

## ARTICLE

### UBI JUS NON REMEDIUM: How Insufficient Secondary Rules Diminish the Coercive Force of International Human Rights' Primary Rules

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**UBI JUS NON REMEDIUM:  
HOW INSUFFICIENT SECONDARY RULES DIMINISH THE COERCIVE  
FORCE OF INTERNATIONAL HUMAN RIGHTS' PRIMARY RULES**

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**Introduction**

The study of human rights under international law is a paradox of contrasts. While States celebrate the progress of codification and development of substantive norms on human rights, there is an almost incomprehensible silence on the consensus for enforcement of such norms. In so doing, should the mere *recognition* of the content of the right *per se* suffice for the international community? Some quarters acknowledge that claims for a uniform system or procedure for the enforcement of such right or to obtain redress for its violation have long become stale demands, and would prefer to treat the issue as one of the typical tensions of *lex lata* and *lex ferenda*.

*"In principle, human rights obligations, like other international obligations, create rights in the promisees and afford them remedies. But while State promisees are entitled to pursue such remedies, they have not been sufficiently motivated to do so and do not in fact do so....Many States, themselves still lacking an entrenched human rights culture, themselves vulnerable to charges of violation, are reluctant to respond to a violation by another friendly State of the human rights of the State's own inhabitants."*<sup>2</sup>

The ultimate result of the lacunae in universal or broad enforcement standards and procedures is to vest more authority on governments to determine the merits and manner of pursuing the claims of individuals against human rights violators. Human rights victims have to contend with the bitter irony that the 'human scale and nature' of their rights is inevitably subject to the political considerations of statecraft. *Rights exist, remedies perhaps.* And yet the **right of any person to an effective remedy** is itself a substantive human rights norm. Various international instruments<sup>3</sup> embrace this principle, demonstrating at the very least

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<sup>2</sup> L. HENKIN, *International Law: Politics, Values and Functions*, in 216 COLLECTED COURSES OF HAGUE ACADEMY OF INTERNATIONAL LAW 13 at 251 (1989).

<sup>3</sup> Art. 8 of the UNIVERSAL DECLARATION OF HUMAN RIGHTS, G.A. Res. 217 (III), U.N. Doc. A/810 (1948), provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws."; See Art. 2(3) of the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR), G.A. Res. 2200A (XXI), 21 U.N.

the *opinio juris* of States that such a right exists, even if the manner of enforcement is susceptible to divergence in practice and belief. Yet another instance where a right exists, but the remedy may not.

The precise oxymoron not fully appreciated by traditional theorists on remedies under international law is that injuries created by human rights violations are received by *individuals*, and whatever injury the legal construct called the *State* incurs is merely derivative therefrom. Such traditional theorists still rely upon the doctrine of espousal of claims for injury to nationals,<sup>4</sup> principally based on the general test of observance of the 'international minimum standard' of treatment of aliens in one's territory:

The propriety of governmental acts should be put to the test of international standards...The treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.<sup>5</sup>

Without weakening the observation, it may still be conceded that remedies for human rights violations under international law have certainly crossed the

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GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966); Art. 6 of the INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD), 660 U.N.T.S. 195; Art. 2(c) of the CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW), G.A. Res. 34/180, 34 U.N. GAOR Supp. No. 46 at 193, U.N. Doc. A/34/46 (1979); Art. 11 of the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 AT 197 [1984], [hereinafter referred to as TORTURE CONVENTION]; Art. 16 of the CONVENTION ON THE RIGHTS OF THE CHILD (CRC), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. No. 49 at 167, U.N. Doc. A/44/49 (1989); Art. 11(3) of the AMERICAN CONVENTION OF HUMAN RIGHTS, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Art. 8 of the EUROPEAN CONVENTION OF HUMAN RIGHTS, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, the text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), of Protocol No. 5 (ETS No. 55), and of Protocol No. 8 (ETS No. 118), and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), is repealed and Protocol No. 10 (ETS No. 145) has lost its purpose; Art. 5 of the AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS, AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). See also Arts. 16(4) and 16(5) of the CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES, 28 I.L.M. 1382 (1989); CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES (ILO No. 169), 72 I.L.O. 59.

<sup>4</sup> I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 403-6 [5<sup>th</sup> ed. 1999] [hereinafter referred to as BROWNIE]; See Nottebohm case, (Liechtenstein v. Guatemala) Judgment (Second Phase) I.C.J. Rep. 4 (1955); Canevaro Case (Italy vs. Peru), 11 RIAA 397 (1912).

<sup>5</sup> Neer Claim (US-Mexico General Claims Commission), 4 RIAA 60 (1926).

threshold of mere espousal of claims by States to allow some measure of *individual* presentation of claims. Nevertheless, severe difficulties in various areas of litigation remain in the vindication of human rights, largely generated by the absence of a coherent and uniformly applicable system of enforcement and redress for human rights violations. For as long as individual claimants are dependent upon international consensus for remedies, there are no *real* human rights. There are norms for observance by state and non-state actors, but their obligatory nature can very well be denied.

This paper assesses human rights remedies from the perspective of the individual human rights victim. The first section outlines the different forums (international and local) for redress to which individual victims of human rights violations may apply, concisely summarizing the salient basic procedures and the extent of relief that may be afforded in such forums. The second section examines common issues affecting the recourse of human rights victims to various remedies, identifying three common 'stasis' points where individual claimants can expect severe delay or even outright foreclosure of the remedy: 1) **jurisdiction of the forum** (including standing to sue and the political question doctrine as applied in domestic courts), 2) **the extent of authority of the forum**, and 3) **the enforcement and execution of judgment** of the forum. The second section also posits (as a further consideration for individual claimants) the correlation between the success of the claim and the severity of the liability or relief sought by the potential claimant. The third section will illustrate the principles analyzed in the second section through the extreme case of the 'Jugun Ianfu' (Comfort Women) of World War II, and discuss possible remedies available to this class of claimants. The last section briefly concludes with prospects for the international human rights remedies system.

Finally, it hardly needs stating that it is not the intent of this paper to impugn the relevance of human rights discourse, but merely to substantiate its significance to the direct victims of human rights violations by identifying the lacunae in enforcement of human rights and positing solutions for controversial issues under the current remedies system of international law.

