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The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women

Beth Stephens*

* In the late 1970s, three young Ethiopian women were brutally tortured by Kelbessa Negewo, an Ethiopian security official. One of them later recognized Negewo working at the hotel where she was employed in Atlanta, Georgia.

* In 1989, Sister Dianna Ortiz, a U.S. nun, was kidnapped, raped and otherwise tortured by security forces in Guatemala under the command of General Hector Gramajo. Gramajo then left Guatemala to study at Harvard's Kennedy School of Government.

* Thousands of women in Bosnia-Herzegovina have been raped and subjected to other forms of sexual assault by Bosnian Serb forces. The self-proclaimed head of the Bosnian Serbs came to New York in early 1993, buying time for his troops while he attended meetings at the United Nations.

INTRODUCTION

Despite these gross human rights abuses, none of the men responsible for these or for countless similar crimes against women around the world has been brought to justice in his home country. The perpetrators have been protected by governments which instigate and condone such abuses and by the all-too-common acceptance of male violence against women. If a government actually seeks to hold human rights abusers accountable, those responsible frequently seek refuge in another country—often, the United States. When the abuses take place during a war, as in Bosnia-

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The author wishes to thank Jennifer Green as well as the many other colleagues who offered their comments on this and related projects.
Herzegovina ("Bosnia"), it is even less likely that those responsible will ever be held accountable.

In the three cases described above, however, the women were able to seek one form of justice: they sued the perpetrators of these vicious crimes in U.S. federal court, even though the rapes and torture were carried out far from the United States.\(^1\) Fifteen years ago such suits seemed impossible. Since 1980, in a remarkable series of cases, the U.S. federal courts have repeatedly upheld the right of victims of human rights abuses to sue those responsible for their ordeal.\(^2\)

Civil lawsuits, although not a substitute for criminal prosecution of human rights abusers, are an important and complementary action, offering redress to people who otherwise would be left with no alternatives. In addition, as this article will explain, a civil lawsuit offers one key advantage over criminal trials, in that it allows victims of human rights abuses to take action without depending on governments or international bodies to take action. Further, the body of precedents building in the United States may give impetus to the development of a powerful international system of civil reparations.

Part I of this article describes the paucity of remedies available to the women in Bosnia who have suffered rapes and other violent abuse as part of the war in the former Yugoslavia. Part II explains the line of cases in the United States which has permitted civil lawsuits by victims of international human rights abuses, while Part III discusses how that doctrine might apply to violence against women. Part IV explores the international law principles which underlie these civil remedies and Part V calls for coordinated efforts to undertake such civil litigation in other countries as well as in the United States.

I. The Inadequacy of Other Remedies

Widespread rape and other sexual abuses of women in Bosnia-Herzegovina have shocked people around the world. Horrifying reports indicate that women have been intentionally targeted for mass and repeated

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rapes, forced to serve in "brothels," and even intentionally impregnated and detained until abortion is no longer feasible.  

Rape of women, including minors, has occurred on a large scale. . . . In Bosnia-Herzegovina and in Croatia, rape has been used as an instrument of ethnic cleansing. . . . In this context, rape has been used not only as an attack on the individual victim, but is intended to humiliate, shame, degrade and terrify the entire ethnic group. There are reliable reports of public rapes, for example, in front of a whole village, designed to terrorize the population and force ethnic groups to flee.  

One human rights group reported that women have been “gang-raped, taunted with ethnic slurs and cursed by rapists who stated their intention to forcibly impregnate women as a haunting reminder of the rape and an intensification of the trauma it inflicts.”  

Despite the widespread publicity given to these atrocities and the almost universal outrage with which they have been received, the rapes continued and those responsible have not been held accountable. Many women in the former Yugoslavia have braved physical danger, shame, and psychological trauma to tell their stories in the belief that, if outsiders knew of their plight, the abuses would be halted and the rapists punished. As


5. HELSINKI WATCH II, supra note 3, at 21.  

6. In June 1993, for example, one human rights investigator reported: Since my last visit in February, the situation has become worse for women in Bosnia-Herzegovina. In response to the international outcry against rape, the Serbian military forces in Bosnia have made efforts to diminish the visibility of rape. The strategy has not changed, only the tactics. Rather than several hundred women in one rape camp, now there are much smaller groups of women in many more rape camps.  

one investigator reported, they have been bitterly disillusioned by the response to their disclosures:

I sensed shame turning to anger, as women realize that although the atrocities they suffered have been exposed internationally, no action is being taken to stop these crimes against humanity. The women feel betrayed and abandoned.\(^7\)

The fact that much of the world now knows, but has done virtually nothing to stop the ongoing atrocities, has been yet another tragic blow.

Unfortunately, neither the violence against women nor the world’s unwillingness to take action is new. Women have been raped, intentionally, as a tactic of war, in virtually all wars, by almost all military forces.\(^8\) Most armies have considered rape a legitimate “perk” of battle—the loser’s property is stolen and destroyed, as are “their” women.\(^9\) Several of the more notorious examples were as massive in scope as the rapes recently reported in Bosnia—the Rape of Nanking\(^10\) and the enslavement and repeated rape of 200,000 “comfort women” by the Japanese during World War II,\(^11\) or the massive rapes of women in Bangladesh during the 1971 war.\(^12\) During the Vietnam War, U.S. soldiers reported the rape of Vietnamese women as a routine aspect of many missions.\(^13\)

Although reports of rape and other abuses have often been used to whip up public support for fighting a war, little or nothing has been done to

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7. Id.
9. Id.
10. When the Japanese Army entered the Chinese city of Nanking in December 1937, it unleashed a campaign of atrocities and violence which included approximately 20,000 rapes during the first month of the occupation. \(1\) THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST 389 (B.V.A. Roling & C.F. Ruter eds., 1977). Many of the rape victims were killed and their bodies mutilated. \(Id.\) See also BROWNMILLER, supra note 8, at 56-62.
11. The Japanese army kidnapped as many as 200,000 women from several Asian nations during World War II, imprisoning them in brothels known as “comfort stations” where some were raped by as many as 30-40 men each night. Until just last year, Japan denied that any such violations had occurred. Many of the survivors were unable to disclose what had happened to them. Only now, fifty years later, have they been able to organize to demand compensation from Japan. \(See JAPAN CIVIL LIBERTIES UNION, REPORT ON POST WAR RESPONSIBILITY OF JAPAN FOR REPARATION AND COMPENSATION\) (Apr. 1993); Filipina Comfort Women v. Japan (Petition filed with the U.N. Commission on Human Rights by the Center for Constitutional Rights and other organizations) (Oct. 26, 1993); \WAR CRIMES ON ASIAN WOMEN: MILITARY SEXUAL SLAVERY BY JAPAN DURING WORLD WAR II: THE CASE OF THE FILIPINO COMFORT WOMEN\) (Dan P. Calica & Nelia Sancho eds., 1993).
12. As many as 200,000 to 400,000 Bengali women were raped by Pakistani soldiers during the nine-month war after Bangladesh declared independence from Pakistan in 1971. Many of the victims were rejected by their husbands and families after the rapes. \(BROWNMILLER, supra note 8, at 78-86.\)
13. \Id.\ at 86-113.
prevent or punish such crimes. After the war is over, women's reports of rape become suspect: men begin to doubt that they even took place, and the rapes fade from the history books.\(^{14}\)

