In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention

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In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention

Beth Van Schaack*

Unless recovery is allowed in each instance where there has been a violation of a right, the violations will be repeated with impunity, and that which is wrong will come to be regarded as something right. Unless it is faced and dealt with, wrong will have the same stature as right.1

I. INTRODUCTION

Delegations from forty-five countries are in the process of drafting the Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters ("the Hague Convention") under the auspices of the Hague Conference on Private International Law.2 The Hague Convention seeks to

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1 J.D. LEE & BARRY A. LINDahl, MODERN TORT LAW § 1.01, at 2 (rev. ed. 1988).

2. The Hague Conference on Private International Law ("the Hague Conference") is an intergovernmental organization whose purpose is "to work for the progressive unification of the rules of private international law." Statute of the Hague Conference on Private International Law, opened for signature July 15, 1955, art. 1, 15 U.S.T. 2228, 2228, 220 U.N.T.S. 121, 121. The Hague Conference negotiates and drafts multilateral treaties in various fields of private international law, such as international judicial and administrative cooperation and conflict of laws for contracts and torts. The Secretariat conducts preparatory research, and Special Commissions composed of governmental experts compile draft conventions. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, a diplomatic conference held every four years. The following forty-seven states are members of the Hague Conference: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Croatia, Cyprus, the Czech Republic, Denmark, Egypt, Estonia, Finland, the Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, the Republic of Korea, Latvia, Luxembourg, Malta, Mexico, Monaco, Morocco, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, the United Kingdom, the United States, Uruguay, and Venezuela. See http://www.hcch.net/e/members/members.html (last updated Sept. 27, 2000).
establish a foundation for a worldwide regime for the free enforcement of civil judgments in exchange for the rigid regulation of assertions of personal jurisdiction. Accordingly, the proposed Hague Convention will oblige signatories to prohibit the exercise of certain bases of personal jurisdiction and will require the enforcement of only those judgments obtained through the application of a mandatory basis of jurisdiction. Other bases of jurisdiction may be allowed, but the enforcement of any resultant judgment would be discretionary.

The current deliberations raise high stakes for parties engaged in litigation seeking to enforce international human rights, international humanitarian law, and international criminal law through civil actions in domestic courts. Civil actions initiated by victims or the families of victims of human rights violations likely fall under the Hague Convention's proposed definition of "civil and commercial matters." This would include suits brought under the Alien Tort Claims Act (ATCA), the Torture Victim Protection Act (TVPA), the Anti-Terrorism Act (ATA), and the Foreign Sovereign Immunity Act (FSIA) in the United States. Similarly, the ability of victims of human rights abuses to bring claims for reparations in connection with criminal trials, as is allowed in many civil law jurisdictions, will also be affected by the Hague Convention's proposed provisions. If such criminal cases involve an extraterritorial assertion of jurisdiction, companion civil suits may be prohibited by the proposed Hague Convention's jurisdictional regime.


4. The Alien Tort Claims Act, 28 U.S.C. § 1350 (1994) [hereinafter ATCA], provides that federal courts may entertain "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." Cases have been brought under the ATCA involving claims of genocide, torture, summary execution, disappearance, arbitrary detention, crimes against humanity, and war crimes. See Beth Stephens & Michael Ratner, International Human Rights Litigation in U.S. Courts 5 (1996). The plaintiff must be an alien and the defendant may be a U.S. or a foreign citizen. See id. at 6.


6. The Anti-Terrorism Act of 1990 provides that any national of the U.S. injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold damages he or she sustains and the cost of the suit, including attorney's fees. 18 U.S.C. § 2333 (1994).

This Article addresses the impact the proposed Hague Convention will have on these lawsuits. The Article begins with a brief survey of the way in which such litigation proceeds in domestic courts in both civil and common law jurisdictions; examines the exercise of jurisdiction in these suits with reference to exemplary cases; and then recounts the genesis of the proposed Hague Convention and the impact it could have on civil human rights cases if the drafters do not include language exempting such litigation from the proposed jurisdictional regime. The Article demonstrates that if the Hague Convention is adopted without a special provision protecting human rights litigation, it could severely hamper one of the most innovative developments in international law and unduly interfere with present and future efforts by states to comply with duties under international treaty and customary law. The Article argues that the Hague Convention must not foreclose civil cases based on human rights violations, particularly given the importance to victims of civil redress in domestic courts and the paucity of legal institutions in which victims of human rights abuses can seek civil redress from responsible individuals. Finally, the Article suggests adjustments to the draft under consideration and presents a proposal for interpretation that will disarm these threats, leave intact existing avenues for the civil redress of human rights violations, and enhance the enforcement of international norms in national courts.

II. HUMAN RIGHTS LITIGATION IN DOMESTIC COURTS

In the last two decades, survivors of human rights abuses have sought to enforce human rights norms through litigation in national courts, in part because of the lack of effective and accessible enforcement regimes at the international level. This general phenomenon has taken different forms in common law and civil law systems. In civil law countries, actions to enforce international human rights norms generally proceed as criminal suits prosecuted by representatives of the state. In such systems, the victims of the crimes in question may either commence or join these criminal suits as parties civiles. The primary remedy obtained is the punishment of the defendant, but victims may also seek civil reparations in connection with the criminal trial. In contrast, in the United States, actions to enforce international hu-

human rights norms have taken the form of civil suits initiated by the victims themselves or their representatives. The challenged acts are pleaded by the plaintiffs as torts, and the remedies are compensatory and, potentially, exemplary damages. This Part provides an overview of the way in which cases seeking to enforce international human rights norms have proceeded in domestic courts in these two systems with reference to exemplary cases and the jurisdictional bases under which such cases are brought.

A. Cases Seeking to Enforce International Human Rights in Civil Law Jurisdictions

The last two decades have witnessed a resurgence in prosecutions of international crimes throughout Europe at a rate not seen since immediately following the Second World War. Officials in civil law states are increasingly prosecuting individuals for extraterritorial violations of international law. Many of these cases involve the exercise of extraterritorial jurisdiction—either through the universality or passive personality principles—over the defendant. Prosecutions arising out of conflicts in Latin America, Europe, and Africa have been commenced in states such as Austria, Belgium, Denmark, France, Germany, Italy, the Netherlands, Senegal, and Switzerland against individuals who are alleged to have committed international crimes in other states.

9. As is commonly understood, a "tort" represents "a civil wrong for which a remedy may be obtained, usually in the form of damages." BLACK'S LAW DICTIONARY 1496 (7th ed. 1999). In contrast, a "crime" is considered a "social harm that the law makes punishable," and thus the state is charged with instituting proceedings against the accused in order to satisfy public justice. Id. at 377. Some human rights abuses, such as torture, manifest a dual character as both crimes and torts because they harm individual victims as well as society as a whole. See, e.g., Al-Adsani v. Gov't of Kuwait, 107 I.L.R. 536, 540 (Eng. C.A. 1996) ("In international law, torture is a violation of a fundamental human right, it is a crime and a tort for which the victim should be compensated.").

10. International law contains established principles for determining when a state may exercise jurisdiction over international offenses, particularly when those offenses also affect other states (e.g., when a state seeks to adjudicate acts committed extraterritorially). According to general international law, states may act with respect to a person accused of committing a crime on the basis of one of five jurisdictional principles. The "territoriality principle" applies when an offense occurs within the territory of the prosecuting state. The "nationality principle" permits jurisdiction when the offender is a national or resident of the prosecuting state. The "protective principle" permits the exercise of jurisdiction where an extraterritorial act threatens interests that are vital to the integrity of the prosecuting state. The "passive personality principle" permits jurisdiction where the victim is a national of the prosecuting state. And finally, the "universality principle" allows all states to prosecute perpetrators of certain violations of international law regardless of the nationality of the perpetrator, the nationality of the victim, or the place of commission. Contemporary cases seeking to enforce human rights norms may be brought on the basis of all five jurisdictional bases, although cases brought on the basis of either passive personality or universal jurisdiction are increasingly prevalent. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, introductory note (1987) (hereinafter RESTATEMENT OF FOREIGN RELATIONS); Harvard Draft Convention on Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. SUPP. 439 (1935); IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 305-09 (5th ed. Clarendon Press, 1998); Kenneth Randall, Universal Jurisdiction Under International Law, 66 TEX. L. REV. 785, 786 (1988).

11. For summaries of these cases, see REDRESS TRUST, UNIVERSAL JURISDICTION IN EUROPE: CRIMINAL PROSECUTIONS IN EUROPE SINCE 1990 FOR WAR CRIMES, CRIMES AGAINST HUMANITY, AND GENOCIDE 16-17 (1999); AMNESTY INT'L, THE PINOCHET CASE: UNIVERSAL JURISDICTION AND THE
Additionally, many countries have enacted domestic statutes specifically providing for the exercise of extraterritorial jurisdiction over grave international crimes. For example, Belgium has adopted legislation specifically enabling courts to prosecute violators of the Geneva Conventions and their Protocols. In February 1999, the Belgian parliament extended the principle of universal jurisdiction to genocide and crimes against humanity. Likewise, the French Code de Procédure Pénale codifies a form of passive personality jurisdiction by allowing for the assertion of extraterritorial jurisdiction when the victim is a French national. A number of Latin American states, in nations such as Brazil, El Salvador, Guatemala, Mexico, and Uruguay, allow for the assertion of extraterritorial jurisdiction where treaties so provide.

Many civil law jurisdictions provide for some form of intervention by the injured party in criminal proceedings. In such systems, the injured party can initiate a criminal proceeding where a prosecutor fails to act or in some cases can join a civil claim (action civile) to the criminal proceedings in order to claim compensation. When the victim constitutes himself as a partie...
civile, he may be empowered to act as a co-prosecutor and, as such, receives a number of procedural advantages, such as the right to employ the full investigatory facilities of the state, which would be unavailable to him in a strictly civil proceeding.\textsuperscript{19} When the victim constitutes himself as a partie civile, he is no longer considered a witness and thus cannot be examined without being offered counsel.\textsuperscript{20} Further, a partie civile can appeal the decision of the juge d'instruction and the court.\textsuperscript{21}

In asserting the role of partie civile, the victim can obtain relief, by way of reparation or restitution, within the context of a criminal trial.\textsuperscript{22} Once a civil judgment is issued, it can be executed wherever the defendant's assets are found under general principles governing the enforcement of foreign judgments or any operative enforcement treaty. Even common law courts that do not employ the partie civile mechanism may enforce the civil portion of these judgments on the basis of their procedures for the recognition and enforcement of foreign judgments.\textsuperscript{23}

Victims of human rights abuses are increasingly utilizing the partie civile system to seek legal redress.\textsuperscript{24} In many respects, this phenomenon is exemplified by the proceedings in Spain against Chilean General and self-appointed Senator for Life Augusto Pinochet and other Latin American former officials.\textsuperscript{25} In 1996, numerous groups and individuals commenced criminal proceedings in Spain arising out of the torture and disappearances of Spanish and other nationals in Argentina and Chile. The victims reserved the right to seek civil reparations at the conclusion of the criminal proceedings. The public prosecutors appealed the cases on various jurisdictional grounds, but the Spanish National Criminal Court (Audencia National) upheld jurisdiction in October 1998 on the basis of a Spanish law that allows for the exercise of criminal jurisdiction over acts committed abroad that amount to genocide or terrorism when this jurisdiction is provided for in Spanish law or when Spain is obliged to exercise such jurisdiction according to international law.

\textsuperscript{20} See id. at 698; A.V. Sheehan, Criminal Procedure in Scotland and France 22 (1975) (discussing the procedural advantages and disadvantages of partie civile system).
\textsuperscript{21} Jolowicz, supra note 17, at 10–11.
\textsuperscript{22} Sheehan, supra note 20, at 20–21.
\textsuperscript{23} See, e.g., Raulin v. Fischer [1911] 2 K.B. 93 (Eng.).
to international treaties. On the basis of this ruling, the Spanish courts requested Pinochet's extradition to Spain.

Following Pinochet's detention in the United Kingdom, a group of Chilean nationals residing in Belgium filed a criminal complaint against Pinochet requesting an international warrant for his arrest. Because the 1993 law codifying the principle of universal jurisdiction was not yet in force, the investigating magistrate ruled that customary international law provided for universal jurisdiction over crimes against humanity and allowed the petition. Likewise, in France, family members of victims of the Pinochet regime filed a criminal complaint against him, prompting the transmission of two additional arrest warrants to the United Kingdom.

B. Cases Seeking to Enforce International Human Rights in Common Law Jurisdictions

In contrast to the current trend in civil law jurisdictions, cases brought in the United States seeking to enforce human rights norms are not typically pursued as criminal actions despite the legal authority and, in some cases, obligation to do so. Against this general backdrop of government inaction, victims of human rights violations have, with a few noteworthy exceptions, been forced to pursue purely civil cases instead. Many such civil cases have been brought in the United States on the basis of several federal statutes specifically authorizing such litigation. This section identifies the handful of criminal prosecutions commenced in common law jurisdictions and then provides an overview of the ways in which victims of human rights abuses have sought civil redress in the United States.

1. Criminal Prosecutions in Common Law Jurisdictions

Attorney-General of Israel v. Eichmann marks the first major case brought under the principle of universal jurisdiction in a common law state outside of the immediate post-Second World War period. In asserting jurisdiction, the Supreme Court of Israel reasoned that the "power to try and punish a

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28. See Luc Reydam, International Decision, Belgian Tribunal of First Instance of Brussels (investigating magistrate), Nov. 8, 1998, 93 AM. J. INT'L L. 700 (1999) (discussing proceedings against Pinochet in Belgium). Similarly, Belgian proceedings were initiated against a Rwandan national, Vincent Ntezimana, after three additional Rwandan nationals were transferred to the International Criminal Tribunal for Rwanda. The victims joined the case as parties civiles. See REDRESS TRUST, supra note 11, at 21. Other proceedings have been brought in France. See generally Brigitte Stern, International Decision, French Tribunal de Grande Instance, 93 AM. J. INT'L L. 696 (1999); Brigitte Stern, International Decision, In re Javor and In re Munyeshyaka, 93 AM. J. INT'L L. 525 (1999) (discussing French cases in which French parties constituted themselves as parties civiles in order to commence criminal prosecutions).
29. See 36 I.L.R. 5 (Jm. 1961), aff'd, 36 I.L.R. 277 (S. Ct. 1962) (fmr.).
person for an offense...is vested in every State regardless of the fact that the offense was committed outside its territory by a person who did not belong to it."30

Since then, common law countries have undertaken a smattering of criminal prosecutions relying upon extraterritorial jurisdiction. The Canadian experience is instructive. For a fleeting period, the Canadian government adopted a policy of criminally prosecuting and deporting Canadian citizens found guilty of war crimes in Nazi-occupied Europe in response to recommendations of a Commission of Inquiry into Nazi War Criminals in Canada ("the Deschênes Commission").31 Accordingly, the Canadian government amended its criminal code to authorize a limited form of extraterritorial jurisdiction allowing for prosecutions of war crimes or crimes against humanity in which the individual accused was a Canadian citizen, a citizen of a country at war with Canada, or where the victim was a Canadian citizen or a citizen of an ally of Canada.32 In March 1994, the Supreme Court of Canada rendered its first decision under the 1987 amendment to the criminal code, upholding by a vote of four to three the acquittal of Imre Finta, who had been accused of committing war crimes and crimes against humanity against Hungarian Jews during the Second World War.33

In part as a result of what were perceived as prohibitively high standards established by the Finta case,34 the Canadian government announced in January 1995 a shift in its strategy for addressing the presence of individuals accused of committing war crimes and crimes against humanity. Under the new policy, instead of prosecuting individuals, the government would respond with administrative actions seeking the denaturalization, revocation of citizenship, and/or deportation of offenders.35

In contrast to some other common law jurisdictions,36 there are no significant criminal cases for torture and crimes against humanity in the...
United States despite the legality of such prosecutions. Pursuant to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Torture Convention"), the United States enacted a statute authorizing the exercise of universal jurisdiction by U.S. courts over torture committed extraterritorially. The statute grants jurisdiction where the alleged offender is a national of the United States or where the alleged offender is present in the United States, regardless of the nationality of either victim or offender. However, despite receiving credible information about the presence of human rights abusers within the United States, this statute has yet to be utilized.