## I. INSTITUTIONS FOR REDRESS: BASIC PROCEDURES AND RELIEFS

The protection of human rights pervades the entirety of the United Nations Charter<sup>6</sup>, underscoring its importance to the community of nations. The

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<sup>6</sup> CHARTER OF THE UNITED NATIONS, 59 Stat. 1031, T.I.A.S. 993 [1945] [hereinafter referred to as U.N. CHARTER].

preamble to the Charter “reaffirms faith in fundamental human rights, and in the dignity and worth of the human person”. Article 1(3) of the Charter assigns as one of the basic purposes of the UN the task of “achieving international cooperation and encouraging respect for human rights and fundamental freedoms”. Article 55 specifically calls on member States to “promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion”. In relation to Article 55, Article 56 declares “all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

The primacy of human rights as a concern of all States is unequivocally evident. Curiously enough, however, there is no principle or provision in the Charter that describes the specific content of any obligation of States to **victims** of human rights violations. The tenor of the Charter provisions implies that States are the principal actors in human rights promotion and observance, and leaves to their judgment and discretion both the treatment and legal circumstances of individuals possessing such rights.

Given this framework, it is altogether understandable that victims of human rights violations to date have limited access to different forums for redress. Each forum is distinct in mandate and function, and the extent of relief that victims can obtain from each is predictably diverse. The following subsections outline salient basic procedures, issues, and limitations unique to each forum, still from the perspective of the individual victims seeking relief.

## A. INTERNATIONAL ORGANS/TRIBUNALS

### 1. The International Court of Justice (ICJ)

As the international tribunal succeeding to the Permanent Court of International Justice (PCIJ), the ICJ continues to reify States as the only parties entitled to bring cases before it.<sup>7</sup> The ICJ exercises both advisory<sup>8</sup> and contentious<sup>9</sup> jurisdiction. It is in the latter type of jurisdiction that individual victims of human rights violations will be principally concerned.

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<sup>7</sup> STATUTE OF THE INTERNATIONAL COURT OF JUSTICE [hereinafter referred to as I.C.J. STATUTE] art. 34, para. 1.

<sup>8</sup> Art. 65(1) of the I.C.J. STATUTE provides that the Court can render an advisory opinion “on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.”

<sup>9</sup> See I.C.J. STATUTE, arts. 34-36.

Necessarily, the litigation of the claims of individual victims is dependent upon the ability of a State to validly assert their rights against a violating State to whom the offending acts are attributed.<sup>10</sup> Individual claims must be adopted by a State. However, the process of 'adoption', or the establishment of a juridical link between the individual and the State, is hardly automatic. Customary norms have developed in ascertaining the 'valid bases' for a State to elevate individual claims to the international plane.

The less controversial among these bases is the principle of 'nationality of claims' (alternatively known as the principle of diplomatic protection<sup>11</sup> or the doctrine of espousal of claims), which permits a State of nationality of the injured victim to sue the violating State. The rationale for the principle is that a State causing injury to an individual indirectly injures the State of nationality. The adoption of the claim does not undermine the separate interest of the State of nationality --- ultimately, what will be litigated in theory is the injury to the State *as inflicted on its nationals*.<sup>12</sup> Moreover, the discretion employed by the State of nationality to take up the claim of an individual is still considered as part of its reserved domain of domestic jurisdiction.<sup>13</sup>

The application of the nationality of claims principle is not without its complications. In the *Nottebohm* case,<sup>14</sup> the Court laid down the clarification that it is the *effective nationality* of the individual that creates a substantial legal interest for the State seeking to exercise diplomatic protection. Where the individual has dual nationality, Article 4 of the 1930 Hague Convention strictly prohibits any of the States from which the individual derives nationality from exercising diplomatic protection against the other.<sup>15</sup>

However, where the individual does not possess the necessary ties of nationality with the State seeking to assert diplomatic protection, the rules for recognition of standing in the Court are less clear. The strict view holds that States cannot exercise any diplomatic protection where there is no link of nationality.<sup>16</sup>

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<sup>10</sup> See Arts. 1 and 2 of the ARTICLES ON STATE RESPONSIBILITY, G.A. Res. 56/83, U.N. GAOR, 56<sup>th</sup> Session, Agenda Item 62.

<sup>11</sup> The *Panevezys-Saldutiskis Railway* case, P.C.I.J. (ser. A/B) no. 76 (1939).

<sup>12</sup> *Mavrommatis Palestine Concessions* Case, P.C.I.J. (ser. A) no. 2 at 12 (1924).

<sup>13</sup> BROWNLEE, p. 293. See also Advisory Opinion on Nationality Decrees Issued in Tunis and Morocco Case, P.C.I.J. (ser. B) no. 4 (1923).

<sup>14</sup> *Nottebohm* case, (*Liechtenstein v. Guatemala*) (Second Phase) Judgment, I.C.J. Rep. 4. (1955).

<sup>15</sup> See CONVENTION ON CERTAIN QUESTIONS RELATING TO CONFLICT OF NATIONALITY LAWS, 12 April 1930, SPECIAL PROTOCOL ON STATELESSNESS, 12 April 1930.

<sup>16</sup> J. Blackman, *State Successions and Statelessness: The Emerging Right to An Effective Nationality under International Law*, 19 MICH. J. INT'L L. 1161 (1998).

The more liberal view as regards stateless persons holds that ties of *residence*, and not nationality exclusively, are sufficient:

The tendency to assimilate de facto stateless persons (i.e. persons who do not enjoy the protection of the Government of the State of their nationality and who have, as refugees, severed their ties with that State) to *de jure* stateless persons is further evidence of the importance of the question whether the nationality which an individual possesses in law is effective. *More and more frequently, in States in which personal status is, in principle, governed by the law of the country of nationality, the personal status of such persons is determined by the law of their country of residence, rather than by the law of their State of nationality, and they are treated, as regards certain rights, not according to their formal national status but in the same manner as nationals of the country of their residence.*<sup>17</sup> (Italics supplied.)

This dispute between the two views has not yet been resolved. The Court has not had occasion to rule upon norms concerning statelessness in toto.

The issue of state succession has diverse consequences for the status of nationality. For some publicists, nationals of the predecessor State do not acquire the nationality of the successor State.<sup>18</sup> The International Law Commission posits the opposing view that the successor State may grant nationality to persons having habitual residence in their territory, thus including nationals of the predecessor State.<sup>19</sup> Again, the Court has not ruled upon this issue, thereby permitting a fertile academic debate on the use of habitual residence as an acceptable substitute for the nationality link.