Of course, violence against women during peacetime has been subject to the same pattern of denial. Only recently in the United States has the widespread physical abuse of women and girls received systematic attention. Yet despite the heightened awareness, battery and sexual abuse continue to be common, and women continue to face often insurmountable hurdles when they seek protection or redress. In other parts of the world, women have made even less headway in challenging the deeply ingrained assumption that men have the right to physically assault their wives, girlfriends, and daughters.

The search for justice for the women and girls who have suffered rapes and other sexual abuse in Bosnia is made more difficult by the fact that the ongoing abuses take place during war. It was only during the last century that significant efforts were made to formulate agreements about what conduct would be considered unacceptable during war.\(^{15}\) Efforts to hold world leaders and combatants liable for violations of international humanitarian law after World War I were an embarrassing failure.\(^{16}\)

The systematized brutality of the Nazi regime in Germany and the Japanese army led to the first—and only—international war crimes trials, the Nuremberg Tribunal in Europe and the Tokyo War Crimes Trials in Asia.\(^{17}\) At the time, participants hoped that these tribunals would set a precedent for enforcing rules of conduct which would make war less vicious. They did lead to the adoption of the Geneva Conventions,\(^{18}\) the

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14. See discussion of the use of sensationalized allegations of rape to drum up support for U.S. involvement in World War I. Id. at 40-48. After the war, when a handful of the reports of rapes and other atrocities were shown to have been exaggerated, the thousands of brutal rapes which actually did occur were largely forgotten. Id. Similarly, supporters of the Bosnian Serbs have seized upon alleged exaggerations or errors in the reports of human rights abuses by their troops to attempt to cast doubt on the accusation of gross human rights abuses by the Serbian forces in Bosnia.


Genocide Convention,19 and many additional international human rights agreements.20 However, the tribunals themselves proved to be aberrations: no individual accused of committing abuses during war has since been brought before an international tribunal.

The World War II tribunals prosecuted individuals who had been forced to surrender after devastating losses. The outcome now seems an exception that proves the rule, rather than the precursor of a new international system for judging war criminals. Indeed, the lessons of Nuremberg and Tokyo, unfortunately, are that (a) only losers will be held accountable for their war crimes, (b) only when the loss has been so devastating that the losers are in custody and have no power to negotiate amnesty, and (c) only if governments around the world are virtually unanimous in condemning their actions and share the political will to hold them accountable.

The United Nations Security Council voted in February 1993 to establish an international tribunal to prosecute abuses committed in the former Yugoslavia,21 the first such effort in the almost 50 years since the World War II tribunals. However, the effort is regarded by many as likely to founder on one or all of the obstacles noted above: there may be a negotiated settlement, rather than a military victory; it is unlikely that there will be an occupation and detention of the leaders of any side; and, it is possible that amnesty will be a condition of some future peace agreement.


The Security Council acted under the authority of Chapter VII of the United Nations Charter, which directs the Council to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and take measures “to maintain or restore international peace and security.” U.N. CHARTER art. 39. This is the first time that the Security Council's peacekeeping authority has been cited as the basis for the prosecution of international law violations. Meron, supra note 15, at 424.
Finally, the international community's continued unwillingness to invest resources in halting the violence indicates that the political will to prosecute those responsible for the atrocities may well be lacking.

The international tribunal is likely to have even more difficulty responding to evidence of violence against women. Effective prosecution would require an understanding of the obstacles and prejudice, faced by women who report rape and other gender violence, which make it difficult for them to testify against the men who assaulted them. Difficulties of proof would have to be handled creatively, so as to make it possible for rape victims to testify in a manner which does not prolong and worsen their ordeal. A group of lawyers and feminist advocates in the United States recently proposed to the tribunal a whole series of measures which would make it feasible to prosecute those responsible for the rapes and other gender abuses, including offering medical and psychological support and physical protection to the witnesses. The limited resources of the tribunal, however, combined with the fact that many of the judges have no experience with the prosecution of sex crimes, make it unlikely that adequate measures will be adopted.

Given the tremendous difficulty in reaching a consensus among the world community about the political, legal, and moral issues involved, ad hoc tribunals are inevitably subject to these serious limitations. A permanent international criminal court would solve many of these problems, creating a structure for prosecutions which could be triggered by accusations of international law violations. However, criminal prosecutions will always be subject to political winds, which more often than not seek to protect those responsible for human rights violations. By definition, criminal prosecutions require government action and can be slowed or halted by overt or covert political machinations. In the meantime, victims of human rights abuses—and advocates working with them—must seek alternative remedies.

II. The Civil Remedy in U.S. Courts

What if the victims of human rights abuses were able to initiate private, civil actions against those responsible for the abuses they suffered? Two U.S. statutes allow just that, if the person charged with responsibility is physically present in the United States: the Alien Tort Claims Act, passed in 1980, and the Torture Victim Protection Act, enacted in March 1992.

The Alien Tort Claims Act (ATCA) grants the federal courts original jurisdiction over "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." Enacted as part of the Judiciary Act of 1789, it was interpreted in 1980 as opening the federal courts for adjudication of suits alleging torture—a violation of international law—committed by officials of foreign governments. The Filartiga decision held that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights. . . . Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.