2. Civil Suits in Common Law Jurisdictions

Given the apparent unwillingness of common law countries to initiate criminal prosecutions on the basis of universal jurisdiction, civil suits have become an important vehicle for victims of human rights abuses to enforce international law and obtain legal redress. In the United States in particular, victims of human rights violations have pursued federal civil cases alleging tort violations against human rights abusers a number of times over the last two decades. To proceed, U.S. federal courts must have both subject-matter jurisdiction over the claim and personal jurisdiction over the defendant. This section describes the statutory framework that governs these suits in the United States. It then discusses the two most important forms of personal jurisdiction in such cases brought against alien defendants—transient jurisdiction and doing-business jurisdiction. Finally, the section provides a brief overview of the way in which personal jurisdiction is exercised, noting that cases seeking to enforce human rights norms in domestic courts are often predicated on transitory or doing-business jurisdiction.

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37. This statute provides that

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

18 U.S.C. § 2340a (1994). Likewise, The Hostage Taking Act, 18 U.S.C. § 1203 (1994), provides for universal jurisdiction over any individual who, "whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act ...." See also United States v. Yunis, 924 F.2d 1086 (D.C. Cir. 1991) (holding that the Hostage-Taking Act provided a basis for exercising jurisdiction over an accused hijacker).

38. On several occasions, organizations working with refugee communities have presented the U.S. government with dossiers on individuals present in the United States who are accused of having committed torture. To date, the government has generally refused to act. Interview with Gerald Gray, Executive Director, The Center for Justice & Accountability, in San Francisco, Cal. (June 5, 2000). See, e.g., Coletta Youngers, The Pockets Ricochet, NATION, May 8, 2000, at 5 (discussing the intervention of the U.S. government to prevent torture prosecution).

39. See generally STEPHENS & RATNER, supra note 4 (analyzing civil human rights cases).
a. Subject-Matter Jurisdiction over Human Rights Claims in Courts

In the United States, cases seeking to enforce human rights norms proceed under several subject-matter jurisdiction statutes. Although the majority of such suits have been brought in federal court under the aforementioned statutes, they may also be pursued in state court, as jurisdiction over such suits is concurrent between state and federal courts. The most frequently invoked federal statute is the ATCA. The ATCA was a component of the Judiciary Act passed by the First Continental Congress to establish the federal court system. The statute was first applied to a claim involving international human rights norms in Filartiga v. Peña-Irala, in which a federal court found a Paraguayan national liable for acts of torture and summary execution.

More recently, the U.S. Congress passed the TVPA in order to carry out "the intent of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment." The House Report on the TVPA

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40. Although all judicial systems recognize the principle of personal jurisdiction, the concept of subject-matter jurisdiction is in many respects a unique feature of U.S. law with its roots in the American system of federalism. The October Draft Convention does not regulate subject-matter jurisdiction. The topic is discussed here because it is central to understanding the legal basis for pursuing cases seeking to enforce human rights norms in U.S. courts.

41. See, e.g., Alomang v. Freeport-McMoran, 97-1349 (La. App. 4 Cir. 3/4/98), 718 So. 2d 971, reh'g granted, 97-1349 (La. App. 4 Cir. 4/15/98), 718 So. 2d 971, 974 (class action in state court against a corporation accused of committing cultural genocide and environmental and other human rights violations in Indonesia).

42. See Filartiga v. Peña-Irala, 630 E2d 876, 887 n.22 (2d Cir. 1980) (noting that alien plaintiffs have a choice of jurisdictions in which to bring suit).

43. ATCA, supra note 4. The term "alien" is defined under federal law as a citizen or subject of a foreign government. 28 U.S.C. § 2502 (1994).


45. 630 E2d at 878 (" Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.").

46. Prior to Filartiga, the statute was "virtually ignored" for 200 years. STEPHENS & RATNER, supra note 4, at 7. See Bolchos v. Darrell, 3 E. Cas. 810 (D.S.C. 1795) (No. 1607) (finding jurisdiction over suit for restitution of property seized at war); Adra v. Clift, 195 E Supp. 827 (D. Md. 1961) (finding that kidnapping and internationally transporting a child on a false passport constitutes a violation of the law of nations).

47. TVPA, supra note 5. The statute provides that

An individual who, under actual or apparent authority, or color of law, of any foreign nation—subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Id. § 2(a). The definition of torture conforms to that in the Torture Convention. Id. § 3(b). The definition of extrajudicial killing is related to the definition in Common Article 3 of the Geneva Conventions: "the term 'extrajudicial killing' means a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Id. § 3(a).

noted that the Torture Convention is "enforcement-oriented" in that it "obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts" and that "[o]ne such obligation is to provide means of civil redress to victims of torture."\(^4\) The legislative history makes clear that the intent of Congress was to codify the Filartiga result and to extend the right of access to federal courts to U.S. citizens.\(^5\) This history also stresses the importance of protecting human rights around the world and of granting access to U.S. courts to victims of torture and extrajudicial killing.\(^6\)

With the Anti-Terrorism Act of 1990,\(^7\) the United States incorporated the international prohibition against terrorism into domestic law and provided for both criminal\(^8\) and civil\(^9\) penalties for offenders. The legislative history of this statute reveals an intent to thwart terrorism by enhancing the power of private citizens to combat acts of terrorism.\(^10\) Accordingly, the statute provides an express right to victims of international terrorist attacks (and so-called "indirect victims" such as survivors and heirs) to seek civil redress. Federal courts may seize assets within the jurisdictional reach of U.S. courts in order to render it unprofitable to engage in terrorist activities and to prevent terrorists from soliciting and maintaining assets within the United States.

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\(^{50}\) See id. at 4 ("Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.").

\(^{51}\) S. REP. NO. 102-249, supra note 48, at 3 (predicting that "torturers and death squads will no longer have a safe haven in the United States").

\(^{52}\) 18 U.S.C. §§ 2331-39 (1994). The statute addresses itself to "international terrorism," which is defined as activities that

- involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- appear to be intended-(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by assassination or kidnapping; and
- occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

18 U.S.C. § 2331(1). The Act also addresses the use of certain weapons of mass destruction. Id. § 2332a.

\(^{53}\) The statute grants the federal government the power to prosecute individuals accused of committing homicide or other related conduct against a U.S. national overseas, so long as it is determined that the offense "was intended to coerce, intimidate, or retaliate against a government or a civilian population." Id. § 2332a-d. See, e.g., United States v. Yousef, 927 F. Supp. 673 (S.D.N.Y. 1996).

\(^{54}\) The statute also provides that

- any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.


United States. The drafters also wished to ensure that victims were not left without a remedy, especially if, for evidentiary or other reasons, criminal charges could not or would not be brought.56

Finally, victims of human rights abuses may attempt to file suit directly against a responsible state under the FSIA.57 Most courts, however, have found that the FSIA immunizes nations from suit for violations under the terms of the statute. The statute provides that states are generally immune from suit except in any case, *inter alia,*

(1) in which the foreign state has waived its immunity either explicitly or by implication . . . (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States; . . . (5) . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that for-

56. See Rosenfeld, *supra* note 55, at 737 n.36.
57. 28 U.S.C. § 1330(a) (1994) states that

*The district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-07 of this title or under any applicable international agreement.*


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foreign state while acting within the scope of his office or employment . . . .

In 1996, Congress amended the FSIA to include a limited human rights exception to sovereign immunity. This provision allows for suit to be brought by foreigners against a state or one of its officials or employees if "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking" where the state has been designated a state-sponsor of terrorism. The commercial activity, direct effects, and human rights exceptions allow for the exercise of jurisdiction over acts that occurred abroad, so long as the constitutionally required jurisdictional contacts are satisfied.

b. Personal Jurisdiction over Human Rights Violators in U.S. Courts

U.S. jurisprudence regarding the due process principles applicable to the exercise of personal jurisdiction has evolved considerably since the U.S. Supreme Court first addressed this issue in 1877 in Pennoyer v. Neff. Originally, the Court based the exercise of in personam jurisdiction on notions of physical presence and power and the theory that states may exercise jurisdiction over any entity within their territory. In this century, however, the Court has increasingly analyzed personal jurisdiction using principles of due process and fairness, rather than territoriality. In the leading case on this subject, International Shoe v. Washington, the Court permitted the exercise of

59. 28 U.S.C. § 1605(a) (1994). Traditionally, foreign states were considered entirely immune from suit. See, e.g., Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812) (premising the common law rule of sovereign immunity on the "perfect equality and absolute independence of sovereigns"). Over time, however, the notion of absolute sovereign immunity gave rise to a more restricted immunity eventually codified in the FSIA, which grants sovereign immunity to states-engaged in public acts (jure imperii), but withholds it from states acting in their private or commercial activities (jure gestionis). See, e.g., Tate Letter, 26 DEPT ST. BULL. 984-85 (1952), reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 app.2, at 711-15 (1976).
63. See, e.g., Sugarman v. Aeromexico, Inc., 626 F.2d 270, 273 (3d Cir. 1980) (finding jurisdiction over tort claims arising from extraterritorial acts when defendant carried on commercial activities within the United States). See also Princz v. Federal Republic of Germany, 26 F.3d 1166, 1172-73 (holding lingering effects of personal injuries from slave labor insufficient to support the exercise of jurisdiction based upon the tort exception to the FSIA).
64. 95 U.S. 714 (1877).
jurisdiction over a nonresident corporation that was not served while present in the state so long as the defendant maintained certain "minimum contacts" with the jurisdiction such that the suit did not offend "traditional notions of fair play and substantial justice." Related to this notion is "doing-business jurisdiction," which is based on the theory that individuals or entities that carry on a certain level of business activity within a jurisdiction should be amenable to general jurisdiction there.

Despite this trend, however, the Court has found that exercising jurisdiction solely on territorial grounds remains fair from a due-process perspective. In *Burnham v. Superior Court of California*, the Court invoked the territoriality principle first articulated in *Pennoyer* and reaffirmed the continued validity of physical presence, however fleeting, as a sufficient basis for the exercise of general jurisdiction. *Burnham* involved domestic parties, but given the Court's analysis, it is likely that it would uphold the exercise of transient jurisdiction over a foreign defendant. *Burnham* has, in fact, been applied to uphold the exercise of transient jurisdiction over foreign defendants only temporarily in the forum. Thus, under current U.S. law, general jurisdiction over a foreign defendant may be exercised on the basis of either the defendant's presence in the forum or on the basis of the defendant's continuous, systematic, and purposeful activities in the forum.

The continuing vitality of personal jurisdiction on the basis of territoriality has been crucial to plaintiffs seeking to enforce human rights norms in U.S. courts. Personal jurisdiction in many such cases is based on transient jurisdiction. For example, the Second Circuit Court ofAppeals upheld transient personal jurisdiction over Radovan Karadžić, the self-proclaimed political leader of the Bosnian Serbs. Additionally, cases have been brought

67. Id. at 316.
68. See, e.g., Perkins, 342 U.S. 437, 445–46 (upholding personal jurisdiction over foreign corporation engaged in systematic and continuous activities in the forum).
70. See, e.g., Bourassa v. Desrochers, 938 E2d 1056, 1057–58 (9th Cir. 1991).
71. Transient jurisdiction is not a purely U.S. phenomenon. However, when the United Kingdom acceded to the Brussels Convention in 1978, the list of prohibited bases of jurisdiction was expanded to include transient jurisdiction as it was practiced in England and Scotland. See Civil Jurisdiction and Judgments Act, ch. 27, art. 3 (1982) (reproducing the text of the Lugano Convention and stating that the rule in that Convention which allows jurisdiction to be founded upon service of process while the defendant is temporarily in the United Kingdom does not apply under the Hague Convention).
73. See Kadić v. Karadžić, 70 F3d 232, 237 (2d Cir. 1995).
against non-resident corporations on the basis of general doing-business jurisdiction. For example, the Second Circuit Court of Appeals upheld personal jurisdiction in New York over Royal Dutch Shell, a British/Dutch company.74 Jurisdiction over individuals may be obtained on the basis of continuous, substantial, and systematic activities within the forum state.75

At the same time, cases within the United States have also been brought against defendants who would qualify as "resident" within the United States.76 This includes cases brought against corporations that are incorporated within the United States.77 Cases within contracting states and against "resident" defendants will be largely unaffected by the proposed Convention's jurisdictional regime because the Convention adopts as its general rule that individuals may be sued where they reside. Accordingly, judgments arising from such cases would benefit from automatic enforcement under proposed Article 26(1).

III. THE IMPORTANCE OF CIVIL REDRESS IN DOMESTIC FORA

Suits seeking civil redress in domestic courts play an important role in the worldwide effort to enforce international norms concerned with the protection of international human rights. Civil suits provide a mechanism by which individual victims can initiate and control the legal process. They contribute toward the rehabilitation of victims, the deterrence of future abuses, and the enunciation of norms in ways that other forms of redress may not. Despite efforts to create mechanisms of accountability for human rights abuses on the international or regional level, few international institutions are directly accessible to individual victims. Further, many of these international institutions are quasi-judicial bodies that cannot hold individuals accountable or issue enforceable damage awards on behalf of individual victims. For example, the ad hoc tribunals created during the mid-1990s for Rwanda and Yugoslavia, while extremely successful in articulating norms of international law, are able to prosecute only a fraction of violators and are not empowered to provide victims with pecuniary or other material redress. As a result, domestic courts may provide victims with a form of redress that is unattainable in international and regional fora. Finally, civil suits in do-

75. See, e.g., Byung Wha An v. Doo-Hwan Chun, No. 96-35971, 1998 U.S. App. LEXIS 1303, at *5 (9th Cir. Jan 28, 1998) (finding that defendant's contacts were insufficient for the exercise of general or specific jurisdiction in a case involving claims of torture and summary execution against a Korean official).
76. See, e.g., Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (allowing claim against defendant, a former military ruler of Haiti, who was a resident in Florida).
Domestic courts contribute to the fulfillment of states' obligations under international law to provide victims of human rights violations with civil reparations. Given the important goals satisfied by civil redress, the current limitations on international enforcement mechanisms, and the right of victims to reparations, it is vital that victims of human rights violations retain the ability to bring civil claims within domestic fora.

A. The Importance of Civil Redress

Civil redress represents a valuable tool in the enforcement of international human rights norms and the rehabilitation of victims. First and foremost, given that the effectiveness of criminal remedies depends upon state discretion,78 civil cases can be commenced where the government with criminal jurisdiction over the offender is unwilling to prosecute for evidentiary or political reasons.79 Further, even where criminal prosecutions occur, civil suits provide an effective complement to such proceedings as they "offer victims of violence a legal remedy which they control and which may satisfy needs not met by the criminal law system."80 Civil cases also involve the victim directly in the legal process. The victim chooses to initiate the proceeding and then plays a central role throughout. Attorneys and advocates working with victims of human rights abuses have observed that this active participation within the legal system can be empowering and can restore a sense of justice within victims of grave human rights abuses for whom the courts of their countries provided no recourse.81

Tort law seeks to achieve a number of goals that are to some degree mutually reinforcing.82 The most salient goal is the financial indemnification of the plaintiff in response to proven losses that society believes victims should

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78. See Schwartz, supra note 48, at 333–34.

The executive may decide, rightly or wrongly, not to prosecute certain crimes—even though it finds them abhorrent—because official foreign policy is committed to backing or appeasing certain regimes. In such situations, even the executive might favor a cause of action beyond its control to redress individual injuries.

79. Id.

80. See John F. Murphy, Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution, 12 Harv. Hum. Rts. J. 1, 47–49 (1999) (arguing in favor of civil suits over criminal suits given, in part, the lower standards of proof and the increased availability of discovery devices).

not have to bear. In theory at least, this occurs through the restoration of the status quo ante—i.e., the return of the plaintiff to a position that is, as nearly as possible, equivalent to his position prior to the commission of the tort. Thus, the most common remedy provided by a civil suit is an award of money damages, which includes compensation for non-pecuniary but legally recognized harms, such as pain and suffering, solatium, or so-called moral damages.

To be sure, in the context of human rights violations, any award of money damages will be incommensurate to the harm the individual victim suffers, as a money judgment is clearly no equivalent to the harm suffered. The impact of torture on the life of a victim can never be fully quantified. However, money damages can compensate the victim for pain, emotional distress, bodily harm, and lost wages and earning potential. Further, such damages will assist victims in obtaining the therapy they need for as complete a rehabilitation as possible.

As an additional goal, tort law seeks to deter unreasonably dangerous or unwelcome conduct on the theory that defendants, who do not want to pay money damages, will refrain from engaging in the unreasonable behavior.

