

Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution

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INTRODUCTION

On July 17, 1998, delegates to a United Nations–sponsored conference in Rome, Italy adopted a statute in treaty form for an international criminal court.¹ The future effectiveness of this tribunal, however, was cast in serious doubt by strong U.S. opposition to several provisions in the statute.² According to newspaper reports, David Scheffer, the head of the U.S. delegation, stated that “this is the court we and others warned of, strong on paper and weak in reality.”³

The overwhelming majority of the delegates from 160 countries attending the conference opposed the U.S. position. In a vote on whether to accept the draft statute without further amendments proposed by the United States, the count was 120 countries in favor, 7 opposed, and 21 abstaining.⁴ Besides the United States the countries reportedly voting against the draft statute were Iraq, Libya, Qatar, Yemen, China, and Israel.⁵

Even if the United States were to lend its full support to the establishment of a permanent international criminal court, however, its success would hardly be assured. For one thing, it is uncertain that the obstacles that have hindered the prosecution of international crimes before national tribunals could be overcome by an international criminal court.⁶ The mixed

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1. See Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183.9, reprinted in 37 I.L.M. 999 (1998) [hereinafter Rome Statute]; Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

2. See Stanley, *supra* note 1; Neil King, Jr., *Nations Create War-Crimes Court Despite U.S. Protests*, WALL ST. J., July 20, 1998, at A16.

3. Stanley, *supra* note 1.

4. See *id.*

5. See Anthony Lewis, *A Turn in the Road*, N.Y. TIMES, July 20, 1998, at A15.

6. For discussion of these obstacles, see *infra* text accompanying notes 34–173.

record of the tribunals established by the U.N. Security Council for Former Yugoslavia and Rwanda,⁷ which, at least in theory, have the full support of all five permanent members and the considerable enforcement powers of the Council behind them, illustrates some of these difficulties.⁸

In any event, the prosecution of international crimes will remain a difficult and, at best, an intermittently successful undertaking. It may therefore be useful to consider an approach that has received relatively little attention⁹ as compared to criminal prosecution: civil suits against those who commit international crimes and those who sponsor them. Although such suits are by no means a panacea, they may afford a measure of justice to the victims of international crimes and their families and serve as an additional deterrent to future crimes. Most importantly, civil suits may allow recourse against the governments that sponsor international crimes where criminal prosecution is not an option. On the other hand, for reasons we will explore, governments, including the U.S. Government, have resisted both civil suits against individual perpetrators and those against state sponsors, at least if they are based on acts occurring outside of the territory in which the court sits.

Accordingly, after a brief discussion of the nature of international crimes in Part I, the Article in Part II considers some reasons why it has proven so difficult to prosecute them. Then, in Part III, it evaluates efforts to hold the perpetrators of international crimes civilly liable for damages. Part IV proposes some steps that might be taken, at both the international and national levels, to enhance prospects for successful civil liability suits. Lastly, the Article sets forth some concluding observations.

I. A BRIEF EXCURSUS ON INTERNATIONAL CRIMES

At the outset it is necessary to stress that the field of international criminal law is an area of considerable definitional ambiguity.¹⁰ Indeed, in the

7. On February 22, 1993, the Security Council decided by resolution to establish the International Criminal Tribunal for the Former Yugoslavia. S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993) [hereinafter Statute of the Yugoslavia Tribunal]. In 1994 the Council adopted by resolution the statute for the Rwanda Tribunal. S.C. Res. 955, U.N. SCOR 49th Sess., U.N. Doc. S/RES/955 (1994) [hereinafter Statute of the Rwanda Tribunal].

8. As Professor M. Cherif Bassiouni has noted concerning the Yugoslavia Tribunal, however, "the Security Council has not used its sanction powers to enforce the orders of the Tribunal with respect to any defendant, nor has it taken any action against the Federal Republic of Yugoslavia or the authorities of the so-called Republica Srpska." M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 46 (1997).

9. For example, in their seminal study, Steven Ratner and Jason Abrams devote only 7 out of a total of 303 pages of text to a consideration of civil suits against human rights violators. See STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 204-11 (1997).

10. For further consideration of the subjects discussed in this section, see John F. Murphy, *International Crimes*, in 2 UNITED NATIONS LEGAL ORDER 993 (Oscar Schachter et al. eds., 1995); John F. Murphy, *International Crimes*, in THE UNITED NATIONS AND INTERNATIONAL LAW 362 (Christopher C. Joyner, ed. 1997).

view of some eminent scholars, "international criminal law in any true sense does not exist."¹¹ Rather, under this "positivist" approach, so-called international crimes like piracy are classified solely as municipal law crimes, "the only question of international law being the extent of a state's jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state."¹² In contrast, under the "naturalist" model, certain crimes, like piracy, are considered crimes against international law "seeking only a tribunal with jurisdiction to apply that law and punish the criminal."¹³

In large part this issue has lost its poignancy because of the establishment of the Yugoslavia and Rwanda tribunals. These tribunals exercise jurisdiction over crimes that are clearly international crimes because they appear in and are defined by the statutes of the tribunals, which in turn were established by binding Security Council resolutions. Similarly, if the statute adopted by the Rome Conference in treaty form comes into effect, the international criminal court will be exercising jurisdiction over crimes defined under international law.

As to crimes that are not within the jurisdiction of established or proposed international criminal tribunals, and therefore are prosecuted, if at all, before national tribunals, international law and procedures may play a major role, regardless of whether the crimes themselves are properly classified as "international crimes." In particular, many of the so-called international crimes are the subject of treaties and conventions, which, *inter alia*, define the offence and establish a legal framework for states parties to cooperate toward punishment of the perpetrators of these crimes. They may also create a system of universal jurisdiction over these crimes for states parties and, in the case of those conventions that have been ratified by a large number of states, they may have contributed to the establishment of a system of universal jurisdiction available to all states.¹⁴

Since the most important goal of these treaties and conventions is to ensure prosecution of the accused, many of the conventions strongly state an obligation either to extradite or to submit the accused for prosecution.¹⁵ Under normal circumstances, it is solely up to the state where an accused is

11. Georg Schwarzenberger, *The Problem of an International Criminal Law*, in 3 CURRENT LEGAL PROBLEMS 263, 295 (1950).

12. ALFRED P. RUBIN, *THE LAW OF PIRACY* 328 (1988).

13. *Id.*

14. The classic article describing this process is Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965-66). See also ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 123-47 (1987); CLIVE PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 62-67 (1965).

15. See, e.g., Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, entered into force Feb. 20, 1977, art. 7, 28 U.S.T. 1975, 1035 U.N.T.S. 167, which states: "The state party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution through proceedings in accordance with the law of that state."

apprehended to decide whether to extradite or prosecute him.¹⁶ To ensure that the prosecution option is realizable, each state party is required to take such measures as may be necessary to establish its jurisdiction over the offence in cases where the alleged offender is present in its territory and it decides not to extradite him.¹⁷ Usually, this will require the adoption of legislation.

By definition, then, an "international crime" is an act that is defined as criminal under international law. In most instances, this will be done through international agreements, but customary international law also plays a role. Normally, an act will initially be defined as a crime by an international agreement and then, after the agreement has been ratified by a large number of states and generally accepted even by those states who do not become parties, the act may be regarded as a crime under customary international law.¹⁸ If an act is defined as an international crime under customary

16. Clear examples of abnormal circumstances are the efforts the United States and Great Britain have undertaken against Libya in the United Nations Security Council for its support of international terrorism and the counteraction that Libya has taken before the International Court of Justice. The U.S. and U.K. initiatives in the Security Council came about because of Libya's refusal to surrender two Libyan members of the Libyan secret service who were indicted by a Grand Jury of the District of Columbia in November, 1991. In response the Security Council adopted several resolutions that, *inter alia*, demanded that Libya surrender the two accused, as well as cease its support for all terrorist activity, and imposed economic sanctions against Libya. See S.C. Res. 731 (1992), reprinted in 31 I.L.M. 731 (1992); S.C. Res. 748 (1992), reprinted in 31 I.L.M. 750 (1992).

For its part Libya claimed that, under the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177, (1971), the only obligation on Libya was to decide, in its absolute discretion, whether it would extradite the accused persons or submit them to its own courts for purposes of prosecution. Since, allegedly, Libya has submitted the two accused persons to its competent authorities to be prosecuted under Libyan law, it claims it has fulfilled its obligations under the Montreal Convention and that the United States and Great Britain, in insisting that Libya surrender the accused, are violating the Convention. On March 3, 1992, Libya brought an action against the United States and the United Kingdom before the International Court of Justice and requested that the Court "indicate provisional measures" (roughly issue an injunction) against the United States and the United Kingdom in an effort to prevent them from imposing the sanctions against it. The Court declined to do so. Questions of Interpretation and Application of the 1971 Montreal Convention Arising From the Aerial Incident at Lockerbie (Libya v. U.K., Libya v. U.S.), 1992 I.C.J. 3, 114 (Orders of Apr. 14). More recently, however, on February 27, 1998, the ICJ ruled by a 13-2 vote that it has jurisdiction to consider the merits of Libya's claims against the United States and the United Kingdom. For a summary of this decision, see Peter H.F. Bekker, *The ICJ Upholds Its Jurisdiction in Lockerbie Cases*, ASIL NEWSLETTER, Mar.-Apr., 1998, at 2. The full text of the decision may be found on the Internet at <<http://www.icj-cij.org>>.

At this writing there are newspaper reports that the U.S. and U.K. Governments are actively considering a proposal to hold a trial of the accused Libyans before a Scottish Court under Scottish law with Scottish judges in the Netherlands. Libya had made a proposal along these lines in 1994, and had gained the support of the Organization of African Unity, President Nelson Mandela of South Africa, and the Arab League, but the United States and the United Kingdom had categorically rejected it and insisted that the trial be held either in the United States or in Scotland. Reportedly, erosion of support for the sanctions applied against Libya and a realization that there might be no other way to bring the suspects to trial were among the reasons for the change of view. See *What's News World Wide*, WALL ST. J., July 22, 1998, at A1; Youssef M. Ibrahim, *Britain Weighs Dutch Trial in Lockerbie Case*, N.Y. TIMES, July 23, 1998, at A5; and *Justice and Pan Am Flight 103*, N.Y. TIMES, at A21.

17. See, e.g., Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 5, *supra* note 16.

18. See Baxter, *supra* note 14.

international law, this creates an international legal obligation to refrain from the commission of the act. The classic example of this process is the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land,¹⁹ which the International Military Tribunal at Nuremberg explicitly recognized as having become customary international law, at least by 1939.²⁰ There is no definitive list of what acts qualify as international crimes. A recent survey of conventions that criminalize certain acts, however, produced the following table,²¹ which lists the acts under the interests the conventions are designed to protect:

- A. Protection of Peace
 - 1. Aggression
- B. Humanitarian Protection During Armed Conflicts, the Regulation of Armed Conflicts, and the Control of Weapons
 - 2. War Crimes
 - 3. Unlawful Use of Weapons; Unlawful Emplacement of Weapons
 - 4. Mercenarism
- C. Protection of Fundamental Human rights
 - 5. Genocide
 - 6. Crimes Against Humanity
 - 7. Apartheid
 - 8. Slavery and Related Crimes
 - 9. Torture
 - 10. Unlawful Human Experimentation
- D. Protection Against Terror-Violence
 - 11. Piracy
 - 12. Aircraft Hijacking and Sabotage of Aircrafts
 - 13. Threat and Use of Force Against Internationally Protected Persons
 - 14. Taking of Civilian Hostages
 - 15. Attacks upon Commercial Vessels and Hostage-Taking on Board Such Vessels
- E. Protection of Social Interests
 - 16. Drug Offenses
 - 17. International Traffic in Obscene Publications
- F. Protection of Cultural Interests
 - 18. Destruction and/or Theft of National Treasures
- G. Protection of the Environment
 - 19. Environmental Protection
 - 20. Theft of Nuclear Materials
- H. Protection of Communication Means
 - 21. Unlawful Use of the Mails
 - 22. Interference with Submarine Cables

19. Oct. 18, 1907, 36 Stat. 2277; T.S. 539; 1 Bevans 631.

20. See Judgment of the International Military Tribunal, 6 F.D.R. 69 (1946), at 130.

21. The table may be found in JORDAN PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 11 (1996).

I. Protection of Economic Interests

23. Falsification and Counterfeiting

24. Bribery of Foreign Public Officials

Some of these crimes are generally regarded as covered by *jus cogens* norms, i.e., peremptory norms of international law that preempt any other inconsistent law.²² Examples commonly cited include aggression, genocide, crimes against humanity, war crimes, piracy, slavery, and torture.²³ In such cases, an agreement by a state or an individual to commit the crime would be unlawful and void *ab initio* as a matter of law.²⁴

Also, some of these crimes are distinguished from the other crimes by referring to them as "core crimes."²⁵ For example, the statute of the permanent international criminal court only covers genocide, crimes against humanity, war crimes, and aggression.

Not all of the conventions that cover these crimes contain an obligation or authorization to prosecute or a duty to prosecute or extradite.²⁶ In sharp contrast, with respect to war crimes, the Geneva Conventions of 1949,²⁷ in particular, designate certain "grave breaches" as universal and extraditable offenses within the criminal jurisdiction of each state party. Each of the four 1949 Geneva Conventions obligates states parties: (1) to enact any legislation necessary to impose effective criminal sanctions on persons committing, or ordering to be committed, any grave breaches of the conventions; (2) to

22. Article 53 of the Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27 (1969), provides:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Although by its terms Article 53 limits its definition of a peremptory norm to the purposes of the Vienna Convention, the definition is regarded as a general standard for other purposes as well. For further discussion of this topic, see OPPENHEIM'S INTERNATIONAL LAW 7-8 (R.Y. Jennings & A. Watts eds., 9th ed. 1992).

23. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 102, cmt. k at 404, 702 (1987).

24. See Vienna Convention on the Law of Treaties, *supra* note 22, art. 53. Article 64 of the Vienna Convention complements Article 53 by providing: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

25. See art. 5 of the Rome Statute, *supra* note 1.

26. See PAUST, *supra* note 21, at 10.

27. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See also Protocol I Additional to the Geneva Conventions of August 12, 1949, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144 Annex I; Protocol II Additional to the Geneva Conventions of August 12, 1949, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex II.

search for alleged offenders and to submit them for prosecution before their own courts, whatever their nationality, or, alternatively, and in accordance with their own legislation, to extradite them to another state party, provided that the requesting party has made out a *prima facie* case; and (3) to ensure to accused persons a fair trial with judicial safeguards specified in the Third Convention on prisoners of war.²⁸

28. Until 1996 the United States was in clear breach of its obligation under the Geneva Conventions to enact legislation that would enable U.S. courts to impose effective criminal sanctions on persons committing, or ordering to be committed, grave breaches of the Conventions. In that year the United States promulgated the War Crimes Act, 18 U.S.C.A. § 2441 (West Supp. 1998). Under this legislation, anyone who commits a war crime in violation of the Geneva or Hague Conventions, "whether inside or outside the United States," may be subject to a range of criminal penalties, including the death penalty if the victim dies as a result of the crime. The imposition of such penalties, however, is limited to circumstances where the person committing the crime, or the victim of the crime, is a member of the U.S. armed forces, or a national of the United States. In addition to covering grave breaches, war crimes are defined to include acts prohibited by Articles 23, 25, 27, or 28 of the Annex to the Hague Convention IV Respecting the Laws and Customs of War on Land; acts constituting a violation of Common Article 3 of the Geneva Conventions of 1949, or any protocol to these Conventions to which the United States may become a party and which deals with non-international conflict; conduct of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices, when the United States is a party to the Protocol, willfully kills or causes serious injury to others.

Even with the passage of this legislation, the United States may be in violation of its obligation under the Geneva Conventions. For example, Article 129 of the Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 27, at 3418 provides in pertinent part:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. (emphasis supplied.)

Under the War Crimes Act of 1996 jurisdiction of U.S. courts over the specified war crimes is limited to U.S. nationals or to situations where either the perpetrator or the victim of the act is a member of the U.S. armed forces. Hence, the Act would appear not to provide U.S. courts with the kind of *universal* jurisdiction over grave breaches that is required by the Geneva Conventions. During hearings on the legislation several participants recommended that the draft be amended to provide for such coverage. *See, e.g.*, War Crimes Act of 1995, Hearing Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary, 104th Cong. 11-13 (1996) (statement of Michael J. Matheson, Principal Deputy Legal Adviser, Department of State); *id.* at 15-16 (statement of John H. McNeill, Senior Deputy General Counsel, International Affairs and Intelligence, Office of General Counsel, Department of Defense); *id.* at 32-39 (statement of Mark S. Zaid, Vice Chair International Law Committee, Section of Criminal Justice, American Bar Association and Chair, American Association Task Force on Proposed Protocols of Evidence and Procedure for Future War Crimes Tribunals).