26. For a complete discussion of the two statutes and the issues raised in this and the following section, see BETH STEPHENS, MICHAEL RATNER & JENNIFER GREEN, SUING FOR TORTURE AND OTHER HUMAN RIGHTS ABUSES IN FEDERAL COURT: A LITIGATION MANUAL (1993) (Transnational Publications, forthcoming 1995).
28. Id. at 878. The Filartiga court's interpretation of § 1350 as allowing suits for international human rights violations such as official torture has been accepted by every court which has reached the issue. See Maximo Hilao, et al. v. Ferdinand E. Marcos, 25 F.3d 1467 (9th Cir. 1994); Agapita & Achimedes Trajano v. Ferdinand E. Marcos, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S.Ct. 2960 (1993); Evans Paul v. Prosper Avril, 812 F. Supp. 207 (S.D.Fla. 1992), final judgment, No. 91-399 (S.D.Fla. June 30, 1994); Alfredo Forti v. Carlos Guillermo Suarez-Mason, 672 F. Supp. 1531 (N.D.Cal. 1987) [hereinafter Forti I]; Alfredo Forti v. Carlos Guillermo Suarez-Mason, 694 F. Supp. 707 (N.D.Cal. 1988) [hereinafter Forti II]; Helen Todd v. Sintong Panjaitan, No. 92-12255 (D.Mass. Oct. 26, 1994); Abebe-Jiri, No. 90-2010, appeal docketed, No. 93-9133 (11th Cir. Sept. 10, 1993); Susana Quiros de Rapaport v. Carlos Guillermo Suarez-Mason, No. 87-2266 (N.D.Cal. Apr. 11, 1989); Martinez-Baca v. Suarez-Mason, No. 87-2057 (N.D.Cal. Apr. 22, 1988). But see Hanoch Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir. 1984) (in case involving allegations of terrorism against a non-state organization, the Palestine Liberation Organization, three-judge panel dismissed with three separate opinions: Judge Edwards followed Filartiga but found it inapplicable under these particular facts; Judge Robb would have dismissed on these facts as a political question; and Judge Bork would have limited the ATCA to three narrowly circumscribed violations of the law of nations recognized in 1789), cert. denied, 470 U.S. 1003 (1985).
Later decisions have permitted ATCA suits for summary execution, disappearance, prolonged arbitrary detention, and cruel, inhuman or degrading treatment.29

The 1992 Torture Victim Protection Act (TVPA) creates a federal cause of action for torture or summary execution committed by an individual acting under color of law of a foreign nation. The legislative history makes clear that the TVPA was designed to strengthen and expand the ATCA, lessening the danger that the judiciary might reject the Filartiga court's interpretation of the ATCA and extending coverage to claims by U.S. citizens.30

Litigation under the ATCA and the TVPA has aimed to hold accountable people who had previously been able to escape responsibility for their gross human rights violations because of the weakness of other enforcement mechanisms.31 Thus, the first case in this modern line, Filartiga, involved a high-level police officer who fled Paraguay after he was accused of torturing a young man to death in retaliation for the political activities of his father, a prominent opponent of the dictatorship.32 Police officer Peña-Irala's flight was aided by his own government, which also scotched

Under the Carter Administration, the Justice and State Departments both urged the Second Circuit to allow the Filartiga case to go forward. Memorandum for the United States as Amicus Curiae, Filartiga, reprinted in 12 HASTINGS INT'L & COMP. L. REV. 34 (1988). Under President Reagan, the Justice Department reversed its view, urging the Ninth Circuit to reject Filartiga. Memorandum for the United States as Amicus Curiae, Trajano. The Ninth Circuit declined to do so, and followed Filartiga in Trajano. The issue has never reached the Supreme Court. However, the recent passage of the TVPA with legislative history which supports Filartiga's interpretation of the ATCA makes it unlikely that Filartiga will be successfully challenged.

29. See, e.g., Trajano, 978 F.2d 493 (torture, summary execution); Abebe-Jiri, No. 90-2010 (torture, cruel, inhuman, or degrading treatment); Forti I, 672 F. Supp. 1531 (torture, summary execution, prolonged arbitrary detention); Forti II, 694 F. Supp. 707 (disappearance); Martinez-Baca, No. 87-2057 (torture, prolonged arbitrary detention); Quiros de Rapaport, No. 87-2266 (summary execution). Compare Forti II (1988 decision holding that cruel, inhuman, or degrading treatment was not sufficiently defined by international law so as to constitute a tort under the ATCA) with Abebe-Jiri (1993 decision upholding claim of cruel, inhuman, or degrading treatment, relying on recent definition of the violation by the U.S. Congress).


31. The TVPA states explicitly that domestic remedies must be exhausted before a suit will be allowed in the United States:

A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

§ 2(b). Further, since a lawsuit under either statute would probably face a forum non conveniens motion, only cases which cannot be litigated in the country in which the violation took place will be successful in U.S. courts. See, e.g., Filartiga, 630 F.2d at 879-880 and Filartiga v. Peña-Irala, 577 F. Supp. 860, 862 (E.D.N.Y. 1984) (on remand).

32. Filartiga, 630 F.2d at 878.
all attempts to investigate or prosecute him in Paraguay. Several cases were then brought against an Argentine general who had fled his home to escape responsibility for his role in the “dirty war” in which thousands of Argentine civilians were disappeared, tortured, and murdered. Pending cases involve defendants who have come to the United States to avoid being held accountable in their home countries, as well as defendants who cannot be sued at home because the governing regime tolerates or protects them.

The legislative history of the TVPA stresses the importance of guaranteeing victims of torture and extrajudicial killings access to U.S. courts, given that they are unlikely to have any channels open to them in their home countries:

Judicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. The Torture Victim Protection Act (TVPA), H.R. 2092, would respond to this situation.

Plaintiffs in these lawsuits need not be physically present in the United States. Thus, lawsuits can be brought on their behalf by attorneys in this country. Perhaps the most significant limitation on ATCA and TVPA