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83. Restatement (Second) of Torts, supra note 82, § 901.
84. See Dan B. Dobbs, Handbook on the Law of Remedies: Damages, Equity, Restitution 135 (2d ed. 1993) (stating that "[t]he damages remedy is a judicial award in money payable as compensation to one who has suffered a legally recognized injury or harm.")
86. See, e.g., Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409, at *6 (S.D.N.Y. Apr. 8, 1996) (noting that the judge had seen "no other case in which monetary damages were so inadequate to compensate the plaintiffs for the injuries caused by a defendant" and arguing that "one can not place a dollar value on the lives lost as the result of the defendant's actions and the suffering inflicted on the innocent victims of his cruel campaign. Unfortunately, however, a monetary judgment is all the Court can award these plaintiffs."); see also Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence 102–05 (1999).
87. Dobbs, supra note 84, § 8.1; see also Study on Reparations (1993), supra note 82, at 57.

Compensation shall be provided for any economically assessable damage resulting from human rights violations, such as (a) Physical or mental harm; (b) Pain, suffering and emotional distress; (c) Lost opportunities, including education; (d) Loss of earnings and earning capacity; (e) Reasonable medical and other expenses of rehabilitation; (f) Harm to property or business, including lost profits; (g) Harm to reputation or dignity; (h) Reasonable costs and fees of legal or expert assistance to obtain a remedy.

Id.

88. Tort law manifests both species of deterrence: specific and general. Specific deterrence operates against individuals who have already engaged in undesirable conduct, whereas general deterrence is directed at society at large in an attempt to prevent others from engaging in such conduct. See George Norris Stavis, Collecting Judgments In Human Rights Torts Cases—Flexibility For Non-Profit Litigators?, 31 COLUM. HUM. RTS. L. REV. 209, 217 (1999) ("Vigorous tort litigation against such persons may reduce the incidence of such acts, as it does in more conventional arenas. On the other hand, failure to prosecute and collect such claims may embolden wrongdoers to the notion that their deeds bear no consequences from the international community."). As with all torts, the contribution of civil suits against human rights abusers toward the deterrence of human rights violations is impossible to measure. It could be argued that a human rights violator is unlikely to be deterred by any legal sanction. Even so, the pursuit of civil suits still contributes to the rehabilitation of victims and may at least prevent perpetrators from leaving or investing outside of their home countries for fear of either being sued or of having their assets
In other words, tort law seeks to make the risk of injury appear more costly than the value of the undesirable conduct itself. Suits within national courts may also serve to deter perpetrators from travelling or investing abroad, thus confining them in their home countries and depriving them of a safe harbor elsewhere.

To this end, national systems may also allow for the award of exemplary or punitive damages.89 The theory is that in some cases, compensatory damages alone would be insufficient to effectuate deterrence. In addition to this deterrent function, exemplary damages may also be viewed as expressly punitive. In the United States in particular, intentional torts manifesting willful or wanton behavior can give rise to punitive damages designed to punish the defendant without reference to the amount of harm actually sustained by the plaintiff. Exemplary damages may also be justified as a reflection of the aggravated harm suffered by the plaintiff;90 or they may redress incalculable economic harm or financial losses not otherwise accounted for, such as attorneys’ fees.

Civil suits have the potential to revive the dignity of victims and satisfy a demand for justice.91 In this way, the pursuit of a civil suit may contribute to the satisfaction of the victim—a notion that is deemed by some to be an independent objective of the tort system.92 As a related function, tort law is concerned with the definition and defense of social norms by expressing a consensus about the way in which people should relate to and interact with each other and by communicating that consensus to the general populace.93 A judgment ordering the payment of money damages necessarily includes an

89. See Stephens, supra note 80, at 582 ("The line between criminal law and tort law is blurred by the imposition in tort damages of punitive damages, which address the moral culpability of the tortfeasor."). For examples of such punitive damage awards, see Paul v. Avril, 901 F. Supp. 330, 336 (S.D. Fla. 1994) (awarding punitive damages to reflect "the egregiousness of the defendant’s conduct, the central role he played in the abuses, and the international condemnation with which these abuses are viewed"); Filartiga v. Peña-Irala, 577 F. Supp. 860, 866 (E.D.N.Y. 1984) ("Punitive damages are designed not merely to teach a defendant not to repeat his conduct but to deter others from following his example.").


91. See André Tunc, Introduction, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, pt. I, at 1–96 (André Tunc ed., 1983) ("[T]he law of tort should serve the fulfillment of justice, at least if a compensatory justice, not a punishing one, is contemplated.").

92. See Stoll, supra note 90, at 9.

93. See Harold Hongju Koh, Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation, 22 Tex. INT’L L.J. 169, 185 (1987). In this way, a civil judgment “awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law” condemning the international crime. Id.
assessment that a legal right of the plaintiff was violated, and each individual expression of liability "adds its voice to others in the international community collectively condemning [such acts] as an illegitimate means of promoting individual and sovereign ends."94 In comparison to a criminal suit, a civil suit may better preserve a collective memory and "permit a more thorough airing of victims' stories . . . along with an expression of judicial solicitude."95 In this regard, a criminal proceeding may be focused on the culpability of the perpetrator at the expense of the harm suffered by the victim.

This is not to say that civil redress in domestic courts is necessarily superior to other forms of redress or other accountability mechanisms available to victims of human rights violations. Rather, civil redress in domestic courts constitutes an important component within a comprehensive and worldwide regime for the enforcement of human rights. This regime operates at all levels—international, regional, and municipal—and includes a variety of accountability mechanisms, including judicial (civil and criminal), administrative, geo-political, retributive, restorative, and symbolic ones.96 Each of these various mechanisms has certain strengths and weaknesses, but if international norms are to have any meaning, all should be available to victims in search of redress.

B. The Dearth of International Enforcement Mechanisms

In the last decade, there have been significant and important developments toward the creation of international institutions to ensure accountability for human rights violations and end the culture of impunity enjoyed by human rights violators. These efforts include the establishment of the two ad hoc criminal tribunals to investigate and prosecute human rights violations that occurred in the former Yugoslavia97 and Rwanda;98 the future

94. Id.; see also Stephens, supra note 80, at 604-05 ("[A] judicial finding of liability puts a formal, official stamp upon a judgment, which may at least partially satisfy the need for acknowledgement of the wrong inflicted on the victims."). The Restatement of the Law of Torts recognizes that in determining damages, one objective is "to determine rights." RESTATEMENT (SECOND) OF TORTS, supra note 82, § 901(b).
95. Alvarez, supra note 81, at 2102.
establishment of the permanent International Criminal Court (ICC),\(^9^9\) and
the proposed establishment of international courts to prosecute crimes
against humanity committed in Cambodia in the 1970s,\(^1^0^0\) and crimes
against humanity, war crimes, and other serious violations of international
humanitarian law committed during the civil war in Sierra Leone.\(^1^0^1\) These
international institutions, however, by necessity and design can and will
only address a limited number of perpetrators and conflicts. In fact, they are
specifically designed to complement, not supplant, the work of national ju-
dicial systems.\(^1^0^2\)

Ad hoc tribunals established to respond to the crises in the former Yugo-
slav and Rwanda will never provide complete accountability for human
rights violations. Their jurisdiction is limited substantively, temporally, and
directionally; the jurisdiction of the two tribunals is limited to interna-
tional criminal law violations committed in the former Yugoslavia and
Rwanda since 1991 and in 1994, respectively. As indicated by their statutes,
and as their indictments attest, both tribunals generally concentrate on
prosecuting the most serious violations of international law\(^1^0^3\) committed by
individuals high in the chain of command or certain exemplary cases where
the law is in need of clarification.\(^1^0^4\) It is likely that the temporal and geo-
graphic jurisdiction of a tribunal established to try individuals responsible
for violations of international law committed in Cambodia will be equally
restrictive.\(^1^0^5\) Further, the establishment of the two ad hoc tribunals by the
U.N. Security Council required a virtually unprecedented international con-
sensus.\(^1^0^6\)

Although the two ad hoc institutions are fully operational, apprehending
indictees—particularly those from the former Yugoslavia—remains an on-
going impediment to justice for victims. For example, Radovan Karadžić
has been wanted since 1995 by the International Criminal Tribunal for the
Former Yugoslavia (ICTY) on charges of genocide, crimes against humanity,


\(^{102}\) See Yugoslavia Statute, supra note 97, art. 9(1) ("The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law . . . .").

\(^{103}\) See, e.g., id. art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law . . . .").

\(^{104}\) See, e.g., Indictment, Prosecutor of the Tribunal v. Kunarac, et al., Case No. IT-96-23-I (June 26, 1996) (seeking to clarify the status of rape as a war crime and a crime against humanity).

\(^{105}\) See U.N. Agrees to Limit Scope of Khmer Rouge Prosecution, JAPAN ECONOMIC NEWSWIRE, KYODO NEWS SERVICE, July 11, 2000 (noting that the Cambodian draft bill to try members of the Khmer Rouge was to be amended to allow for the trial of those "senior leaders of Democratic Kampuchea [the Khmer Rouge] and those who were responsible for crimes and serious violations").

\(^{106}\) Stephens, supra note 80, at 591.
and violations of the laws or customs of war.107 Meanwhile, a number of Bosnian victims sued Karadžić in the United States under the ATCA and the TVPA for acts of genocide, war crimes, torture, extrajudicial killing, and other violations of fundamental human rights committed by forces in the former Yugoslavia under the defendant’s command and control.108 Given Karadžić's continued evasion of the ICTY, a U.S. civil judgment may be the only justice achieved by his victims.109

The jurisdictional reach of the ICC will be similarly limited. First, pursuant to the principle of complementarity, the ICC will operate only when the domestic court with jurisdiction is unable or unwilling to prosecute.110 Further, the ICC will be limited to criminal prosecutions referred to the prosecutor by States Parties to the its statute or the U.N. Security Council, or commenced by the prosecutor after having received authorization from the ICC Pre-Trial Chamber.111 The court will only be able to proceed if the state in which the crime was committed or the state of the accused has ratified the statute. And, cases that are being investigated by a national court or that are not “of sufficient gravity” are considered inadmissible under Article 17 of the Statute.112

Institutions based on the U.N. Charter, international multilateral treaties, or regional agreements typically address state responsibility and norm compliance but do not assign liability to individual defendants, generate enforceable remedies, or provide victims with a judicial forum in which to bear witness and confront their abusers.113 For example, the Human Rights Committee (“the Committee”) of the International Covenant on Civil and


108. See Amended Complaint for Genocide; War Crimes and Crimes Against Humanity; Summary Execution; Forced Disappearance; Torture; Cruel, Inhuman and Degrading Treatment; Wrongful Death; Assault and Battery; and Intentional Infliction of Emotional Harm, Doe v. Karadžić, No. 95 Civ. 0878 (S.D.N.Y. filed June 30, 1997); Kadić v. Karadžić, 70 F.3d 232 (2d Cir. 1995). The defendant was personally served with the summonses and complaints during two separate visits to New York City in early 1993, and the Court of Appeals sustained this assertion of civil jurisdiction. Id. at 248. Both the U.S. Justice and State Departments supported the exercise of jurisdiction over the defendant. See Statement of Interest of the United States, Doe v. Karadžić, Nos. 94-9035 and 94-9069 (2d Cir. Sept. 13, 1995).


111. Id. arts. 13-15.

112. Id. art. 17(1)(d). See COMM. ON INT’L HUMAN RIGHTS LAW AND PRACTICE, INT’L LAW ASS’N, FINAL REPORT ON THE EXERCISE OF UNIVERSAL JURISDICTION IN RESPECT OF GROSS HUMAN RIGHTS OFFENSES 10 (2000) (emphasizing the role to be played by domestic courts in exercising extraterritorial jurisdiction over international crimes given the limited jurisdiction of the ICC); see also ICC Statute, supra note 99, Preamble (“It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”).

113. The International Court of Justice only adjudicates disputes between states. See Statute of the International Court of Justice, art. 34(1), 59 Stat. 1055, 1059 (1945) (“Only states may be parties in cases before the Court.”).
Political Rights\(^{114}\) (ICCPR) is one of the few international treaty-based bodies empowered to receive human rights complaints from individuals.\(^{115}\) The Committee can entertain communications from victims of violations of the ICCPR at the hands of a State Party, but the Committee cannot consider violations by private entities rather than states themselves.\(^{116}\) Not all Parties to the ICCPR have ratified the Optional Protocol, and the Committee may not receive complaints against States Parties that have not done so.

Further, the Committee is not an adjudicatory body. Instead, it employs a policy of constructive dialogue that limits the Committee to "forward[ing] its views" to the individual and government concerned\(^{117}\) and to seeking "explanations or statements clarifying the matter."\(^{118}\) There is no judicial process, confrontation between the parties, investigation, oral hearings or formal judgment, and no perpetrator is identified or held individually liable. The Committee can recommend specific remedies for victims, but it has little leverage to ensure that states implement these recommendations. As such, the case is effectively closed once the Committee forwards its views.

Individuals may convey communications to the U.N. Sub-Commission on the Promotion and Protection of Human Rights\(^{119}\) ("the Sub-Commission") alleging human rights abuses within both member and non-member states.

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115. See generally Theo C. Van Boven, Protection of Human Rights through the United Nations System, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 46, 49 (1984) ("[T]he only procedure that is operative and intended to deal with the human rights concerns of individuals is found in the Optional Protocol to the International Covenant on Civil and Political Rights."). Another such procedure was created by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex 39, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter Torture Convention]. Article 17 of the Torture Convention established the Committee Against Torture to review State Party submissions and conduct cooperative investigations. Under Article 21 of the Torture Convention, States Parties may also empower the Committee Against Torture to consider submissions from other States Parties claiming that they are not fulfilling their obligations under the Torture Convention, and under Article 22, States Parties may empower the Committee Against Torture to consider communications from individual victims claiming violations by States Parties.

116. See Optional Protocol, supra note 114. According to Article 1 of the Optional Protocol, in order for a complaint to be admissible, the complainant must claim to be a victim of a violation of the Covenant by a State Party that has ratified the Protocol. Articles 2 and 5(2)(b) counsel that the Committee shall not consider any communication unless it has ascertained that all available local remedies have been exhausted, unless such remedies are "unreasonably prolonged." Id.

117. Optional Protocol, supra note 114, art. 5(4).

118. Id. art. 4(2).

119. The U.N. Commission on Human Rights established the Sub-Commission on the Promotion and Protection of Human Rights (originally named the Sub-Commission on Prevention of Discrimination and Protection of Minorities), U.N. ESCOR, 4th Sess., Supp. 3, at 4, U.N. Doc. E/259 (1947). The petition is considered first by a Working Group of the Sub-Commission, which in turn forwards acceptable cases to the full Sub-Commission, which decides whether to forward the case onto the Commission. These proceedings are conducted in near total confidentiality.
This is the only U.N. procedure capable of accepting individual petitions.\textsuperscript{120} In order for such petitions to be admissible, they must be submitted within a reasonable time after the exhaustion of local remedies, provided such remedies are "effective and not unreasonably prolonged."\textsuperscript{121} This procedure was designed for the consideration of systematic violations of human rights by states, as opposed to individual or isolated violations.\textsuperscript{122} Allegations of singular incidents involving human rights violations will be considered as evidence of such patterns if they are of sufficient quantity. However, these individual cases do not give rise to judgments or remedies in and of themselves.\textsuperscript{123} In fact, the Sub-Commission may refuse to consider a situation that is not sufficiently serious or systematic, notwithstanding that a violation has clearly occurred.\textsuperscript{124}

Further, the authors of such communications are denied direct involvement in the process of review; once a communication is filed the dispute becomes a confidential matter between the Sub-Commission (or the entire Commission) and that state.\textsuperscript{125} The outcome may be a decision by the entire Human Rights Commission to conduct a thorough study of, or investigation within, the state complained against, with or without the consent of the state. Despite the potential of such bodies, international adjudicatory mechanisms in the U.N. system remain inherently ineffective.\textsuperscript{126}

Even regional human rights fora are not adequate substitutes for civil redress in national courts. The Inter-American Court of Human Rights ("the Inter-American Court"), for example, can issue binding decisions and award compensation, but is not directly accessible to victims.\textsuperscript{127} Rather, individuals who have exhausted local remedies\textsuperscript{128} must first submit their case to the

\textsuperscript{122} U.N. ESCOR, 24th Sess., 627th mtg. at 50, U.N. Doc. E/CN.4/Sub.2/323 (1971) ("Communications shall be admissible only if, after consideration thereof, . . . there are reasonable grounds to believe that they may reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.").
\textsuperscript{123} See Shelton, supra note 121, at 60.
\textsuperscript{124} See id. at 61.
\textsuperscript{125} See id. at 63--64.
\textsuperscript{126} One noted commentator has observed that: "Although the UN has developed a comprehensive set of international norms for the promotion and protection of human rights, its system of actual implementation and supervision is still rudimentary. At national levels well-developed, independent judicial systems and rules may exist . . . . Although the UN might be able to provide a remedy in certain cases and situations, this can only be considered a supplemental or complementary avenue of redress. The primary and most direct remedy should ideally be available at the national level, and recourse should be sought at the international level only where domestic remedies are inadequate and ineffective.

