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The Civil Enforcement of Human Rights Norms in Domestic Courts

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This Article will attempt to make the case for the domestic civil action in defense of international human rights in the face of a potential threat to such litigation. It starts with a discussion of the importance of civil redress for human rights victims and then recounts developments in the area of private international law that threatens these domestic civil enforcement measures.

Until very recently, impunity for human rights violations and international crimes has been the general rule in the international community, with few exceptions. It is clear that only a small proportion of those who commit human rights offenses are ever brought to justice in a court of law. Some perpetrators are insulated by blanket amnesties erected in the wake of a transition to democracy, while others benefit from general government complicity and inaction. It is axiomatic that this pervasive impunity is probably the most important factor in the recurrence of such abuses.

Recently, a great deal of attention has focused on efforts at the international level to establish institutions to end this culture of impunity and ensure some measure of accountability for human rights violations. These efforts include the establishment of the two *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, the future establishment of the permanent International Criminal Court (ICC), and renewed interest in the establishment of a hybrid institution to try members of the Khmer Rouge for the international crimes committed in Cambodia in the 1970s. However, even when these institutions are fully operational at the international level, domestic enforcement mechanisms will continue to play a vital role in the promotion of international human rights norms. International institutions, by necessity and by design, are capable of addressing only a limited number of perpetrators and conflicts. The jurisdiction of *ad hoc* tribunals, such as those established to respond to the crises in the former Yugoslavia and Rwanda, is limited substantively, temporally, and geographically. Likewise, a fundamental pillar of the ICC statute is the principle of complementarity, which provides that the future Court will operate only when the domestic court with jurisdiction is unable or unwilling to go forward with prosecutions. In all fora, prosecutions at the international level will probably be limited to those individuals

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commanding and controlling large-scale abuses and to individuals committing *the most serious violations of international humanitarian law*. Thus, in order to address comprehensively this problem of impunity, national systems must be prepared to take action against human rights abusers within their jurisdictional reach. National legal systems may respond in a variety of ways to the presence of human rights abusers within their territories or subject to their jurisdictional reach. These include criminal prosecutions, often according to the principle of universal jurisdiction, administrative remedies, and civil redress. No one mechanism is sufficient, and human rights advocates must strive for the creation of a coordinated and multifaceted national response to the problem of impunity.

Europe has witnessed a resurgence in domestic criminal proceedings initiated against human rights abusers not seen since the close of World War II. Many of these cases have been brought on the basis of the principle of universal jurisdiction, as the events in question usually occurred extraterritorially and involved non-nationals. A leading example is found in the Pinochet proceedings, but prosecutions of individuals accused of committing international crimes during the conflicts in Latin America, Bosnia, Rwanda, and elsewhere have been commenced in almost every European state, including Austria, Denmark, Germany, Italy, the Netherlands, France, and Switzerland. Additionally, many countries have enacted domestic statutes specifically authorizing the exercise of universal jurisdiction over individuals accused of perpetrating grave international crimes. The typical remedy of a criminal proceeding is the incarceration of other punishment of the perpetrator. At the same time, civil reparations for the victim in the form of a money judgment may be available through the criminal law system in civil law countries that have adopted the *partie civile* system.

In contrast to these exciting developments in Europe, criminal proceedings enforcing international human rights norms in the United States are almost non-existent despite the legal authorization, and indeed the obligation to criminally punish human rights abusers within this country. In 1994, the United States enacted federal legislation providing for the prosecution of torturers found within its borders pursuant to the principle of universal jurisdiction espoused in the Torture Convention. To date, however, the United States has declined to initiate criminal proceedings under this statute, despite credible and corroborated evidence of the presence of torturers here.

In addition to criminal prosecutions, states may respond to human rights abusers with administrative measures. These remedies usually relate to an accused's right to enter or remain in a particular country and include exclusion, deportation, denaturalization, or revocation of visa rights. For example, after staging a few largely unsuccessful prosecutions of World War II defendants, Canada reevaluated its strategy in 1995, and thereafter adopted a practice of

deporting non-Nazi perpetrators from the country, rather than criminally prosecuting them.