Where the basis for the State to sue is other than the juridical ties of nationality or habitual residence, the State expectedly faces difficulty meeting *locus standi* requirements for the Court to take jurisdiction. In the *South West Africa* cases<sup>20</sup> the Court denied the existence of direct legal interests on the part of Ethiopia and Liberia (both of whom applied with the Court for relief in behalf of many individuals residing in South Africa allegedly subject to maltreatment and abuse from the apartheid policies of the South African government) as would satisfy *locus*

<sup>17</sup> WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW, 197 (1956).

<sup>18</sup> WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW, 143-144 (2d. ed., 1979); See Beemelmans, *State Succession in International Law: Remarks on Recent Theory and State Practice*, 15 B.U. INT'L L.J. 71 (1997).

<sup>19</sup> Draft Articles on Nationality, Report of the International Law Commission on the Work of its 47<sup>th</sup> Session, arts. 19 and 20. <[http://un-org/law/ilc/reports/1997/chap\\_4.html](http://un-org/law/ilc/reports/1997/chap_4.html)>

<sup>20</sup> South West Africa cases (Ethiopia v. South Africa, Liberia v. South Africa) (Preliminary Objections), I.C.J. Reports 319 (1962). See Northern Cameroons case, I.C.J. Reports (1963).

*standi*. The narrow majority of the Court in the second phase of the proceedings (1966) treated the issue of legal interest as one of merits:

The Court simply holds that such rights or interest, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law.

The Court ruled against Ethiopia and Liberia, relying upon provisions of the Mandate for South West Africa stipulating that only Members of the League of Nations could submit a dispute with the Mandatory to the PCIJ. Neither Ethiopia nor Liberia was a member at the time of the dispute. The Court significantly stated:

...the argument amounts to a plea that the Court should allow the equivalent of an '*actio popularis*', or right resident in any member of a community to take legal action in vindication of a public interest....Although a right of this kind may be known to certain municipal systems of law, it is *not known to international law as it stands at present*...<sup>21</sup>

The State would have to rely upon a wider legal construct to invoke a sufficient legal interest as would entitle it to sue before the Court.

Various such 'constructs' have arisen in academic debate to grant third States (by this we refer to States possessing neither nationality nor residence links with the individuals injured by the violations of another State s) the sufficient legal interest to sue before the Court: *obligations erga omnes*, *denial of justice*, *violation of jus cogens norms*, among others. While the Court has had the opportunity to define and illustrate the principles involved in the latter,<sup>22</sup> the acceptability of such bases for States to acquire *locus standi* has never been tested in the Court. It must be further observed that the common denominator among these bases is the correlation posited by the State between the *nature of the norm violated* and the *existence of legal interest by the State*. Unlike the traditional bases of nationality and residence, which confers upon the State the right of action the individual would have against a State

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<sup>21</sup> South West Africa cases (Second Phase), I.C.J. Reports 47 (1966).

<sup>22</sup> For obligations erga omnes and peremptory norms/jus cogens norms, see Barcelona Traction Case (Belgium vs. Spain) (Second Phase), I.C.J. Reports, paras. 33-34 (1970); Military and Paramilitary Activities in and Against Nicaragua (Nicaragua vs. U.S.) (Merits), I.C.J. Reports, para. 190 (1986); South West Africa cases (Second Phase), I.C.J. Reports, 304 (1966); East Timor case, I.C.J. Reports, 90 at 102 (1995); Reservations on the Convention on Genocide (Advisory Opinion) I.C.J. Rep. 15 (1951); Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), I.C.J. Reports, para. 31 (1996); See also R. Higgins, *Derogation Under Human Rights Treaties*, 1976-77 BRIT. Y.B. INT'L. L. 281-82. See also K. Parker, *Jus Cogens: 'Compelling The Law of Human Rights'*, 12 HASTINGS INT'L & COMP. L. LEV. 2, 454 (1989); L. HANNIKAINEN, PEREMPTORY NORMS IN INTERNATIONAL LAW (1988); N. JORGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, 93-95 (2000).

or its agents, *obligations erga omnes*, *denial of justice*, and *violation of jus cogens norms* stretch the concept of derivative injury to the State. Under the latter bases, any State would allegedly possess 'sufficient' legal interest by virtue of the content of the norm violated by another State. The political status of the individual recipients of the injury becomes altogether irrelevant because *all* States, in theory, are injured by the violation of the norm in question. In the famous *obiter dictum* in the *Barcelona Traction* case the Court pronounced thus:

In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes...

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.<sup>23</sup>

Notably, the International Law Commission as well as some publicists interprets the afore-cited passages to favor the creation of a legal interest sufficient to entitle States to assert *locus standi*.<sup>24</sup>

It is manifest, therefore, that individual victims would have to hurdle their own national laws and procedures for the adoption of their claims by their State before the Court, as well as both the nascent and established norms in international law for their States to acquire *locus standi*. However, should the individual victims prove successful in both instances, the reliefs (whether restitution, damages, specific performance, satisfaction, injunctive relief) that may be granted will not automatically accrue to them, as it is the applicant State who prosecutes the case and is awarded the reliefs prayed for. The reliefs prayed for by the applicant State may not necessarily be those of the individual victims, and even when they are, the applicant State is under no express international obligation to transmit such reliefs (such as damages) to the individual victims.<sup>25</sup> If it does transmit such reliefs to the

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<sup>23</sup> *Barcelona Traction Case (Belgium vs. Spain) (Second Phase)* I.C.J. Reports paras. 33-34 (1970).

<sup>24</sup> ILC Yearbook (1976), vol. 2, pt. 2, 99; M. RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES*, 203 (1997); T. MERON, *HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 195-6* (1986).

<sup>25</sup> C. Gray, *Is there an International Law of Remedies?* 65 BRIT. YB INT'L L. 25, 36 (1985).

individual victims, neither is there any express international obligation that governs the manner of disposition and distribution to individual victims.<sup>26</sup>

A final consideration that individual victims must take into account (apart from the national laws governing adoption of their claim by the plaintiff State, the fulfillment of *locus standi* requirements in the Court, the extent of reliefs that may be granted and the possibility of transmission to the individual victims ) in availing of the Court as its chosen forum for redress is the extent of its contentious jurisdiction. Since the Court may only adjudicate disputes between States that have consented to its jurisdiction,<sup>27</sup> such consent is obtainable only by **agreement** with respect to a particular dispute,<sup>28</sup> a **treaty provision** by which States parties agree to submit disputes arising under the treaty to the Court,<sup>29</sup> or through an **“optional clause” declaration** prospectively recognizing the Court’s jurisdiction.<sup>30</sup> Individual victims must not only ensure that the applicant State asserting their claims is embraced by the jurisdiction of the Court; more importantly, the respondent State from which they seek to obtain relief must consent to the suit.