33. The Filartiga family commenced a criminal action in Paraguay, but their attorney was arrested and brought to police headquarters, where the defendant, Peña-Irala, threatened him with death. Id. 34. Forti I, 672 F. Supp. 1531; Martinez-Baca, No. 87-2058; Quiros de Rapaport, No. 87-2266. 35. See, e.g., Evans Paul, 812 F. Supp. 207, final judgment, No. 91-399 (ex-dictator of Haiti living in Miami at time lawsuit was filed); In re Estate of Ferdinand Marcos, Human Rights Litigation, MDL No. 840 and related cases (deposed dictator of Philippines, living in the United States). 36. See, e.g., Teresa Xuncax v. Hector Gramajo, No. 91-11564 (D.Mass. filed June 6, 1991); Ortiz, No. 91-11612 (ex-Minister of Defense of Guatemala sued while living in Massachusetts); Doe, No. 93-0878 (head of the Bosnian Serbs sued while visiting New York) (defendant’s Motion to Dismiss for lack of subject matter jurisdiction granted Sept. 7, 1994). 37. H.R. REP. NO. 367, 102d Cong., 1st Sess., pt. 1, at 2-3 (1992). Describing these human right abuses as “dehumanizing” means of terrorizing and oppressing “entire populations,” the Senate Report states that the TVPA will “mak[e] sure that torturers and death squads will no longer have a safe haven in the United States.” S. REP. NO. 249, 102d Cong., 1st Sess., pt. 2, at 3 (1992). 38. There are significant differences as to who can sue under the two statutes. The TVPA allows suit by either a U.S. citizen or an alien; the ATCA permits suits only by aliens. Plaintiffs can sue under either statute for an abuse committed against themselves; under the ATCA, damages can also be sought for harm suffered as a result of the abuse of a close relative. Both allow a survivor to sue on behalf of a deceased victim; parents or other guardians can sue on behalf of a minor.
suits concerns the defendants: individual defendants must be subject to the personal jurisdiction of the U.S. court at the time the lawsuit is initiated. Under traditional U.S. jurisdictional principles, this means they must be physically present within the district in which suit is filed. Further, the defendants must not be entitled to immunity from suit, as, for example, a diplomat or head of state. Finally, governments are immune from such lawsuits under the Foreign Sovereign Immunities Act. As a result, these lawsuits will generally be limited to those in which an interested plaintiff can be linked with a particular person who happens to be present in the United States and who is not a diplomat or head of state.

A class action on behalf of thousands of victims of human rights abuses has been successfully maintained against the former dictator of the Philippines (In re Estate of Ferdinand Marcos, Human Rights Litigation, MDL No. 840 and related cases, Order Granting Class Certification (Apr. 15, 1991)), and has been pled on behalf of the victims of the Bosnian Serbs (Doe v. Karadžić, No. 93-898, Complaint at ¶ 10 (Motion to Dismiss granted Sept. 7, 1994), appeal docketed, No. 94-9035). See Stephens, Ratner & Green, supra note 26, Chapter 4, at 26-31, for complete discussion of these issues.

39. See Burnham v. Superior Court of California, 495 U.S. 604 (1990) (holding that state courts have personal jurisdiction over individuals who are physically present in the state).


A strong argument can be made that, under international law, immunity can never be granted for certain gross human rights violations. However, as of this point, the U.S. courts have been unwilling to create exceptions to the immunity rules. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 431 (1989); Veronica De Negri v. Republic of Chile, No. 86-3085 (D.D.C. Apr. 6, 1992); Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994). The legislative history of the TVPA indicates that both diplomatic and head-of-state immunity are defenses to suits under that statute:

[N]othing in the TVPA overrides the doctrines of diplomatic or head of state immunity. These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business.


See Stephens, Ratner & Green, supra note 26, Chapter 9, at 75-79, for complete discussion of diplomatic and head-of-state immunities.

The defendant in the pending Bosnia cases, Doe v. Karadžić, supra note 1, and Kadic v. Karadžić, supra note 1, argued that the court should create a common law immunity for individuals in New York in order to conduct negotiations at the United Nations. The district court did not reach this issue (defendant's Motion to Dismiss for lack of subject matter jurisdiction was granted Sept. 7, 1994).

41. 28 U.S.C. § 1602 et seq. (1988). Again, an argument can be made that international law requires a gross human rights exception to the Foreign Sovereign Immunities Act; however, the U.S. courts have rejected this claim. See supra note 40.

See Stephens, Ratner & Green, supra note 26, Chapter 9, at 71-75, for complete discussion of the Foreign Sovereign Immunities Act.
Despite these limitations, ATCA and TVPA litigation has proven to be an important tool in the struggle to protect human rights. The impact of these cases on both the individual plaintiffs and the human rights movement in their home countries and elsewhere should not be underestimated. Multi-million dollar judgments have been awarded to victims of gross human rights violations. Although none of the judgments has yet been paid, some may still be collected, if not immediately, then at some point in the future.

Just as importantly, the plaintiffs in these cases are concerned about much more than money. They take tremendous personal satisfaction from filing a lawsuit, from forcing the defendant to answer in court or to abandon the United States, and from creating an official record of the human rights abuses inflicted on them or their families. The three plaintiffs in the Abebe-Jiri case found that the process of confronting their torturer in open court contributed enormously to their recovery from their brutal experiences. Likewise, the parents who sued for the loss of their children in Filártiga and Todd took consolation from knowing that they had forced those responsible for the death of their sons to flee from the United States.

Some of these cases target an individual who personally inflicted torture or other abuse, while others seek to hold accountable a government or military official responsible for a program of human rights abuses of which the plaintiff is but one victim. Either way, they serve as a warning to those involved in human rights abuses, an indication that they might face the consequences of their actions at some point in the future.

In addition to their impact on the individual plaintiffs and the organizations working with them, these cases also strengthen the human rights movement in the plaintiffs' home countries, the United States, and worldwide. In the countries where the abuses took place, the lawsuits help create a record of human rights violations and point the finger of responsibility at the culprits. Thus, human rights activists in Guatemala view the Gramajo cases as an important step in the long struggle to hold the

42. See discussion of these issues in Michael Ratner & Beth Stephens, Using Law and the Filártiga Principle in the Fight for Human Rights, 2 ACLU INTERNATIONAL CIVIL LIBERTIES REPORT 29, 32 (Dec. 1993).
43. A collectible judgment is likely in the Marcos cases, where the assets of the defendant's estate have been frozen. In re Estate of Ferdinand Marcos, Human Rights Litigation, MDL No. 840 and related cases. Assisted by a change in government at home, the Filártiga family is currently attempting to enforce their U.S. judgment in Paraguay, against both the individual defendant and the Paraguayan government.
44. Abebe-Jiri, No. 90-2010.
45. Filártiga, 630 F.2d at 876.
47. Xuncax, No. 91-11564; Ortiz, No. 91-11612.
military accountable for its human rights atrocities. In the United States, these lawsuits strengthen our judiciary’s understanding and tolerance of international law norms. Internationally, these cases contribute to development of a system for the punishment of human rights abusers and the compensation of their victims. In the drive to overcome the current trend of impunity for violators and move toward a world in which human rights abuses do not occur or are promptly punished when they do, ATCA and TVPA litigation is one important step in the right direction.

III. Applying the ATCA and the TVPA to Rape and Other Gender-Based Violence

Violence against women, including rape and other gender-based violence, has historically received little attention from international human rights scholars and organizations, which have viewed such issues as falling within the narrow, specialized area of gender discrimination rather than as an abuse of human rights.48 This theoretical and practical separation is shocking, given the enormity of the human rights abuses associated with gender.