Individuals seeking admission into the United States either as refugees, asylees, or in other capacities must disclose their military service and answer a series of questions relating to past criminal behavior. Unfortunately, these filters are not as fine as one would hope. For example, one United States forum asks candidates if they ever committed a crime of "moral turpitude." The form fails, however, to proffer specific questions about the candidate's involvement in the torture or persecution of others. If individuals misrepresent their past on an immigration form, they may be subject to administrative remedies, such as deportation, or they may face criminal prosecution for fraud. Earlier this year, Senator Leahy of Vermont sponsored legislation approved by the Senate and designed to strengthen administrative remedies by empowering the Office of Special Investigations of the Department of Justice to investigate and prosecute modern day war criminals and human rights violators present in the United States.

Such administrative responses have the benefit of providing victims of human rights abuses with a genuine safe haven in their country of refuge. However, these measures may ultimately prove unsatisfactory to victims because they provide only a limited degree of punishment or accountability. Further, such proceedings take place in closed hearings that do not afford victims an opportunity to present their claims in a court of law or see justice in action. And they do not assign individual liability or provide victims with reparations.

This brings us to civil suits within domestic courts. This may seem strange to some observers, but every international crime - such as the crime of genocide or torture - is also a tort. Human rights abuses manifest this dual character as both crimes and torts because they harm both human society generally and individual victims. The commission of a tort can give rise to a civil proceeding by the victim against the tortfeasor, and the principle remedy is a money judgment for the victim against the perpetrator.

In the United States, civil cases against human rights abusers have been pursued with consistency over the last two decades by organizations such as: the Center for Constitutional Rights in New York and The Center for Justice & Accountability in San Francisco. Many of these cases manifest a form of civil universal jurisdiction, in that, personal jurisdiction over the defendant is obtained wherever he may be found. These civil cases have the benefit of involving the victim directly in the legal process. The victim chooses to initiate the proceeding and then plays a central role throughout. This is in contrast to a criminal trial, at least in the United States and other common law countries, in which the victim plays a secondary role as witness for the prosecution against the defendant.

Those of us who represent victims of human rights violations have found that this active and direct participation within the legal system is empowering and often restores a sense of justice for victims of grave human rights abuses for whom the courts of their countries provided no recourse. Civil cases can also be commenced where the government is unwilling to act against abusers within a particular country, as is currently the situation in the United States. The remedy provided by a civil suit is money damages. The theory behind tort damages is that they return the plaintiff to the place he or she was prior to the commission of the tort. In the context of a case seeking to enforce human rights norms, a money judgment is clearly no equivalent to the harm suffered by the victims of human rights violations; something fundamental has been taken from them. However, money damages may begin to compensate the victim for the pain, emotional distress, and bodily harm suffered, as well as, for medical expenses, and lost wages, and earning potential. In some common law systems, punitive or exemplary damages can also be awarded to reflect the willful or wanton nature of the defendant's conduct and to contribute to the deterrence of future tortfeasors.

There are some limitations to such suits. First, during the pendency of the suit, the defendant is not detained in any fashion, which may raise security concerns for the plaintiffs. Further, in most countries, the defendant can leave the country despite the filing of a suit against him. Thus, there is no guarantee that the proceedings will be adversarial in nature, and the plaintiff may end up with a default judgment in her favor without a detailed articulation of the full scope of her rights under international law. The most vexing limitation of civil suits relates to the difficulty of enforcing any resultant judgment. Cases brought in the United States have been plagued by a lack of enforcement, because defendants may not hold assets here or they may secrete their assets abroad during the pendency of the suit. Further, a money judgment may be difficult to enforce overseas. There is no worldwide enforcement regime in place. As a result, the enforcement of foreign judgments is largely a matter of comity and reciprocity.

Several years ago, the United States initiated an effort on the international level to create a worldwide system aimed at the universal enforcement of foreign judgments in exchange for the rigid regulation of the exercise of jurisdiction. As will be explained, this system raises large stakes for civil human rights litigation in domestic courts. Delegates from the international community are in the process of drafting a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters under the auspices of the Hague Conference on Private International Law. The proposed Convention will govern all "civil and commercial matters" within the national courts of signatory countries brought against defendants domiciled in another signatory

country. As such, the Convention would apply to civil suits by human rights victims and civil judgments for reparations obtained through criminal trials.