The House Committee on the Judiciary ultimately rejected the suggestions of these witnesses. Instead, it decided that:

[E]xpansion of [the draft legislation] to include universal jurisdiction would be an unwise (sic) at present. Domestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight. In addition, problems involving witnesses and evidence would likely be daunting. This does not mean that war criminals should go unpunished. There are ample alternative venues available which are more appropriate. Prosecutions can be handled by the nations involved or by international tribunal. If a war criminal is discovered in the United States, the federal government

As previously noted, many of the conventions on international crimes have as their primary focus the prosecution and punishment of individuals who perpetrate the crimes. Moreover, it has long been established that the official position of the perpetrator, as head of state or as a government official, does not relieve him or her of criminal responsibility.²⁹ It has long been equally well-established that states that sponsor international crimes may be held civilly liable, at least at the international level, for such sponsorship.³⁰ Much more controversial, however, have been recent developments in the International Law Commission's work on state responsibility. Specifically, in 1996, the Commission adopted a complete set of draft arti-

can extradite the individual upon request in order to facilitate prosecution overseas. The committee is not presently aware that these alternative venues are inadequate to meet the task.

Finally, even if enacted, universal jurisdiction will in all likelihood be purely symbolic. The committee has been informed that there has never been a single case of a signatory country to the Geneva Conventions exercising its own criminal jurisdiction over an alleged war criminal on the basis of universal jurisdiction. H.R. Rep. No. 104-698, at 8 (1996).

29. The decision of the International Military Tribunal at Nuremberg stated this principle most emphatically:

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of State, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized

. . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced

. . . .

The principle of international law, which under certain circumstances, protects the representatives of a State, cannot be applied to acts which are considered as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceeding

Judgment of the International Military Tribunal, *supra*, note 20, at 110.

On December 11, 1946, the United Nations General Assembly unanimously affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal." G.A. Res. 95, 1 U.N. GAOR 6th Comm., 1st Session, 46th plen. mtg. at 1144, U.N. Doc. A/236 (1946).

30. The classic statement of state responsibility for international delicts was made by the Permanent Court of International Justice in the *Chorzow Factory Case*. There the Court stated that, where a state imposes injuries on another, it bears responsibility to make reparation, the "essential principle" of which is that it must, "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed." *Chorzow Factory Case* (Pol. v. F.R.G.), 1927 P.C.I.J. (ser. A) No. 17, at 47 (Nov. 21). A salient recent affirmation of this principle is Security Council Resolution 674, adopted on October 29, 1990, and reprinted in 29 I.L.M. 1561 (1990), where the Council reminded Iraq that "under international law, it is liable for any loss, damage or injury arising in regard to Kuwait and third states and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq." By Resolution 692 (May 20, 1991), reprinted in 30 I.L.M. 864 (1991), the Council established a Compensation Commission to decide claims against Iraq arising out of its invasion of Iraq. Many of these claims are based on Iraqi acts that constitute international crimes. For further discussion, see generally the UNITED NATIONS COMPENSATION COMMISSION (Richard B. Lillich, ed. 1995).

cles on state responsibility at first reading.³¹ Among these draft articles is Article 19, which draws a distinction between international “crimes” and international “delicts.” Under the Commission’s approach, states would be subject to additional consequences for the commission of state crimes.³² The United States Government, among others, has sharply criticized this concept,³³ and it is unclear at this writing whether the final articles on state responsibility will retain it. Regardless of the ultimate fate of Article 19 and related articles, the Commission’s approach raises the complex issue of states that sponsor international crimes.

II. OBSTACLES TO THE PROSECUTION OF INTERNATIONAL CRIMES

As noted above,³⁴ there may be as many as twenty-four different international crimes. For purposes of our brief consideration of obstacles to the prosecution of international crimes, however, it may be useful to distinguish between the so-called “core crimes”—aggression, genocide, war crimes, and crimes against humanity—and other international crimes. Also, as to the “other” international crimes, it would seem prudent to limit our consideration to a few crimes that have been at the center of international efforts to suppress them, namely, acts of terrorism and torture. As we shall see, rather different obstacles face efforts to prosecute the core crimes as compared to the others, although there are, to be sure, areas of considerable overlap.

A. *The Core Crimes*

1. Aggression

Among the four crimes covered by the Rome Statute for an International Criminal Court, the crime of aggression has been the most troublesome and controversial. The precedent for the crime of aggression was the crime against peace charge filed against the defendants at the Nuremberg Trials.³⁵ Article 6(a) of the London Charter that established the Nuremberg Tribunal defined crimes against peace as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” The term, “aggression,” however, is nowhere defined in the London Charter; nor was the term defined in the

31. Report of the International Law Commission on the Work of its Forty-eighth Session: Draft Articles on State Responsibility, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996).

32. These consequences are set forth in articles 51–53 of the draft articles on state responsibility. *Id.* at 458–59.

33. See *Draft Articles on State Responsibility: Comments of the Government of the United States of America*, 37 I.L.M. 468, 474–78 (1998) [hereinafter *Draft Articles on State Responsibility*].

34. See *supra* text accompanying note 20.

35. For discussion, see John F. Murphy, *Crimes Against Peace at the Nuremberg Trial*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 141–53 (G. Ginsburgs & V.N. Kudriavtsev eds. 1990).

Tribunal's opinion. Rather, the aggressive nature of the Nazi attacks was assumed, and the primary focus of the Tribunal was on the defendants' allegation that the charge constituted *ex post facto* law.

The United Nations Charter uses the term "aggression" only in Chapter VII, where it authorizes the Security Council to determine the existence of an act of aggression and to make recommendations or decisions on measures to be taken by member states in order to maintain international peace and security.³⁶ Nowhere in the U.N. Charter is the concept of aggression defined.

This absence is deliberate, for many states, including the United States, opposed defining aggression. U.S. President Harry Truman described such an effort as "a trap for the innocent and an invitation to the guilty" and noted that under the Charter system as adopted, "the appropriate U.N. organ, in the first instance the Security Council, would determine on the basis of the facts of a particular case whether aggression has taken place."³⁷

Despite this and later U.S. reservations, in 1974 the U.N. General Assembly adopted by consensus a resolution defining aggression.³⁸ The Assembly's definition, however, was not adopted for the purpose of imposing criminal liability, and was intended only as a political guide for the Security Council.³⁹

As a consequence, the definition of aggression was not included in any multilateral convention, nor was it generally included as a crime in national criminal legislation. Most significantly, it does not appear in the statute of either the Yugoslavia or Rwanda Tribunals, and there have been no prosecutions for crimes against peace or aggression since the Nuremberg and Tokyo Trials and the trials of German and Japanese defendants that followed in their wake.⁴⁰

One reason for this inactivity may be that prosecution for the crime of aggression would arguably raise serious due process questions. Under U.S. constitutional law a criminal statute is void when it is so vague and imprecise that "men of common intelligence must necessarily guess at its meaning and

36. See U.N. CHARTER, art. 39.

37. MARJORIE WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 740 (1965).

38. Res. 3314 (XXIX) on the Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR, 26th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

39. See Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977).

40. In addition to the trials of Nazi leaders held before the International Military Tribunal, numerous prosecutions of Nazis below the level of those tried before the I.M.T. were held at Nuremberg under *Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity*, Allied Control Council Law No. 10, 20 December 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946, reprinted in BENJAMIN B. FERENCZ, *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE* 488 (1980). In these trials the judicial machinery was part of the occupation administration for the American zone. The Tokyo Tribunal, which consisted of eleven judges, was appointed by General MacArthur. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, amended April 26, 1946, 4 Bevans 20. The Tribunal tried 28 Japanese leaders and convicted 25. Other allied tribunals tried over 5000 other Japanese for war crimes. See M. Cherif Bassiouni, *Editor's Note*, in 3 INTERNATIONAL CRIMINAL LAW 97-98 (M. Cherif Bassiouni, ed. 1986).

differ as to its application."⁴¹ Past efforts to define aggression have been replete with vagueness and ambiguity.⁴²

It is thus perhaps surprising that aggression would appear in the Rome Statute for the International Criminal Court.⁴³ The court's jurisdiction would be deferred, however, until such time as the states parties have defined the crime and set out the conditions under which the Court shall exercise jurisdiction with respect to this crime.⁴⁴ It remains to be seen whether the states parties will be able to accomplish this task.

2. Genocide

As noted by Steven Ratner and Jason Abrams, "[s]cholars and practitioners of international law often regard genocide as the most heinous international crime."⁴⁵ A primary reason for this view is the extraordinary barbarism that characterized the Holocaust, history's most traumatic instance of genocide. The Charter of the Nuremberg Tribunal did not expressly use the term "genocide,"⁴⁶ but the definition of the crimes against peace charge covered many acts today regarded as constituting genocide,⁴⁷ the indictment of the defendants expressly charged them with genocide,⁴⁸ and the prosecution used the term during the proceedings.⁴⁹ Moreover, unlike the other crimes against humanity, the crime of genocide has been defined in a widely ratified multilateral convention—the Genocide Convention of 1948⁵⁰—and the prohibition against genocide is generally regarded as a *jus cogens* norm. However, the Genocide Convention's definition of genocide remains controversial and, most importantly, the Convention has been a singular failure, both as a

41. *Conally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

42. For an examination of the many ambiguities in the General Assembly's Definition of Aggression, see Stone, *supra* note 39, at 226–37.

43. See art. 5(1)(d) of Rome Statute, *supra* note 1.

44. See *id.*, at art. 5(2).

45. RATNER & ABRAMS, *supra* note 9, at 24.

46. Rather, Article 6(a) the London Charter charged the defendants with crimes against humanity, defined as:

namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Charter), art. 6, Aug. 8, 1945, 59 Stat. 1544, 82, U.N.T.S. 279.

47. Note particularly the language "persecutions on political, racial or religious grounds" in the definition. *Id.*

48. See RATNER & ABRAMS, *supra* note 9, at 25.

49. *Id.*

50. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (III), U.N. GAOR, 3d Sess., 179th Plen. Mtg. at 174, U.N. Doc. A/810 (1948) [hereinafter Genocide Convention].

deterrent to acts of genocide⁵¹ and as a legal instrument facilitating prosecution and punishment of the crime.⁵²

This failure is not surprising, since the Genocide Convention is a seriously flawed instrument. Besides its limited scope, which does not cover so-called political genocide,⁵³ the Convention's most serious failing was identified by George Schwarzenberger. Noting that genocide by its very nature is most often committed by government officials as a matter of national policy and that the Convention calls for prosecution in the court of the state in which the crime was committed, Schwarzenberger states, after reviewing arguably genocidal actions by a number of governments:

Hardly any of these alleged crimes have been committed spontaneously by irresponsible individuals. Yet the whole Convention is based on the assumption of virtuous governments and criminal individuals, a reversion of the truth in proportion to the degree of totalitarianism and nationalism practiced in any country. In any event, even if this assumption were correct, the criminal law of every civilized State provides sufficiently against any individual act of the kind which are enumerated in the Convention. As it was once put by Sir Hartley Shawcross, murder remains murder whether committed against one or a million. In either case a criminal can be hanged only once.⁵⁴

The Convention also provides that states parties may "call upon the competent organs of the United Nations to take such action . . . as they consider appropriate for the prevention and suppression of acts of genocide"⁵⁵ and that disputes between states parties regarding the "interpretation, application, or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide . . . shall be submitted to the Inter-

51. Since adoption of the Genocide Convention in 1948, the world has witnessed, among others, the genocidal acts of the Khmer Rouge in Cambodia, the slaughter of the Kurds in Iraq, the massacres in Bosnia of Muslim, Croats and Serbs, and the ethnic slaughters in Rwanda of Tutsis and Hutus.

52. As noted by RATNER & ABRAMS, *supra* note 9, at 24, "[t]here have been very few prosecutions for the crime [of genocide]." The major exception has been Israel's prosecution of Adolf Eichmann, but the Genocide Convention played no role in that case.

53. Article II of the Genocide Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another region.

Genocide Convention, *supra* note 50, art. II. Earlier drafts of the convention had included political and certain other groups. In large part because of the strong opposition of the Soviet Union to its inclusion, political groups were omitted from the convention's coverage. For discussion, see RATNER & ABRAMS, *supra* note 9, at 32-33.

54. Georg Schwarzenberger, *supra* note 11, at 292.

55. Convention on the Prevention and Punishment of Genocide, *supra* note 50, art. VIII.

national Court of Justice at the request of any of the parties to the dispute."⁵⁶ These provisions have been invoked only once.⁵⁷ Moreover, some states, including the United States, have made reservations to the jurisdiction of the ICJ that preclude their calling another state party to account for the commission of genocidal acts.⁵⁸

Notably, both the Yugoslavia Tribunal and the Rwanda Tribunal have jurisdiction over the crime of genocide.⁵⁹ On July 6, 1998, the Yugoslavia Tribunal began the trial of a Bosnian Serb charged with the crime of genocide, the first time an international trial for genocide has taken place in Europe.⁶⁰ This trial came to an abrupt halt when, on August 1, 1998, the defendant died in his cell of an apparent heart attack.⁶¹ For its part the Rwanda Tribunal is trying dozens of defendants on charges of genocide committed during the ethnic massacres in Rwanda in 1994.⁶² According to newspaper reports, a former prime minister of Rwanda recently "pleaded guilty to charges of genocide after long negotiations with the prosecutors"⁶³ for the Rwanda Tribunal, and the tribunal has found a former mayor in Rwanda guilty of genocide—the first time an international criminal tribunal has convicted someone of that crime.⁶⁴ Reportedly, Rwanda's national

56. See *id.* Art. IX, at 175.

57. The invocation was by Bosnia-Herzegovina in its claim before the International Court of Justice [hereinafter ICJ] that Yugoslavia (Serbia and Montenegro) committed genocide during the conflict in Bosnia, in violation of its obligations as a party to the Genocide Convention. At this writing the ICJ has granted Bosnia's request for the Indication of Provisional Measures (roughly issue an injunction) and has ruled that both Bosnia-Herzegovina's claim and a counterclaim by Yugoslavia are admissible. See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325 (Sept. 13); Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1996 I.C.J. 595 (July 11); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.) (Admissibility of counterclaim by Yugoslavia), 1997 I.C.J.

58. The U.S. reservation to the dispute settlement clause in Article IX of the Genocide Convention provides that the specific consent of the United States shall be required before a dispute to which the United States is a party may be submitted to the Court. For the full text of the U.S. resolution of ratification, see S. Res. 347, 99th Cong., 2d Sess., 132 Cong. Rec. 1377-78 (daily ed. Feb. 19, 1986). Under the doctrine of reciprocity that governs the jurisdiction of the ICJ, the United States would not be able to refer a dispute regarding whether another state party had violated its obligations under the Genocide Convention to the Court unless that state party consented to such referral. See Case of Certain Norwegian Loans (Fr. v. No.), 1957 I.C.J. 9 (July 6).

59. See Article 4 of the Statute of the Yugoslavia Tribunal, *supra* note 7, and Article 2 of the Statute for the Rwanda Tribunal, *id.*

60. See Marlise Simons, *First Genocide Trial of a Bosnian Serb Opens in the Hague*, N.Y. TIMES, July 7, 1998, at A3.

61. See William J. Kole, *Serb Dies, Ending U.N. Genocide Trial*, PHILA. INQUIRER, Aug. 2, 1998, at A27.

62. See *Law of War: Yugoslav Tribunal Starts First Genocide Trial*, 14 INT'L ENFORCEMENT L. REP. 335 (Aug. 1998).

63. See Barbara Crossette, *U.N. Chief Pays a Visit to Tribunal for Rwanda*, N.Y. TIMES, May 6, 1998, at A13.

64. See James C. McKinley, Jr., *U.N. Tribunal, in First Such Trial Verdict, Convicts Rwandan Ex-Mayor of Genocide*, N.Y. TIMES, Sept. 3, 1998, at A14. For further discussion, see Sara Darethshori, *Inching Toward Justice in Rwanda*, N.Y. TIMES, Sept. 8, 1998, at A25.

courts have convicted some members of the Hutu ethnic group of genocide under local law.⁶⁵

The definition of genocide in the statutes of the two tribunals, however, tracks the definition in the Genocide Convention. Accordingly, as pointed out by Ratner and Abrams,⁶⁶ ambiguities in this definition, as well as its exclusion of protection for political, economic, and social groups, may make successful prosecution for genocide before the tribunals problematic.

3. War Crimes

The law of war crimes has a long vintage and was arguably already well established by the time of the Nuremberg Trials.⁶⁷ As noted earlier in this Article,⁶⁸ the Geneva Conventions of 1949, as well as Additional Protocol I, designate certain "grave breaches"⁶⁹ as universal and extraditable offenses within the criminal jurisdiction of each state party and require states parties to search for alleged offenders, submit them for prosecution before their own courts, or alternatively, to extradite them to another state party. For its part, in 1953 the United Nations General Assembly adopted a resolution⁷⁰ that, *inter alia*, reaffirms that war crimes and crimes against humanity are subject to universal jurisdiction, calls upon states to assist each other in "detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them," and provides that

65. *Law of War: Yugoslav Tribunal Starts First Genocide Trial*, *supra* note 62.