Van Boven, supra note 115, at 55.

\textsuperscript{128} See American Convention on Human Rights, Nov. 22, 1969, arts. 46--47, Series no. 36, at 1, Or-
Inter-American Commission on Human Rights ("the Inter-American Commission").129 This body accepts communications from the state concerned, seeks a resolution of the matter by "friendly settlement,"130 and issues a report to other member states setting forth facts and conclusions.131 At this point, the Inter-American Commission may, at its discretion, forward a particular case to the Inter-American Court so long as the state in question has specifically accepted the Inter-American Court's adjudicatory jurisdiction.132 The Inter-American Commission then becomes counsel of record in the case, and the individual petitioner retains no formal role in the process.133 Perhaps most importantly, the Inter-American Court can only address state responsibility, not individual liability, and thus cannot consider violations by private actors unless those persons are acting under color of law or are allowed to act with impunity.134 If the Inter-American Court determines that there has been a violation of the American Convention by the state involved, it may issue a declaratory judgment and order remedial actions such as provisional measures or reparations.135

Even the newly empowered European Court of Human Rights ("the European Court"), operating under the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended in 1998 ("the European Convention"),136 is limited in the forms of redress it can offer to individuals. Under Article 34, "any person, non-governmental organization or group of individuals" may submit applications directly to the European Court, whose decisions are binding.137 Cases are admissible, however, only after all domestic remedies have been exhausted.138 The judgments of
the European Court cannot be enforced directly in the national courts of the European Convention's signatories. The European Court can award "just satisfaction" to the injured party if the "internal law of the High Contracting Party concerned allows only partial reparation to be made," but this award is to be paid by the state, not the individuals directly responsible.

Finally, members of the Organization of African Unity are in the process of establishing an intergovernmental human rights court to complement the African Commission on Human Rights and Peoples' Rights, which can accept communications concerning widespread violations of the African Charter on Human and Peoples' Rights.

The limitations of regional and international accountability mechanisms render national courts vital human rights mechanisms. Indeed, many of the statutes and treaties governing these international bodies specifically identify the primary role to be played by domestic courts in bringing human rights violators to justice. Further, a network of national courts that can prosecute perpetrators is already in existence; therefore, there is no need to rely on international political will to build additional international institutions.

C. The Right to Reparations

Nations have pledged among themselves to enforce human rights norms, protect the rights of victims of crime, and cooperate in the detec-

140. European Convention, supra note 136, art. 41.
142. Id., arts. 55-56.
143. Aceves, supra note 27, at 177.
144. Id. at 132.
145. As was noted by the U.S. government in its submission in the Filartiga case, "a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights." Memorandum for the United States Submitted to the Court of Appeals for the Second Circuit in Filartiga v. Peña-Irala, reprinted in 19 I.L.M. 585, 604 (1980) (No. 79-6090) [hereinafter Filartiga Memorandum]. The Filartiga court noted that the interests of the United States in the case were substantial:

In order to take the international condemnation of torture seriously this court must adopt a remedy appropriate to the ends and reflective of the nature of the condemnation .... If the courts of the United States are to adhere to the consensus of the community of humankind, any remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe.

Filartiga v. Peña-Irala, 577 F. Supp. 860, 863 (S.D.N.Y. 1984); Jeffrey M. Blum & Ralph G. Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Peña-Irala, 22 Harv. Int'l L.J. 53, 86-87 (1981) (noting that "the existence of international norms means that the violator's presence in the forum state is itself an effect upon that state. His presence is likely to become a source of embarrassment internationally, and can even inspire disturbances domesticaly," and that "[a] refusal to allow victims redress in the courts only compounds the problem by casting doubt upon the forum state's efforts 'to ensure that any person whose rights or freedoms ... are violated shall have an effective remedy.'" (quoting ICCPR, supra note 114, art. 2(3)(a)).
tion and prosecution of persons suspected of having committed international crimes. In keeping with these overarching duties, a right to reparations on the part of victims of human rights violations appears in numerous multilateral instruments. Specifically, these treaties and declarations obligate states to provide victims with legal redress, judicial access, and an enforceable right to fair and/or adequate compensation. For example, the Universal Declaration of Human Rights, the ICCPR, the American Convention, and the Torture Convention all require states to provide effective


147. Universal Declaration of Human Rights art. 8, G.A. Res. 217 (III), U.N. GAOR, U.N. Doc. A/810, at 73 (1948) (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).

148. According to Article 2(3) of the ICCPR:

Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.

ICCPR, supra note 114, art. 2(3).

149. The American Convention obliges signatories to ensure that every person has the right to a hearing to determine his rights and obligations of a civil nature. American Convention, supra note 128, art. 8.1. See also Velasquez Rodriquez Case, supra note 134, at 324. The Inter-American Court noted that: the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction . . . implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.

Id.

150. The Torture Convention requires each State Party to take such measures as may be necessary to establish its jurisdiction over offences. More specifically, Article 14 of the Torture Convention states:

(1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation. (2) Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

Torture Convention, supra note 115, art. 14. These provisions apply mutatis mutandis to acts of cruel, inhuman and degrading treatment or punishment: “the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.” Id. art. 16.
remedies within their national courts\textsuperscript{151} for victims of violations of fundamental rights guaranteed by those instruments.\textsuperscript{152}

Although it could be argued that such provisions are applicable only when it is the State Party that is responsible for the treaty violations, none of these provisions specifically distinguishes between individuals who are harmed within or without the territory of the particular state.\textsuperscript{153} Rather, all citizens\textsuperscript{154} of a Contracting State are entitled to a remedy if a treaty creates reciprocal access to courts of both states. The Torture Convention in particular emphasizes the importance of providing monetary compensation for victims.\textsuperscript{155} This grant of compensation must be a right; it is not sufficient

\textsuperscript{151} At the time of ratification, the United States adopted a reservation with respect to Article 14 of the Torture Convention indicating "the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party." Multilateral Treaties, Deposited with the Secretary General: Status as of 31 December 1992, U.N. Doc. ST/LEG/SER.E/18 (Vol. I), U.N. Sales No. E. 00.V.2 (2000).

\textsuperscript{152} This reservation indicates that the United States intended to provide a right of action for acts of torture committed only in territory under U.S. jurisdiction. The legality of such reservations has been questioned. See William A. Schabas, \textit{Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?}, 21 BROOK. J. INT’L L. 277 (1995). In any case, the passage of the TVPA effectively nullifies this reservation as it provides a cause of action within U.S. courts for torture committed overseas. See \textit{supra} text accompanying note 47.

\textsuperscript{153} The American Convention, in pertinent part, states:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce such remedies when granted.

\textit{American Convention, supra} note 128, art. 25. \textit{See also id.}, art. 8.1 ("Everyone has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . . for the determination of his rights and obligations of a civil, labor, fiscal or any other nature.") (emphasis added); \textit{European Convention, supra} note 136, art. 13.

\textsuperscript{154} \textit{See, e.g., American Convention, supra} note 128, art. 1.1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination . . . .") (emphasis added); ICCPR, \textit{supra} note 148, art. 2(1). In fact, the \textit{travaux preparatoires} of the ICCPR indicate that the term "any person" in Article 2(2) encompasses "citizens, nationals, persons of foreign nationality or stateless persons." M.J. Bossuyt, \textit{Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights} 50 (1987). The U.S. reservation in this regard, see \textit{supra} note 151, suggests that these provisions are open to multiple interpretations.

\textsuperscript{155} One U.S. court has explicitly interpreted the provisions of the ICCPR to grant citizens of States Parties reciprocal access to the courts of other States Parties. \textit{See} Kazi v. Dubai Petroleum Co., 961 S.W.2d 313, 316 (Tex. Ct. App. 1st Div. 1997) (citing with approval the affidavit of plaintiff's expert witness, stating that "[w]here the covenant employs terms like 'everyone' or 'all persons,' it refers not only to citizens of the State whose act or omission is at issue, but to all persons subject to its jurisdiction, irrespective of their nationality, and that such a covenant 'accords civil rights to 'everyone,' to 'all persons' . . . but it grants political rights such as voting, election to office, and eligibility for public service in one's own country only to 'every citizen,'" and holding that "the citizens of India are entitled . . . to a fair hearing by a competent independent and impartial tribunal established by law."). \textit{Aff'd by} Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71 (Tex.S.Ct. J. 2000).

\textit{See, e.g., Torture Convention, supra} note 115, art. 14(1). The drafting history of the Torture Con-
that compensation can be extended as an *ex gratia* gesture.\(^{156}\)

To be sure, some of these treaties do not specifically require that victims be granted access to an adversary process or to judicial review. In some cases a compensation commission or other non-judicial body might be sufficient. In many national systems, however, the judiciary represents the only forum in which to bring such claims for compensation against those directly responsible. For example, in the United States, victims of human rights abuses must seek civil redress and damages within federal or state courts, although non-monetary administrative remedies are also available.

Further, many of these instruments specifically obligate signatories to assert criminal jurisdiction over violators while providing that signatories must also recognize the victim’s “right to a remedy.” In order to avoid superfluity, the inclusion of both criminal and remedial duties suggests a reading that these “right to a remedy” provisions refer to non-criminal enforcement mechanisms, such as civil redress.

Some interpretations of these human rights treaties have recognized the duty of states to provide victims of violations with civil redress for the harms that befell them. For example, in one noteworthy (though unique) case, the Federal Supreme Court of Switzerland recently acknowledged and fulfilled obligations under the Torture Convention when it ordered the release of assets from Swiss banks in execution of the judgment obtained in the *Marcos* litigation.\(^{157}\) In so ruling, the Federal Supreme Court of Switzerland cited Article 14 of the Torture Convention for the proposition that States Parties must ensure that the victim of torture receives indemnification and has an actionable right to fair and reasonable compensation, including the means for rehabilitation that is as complete as possible . . . . According to these provisions [in the Torture Convention and other international human rights treaties], victims of serious human rights violations are entitled to compensation and to a fair trial, in which they can assert their claims for compensation.\(^{158}\)

Additionally, the Inter-American Commission’s and Inter-American Court’s opinions concerning the legality of national amnesty laws in Latin America

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\(^{156}\) J. HERMAN BURGERS & HANS DANIELIUS, THE UNITED NATIONS CONVENTIONS AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORMURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 68 (1988). Moreover, delegations were adamant that “all other forms of claims for compensation—with the exception of those of a purely personal nature—should be open to the victim’s heirs as successors.” *Id.* at 147.

\(^{157}\) BURGERS & DANIELIUS, supra note 155, at 146.

\(^{158}\) *In re* Federal Office for Police Matters, 1A.87/1997/err, ¶ 7(c) and (dd) (Fed. Sup. Cc., Dec. 10, 1997) (Switz.).
that extinguish civil and criminal liability have decried the complete impunity generated by such amnesties. For example, in *Garay Hermosilla v. Chile*,\(^ {159}\) the petitioners, all victims of human rights abuses perpetrated by Chilean officials, asked the Inter-American Commission to declare that Chile, by enacting a blanket amnesty, had violated Article 25 of the Inter-American Convention, which provides that:

(1) Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. (2) The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.\(^ {160}\)

The Inter-American Commission declared that in light of these rights, Decree Law 2.191 was incompatible with the obligations of Chile under the American Convention, including Articles 25, 1.1, and 8.1. The Inter-American Commission advised that such amnesties deprive individuals of “their right to due process for their just complaints against persons who had committed excesses and acts of barbarism against them.”\(^ {161}\) Further, the Inter-American Commission found that the national reparations provided to the petitioners were insufficient to satisfy the obligations of the American Convention, in part because they were not personalized and in part because they deprived victims of other types of compensation.\(^ {162}\) The Inter-American Commission also found that the work of the Chilean Truth Commission did not replace the right to individualized redress, because under the terms of the Truth Commission’s mandate, it was unable to name or individually sanction perpetrators.\(^ {165}\)

### D. The Limitations of Civil Suits

There are certainly limitations on the effectiveness of civil suits seeking reparations on behalf of victims of human rights abuses. Unlike a criminal case, where defendants may be detained, during the pendency of a civil suit

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160. American Convention, supra note 128, art. 25.
162. See *id.* ¶ 74. The individual received “a single life-time pension in an amount no less than the average compensation for a family in Chile.” *Id.* ¶ 57.
163. See *id.* ¶ 75.
and beyond the defendant is not detained in any fashion, potentially raising security concerns for the plaintiffs or flight risk. In fact, in many countries, the defendant can even leave the country despite the filing of a suit or the existence of a judgment against him. Thus, there is no guarantee that the proceedings will be adversarial in nature, and the result may be a default judgment for the plaintiff, thereby denying the plaintiff the opportunity to face her adversary and to receive a clear articulation of the relevant law. Further, to some, a civil judgment alone “may not carry the moral impact of a criminal conviction, since tort actions are viewed as a response to a private injury, rather than to an injury of concern to the whole community.”

Civil cases seeking to enforce human rights norms have resulted in millions of dollars in money judgments. Historically, however, the full benefit of any plaintiff’s victory has been limited by the challenges of enforcement. In particular, the majority of defendants in these suits do not hold assets in the country in which they are prosecuted, or they may secrete their assets overseas during the pendency of the litigation. As a result, no judgment stemming from cases seeking to enforce human rights norms in the United States has ever been enforced, with the exception of a paltry sum retrieved from General Suarez-Mason of Argentina. These difficulties are not unique to this class of litigation. Indeed, outside of the ambit of the Brussels/Lugano Conventions money judgments can be difficult to enforce overseas due to the lack of a universal judgment enforcement regime.

164. Stephens, supra note 80, at 585. The “label ‘tort’ is a pale understatement when applied to the horrors inflicted upon victims and survivors of human rights abuses.” Id. at 603.


166. See Stavis, supra note 88, at 214.


168. See generally Edward A. Amley, Jr., Note, Sue and Be Recognized: Collecting § 1350 Judgments Abroad, 107 Yale L.J. 2177 (1998) (discussing the enforcement and recognition of foreign judgments); Stavis, supra note 88, at 209 (discussing difficulties in collecting judgments) (“The difficulty of enforcing monetary judgments entered in almost all of these cases has hampered the expansion of this human rights legal tool.”).

169. See infra text accompanying notes 174–189.

170. Without such a regime, the enforcement of foreign judgments is largely a matter of comity and reciprocity. See generally Gary Born & Gary Westin, International Civil-Litigation (1996) (discussing the enforcement of foreign judgments); Amley, supra note 168 (discussing the enforcement and recognition of foreign judgments).
IV. THE HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS AND THE POTENTIAL THREAT TO HUMAN RIGHTS LITIGATION IN DOMESTIC COURTS

As discussed in this Part, certain developments in the area of private international law could greatly improve the enforcement track record of domestic actions—both criminal and civil—seeking reparations for the victims of human rights abuses. The proposed Hague Convention on Jurisdiction and the Enforcement of Civil Judgments ("the Hague Convention"), if it enters into force, will create the foundation for an extensive enforcement regime that will enable plaintiffs litigating in Contracting States to seek enforcement of their civil judgments in any Contracting State in which the defendant holds assets. This may come at a price, however. The proposed Hague Convention may regulate the exercise of jurisdiction by national courts in a way that affects cases seeking civil reparations for violations of human rights norms. In particular, unless drafters adopt language exempting cases seeking to enforce human rights norms from the Hague Convention's jurisdictional regime, cases seeking civil damages brought on the basis of extraterritorial jurisdiction may be foreclosed in the courts of states that ratify the proposed Convention.