The Convention seeks to regulate two areas of private international law: the exercise of jurisdiction and the enforcement of foreign judgments. The latter aspect of the Convention, dealing with the enforcement of foreign judgments, holds the potential to greatly benefit civil human rights suits by providing a mechanism for the automatic enforcement of judgments in the jurisdictions in which defendants have assets. However, the former aspect of the Convention - dealing with the exercise of jurisdiction - may actually hinder, and under some circumstances eliminate, civil suits seeking to enforce human rights norms. As the Convention was originally drafted, the default jurisdictional rule was found in draft Article 3, which provided that suits could be brought in the jurisdiction in which the defendant resides. Draft Article 10 was a claim specific rule governing cases in tort. According to this rule, a suit sounding in tort could also be brought in the forum in which the tortious activity occurred. Article 20 outlined a series of prohibited bases of jurisdiction and included two important bases of jurisdiction for plaintiffs seeking to enforce international human rights norms: doing business jurisdiction and transient jurisdiction. The former allows for plaintiffs to bring suit in a jurisdiction in which the defendant engages in "systematic and continuous" activities, even if the defendant is not a resident in the jurisdiction. The latter allows for plaintiffs to bring suit in any forum in which the defendant is present, so long as the process is properly served while the defendant is in the forum.

Under the original jurisdictional system, victims of human rights abuses seeking civil redress would have had two options available to them: suing in the state in which the defendant resides or suing in the state in which the harm occurred. Thus, these provisions would have entirely foreclosed the application of universal jurisdiction in the civil context. These original provisions failed to reflect the fact that many human rights cases before national courts are brought outside of the state in which the harm occurred or in which the defendant resides. The vast majority of grave international law violations occur in states that are experiencing political upheaval or are governed by authorities who themselves are responsible for the commission of, are complicit in, or are otherwise indifferent to such violations. Further, perpetrators of human rights violations may benefit from a blanket amnesty that precludes criminal and civil trials. As such, domestic courts in these states may be unable or unwilling to proceed effectively against perpetrators or to provide victims with redress.

In order to ensure their safety, many victims of human rights abuses have had to flee the state in which the harm occurred, such that it may be impossible for them to return to that state in order to pursue their rightful claims. They may even be refugees as defined by the 1951 Refugee Convention. Requiring the victim to return to their country of persecution in order to seek redress

clearly convenes the object and purpose of the Refugee Convention and the international law principle of non-refoulement.

Given these unfortunate realities, in order to seek civil redress, such victims must be able to access the courts of other nations when a human rights violator travels abroad. Articles 3, 10, and 20 as originally drafted would have barred this. Further, the proposed Convention could have prevented the enforcement of civil judgments arising out of criminal trials if jurisdiction were premised on the principle of universal jurisdiction, which was effectively prohibited by the proposed Convention.

In this way, the original draft of the proposed Convention could have extinguished efforts by certain states to enforce international human rights norms through civil litigation in their national courts and foreclosed efforts to develop similar avenues for redress elsewhere. This would have significantly stymied efforts by states to fulfill specific conventional and customary international law obligations to prevent, punish, or remedy international law violations. Many international human rights conventions, such as the Torture Convention and the two International Covenants, oblige states parties to provide victims of abuses with a meaningful remedy, access to the judiciary, and monetary reparations. If the Convention were ratified as it was then drafted, signatories would arguably have been in breach of these conventional provisions. This is especially alarming given the lack of available international and regional fora for individual victims of human rights abuses.

Fortunately, attorneys and advocates representing victims of human rights abuses became aware of the implications of this Convention to cases seeking to enforce human rights norms in domestic courts and sounded the alarm among other members of the human rights community. These concerned individuals formed a "Human Rights Coalition" to participate in the drafting process of the Convention and lobby delegates to include language excluding human rights provisions from the more restrictive aspects of the Convention's jurisdictional regime. Negotiations of the Hague Conference on Private International Law on the draft Convention were held most recently in October 1999 in preparation for a final Diplomatic Conference in 2000. Going into the negotiations, members of the Coalition had secured a bracketed "placeholder" that suggested an exception for civil suits seeking to enforce human rights norms. However, this placeholder did not provide any details regarding the scope of the exception. Fortunately, the negotiation session resulted in considerable progress, although additional work is necessary.

The debate began with the submission from the Human Rights Coalition that proposed that the following language be inserted in Article 20:

> Nothing in this Article shall prevent a party from bringing an action in a national court seeking relief for a violation of international

> human rights or international humanitarian law that amounts to criminal conduct under either international or national law, or for which a right to reparation is established under either international law or national law. International law shall be interpreted with reference to the sources of international law identified in Article 38 of the Statute of the International Court of Justice.[1]

In drafting this language, members of the Coalition were mindful of two considerations. On the one hand, we wanted to keep the language as broad as possible in order to allow for the evolution of norms under international law. At the same time, however, we were cognizant of the fact that delegates would balk if the exception swallowed the rule. Thus, we drafted the text so that the exception would apply only to conduct that rose to the level of a crime under international law. We also suggested that courts look to international and domestic law to determine which norms have attained this status.