66. See RATNER & ABRAMS, *supra* note 9, at 41-44.

67. See *id.* at 78-80.

68. See *supra* text accompanying notes 27 and 28.

69. The grave breaches defined in the 1949 Geneva Conventions have been usefully summarized by Waldemar A. Solf. As he notes, the following acts constitute grave breaches if committed in an international armed conflict against protected persons and objects:

—in the case of all four Conventions: willful killing, torture, or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health;

—in the case of the First, Second and Fourth Conventions: extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;

—in the case of the Third Convention: compelling a prisoner of war to serve in the forces of the hostile power, or willfully depriving him of the rights of fair and regular trial prescribed in the Convention;

—in the case of the Fourth Convention: unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial prescribed by the Convention, and the taking of hostages.

Waldemar A. Solf, *War Crimes and the Nuremberg Principle*, in NATIONAL SECURITY LAW 359, 376 (John N. Moore, Frederick S. Tipson, & Robert F. Turner, eds. 1990).

Solf further notes that "[p]rotected persons' within the meaning of the 1949 Geneva Conventions are the wounded, sick, and shipwrecked persons of the armed forces, medical personnel, prisoners of war, and civilians in the power of a party to the conflict of which they are not nations." *Id.*

Additional Protocol I, which the United States has not ratified, would add a number of new grave breaches. For discussion, see *id.* at 377-79.

70. *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973).

persons accused of war crimes and crimes against humanity should be tried in the countries where they committed their crimes, that states shall cooperate on questions of extraditing such persons and that states shall not grant asylum to any person who is suspected of having committed a "crime against peace, a war crime or a crime against humanity."⁷¹

Although most authorities agree that war crimes may be punished by any state that obtains custody of alleged offenders under the principle of universality, war crime cases tried by national tribunals of states other than those of the nationality of the victim, the accused or the locale of the crime have been quite rare. The obligation to exercise jurisdiction over grave breaches of the Geneva Conventions of 1949 extends to neutral states, yet they have been reluctant to fulfill their obligation.⁷² Their reluctance to become involved in the trial of war criminals hampers efforts to provide an impartial tribunal for the trial of these crimes.⁷³

Beyond the text of the various instruments, the key impediment to successful invocation of the humanitarian law of international armed conflict is likely to be the attitude of the combatants toward prosecutions. States have proved reluctant to prosecute their own soldiers for war crimes unless they are especially heinous and publicized, thereby justifying impunity, or a small administrative punishment, on the exigencies of warfare. Moreover, they have also hesitated to prosecute the opponent's soldiers if the opponent is still holding some of their prisoners, for fear of retaliation. These problems do not wholly dissipate with the creation of international fora for prosecutions, for the same inertia could render states reluctant to hand over suspects to such a tribunal.⁷⁴

The lack of political will or "inertia" to bring the perpetrators of war crimes to justice has been especially evident in recent years. In such major conflicts as the Iran-Iraq War (1981-88) and the Soviet intervention in Afghanistan (1981-89), the unannounced policy of the combatants was that of unrestricted warfare, atrocities were routinely perpetrated by both sides, and no war crimes trials were ever held. Similarly, although numerous war crimes were committed by Iraq during the Gulf War, and proposals were made to establish an international criminal tribunal to try Saddam Hussain

71. In 1968 the General Assembly adopted the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968). The Convention has not been widely ratified, however, in part because apartheid is listed as an example of a crime against humanity.

72. In enacting the War Crimes Act of 1996, Congress made a deliberate decision along these lines. See *supra* note 28.

73. One reason for establishing a permanent international criminal court is to provide an impartial tribunal for the trial of war crimes. For discussion, see REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT OF THE AMERICAN BAR ASSOCIATION 45-50 (Benjamin R. Civiletti et al., eds. 1995).

74. RATNER & ABRAMS, *supra* note 9, at 91.

and other Iraqi leaders,⁷⁵ no war trials have been held. Only as the gruesome atrocities committed in Bosnia were widely publicized, was the pattern of inaction broken with the establishment of the Yugoslavia Tribunal.⁷⁶

Moreover, most armed conflicts since World War II have not been between states but have instead involved non-international conflicts.⁷⁷ In this milieu the prosecution of war crimes has been especially difficult.⁷⁸

An overarching problem in prosecuting war crimes perpetrated in non-international conflicts is that states have resisted extending the law of armed conflict to internal struggles for power because they prefer to deal with those who rebel against their authority solely under the national law and procedure.⁷⁹ Common Article 3 of the Geneva Conventions of 1949 requires parties to any "armed conflict not of an international character" to apply, "as a minimum," certain standards⁸⁰ to "persons taking no active part in the hostilities." But it is unclear what level of conflict is necessary to trigger these protections.⁸¹ Most important, violations of Common Article 3 do not constitute grave breaches for which criminal responsibility necessarily lies.⁸²

Similarly, Protocol II to the Geneva Conventions of 1949,⁸³ if anything, reflects a *greater* unwillingness on the part of states to extend the law of armed conflicts to non-international conflicts. This is because Protocol II's threshold of applicability is "significantly higher" than that of Common

75. For discussion of these proposals and why they were ultimately rejected, see INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 968-78 (Richard B. Lillich & Hurst Hannum eds., 3d ed. 1995).

76. For an excellent discussion of the backdrop to establishment of the Yugoslavia Tribunal, see 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 17-35 (1995).

77. See, e.g., INSURGENCY IN THE MODERN WORLD ix (Bard E. O'Neill, William R. Heaton, & Donald J. Alberts, eds. 1980).

78. For discussion, see RATNER & ABRAMS, *supra* note 9, at 91-101.

79. See *id.* at 92-93.

80. Common Article 3 prohibits the following "at any time and in any place whatsoever" with respect to persons not actively involved in hostilities:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Geneva Convention for the Amelioration for the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, ch.1, art.3, 6 U.S.T. 3114, 75 U.N.T.S. 31.

81. See RATNER & ABRAMS, *supra* note 9, at 92.

82. See MORRIS AND SCHARF, *supra* note 76, at 78. To be sure, in the Tadic case, involving the first defendant to be tried by the Tribunal, the Yugoslavia Tribunal, while recognizing that Article 2 of its statute (grave breaches of the Geneva Conventions) applied only to international armed conflicts, decided that Article 3 of its statute (violations of the customs of war) applied to war crimes "regardless of whether they were committed in internal or international armed conflicts." Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT doc. IT-94-1-AR 72, p. 68. This conclusion, however, is highly controversial. For discussion, see MICHAEL P. SCHARF, BALKAN JUSTICE 106-07 (1997).

83. See *supra* note 27.

Article 3.⁸⁴ As pointed out by Ratner and Abrams, this is demonstrated “particularly in the requirements of (a) two sets of armed forces, (b) responsible command, and (c) sufficient control over territory to carry out sustained operations, none of which is necessarily required for application of Common Article 3.”⁸⁵

4. Crimes against Humanity

Like aggression, but unlike genocide and war crimes, crimes against humanity have not been the subject of development through widely ratified multilateral treaties. Hence, development of the law on crimes against humanity has been primarily through customary international law.⁸⁶ This evolution has resulted in a situation where the precise scope and content of crimes against humanity are uncertain.⁸⁷

As we have seen,⁸⁸ the Charter of the Nuremberg Tribunal contained the charge of crimes against humanity, and this has been described as “the birth of the modern notion of crimes against humanity.”⁸⁹ Since the Nuremberg Trial, however, there has been no definition of crimes against humanity enjoying universal acceptance.⁹⁰ Arguably, the most authoritative definition is that found in the Rome Statute for the International Criminal Court, since it is the product of deliberations stretching over several years and involving over 160 countries and numerous nongovernmental organizations and private experts.⁹¹ Article 7 of the Rome Statute provides:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

84. RATNER & ABRAMS, *supra* note 9, at 94.

85. *Id.*

86. *See id.* at 48–49.

87. *See id.* at 45–48.

88. *See supra* text accompanying note 47.

89. RATNER & ABRAMS, *supra* note 9, at 46.

90. *See id.* at 48–67.

91. For a history of these deliberations, see generally, Bassiouni, *supra* note 8, at 49–57.

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement, or a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or

groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 7 would, at least for the purposes of the Rome Statute, resolve a variety of issues that have arisen regarding the definition of crimes against humanity.⁹² A primary issue has been whether, as in the case of the charge at Nuremberg, there must be a connection between the crime and armed conflict. In keeping with the modern trend,⁹³ Article 7 would not require any such connection.

Another key issue regarding crimes against humanity is how to distinguish the crime from, say, the crime of murder as found in national legal systems around the world. To this end, it has long been agreed that acts must involve more than isolated instances for them to qualify as crimes against humanity.⁹⁴ Rather, such acts must involve either atrocities on a large scale or a policy of acting in a preconceived and systematic way.⁹⁵ In requiring that the acts specified be "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," paragraph 1 of Article 7 reflects the generally agreed upon limitations.⁹⁶

Still another issue has been whether the motive behind the crime should play any role in its definition, i.e., whether the perpetrator must have acted based on some character trait of the victim.⁹⁷ On this issue the authorities have been split. Some support the proposition that certain acts, such as murder, torture or deportation, are so atrocious that motive is irrelevant.⁹⁸ Others argue that all crimes against humanity require the presence of a motive that identifies the victim with a particular racial, religious, political,

92. For a full discussion of these issues, see RATNER & ABRAMS, *supra* note 9, at 48-67.

93. *See id.* at 56-57.

94. *See id.* at 59.

95. *See id.* at 57.

96. *Id.* at 59-60.

97. *See id.* at 60.

98. *See id.* at 63-64.

social, or cultural attribute.⁹⁹ The Statute for the Yugoslavia Tribunal makes grounds for commission of the acts relevant only in the case of persecutions, and not for the other acts listed under the definition of crimes against humanity.¹⁰⁰ This is also the approach taken under paragraph 1(h) of Article 7 of the Rome Statute for the International Criminal Court.

Finally, there is the issue whether governmental involvement is necessary to transform a simple crime into a crime against humanity.¹⁰¹ The majority view, at least until recently, has been that crimes against humanity require state action.¹⁰² This is not the approach, however, favored by the Yugoslavia or Rwanda Tribunal Statutes.¹⁰³ The reason for this deviation from the majority view is that the Security Council recognized that many of the crimes in Yugoslavia and Rwanda had been committed by persons not associated with a recognized state.¹⁰⁴ Similarly, the Rome Statute for the International Criminal Court does not require the presence of state action.¹⁰⁵

5. Some General Observations Regarding the Prosecution of Core Crimes

As noted above, for a variety of reasons, states have been unwilling or unable to prosecute perpetrators of the core crimes, at least since the Nuremberg and Tokyo Trials. It remains to be seen whether the Yugoslavia and Rwanda Tribunals prove to be successful instruments for such prosecutions. As for the Rome Statute for the International Criminal Court, it is difficult not to be pessimistic. Assuming that the statute is widely ratified—a questionable proposition—there are provisions in the statute that may constitute insurmountable barriers to the court's effectiveness.¹⁰⁶

99. *See id.*

100. Article 5 of the Statute of the Yugoslavia Tribunal, *supra* note 7, provides:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

101. *See* RATNER & ABRAMS, *supra* note 9, at 64–67.

102. *See id.* at 66–67.

103. *See* Statute of the Yugoslavia Tribunal, Art. 5, Statute of the Rwanda Tribunal, Art. 3, *supra* note 7.

104. *See* RATNER & ABRAMS, *supra* note 9, at 66.

105. Note that paragraph 2(a) of Article 7 of the Rome Statute, *supra* note 1, defines “[a]ttack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.” (emphasis added)

106. For journalistic comment, see *A Weak International Court*, N.Y. TIMES, July 27, 1998, at A16, and James Blitz, *Diplomats Deliver Judgment On New War Crimes Court*, FIN. TIMES, July 20, 1998, at 13.

For example, in order to gain France's approval of the statute,¹⁰⁷ there is a provision that allows states parties to "opt out" of the court's jurisdiction over war crimes for a seven year period after they become a party to the statute.¹⁰⁸ The most disabling aspect of the Rome Statute, however, is the consent regime that limits the court's jurisdiction.¹⁰⁹ As a precondition to the court's exercise of jurisdiction over any of the four core crimes,¹¹⁰ either the state where the alleged crime took place, or the state of nationality of the alleged offender, must give its consent,¹¹¹ either by becoming a party to the court's statute or on an ad hoc basis.¹¹² The practical effect of this limitation on the court's jurisdiction is that only someone who commits genocide, crimes against humanity, or war crimes on foreign soil might possibly come within the jurisdiction of the court. In most cases, such people commit these crimes within their own territory and against their own countrymen. Also, more often than not these crimes are state sponsored and therefore the necessary state consent would not be forthcoming.¹¹³ These perpetrators would even be able to travel freely without fear of being subject to an arrest warrant from the court.¹¹⁴

Despite these limitations on the ability of the permanent international criminal court to function, for some observers in the United States, these are not enough. To them the United States must not only refrain from ratifying the court's statute, it must also aggressively oppose the court's establishment and bring substantial pressure to bear against other countries to ensure that they do not become parties to the court's statute.¹¹⁵

107. See Stanley, *supra* note 1.

108. See, *supra* note 1, Art. 124 of the Rome Statute.

109. See *supra* note 1, Art. 12 of the Rome Statute.

110. The consent regime of the International Law Commission's 1994 draft statute for an international criminal court did not apply to the crime of genocide. As to genocide the court could exercise jurisdiction over a charge of genocide if a state party to the statute, which was also a party to the Genocide Convention, lodged a complaint with the prosecutor alleging that a crime of genocide appeared to have been committed. In every other case where a complaint was brought by a state party to the statute, the court could exercise jurisdiction only with the consent of the state which had custody of the suspect and the state on the territory of which the act in question had occurred. See Articles 21 and 25 of the *Draft Statute For An International Criminal Court, Report Of The International Law Commission On The Work Of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 43-161, UN Doc. A/49/10 (1994) [hereinafter *International Law Commission Report*]. For comment, see James C. Crawford, *The ILC Adopts a Statute for an International Criminal Court*, 89 AM. J. INT'L L. 404 (1995).

111. See *supra* note 1, Art. 12(2) of the Rome Statute.

112. *Id.* Art. 12(3).

113. See *A Weak International Court*, *supra* note 106.

114. See *id.*

115. See Jesse Helms, *Slay This Monster*, FIN. TIMES, July 30, 1998, at 12. According to Senator Helms, who is chairman of the U.S. Senate Foreign Relations Committee, the Clinton administration should give assurances that:

- The U.S. will never vote in the Security Council to refer a case to the court.
- The U.S. will provide no assistance whatsoever to the court, either in funding, in kind contributions or other legal assistance.
- The U.S. will not extradite any individual to the court or, directly or indirectly, refer a case to the court.

For both national and international tribunals, in cases involving the core crimes, there are often substantial obstacles to obtaining custody of the alleged offender and evidence sufficient to lead to a conviction.¹¹⁶ Extradition is the most formal of the processes by which a tribunal obtains jurisdiction over offenders located outside its jurisdiction.¹¹⁷ It is also the process most protective of the rights of the alleged offender.¹¹⁸ At the same time it is a process that may not be available¹¹⁹ or that may be ineffective.¹²⁰ As a consequence more informal methods of rendition, such as deportation or exclusion, may be utilized.¹²¹ If these methods are unavailable, illegal (under international law) methods, such as kidnapping, may be employed.¹²²

For national tribunals the mechanisms for obtaining evidence abroad for use in criminal proceedings are, if anything, weaker and less satisfactory than those for obtaining custody of an accused. These include letters rogatory (formal requests to a foreign court) and mutual legal assistance treaties, which obligate parties to take certain steps to cooperate with and assist each other.¹²³

In contrast both the Yugoslavia and Rwanda Tribunals have extraordinary powers, conferred by the Security Council, to obtain custody of defendants and evidence.¹²⁴ Nonetheless, both tribunals have encountered significant resistance to their efforts toward this end.¹²⁵ Moreover, investigators for the tribunals have discovered that much of the evidence they have uncovered is insufficient for the purposes of criminal prosecution.¹²⁶

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- The U.S. will include in all of its bilateral extradition treaties a provision prohibiting a treaty partner from extraditing U.S. citizens to this court.
 - The U.S. will renegotiate every one of its status of forces agreements to include a provision that prohibits a treaty partner from extraditing U.S. soldiers to this court, and not station forces in any country that refuses to accept such a prohibition.
 - The U.S. will not permit a U.S. soldier to participate in any Nato, U.N. or other international peacekeeping mission until the U.S. has reached agreement with all of our Nato allies and the U.N. that no U.S. soldier will be subject to the jurisdiction of this court.

116. For general discussion, see RATNER & ABRAMS, *supra* note 9, at 220–26. For an excellent general survey, see Ethan A. Nadelman, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J INT'L L. & POL. 813 (1993).

