvard Human Rights Journal* 14 (2001): 87, 89.

6 In addition to the efforts of the Spanish judiciary, best known in the Pinochet matter, one should also note the remarkable undertakings in Belgium where there have been a number of cases filed against former and present world leaders for violations of human rights. Marlise Simons, "Human Rights Cases Begin to Flood Into Belgian Courts," *The New York Times,* December 27, 2001, A8. However, the International Court of Justice's recent decision in the Case Concerning the Arrest Warrant of April 11, 2000 *(Democratic Republic of the Congo v. Belgium)* February 14, 2002, General List No. 121 will seemingly bring a halt to these and other domestic efforts to prosecute sitting heads of state.

7 William Aceves has made a similar point: The prominence of the state-centric paradigm has inhibited the development of alternative models for the protection of human rights. As a result, only limited efforts have been made to establish fora that recognize the rights and duties of individuals and that allow individuals to enforce these rules in an effective manner. See William Aceves, "Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation," *Harvard International Law Journal* 41 (2000): 129, 131.

8 This is not to suggest that no enforcement mechanisms exist. The most obvious counter-example is the European Court of Human Rights that, in many ways, serves as a model for human rights protection, although this court has been spared (by and large) from having to deal with gross and systematic levels of human rights abuse. Beyond this, there is some indication that the Inter-American system might, over time, develop into a noteworthy institution as well. In the UN system, one might argue that the 1503 procedure provides individuals with some kind of "voice." And as will be discussed later, the Human Rights Committee has started to evolve in a way that should help it gain much needed stature. However, the larger point is that these efforts simply pale in the face of the levels of human rights abuses that continue to exist in the world.

9 630 F. 2d 876 (2d Cir. 1980).

10 28 U.S.C. Sec. 1350 (1994).

11 *Xuncax v. Gramajo* and *Ortiz v. Gramajo,* 886 F. Supp. 162 (D. Mass. 1995).

12 *Trajano v. Marcos,* 978 F. 2d 493 (9th Cir. 1992).

13 *Doe v. Karadzic* and *Kadac v. Karadzic,* 866 F. Supp. 734 (S.D.N.Y. 1994), rev'd 70 F. 3d 232 (2d Cir. 1995).

14 *Todd v. Panjaintan,* No. 92-122555, 1994 WL 827111 (D. Mass. October 26, 1994).

15 *Abebe-Jiri v. Negewo,* 72 F. 3d 844 (11th Cir. 1996).

16 *Mushikiwabo v. Barayagwiza,* No. 94-3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996).

17 *Paul v. Avril,* 812 F. Supp. 207 (S.D. Fla 1993), aff'd, 901 F..Supp. 330 (1994).

18 Seth Mydans, World Briefing, "Indonesia: General Held Liable in Atrocities," *The New York Times,* October 6, 2001, A6.

19 Edward Wong, "Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown," *The New York Times,* September 1, 2000, A6.

20 Bill Miller, "Mugabe Sued in N.Y. Over Rights Abuses," *Washington Post,* September 9, 2000, A3.

21 Bill Miller, "Comfort Women Sue Japan in U.S.; Damages Sought by WWII Sex Slaves," *Washington Post,* September 19, 2000, A18.

22 *Doe v. Unocal Corp.* 110 F. Supp. 1294 (C.D. Cal. 2000) appeal pending (9th Cir.).

23 *Forti v. Suarez-Mason,* 672 F. Supp. 1531 (N.D. Cal. 1987), aff'd in part, 694 F. Supp. 707 (N.D. Cal. 1988); *Martinez-Baca v. Suarez-Mason,* No. 87-2057 (N.D. Cal. April 22, 1988); *Quiros de Rapaport v. Suarez-Mason,* No. C87-2266 (N.D. Cal. April 11, 1989); Siderman v. Republic of Argentina, 965 F. 2d 699 (9th Cir. 1992).

24 See Foreign Relations Authorization Act, Fiscal Year 1994 and 1995, Pub. L. No. 103-236, Sec. 506 (a), 108 Stat. 382, 463-64 (1994) (codified at 18 U.S.C. Sec. 2340).

25 Amnesty International, *United States of America: A Safe Haven for Torturers* (April 2002).

26 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. 1350 note).

27 The exceptions are essentially as follows: if a state has waived its immunity; if the cause of action relates to "commercial activities" engaged in by the state; if the case involves property that is taken in violation of international law; or if the state commits a "tortious act" in the United States. 28 U.S.C. Sec. 1605.