## 2. International Labor Organization (ILO)

The ILO monitors conformity by States Parties with norms under various ILO Conventions. Articles 24-34 of the ILO Constitution contain the basic procedures for facilitation of complaints and grievances. Article 24 of the ILO Constitution permits any “industrial association of employers or workers” to make a representation to the ILO that a State Party has “failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party.” The ILO Governing Body may communicate such a representation to the government of the State Party in question and invite the latter to reply. If no reply is given, or such reply is unsatisfactory to the ILO Governing Body, then the ILO has the **right to publish the representation** made along with the reply statement, if any, presented.<sup>31</sup>

Under Article 26 of the ILO Constitution, governments of State Parties may also raise complaints for non-observance of any ILO Convention ratified by both the complainant State and the respondent State. The ILO Governing Body may opt to communicate the complaint to the government of the State in question,

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<sup>26</sup> D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 54-55 [2000] [hereinafter referred to as SHELTON].

<sup>27</sup> I.C.J. STATUTE, arts. 34-36.

<sup>28</sup> I.C.J. STATUTE, art. 36(1).

<sup>29</sup> I.C.J. STATUTE, art. 40(1).

<sup>30</sup> I.C.J. STATUTE, art. 36(2).

<sup>31</sup> I.L.O. CONSTITUTION, art. 25 <<http://www.ilo.org/public/english/about/iloconst.htm#a24>>

and follow the procedure earlier stated under Article 24. Otherwise, the ILO Governing Body may create a **Commission of Inquiry** to consider the complaint and render a report after a quasi-judicial proceeding to which the States Parties involved will be given the opportunity to participate.<sup>32</sup> In its report, the Commission presents recommendations to be implemented within a specified time.<sup>33</sup> The Director General of the ILO shall then communicate the Commission report to the ILO Governing Body. The governments involved shall inform the Director General if they accept the recommendations contained in the Commission report, and if not, whether they propose to refer the complaint to the International Court of Justice (ICJ).<sup>34</sup> The ICJ may then affirm, reverse, or vary the recommendations of the Commission report. If any State Party fails to carry out the recommendations of the Commission, or the decision of the ICJ, then “the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.”<sup>35</sup>

### 3. United Nations Charter Organs

#### a. UN High Commission for Human Rights (UNHCR)

The UNHCR aims to ensure the practical implementation of universally recognized human rights norms through **treaty monitoring, fact-gathering and fact-finding** activities, engaging in **diplomatic dialogue** with Governments on human rights issues, providing **advisory and technical assistance** upon request, and **publishing reports** on the status of observance of human rights standards throughout the globe.<sup>36</sup> Treaty implementation is monitored through reports submitted by State Parties every two to five years. Fact-gathering is undertaken through information sent to the UNHCR from reliable media sources, UNHCR regional offices and advisers, field offices, and other institutional partners in the UN system. Fact-finding by the High Commissioner may take any of the following forms: (a) visit by the High Commissioner, (b) Despatch of an Envoy, (c) Despatch of a Fact-Finding mission or (d) Information gathering by field offices of the UNHCR.

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<sup>32</sup> I.L.O. CONSTITUTION, art. 26 <<http://www.ilo.org/public/english/about/iloconst.htm#a24>>

<sup>33</sup> I.L.O. CONSTITUTION, art. 28 <<http://www.ilo.org/public/english/about/iloconst.htm#a24>>

<sup>34</sup> I.L.O. CONSTITUTION, art. 29 <<http://www.ilo.org/public/english/about/iloconst.htm#a24>>

<sup>35</sup> I.L.O. CONSTITUTION, art. 33 <<http://www.ilo.org/public/english/about/iloconst.htm#a24>>

<sup>36</sup> B. Ramcharan, *The United Nations High Commissioner for Human Rights: The Challenges of International Protection*, 71 INT'L STUD. HUM. RTS. 2002; see also U.N. G.A. Res. 48/141, U.N. Doc. A/RES/48/141 (1994), providing for the mandate of the United Nations High Commissioner for Human Rights (UNHCR).

The protective role and functions of the UNHCR have evolved to include the development of an **early warning mechanism** (a 24-hour 'hotline'<sup>37</sup> for reporting human rights violations available to victims, their relatives, or non-governmental organizations and a Human Rights Data Base for investigating human rights situations), **conflict prevention strategies** (sending international observers or fact-finders, mediation by eminent persons who can offer good offices to help defuse situations where gross violations of human rights appear imminent, extensive reporting with the Security Council, among others), and **public statements** on individual cases.<sup>38</sup>

The extent of relief that may be afforded to individual victims under the UNHCR processes earlier stated is conceivably limited:

"Fact-finding in the field of human rights has a special importance, and also encounters special difficulties, both because of the subject-matter and because of the importance attached to it by public opinion, which regards it as the acid test of the effectiveness of international organizations...It is however all the more difficult, because it frequently concerns the action and essential interests, if not indeed the very structure, of the States involved, who are therefore less inclined to accept international intervention in such matters....One conclusion to be drawn from this is that is *necessary to have available a variety of procedures suited to different situations, ranging from quasi-judicial inquiries to methods involving a minimum of formality such as 'direct contacts'...*"<sup>39</sup>

#### b. United Nations General Assembly (GA)

The GA has the authority to issue resolutions or recommendations on any matter within the scope of the Charter.<sup>40</sup> It may also authorize the creation of Working Groups or other ad-hoc committees to undertake factual findings or studies of human rights situations. The resolutions in themselves are not legally binding, and are merely reflective of the opinions of the Member States of the United Nations.

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<sup>37</sup> U.N. Press Release HR/94/20, 30 May 1994. The hotline number is +41-22-917-0092.

<sup>38</sup> Report to the Commission on Human Rights on the Situation in Rwanda, U.N. Press Release HR/95/19 (1994).

<sup>39</sup> B.G. RAMCHARAN, INTERNATIONAL LAW AND FACT-FINDING IN THE FIELD OF HUMAN RIGHTS vii (1982). See also *The Belgrade Minimum Rules of Procedure for International Human Rights Fact-finding Missions*, 75 Am. J. Int'l. L. 163 (1981).