117. See RATNER & ABRAMS, *supra* note 9, at 220; see also Nadelmann, *supra* note 116, at 814.

118. See JOHN F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS: THE LEGAL FRAMEWORK FOR POLICY INITIATIVES 80–84 (1985).

119. See Nadelmann, *supra* note 116, at 814.

120. See *id.*

121. See *id.* at 857–68.

122. See *id.* at 868–82.

123. See RATNER & ABRAMS, *supra* note 9, at 221–23. For an extensive discussion of mutual legal assistance treaties (MLATs), see Bruce Zagaris & Jessica Resnick, *The Mexico-U.S. Mutual Legal Assistance in Criminal Matters Treaty: Another Step Toward the Harmonization of International Law Enforcement*, 14 ARIZ. J. INT'L & COM. L. 1 (1997).

124. See RATNER & ABRAMS, *supra* note 9, at 223–25.

125. See *id.* at 224–25.

126. See *id.* at 219.

B. Acts of Terrorism and Torture

The past year has seen terrorist bombings of U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, that have resulted in large numbers of persons killed or seriously wounded.¹²⁷ Interestingly, until recently, terrorist bombings—unlike other manifestations of terrorism, such as aircraft hijacking or sabotage, attacks on internationally protected persons, including diplomats, hostage taking, and the theft of nuclear material—were not covered by any multilateral treaty that required states parties to criminalize such activity under their domestic law.¹²⁸ On December 15, 1997, however, the United Nations General Assembly adopted by consensus an International Convention for the Suppression of Terrorist Bombings, which will enter into force thirty days after the twenty-second state party has ratified it.¹²⁹

In contrast, as already noted, the Rome Statute of the International Criminal Court does not include any manifestations of terrorism within the court's jurisdiction. The 1994 ILC draft statute would have provided for such coverage¹³⁰ but these provisions, as well as others that would have covered other international crimes including torture, were dropped and do not appear in the Rome Statute.¹³¹

For its part, depending on the circumstances in which it is committed, torture may qualify as a war crime or a crime against humanity. Torture may also qualify as an independent crime outside of the context of armed conflict

127. As of August 12, 1998, the combined death toll from the bombings was 250, and wounded 5500. N.Y. TIMES, Aug. 13, 1998 at A8.

128. Until recently, there was no realistic possibility to reach agreement on a convention that would criminalize terrorist bombings because of widespread support in the United Nations General Assembly for wars of national liberation in which "freedom fighters" regularly employed such tactics. For general discussion, see John F. Murphy, *The Future of Multilateralism and Efforts to Combat International Terrorism*, 25 COLUM. J. TRANSNAT'L L. 35 (1986).

129. International Convention for the Suppression of Terrorist Bombings, U.N. GAOR 6th Comm., 52d Sess., Annex, Agenda Item 152, 72d plen. mtg. at 1, U.N. Doc. A/52/653 (1997) [hereinafter International Bombing Convention].

130. See *International Law Commission Report*, *supra* note 110, Art. 20(e), at 70.

131. The United States opposed the inclusion of crimes other than the core crimes (excluding aggression) within the jurisdiction of the international criminal court. See, e.g., *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess. Supp. No. 22, 27, U.N. Doc. A/51/22 (1996); Statement by Ambassador Bill Richardson, United States Representative to the United Nations, on Agenda Item #150, the Establishment of an International Criminal Court, in the Sixth Committee, October 23, 1997, U.S.U.N. Press Rel. #188-(97) (Oct. 23, 1997). Some arguments against the inclusion of terrorism are that these prosecutions would require enormous resources beyond the capacity of an international criminal court and could undermine national investigations. In contrast, some arguments in favor of inclusion of terrorism are that acts of international terrorism clearly qualify as the most serious crimes of concern to the international community as a whole and that terrorism is a crime occurring with some frequency; therefore, the need for a permanent international criminal court as a forum in which to prosecute such crimes is apparent. Since all crimes within the court's jurisdiction would require significant resources for their prosecution, acts of terrorism cannot justifiably be singled out as a unique drain on resources. Finally, it is argued that inclusion of terrorism would not undermine national investigations in view of the court's obligation to proceed only when national courts are unavailable or ineffective, and in a manner that supports rather than undermines national efforts.

or crimes against humanity.¹³² It is also generally agreed that prohibitions against torture constitute *jus cogens* norms.¹³³

Despite the presence of these relatively elaborate legal frameworks, efforts to prosecute and punish acts of terrorism and torture have faced considerable obstacles.

1. Acts of Terrorism

This Section of the Article addresses the issue of prosecuting and punishing acts of terrorism rather than "terrorism" as such. For a variety of reasons neither the United Nations nor its specialized agencies has been able to agree on a definition of international terrorism.¹³⁴ Partly as a result the United Nations has also been unable to agree on a single convention on the legal control of terrorism. Rather, the United Nations has adopted a piecemeal approach to the problem through the adoption of separate conventions aimed at suppressing aircraft hijacking,¹³⁵ unlawful acts against the safety of civil aviation,¹³⁶ or of airports serving international civil aviation,¹³⁷ attacks against internationally protected persons, including diplomats,¹³⁸ the taking of hostages,¹³⁹ unlawful acts against the safety of maritime navigation,¹⁴⁰ the theft of nuclear material,¹⁴¹ the use of plastic explosives,¹⁴² and, most recently, terrorist bombing.¹⁴³

Although these treaty provisions are often loosely described as "antiterrorist," the acts themselves that they cover are criminalized regardless of whether, in a particular case, they could be described as "terrorism."¹⁴⁴ Whether the crimes

132. See RATNER & ABRAMS, *supra* note 9, at 110.

133. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714-18 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n. (1987).

134. See John F. Murphy, *Defining International Terrorism: A Way Out of the Quagmire*, 19 ISR. Y.B. HUM. RTS. 13, 14-18 (Yoram Dinstein ed., 1989).

135. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, entered into force Dec. 4, 1969, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Oct. 14, 1971, 22 U.S.T. 1641.

136. Convention for Suppression of Unlawful Acts Against the Safety of Civil Aviation (*Sabotage*), entered into force Jan. 26, 1973, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 178.

137. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, entered into force Feb. 24, 1988, reprinted in 27 I.L.M. 627 (1988).

138. Convention on Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, *supra* note 15.

139. International Convention against the Taking of Hostages, U.N. GAOR 6th Comm., 34th Sess., Supp. No. 39, Annex, Agenda Item 113, at 23, U.N. Doc A/C.6/34/L.23 (1979).

140. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, March 10, 1988, S. TREATY DOC. NO. 101-1 (1988), reprinted in 27 I.L.M. 672 (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, *id.*, 27 I.L.M. 685 (1988).

141. Convention on the Physical Protection of Nuclear Materials, Oct. 26, 1979, T.I.A.S. No. 11080.

142. See *International Controls to Regulate Plastic Explosives Adopted in Montreal*, U.N. CHRONICLE, June 1991, at 32.

143. See International Bombing Convention, *supra* note 129.

144. For further discussion, see Murphy, *The Future of Multilateralism and Efforts to Combat International*

covered by the antiterrorist conventions may be classified as "international crimes" is debatable.¹⁴⁵ At the least, the antiterrorist conventions establish a legal framework for states parties to cooperate toward punishment of the perpetrators of these crimes. They also create a system of universal jurisdiction over these crimes for states parties and, in the case of those conventions that have been ratified by a large number of states,¹⁴⁶ they may have contributed to the establishment of a system of universal jurisdiction available to all states.

There is at least anecdotal evidence to support the claim of the U.S. Government, made with respect to the year 1997, that "[c]ontinuing a positive trend of recent years, more terrorists are being apprehended, put on trial, and given severe prison terms for their crimes."¹⁴⁷ Moreover, in considerable part, this positive trend is the result of an "antiterrorist campaign promoted by the U.S. government."¹⁴⁸ This campaign has included, among other things, intensive exchanges of information among police and intelligence agencies, pressure on foreign governments to adopt tougher antiterrorist policies, the conclusion of new, and the revision of old, extradition treaties and mutual legal assistance treaties (MLATs), greater use of such "irregular" methods of rendition as deportation and exclusion, the conclusion of antiterrorist conventions, the passage of legislation with extraterritorial reach, and the tightening of security for U.S. embassies abroad and government buildings at home.¹⁴⁹

A major difficulty in evaluating whether efforts to prosecute and punish international terrorists have been successful is that, "with the exception of data on the extradition and prosecution of aircraft hijackers and saboteurs, compiled by the International Civil Aviation Organization and the U.S. Federal Aviation Administration, reliable data on the extradition, prosecution and punishment of those who commit international crimes are not available."¹⁵⁰ In any event, current trends in terrorism may make the prosecution of these crimes more difficult. Specifically, the number of aircraft hijackings and hostage takings, previously favored manifestations of terrorism that fairly often resulted in apprehension of the perpetrator, have declined, but bombings that result in large number of casualties and the escape of the

Terrorism, *supra* note 128, at 37–38.

145. See *supra* text accompanying notes 10–13.

146. See *supra* text accompanying note 14.

147. U.S. DEPARTMENT OF STATE, PATTERNS OF GLOBAL TERRORISM: 1997, at iii (1998).

148. Nadelman, *supra* note 116, at 878–79.

149. The security at the U.S. Embassy in Nairobi, Kenya, was reportedly grossly inadequate. See James C. McKinley, Jr., *Security Flaws Left Embassy in Nairobi Open to Attack*, N.Y. TIMES, Sept. 9, 1998, at A6.

150. See MURPHY, *supra* note 10 at 378. This conclusion was recently reaffirmed through an informal survey of various sources, including a telephone conversation by my research assistant with David Johnston of the *New York Times*, who reported that there was no systematic data on the prosecution and punishment of terrorism in the *Times* data bank or in any other source he was able to find.

perpetrators are on the increase.¹⁵¹ Also, as noted in the *New York Times*,¹⁵² there have been major attacks against Americans in the 1980s and the 1990s where the terrorists were either not identified or, if identified, were not prosecuted or punished, sometimes because of the failure of the governments of other countries to cooperate.

2. Torture

There is a wide range of international legal instruments that implicitly or explicitly prohibit torture.¹⁵³ Until recently, these instruments simply imposed obligations on states to refrain from and to take preventive action against the practice.¹⁵⁴ In 1975, however, the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁵⁵ This landmark declaration takes the vitally important steps of defining "torture," calling upon states to ensure that all acts so defined are criminal offenses under their criminal law, and providing for redress and compensation for the victims. This declaration was followed by the General Assembly's adoption in 1984 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁵⁶ As of September 1, 1998, 106 states were parties to the Torture Convention.¹⁵⁷

The Torture Convention's definition of torture is generally regarded as the most authoritative.¹⁵⁸ Under the Convention torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession,

151. See Robin Wright, *A '93 Pentagon Report Held Predictions on Terrorism*, PHILA. INQUIRER, Aug. 10, 1998, at A7.

152. See David Johnston & Philip Shenon, *A Scorecard on Terrorist Attacks*, N.Y. TIMES, Aug. 9, 1988, at WK5. See also, Tim Weiner, *Sophisticated Terrorists Pose Daunting Obstacle*, N.Y. TIMES, Aug. 13, 1998, at A8.

153. For discussion, see Amnesty International, *Torture as Policy*, HUMAN RIGHTS IN THE WORLD COMMUNITY 79 (Richard Pierre Claude & Burns H. Weston, 2d ed. 1992).

154. For example, *Universal Declaration of Human Rights*, art. 5, G.A. Res. 217A, U.N. GAOR, 2d Sess., 177th plen. mtg. at 71, 73, U.N. doc. A/810 (1948) states that: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Arguably, this originally nonbinding Declaration now has binding effect as its principles have achieved such a degree of acceptance that they constitute general principles of law recognized by all civilized nations. For discussion, see, e.g., Egon Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 1959 AM SOC'Y INT'L L. PROC. 217 (1959).

155. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 34/52, U.N. GAOR, 39th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1975).

156. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter *Torture Convention*].

157. According to information supplied by the Office of the Assistant Legal Adviser for Treaty Affairs, Department of State.

158. See RATNER & ABRAMS, *supra* note 9, at 111.

punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.¹⁵⁹

The Convention does not permit any "exceptional circumstances whatever" to be invoked as a justification of torture.¹⁶⁰ The scope of its definition of torture, however, is a matter of some ambiguity. It is clear that the list of purposes for which the severe pain is inflicted on the victim is illustrative only¹⁶¹ and that the perpetrator of the torture need not be a public official, although a public authority must have ordered or acquiesced in the action.¹⁶² Precisely what situations would be covered by the Convention's required nexus to official conduct is less clear. It would appear that the Convention does not address torture committed by a purely private group.¹⁶³

The Convention contains a number of provisions designed to enhance the prospects for prosecution of those who engage in torture. Each state party is required to "ensure that all acts of torture are offenses under its criminal law"¹⁶⁴ and that it is able to exercise jurisdiction over an alleged offender when it decides not to extradite him.¹⁶⁵ The choice of whether to extradite or prosecute is up to the state party where an alleged offender is found.¹⁶⁶ Each state party is also required to "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."¹⁶⁷ As we shall see later in this Article,¹⁶⁸ there is some evidence that the drafters of the Convention intended that this provision would apply only to torture that took place in the territory of the state party awarding compensation and would have no extraterritorial application.

Torture is a practice that has been widely employed throughout the ages and, according to reports, continues to be employed extensively.¹⁶⁹ Nonetheless, there appears to be a general consensus today that it constitutes both

159. Torture Convention, *supra* note 156, Art. 1, at 197.

160. *Id.* Art. 2 (2).

161. See RATNER & ABRAMS, *supra* note 9, at 111.

162. See *id.*

163. See *id.* at 112–13.

164. Torture Convention, *supra* note 156, art. 4(1), at 198.

165. *Id.*, art. 5(2).

166. *Id.*, art. 7(2).

167. *Id.*, art. 14(1).

168. See *infra* text accompanying notes 225–226.

169. See, e.g., *Torture as Policy*, *supra* note 153.

a tort¹⁷⁰ and a crime¹⁷¹ under international law. Yet there is little evidence that the crime is prosecuted in national courts and less evidence that the Torture Convention has enhanced the prospects for such prosecution.¹⁷² Moreover, as noted above,¹⁷³ the Rome Statute of the International Criminal Court does not include torture in the list of crimes over which the court would have jurisdiction. Nor is torture listed as a separate crime in the Statutes of the Yugoslavia and Rwanda Tribunals.

The lack of prosecution for torture may be due in large part to the required nexus between the crime and official conduct. No state proclaims a right to torture. On the contrary, torture is a crime under virtually all national legal systems. When torture does occur the standard response of the government of the country where it takes place is to deny its existence. Holding a trial of an alleged offender would probably reveal government involvement. The problem is similar in this respect to cases of genocide.¹⁷⁴

III. CIVIL LIABILITY FOR INTERNATIONAL CRIMES: CURRENT LAW AND PRACTICE

When considering the possibility of civil liability for the commission of international crimes, it is important to make two distinctions. First, imposing civil liability against individuals differs greatly from imposing it against governments. As we shall see, in the U.S. context, there is a history, albeit limited, of suits that have been successful in seeking to hold individuals civilly liable for the commission of international crimes. In contrast, the history of successful suits against governments for the commission of international crimes abroad begins with the year 1996. Second, it is important to distinguish between obtaining a judgment of liability for international crimes and seeking to collect on such a judgment. In suits against individuals and governments, plaintiffs have encountered extreme difficulties in collecting on their judgments.

There is no special difficulty in bringing a civil suit against individuals who commit an international crime in the United States, although collect-

170. The most thorough discussion of this issue is found in Judge Irving Kaufman's landmark decision in *Filartiga v. Pena-Irala*, discussed further at *infra* note 181. There Judge Kaufman decided that U.N. actions, coupled with provisions in regional human rights treaties and court decisions, national constitutions and laws, and the writings of jurists confirm that torture constitutes an international tort under customary international law and establish that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of mankind." *Id.* at 890.

171. For a view that the Torture Convention does not establish torture as a crime under international law but only obligates states parties to make it a crime under their national laws, see William T. D'Zurilla, *Individual Responsibility for Torture under International Law*, 56 TUL. L. REV. 186, 210–14 (1981). This is, however, a minority view. See RATNER & ABRAMS, *supra* note 9, at 110.

172. For example, there have been no prosecutions under the legislation implementing U.S. obligations under the Torture Convention, 18 U.S.C.A. § 2340 (West Supp. 1998), and a survey of the literature disclosed no reported cases of requests for extradition or prosecutions in torture cases.

173. See *supra* note 1, Rome Statute, Art. 5.

174. See *supra* text accompanying notes 53–58.

ing on the judgment may be difficult if the defendant has no assets in the United States. Civil suits against governments who commit international crimes in the United States also should encounter no special difficulty, *except* at the enforcement of judgment stage. Even if the government has assets in the United States, the obstacles to executing a judgment against them may be insurmountable.