28 The result would have been different if the torture, or the "tortious act," had been carried out in the United States instead. The leading case in this area is *Letelier v. Chile,* 488 F. Supp. 665 (D.D.C. 1980) which was a suit brought against Chile alleging that the Chilean government had hired foreign agents (Cuban agents to be exact) who detonated a bomb in Washington, D.C. that killed Orlando Letelier, a former Chilean ambassador to the United States, and Ronni Moffitt, Letelier's assistant.

29 28 U.S.C. Sec. 1605 (a) (7) (1994).

30 28 U.S.C. Sec. 1330, 1602-11 (1994).

31 *Alejandre v. Cuba,* 996 F. Supp. 1239 (S.D. Fla. 1997) was a suit brought by the personal representatives of three persons who died as a result of the shooting down of two unarmed civilian planes over international waters by the Cuban Air Force.

32 *Daliberti v. Republic of Iraq,* No. 96-1118, 2000 WL 684813 (D.D.C. May 23, 2000).

33 *Rein v. Socialist People's Libyan Arab Jamahiriya,* 995 F. Supp. 325 (E.D.N.Y. 1998) aff'd in part 162 F. 3d 748 (2d Cir. 1998).

34 In *Flatlow v. Iran,* 999 F. Supp. 1 (D.D.C. 1998) the plaintiff alleged that his daughter was the victim of a terrorist suicide bombing of an Israeli bus on which his daughter was a passenger. The Shaqiqi faction of

Palestine Islamic Jihad claimed responsibility for the bombing and investigations by the U.S. State Department confirmed this claim. The State Department also reported that Iran had provided approximately $2 million annually to the Palestine Islamic Jihad for support of international terrorist activities. In doing so, at least according to the U.S. court, Iran had provided the requisite "material support," and thus could be held civilly liable to the Flatlow family. Several Americans who had been kidnapped by terrorist organizations in the Middle East have been able to bring suit against Iran based on the "material support" provision in the law. See, e.g., *Cicippio v. The Islamic Republic of Iran,* 18 F. Supp. 2d 62 (D.D.C. 1998); *Anderson v. The Islamic Republic of Iran,* 90 F. Supp. 107 (D.D.C. 2000); *Sutherland v. The Islamic Republic of Iran,* 2001 WL 705838.

35 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F. 2d 202 (D.C. Cir. 1985).

36 *McFarland v. Cheney,* 1991 WL 43262 (D.D.C. 1991), aff'd, 971 F. 2d 766 (D.C. Cir. 1992).

37 *Saltany v. Reagan,* 702 F. Supp. 319 (D.D.C. 1988).

38 *McFarland v. Cheney,* 1991 WL 43262 (D.D.C. 1991), aff'd, 971 F. 2d 766 (D.C. Cir. 1992).

39 One of the great ironies in all this is that international instruments place a heavy emphasis on enforcement. Article 8 of the Universal Declaration states that "everyone has a right to an effective remedy," while Article 2 of the International Covenant on Civil and Political Rights is devoted to the means by which individuals can enforce their rights.

40 John F. Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution," *Harvard Human Rights Journal* Vol. 12 (1999): 1.

41 See generally, Jose E. Alvarez, "Rush to Judgment: Lessons of the Tadic Judgment," *Michigan Law Review* Vol. 96 (1988): 2031; Todd Howland and William Calanthes, "The UN's International Criminal Tribunal: Is It Justice or Jingoism for Rwanda?" *Virginia Journal of International Law* Vol. 39 (1998): 135.

42 Perhaps what is needed is a "victim's rights" movement, only in the international realm. Interestingly enough, the International Criminal Court does make certain provisions for victims, most notably Article 75 which allows reparations for victims and paragraph 3 of that same article whereby the court can take account of representations from the victim, among others. Notwithstanding this blurring of the line between civil and criminal law, the concern remains that "outside" actors—in this case the prosecutor's office of the International Criminal Court or the Security Council—will pursue their own interests at the expense of individual victims.

43 What might make sense, at least initially, is to limit the cause of action to violations of *jus cogens* norms.

44 It is interesting to note that in the original version of the AEDPA there was no limitation with respect to which states could be sued. Only later was the fight against political terror limited to a few "terrorist" states—all enemies of the U.S. government. See Naomi Roht-Arriaza, "The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?" *Berkeley Journal of International Law* 16 (1988): 71, 80.

45 The state-centric view of international law also manifests itself in terms of the responsibility for violating human rights. Rather reflexively, international human rights law has concerned itself almost exclusively with the relationship between states and the citizens of that same state, thereby largely ignoring the manner in which "outside" states might also be responsible for aiding in the commission of human rights in other countries. For an examination of this issue see Mark Gibney, Katarina Tomasevski, and Jens Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," *Harvard Human Rights Journal* 12 (1999): 267.

46 See generally, Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," *Yale Law Journal* 107 (1997): 273.

47 Ibid., 293-97.