<sup>40</sup> U.N. CHARTER, arts. 10-11.

### c. Economic and Social Council (ECOSOC)

The Economic and Social Council coordinates the work of the fourteen UN specialized agencies, ten functional commissions and five regional commissions; receives reports from eleven UN funds and programmes and issues policy recommendations to the UN system and to Member States.<sup>41</sup> Some of these commissions include the Commission on Human Rights, Commission on the Status of Women, and the Sub-Commission on the Promotion and Protection of Human Rights. The Commissions traditionally exercise research and fact-finding powers and provide technical support to covered groups (i.e. NGOs for women or minorities), with limited authority to issue potentially sensitive annual country reports.

### d. Office of the UN Secretary General

As the chief administrative officer of the UN, the Secretary General may exercise good offices to protect human rights. He/She exerts moral persuasion with Member governments by calling their attention to a particular human rights situation or mediating upon request in such situations.<sup>42</sup>

### e. UN Security Council

The Security Council has the mandate, under Chapter VII of the Charter of the United Nations, to achieve the “pacific settlement of any dispute, the continuance of which is likely to endanger the maintenance of international peace and security.” It may call on States to apply sanctions (Article 41 measures) or take such military action “necessary to restore international peace and security” (Article 42 measures). It may make “regional arrangements or agencies for enforcement action under its authority” (Article 53 measures), and may also create specialized tribunals for the prosecution of international crimes in conflict-ridden regions, as seen in the international criminal tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY). It is highly unlikely that individual victims may course complaints before the Council, although the Council has at times acted upon the

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<sup>41</sup> For a complete list of the sub-organizations, see <<http://www.un.org/esa/coordination/ecosoc/about.htm>> See also Economic and Social Council (ECOSOC) Resolution 1503 (XLVIII) 1970, establishing the procedure for the Council's examination of communications on “situations that appear to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission” and ECOSOC Resolution 1235 (XLII) 1967, which establishes the procedure for the Council to conduct an annual public debate and issue country-specific reports focusing on gross violations of human rights.

<sup>42</sup>See K. Annan, *The Question of Intervention: Statements by the Secretary-General*, U.N. DPI/2080 – 10 M – December 1999.

instance of international media reports as well as the reports of Special Rapporteurs designated by it to conduct fact-finding missions.<sup>43</sup>

## **B. Treaty-Based Enforcement**

### **1. International Covenant on Civil and Political Rights (ICCPR) and Subsequent Protocols**

Part IV of the ICCPR creates the Human Rights Committee, which monitors and reviews the reports of State Parties on the implementation and compliance with the ICCPR.<sup>44</sup> States Parties may bring written communications to other States Parties when it deems that such Party/ies is/are “not giving effect to the ICCPR”. If there is no resolution within 6 months, the State bringing the communication may refer the matter to the Committee, who will submit a report within 12 months containing a statement of facts and the resolution reached by the Parties, or recommended actions to remedy the violation. (Recommended actions have included public fact-finding investigations, criminal prosecution, compensation, ensuring non-repetition of the violation, amending the law, restitution, among others.<sup>45</sup>) If the Parties do not reach a resolution, the Committee may create an ad hoc Conciliation Commission acceptable to both Parties to arrive at an amicable solution. The Commission will submit a report within 12 months. Parties must then notify the Committee whether or not they accept the contents of the Commission report.

Under Article 40(4) of the ICCPR, the Committee may also issue “general comments as it may consider appropriate to the States Parties”, involving the rights and duties contained in the ICCPR. It submits an annual report to the UN General Assembly.

Significantly, the First Optional Protocol<sup>46</sup> to the ICCPR permits **individuals** claiming to be victims of human rights violations under the ICCPR to submit written communications to the Committee, after having exhausted all available domestic remedies (which does not include ‘unreasonably prolonged’ domestic remedies). Anonymous communications are inadmissible. After receiving the communication, the Committee refers the same to the State Party in question

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<sup>43</sup> L. SOHN, *INTERPRETING THE LAW*, in UNITED NATIONS LEGAL ORDER (1995).

<sup>44</sup> Articles 28-45 of the INTERNATIONAL COVENANT FOR CIVIL AND POLITICAL RIGHTS, G.A. Res. 2200A (XXI), U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

<sup>45</sup> SHELTON, 142-3.

<sup>46</sup> OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 999 U.N.T.S. 171.

for the latter's reply, explanation, clarification, or remedy within 6 months from receipt of communication by the State Party in question.

The Second Optional Protocol<sup>47</sup> provides the same communication and reporting procedures under the ICCPR (for States Parties) and the First Optional Protocol (for individuals) in respect to the particular obligation of the State Party "to take all necessary measures to abolish the death penalty within its jurisdiction" and to uphold that "no one within the jurisdiction of a State Party to the present Protocol shall be executed." The Second Optional Protocol does not permit reservations, except for reservations in respect to the application of the death penalty "in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime."

## 2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention)

Among several obligations contained in Part I of the Torture Convention<sup>48</sup>, States Parties have the specific obligations to **prohibit any act of torture**; to take all administrative, legislative, and judicial measures to **prevent** all acts of torture within their jurisdiction; to **deny extradition** of individuals to States where there are substantial grounds (including a consistent pattern of gross violations of human rights) to believe they would be tortured; provide the individual victim of torture with a **forum for redress** and an **enforceable right to fair and adequate compensation**. Part II of the same Convention creates the **Committee Against Torture**, to whom regular 4-year reports on the implementation and compliance with the Convention by States Parties are submitted. The Committee considers such reports, and may issue "general comments" to the State Party concerned, which may or may not be included in the Committee's annual report to the United Nations.<sup>49</sup> The Committee may receive information from any source on allegations of torture, and if these are well-founded, the Committee invites the State Party concerned to cooperate in the examination of the information and to submit its observations. The Committee may also undertake a confidential inquiry (including visits to the territory concerned) if warranted.<sup>50</sup>

Similar to the ICCPR procedures, under the Article 21 complaints procedure in the Torture Convention, the Committee may also receive written

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<sup>47</sup> SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, aiming at the abolition of the death penalty, G.A. res. 44/128, annex, U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989).

<sup>48</sup> TORTURE CONVENTION.

<sup>49</sup> TORTURE CONVENTION, art. 19(3) and 19(4).