Civil suits for the commission of international crimes outside of the United States, on the other hand, have given rise to great controversy and are the primary focus of this Article. Although it has not been consistent in this respect, the U.S. Government has usually been unenthusiastic about civil suits against individuals who commit international crimes abroad. It has been more adamant in its opposition to suits against governments who sponsor the commission of international crimes abroad filed in U.S. courts.

In the following section we examine arguments for and against the use of civil suits as an alternative to criminal prosecution of international crimes. We begin with a consideration of civil suits against individuals and then turn to civil suits against governments.

A. *Civil Suits against Individuals*

Although the legal systems of other countries may afford opportunities to bring civil suits against those who commit international crimes abroad, these have apparently been few and largely unsuccessful.¹⁷⁵ In any event the United States has by far the most extensive experience with such suits, which have been based primarily on an ambiguous statute called the Alien Tort Claims Act¹⁷⁶ and the Torture Victim Protection Act of 1991.¹⁷⁷

The Alien Tort Claims Act provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” There is no requirement under the statute that plaintiffs prove that the act in question constitutes a crime as well as a tort under the “law of nations” but many of the acts forming the basis for suits under the statute have constituted international crimes as well as international torts.¹⁷⁸ In order for the federal courts to have subject matter jurisdiction, plaintiffs must demonstrate that

175. See RATNER & ABRAMS, *supra* note 9, at 204 n.38. There have been criminal investigations of gross human rights violations committed in Argentina and Chile undertaken by Spanish judges, as well as a trial of a resident Sudanese doctor in Scotland for alleged acts of torture inflicted upon detainees in the Sudan. There is some possibility that these actions could result in compensation for victims or their personal representatives. For brief discussion, see Jennifer Green & Paul L. Hoffman, *Litigation Update*, in ACLU INTERNATIONAL CIVIL LIBERTIES REPORT 50, 55 (May 1998); Joan Fitzpatrick, *The Role of Domestic Courts in Enforcing International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE (Hurst Hannum, ed., 3d ed. forthcoming).

176. 28 U.S.C. § 1350 (1994).

177. Torture Victim Protection Act of 1991, Pub. L. No 102-256, 106 Stat. 73 (1992).

178. See, e.g., *Kadic v. Karadzic*, 70 F. 3d 232 (2d Cir. 1995) (genocide); *Abebe-Jira v. Negewo*, 72 F. 3d 844 (11th Cir. 1996) (torture); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998) (crimes against humanity).

they are aliens, that the defendant is responsible for a tort, and that the tort violates the law of nations or a treaty to which the United States is a party.¹⁷⁹

Until 1980 the Alien Tort Claims Act was seldom invoked and was an "obscure basis for U.S. federal court jurisdiction."¹⁸⁰ In that year, however, the situation changed dramatically when the Second Circuit Court of Appeals handed down its decision in *Filartiga v. Pena-Irala*.¹⁸¹ There, in the context of a suit brought by the family of a Paraguayan man who had been tortured to death against the alleged perpetrator, also a Paraguayan, while he was in the United States, the court found that the Alien Tort Claims Act afforded it subject matter jurisdiction and, as we have previously seen,¹⁸² went on to hold that torture was a violation of the law of nations within the meaning of the statute.¹⁸³

Shortly after Judge Irving Kaufman's decision, his interpretation of the Alien Tort Claims Act was challenged by Judge Robert Bork in a concurring opinion of the Court of Appeals for the District of Columbia Circuit in *Tel Oren v. Libyan Arab Republic*.¹⁸⁴ In *Filartiga*, the court had interpreted the phrase "in violation of the law of nations" as referring to "international law not as it was in 1789 [the date of the statute], but as it has evolved and exists among the nations of the world today."¹⁸⁵ To the contrary, Judge Bork interpreted this phrase as referring only to the law of nations as it stood in 1789.¹⁸⁶ Additionally, Judge Kaufman interpreted the Act as providing a federal cause of action for violations of international law falling under it.¹⁸⁷ *Per contra*, Judge Bork would require that the treaty provision or customary international law norm in question explicitly grant individuals a "cause of action."¹⁸⁸

Significantly, the U.S. Departments of Justice and State filed an *Amicus Curiae* memorandum in *Filartiga* supporting the position adopted by Judge Kaufman. After the *Tel Oren* decision, however, the Department of Justice adopted Judge Bork's "cause of action" approach in a Memorandum for the United States as *Amicus Curiae* in a suit pending before the Ninth Circuit.¹⁸⁹ Although the Ninth Circuit¹⁹⁰ and other circuits¹⁹¹ have rejected this view,

179. See RATNER & ABRAMS, *supra* note 9, at 205.

180. *Id.*

181. 630 F.2d 876 (2d Cir. 1980).

182. See *id.*

183. See *id.* at 884.

184. 726 F.2d 774, 798-823 (D.C. Cir. 1984).

185. *Filartiga*, 630 F.2d at 881.

186. See *Tel-Oren*, 726 F.2d at 812-16.

187. See *Filartiga*, 630 F.2d at 887.

188. See *Tel-Oren*, 726 F.2d at 801, 804-19.

189. The Department of Justice submitted its memorandum in *Trajano v. Marcos*, No. 86-207, slip op. (D. Haw. July 18, 1986), appeal docketed No. 86-2448 (9th Cir. Aug. 20, 1986). For discussion of this memorandum and opposition to it, see LILlich & HANNUM, *supra* note 75 at 156-57.

190. See *Trajano v. Marcos*, No. 86-2448, 1989 WL 76 894 (9th Cir. July 10, 1989); *Hilao v. Marcos*, 25 F.3d 1467, 1475-76 (9th Cir. 1994).

191. See, e.g., *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 8 (D. D.C. 1998); *Abebe-Jira v. Negewo*, 72 F.3d 844, 846-48 (11th Cir. 1996); *In Re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995).

it has never been considered by the U.S. Supreme Court. Nonetheless, at least for acts of torture and extrajudicial killing, Judge Bork's approach was rejected by the passage of the Torture Victim Protection Act in 1992.

The Torture Victim Protection Act of 1991¹⁹² authorizes civil suits against persons who, under the color of law of any foreign nation, torture or summarily execute another person. As pointed out by Ratner and Abrams, the Torture Victim Protection Act has four basic requirements:

(1) the defendant must have committed torture or an extrajudicial killing; (2) the defendant must have acted under actual or apparent authority, or color of law, of a foreign nation; (3) the plaintiff must be a victim, their legal representative, or a person who may be a claimant in a wrongful death action; and (4) the plaintiff must have exhausted remedies in the country where the conduct giving rise to the claim occurred.¹⁹³

Unlike the Alien Tort Claims Act, the Torture Victim Protection Act does not limit its coverage to alien plaintiffs. On the other hand, the Act has been interpreted as "not intended to trump diplomatic and head-of-state immunities."¹⁹⁴

Although bringing suits under the Alien Tort Claims Act and the Torture Victim Protection Act is "fraught with obstacles," a number of earlier and recent cases have awarded judgments in favor of the plaintiffs for substantial compensatory and punitive damages.¹⁹⁵ Arguably, however, these judgments have been largely pyrrhic victories, because usually the plaintiffs in these actions have been unable to collect on their judgments.

To be sure, even if there is no recovery of a judgment, there may be other reasons for pursuing such litigation. For example, as stated by Ratner and Abrams:

While civil suits do not lead to the same degree of accountability as a criminal process, they do offer a way of seeking justice and represent one form of authoritative adjudication of legal issues relating to human rights violations. Even if defendants flee the jurisdiction, such suits still bring attention to past atrocities, provide victims with a forum to present their claims, and deprive the defendants of foreign refuge in the countries where the cases are

192. See *supra* note 177.

193. RATNER & ABRAMS, *supra* note 9, at 207.

194. *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (extrajudicial killing action against exiled president of Haiti dismissed on head-of-state immunity grounds).

195. See, e.g., *Abebe-Jira v. Negewo*, 72 F3d 844 (11th Cir. 1996) (\$200,000 compensatory damages and \$300,000 in punitive damages); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (10 plaintiffs awarded a total of \$47.5 million in compensatory and punitive damages); *Mushikiwabo v. Barayagwiza*, No. 94-3627, 1996 WL 164496 (S.D.N.Y. 1996) (five plaintiffs awarded a total of \$104 million in compensatory and punitive damages).

brought. Moreover, obtaining a judgment against the defendant affords the plaintiff an opportunity to pursue any of the defendant's assets uncovered in jurisdictions willing to enforce the judgment.¹⁹⁶

It is unclear to what extent foreign jurisdictions would be willing to enforce judgments in these cases. Even in ordinary tort and commercial cases it may be difficult to enforce U.S. court decisions abroad.¹⁹⁷ These difficulties could be greatly compounded in Alien Tort Claims Act and Torture Victim Protection Act cases.¹⁹⁸ Perhaps in part because of these difficulties, there have been very few attempts to enforce such judgments abroad.¹⁹⁹

B. Civil Suits against Governments

As we have seen, in many cases—especially those involving the three core crimes of genocide, war crimes and crimes against humanity, torture, and, to a lesser extent, acts of terrorism—the crime in question is committed by government agents or at least is sponsored by a government.²⁰⁰ Nevertheless, only rarely have governments been held liable for the commission of international crimes. Recently, however, the situation has changed dramatically, especially in U.S. courts.

Before turning to a consideration of the evolving situation in the United States, it is useful to note the prospects for holding states civilly liable through the processes of international law and international institutions. The norms prohibiting the crimes in question clearly are peremptory or *jus cogens* rules and give rise to rights and obligations *erga omnes*, that is, all states have an interest in the protection of the rights involved.²⁰¹ As to such *erga omnes* norms all States can take peaceful steps to induce compliance. They can protest, make claims through diplomatic channels, or bring suit if they can satisfy the jurisdictional requirements of the International Court of Justice or of some relevant system of arbitration. In practice, however, states seldom take such steps. For example, although the Genocide Convention has been in force since 1951, no steps to induce compliance with it were taken until March 20, 1993 when Bosnia-Herzegovina brought its action against

196. RATNER & ABRAMS, *supra* note 9, at 211.

197. For consideration of many of these difficulties, see Symposium, *Enforcing Judgments Abroad: the Global Challenge*, 24 BROOKLYN J. INT'L L. 1 (1998); ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD (Ronald A. Brand, ed. 1992).

198. See generally Edward A. Amley, Jr., *Sue and Be Recognized: Collecting \$ 1350 Judgments Abroad*, 107 YALE L.J. 2177 (1998).

199. See *id.* In the Marcos human rights litigation, in December 1977, the highest Swiss Court ruled that the Marcos accounts should be sent back to the Philippines at the request of the Philippine Government. The Swiss court urged the Philippine Government and courts to consider the interests of the human rights claimants when making any future distribution of the funds, but did not make this request a condition of its release of the accounts. See Green and Hoffman, *supra* note 147, at 50.

200. See *supra* text accompanying notes 35–104.

201. For discussion of the doctrine of *erga omnes*, see 1 OPPENHEIM'S INTERNATIONAL LAW 4 (Robert Jennings & Arthur Watts, eds., 9th ed. 1993).

Yugoslavia before the International Court of Justice.²⁰² Until the eruptions in Yugoslavia and Rwanda the widespread commission of war crimes and crimes against humanity in the post World War II period largely went unprotested. Although many of the antiterrorist conventions contain compromissory clauses that would permit allegations of state sponsorship of terrorism to be brought before the International Court of Justice, states have been reluctant to invoke these clauses.²⁰³ Ironically, it was Libya rather than the United States and the United Kingdom who invoked the compromissory clause in the Montreal Convention,²⁰⁴ although the evidence is strong that the Libyan Government was behind the bombing of Pan Am Flight 103. The Torture Convention has been in force since 1987, but nongovernmental organizations like Amnesty International rather than states continue to be the primary force protesting violations of the convention. Also, although the Torture Convention has a compromissory clause that would permit reference of disputes regarding alleged violations of the convention to the International Court of Justice, many state-parties, including the United States, have made disabling reservations to that clause.²⁰⁵

In short, it appears highly unlikely that states will play a significant role in pursuing civil liability suits against other states for alleged violations of the prohibitions against international crimes. In fact, we shall see that governments have resisted the efforts of private individuals to pursue such remedies.

1. U.S. Civil Suits against Foreign Governments prior to the 1996 Antiterrorism and Effective Death Penalty Act

The major, although by no means the only, obstacle facing those who would bring civil suits against countries that commit or sponsor the commission of international crimes is, of course, the doctrine of foreign sovereign immunity.²⁰⁶ Since 1976 issues of foreign sovereign immunity in the United States have been governed by the Foreign Sovereign Immunities Act (FSIA).²⁰⁷ The terms of the FSIA as it was adopted in 1976 reflected a re-

202. See *Case Concerning Application of the Convention and Punishment of the Crime of Genocide* (Bosn. and Herz. v. Yugo.), 1993 I.C.J. 3 (Request for the Indication of Provisional Measures).

203. For an excellent discussion of the role of compromissory clauses, see John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831 (1994).

204. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 14, 24 U.S.T. 564, 974 U.N.T.S. 177.

205. The U.S. reservation first declares that the United States does not consider itself bound by the provisions of Article 30(1) of the Torture Convention (the compromissory clause) and then "reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case." See Message from the President of the United States Transmitting the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Doc. 100-20, 100th Cong. 2d Sess. (May 23, 1998), at 18.

206. For a brief but excellent discussion of foreign sovereign immunity, see GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 450-54 (2d ed. 1992).

207. See 28 U.S.C.A. § 1330, 1602-11 (West 1994).

strictive theory of sovereign immunity. This restrictive theory denied immunity in cases arising out of commercial transactions on the ground that absolute immunity was unfair because it deprived private parties of their judicial remedies when dealing with states, and gave the states an unfair comparative advantage over private commercial enterprises. Aside from the commercial activity exception, however, the exceptions to sovereign immunity under the FSIA were few. Indeed, prior to 1996, absent an explicit or implicit waiver of immunity, the liability of a foreign sovereign for non-commercial, public acts was largely limited to noncommercial torts that were committed and had their injurious consequences in the United States.²⁰⁸ With rare exceptions, foreign sovereigns enjoyed complete immunity under the FSIA from possible civil liability for the commission of international crimes abroad.²⁰⁹

Moreover, in *Argentine Republic v. Amerada Hess Shipping Company*,²¹⁰ the U.S. Supreme Court ruled unanimously that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of the United States. In so ruling the Court reversed a decision of the Court of Appeals for the Second Circuit that the FSIA was not intended to eliminate the preexisting remedies of the Alien Tort Claims Act.²¹¹

After the ruling in *Amerada Hess*, plaintiffs seeking to sue foreign sovereigns in U.S. courts for the commission of international crimes abroad had to demonstrate that the circumstances of their cases fell within one of the exceptions to the FSIA. To this end, they employed a number of arguments. For example, they argued that defendants who participated in the commission of international crimes had violated *jus cogens* norms of international law and thereby waived their immunity under the FSIA.²¹² Several U.S. Circuit Courts of Appeal rejected this argument.²¹³

In an action brought by the personal representatives of the victims of the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988, the plaintiffs argued that Pan Am Flight 103 should have been considered the "terri-

208. For the noncommercial tort exception, see 28 U.S.C.A. § 1606 (5) (West 1994). For cases where terrorist activity occurred in the United States and therefore fell within the noncommercial tort exception, see *Letelier v. Republic of Chile*, 502 F. Supp. 259 (D.D.C. 1980) and *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

209. See *Siderman v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993) (alleged torture by Argentine officials of two Argentine and one U.S. citizen fell within the commercial activity exception of 28 U.S.C.A. § 1605 (2)); but see *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) (Saudi Arabia's alleged torture of Mr. Nelson did not constitute a commercial activity within the meaning of the FSIA).

210. 488 U.S. 428 (1989).

211. See *Amerada Hess Shipping Company*, 830 F.2d 421 (2d Cir. 1987).

212. The rationale behind this argument is that by violating *jus cogens* norms states impliedly waive their immunity since they have no reasonable expectation that they should be immune from liability for the commission of such acts.

213. See, e.g., *Smith v. Socialist People's Libyan Arab Jamabiriyia*, 101 F.3d 239, 242-45 (2d Cir. 1996); *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994); *Siderman* 965 F.2d at 714-19.

tory” of the United States for purposes of the FSIA. The court rejected this argument on the ground that merely because a location is subject to an assertion of U.S. authority it does not necessarily follow that it is the “territory” of the United States for purposes of the FSIA. Accordingly, the court held, the bombing did not fall within the noncommercial tort exception to immunity under the FSIA.²¹⁴

Alternatively, the plaintiffs in the Pan Am Flight 103 case made an argument based on the language in the FSIA that a foreign state’s immunity is “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA].”²¹⁵ According to the plaintiffs, Security Council Resolution 748,²¹⁶ which commits Libya to pay compensation to the victims of Pan Am Flight 103, is a binding treaty obligation under Article 25 of the U.N. Charter and is therefore covered by the above quoted language of the FSIA. The court disagreed. In its view, this FSIA displacement of immunity is applicable only to international agreements in effect at the time the FSIA was adopted and cannot be interpreted to provide a “dynamic expansion whereby FSIA immunity can be removed by action of the U.N. taken after the FSIA was enacted.”²¹⁷

Lastly, plaintiffs contended that international crimes committed abroad constituted “commercial acts” and therefore fell within the commercial activity exception of FSIA.²¹⁸ With one arguable exception²¹⁹ this argument also was unsuccessful.