Significant numbers of the world’s population are routinely subject to torture, starvation, terrorism, humiliation, mutilation, and even murder simply because they are female. Crimes such as these against any other group other than women would be recognized as a civil and political emergency as well as a gross violation of the victims’ humanity. Yet, despite a clear record of deaths and demonstrable abuse, women’s rights are not commonly classified as human rights.49 Internationally, women’s concerns have traditionally been handled by special bodies, focusing on discrimination against women, which have weaker, more restricted powers to respond to complaints.50 An interna-

49. Bunch, supra note 48, at 486.
50. The U.N. Commission on the Status of Women (the Women’s Commission), established in 1947 by the United Nations Economic and Social Council, is responsible for promoting women’s human rights, while the Committee on the Elimination of Discrimination Against Women (CEDAW) monitors compliance with the Convention on the Elimination of All Forms of Discrimination Against Women, which entered into force in 1981 (G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/Res/34/180 (1980)). Within the United Nations system, however, the Convention “is not generally regarded as a convention with teeth” (Bunch, supra note 48, at 496), and neither the Women’s Commission nor CEDAW has even the limited investigatory and remedial powers afforded other U.N. human rights bodies. See Blatt, supra note 48, at 833-39; Bunch, supra note 48, at 495-96; Sandra Colliver, United Nations Commission on the Status of Women:
tional campaign to bring women's human rights into the human rights mainstream, coupled with the reports of brutal violence against women in the former Yugoslavia, have sparked a renewed interest in analyzing the treatment of gender-based violence under international law.

One approach looks at existing international human rights norms and argues that, properly understood, rape and other gender-based violence are prohibited by the provisions governing torture. 51 The international definition of torture 52 includes three requirements: (1) an act causing severe physical or mental suffering, (2) committed with the intent to obtain information, for punishment, intimidation, or coercion, or for any discriminatory reason, (3) by a government official or someone acting with the acquiescence of such an official. Properly understood as a crime of violence which involves physical and psychological abuse, rape by a public official or one acting under state authority necessarily meets this definition. Rape involves the intentional infliction of severe physical and mental pain and suffering. When inflicted by or with the acquiescence of a government agent, it would meet one or more of the intent requirements: punishment; intimidation of the victim, her family, her friends, and women in general; or gender-based discrimination. 53

Increasingly, rape has been recognized as meeting this definition by groups monitoring international human rights abuses, at least when the victim is in detention or under the custody of a government official. In a key advance, the United Nations Special Rapporteur on Torture in 1992 defined rape in detention as an act of torture. 54 In 1991, the U.S. State

52. The Torture Convention, supra note 20, art. 1, provides the following definition of torture:

[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, 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.

53. In general, violence or other mistreatment directed against another person is considered an international human rights violation (as opposed to a crime punishable under local law) only when inflicted by a public official or under color of state law. Some analysts, however, assert that even rape committed by private actors should be considered an international human rights violation, holding the government responsible because it encourages a system of male domination which includes tolerance of male violence against women. See, e.g., Blatt, supra note 48, at 859-60.

Department included rapes in detention as incidents of torture in its annual country-by-country human rights report.\textsuperscript{55} Amnesty International has also recently listed rapes committed while the victim is in the custody of the rapist as a form of torture.\textsuperscript{56}

The recognition of rape and other gender-based violence as torture triggers a whole range of human rights and humanitarian law protections. Torture is prohibited by all of the major human rights instruments, including regional agreements,\textsuperscript{57} and is barred by the constitutions of many countries.\textsuperscript{58} No government claims the right to torture its own or another nation's citizens. The prohibition against torture rises to the level of customary international law\textsuperscript{59} and applies with equal force during war.
as well as peace.  

Finally, the Torture Convention obligates its signatories to extradite or prosecute torturers found within their territory.

Understanding that rape is a form of torture brings it within the purview of the TVPA and the ATCA. The TVPA allows suits for torture, defined by the statute in accordance with international law. The ATCA allows suit for torts "in violation of the law of nations," which has been defined to include torture. The rapes in Bosnia-Herzegovina thus fit within both these statutes.

Other gender-based violence reported in Bosnia—forced prostitution and forced impregnation—similarly constitute torture: they inflict severe mental and physical pain and suffering, and are committed with the requisite intent. Forced impregnation has been defined as "an impregnation that results from an assault or series of assaults on a woman perpetrated with the intent that she become pregnant." Although a forced impregnation probably results from one or more rapes, the intentional impregnation of a woman constitutes a separate violation of her rights:

Forced impregnation makes the humiliation of rape more complete, more prolonged, and more inescapable. For at least the duration of the pregnancy, and for a lifetime if she keeps the child, the woman may be unable to put the rape behind her and move on with her life. Forced impregnation [also] subjects the victim to the

definition of customary international law:

With respect to content as opposed to sources, it is convenient to classify international law norms in two groups: the written and the unwritten. The latter category, which resembles the unwritten common law of the Anglo-American legal tradition, consists of the customary rules and general principles mentioned above. Together these concepts comprise customary international law. Customary international law is binding upon all states, even though its content is uncodified and therefore often is more difficult to ascertain.


60. Torture is considered a "grave breach" of the laws of war. Geneva Convention IV, supra note 18, art. 147.

61. Torture Convention, supra note 20, art. 5, § 2.

62. The TVPA defines torture as an act which intentionally inflicts "severe pain or suffering," whether that be physical or mental, for the purposes of obtaining information, punishment, intimidation, coercion, "or for any reason based on discrimination of any kind." § 3(b)(1). "Mental pain or suffering" is further defined as "prolonged mental harm" caused by the infliction or threatened infliction of physical pain or suffering. § 3(b)(2).

63. See Alien Tort Claims Act, supra note 24. Cases to date have also allowed ATCA suits for summary execution, disappearance, prolonged arbitrary detention, and cruel, inhuman, or degrading treatment. See sources cited supra note 29.

Forced prostitution likewise prolongs the agony of rape, forcing a woman to submit to repeated rapes. Given cultural condemnations of prostitution, it may also make it far more difficult for the victim to recover from her ordeal.