This Part discusses the background of the Hague Convention. It considers the Brussels/Lugano regime on which the Hague Convention was loosely based and from which some delegations have sought significant departures. In particular, this Part describes the Hague Convention's proposed jurisdictional framework with reference to the impact it could have on litigation within domestic courts seeking to enforce human rights norms. Next, it recounts significant events in the drafting history of the Hague Convention leading up to the involvement of human rights advocates in the negotiations. It suggests the inclusion in the Hague Convention of a special exception applying only to cases seeking to enforce international human rights norms that would protect the right of victims to seek civil redress within domestic courts without significantly altering the basic structure of the proposed Hague Convention's jurisdictional regime.

A. Background to the Hague Convention Project

There is no global convention in force governing the recognition and enforcement of foreign judgments. In the 1960s, the Hague Conference on Private International Law drafted a convention governing recognition and enforcement of foreign judgments, but it did not directly govern the exer-

171. Recognition of a judgment occurs when a court concludes that a certain matter has already been decided and therefore need not be litigated further. In contrast, enforcement occurs when a party is accorded the relief that was awarded by the court issuing the judgment. A judgment must be recognized before it is enforced. See Robert B. von Mehren & Michael E. Patterson, Recognition and Enforcement of Foreign-Country Judgments in the United States, 6 LAW & POLY INT'L BUS. 37, 38 (1974).
There are very few signatories, and events within the European Community eventually superseded this effort.

The Brussels Convention, as the Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters is commonly known, was adopted by delegations from the six original members of the European Economic Community. Unlike the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters ("the Recognition Convention"), the Brussels Convention is a double convention with respect to domiciliaries of Contracting States in that it governs both the exercise of jurisdiction and the enforcement of judgments.

In keeping with continental notions of personal jurisdiction based on an objective relationship between the defendant and the forum, the Brussels Convention adopts the general rule that the defendant may be sued in the jurisdiction in which he or she is domiciled or habitually resident, regardless


175. The six original members of the European Economic Community were France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. Eric P. Hinton, Strengthening the Effectiveness of Community Law: Direct Effect, Article 5 EC, and the European Court of Justice, 31 N.Y.U. J. INT'L L. & POL. 307, 308 n.8 (1999).

176. See Arthur T. von Mehren, Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions, 24 BROOK. J. INT'L L. 17, 17–18 (1998). A double convention governs both jurisdiction to adjudicate and recognition of foreign judgments. Id. There are two variations of double conventions. In a pure double convention, all jurisdictional bases that a state is not obliged by the convention to offer are prohibited. Id. at 19. In contrast, in a mixed convention, there are three groups of jurisdictional bases: first, required bases which the state must allow if the litigation falls within the scope of the convention; second, permitted bases that the state may allow, but judgments rendered on such a basis are not entitled to automatic enforcement under the convention; and third, prohibited bases that a state may not allow in litigation that is within the scope of the convention. Id.
of the defendant's nationality. Beyond this general rule, the Brussels Convention adopts a series of claim-specific rules. For example, tort claims may be brought in the jurisdiction in which the harmful event occurred. Thus, the plaintiff suing a natural person in tort may exercise personal jurisdiction according to two provisions of the Brussels Convention: the general rule of domicile or the claim-specific rule of locus of harm.

The Brussels Convention has the effect of dividing jurisdiction into two lists: a required (white) list and a prohibited (black) list with respect to domiciliaries of Contracting States. All Contracting Parties must make available the bases of jurisdiction enumerated on the required list to all parties who are litigating matters within the scope of the Brussels Convention. Defendants who are domiciliaries of Contracting States may not be sued except under bases enumerated under the Brussels Convention, even if those bases exist under national law. Therefore, Contracting States may not allow plaintiffs who are litigating matters within the scope of the Brussels Convention against domiciliaries of another Contracting State to utilize these prohibited bases of jurisdiction, even though they are otherwise permitted under national law. Article 3 of the Brussels Convention sets forth an exemplary, not exhaustive, list of prohibited bases, and identifies provisions in the national legal systems of Contracting States that constitute prohibited bases. For example, Article 3(2) specifically prohibits the exercise of transient jurisdiction as it is practiced in Ireland and the United Kingdom.

The Brussels Convention is the first multilateral convention to regulate both jurisdiction and enforcement. Under this system, the enforcing court need not scrutinize the court of origin's jurisdictional basis, since the Brussels Convention itself ensures that jurisdiction was proper before the court of origin. Any judgment rendered by a Contracting State according to the

177. According to Article 2, "Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State." Brussels Convention, supra note 174, art. 2. Article 52 leaves the definition of "domicile" to the state's local law. With respect to legal persons, "domicile" is the seat of the corporation as defined by the private international law of the forum state according to Article 53. Id. arts. 52-53.

178. According to this provision, a person domiciled in a Contracting State may be sued "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred." Id., art. 5(3). The European Court of Justice has defined "tort" by what it is not. See Case 189/87, Kalfelis v. Schroder, 1988 E.C.R. 5565, 5585 ("The concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(3)."").

179. See von Mehren, supra note 176, at 20–21. Thus, the Brussels Convention is a pure double convention with respect to domiciliaries of Contracting States. See supra note 176.

180. "Exorbitant jurisdiction can be defined as those assertions of jurisdiction that are not generally recognized by accepted principles of international law." John Fitzpatrick, The Lugano Convention and Western European Integration: A Comparative Analysis of Jurisdiction and Judgments in Europe and the United States, 8 CONN. J. INT'L L. 695, 703 n.34 (1993).

181. See Brussels Convention, supra note 174, art. 3(2). Similarly, the Brussels Convention forbids the exercise of jurisdiction based solely on the nationality of the plaintiff as allowed under French law, CODE CIVIL [C.Civ.] art. 14, and on the basis of the defendant's ownership of property within the forum as allowed under German law, Zivilprozessordnung [ZPO] [civil procedure statute] § 23.
Brussels Convention’s jurisdictional rules is to be automatically enforced by the courts of other Contracting States with no reference to the merits of the case.182

The Brussels Convention does not regulate the exercise of jurisdiction over domiciliaries of non-Contracting States. Rather, Article 4(1) of the Brussels Convention preserves for Contracting States the use of exorbitant grounds of jurisdiction against domiciliaries of non-Contracting States. At the same time, such judgments must be recognized and enforced by other Contracting States pursuant to Article 26. In other words, non-domiciliary defendants may be sued under any jurisdictional basis and may have any resultant judgment automatically enforced against them, but they do not benefit from the Brussels Convention’s jurisdictional regime or defenses to enforcement as provided in Article 27. Thus, the Brussels Convention does not concern itself with non-domiciliary defendants until the time of enforcement. This aspect of the Brussels Convention has been the subject of indignant criticism.183

The Convention purports to provide a remedy for this asymmetry at Article 59, which invites non-Contracting States to ratify bilateral conventions on the recognition and enforcement of judgments with Contracting States. In these bilateral agreements, Contracting States pledge not to enforce judgments rendered on the basis of a jurisdictional rule on the Brussels Convention’s prohibited list. This remedy has proven illusory. For example, the United States attempted to negotiate a bilateral enforcement treaty with the United Kingdom, after the latter acceded to the Brussels Convention, in order to prevent judgments rendered pursuant to Article 4 against U.S. parties initiated in member states from being recognized and enforced in the United Kingdom. The treaty negotiations failed in part due to the influence of British insurance companies, who were fearful of U.S. jury verdicts, punitive damage awards (particularly in products liability cases), and antitrust remedies.184

As a result of the widespread implementation of the Brussels Convention regime, judgments against domiciliaries of Contracting States are freely enforced throughout Europe.185 In contrast, it is more difficult for litigants outside the Brussels Convention ambit to enforce judgments abroad.186 For

182. See Brussels Convention, supra note 174, art. 26 (“A judgment given in a Contracting State shall be recognized in other Contracting States without any special procedure being required.”); id. art. 29 (“Under no circumstances may a foreign judgment be reviewed as to its substance.”).

183. See, e.g., Fitzpatrick, supra note 180, at 703 n.36, 724 (describing the system as “blatantly discriminatory” with a “significant negative impact on foreign parties doing-business in the EC,” and noting that the Convention has the effect of reinforcing “judgments based on exorbitant assertions of jurisdiction by guaranteeing their recognition and enforcement throughout Western Europe”); von Mehren, supra note 176, at 23.


185. See id. at 116.

186. See Linda J. Silberman & Andreas F. Lowenfeld, A Different Challenge for the ALI: Herein of Foreign
example, U.S. judgments may be difficult to enforce overseas, in part due to
the prevalence (or perception of the prevalence) of large jury awards con-
taining punitive or multiple damages.\textsuperscript{187} In contrast, foreign judgments are
generally liberally enforced in the United States.\textsuperscript{188} Although there is no
uniform enforcement regime in place within the United States due to con-
gressional inaction, judgments issuing from foreign tribunals are freely rec-
ognized and enforced either on principles of common law or pursuant to the
Uniform Foreign Money Judgments Recognition Act, which has been
adopted by approximately half of the states.\textsuperscript{189}

The operation of the Brussels Convention has been quite successful in
Europe. The system is predictable and reliable, and the enforcement of for-
eign judgments occurs by operation of law without a \textit{de novo} review of the
judgment and thus at only minimal judicial cost.\textsuperscript{190} Over time, many states
lobbied for the creation of a more inclusive and worldwide enforcement re-
gime to replace the current patchwork approach, and the Hague Convention
project was born.

\textbf{B. The Launching of the Hague Convention}

The United States initiated the current Hague Convention project in May
1992 with a proposal to the Hague Conference on Private International
Law.\textsuperscript{191} One commentator has noted the unequal negotiating positions of the
United States vis-à-vis the members of the Brussels Convention, notwithstanding U.S. economic and diplomatic strength.\textsuperscript{192} On the one hand, the

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\textsuperscript{187} \textit{Juenger}, supra note 184, at 114.
\textsuperscript{188} \textit{See} \textit{Juenger}, supra note 184, at 114.
\textsuperscript{189} \textit{United Nations Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, supra note 3.}\n\textsuperscript{190} \textit{See} \textit{Juenger}, supra note 184, at 116.
\textsuperscript{191} \textit{See} \textit{Juenger}, supra note 184, at 116.
\textsuperscript{192} \textit{See} \textit{Juenger}, supra note 184, at 116.
\end{footnotesize}
United States stands to gain significantly from the proposed Hague Convention. First, parties resident in the United States would gain protection from assertions of jurisdiction based on Europe's exorbitant bases of jurisdiction. Second, parties litigating in the United States would gain greater predictability in enforcement, because they would have access to a more uniform enforcement regime.

In contrast, parties litigating in Europe already benefit from a successful enforcement regime among themselves. Given the already liberal enforcement record for foreign judgments within the United States, the new Hague Convention can only offer a marginal increase in assurance that foreign judgments will be enforced here. Thus, the main bargaining chip for the United States is the relinquishment of forms of U.S. jurisdiction deemed exorbitant from a continental perspective. These are principally transient (or tag) jurisdiction and general doing-business jurisdiction, both of which have received constitutional blessing from U.S. courts and are particularly important for civil human rights litigation.

Working Document 144E, an early consolidated draft text prepared by the drafting committee for the June 1999 negotiations, was loosely based on the Brussels Convention model and envisioned a pure double convention in which some bases of jurisdiction were required and all bases not required were prohibited. Working Document 144E, like the Brussels Convention, included a basic rule governing the exercise of general jurisdiction. Under this rule, a natural person could be sued where the person was habitually resident or domiciled, and legal persons could be sued in their place of incorporation or central management, or in their place of principal activity if the other locations could not be determined.

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193. Id. at 114.
195. Despite initial support from the United States, observers increasingly question whether the United States will sign and ratify the Hague Convention once it is opened for signature. See Letter from Jeffrey Kovar, Assistant Legal Advisor for Private International Law, U.S. Department of State, to Alasdair Wallace, Head of International and Common Law Division, Lord Chancellor's Department, United Kingdom (Sept. 19, 2000) (on file with the Harvard International Law Journal) (emphasizing that "[a]s a general matter ... the U.S. delegation believes the October 1999 draft is not an effective vehicle for achieving a convention to which the United States can become a party." Kovar went on to note that "[t]he October 1999 draft presents a deal on jurisdiction that is heavily weighted against U.S. jurisdictional practices. The Bar would reject it in this country."). However, even if the United States does not immediately sign or ratify the Hague Convention, the proposed amendments to the human rights exception remain important and appropriate, as they will ensure that other signatory states retain the ability to provide victims of human rights abuses with civil redress.
196. This text holds no official status. It was promulgated by the drafting committee to focus the negotiations. See Working Document No. 144E, supra note 191, note.
197. See id. note 3.
Working Document 144E also recognized claim-specific bases for jurisdiction over contract and tort claims.\textsuperscript{198} Echoing the general rule of the Brussels Convention, Article 10 provided that,

\begin{quote}
[t]he plaintiff may commence an action based on a claim in tort or delict in the courts of the Contracting State—(a) in which the act or omission of the defendant that caused the injury occurred, or (b) in which the injury arose, provided that the defendant could reasonably foresee that the activity giving rise to the claim could result in such injury in that State . . . .\textsuperscript{199}
\end{quote}

Finally, Working Document 144E provided for jurisdiction over a defendant legal entity in the state in which a branch, agency, or other establishment of the defendant was situated or had acted on behalf of the defendant as long as the suit arose out of that activity.\textsuperscript{200}

Article 20 of Working Document 144E outlined eight prohibited bases of jurisdiction. Most importantly for litigation seeking to enforce human rights norms, this prohibited list included jurisdiction premised on "(e) the carrying on of commercial or other activities by the defendant within the territory of the State; [and] (f) the service of a writ upon the defendant within the territory of the State."\textsuperscript{201} The original Hague Convention draft was a pure double convention in that the prohibited list was exemplary, rather than exhaustive, and every basis of jurisdiction not required was prohibited.

Like the Brussels Convention, the enforcement provisions of Working Document 144E were quite liberal. As a general rule it provided that "[a] decision rendered in a Contracting State shall be recognised in another Contracting State if it is final in the State of origin."\textsuperscript{202} At the same time, a court was to decline recognition and enforcement if "the decision was rendered by a court not having jurisdiction under this Convention."\textsuperscript{203} The enforcing court was not to undertake a review on the merits of the decision rendered by the court of origin.\textsuperscript{204}

From the start of the negotiations, the United States advocated that the Hague Convention be a mixed, rather than a pure double, convention. A mixed convention envisions three categories\textsuperscript{205} of jurisdictional bases: a

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\textsuperscript{198} See id. arts. 6–8, 10.
\textsuperscript{199} Id. art. 10.
\textsuperscript{200} See id. art. 9.
\textsuperscript{201} Id. art. 20. Article 20 also prohibited the exercise of general jurisdiction within a particular forum based on the presence of property in that forum, the nationality of either the plaintiff or defendant, the domicile of the plaintiff, a unilateral specification of the forum by the plaintiff, and an assertion of specific jurisdiction premised on transient jurisdiction or commercial activity. Id.
\textsuperscript{202} Id. art. 26.
\textsuperscript{203} Id. art. 27(1) (a).
\textsuperscript{204} See id. art. 27(3).
\textsuperscript{205} For an explanation of pure double and mixed conventions, see supra note 176.
\end{flushright}
mandatory list, a prohibited list, and a permissive ("gray") list. The permissive list would comprise bases of jurisdiction existing in national law that were neither mandatory nor prohibited. Litigants would be allowed to utilize such bases against residents of Contracting States, but the enforcement of the resultant judgment by the courts of other Contracting States would be discretionary.

The United States argued that a mixed convention was necessary to avoid preempting idiosyncratic jurisdictional rules and freezing permitted bases of jurisdiction despite developments in business methods, technology, and communications. In a proposal submitted to the Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters ("the Special Commission") during the June 1999 proceedings, the United States reproduced Article 20 with its list of prohibited bases of jurisdiction, but included at Article 21 a residual provision to the effect that "[t]his Convention does not affect the status under the law of each Contracting Party of rules of jurisdiction or competence neither required nor prohibited by this Convention." This proposal ensured that the list of prohibited bases of jurisdiction was exhaustive, so that states could utilize any basis of jurisdiction not expressly prohibited; the enforcement of judgments on bases of jurisdiction not contained in the mandatory list, however, would not be guaranteed. This position was ultimately adopted by the drafters.