2. The 1996 Antiterrorism and Effective Death Penalty Act and Subsequent Legislation

The inability of plaintiffs to recover against states for the commission of international crimes abroad led to sustained efforts to amend the Foreign Sovereign Immunities Act so as to permit such recovery. These efforts, however, were met with substantial resistance on the part of the executive branch.

This resistance was perhaps foreshadowed by executive branch opposition to passage of the Torture Victim Protection Act.²²⁰ Although, as we have

214. See Smith, 101 F.3d at 246.

215. 28 U.S.C. § 1604 (1994).

216. U.N. Security Council Resolution Deciding that Libya Must Comply with Previous Request and Imposing Certain Sanctions, U.N. Doc. S/RES/748 (1992). See also Report of the Secretary-General Pursuant to Paragraph 8 of Security Council Resolution, U.N. Doc. S/23992 (1992), reprinted in 31 I.L.M. 749, 750 (1992).

217. Smith, 101 F.3d at 247.

218. For further discussion, see *infra* text accompanying notes 284–288.

219. The arguable exception is *Siderman*, discussed *supra* at note 209.

220. *Torture Victim Protection Act: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary*, 101st Cong., 11–16 (1990) (Statement of John O. McGinnis, Deputy Assistant Attorney General, Office of the Legal Counsel, Department of Justice); *id.* at 22–29 (Statement of David P. Stewart, Assistant Legal Adviser, Department of State).

seen,²²¹ that legislation does not provide for a cause of action against a foreign sovereign, it does require that the individual defendant act "under actual or apparent authority, or color of law, of a foreign nation."²²² In the view of the U.S. Department of State,²²³ "opening U.S. courts to suits against foreign governments or officials for extraterritorial acts of torture or extrajudicial killings raises three particular concerns: consistency with the international approach reflected in the UN [Torture] Convention, the problem of reciprocity and retaliation, and unwarranted judicial involvement in the conduct of foreign affairs."²²⁴

With respect to the first concern, the Department of State's representative contended in hearings on the Act that the provision of the U.N. Torture Convention requiring states parties to ensure that victims of torture have an enforceable right to fair and adequate compensation,²²⁵ while not so limited by its terms, contemplates a private right of action only for acts of torture committed in the territory of that state party, not for acts of torture taking place in other countries. According to the Department's representative, "the text as adopted included an express reference to that effect (which was evidently deleted by mistake)."²²⁶ The unilateral enactment of extraterritorial jurisdiction contemplated by the Act could, according to the Department of State's representative, result in the second concern: the "enactment of reciprocal legislation in countries which perceive themselves as targets . . . and . . . retaliation against U.S. citizens or governmental officials traveling abroad."²²⁷ Lastly, as to the third concern, the Department of State's representative stated:

From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where allegations may be made against foreign governments or officials who are not torturers but who will be required to defend against expensive and drawn-out legal proceedings. Even when the foreign government declines to defend and a default judgment results, such suits have the potential of creating significant problems for the Executive's management of foreign policy. This is especially troubling because, in order to meet the statutory requirements, plaintiffs will have to allege as a preliminary matter that the conduct in question took place under the authority of the foreign government or under color of its law. In every case, therefore, the "lawfulness" of foreign government sanctions will be at issue. We believe that inquiry by a

221. See *supra* text accompanying notes 192–194.

222. RATNER & ABRAMS, *supra* note 9, at 207.

223. See Statement of David P. Stewart, *supra* note 220.

224. *Id.* at 24.

225. Torture Convention, *supra* note 156, Art. 4(1).

226. Statement of David P. Stewart, *supra* note 220, at 26.

227. *Id.* at 27–28.

U.S. court into the legitimacy of foreign government sanctions is likely to be viewed as highly intrusive and offensive. In fact, it is also likely to be unnecessary, since even those states which engage in torture do not assert a legal right to do so.²²⁸

The U.S. Department of Justice presented testimony along similar lines.²²⁹

Not surprisingly, then, the U.S. Departments of State and Justice strongly opposed the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) that amended the Foreign Sovereign Immunities Act. In hearings on these provisions the Department of State's representative suggested that "[f]undamental principles of sovereignty and international law are implicated in determining the extent to which foreign states should be responsible to private persons in the courts of other states."²³⁰ She reported that the Department of State was unaware of "any instance in which a state permits jurisdiction over such tortious conduct of a foreign state without territorial limitations."²³¹ On the contrary, she said, other countries limited the lifting of sovereign immunity for such acts to situations where the act occurred in the forum state.²³² She then pronounced:

Consistency of the FSIA with established international practice is important. If we deviate from that practice and assert jurisdiction over foreign states for acts that are generally perceived by the international community as falling within the scope of immunity, this would tend to erode the credibility of the FSIA. We have made substantial efforts over the years to persuade foreign states to participate in our judicial system—to appear and defend in actions against them under the FSIA. That kind of broad participation serves the interests of all. If we expand our jurisdiction in ways that cause other states to question our statute, this could undermine the broad participation we seek. It could also diminish our ability to influence other countries to abandon the theory of absolute immunity and adopt the restrictive view of sovereign immunity, which the United States has followed for over forty years.²³³

The Department of State's representative also contended that passage of this legislation could undermine the conduct of U.S. foreign policy and result in retaliation against the United States.²³⁴ In particular, she suggested that

228. *Id.* at 28.

229. See Statement of John O. McGinnis, *supra* note 220.

230. *Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 12 (1994) (Statement of Jamison S. Borek, Deputy Legal Adviser, Department of State).

231. *Id.* at 13.

232. *Id.*

233. *Id.* at 14.

234. *Id.* at 14–15.

execution of judgments on foreign state property had "always been an area of particular sensitivity."²³⁵

In contrast, other witnesses in the hearings strongly supported the proposed amendments.²³⁶ Especially noteworthy was the testimony of Abraham D. Sofaer, a former Legal Adviser of the Department of State.²³⁷ With respect to the Department of State's objections to the extraterritorial reach of the proposed amendments, Sofaer noted that the prohibitions against torture and the other crimes covered are so fundamental and widely accepted among all states that the normal rules against extraterritorial assertions of jurisdiction are inapplicable. He also suggested that the safeguards contained in the proposed amendments on this extraterritorial assertion of jurisdiction should obviate any objections. The safeguards included limiting the right to sue to U.S. citizens to avoid opening U.S. courts to persons who suffer human rights violations anywhere in the world, and requiring the aggrieved person to exhaust any remedies that might be available in the country where the alleged violation occurred. Sofaer further suggested that the Department of State cannot be relied upon to espouse the claims of U.S. citizens who are the victims of international crimes committed abroad because the "Department's decision with respect to espousal is likely to be influenced, not only by the merits of the case, but by the Department's concern for offending a foreign state and creating a potential irritant in its dealings with that state."²³⁸ Most significantly, he contended:

The fear that adoption of this legislation would result in U.S. law enforcement agencies being hauled into foreign courts to account for their actions is unfounded . . . foreign states have been subject to suit in the United States for human rights abuses perpetrated by their intelligence and law enforcement agencies in this country. Yet, I am unaware of a single case in which an action alleging torture, assassination, or any similar abuse has been brought against the CIA, the DEA, or any other agency of the U.S. Government based on its activities abroad. Even less reason exists to fear that the U.S. law enforcement agencies will be hauled into foreign courts based on their maltreatment of foreign nationals on American soil. Few such cases occur in the U.S., and adequate and effective remedies exist for foreigners who might claim to have suffered such violations. While the danger of a retaliatory action is real, it seems insubstantial and well worth accepting as the price for en-

235. *Id.* at 14. .

236. *See, e.g., Hearing on S. 825 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary*, 103d Cong., 81, (1994) (statement of Abraham D. Sofaer) [hereinafter Statement of Abraham D. Sofaer]; *id.* at 2 (1994) (statement of the Honorable Romano L. Mazzoli).

237. *See id.* at 81.

238. *Id.* at 83.

uring a fair forum for the egregious acts involved, whether they occur on foreign or American soil.²³⁹

As enacted, the AEDPA amends the FSIA to permit a suit for money damages against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if the act or provision of support is engaged in by an official agent of the foreign state while acting within the scope of his or her duties.²⁴⁰ The court shall decline to hear such a claim if: (1) the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979²⁴¹ or section 620A of the Foreign Assistance Act of 1961²⁴² at the time the act occurred, unless later so designated as a result of such acts; (2) the act occurred within the designated foreign state against which the claim was brought and the claimant did not afford the foreign state a reasonable opportunity to arbitrate the claim; or (3) the claimant or victim was not a U.S. national. At this writing, the states designated as sponsors of terrorism include Cuba, Iraq, Iran, Libya, North Korea, Sudan, and Syria.

The AEDPA also amended the FSIA to permit the attachment of, or execution upon a judgment against, the property of a foreign state used for a commercial activity in the United States. The action is taken when the judgment relates to a claim for which the foreign state is not immune as a state sponsor of terrorism, regardless of whether the property is or was involved with the act upon which the claim is based.²⁴³ Normally, the property of a foreign state is immune from attachment or execution if the property was not involved with the act upon which the claim is based.²⁴⁴

Under separate legislation,²⁴⁵ the FSIA was subsequently amended to grant a cause of action against an official, employee, or agent of a foreign state designated as a state sponsor of terrorism, who commits any of the acts covered by the Antiterrorism and Effective Death Penalty Act's amendments to the FSIA, if the official, employee, or agent acts within the scope of his or her office, employment, or agency. This is significant, because the FSIA as otherwise enacted is not intended to affect the substantive law of liability in actions against foreign states.²⁴⁶

239. *Id.* at 84.

240. 28 U.S.C. § 1605 (a)(7) (1998).

241. 50 U.S.C. § 2405(j) (1994).

242. 22 U.S.C. § 2371 (1994).

243. 28 U.S.C. § 1610(a)(7) (1998).

244. 28 U.S.C. § 1610(a) (1994).

245. 28 U.S.C.A. § 1605 (West Supp. 1998) (Civil Liability for Acts of State Sponsored Terrorism).

246. *See, e.g.,* Liu v. Republic of China, 892 F. 2d 1419, 1425 (9th Cir. 1989).

3. U.S. Civil Suits against Foreign Governments after the 1996 Antiterrorism and Effective Death Penalty Act

After the passage of the amendments to the Foreign Sovereign Immunities Act effected by the Antiterrorism and Effective Death Penalty Act and as of this writing, suits have been filed and decisions have been rendered against Cuba,²⁴⁷ Iran,²⁴⁸ and Libya.²⁴⁹ Despite the amendments to the FSIA the plaintiffs in these cases have faced a number of challenges in establishing liability and even greater challenges in collecting on their judgments.

The plaintiffs' challenges in establishing liability have included meeting the requirements of the amended FSIA, calculating damages, and withstanding constitutional objections. In *Alejandro v. Cuba*,²⁵⁰ for example, the personal representatives of three persons²⁵¹ who died as a result of the shooting down of two unarmed civilian planes over international waters by the Cuban Air Force, succeeded in convincing the court that Cuba's actions violated international norms and that they had met all the necessary requirements to establish an exception to foreign sovereign immunity. The unprovoked firing of deadly rockets came within the statute's definition of "extrajudicial killing." The Cuban Air Force was acting as an agent of Cuba when it committed the killings and Cuba had been designated as a state sponsor of terrorism. The act occurred outside of Cuban territory and the plaintiffs were all U.S. citizens at the time the planes were shot down. The court also held that the plaintiffs could base their substantive cause of action on the FSIA, because, as amended, the FSIA creates a cause of action against agents of a foreign state that act under the conditions that result in a loss of foreign sovereign immunity.²⁵² Moreover, since the plaintiffs had proved the Cuban Air Force's liability under the FSIA, Cuba itself was liable under the doctrine of respondeat superior.

*Flatow v. Iran*²⁵³ is a case of another claim of extrajudicial killing. In that case, the plaintiff alleged that his daughter was the victim of a terrorist suicide bombing of an Israeli bus on which she was a passenger.²⁵⁴ The Shaqaqi faction of Palestine Islamic Jihad claimed responsibility for the bombing, and investigations by Israeli authorities and by U.S. Department of State officials confirmed this claim. The Department of State also reported that

247. See *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

248. See *Flatow v. Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); *Cicippio v. Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998).

249. See *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998).

250. 996 F. Supp. 1239 (S.D. Fla. 1997).

251. The representative of the fourth person who died could not join in the suit because the victim he represented was not a U.S. citizen.

252. See *supra* text accompanying notes 245–246.

253. 999 F. Supp. 1 (D.D.C. 1998).

254. On April 9, 1995, at or about 12:05 p.m. local time, near Kfar Darom in the Gaza Strip, a suicide bomber drove a van loaded with explosives into the bus on which Alisa Michelle Flatow was a passenger. As a result of the explosion, a piece of shrapnel pierced Ms. Flatow's skull and lodged in her brain. She later died in an Israeli hospital.

Iran had provided approximately \$2 million to Palestine Islamic Jihad annually in support of its terrorist activities. The court found that the death of the plaintiff's daughter was caused by a willful and deliberate act of extrajudicial killing and that the suicide bomber had acted under the direction of the defendants including Iran, the Iranian Ministry of Information and Security, and several Iranian officials acting within the scope of their offices. Accordingly, the court held that the defendants were liable.

In both *Alejandre* and *Flatow* the courts awarded the plaintiffs substantial compensatory and punitive damages. In *Alejandre* the court noted that the FSIA as amended provides that an agent of a foreign state who commits an extrajudicial killing shall be liable for "money damages which may include economic damages, solatium, pain and suffering, and punitive damages,"²⁵⁵ and accordingly held that the Cuban Air Force was liable for both compensatory and punitive damages. Under the doctrine of respondeat superior, the court stated, Cuba was liable for the same amount of damages as its agent, with the exception of punitive damages, which the FSIA expressly prohibits against foreign states.²⁵⁶ The court found that the plaintiffs should be awarded compensatory damages of over \$49 million against Cuba and the Cuban Air Force and punitive damages of over \$137 million against the Cuban Air Force.

The most notable and surprising aspect of the court's decision in *Flatow* was its determination that, in addition to compensatory damages, plaintiff could recover punitive damages, not only against officials, employees, or agents of Iran, but against Iran itself. Although, as just noted, the FSIA, by its terms, limits the imposition of punitive damages to officials, employees, or agents of a foreign state, and appears expressly to rule out punitive damages against a foreign state, the court in *Flatow* interpreted this limitation as applying only to causes of action brought directly against a foreign state and held that punitive damages awarded against a foreign state's officials, agents, or employees for the provision of material support and resources to a terrorist group whose acts resulted in the personal injury or wrongful death of a U.S. national can be imputed to the foreign state under the doctrines of respondeat superior and vicarious liability.²⁵⁷ Stressing the deterrent effect of punitive damages, the court determined, with the assistance of expert testimony, that an award of punitive damages in the amount of three times Iran's annual expenditure for terrorist activities, or \$225 million, would be appropriate. The total damages awarded to the plaintiff came to \$247.5 million.

The court in *Flatow* also addressed some constitutional issues. While noting that Congress had expressly directed the retroactive application of

255. See 28 U.S.C.A. § 1605 (West 1994) (Civil Liability for Acts of State Sponsored Terrorism).

256. 28 U.S.C. § 1606 (West 1994) provides, in pertinent part: "[t]he foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages."

257. See *Flatow*, 999 F. Supp. at 27.

the amendments to the FSIA, the court rejected the defendants' contention that such retroactive application was unconstitutional.²⁵⁸ The court further addressed the question of whether there was a constitutional basis for exercising personal jurisdiction over the defendants. The court first suggested that dicta in Supreme Court decisions²⁵⁹ indicated that a foreign state might not be a "person" for purposes of constitutional due process analysis. Even if it is, the court concluded, "a foreign state that sponsors terrorist activities which causes [sic] the death or personal injury of a United States national will *invariably* have sufficient contacts with the United States to satisfy Due Process."²⁶⁰ The court supported this conclusion by noting that the suit was brought against Iran and its officials for actions in their sovereign capacity and by suggesting that sovereign contacts should therefore be sufficient to sustain general jurisdiction over defendants. Moreover, applying the "fair play and substantial justice" standard of *International Shoe*,²⁶¹ the court held that since terrorism has been almost universally condemned, fair play and substantial justice are well served by the exercise of jurisdiction over state sponsors of terrorism.