Two lawsuits filed in 1993 against Radovan Karadžić, the self-proclaimed president of the Bosnian Serb nation, both claim that rapes and other gender violence committed by Karadžić’s forces are actionable under the ATCA and the TVPA.66 Filed on behalf of victims of human rights atrocities committed by the Bosnian Serb forces, the lawsuits allege that Karadžić bears responsibility for the systematic rapes and other abuses committed by his forces.67 If the cases survive attacks on other grounds, they will provide a vehicle for a U.S. federal court judgment that such gender violence does constitute torture and thus, in the language of the ATCA, a violation of the law of nations.68

The TVPA is limited to claims of torture and summary execution; to raise gender violence as a TVPA violation, it must be understood as a form of torture. The ATCA, however, is much broader, allowing suits for torts

65. Id. at 17.
67. Both cases were filed while Radovan Karadžić was in New York City, attending meetings at the United Nations concerning the war. Doe was filed by two unnamed women as a class action on behalf of all Bosnian Muslim victims of human rights abuses. Kadic was filed on behalf of a mother and her infant son and two women’s organizations. Both seek compensatory and punitive damages; Kadic also asks for injunctive relief.
68. The claim that rape constitutes torture under international law is also pending in a Boston federal district court. Ortiz, No. 91-11612 (decision pending on plaintiff’s Motion for Default Judgment). Two complaints currently pending before the U.N. Human Rights Commission raise the same claim. Farhat v. Kuwait (Petition filed with the U.N. Commission on Human Rights by the Center for Constitutional Rights) (Dec. 3, 1992) and Filipina Comfort Women v. Japan (Petition filed with the U.N. Commission on Human Rights by the Center for Constitutional Rights and other organizations) (Oct. 26, 1993).
"in violation of the law of nations." Under the *Filártiga* approach, the law of nations is understood as an evolving concept, reflecting current international standards, a view endorsed by Congress when the TVPA was passed. Thus, rape and other gender violence can be addressed through the ATCA, not just as a form of torture, but also through any other tort "in violation of the law of nations."

The Restatement defines torts in violation of the law of nations as those of such international importance that "a violation by a state of rights of persons subject to its jurisdiction is a breach of the obligation to all other states." The *Forti* court refined this definition, stating that international torts are those characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms.

Genocide is perhaps the clearest example of an international tort which undeniably falls within the reach of the ATCA. To the extent that the

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69. *Filártiga* held that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." 630 F.2d at 881. The TVPA House Report notes that the ATCA permits suits based on "norms that may already exist or may ripen in the future into rules of customary international law." H. REP. NO. 367, 102d Cong. 1st Sess. (1992).

International law scholars agree that the international law referred to by the ATCA is not static. "There can be little doubt as to the correctness of the *Filártiga* court's view. Courts of the United States have long been aware of the evolving character of international law." Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Torts Claims Act After Filártiga v. Peña-Irala*, 22 HARV. INT'L LJ. 53, 59 (1981). But see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-16 (D.C.Cir. 1984) (Bork, J., concurring) (would have limited the ATCA to violations of the law of nations recognized in 1789), cert. denied, 470 U.S. 1003 (1985).


71. *Forti*, 672 F. Supp. at 1540. To date, in addition to torture, summary execution, disappearance, prolonged arbitrary detention, and cruel, inhuman or degrading treatment have been held to meet this standard by one or more U.S. federal court. See sources cited supra note 29.

72. Genocide is defined by the Genocide Convention, supra note 19, as follows: 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 group.

art. 2. This definition is generally accepted for purposes of customary law (*Restatement (Third) of Foreign Relations Law*, § 702, cmt. (d)), which requires that a State both refrain from practicing or encouraging genocide and also punish persons guilty of genocide or conspiracy to commit genocide. Genocide Convention, supra note 19, arts. 1, 3.
rapes and other gender violence in Bosnia are part of a genocidal pattern, aimed at destroying the Bosnian Muslims, they form the basis for an ATCA claim for genocide. 73

Under the ATCA, a civil claim for war crimes 74 and crimes against humanity 75 may also be brought as a violation of the law of nations. 76 Thus, violence against women which constitutes a war crime or a crime against humanity could be raised as a cause of action under the ATCA. 77

Legal scholars have generally agreed that genocide falls within the ATCA as a violation of the law of nations. See Blum & Steinhardt, supra note 69, at 91-94; Stephens, Ratner & Green, supra note 26, at 43-44.

73. Both cases filed against the Bosnian Serb leader include claims of genocide. Doe v. Karadžić, No. 93-1163 (Motion to Dismiss granted Sept. 7, 1994) appeal docketed, No. 94-9035; Kadic v. Karadžić, No. 93-1163 (Motion to Dismiss granted Sept. 7, 1994) appeal docketed, No. 94-9069 (2d Cir. Oct. 18, 1994)

74. "War crimes" fall into two categories: first, all violations of the laws of war; and second, "grave breaches" of those laws, which trigger a stronger set of prohibitions and governmental obligations. Meron, supra note 15, at 426; Rhonda Copelon, Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War, in MASS RAPE 197, 200-201 (Alexandra Stiglmayer ed., 1994). Rape is a violation of laws of war, and thus is a "war crime" of the first category. Id.

Unfortunately, there is some confusion about whether rape constitutes a "grave breach." The Geneva Convention's definition of "grave breaches" includes torture and inhumane treatment, and acts "willfully causing great suffering or serious injury to body or health." Geneva Convention IV, supra note 18, art. 147. Many international scholars, non-governmental organizations, and several governments have concluded that rape clearly falls within this definition. Meron, supra note 15, at 426-27; Copelon, supra, at 202; Beth Stephens, Women and the Atrocities of War, 20 HUMAN RIGHTS 12, 13-15 (1993). It is not clear, however, that an international consensus has developed on this issue. A disturbing question has been raised by the Statute of the International Tribunal, which does not specifically list rape as an example of a grave breach. Id.; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. SCOR, 48th Sess., Annex, art. 2, U.N. Doc. S/25704 (1993) [hereinafter Statute of the International Tribunal].


76. See Stephens, Ratner & Green, supra note 26, at 46-47.

77. As discussed supra notes 74-75, the rapes and other gender violence in Bosnia would be recognized as war crimes, if not grave breaches, and, as crimes against humanity when associated with ethnic violence, if not on their own. One of the pending cases against the Bosnian Serb leader contains a cause of action for war crimes and crimes against humanity. Doe v. Karadžić, No. 93-1163 (Motion to Dismiss granted Sept. 7, 1994) appeal docketed, No. 94-9035.
It is important, however, that the particular characteristics of rape and other gender violence not be lost within definitions of broader international torts. Rape is an international human rights violation even when not connected to genocide or not committed during a war, and the rapes and other gender violence in Bosnia constitute international torts even when unconnected to the broader pattern of genocide.78

Indeed, the evolving nature of international law could lead to the definition of an international tort of gender violence, independent of the definition of torture. The drafters of two draft declarations on violence against women have begun the process of defining such a tort.79 The draft declaration prepared under the auspices of the U.N. Commission on the Status of Women defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women.”80

If and when the prohibition of gender violence reaches the level of a universal, definable, and obligatory norm, the evolving definition of the law of nations incorporated into the ATCA will allow it to be raised as an independent cause of action. For now, despite its limitations, current international law provides a strong basis for ACTA and TVPA claims for the rapes and other gender violence in Bosnia as forms of torture, and as components of genocide, war crimes, and crimes against humanity.