C. The Impact of the Original Proposed Jurisdictional Rules on Cases Seeking to Enforce Human Rights Norms

As originally drafted, the jurisdictional rules contained in Working Document 144E threatened to hinder the ability of victims of human rights abuses to obtain civil reparations through strictly civil proceedings in common law jurisdictions or through civil actions in the context of criminal prosecutions in civil law jurisdictions. Assuming the Hague Convention


208. Working Document No. 150E, supra note 206.

209. See infra text accompanying note 227.

210. It is important to emphasize that this threat appears to have been inadvertent. Peter Nygh & Fausto Pocar, Hague Conf. on Priv. Int'l Law, Report of the Special Comm'n 80 (Preliminary Document No. 11), available at http://www.hcch.net/e/workprog/jdgm.html (n.d., visited on Nov.
had proceeded as a pure double convention, in which all bases of jurisdiction were either mandatory or prohibited, victims of human rights abuses would have been permitted to obtain civil redress from responsible persons in only two fora: the forum in which the violator resided, as provided by Article 3, or the forum wherein the tort occurred, as provided by Article 10. In the human rights context, these fora are often the same, so it is likely that in reality only one forum would be available. This is often a forum that is unwilling or unable to entertain suits by human rights victims.

If victims had sought to file suit against a resident of a Contracting State in common law systems, the original jurisdictional rules would have prohibited recourse by victims of human rights abuses to either transient or doing-business jurisdiction. Specifically, an individual who was victimized in Country A by a resident of Country A and who was in exile in, or had access to the courts of, Country B would have been prohibited from seeking civil reparations in the courts of Country B if both Country A and Country B were parties to the Hague Convention and the potential defendant traveled to or maintained significant contacts in Country B. Rather, the victim would have had to return to Country A in order to seek civil redress.

Similarly, in the civil law context, victims of human rights abuses could have been prohibited from seeking reparations within the context of criminal trials initiated in Contracting States against non-resident defendants on the basis of extraterritorial forms of jurisdiction. Because Working Document 144E did not authorize the exercise of jurisdiction over non-residents, courts could have interpreted attempts to add civil claims to criminal prosecutions brought under universal or passive personality jurisdiction as transgressions of the jurisdictional provisions of the Hague Convention. In this scenario, the criminal court would have power over the defendant by virtue of universal or passive personality jurisdiction—both extraordinary bases of jurisdiction. Even if such a claim for reparations were permitted *ex ante* as a supplementary form of criminal jurisdiction, the enforcing court could have denied enforcement of any civil judgment, as the basis of civil jurisdiction was not mandatory under the Hague Convention.

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13. 2000) [hereinafter Preliminary Document No. 11] (noting that "the chief aim of the Convention is not to regulate civil actions of this kind [human rights actions], but rather to define the rules of jurisdiction for civil and commercial relations among individuals within an international setting."). Once delegations recognized the potential impact of the proposed jurisdictional rules on civil cases seeking to enforce human rights norms, they for the most part appeared committed to devising a remedy, although there has been significant disagreement on the form and scope thereof.

211. Although this is not express from the terms of the Hague Convention, it is expected that the Hague Convention’s enforcement provisions would apply to all judgments providing for civil remedies, regardless of the nature of the court or proceedings producing the judgment, as is the case with respect to the Brussels Convention. See id. at 80 (noting that "[t]here is a well known tendency with these international crimes to assign universal jurisdiction to States . . . . Thus, it is only to be expected that criminal proceedings may be accompanied by civil proceedings instituted by victims to obtain relief from the person responsible for the violation," and that "a civil action of this kind may be taken in the context of the criminal action itself").
and the civil judgment ultimately was rooted in an extraordinary basis of jurisdiction more akin to the prohibited bases of jurisdiction.

If the Hague Convention had been drafted as a mixed convention without specific accommodation for human rights litigation, the most important forms of jurisdiction utilized by victims of human rights abuses in common law jurisdictions would have still been foreclosed by operation of Article 20. According to Working Documents 144E and 150E, the U.S. proposal, transient and doing-business jurisdiction remained on Article 20's prohibited list of jurisdictional bases.

Working Document 144E's jurisdictional provisions did not reflect the fact that in certain circumstances, cases seeking to enforce human rights norms simply must be brought before national courts outside of the state in which the harm occurred, as redress would be impossible in the jurisdiction in which the harm occurred. Historically, most cases brought under the ATCA and the TVPA in U.S. courts would not have been possible in the jurisdiction in which the harm occurred. These grave international law violations often occur in states experiencing political upheaval or governed by authorities who are themselves responsible for or complicit in such violations. As such, domestic courts in these states may be unable or unwilling to proceed effectively against perpetrators or to provide victims with redress.

For example, in Filartiga, the plaintiffs demonstrated that victims, lawyers, and judges involved in lawsuits against Paraguay's security forces had been threatened and killed, and efforts to prosecute offenders were routinely sabotaged. Similarly, the plaintiffs in a case against Jean Bosco Barayag-


214. This unfortunate reality was one of the motivating factors underlying the passage of the TVPA in the United States. See H.R. REP. NO. 249, pt. 1 (1991). There, it was noted that "[j]udicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent." Id. at 3. As a result, [a] state that practices torture and summary execution is not one that adheres to the rule of law. The general collapse of democratic institutions characteristic of countries scourged by massive violations of fundamental rights rarely leaves the judiciary intact . . . . The Torture Victim Protection Act . . . would respond to this situation.

Id. at 3.

215. See Filartiga, 630 F.2d at 878 (noting that plaintiff's Paraguayan attorney was arrested, threat-
wiza, the leader of a Hutu political party in Rwanda, demonstrated that the Rwandan judicial system was virtually inoperative and thus unable to process civil claims. Human rights violators are often protected from suit in the states in which they act, either because they are agents of the state or because the state condones, is complicit in, indifferent to, or otherwise powerless in the face of, human rights abuses in its territory. Such perpetrators may even benefit from a blanket amnesty in the state in which the harm occurred, which may expressly or implicitly foreclose civil redress. Perpetrators of human rights violations may also dodge apprehension by the courts of their own country by fleeing to another jurisdiction.

Many cases seeking to enforce human rights norms have been brought by individuals who have had to flee the state in which the harm occurred, thereby making it extremely difficult for them to return to that state in order to pursue their rightful claims. Such plaintiffs may even be refugees, as defined by the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention"), who have sought a safe haven in a foreign country because they are targeted for persecution at home. To force these individuals to seek redress in the country from which they have fled is unjust and contrary to the spirit of the Refugee Convention. A central feature of the Refugee Convention and of international refugee law in general is the principle of non-refoulement, which prohibits states from sending refugees back to a territory in which their life or freedom would be threatened.

Alternated with death and subsequently disbarred). The difficulty of pursuing human rights claims domestically has been noted by the Inter-American Commission on Human Rights. See, e.g., Velasquez Rodriguez Case, supra note 134, at 319–20 (noting the inefficacy of the domestic system in Honduras).
tively, victims of human rights abuses may be granted political asylum\(^2\) in their host state upon a showing that the petitioner possesses a credible fear of persecution.\(^2\) Even if such victims are not refugees or asylum seekers, it still may be difficult or impossible for them to return to the state in which the harm occurred. They may be in voluntary or forced exile, or have simply moved on and resettled abroad.

Given these unfortunate realities, it is often impossible for victims of human rights abuses to obtain legal redress in the courts of the state in which the defendant resides or the harm occurred. It is imperative that victims have access to the courts of any country where the alleged perpetrator can be found. If the Hague Convention were to require national courts to dismiss claims to reparations for human rights violations committed abroad by non-residents, it would perpetrate further injustices on victims already traumatized by gross human rights violations committed against them.

V. THE INCLUSION OF AN EXCEPTION FOR HUMAN RIGHTS CASES IN THE DRAFT TEXT OF THE HAGUE CONVENTION

Prior to the June 1999 proceedings of the Hague Conference, human rights advocates became aware of the implications of the proposed Hague Convention's jurisdictional provisions that would limit human rights enforcement through civil redress.\(^2\)\(^2\)\(^2\)\(^4\) A number of concerned groups and individuals formed a Human Rights Coalition ("the Coalition") to participate in the drafting process and lobby delegations to include language excluding cases seeking to enforce human rights norms from the more restrictive aspects of the Hague Convention's jurisdictional regime.\(^2\)\(^2\)\(^5\) This Part describes the Coalition's contribution to the negotiations. It then recounts the debates

\(^{222}\) See, e.g., Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189, 1191 (S.D.N.Y. 1996) (Ghanaian plaintiff had been granted political asylum in the United States); id. at 1199 (noting that the plaintiff "would be putting himself in grave danger were he to return to Ghana to prosecute this action"); Xuncac v. Gramajo, 886 F. Supp. 162, 169 (D. Mass. 1995) (Guatemalan plaintiffs had applied for political asylum in the United States); Filartiga v. Peña-Irala, 577 F. Supp. 860, 864 (E.D.N.Y. 1984) (Paraguayan plaintiff sought asylum in the United States during the pendency of her suit).

\(^{223}\) See 8 U.S.C. § 1101(42) (A) (1994); United States Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) (holding that an alien who shows a well-founded fear of prosecution is eligible to be considered for asylum).

\(^{224}\) As a result of a presentation by Professor Paul Dubinsky of New York Law School, delegations first discussed the potential threat to civil suits enforcing human rights during the Mar. and Nov. 1998 drafting sessions, but no specific language was crafted. See SPECIAL COMM'N ON THE QUESTION OF JURISDICTION, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS, HAGUE CONF. ON PRIVATE INT'L LAW, REPORT OF MEETING NO. 47, at 2 (Nov. 17, 1998).

\(^{225}\) The Coalition consists of academics, practitioners, and representatives from non-governmental organizations, such as Amnesty International, The Center for Justice & Accountability, Fédération Internationale des Liges des Droits de l'Homme, Human Rights Watch, the International Association of Democratic Lawyers, Lawyers Committee for Human Rights, and Redress Trust.
over the human rights exception that resulted in the draft text that will serve as the basis for future negotiations.

A. The Drafting History of the Human Rights Exception

Members of the Coalition officially participated in the June and October 1999 negotiation sessions of the Hague Conference. At the June session, the Special Commission provisionally adopted a draft text in preparation for a final diplomatic conference, originally to be held in 2000 ("the June Draft Convention"). At the June session, it appeared that the U.S. position had prevailed and the Hague Convention would be a mixed, rather than pure double, convention. In other words, the Hague Convention envisioned three categories of jurisdictional bases: those that were mandatory, or white (i.e., all signatories must make these bases available to litigants), those that were prohibited, or black (i.e., such bases could not be invoked in relation to residents of signatory countries), and those that were permissive, or gray, but for which enforcement would be discretionary.

The June Draft Convention maintained the prohibition of "tag jurisdiction" and jurisdiction on the basis of "the carrying on of commercial or other activities by the defendant in that State." However, the Coalition succeeded in effectuating the insertion of a bracketed placeholder in Article 20(3) based on a proposal by the Netherlands and Japan. The placeholder reads, "Nothing in this article shall prevent a party from bringing an action under national law based on a violation of human rights [to be defined]."

Members of the Coalition had suggested that the Hague Convention contain a separate provision setting forth jurisdictional rules unique to human rights litigation along the lines of the provisions governing suits involving contracts with consumers or trusts. However, state delegations insisted that


227. See id. art. 19 (providing that "subject to Articles 4 [choice of court], 5 [appearance by the defendant], 7 [contracts concluded by consumers], 8 [employment contracts], 13 [exclusive jurisdiction] and 14 [provisional and protective measures], the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 20") (brackets surrounding 14 in original).

228. See id. art. 20. ("Jurisdiction shall not be exercised . . . on the basis solely of one or more of the following—(i) the temporary residence or presence of the defendant in that State . . . .")

229. Id.


231. June Draft Convention, supra note 226. During the June proceedings, a number of state and non-governmental delegations—including those of Canada, Slovakia, Switzerland, the United Kingdom, the United States, the European Commission, Human Rights Watch, Amnesty International, the International Association of Democratic Lawyers, the International Bar Association, and the International Law Association—participated in a "Human Rights Working Group" to discuss language to exempt litigation enforcing human rights norms from the prohibited list of jurisdictional bases.
such litigation be addressed instead through a general exception to Article 20 at least preliminarily. 232 Further, Australia suggested that human rights litigation be excluded from the Hague Convention. 233

The human rights exception language in the June Draft Convention was the subject of considerable debate in both formal and informal sessions during the October 1999 inter-sessional proceedings. The debate began with the consensus submission from the Coalition. This submission proposed the insertion of the following language 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. 234

In the ensuing debate, 235 once the impact of the proposed Hague Convention on cases seeking to enforce human rights norms became clear, some state delegations indicated support for language protecting such cases in principle. At the same time, some resistance to the authorization of any form of transient jurisdiction was apparent on the part of other delegations. One delegation particularly opposed the inclusion of any reference to human rights in the Hague Convention, arguing that the Hague Convention was designed to address commercial disputes, as opposed to issues of public international law. One delegation argued that if there were such an exception, it should also apply to other international crimes, such as hijacking and terrorism. 236

232. For a summary of discussion of the human rights exception during the June 1999 proceedings, see SPECIAL COMM’N ON INT’L JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIV. AND COM. MATTERS, HAGUE CONF. ON PRIVATE INT’L LAW, REPORT OF MEETING NO. 64, at 2 (June 14, 1999).

233. See SPECIAL COMM’N ON INT’L JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIV. AND COM. MATTERS, HAGUE CONF. ON PRIVATE INTERNATIONAL LAW, PROPOSAL BY THE DELEGATION OF AUSTRALIA. (Working Document No. 199 E+F, June 12, 1999). However, delegations ultimately “rejected this solution, as the consequence would have been that these proceedings, and the judgments handed down as a result, could not have been covered by the Convention’s rules of recognition and enforcement although they would have been based on a rule of jurisdiction admitted by the Convention itself.” Preliminary Document No. 11, supra note 210, at 80.


235. The discussion of the deliberations is drawn in part from correspondence with members of the Coalition who were in attendance. The author is particularly indebted to Helen Duffy for her exhaustive reporting during the October session.

236. See SPECIAL COMM’N ON INT’L JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN
To channel the debate, the Working Group of state delegations convened at the outset of the October meeting and drafted the following alternative language:

Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction [under national law] in an action seeking relief for a violation of international human rights or international humanitarian law [which constitutes a crime under international law] a) if such violation amounts to genocide, a crime against humanity or a war crime;

[[and][or]]

b) 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.]

According to this language, sub-section (a) would have provided that only suits involving claims of genocide, crimes against humanity, or war crimes would have benefited from the exception to Article 20's prohibitions. Accordingly, the victim of an act of torture that did not constitute a crime against humanity (i.e., if the torture was not undertaken within the context of a widespread or systematic attack against a civilian population) would be precluded from utilizing any of the bases of jurisdiction included in the prohibited list. Sub-section (a) prompted a protracted debate over whether the exception should include an enumeration of tortious acts as opposed to a non-exhaustive or illustrative list.

Sub-section (b) remained controversial within the Working Group, as delegations could not agree on whether proof that the plaintiff would suffer a denial of justice should be a requirement for all cases benefiting from the exception to Article 20, or whether such a denial of justice should provide an alternative trigger mechanism for the exception, regardless of the particular violation alleged. One delegation insisted that the denial of justice element was essential to justify the assertion of an otherwise exorbitant basis of jurisdiction. Other delegations expressed concern that victims of human rights violations would forum shop for the most receptive forum in which to bring their claims. In response, other delegations, namely those from non-governmental organizations, raised the practical problems of requiring human rights victims to surmount this hurdle and prove that justice was unobtainable elsewhere.

CIV. AND COM. MATTERS, HAGUE CONF. ON PRIVATE INT'L LAW, REPORT OF MEETING NO. 75, AT 2–3 (OCT. 27, 1999).

237. See SPECIAL COMM'N ON INT'L JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN CIV. AND COM. MATTERS, HAGUE CONF. ON PRIVATE INT'L LAW, PROPOSAL BY THE HUMAN RIGHTS WORKING GROUP (WORKING DOCUMENT NO. 264 E+F, OCT. 26, 1999).