The most recent decision rendered under the 1996 amendments to the FSIA at the time of this writing is *Cicippio v. Iran*,²⁶² in which the U.S. District Court for the District of Columbia ordered the government of Iran to pay a total of \$65 million to Joseph Cicippio and two other plaintiffs who were abducted at gunpoint by the terrorist group Hezbollah during 1985-86 and held hostage for periods ranging from a year and a half to over five years,²⁶³ as well as to the wives of two of the former hostages for the suffering they endured while their husbands were in captivity.²⁶⁴ In summarizing its decision, the court stated:

plaintiffs have proved to the Court's satisfaction: (1) that they were injured by acts of torture and hostage-taking; (2) that the acts were perpetrated by a group receiving material support from Iran; (3) that the provision of material support was engaged in by Iranian officials, employees, or agents acting within the scope of their

258. *See id.* at 13-14.

259. *See id.* at 19 (discussing *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 484 n.5 (1982) and *Republic of Argentina v. Weltover*, 504 U.S. 607, 619-20 (1992)).

260. *Flatow*, 999 F. Supp. at 23 (emphasis added).

261. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

262. 18 F. Supp. 2d 62 (D.D.C. 1998).

263. David Jacobson was held captive for 18 months; Frank Reed for 44 months, and Joseph Cicippio for 5 years and 3 months. *See id.* at 64.

264. The court awarded damages as follows:

Joseph J. Cicippio:	\$20,000,000.00
Elham Cicippio:	\$10,000,000.00
Frank Reed:	\$16,000,000.00
Fifi Delati-Reed:	\$10,000,000.00
David P. Jacobson:	\$ 9,000,000.00

Id. at 70.

office, employment, or agency; (4) that at the time of the acts, Iran was designated as a state sponsor of terrorism . . . ; (5) that the claimants or victims were U.S. nationals at the time the acts occurred.²⁶⁵

The court also held that the ten-year statute of limitations for actions under the FSIA did not bar the plaintiffs' claims because the statute of limitations had been tolled during the period that Iran was immune from suit from the plaintiffs.²⁶⁶ The court awarded compensatory damages only because it found, unlike the court in *Flatow*, that the FSIA barred the imposition of punitive damages against a foreign state. The court reportedly urged, in a letter to Secretary of State Madeleine K. Albright, that the State Department help the plaintiffs collect from the Iranian Government.²⁶⁷

The decisions in *Alejandro*, *Flatow*, and *Cicippio* resulted in default judgments because in all three cases the defendants did not enter an appearance. In contrast, the defendant in *Rein v. Socialist People's Libyan Arab Jamahiriya*²⁶⁸ appeared and mounted a vigorous challenge to the 1996 amendments to the FSIA. The plaintiffs in *Rein* were seeking the same relief that had been denied in *Smith v. Socialist People's Libyan Arab Jamahiriya*, discussed above.²⁶⁹ Unlike Cuba and Iran, Libya has defended itself vigorously from the outset in U.S. court proceedings.

Libya first argued that the 1996 amendments to the FSIA are unconstitutional because they provide that federal court jurisdiction is to be determined by the Secretary of State. The court ruled that the amendments merely confirm the power or subject matter jurisdiction of U.S. courts to hear controversies between citizens of the United States and foreign states and direct the courts to decline to hear claims against states not designated as terrorist states. As to claims against states so designated, the amendments left open the discretion of the courts to hear such claims. Moreover, the court stated, Congress clearly has the power to delegate to the executive branch the responsibility of determining those foreign nations that may be accorded sovereign immunity by the courts.

Libya next contended that the court had no personal jurisdiction over it.²⁷⁰ The court was of the opinion that the relevant inquiry was whether the effects of a foreign state's actions upon the United States are sufficient to give that state fair warning that it may be subject to the jurisdiction of U.S. courts. In the court's view, "any foreign state would know that the United States has substantial interests in protecting its flag carriers and its nationals

265. *Id.* at 68.

266. *See id.* at 69.

267. *See* Chris Modics, *3 Ex-Hostages Win Suit Against Iran*, PHILA. INQUIRER, Aug. 28, 1998, at A3.

268. 995 F. Supp. 325 (E.D.N.Y. 1998).

269. *See supra* text accompanying notes 214-219.

270. For a comment on issues of personal jurisdiction under the FSIA, see Victoria A. Carter, *God Save the King: Unconstitutional Assertions of Personal Jurisdiction over Foreign States in U.S. Courts*, 82 VA. L. REV. 357 (1996).

from terrorist activities and should reasonably expect that if these interests were harmed, it would be subject to a variety of potential responses, including civil actions in U.S. courts."²⁷¹

Furthermore, Libya claimed that the provisions providing for the designation of states as sponsors of terrorism violated their due process rights to a fair trial. The court noted, however, that the Secretary of State's designation went only to establishing jurisdiction in particular cases and had no effect on the plaintiffs' burden to prove the merits of their case. Because the Secretary's designation implicated no fundamental right, the court said, Libya's contention that a strict scrutiny test should be applied to the amendments was incorrect. Rather, the proper test was the rational basis approach, and thus the court held that the 1996 amendments were "a reasonable means of achieving the legitimate government purpose of protecting United States nationals and air carriers in international travel to and from the United States."²⁷²

Lastly, the court found that Libya's claim that the 1996 amendments were an impermissible ex post facto law had no merit. According to the court, the ex post facto doctrine was inapplicable to the question of whether a foreign state is immune from liability in civil tort actions. A foreign state is not criminally punished merely because the United States decides not to grant sovereign immunity to it in a civil action in a U.S. Court.

In conclusion the court denied defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state claims upon which relief can be granted. The case is currently on appeal.²⁷³

Assuming that the plaintiffs in the *Rein* case prevail on the constitutional issues, they will then have to prove their cases against Libya, which may be difficult to do. Plaintiffs will have to prove that officials, employees, or agents of Libya caused the bombing of Pan Am Flight 103 while acting within the scope of their office, employment, or agency. This burden of proof may be especially onerous because of a limitation on discovery in a case brought under the antiterrorism exception created by the AEDPA.²⁷⁴ Under this provision, if the Attorney General determines that discovery in a case brought under the antiterrorism amendments would "significantly interfere with a criminal investigation or prosecution, or a national security operation related to the incident,"²⁷⁵ he or she may so advise the court, and the court shall stay such discovery for twelve months subject to renewal for additional twelve month periods. Even if they succeed in proving their case and obtaining a judgment, the experience of the plaintiffs in the *Alejandre* and *Flatow* cases would indicate that the plaintiffs in *Rein* may face grave

271. *Rein*, 995 F. Supp. at 330.

272. *Id.* at 331.

273. *Socialist People's Libyan Arab Jamahiriya v. Smith*, No. 98-7467, 1998 U.S. App. LEXIS 31223 (2d Cir. December 15, 1998).

274. 28 U.S.C.A. § 1605(g)(1)(A)-(B) (West Supp. 1998).

275. 28 U.S.C.A. § 1605(g)(1)(A) (West Supp. 1998).

difficulties in recovering on their judgment because Libyan assets in the United States are frozen and because of the difficulties they would encounter in enforcing their judgment abroad.

At this writing the plaintiffs in *Alejandre*, *Flatow*, and *Cicippio* are seeking to recover on their judgments against the frozen assets of the defendant sovereign states in the United States. As previously noted,²⁷⁶ the AEDPA amended the FSIA to permit execution upon a judgment against the property of a foreign state, used for a commercial activity in the United States, when the judgment relates to a claim for which the foreign state is not immune as a state sponsor of terrorism. Plaintiffs have had difficulty, however, in finding property of the defendants, used for commercial purposes, in the United States. In the *Flatow* case, the U.S. Government has intervened in court proceedings to allege that three properties in the District of Columbia attached by the plaintiff are used for diplomatic rather than commercial purposes and therefore do not qualify for the exception to immunity of the property of a foreign state under the FSIA.²⁷⁷ The United States Government has also argued that the identified properties, indeed *all* properties of Iran located in the United States, are "blocked" by Executive Order and are also the subject of ongoing proceedings between Iran and the United States in the Iran-U.S. Claims Tribunal.²⁷⁸ The plaintiff in the *Flatow* case disputes the U.S. Government on all these arguments.

Besides seeking to execute their judgments in U.S. court proceedings the plaintiffs in *Alejandre* and *Flatow* have sought relief from the executive branch in the form of an order to unblock the defendants' assets and from Congress in the form of legislation. At this writing they have been unsuccessful with the executive branch. As to Congress, they have achieved what appears to amount to a pyrrhic victory.

Specifically, on October 21, 1998, the President signed into law § 117 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental appropriations Act of 1999.²⁷⁹ Section 117, inter alia, amends 28 U.S.C. § 1610 to provide that "any property;" including property frozen under various provisions of U.S. law, "shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7)."²⁸⁰ Section 117 also directs the

276. See *supra* text accompanying notes 243–244.

277. See Statement of Interest of the United States filed with the United States District Court for the District of Columbia (*Flatow v. Iran*), Civil No. 97-396. The argument regarding the diplomatic status of the attached properties appears at pages 6–13 of the Statement of Interest.

278. See *id.* at 15–16.

279. Pub. L. No. 105-277, 112 Stat. 2681, *2681-491 (1999).

280. Section 117 reads:

Sec. 117. EXCEPTION TO IMMUNITY FROM ATTACHMENT OR EXECUTION. (a)
Section 1610 of title 28, United States Code, is amended by adding at the end the following new subsection:

Secretary of the Treasury and the Secretary of State to "fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state," if so requested by any judgment creditor.²⁸¹

Under another provision of § 117, however, the President "may waive the requirements of this section in the interest of national security."²⁸² On October 21, 1998, the same day he signed the legislation, President Clinton exercised this waiver authority on the ground that application of the other provisions of § 117 would "impede the ability of the President to conduct foreign policy in the interest of national security."²⁸³

In response, plaintiffs in the *Alejandro* case contended that the waiver authority of the President extends only to the requirement that the Secretary of the Treasury and the Secretary of State assist plaintiffs in locating assets of defendant governments in the United States and not to the provisions requiring the assets of such states to be unblocked and subject to execution of judgments. The U.S. District Court in southern Florida has reportedly agreed with the plaintiffs and ruled that they could proceed in their efforts to be compensated from Cuban assets.²⁸⁴

Regardless of how plaintiffs in currently pending suits ultimately fare in their efforts to recover damages from states subject to suit under the 1996 and subsequent amendments to the Foreign Sovereign Immunities Act, it is time to turn to the broader question of what changes, if any, should be made in current law and practice regarding civil suits against those who commit or sponsor the commission of international crimes.

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality of such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

281. § 117(f)(2)(A).

282. § 117(d).

283. Presidential Determination No. 99-1, October 21, 1998.

284. *Pilots' Families Gain Recourse: New Way to Collect From Cuba*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Oct. 28, 1998, at 1B.

IV. CIVIL LIABILITY FOR INTERNATIONAL CRIMES: THE NEED FOR A MULTILATERAL APPROACH

A. *The Advantages of Civil over Criminal Suits*

Before turning to a possible multilateral approach to civil liability for international crimes, it may be appropriate to consider more thoroughly the possible advantages of civil suits against the individual perpetrators of international crimes and the states that sponsor them, as compared to criminal prosecution of the individual perpetrators. One obvious advantage, at least if the action is pursued in the United States, is that the chances for a successful civil suit are substantially greater than those for a successful criminal prosecution. As we have seen,²⁸⁵ there have been a fairly substantial number of judgments against individual defendants under the Alien Tort Claims Act and the Torture Victim Protection Act for criminal acts committed abroad. As we have also seen,²⁸⁶ there have been relatively few criminal prosecutions for such crimes.

The Alien Tort Claims Act, in particular, has been a fertile source of civil suits against the perpetrators of international crimes. Under this legislation judgments have been rendered imposing civil liability for genocide, war crimes, crimes against humanity, torture and acts of terrorism.²⁸⁷ The more recently adopted Torture Victim Protection Act affords a possible civil remedy to U.S. as well as alien plaintiffs but covers only torture and extrajudicial killing and requires that the perpetrator act under the actual or apparent authority, or color of law, of a foreign nation.²⁸⁸

Plaintiffs in civil suits in the United States against the perpetrators of international crimes have, by and large, been able to establish personal and subject matter jurisdiction over defendants and to overcome a host of defenses raised by these defendants. They have also benefited from the standard of proof in civil suits—preponderance of the evidence rather than proof beyond a reasonable doubt—and have been able to use discovery devices and, in some instances, conventions on discovery to obtain documents and other forms of evidence that are unavailable in criminal proceedings.²⁸⁹

285. See *supra* text accompanying notes 175–195.

286. See *supra* text accompanying notes 34–174.

287. See, e.g., *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996) (genocide, war crimes, torture, summary execution); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (torture, summary execution, disappearances); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (torture, summary executions, prolonged arbitrary detentions, disappearances); *Flatow v. Iran*, 999 F. Supp. 1 (D. D.C. 1998) (terrorism).

288. In *Kadić v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), the Second Circuit held that the Torture Victim Protection Act is not a jurisdictional statute. Rather, it provides a cause of action for official torture. Accordingly, the Act permitted the plaintiffs “to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of Section 1331.” *Id.* at 246.

289. The primary relevant convention is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, entered into force Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

As recently noted by Professor Jose E. Alvarez, civil suits may be more effective than criminal prosecutions in establishing the full factual context in which the perpetrators committed their crimes and thereby in enhancing the prospects that the victims will have their suffering brought to the attention of the wider community and that a definitive, historically accurate account of the atrocities will be provided.²⁹⁰ Also, unlike criminal trials, civil suits provide at least the possibility that victims may be compensated for lost property, for injuries suffered, or for emotional distress caused.²⁹¹

At first blush, one may be inclined to regard civil suits as a "second best" option to criminal prosecution. Upon reflection, however, it is not clear that this is necessarily so. As noted, at least in the United States, the prospects for holding the perpetrators of international crimes civilly liable for their actions are substantially greater than the prospects for holding them criminally liable. Moreover, as pointed out by Professor Alvarez:

For these reasons, civil suits, controlled by plaintiff/victims and their chosen attorneys, and not prosecutors responsive to other agendas, may also be more effective in preserving a collective memory that is more sensitive to victims than some judicial accounts rendered in the course of criminal trials. Indeed, if studies about litigants' relative satisfactions with adversarial versus inquisitorial methods of criminal procedure are an accurate guide, it may be that having greater control of the process, including the selection of attorneys and the ability to discover and present one's own evidence and develop one's own strategy, is itself a value for victims, and one that is better met through civil suits such as those now occurring in United States courts.²⁹²

Two other advantages of civil litigation as compared to criminal prosecution should be noted: a civil suit may result in a judgment against a former high ranking government official or against a state that sponsors international crimes. As these words are being written, a five judge panel of the House of Lords, England's highest court, has unanimously set aside a November 24, 1998 3-2 decision of another five judge panel of the House of Lords that Chilean General Augusto Pinochet did not enjoy immunity, as a former head of state, from a Spanish judge's attempt to make him stand trial for alleged crimes against humanity committed in Chile during his reign against Spanish citizens. According to the unanimous decision, the earlier decision had to be set aside because the judge who cast the deciding vote had been since 1990 a director and chairman of a principal Amnesty International charity, and his wife worked in the press and publications office of Amnesty since 1977. Amnesty International had been an active participant

290. See Jose E. Alvarez, *Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2101 (1998).

291. See *id.* at 2068.

292. *Id.* at 2102.

in the case. The 3-2 vote of the House of Lords' panel had reversed a unanimous decision of a three judge panel of London's High court on October 28, 1998 that had granted General Pinochet immunity. At this writing a new five judge panel of the House of Lords is scheduled to decide the immunity issue in January 1999.²⁹³ Regardless of the ultimate outcome in this case, it is worth noting that, if General Pinochet were to be subject to civil suit in the United States for his crimes, the defense of immunity for acts previously committed in his official capacity would most likely not be available.²⁹⁴

Also, despite the controversial work of the International Law Commission on State Responsibility, it is highly unlikely that the law will evolve to the point where states can be held criminally liable.²⁹⁵ In contrast, at least in the United States, they may be subject to civil liability for sponsoring international crimes.

To be sure, the current U.S. (largely) unilateral approach to civil liability has had its difficulties. Although plaintiffs have enjoyed considerable success in establishing the civil liability of those who commit international crimes outside of the territorial boundaries of the United States, it has seldom been possible to collect on such judgments because of the absence of defendants' assets in the United States. If the defendants' assets in these cases are located abroad, by necessity there will need to be international cooperation toward execution of judgments on these assets.

With respect to civil suits against states that sponsor international crimes, under the 1996 amendments to the Foreign Sovereign Immunities Act and subsequent legislation, these are possible only against states that are on the Department of State's list of states that sponsor terrorism. This limitation serves to minimize, although by no means eliminate, the risk of increased tensions between the United States and defendant states, since relations between the United States and states on the Department of State's list are normally already at their nadir. At the same time, as we have seen,²⁹⁶ most of the assets of these countries in the United States are blocked and therefore arguably unavailable for the execution of judgments. Efforts to change this situation, by executive or legislative action, have encountered substantial obstacles.