In the ensuing debate, some delegates were concerned that this proposal remained overly vague and broad. In response, another proposal was put forward that enumerated a few crimes that would activate the exception and required future plaintiffs to demonstrate exposure to a risk of a denial of justice, because proceedings in other states are not possible or could not reasonably be required. Other delegates insisted that this short list of crimes would prove to be too limiting over time and disallow normative evolution. A third proposal was advanced that enumerated three general categories of crime - genocide, war crimes, and crimes against humanity - in keeping with the subject matter jurisdiction of the ICC Statute.

China introduced a fourth proposal that would trigger the exception only if the state exercising jurisdiction was acting in accordance with an international treaty to which it is a party. Other delegates countered that the Convention's exception should be triggered by a violation of customary international law norms, as well as by treaty violations, in order to address the patent inequalities created by the fact that not every state has enacted the necessary implementing legislation for the treaties they have signed.

By the end of the session, the Drafting Committee had consolidated these proposals into the following draft text to be located in Article 20:

> 4. Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action [seeking relief] [claiming damages] in respect of conduct which constitutes: [Variant One:

1. Proposal presented at Debate for Human Rights Coalition for Article 20 (1999-2000).

> genocide, a crime against humanity, or a war crime [as defined in the statute of the International Criminal Court]; or a serious crime against a natural person under international law; or
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> a grave violation against a natural person of non-derogable fundamental rights under international law, such as torture, slavery, forced labor and disappeared persons]. [Sub paragraphs [(b) and (c)] above apply only if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another state are not possible or cannot reasonably be required.]
>
> [Variant Two:
>
> A serious crime under international law, provided that that state has established its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and that the claim is for civil compensatory damages for death or serious bodily injury arising from that crime.][2]

The fact that the entire provision is not in brackets is a welcome development in that it indicates that a human rights exception will be included within the final text, although this could theoretically be re-opened at the final Diplomatic Conference in 2000.

However, this language does include some limitations. First, Variant 2 is unacceptable for the reasons discussed above, and some version of Variant 1 must be adopted. However, the Convention should not require proof that proceedings in another state are not possible. This has never been a prerequisite to the exercise of universal jurisdiction. Further, plaintiffs should not bear the burden of trying to bring suit in various other jurisdictions when the forum in which the defendant is found can exercise jurisdiction under the universality principle. Second, the crimes that trigger the exception should not be defined with reference to the Statute of the ICC. The subject matter jurisdiction of the future ICC is limited to the most serious international crimes. As such, these definitions include high thresholds of applicability in order to exclude smaller-scale and isolated crimes from the ICC's jurisdiction. It is crucial that some exceptional language along the lines of a modified Variant 1 be included within the Convention text to protect cases seeking to enforce international human rights norms from these restrictive jurisdictional provisions. This will ensure that victims of human rights violations who lack access to the courts of the state in which the harm occurred are not denied legal redress, and that perpetrators who are immune from suit in their home countries can be held accountable for their violations of international law wherever they can be found. These minor modifications will ensure that the Convention on Jurisdiction and Judgments reflects the fact that human rights litigation is qualitatively different from

2. Drafting Committees consolidation of Section 4 for Article 20 (1999-2000).

commercial or tort litigation, and that it is inappropriate to subject these vastly disparate types of cases to a uniform set of jurisdictional rules. Further, the Convention will actually advance the cause of human rights by providing a uniform enforcement mechanism that will ensure the enforcement of judgments arising out of civil suits seeking to enforce human rights norms.

International human rights law is composed of a litany of rights that are fundamental to our sense of fairness and justice. However, if these rights are to be meaningful, the law must enforce them and provide a meaningful redress to victims. Civil suits in domestic courts play an important role in this process. A court judgment denouncing a human rights violation, identifying a responsible individual, and providing reparations can go a long way toward restoring a victim's sense of justice. Further, an enforceable damage award can assist the rehabilitation of victims of human rights abuses who must restart their lives in their countries of refuge. Unless wrongful conduct is addressed in some official and public capacity, violations will be repeated with impunity. For these reasons, it is imperative that the proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters enables, rather than disables, civil suits seeking redress for grave human rights violations.