238. See, e.g., YUGOSLAVIA STATUTE, supra note 97, art. 5.

239. See SPECIAL COMM'N ON INT'L JURISDICTION AND THE EFFECTS OF FOREIGN JUDGMENTS IN
Had the "and" been adopted between sub-section (a) and (b), the Hague Convention would have severely limited the ability of human rights victims to seek redress, not only because the plaintiff would have been limited to claims of genocide, crimes against humanity, or war crimes, but also because she would have been required to prove that she was precluded from seeking justice in any other state. Conversely, had the "or" formulation been adopted, the Hague Convention would have provided little guidance to national courts in determining the precise circumstances in which civil plaintiffs would be permitted to utilize the otherwise prohibited bases of jurisdiction. This shortcoming would have been alleviated somewhat had the bracketed language of the *chapeau*, limiting the availability of prohibited bases of jurisdiction to violations of human rights or humanitarian law that rose to the level of criminal conduct under international law, been adopted.

During the negotiations, Japan, the Republic of Korea, Sweden, the United Kingdom, and the International Association of Democratic Lawyers produced a joint proposal ("the Joint Proposal") that referred specifically to international crimes as defined in the statute of the International Criminal Court ("the ICC Statute"). This proposal read:

Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action seeking relief in respect of conduct which constitutes either—

a) genocide, a crime against humanity or war crime, as defined in the Rome Statute of the International Criminal Court; or

b) a serious crime against a natural person under international law.\(^{240}\)

This language reflected debates over whether the Hague Convention should permit the utilization of otherwise prohibited bases of jurisdiction only where the plaintiff alleged the violation of a norm contained within a specific treaty, such as the Torture Convention. Over the course of the debates, certain delegations advocated an enumeration of treaties to guide national courts in applying the exemption. Others countered that listing treaties might create ambiguities with respect to plaintiffs suing within states that had not ratified the particular treaty in question.\(^{241}\)

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\(^{241}\) See generally Report of Meeting No. 80, supra note 239, at 5.
The Joint Proposal would have allowed the plaintiff to utilize an otherwise prohibited basis of jurisdiction so long as his claims were for one of the three listed crimes as they are defined within the Statute of the International Criminal Court. Alternatively, the otherwise prohibited bases of jurisdiction would be available to a civil plaintiff alleging conduct that rose to the level of a "serious crime" under international law. This latter prong would likely have included the crimes of terrorism, drug-trafficking or hijacking; acts of torture, arbitrary detention, slavery, and disappearances that did not otherwise constitute crimes against humanity; or war crimes that fell outside of the ICC Statute. In this regard, sub-section (b) was a welcome development, as it would have provided for the potential evolution and expansion of norms triggering the exception. One delegation argued, however, that the notion of a "serious crime" should encompass only those acts involving physical violence, which would have excluded forms of psychological torture and, arguably, acts of disappearances or slavery that did not involve physical harm. Under this interpretation, a plaintiff who suffered psychological torture would not be able to utilize the prohibited bases of jurisdiction, even though the Torture Convention prohibits acts of mental and physical torture equally.

The Chinese delegation introduced a proposal ("the Chinese Proposal") for Article 20(4) that read:

> Nothing in this article shall prevent a court in a Contracting State from exercising jurisdiction under national law in an action claiming civil compensatory damages for death or serious bodily injury arising from 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.

This language reflected the delegation's prior position that international crimes, in addition to human rights crimes, should trigger an exception from the Hague Convention's jurisdictional prohibitions.

Other delegations argued that the jurisdictional exception for international crimes should be triggered by violations of customary international law and of treaty law, since not every state has enacted implementing legislation for the treaties they have signed. Further, it was unclear from the Chinese Proposal whether the otherwise prohibited bases of jurisdiction would be available only where the state had established criminal jurisdiction over the crime in question, or whether it was sufficient that the state had the legal power to exercise such criminal jurisdiction over crimes of that nature.


243. See REPORT OF MEETING No. 80, supra note 239, at 4.
If the former were the case, victims of international crimes would be dependent on state officials to commence criminal prosecutions before they could seek civil reparations. The Chinese Proposal also would have limited access to otherwise prohibited bases of jurisdiction for claims of serious bodily injury or death, thus excluding acts involving significant deprivations of liberty without bodily harm or acts of psychological torture.

From the various proposals advanced, the Drafting Committee generated a consolidated text that will serve as the basis for the final negotiations. This text appears in two variants. The first is a variant of the Joint Proposal and the second reproduces the Chinese Proposal. The text reads:

18(3) 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:

(a) genocide, a crime against humanity or a war crime[, as defined in the Statute of the International Criminal Court]; or]

(b) a serious crime against a natural person under international law; or]

(c) a grave violation against a natural person of non-derogable fundamental rights established under international law, such as torture, slavery, forced labour 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 this 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.]

The brackets in the chapeau indicate disagreement among delegations as to whether the otherwise prohibited bases of jurisdiction would be available to plaintiffs seeking relief other than money damages, such as injunctive relief. All three sub-sections of Variant One are bracketed, which implies that any one may exist alone or in conjunction with any other sub-section. Variant One reveals further disagreement as to whether the denial of justice requirement should apply to plaintiffs seeking relief for "serious crimes"

244. See id. at 5.
245. OCTOBER DRAFT CONVENTION, supra note 3, art. 18(3). Many of the provisions were renumbered in the final draft, so that the prohibited bases of jurisdiction now appear in Article 18.
under international law or only to plaintiffs seeking relief for "grave violations . . . of non-derogable fundamental rights," notwithstanding that there is likely to be considerable overlap of acts in each category. At this point, the entire provision is unbracketed, which is welcome in that it implies that a human rights exception will be included within the final text. Theoretically, however, the issue of whether there should be a human rights exception at all could still be reopened in subsequent negotiations.246

B. An Evaluation of the October Draft Convention

In the last negotiating session, Hague Conference members made considerable progress toward drafting language that would exempt litigation seeking to enforce international human rights norms from the more restrictive jurisdictional rules of the proposed Hague Convention. The text still contains some pronounced deficiencies, however.

The otherwise prohibited bases of jurisdiction should be available to victims of human rights violations seeking forms of relief other than money damages.247 The jurisdictional rules of the Hague Convention will undoubtedly cover forms of provisional relief, such as injunctive relief. The term "relief" in the first bracketed option of Article 18(3) should be adopted and interpreted to encompass a variety of remedies available at various stages of a proceeding, including reparations, monetary compensation, restitution, and forms of equitable relief such as injunctions.

Article 18(3) should not include an exclusive list of acts whose perpetration will trigger the exception. Instead, the exception should identify a category of norms or an open-ended and exemplary list of norms that support the exercise of civil universal jurisdiction. The Hague Convention should remain flexible to address new forms of human rights abuses and allow for the evolution of international law. Since the Second World War, international law has witnessed a proliferation of new norms that have as their central concern the protection of the individual from violence and abuse. The laws of war alone have evolved considerably in the last few years as a result of the work of the two ad hoc international criminal tribunals248 and the drafting of the ICC Statute.249 In this respect, sub-section (a) of Variant One is acceptable only in conjunction with sub-sections (b) and (c) of Variant One, which remain open-ended and exemplary.250 For the same reasons, 246. In the most recent report of the negotiations, the rapporteurs noted that Article 18(3) was designed to enable states to be free to adopt jurisdictional rules governing human rights actions seeking civil remedies, given states' obligations from general and treaty law. Article 18 thus provides an exception to the prohibition against using certain fora to obtain relief or damages following a serious violation of fundamental human rights. Preliminary Document No. 11, supra note 210, at 82–83.
247. See October Draft Convention, supra note 3, art. 13 (providing that a court with jurisdiction over the merits of a dispute has jurisdiction to order any provisional or protective measures).
248. See Yugoslavia Statute, supra note 97; Rwanda Statute, supra note 98.
249. See ICC Statute, supra note 99, art. 8 (enumerating war crimes subject to ICC jurisdiction).
250. The commentary on the current draft suggests that both subsections (a) and (b) would be in-
the open-ended nature of Variant One is welcome. However, this option does not recognize that national law and customary international law define many international crimes in addition to conventional treaty law. Accordingly, national courts should be able to exercise extraterritorial jurisdiction over perpetrators of human rights violations in accordance with customary international law, national law, or pursuant to an international treaty to which they are a party. As was noted by the Coalition, any exhaustive recitation of norms "invites reservations to particular offenses, which would defeat the purpose of prohibiting obstacles to the exercise of jurisdiction over civil actions seeking remedy for the most serious violations."\textsuperscript{251}

National courts are capable of undertaking the systematic inquiry of international law called for by such language.\textsuperscript{252} For example, U.S. courts have developed a set of standards to determine which international law norms may be privately enforced within domestic courts.\textsuperscript{253} According to this jurisprudence, in order to qualify for private enforcement within the United States, such norms must be obligatory under all circumstances, as opposed to merely hortatory. They must be universally applicable and the object of concerted international attention.\textsuperscript{254} Further, they must be defined with sufficient specificity and clarity.\textsuperscript{255} The list of norms meeting these criteria is included in the final text. Preliminary Document No. 11, supra note 210, at 80–81.

\textsuperscript{251} COALITION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS,.supra note 8, at 2.


\textsuperscript{253} See, e.g., In re Estate of Marcos Human Rights Litigation, 25 E3d 1467, 1475 (9th Cir. 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory."); Forer v. Suarez-Mason, 672 F Supp. 1531, 1539–40 (N.D. Cal. 1987) ("This 'international tort' must be one which is definable, obligatory (rather than hortatory), and universally condemned."). amended in part, 694 F Supp. 707 (N.D. Cal. 1988). See generally Goodman & Jinks, supra note 252, at 493–97 (explaining the federal courts' understanding of the scope of actionable norms in domestic courts).

\textsuperscript{254} See Filartiga v. Pefia-Fala, 630 E2d 876, 881 (2d Cir. 1980) ("The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one."); Id. at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute [ATCA].").

\textsuperscript{255} See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). The Court made clear: that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

\textsuperscript{Id.} This is the position adopted by the executive branch of the U.S. government as well. See Filartiga Memorandum, supra note 145, at 605. As amicus, the United States argued:

The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection.

\textsuperscript{Id.} See also id. at 604 (arguing that the universal prohibition of torture is sufficiently defined to merit private enforcement).
not static. U.S. courts have recognized that contemporary international law includes the prohibitions against genocide;256 crimes against humanity;257 war crimes;258 slavery and forced labor;259 summary or arbitrary executions;260 torture261 and other cruel, inhuman, or degrading treatment or punishment;262 enforced disappearances;263 piracy;264 and arbitrary detention.265 U.S. courts routinely decline to allow for private enforcement of international law norms that are not sufficiently obligatory, universal, or definable under international law. For example, U.S. courts have dismissed


257. See Kadić, 70 F.3d at 236.

258. See id. at 242–44.

259. See Doe v. Unocal, 963 F. Supp. 880, 892 (C.D. Cal. 1997) (stating that participation in slave trade, either by private individuals or under the auspices of a state, violates the law of nations); Nat'l Coalition Gov't of Burma v. Unocal, 176 F.R.D. 329, 345 (C.D. Cal. 1997) (citing the Ninth Circuit for the proposition that slavery constitutes a violation of jus cogens norms); United States v. Matar-Ballesteros, 71 F.3d 754, 764 n.5 (9th Cir. 1995) (considering the prohibition against slavery, a jus cogens norm).

260. See In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 503 (9th Cir. 1992) (finding that federal subject-matter jurisdiction under § 1350 derives from a violation of a jus cogens norm, while the cause of action derives from municipal tort law); Forci v. Suarez-Mason, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (finding that the international legal norm prohibiting murder and summary execution “appears to be universal, readily definable and is of course obligatory”); Xuncax v. Gramajo, 868 F. Supp. 162, 185 (D. Mass. 1995) (“[S]ummary execution ... [has] been met with universal condemnation and opprobrium ... . And again, not only are the proscriptions of these acts universal and obligatory, they are adequately defined to encompass the instant allegations.”) (citations omitted).

261. See Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992) (“All of the authorities agree that torture and summary execution—the torture and killing of wounded non-combatant civilians—are acts that are viewed with universal abhorrence.”); Filartiga v. Peña-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (“[T]here are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.”) (citation omitted); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d at 499 (finding the position that official torture does not violate customary international law “unthinkable”).

262. See Jama v. United States Immigration and Naturalization Service, 22 F. Supp. 2d 353, 363 (D.N.J. 1998) (finding that the “abuses which are alleged to have been inflicted upon plaintiffs violate the international human rights norm of the right to be free from cruel, inhuman [sic] and degrading treatment”); Xuncax, 886 F. Supp. at 186 (holding that actions constituting cruel, inhuman, or degrading treatment or punishment are “proscribed by the Constitution of the United States and by a cognizable principle of international law”). This view has recently replaced a prior view that the norm against cruel, inhuman, or degrading treatment lacked sufficient definition under international law to merit enforcement in domestic courts. See Forci v. Suarez-Mason, 694 F. Supp. 707, 712 (N.D. Cal. 1988).


265. See Forci, 672 F. Supp. at 1541–42 (finding the norm prohibiting arbitrary detention to be “obligatory, ... readily definable,” and subject to an international consensus); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), aff'd, 654 F.2d 1382, 1388 (10th Cir. 1981) (noting that “no principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment”) (citations omitted); Xuncax, 886 F. Supp. at 184 (stating that arbitrary detention is a fully recognized violation of international law).
causes of action for violations of free speech, fraud, expropriation, contract offenses, and corporate torts. This jurisprudence suggests that national courts are capable of identifying and applying international law, and thus are capable of interpreting an open-ended recitation of norms triggering the human rights exception in the Hague Convention.

Sub-section (b) of the October Draft Convention is useful in that it provides that only those acts that constitute criminal conduct would trigger the human rights exception. This limiting factor, as well as the inclusion of the terms "serious," "grave," and "fundamental," ensure that the exception will be activated only by exceptionally serious tortious conduct and will not swallow the Hague Convention's general jurisdictional rules. Given these thresholds, the Hague Convention's principal jurisdictional rules will continue to apply to the majority of tort cases.

Sub-section (a) of the October Draft Convention is overly restrictive insofar as it is limited to three international crimes and potentially defines the acts triggering the human rights exception with reference to the definitions of these crimes within the ICC Statute. The subject-matter jurisdiction of the future ICC is limited to the most serious international crimes. As such, the ICC Statute's definitions include high thresholds of applicability in order to exclude smaller-scale and isolated crimes from the ICC's jurisdiction. Precisely because the ICC's jurisdiction will be limited to criminal prosecutions of mass violence, national courts should be empowered to assert civil jurisdiction over lower-level human rights violations that will not meet the thresholds of the ICC.

Finally, the Hague Convention should not require proof that proceedings in another state are not possible. As a general rule, proof of denial of justice is not a prerequisite to the exercise of extraterritorial jurisdiction according

266. See Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("[A] violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations' [violation].").
268. See Dreyfus v. Von Finck, 534 E.2d 24 (2d Cir. 1976), cert. denied, 429 U.S. 835 (1976) (finding no consensus on the international illegality of the forced sale of property); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 430 (1964) (finding no consensus on the illegality of expropriation and holding that judicial deference to foreign acts is appropriate where the relevant substantive standards in international law are unclear); Nat'l Coalition Gov't of Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 345 (C.D. Cal. 1997) (finding that a foreign sovereign's expropriation of property does not violate any universal norm under international law).
269. See Abiodun v. Martin Oil Service, Inc., 475 E.2d 142, 145 (7th Cir. 1973) (affirming dismissal on summary judgment of contract offense as not raising sufficient international law norms).
270. See Valanga v. Metropolitan Life Ins., 259 F. Supp. 324, 327 (E.D. Pa. 1966) (finding that commercial torts, such as interference with contractual relations, do not qualify for universal enforcement); De Wit v. KLM Royal Dutch Airlines, N.V., 570 F. Supp. 613, 618 (S.D.N.Y. 1983) (finding no subject-matter jurisdiction based on breach of contract and corporate tort claims).
272. See, e.g., id. at 7 ("The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.").
to the multilateral treaties providing for the exercise of universal criminal jurisdiction over violations of international law. Such extraterritorial jurisdiction is distinct from international jurisdiction, which, according to a number of multilateral treaties governing international enforcement mechanisms, does require the exhaustion of local remedies.\(^{273}\) Further, plaintiffs should not bear the burden of trying to bring suit in various other jurisdictions when the jurisdiction in which the defendant is found is available. It is not necessary to include this sort of condition within the Hague Convention as States Parties may decide to include such provisions in their national law. For example, cases interpreting the TVPA in the United States require the plaintiff to demonstrate either that domestic remedies were exhausted, or that such exhaustion would have been futile.\(^{274}\) Indeed, as was noted by the Coalition, "the prospect of forum-shopping by victims of human rights abuse is remote given the steep obstacles that face most such plaintiffs in bringing any suit at all."\(^{275}\)

In conclusion, any exception for human rights litigation should contain the following elements. First, it must identify an exemplary, rather than exclusive, category of norms that will trigger the exception. In this regard, it is inappropriate for the exception to simply import the substantive norms outlined in the ICC Statute. Rather, the exception should apply to claims for international law violations that do not satisfy the ICC Statute's thresholds or that do not rise to the level of crimes against humanity. Second, the exception should identify these norms such that the exception covers only extremely serious tortious conduct. Finally, the exception should not require proof that the plaintiff has exhausted her remedies elsewhere. With all these elements in place, the Hague Convention will ensure that victims of human rights violations will retain their ability to seek reparations for violations of internationally protected human rights in domestic courts in those fora in which the perpetrator may be found.