These efforts raise two issues. First, is it appropriate, as section 117 of the Treasury and General Government Appropriations Act of 1999 purports to do, to subject "any property" of a state sponsor of international crimes to execution of a judgment? The problem with this approach is that property

293. See Warren Hodge, *English Court Rules Pinochet Should Be Free*, N.Y. TIMES, Oct. 29, 1998, at 1.

294. See Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65, 90 (1995).

295. See *Draft Articles on State Responsibility*, *supra* note 33. To be sure, some have argued that it is important, for its symbolic value if nothing else, to establish that states as such can be criminally liable. See e.g., Joseph H. H. Weiler, *On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State*, in *INTERNATIONAL CRIMES OF STATE* 319, 322-29 (Joseph H. H. Weiler et al. eds. 1989).

296. See *supra* text accompanying notes 277-278.

used for diplomatic purposes is clearly immune from such execution under long established norms of international law. Second, is it appropriate to give preference to the victims of state sponsored international crimes as opposed to those who have other claims against the state concerned but cannot satisfy them against the blocked assets? Here, arguably, the answer is yes. It would seem appropriate to give a preference to the victims of international crimes who have suffered personal injury or death instead of only economic loss through expropriation or breach of contract.

The more salient issue is whether the Foreign Sovereign Immunities Act should be amended further to include states besides those that appear on the Department of State's list. Such an expansion of the FSIA's scope would highlight in sharp relief the executive branch's objection that such legislation may undermine U.S. foreign policy and result in retaliation against the U.S. Government in foreign courts.

To raise this issue in more concrete terms, let us consider the cases of Saudi Arabia, James E. Smrkovski, and Scott J. Nelson. Allegedly, Smrkovski was tortured by Saudi officials in 1985 after his arrest for alleged alcohol and gun smuggling. According to the testimony of one of his lawyers, during his 464 days detention Smrkovski managed to get a letter to a U.S. consular officer detailing the torture he was suffering.²⁹⁷ Allegedly, neither this officer nor any other U.S. Government official intervened with the Saudi Government. Moreover, after his release from detention and his return to the United States, Smrkovski allegedly attempted to get the U.S. Government to espouse his claim against Saudi Arabia, but the Department of State declined to do so.

For his part, Nelson was allegedly tortured by Saudi officials in 1984 after his arrest for complaining about a health and safety hazard at the King Faisal Hospital in Riyadh, where he was employed as a monitoring systems engineer. Upon his release from captivity and return to the United States in 1985, Nelson asked the Department of State to espouse his claim against Saudi Arabia. The Department allegedly refused to do so, offering only to assist him in obtaining Saudi counsel so he could bring his case in Saudi Arabia. At this point Nelson brought suit against Saudi Arabia in federal court, claiming that the commercial exception to the Foreign Sovereign Immunities Act applied.²⁹⁸ Although a panel of the U.S. Court of Appeals for the Eleventh Circuit ruled unanimously in his favor,²⁹⁹ the Supreme Court reversed.³⁰⁰ In both the Eleventh Circuit and Supreme Court proceedings the Department of State filed briefs in support of Saudi Arabia's

297. *Victims of Torture: Hearings Before the Subcomm. on International Operations and Human Rights of House Comm. on International Affairs*, 24 (1994) (statement of Daniel Wolf, Attorney, Hughes, Hubbard & Reed, LLP) [hereinafter Statement of Daniel Wolf].

298. *Id.* at 5.

299. *See Nelson*, 923 F.2d at 1528.

300. *See Nelson*, 507 U.S. at 349.

side of the litigation.³⁰¹ Although attorneys for Nelson urged Congress to amend the Foreign Sovereign Immunities Act so as to provide redress to Nelson and other persons similarly situated, this has not been done.³⁰²

Saudi Arabia is, of course, a key country in U.S. foreign policy. The world's foremost producer of oil, it also plays a major strategic role in the Middle East. One can therefore understand the Department of State's reluctance to have Saudi Arabia angry at the United States because of a lawsuit alleging that it had committed an international crime. But as stated by one of Nelson's attorneys, there is "no principled reason for providing redress in our courts for American citizens who are tortured by officials of foreign states on the Department's list, but denying such redress to Americans who are tortured by officials of other countries."³⁰³

So stated, the issue may appear to be whether political realities should trump principle or vice-versa. Perhaps, however, the real issue is whether there is a way to overcome, at least in part, the obstacles that political realities currently place in the way of the pursuit of principle.

Specifically, one political reality in the way of amending the Foreign Sovereign Immunities Act to cover countries other than those on the State Department's list is that the Act currently is retroactive in its application to countries on the State Department's list. If the United States were to extend coverage of the Act to *any* country that has committed the listed international crimes in the past³⁰⁴ and that otherwise meets the criteria of the Act, the response from other countries would likely be sharp and conceivably could result in retaliation against the U.S. Government abroad. On the other hand, if the extended coverage were to apply solely on a prospective basis, the arguments in favor of a principled approach would be stronger.

To be sure, making further amendments to the FSIA apply only prospectively would not help people like Scott Nelson. But it would put Saudi Arabia and other countries on notice that, if they sponsor international crimes against U.S. nationals, they may be subject to civil suits in U.S. courts. In principle there is no reasonable objection to such an approach. The acts covered by the FSIA are prohibited by *jus cogens* norms of international law, constitute crimes under the national legal systems of all civilized nations, and are subject to universal jurisdiction under international law.

Under this approach there would be two types of possible defendant states in suits alleging the sponsorship of international crimes: states on the Department's of State's list of state sponsors of terrorism and all other states. As to the latter, possible liability would be purely prospective rather than retroactive. Otherwise, the provisions in the FSIA denying immunity to states

301. See Statement of Daniel Wolf, *supra* note 297, at 5.

302. See *id.* at 8.

303. *Id.*

304. This would, of course, cover a very large number of countries.

that sponsor international crimes should apply equally to both sets of possible defendant states.

In its present form, the FSIA allows for possible civil liability for the commission of certain manifestations of terrorism and for torture. Notably, the Act does not provide for possible civil liability for commission of the so-called core crimes—genocide, war crimes, and crimes against humanity. The question is whether it should.

An earlier version of the amendments to the FSIA included genocide in its coverage. As pointed out by Abraham Sofaer,³⁰⁵ genocide has now been clearly defined and condemned by the Genocide Convention and other international instruments. Accordingly, in the admittedly unlikely event that U.S. citizens are the victims of state sponsored genocide abroad, in principle there should be a cause of action against the state sponsor available in U.S. courts.

The situation is different with respect to war crimes and crimes against humanity. Although, as noted above,³⁰⁶ war crimes have been defined in a number of international legal instruments, "there are in the world some genuine disputes about operational doctrines."³⁰⁷ The same may be true *a fortiori* with respect to crimes against humanity, which, until recently, were not subject to definition by international legal instruments.³⁰⁸ This lack of clear agreement as to what acts constitute war crimes and crimes against humanity raises an unacceptable risk that the U.S. Government might be subject to suits in foreign courts under circumstances where reasonable persons might differ as to whether the acts in question were war crimes or justified by the doctrine of military necessity.³⁰⁹

Accordingly, as applied to states other than those on the State Department's list of state sponsors of terrorism, the FSIA would cover the crimes of torture, extrajudicial killing, aircraft sabotage, hostage taking and genocide and would apply prospectively only. From a strategic perspective it would probably be appropriate also to exclude punitive damages from the types of damages recoverable against these states. Punitive damages are generally not available in civil law systems, and are a controversial subject in international practice.³¹⁰ Admittedly, in principle a strong case may be made in favor of punitive damages, but, in this instance at least, perhaps political realities should prevail.

305. See Statement of Abraham D. Sofaer, *supra* note 236, at 83.

306. See *supra* text accompanying notes 67–85.

307. Ruth Wedgwood, *The Pitfalls of Global Justice*, N.Y. TIMES, June 10, 1998, at A29.

308. See *supra* text accompanying notes 86–105.

309. For consideration of the concepts "unnecessary suffering" and "military necessity" as they apply to modern warfare, see *Report of the Committee on Armed Conflict on the 1980 Conventions on Certain Conventional Weapons*, in PROCEEDINGS AND COMMITTEE REPORTS OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION 58 (1981-82).

310. See John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton Inc.*, 38 HARV. INT'L L.J. 59 (1997).

Even with these limitations it is, of course, possible that the U.S. Government could be subject to retaliatory civil suits in countries found liable in U.S. courts. But presumably such suits would be seen as illegal reprisals, and the United States would be able to pursue the usual diplomatic and other remedies in response.³¹¹ The United States position, moreover, would be considerably strengthened if it were successful in pursuing multilateral initiatives to complement its unilateral legislative initiatives.

B. *The Move toward a Multilateral Approach*

As a first step the United States might approach other democratic states with a proposal that together they introduce a draft convention in the United Nations that would require state parties to adopt national legislation that would permit civil suits against persons who commit torture, extrajudicial killings, aircraft sabotage, hostage taking or genocide against their nationals, regardless of where the crimes are committed, as well as against any state sponsors of such crimes. Since these would be crimes clearly subject to the universality principle of jurisdiction, as well as to the more controversial passive personality principle,³¹² there would be no valid objections based on the extraterritorial application of law.

As to objections based on sovereign immunity, this doctrine should no longer be a shield for state sponsors of such egregious international crimes to hide behind. Abstract notions of sovereignty should no longer mask the reality that some governments are dominated by thugs who have no hesitation in inflicting pain and suffering on their victims. The property of such governments should be made available to provide compensation to their vic-

311. Under the U.N. CHARTER, art. 33, ¶ 1, "[t]he parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Moreover, according to the Restatement (Third) of the Foreign Relations Law of the United States:

§ 905. UNILATERAL REMEDIES

(1) Subject to Section (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures:

(a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and

(b) are not out of proportion to the violation and the injury suffered.

(2) The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter as well as to Subsection (1).

Under these provisions the United States might well be able to employ economic and political sanctions against a state that permitted the filing of "spite suits" against it, but would not be able to resort to the threat or the use of armed force.

312. The passive personality principle would allow the assertion of extraterritorial legislative jurisdiction based on the nationality of the victim. A number of states have statutes based on the passive personality principle. For example, under 18 U.S.C. § 7, the "special maritime and territorial jurisdiction of the United States, as used in this title, includes . . . [a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States." The passive personality principle remains, however, a controversial basis for jurisdiction. *See, e.g.,* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES, § 402, cmt. g.

tims. Further, in this era when national governments are losing autonomy and sharing power with a variety of nongovernmental actors,³¹³ individual victims and their representatives should be able to engage in self-help measures through national courts to hold governments who commit or sponsor international crimes accountable.

The convention should also contain provisions requiring state parties to help locate assets of and to enforce money judgments rendered by the courts of other states parties against either individual perpetrators of the crimes or their state sponsors. This requirement would be subject to certain exceptions in the event of judgments rendered under circumstances that offended fundamental international norms of due process and fairness or other strong public policy of the state requested to locate assets and enforce the judgment. These provisions would be coupled with a requirement that the state party enforcing the judgment allow execution of the judgment against the civilly liable state's assets used for commercial purposes and located in its territory.

Further, the convention should contain a compromissory clause that would permit reference to the International Court of Justice or to international arbitration of disputes between states parties over the interpretation or application of the convention. This could serve as a safeguard against a state party permitting a suit to be brought and a judgment to be rendered against a state party that was not grounded in fact or law, but was instead designed simply to punish the state defendant as an adversary of the state party permitting the suit.

As to suits against states that are not parties to the convention, the state parties should agree to a provision that would commit them to take responsive action against any state that permitted a retaliatory suit in its courts against a state party. Specifically, under this provision, the state parties would freeze the assets of such a state and make them available to compensate the state party subject to the retaliatory suit.

Should conclusion of a multilateral convention along the lines described above not prove possible, an alternative approach might be to attempt to conclude bilateral agreements along such lines, especially with states that serve as major financial centers such as Great Britain and Germany. Such bilateral agreements might be especially useful in improving the chances that successful plaintiffs would be able to find assets of defendant foreign sovereigns that they would be able to execute judgments against.

Finally, should the foreign sovereign immunity problem prove insurmountable, the effort should be to conclude a multilateral convention or bilateral conventions that would oblige states parties to enact legislation along the lines of the Torture Victim Protection Act but with an expanded scope to include extrajudicial killing, aircraft sabotage, hostage taking, and

313. See Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50.

genocide as well. The convention would require states parties to enforce money judgments rendered by the courts of other states parties under this legislation and the requested state to permit execution of judgments against the defendant's assets located in its territory. To maximize enforceability of such judgments, only compensatory and not punitive damages should be recoverable. Enforcement of judgments would be subject to an appropriate public policy exception, and reference of disputes between states parties over the interpretation or application of the convention to the International Court of Justice or to international arbitration should be possible.

CONCLUSION

This Article has focused on the concept of civil liability for the commission of international crimes as an alternative to criminal prosecution of the perpetrators. This is not to suggest that efforts towards criminal prosecution should, in any way, be pursued less intensely. On the contrary, they should be intensified. At the time of this writing, there is a possibility that the perpetrators of the bombing of Pan Am Flight 103 will be brought to justice. According to newspaper reports,³¹⁴ Libya has apparently agreed to negotiate the turning over of the two alleged offenders in its custody for trial under Scottish law before a court composed of Scottish judges and sitting in the Netherlands. If the trial actually takes place and results in a conviction of the accused, and the plaintiffs in the *Rein* case succeed in obtaining and satisfying a judgment against Libya for its sponsorship of the crime, justice will have been fully and truly served.

Regardless of the outcome in the Pan Am Flight 103 case, however, it is clear that prosecution of international crimes will remain a difficult proposition. Widespread agreement on permitting civil suits to be filed in national courts against those who commit such crimes as well as against state sponsors could offer significant benefits. First and foremost, the threat of substantial civil liability suits could serve as a major deterrent to state sponsorship of such crimes. Other deterrents, such as economic sanctions or military strikes, are employed relatively sparingly and are resorted to only in the most egregious cases. Except in such cases governments will tend to overlook the commission of such crimes in the interest of maintaining good relations with the governments of the states that sponsor them. No such inhibitions stand in the way of the victims of international crimes or their personal representatives filing civil suits in national courts against persons who commit international crimes or the governments that sponsor them. The victims of international crimes and their families are motivated by a desire to see justice done and to receive at least a measure of compensation for their loss.

314. See Barbara Crossette, *Qaddafi Says 'Negotiation' Is Needed on Lockerbie Suspects*, N.Y. TIMES, Aug. 28, 1998, at A3.

In contrast, as we have seen, governments are leery of such suits, not least because they can foresee themselves as defendants in foreign courts facing the prospect of being required to pay substantial damages. Also, as U.S. Government representatives have stressed, their very lack of control over the filing of such suits raises the risk that such suits could undermine important negotiations with foreign governments over important issues and create significant tensions in foreign relations. These concerns cannot be lightly dismissed. Ultimately, though, one has to choose between serving the convenience of governments or pursuing justice for the victims of their crimes.

Moreover, one reason that such suits may interfere with relations between states is that, under present circumstances, at least outside the United States, they are so unexpected. These expectations, however, should be changed. States that engage in or sponsor the international crimes highlighted in this Article—genocide, acts of terrorism and torture—should have no expectation of immunity from civil liability. On the contrary, they should be put on notice that, if they commit or sponsor the commission of such crimes, they will be subject to suit in national courts and their assets will be subject to execution to pay resulting judgments.

At a minimum one might hope that it would be possible for governments to reach agreement on the need to enforce national judgments against the individual perpetrators of international crimes and to cooperate in locating their assets. Negotiations are currently being conducted under the auspices of the Hague Conference on Private International Law with a view to the eventual conclusion of a convention on jurisdiction and recognition/enforcement of judgments in civil and commercial matters.³¹⁵ The issue of recognizing or enforcing civil judgments for the commission of international crimes is not on the Conference's agenda. It should be.

Because of the resistance of governments, progress toward greater civil liability for international crimes will depend upon the efforts of nongovernmental actors to bring pressure to bear on governments. Increasingly, such actors are playing a major role in the development of international law and institutions.³¹⁶ Civil liability for the commission of international crimes deserves a high priority on their agenda.

315. For a brief discussion of these negotiations, see Harold S. Berman, *Private International Law*, 32 INT'L LAW. 591, 592–93 (1998).

316. See, e.g., Steve Charnovitz, *Participation of Nongovernmental Organizations in the World Trade Organization*, 17 U. PA. J. INT'L BUS. L. 331 (1996); Michael H. Posner & Candy Whitton, *The Status of Human Rights NGOs*, 25 COLUM. HUM. RTS. L. REV. 269 (1994); and A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61 (1992).