<sup>50</sup> TORTURE CONVENTION, art. 20.

communications from States Parties that “another State Party is not giving effect to the provisions of the Convention”. The alleged non-complying State is given 3 months to reply, and if the matter is not “adjusted to the satisfaction of both States Parties” within 6 months, the matter may be referred to the Committee. The Committee examines the communications in closed-door sessions and makes its good offices available (including the formation of an **ad hoc conciliation commission**) to arrive at a “friendly solution of the matter on the basis of respect for obligations provided in the Convention”. Within 12 months, the Committee issues a report stating the facts and the solution reached by the States Parties, if any.

Article 22 of the Convention expressly extends analogous procedures under Article 21 to communications made by individuals. (Again, no anonymous complaints are admissible and all domestic remedies must be exhausted, not including those that are “unreasonably prolonged or unlikely to bring effective relief to the person.”) The receiving State must give a reply within 6 months from receipt of the communication from the Committee. The Committee thereafter renders a report similar to that required under Article 21.

### 3. The 1949 Geneva Conventions and Subsequent Protocols<sup>51</sup>

The 1949 Geneva Conventions are to be applied “with the cooperation and under the scrutiny of the Protecting Power whose duty it is to safeguard the interests of the Parties to the conflict.”<sup>52</sup> Protecting Powers aid in the facilitation of mediation and aid consistent with the standards set by the Conventions. Under Articles 9 and 10 of the Conventions, where no Protecting Powers are functioning, the contracting parties may agree to entrust the duties incumbent on Protecting Powers to an “organization that offers all guarantees of impartiality and efficacy.”

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<sup>51</sup> GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD, 75 U.N.T.S. 31, (hereinafter referred to as GENEVA CONVENTION I); GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA, 75 U.N.T.S. 85, (hereinafter referred to as GENEVA CONVENTION II); GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 75 U.N.T.S. 135, (hereinafter referred to as GENEVA CONVENTION III), GENEVA CONVENTION RELATIVE THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR, 75 U.N.T.S. 287, (hereinafter referred to as GENEVA CONVENTION IV); PROTOCOL I ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICTS, UN Doc. A/32/144 Annex I, 1125 U.N.T.S. 17512, (hereinafter referred to as PROTOCOL I); PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS, UN Doc. A/32/144 Annex II, 1125 U.N.T.S. 17513, (hereinafter referred to as PROTOCOL II).

<sup>52</sup> Article 8 of the GENEVA CONVENTIONS I-III, and art. 9 of the GENEVA CONVENTION IV. See also F. KALSHOVEN AND L. ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (2001).

The organization usually designated is the International Committee of the Red Cross/Crescent (ICRC) or any other impartial humanitarian organization.

The Conventions permit Parties to the conflict to undertake **bilateral inquiries** regarding allegations of human rights violations and specifically on grave breaches of the Convention,<sup>53</sup> to **search for and bring before its courts or to hand over to another High Contracting Party according to its own legislation** persons alleged to have committed such grave breaches.<sup>54</sup> Other devices that may be relied upon are **meetings between High Contracting Parties, inter-agency cooperation with the United Nations**, and closed-door inquiries by organizations such as the ICRC.

Article 90 of Protocol I authorizes the **creation of an International Fact-Finding Commission** for the purpose of inquiry into alleged grave breaches of the Conventions or the Protocol, facilitation through good offices of restoration of "attitudes of respect" for the Conventions and Protocol I, and inquiry upon request of a Party to the conflict with the consent of other Parties to the conflict. The inquiry partakes of a quasi-judicial proceeding where all States Parties involved are permitted to present evidence. The Commission may not publish its findings unless it has the unanimous consent of all States Parties to the conflict. Unfortunately for individual victims of rights violations in non-international armed conflict, Protocol II does not establish any similar procedure for inquiry into alleged grave breaches by individual combatants.

The Geneva Conventions and its Protocols do not establish any coherent complaints procedure that may be availed of by individual victims of human rights violations in the context of armed conflict. At best, individuals may resort to personal appeals to the Protecting Power or the international organization acting as such. Otherwise, they must course their complaints to their own governments

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<sup>53</sup> Grave breaches of the Conventions include: willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health (embraced by GENEVA CONVENTIONS I-IV); extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (embraced by GENEVA CONVENTIONS I, II, AND IV); compelling a prisoner of war or a civilian to serve in the forces of the hostile power, willfully depriving a prisoner of war or protected person of the rights of a fair and regular trial (embraced by GENEVA CONVENTIONS III AND IV); unlawful deportation or transfer of a protected person, unlawful confinement of a protected person, and taking of hostages (embraced by GENEVA CONVENTION IV). See S. RATNER AND J. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW [2<sup>nd</sup> ed. 2001] [hereinafter referred to as RATNER AND ABRAMS].

<sup>54</sup> Art. 49 of GENEVA CONVENTION I; art. 50 of GENEVA CONVENTION II; art. 129 of GENEVA CONVENTION III; art. 146, GENEVA CONVENTION IV; See also Common Art. 3 of the GENEVA CONVENTIONS.

(who are presumably parties to the conflict). There is no guarantee of individual reliefs that may be obtained.

### C. Local (Domestic/Regional Institutions)

#### 1. United States Courts under the Alien Tort Claims Act (ATCA) and Torture Victim Protection Act (TVPA)

The Alien Tort Claims Act was adopted in 1789 as part of the Judiciary Act of the United States. The text of the law reads, in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort [personal injury] only, committed in violation of the law of nations or a treaty of the United States."<sup>55</sup> Much of the interpretation of the ATCA lies with recent jurisprudence, specifically involving human rights cases.<sup>56</sup> In the landmark *Filartiga* case, the Second Circuit Court of Appeals held that the ATCA allows victims to sue in US courts for serious violations of international human rights law. The Court held:

...We believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law...It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, *by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the Statute.*<sup>57</sup> (Italics supplied.)

The Court went on to state that the ATCA provides for both **jurisdiction** for district courts and **cause of action** for violations of the law of nations.<sup>58</sup>

Recent cases have clarified the issue of "choice of law" for district courts faced with cases filed under the ATCA. In *Tachiona v. Mugabe*, the court affirmed that international law could be used as the substantive basis for the evaluation of the case on the merits, and not merely the municipal law of the plaintiffs nor the municipal laws of the United States:

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<sup>55</sup> 28 U.S.C. § 1350.