IV. The Civil Remedy in International Law

With the ATCA, as applied by the Filartiga line of cases, and the TVPA, the United States has taken the lead internationally in the creation

78. Feminist international law scholars have expressed concern about the tendency to condemn rapes in Bosnia because they are part of genocidal ethnic cleansing, not because rape itself is a brutal human rights violation.

The international and popular condemnation of the rapes in Bosnia tends to be either explicitly or implicitly based on the fact that rape is being used as a tactic of ethnic cleansing. Genocidal rape is widely seen not as a modality of rape but as unique. The distinction commonly drawn between genocidal rape and the so-called “normal” rape in war or peace is proffered not as a typology, but rather as a hierarchy. But to exaggerate the distinctiveness of genocidal rape obviates the atrocity of common rape.

Copelon, supra note 74, at 205.


80. Declaration on the Elimination of Violence Against Women, supra note 79, at 3. Both declarations include private violence as well as governmental violence as an international human rights violation. State complicity in tolerating private violence, or in failing to prevent it, is viewed as sufficient to hold the government liable for private violence against women.
of a civil remedy for victims of human rights abuses committed in other countries. Although a civil remedy is not a substitute for an international enforcement system, it provides one means of offering justice to victims of human rights abuses. The United States is in many ways a good place to start: many internationally vilified human rights abusers choose to visit or live here.81 As both the world’s only superpower and a country which has in the past put pragmatism before human rights in its foreign policy, the United States is also in a position to set an example for other governments by holding accountable people who pass through our borders who have committed gross human rights abuses.

However, the impact of any remedy which is applied only in the United States is severely limited. Practically speaking, despite the lure of the United States, it is too easy to avoid travel to this country. Further, many people around the world are skeptical of a legal weapon which places the United States in the position of policing the behavior of people from other countries. Put bluntly, they claim that it reeks of arrogance and even imperialism.

But the solution is not for the United States to pull back from a tool which serves to hold accountable those who have committed gross violations of human rights. Rather, the precedents in this country must be used to facilitate the development of a civil remedy in other nations. The ability of human rights victims to sue those responsible for gross violations in countries around the world would be a significant contribution toward the enforcement of human rights norms and the deterrence of such abuses in the future. Given the hurdles women face in enforcing basic human rights, the development of a remedy which allows for private action is of particular importance.82

International cooperation among human rights attorneys has already contributed to human rights advances. A lawsuit in England successfully obtained a judgment against a Kuwaiti prince charged with torture.83 On behalf of the same plaintiff, an appellate court cited Filártiga principles in finding that state immunity did not protect the Kuwaiti government from a suit for torture.84

81. The Senate Report accompanying the TVPA states that one purpose of the statute is to "mak[e] sure that torturers and death squads will no longer have safe haven in the United States." S. REP. NO. 249, 102d Cong., 1st Sess. at 3 (1992).
82. Women generally face hurdles when initiating civil lawsuits as well, since such litigation is often expensive. In human rights litigation, however, public interest lawyers and human rights advocates may be able to "level the playing field," by handling such cases for free.
84. Al-Adansi, 1994 Eng. C.A.
Further attempts to employ this civil remedy in other countries, however, may require overcoming jurisdictional hurdles which restrict the assertion of jurisdiction to incidents which have some nexus to the host country, either because the abuses took place there or because the victims are citizens of that state. Some analysts have even questioned the United States' right to assert jurisdiction over violations committed in other countries, against citizens of those countries. However, a strong argument can be made that international law permits all governments to afford victims of human rights abuses access to a civil remedy. In addition, as the international community begins to grapple with the need for effective remedies for victims of human rights abuses, it may be possible to develop a theory of an international obligation to allow a civil remedy.

The principle of universal criminal jurisdiction for certain human rights violations is widely recognized. The Restatement (Third) of Foreign Relations Law, defines this principle as follows:

[A] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, [and] war crimes. As explained in a comment to that section, the concept of universal jurisdiction "recognize[s] that international law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim)." Universal jurisdiction thus overrides requirements that there be a specific link between the prosecuting nation and the crime, the offender, and/or the victim.

Universal jurisdiction applies with particular force to allegations of war crimes and crimes against humanity. The Geneva Conventions of 1949 impose a duty upon each State party to bring perpetrators of such crimes to justice. Each signatory is obligated to

search for persons alleged to have committed, or to have been ordered to be committed, such grave breaches, and bring such persons, regardless of their nationality, before its own courts.

85. § 404 at 254.
86. Id., cmt a.
87. See Geneva Convention I, supra note 18, art. 49; Geneva Convention II, supra note 18, art. 50; Geneva Convention III, supra note 18, art. 129; and Geneva Convention IV, supra note 18, art. 146. See supra note 74 for discussion of definition of grave breaches and their application to violence against women.
In the case of *In Matter of Demjanjuk*,\(^{88}\) a U.S. federal court recognized that the punishment of such offenses is a concern of *all* nations:

International law provides that certain offenses may be punished by any state because the offenders are 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment'. . . The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent state, not from the state's relationship to the perpetrator, victim or act.\(^{89}\)

The obligation to hold accountable persons accused of gross human rights violations is also reflected in the Torture Convention, which requires a government to either extradite or prosecute any alleged offender present in its territory.\(^{90}\) Thus, international law obligates states to search out those who have committed certain gross human rights violations, and to either prosecute them or send them to a country which will do so.

Although the concept of universal criminal jurisdiction for a certain category of international crimes is well-established (in principle, if not in practice), it can also be argued that international law permits or even mandates universal jurisdiction over civil actions as well. The Restatement (Third) of Foreign Relations Law recognizes a link between criminal and civil jurisdiction, concluding that international law also permits a claim of civil jurisdiction:

In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.\(^{91}\)

Given that civil jurisdiction is a lesser imposition on the accused, it is logical to conclude that states have at the least the right to allow civil lawsuits in situations where they could impose criminal sanctions.