C. The Notion of Civil Universal Jurisdiction

In the United States, the exercise of personal jurisdiction in civil cases seeking to enforce human rights norms against individuals and entities that are not resident in the United States has been commonly conceptualized under domestic law as a form of doing-business jurisdiction or transient jurisdiction based on the notion of the transitory tort.\(^{276}\) This terminology is

\(^{273}\) See e.g., European Convention, supra note 136, art. 35(1).


\(^{275}\) COALITION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS, supra note 8, at 2.

\(^{276}\) Two commentators have noted that:

According to this doctrine, civil actions for personal injury torts are transitory in that the tortfeasor's wrongful acts create an obligation which follows him across national boundaries . . . . Whereas in most foreign criminal actions extradition is the proper remedy, in civil actions it is accepted that, 'a state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders,' notwithstanding that the dispute has arisen overseas.
well established and familiar to the common law tradition. Given the fundamental nature of the international law norms at issue, however, these cases may also be conceptualized as a form of civil universal jurisdiction.

The Restatement recognizes the distinction between transitory jurisdiction in the human rights context vis-à-vis other contexts. On the one hand, it notes at § 421 that "tag jurisdiction, i.e., jurisdiction based on service of process on one only transitorily present in the territory of the state, is not generally acceptable under international law."277 And yet, at § 404 it acknowledges that international law does not preclude the exercise of civil universal jurisdiction in response to grave international law violations where the action in question is necessarily related to every state: "In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy."278 The U.S. Congress (at the time it originally enacted the Torture Victim Protection Act),279 several commentators,280 and several U.S. courts281 have all noted that the exercise of personal

Blum & Steinhardt, supra note 145, at 63 (citations omitted) (quoting Filartiga v. Peña-Irala, 630 F.2d 876, 885 (2d Cir. 1980)). See, e.g., Filartiga, 630 F.2d at 885.

It is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the lex loci delicti commissi is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.

Id. 277. RESTATEMENT OF FOREIGN RELATIONS, supra note 10, § 421 cmt. e; see also id. § 421 rep's note 5 (stating that tag jurisdiction is unacceptable under international law if it is the only basis for jurisdiction and the action in question is unrelated to that state). But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 27(6), (g) (1971) (finding acceptable jurisdiction on the basis of presence in the state or doing-business in a state); id. § 28 ("A state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily.").

278. RESTATEMENT OF FOREIGN RELATIONS, supra note 10, § 404 cmt. b.


280. In the opinion of a group of civil procedure and international law scholars appearing as amici in Karadžić v. Kadić, "[t]he well-established principle of international law that all States have universal jurisdiction to provide criminal and civil redress for extraterritorial conduct that violates fundamental norms of the law of nations, such as genocide, piracy and torture." BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS, 20 HASTINGS INT'L & COMP. L. REV. 686, 698 (1997) (submitted by Professors David J. Bederman, Erwin Chemerinsky, William Dodge, Martha Field, Burke Marshall, Judith Resnik, David L. Shapiro, and William W. Van Alstyne supporting a motion in opposition to a writ of certiorari); see also THE ENFORCEMENT OF HUMAN RIGHTS AND HUMANITARIAN LAW BY CIVIL SUITS IN MUNICIPAL COURTS: THE CIVIL DIMENSION OF UNIVERSAL JURISDICTION, REMARKS BY BETTIE STEPHENS, CIVIL REMEDIES IN THE US COURTS FOR INTERNATIONAL HUMAN RIGHTS OFFENSES, supra note 112, at 3 n.6 ("In the United States universal jurisdiction has been exercised with some success for the purpose of obtaining civil remedies under the Alien Tort Claims Act and the Torture Victim Protection Act.").

281. See, e.g., Filartiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("Indeed, for the purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—hostis humani generis, an enemy of all mankind."); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781 (D.C. Cir.
jurisdiction in the context of human rights litigation in domestic courts invokes a species of the doctrine of universal jurisdiction. The connection between forms of extraterritorial criminal jurisdiction and suits seeking civil redress for violations of human rights norms is more salient in civil law jurisdictions where the common law distinction between these two forms of redress is not as pronounced. Many civil law systems have codified forms of extraterritorial jurisdiction that allow for the exercise of transient or even more attenuated forms of jurisdiction over individuals alleged to have committed human rights violations abroad. In some civil law systems, an award of civil reparations can be an integral part of a criminal suit. Victims of human rights abuses can accordingly seek civil redress in the context of a criminal trial that is premised upon forms of jurisdiction that are considered exorbitant when applied within a common law framework.

This commonality among cases in common law and civil law jurisdictions was noted by the Hague Conference Commentary on the final draft. According to this text,

There is a well known tendency with these international crimes to assign universal jurisdiction to states to enable them to exercise criminal jurisdiction even when there is no clear connection between the crime and the state . . . . Thus it is only to be expected that criminal proceedings may be accompanied by civil proceedings instituted by victims to obtain relief from the person responsible for the violation. In this regard, it should also be noted that a civil action of this kind may be taken in the context of the criminal action itself if national law permits this . . . otherwise, an action may be instituted independently in a civil court.  

Given that extraterritorial jurisdiction exists over these fundamental international norms in the criminal law context, it is perhaps no surprise that such jurisdiction exists in the civil context as well. Imposing criminal sanctions on an individual is clearly more intrusive than asserting adjudicatory jurisdiction in a civil action, which explains the heightened guarantees of

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1984) (Edwards, J., concurring) ("Historically these offenses held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them."); Kadrić v. Karadžić, 70 F.3d 232, 240 (2d Cir. 1995) (noting that "international law permits states to establish appropriate civil remedies") (citation omitted); Xuncax v. Gramajo, 886 F.Supp. 162, 182 n.25 (D. Mass. 1995) ("It is appropriate to note briefly at this point the legitimacy of United States jurisdiction from the perspective of international law. Accordingly, I take explicit note here of the doctrine of universal jurisdiction as set forth in Section 404 of the Restatement . . . ."). But see Amerada Hess Shipping Corp. v. Argentine Republic, 638 F.Supp. 73, 77 (S.D.N.Y. 1986), rev'd 830 F.2d 421 (2d Cir. 1987), rev'd 488 U.S. 428 (1989) (finding that universal jurisdiction does not provide jurisdiction in a civil case).

282. Preliminary Document No. 11, supra note 210, at 80.

283. See RESTATEMENT OF FOREIGN RELATIONS, supra note 10, at § 403 rep's note 8

[T]he exercise of criminal (as distinguished from civil) jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive. It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial
due process accorded to the criminal defendant. The liberty of a foreign defendant is at stake in criminal proceedings. In contrast, civil litigation merely renders the foreign defendant susceptible to providing restitution or compensation to his victims. In light of the exceptional measures authorized by the various multilateral treaties seeking the repression of international crimes to secure jurisdiction over alleged perpetrators in the criminal context, the more passive application of universal jurisdiction in the civil context should raise fewer comity concerns.

It would be paradoxical if a victim of a human rights violation could exercise universal jurisdiction in a criminal context, but not obtain civil redress under the same basis of jurisdiction. Further, civil suits in common law countries are "an essential supplement to criminal prosecutions in those states where the criminal court may not award reparations." Universal jurisdiction in the criminal context is premised on the right of all states to punish individuals for breaches of international order, whereas universal jurisdiction in the civil context is concerned primarily with redress for victims. At the same time, states may adopt those mechanisms they see fit to prevent international law violations, and authorizing private plaintiffs to pursue civil claims can provide one such mechanism.

Accordingly, in cases seeking civil redress to enforce human rights norms, forms of personal jurisdiction that may be considered problematic or exorbitant in other contexts are, in fact, quite in tune with the jurisdictional principles of international law. In other words, civil human rights cases premised on otherwise exorbitant forms of jurisdiction are more analogous to criminal cases brought under well-established forms of extraterritorial jurisdiction, such as universal jurisdiction. Given this perspective on such litigation, protecting the ability of victims of human rights violations to bring civil cases on the basis of otherwise prohibited bases of jurisdiction does not offend or detract from the basic purpose of the proposed Hague Convention and is in keeping with states' obligations under international law to respect human rights norms and to provide victims with redress.

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Id. (citations omitted); Blum & Steinhardt, supra note 145, at 86 ("Prosecution of a foreign national for acts committed abroad involves a much greater assumption of the foreign state's prerogatives than does hearing a private lawsuit in which the substantive law of the situs will most likely be applied.").

284. The exercise of criminal universal jurisdiction is, to some degree, subject to approval by the executive branch in the United States, which will undoubtedly take foreign policy concerns into account. However, the executive branch has expressed support for civil suits on behalf of victims of human rights abuses. See Filartiga Memorandum, supra note 145, at 605.

285. AMNESTY INT'L, JUSTICE FOR VICTIMS: ENSURING EFFECTIVE ENFORCEMENT ABROAD OF COURT DECISIONS CONCERNING REPARATIONS, supra note 8, at 8.

286. See Randall, supra note 10, at 794.

287. See Study on Reparations, supra note 82, at 58 ("12. Every State shall maintain prompt and effective disciplinary, administrative, civil and criminal procedures, with universal jurisdiction for human rights violations that constitute crimes under international law.").
D. Responding to Critiques

Critics may advance a number of arguments against exempting human rights litigation from the jurisdictional prohibitions of the proposed Hague Convention. Some of these arguments were raised during the course of the Hague Conference debates. One concern is that the inclusion of an exception for suits arising out of human rights abuses is that it would enable the courts of one state to sit in judgment over citizens of another state, potentially generating international tension. In extreme cases, the judiciary could effectively deprive the executive of exclusive authority over the international affairs of the state. This not only raises a division of powers dilemma, but could also seriously undermine the efficacy of the state's foreign policy making bodies.

This critique applies to the practice of universal jurisdiction more generally. First, the exercise of such forms of extraterritorial jurisdiction will not necessarily override national law immunity or political question doctrines. Second, a review of the major multilateral treaties outlawing various human rights abuses reveals that the nations of the world have almost uniformly agreed that the exercise of extraterritorial jurisdiction represents an appropriate—and in many cases obligatory—response to the presence of human rights abusers in state territory. Some of these multilateral conventions include advance waivers of jurisdictional defenses among signatories, as states have agreed \textit{ex ante} to either extradite or prosecute violators. As a result of the implementation of these provisions into national laws in some states, nations are already exercising universal jurisdiction in the criminal sphere with increasing frequency.

Obviously, extraterritorial forms of jurisdiction should be exercised with restraint. Because of the dangers of judicial overreaching, it is all the more important that the Hague Conference draft a consensus provision setting forth the circumstances in which the exercise of civil universal jurisdiction is appropriate and authorized. Such language would ensure that this jurisdictional principle is invoked in a uniform and mutually acceptable way. With the inclusion of such an exception, the Hague Convention will constitute the first transnational codification of civil extraterritorial jurisdiction.

There is also the concern that if the human rights exception remains open-ended and exemplary, it may be subject to divergent interpretations by national courts. This is a criticism that can be leveled against the entire Hague Convention project, as decisions engendered under the proposed Hague Convention will not be subject to any supranational oversight mechanism, unlike those rendered pursuant to the Brussels Convention.

\begin{footnotes}
289. See Randall, \textit{supra} note 10, at 820.
290. See \textit{supra} Parts II.A., II.B.1 (discussing criminal prosecutions based on extraterritorial forms of jurisdiction).
\end{footnotes}
which are subject to review before the European Court of Justice.²⁹¹ Instead, national courts will need to independently elucidate and apply the rules of jurisdiction set forth in the Hague Convention. Clear language and broad political consensus will help ensure consistent downstream application in those courts.

Likewise, the exercise of universal jurisdiction by states within the criminal context may also generate conflicting results. Nonetheless, the hope for the entire Hague Convention effort is that a species of transnational precedent will develop over time, so that national courts will look to the jurisprudence of other signatory states in interpreting the human rights exception, and indeed all the Hague Convention's provisions.²⁹²

In a related vein, there is the concern that the exercise of extraterritorial jurisdiction—either criminal or civil—will result in patchwork justice that reaches only those abusers who travel abroad.²⁹³ But the fact that not all abusers will subject themselves to extraterritorial jurisdiction by leaving safe haven states should not bar victims from utilizing those forms of jurisdiction when they are available. The eventual goal is a comprehensive system of justice for victims on the national and international levels, so that every perpetrator is brought to justice. Civil universal jurisdiction provides another layer of that expanding system of justice for human rights victims.

It has also been argued that justice for human rights abusers is better found at home, allowing nations to "consolidate memories and 'engage in secular rituals of commemoration.'"²⁹⁴ In an ideal world, individuals accused of committing grave human rights violations would be tried—either criminally or civilly—in the states in which they committed their crimes. This is true not only for practical reasons, as it is likely that any evidence of the crimes is available only in the state in which the violations occurred, but also for more symbolic or emotive reasons. Citizens of these countries need to see human rights abusers brought to justice in order to come to terms with their country's history of violence, to counter revisionist accounts denying the existence of repression, and to provide a local forum in which victims may bear witness. However, when such countries are unwilling or unable to commence proceedings, or when the victims have resettled abroad, other states must be able to allow suits to proceed in their courts in order to ensure that universal international norms are effectively enforced. Moreover,


²⁹². See Aceves, supra note 27, at 179 (observing that "[t]he development of interstate agreements that facilitate collaboration in civil and criminal matters would further reduce potential conflicts [between national rulings]").


such international actions do not preclude related trials in home states when and if they become politically viable.

VI. CONCLUSION

Absent an exception for human rights litigation, the jurisdictional regime of the proposed Hague Convention threatens to jeopardize efforts by states and individuals to enforce international human rights norms through criminal and civil actions seeking civil redress in national courts. This threat is especially alarming given the scarcity of international and regional fora available to individual victims of human rights abuses. It is thus crucial that the proposed Hague Convention include some exceptional language taking into account the considerations discussed above to protect the ability of victims of human rights abuses to bring suit against their tormenters wherever the latter may be found. This will ensure that victims who lack access to the courts of the state in which their 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. Further, this will ensure that the proposed Hague Convention does not hinder states' efforts to fulfill multilateral obligations to prevent, punish, or remedy international law violations.

In this way, the Hague Convention will reflect the fact that human rights litigation is qualitatively different from traditional contract, commercial, or tort litigation. The Hague Convention should privilege civil actions to enforce international human rights, international criminal law, and humanitarian law precisely because the standards these norms seek to vindicate are universal, and their violation and remedy is of concern to the entire international community. The special quality of this category of international offenses gives each state the right to extend its jurisdiction over violators, even if the offender has no special connection to the state. If national courts decline to entertain meritorious claims brought to enforce human rights norms, or decline to enforce judgments resulting from such civil suits, they risk contravening both treaty and customary international law obligations. Given the special quality of these norms, it is inappropriate to subject vastly different types of cases to a uniform set of jurisdictional rules that fails to take into account these disparities. The revisions suggested above acknowledge the fact that the Hague Convention will primarily address commercial disputes, but at the same time they ensure that the Hague Convention does not inadvertently foreclose the ability of victims of human rights abuses to seek civil redress in domestic courts.

International human rights law is composed of a core group of norms that is fundamental to our communal sense of fairness and justice. If these norms

295. See Amley, supra note 168, at 2195–97 (noting the political symbolism and social ramifications of human rights suits versus transnational commercial tort and contractual disputes).
are to be meaningful, however, the nations of the world must enforce them and provide comprehensive redress to victims. Civil suits in domestic courts play a crucial role in this process. A 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—suits seeking civil redress for grave human rights violations and, in so doing, contributes to the enforcement of human rights norms worldwide.