<sup>56</sup> See among others *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 & n. 21 (2d Cir. 1980) (conviction of Panama's chief of police for acts of torture); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (alleging torture of Ethiopian prisoners); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (alleging torture, rape, and other abuses orchestrated by Serbian military leader); *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994) (alleging torture and other abuses by former President of Philippines); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C.Cir. 1984) (alleging claims against Libya based on armed attack upon civilian bus in Israel).

<sup>57</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 & n. 21 (2d Cir. 1980).

<sup>58</sup> *Id.* at 584.

[V]arious international declarations, covenants and resolutions catalogue rights all persons should enjoy; affirm the obligations of nations to ensure those rights by means of implementing legislation...It is unlikely to escape the notice of government leaders who defile the powers of their offices by resorting to the barbarism of state-sponsored torture and murder, and to the brutalities characteristic of inhuman treatment of their nation's own people, *to equally dishonor the municipal justice system and its laws in order to immunize themselves from accountability and liability for their wrongs.* ...Because customary international norms are not always fixed in codifications and treaties, *not every nation will necessarily reflect clearly in its domestic jurisprudence principles that manifest its unequivocal assent and adherence to universal standards that may override municipal rules.*<sup>59</sup>

Despite the liberal nature of the ATCA, its applicability for all cases of international human rights victims is not a crystalline matter. While the ATCA permits individual litigants to seek civil liability for human rights violations committed by *individuals*, it does not necessarily extend, without qualification, coverage to *sovereign States*. In this regard, the ATCA must be read in conjunction with the Foreign Sovereign Immunities Act (FSIA),<sup>60</sup> which prohibits US courts from exercising jurisdiction over sovereign States except in four instances: (1) Cases involving **commercial activity**, such as contracts involving the purchase of goods; (2) Cases involving **noncommercial torts**, like car accidents; (3) Cases where there are **explicit and implicit waivers of immunity** by the sovereign State being sued; (4) If the suit involves **property located in the United States**. Any individual litigant seeking to bring suit against a sovereign State under the ATCA must invoke any of the four exceptions under the FSIA.<sup>61</sup>

A later enactment by the US Congress that may aid in the institution of civil suits concerning violations of human rights is the 1992 Torture Victim Protection Act (TVPA).<sup>62</sup> The Act authorizes plaintiffs to sue any individual who tortured or summarily executed another person, such individual **acting under color of, actual or apparent authority** in a foreign nation. Plaintiffs must have exhausted remedies in the country where the conduct giving rise to the claim occurred. The TVPA has a 10-year prescriptive period for filing suits.

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<sup>59</sup> Tachiona v. Mugabe, 169 F. Supp.2d 259 at 414-5 (S.D.N.Y. 2001). See also Xuncax v. Gramajo, 886 F. supp. 162 (D. Mass. 1995); J. Pro Civ, *Incorporating Specific International Standards Into ATCA Jurisprudence: Why the Ninth Circuit Should Affirm UNOCAL*, 34 U. MIAMI INTER-AM. L. REV. 515, \*515.

<sup>60</sup> 28 U.S.C. §§ 1330.

<sup>61</sup> See W. Heiser, *Civil Litigation as a Means of Compensating Victims of International Terrorism*, 3 SAN DIEGO INT'L L. J. 1, 45-46 (2002); J. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 53-54 (1999).

<sup>62</sup> 28 U.S.C. § 1350; See RATNER AND ABRAMS 243-5.

## 2. European Institutions

### a. Organization for Security and Cooperation in Europe (OSCE)

The primary mandate of the OSCE under the 1975 Helsinki Final Act is to provide for early warning, conflict prevention, crisis management and post-conflict rehabilitation for its 55 member States in Europe. It addresses human rights issues largely through **diplomatic intervention and mediation**.<sup>63</sup> While it can receive reports and complaints from individuals on occasion, it does not provide for a system of enforcement and redress targeted particularly for individual victims of human rights violations.

### b. European Court of Justice (ECJ) and the Court of Human Rights (CHR)

These institutions are often confused with one another. As the supreme court of the European Union (which the CHR is not), the ECJ may consider issues of human rights in the European Community. However, individuals cannot bring cases in the ECJ. The ECJ may only hear cases involving: (1) Claims by the **European Commission** that a member State has not implemented a directive or legal requirement of the EU, or (2) Claims by **member States** that the European Commission has acted without or in excess of jurisdiction.<sup>64</sup>

The CHR, on the other hand, permits both states and individuals to bring cases against States Parties to the European Convention on Human Rights.<sup>65</sup> It has jurisdiction to afford remedies to either state or individual plaintiffs following a full adversarial and public proceeding to prove the existence of a breach of the Convention. The first stage of the proceedings is generally written (the Court may hold a public hearing when warranted by the issue of admissibility), involving the admissibility of the application. During the judicial procedure, parties are not precluded from entering into a negotiated settlement. Should no settlement be reached at the conclusion of the trial, the Chamber seised of the case must, by a majority vote, render a decision, which may be elevated on appeal to the Grand Chamber. All final judgments of the Court are binding on the respondent States

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<sup>63</sup> See <<http://www.osce.org>>

<sup>64</sup> See arts. 34 and 40, ESCC, 188 EAEC and 215 EC, 151 EAEC and 178 EC; *Francovich v. Italian Republic*, [1990] E.C.R. I-5357; for a detailed listing of CHR procedure for individual application, see <<http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm>>

<sup>65</sup> EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 4 November 1950, 213 U.N.T.S. 221, as amended by Protocol No. 11, 11 May 1994, Europ. T.S. 155 (1994). The Protocol made it compulsory for States to accept the right of individual application.

concerned. The extent of relief that the Court may grant is limited to “just satisfaction” as stipulated under Article 50 of the Convention:

If the Court finds that a decision or measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the Convention, and *if the internal law of the said party allows only partial reparation* to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

This provision was derived from arbitral awards in inter-state proceedings. The CHR was not given appellate jurisdiction to invalidate internal laws.

### 3. Inter-American Court of Human Rights (IACHR)

The IACHR was created under Chapter VII of Part II of the 1969 American Convention on Human Rights.<sup>66</sup> Only the Inter-American Commission of the Organization of American States (OAS) and the States Parties to the Convention may bring cases concerning the interpretation and the application of the Convention before the IACHR.<sup>67</sup> (Before any case may be brought before the Court, applicant-plaintiffs must exhaust the communications and complaints procedures under the Inter-American Commission.) Individuals must seek the adoption of their claims by their respective governments before any claim can be elevated to the IACHR. The Court has the full authority to grant different forms of reliefs: restitution, reparations, compensation, declaratory judgment, injunctive relief, etc.