There is also support, however, for developing the concept that the civil remedy is actually an obligation. One principle of international law holds that certain fundamental violations of humanitarian law and human rights norms are so universally condemned that a perpetrator is considered *hostis*

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89. *Id.* at 556, citing U.S. v. Otto, Case No. 000-Mauthausen-5 (DJAWC, July 10, 1947).
91. § 404 cmt. b.
humani generis, the enemy of all people, who can be brought to justice wherever found. This principle has been understood to include holding such an international pariah accountable under civil as well as criminal law:

The effect of the doctrine [is] to hold individuals liable, both civilly and criminally, for violations. When wrongdoers violate[] the law of nations their liability follow[s] them everywhere. It [is] unimportant whether their acts [have] any connection with the forum state, as all nations [have] a duty to enforce international law.92

This doctrine was relied upon by the Second Circuit in the Filártiga decision:

[F]or the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.93

Under this principle, international law not only permits domestic courts to hear suits brought by victims of human rights violations, but actually obligates them to do so.

The legislative history of the TVPA indicates that the U.S. Congress believed that providing a civil remedy was an obligation under international law:

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts. One such obligation is to provide means of civil redress to victims of torture.94

The assertion of jurisdiction in a civil lawsuit comports with an additional international law obligation, that which requires that each nation

92. Blum & Steinhardt, supra note 69, at 61. In an early federal case, Justice Story imposed a civil penalty upon slave traders, after having declared them to be universal outlaws. La Jeune Eugenie, 26 F. Cas. 832, 851 (D. Mass. 1821). The Supreme Court reversed, not because it disagreed with the principle of universal jurisdiction, but because at that point in the 19th century the Court found no universal agreement that the slave trade was illegal under international law. The Antelope, 23 U.S. (10 Wheat.) 66, 101-02 (1825). See discussion, Blum & Steinhardt, supra note 69, at 61, n. 41.

93. Filártiga, 630 F.2d at 890. 

94. H. Rep. No. 367, 102d Cong., 1st Sess. (1992) (emphasis added). The Torture Convention actually requires criminal prosecution (or extradition), not access to a civil remedy, a contradiction noted by President Bush when he signed the statute. See Signing Statement of President Bush, 4 U.S. Code Congressional and Administrative News 91 (1992) (expressing regret that legislation to implement the Torture Convention, presumably through a statute authorizing extraterritorial criminal jurisdiction has not yet been enacted and stating that the TVPA "does not help to implement the Torture Convention").
provide victims of human rights abuses with effective remedies. Thus, the Universal Declaration of Human Rights states:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights. . . . 95

This article specifically requires that the remedy be adjudicatory ("by the competent national tribunals"), not merely administrative or executive, thus effectively guaranteeing the victim of a human rights abuse his or her day in court.96 The International Covenant on Civil and Political Rights further elaborates this obligation, requiring each state party "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted."97

Several international agreements contain similar obligations,98 often specifying a right to compensation as well.99 The Declaration on the Protection of All Persons from Enforced Disappearance100 states specifically that individuals responsible for forced disappearances are liable under civil law. In general terms, the right to a remedy encompasses access to

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95. Universal Declaration of Human Rights, supra note 20, art. 8. The Universal Declaration is considered binding international law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 701, Notes 4-6.


97. International Covenant on Civil and Political Rights, supra note 20, art. 2(3).

98. The Declaration on the Elimination of All Forms of Racial Discrimination, art. 7, 5 I.L.M. 352 (1966) entered into force Jan. 4, 1969, states:

Everyone shall have the right to an effective remedy and protection against any discrimination he may suffer on the ground of race, colour or ethnic origin with respect to his fundamental rights and freedoms.


99. See, e.g., Torture Convention, supra note 20, art. 14; International Covenant on Civil and Political Rights, supra note 20, art. 9(5); American Convention on Human Rights, supra note 57, art. 63(1); European Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 57, art 5(5); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, supra note 98, arts. 8-21. See discussion, Roht-Arriaza, supra note 96, at 482.

a judicial system empowered to hear allegations of abuse, render judgments, and award compensation.\textsuperscript{101}

The Sub-Commission of the U.N. Human Rights Commission has for several years been engaged in the process of elaborating the significance of the right to a remedy. In 1988, it declared that

all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims, either individually or collectively.\textsuperscript{102}

The following year, the Sub-Commission appointed a Special Rapporteur to study the contours of that right and develop guidelines for its implementation.\textsuperscript{103} This work is beginning to define each government's obligation to offer victims of human rights violations a means of redress:

As a matter of principle every State has the responsibility to redress human rights violations and to enable the victims to exercise their right to reparation. . . . Every State owes it to the victims of gross violations of human rights to see to it that . . . those who have suffered receive reparation. The legal system of every State should, therefore, deal with such issues in a just and effective manner.\textsuperscript{104}

The current process of developing a clear definition of an enforceable right to a remedy and to reparation provides an opportunity to incorporate the concept of civil lawsuits as an important means of implementing these rights.

\textsuperscript{101} Roht-Arriaza, \textit{supra} note 96, at 479.


To date, the obligation to provide a remedy has been imposed on the State responsible for the underlying human rights abuse. However, given the paucity of remedies available to victims of human rights abuses, and the ability of violators to escape judgment by fleeing to other countries, it may be time to reexamine the obligations of States which provide a haven to people fleeing justice in their home countries. Building upon well-established principles of international law, interpreted in light of the difficulties faced by those seeking remedies for the violations they have suffered, a theory of an obligatory civil remedy can be developed.

V. Conclusion

Although international law increasingly recognizes that international rights are of limited significance if they cannot be enforced, victims of human rights abuses face very limited options. Governments are slow to enforce human rights or to offer victims access to the courts to seek justice. No international criminal or civil system is capable of forcing States to protect human rights or provide a remedy to those whose rights are violated.

The inability to enforce human rights protections, to hold violators accountable and offer compensation to victims, is perhaps the most glaring weakness of international law. With no method in place to enforce human rights principles, their force depends upon moral persuasion and the haphazard (and often discriminatory) support of governments around the world. The failure to recognize that women's rights are human rights, or to take seriously the problem of gender-based violence, gives added urgency to the development of alternative means of enforcement and compensation for violations against women.

International law scholars and activists have made significant progress in obtaining a recognition of rape and other gender-violence as forms of torture. Discussion and debate about the nature of violence against women could lead to the emergence of a new category of human rights violations, with corresponding duties and obligations on governments around the world.

Although criminal prosecution of those who violate human rights is an essential part of any long-term progress toward preventing and punishing such violations, the civil remedy currently under development in the United States is a valuable tool as well. If the remedy were available around the world, women could begin to make life difficult for those responsible for gross violations of women's human rights. This would be an important step toward enforcing the basic right to be free from gender-violence and toward obtaining justice for victims of gross violations of human rights.