### 4. African Commission on Human and Peoples' Rights (ACHPR)

The Commission monitors state compliance with the provisions of the 1986 African Charter on Human and Peoples' Rights.<sup>68</sup> Similar to the ICCPR and Torture Convention Committees, the ACHPR may receive **communications** from individuals, non-governmental organizations or other institutions, after having exhausted local remedies. The ACHPR would then make specific **recommendations** to the states concerned.

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<sup>66</sup> AMERICAN CONVENTION ON HUMAN RIGHTS, 36 O.A.S.T.S. 1.

<sup>67</sup> STATUTE OF THE INTER-AMERICAN COURT ON HUMAN RIGHTS, O.A.S. Res. 448 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 98; See also RULES OF PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS, 1991, O.A.S. Doc. OEA/Ser.L/V/III.25 doc.7 at 18 (1992).

<sup>68</sup> AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

### 5. Arbitration Commissions

The creation of arbitration commissions depends upon the consent or agreement of States to submit themselves to the jurisdiction of such entities. Usually the arbitral tribunals are tripartite, composed of one member nominated by each party to the dispute and a third member selected under a given procedure. While states are frequently the plaintiffs and respondents in the tribunal (again, occasions for exercising diplomatic protection), in few instances individuals could initiate proceedings based on the governing agreement from which the authority of the tribunal is derived.<sup>69</sup> Examples of such arbitration commissions include the 1794 Jay Treaty creating a mixed commission to settle claims due to neutrality violations, the US-Mexican Claims Commission in 1923, and the US-Iran Claims Commission in the 1970s. The arbitral tribunals in practice have wide authority to grant reparations, damages, and other reliefs as may be agreed upon in the treaties creating such tribunals.

### 6. Truth Commissions

Truth commissions are of relatively recent vintage in international law, a peculiar device that began in Argentina after the Falkland Islands conflict with the United Kingdom precipitated the Argentinian military's decline in political power. The commissions have wide investigative capacity, with the authority to receive information and reports from all named sources, and may publicly conduct hearings. The reports made by such commissions ultimately become public documents.<sup>70</sup> The commissions recognize social structures and historical tensions upon which human rights atrocities are predicated, and dispense with criminal judgment in light of the sensitivity of the issues and details presented before it by many injured parties. Particularly in cases where social upheavals are imminent or are in fact taking place, truth commissions have employed the use of amnesty grants to encourage the admission and revelation of facts before it.

For individual victims of human rights violations, it is the use of amnesty that frequently impedes any further relief that may be sought by them apart from the statement of their grievances and injuries before the commission. While truth commissions may work towards the restoration of national sensibilities and

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<sup>69</sup> H. STEINER AND P. ASTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, (2<sup>nd</sup> ed. 2000).

<sup>70</sup> H. STEINER, *INTRODUCTION TO TRUTH COMMISSIONS*. HARVARD LAW SCHOOL HUMAN RIGHTS PROGRAM AND WORLD PEACE FOUNDATION, IN *TRUTH COMMISSIONS: A COMPARATIVE ASSESSMENT* (1997) at 7. See also Report of the Chilean National Commission on Truth and Reconciliation (1993), Vol. 1, p. 23; Report of the Truth and Reconciliation Commission of South Africa (1985), Vol. 1.

reconciliation of divided communities, the public perception of the use of the amnesty as denial of justice may very well undermine the efforts of the commissions.<sup>71</sup>

Publicists draw novel distinctions between types of amnesties that violate the international law principles of *aut dedere aut judicare* and the right to an effective remedy and others that are consistent with the State's reserved domain of domestic jurisdiction. The former are illustrated by so-called "**blanket**" or "**sweeping**" amnesties (which do away with any form of accountability for the individual perpetrators or the state machinery, whether administrative, civil, or criminal), and "**conditional**" or "**defined**" amnesties (which are limited in scope and provide for some measure of accountability that may be availed of by the victims either simultaneous with the work of the truth commissions or subsequent thereto).<sup>72</sup> Academic support (frequently referring to principles stressed in international treaties and customary international law) has favored the view that national laws which overwhelmingly and completely expunge criminal and/or civil liability of agents of a prior regime alleged to have violated basic human rights **contravene the presumption** that all grave breaches of basic human rights of individuals must have a judicial and not a political resolution.<sup>73</sup> It has been argued that a new customary international law norm has emerged, one that prohibits wholesale impunity for gross violations of human rights and grave international crimes.<sup>74</sup>

## 7. National courts

In theory, individual victims may apply to national courts for the adjudication of civil and/or criminal liability against perpetrators of human rights violations. The rules for acquisition of jurisdiction by the national courts vary according to the laws of each State. Where the respondent to the suit is a State, or a State agent acting under color of authority or actual authority, courts of such States are expectedly reluctant to exercise jurisdiction over the case, invoking internal law provisions on the non-suability of the State without its consent. Moreover, the

<sup>71</sup> R. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is A Legitimate Amnesty Possible?* VIRG. J. INT'L L. 173, 180-81 (Fall, 2002).

<sup>72</sup> W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L. J. 467 (2001); P. Hayner, *Fifteen Truth Commissions, 1974-1994: A Comparative Study*, 16 HUM. RTS. Q. 1 (1994).

<sup>73</sup> B. CHIGARA, AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS (2002).

<sup>74</sup> D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991); C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENV. J. INT'L L. & POL'Y 591, 613 (1998); M.C. Bassiouni, "Crimes Against Humanity": *The Need for A Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457, 463 (1994).

court may also deny jurisdiction for lack of significant minimum contacts that would render the case susceptible to dismissal under the doctrine of *forum non conveniens*<sup>75</sup>, especially where the respondent is not within the territory of the court before which the case is brought. Further problems that may be foreseeably encountered by victim-litigants apart from acquisition of jurisdiction include issues on **choice of law** (municipal or international law, unless the forum State accepts the general principles of international law under the doctrine of incorporation), **recognition and enforcement of judgment** (should the plaintiff obtain a favorable judgment from a court other than that located in the forum State), and the **applicable procedural law** for the litigation of the case.

## II. COMMON ISSUES AFFECTING THE RIGHT TO AN EFFECTIVE REMEDY

The preceding section delineated the basic procedures, reliefs, and limitations in various forums or institutions for redress to which individual victims of human rights violations may apply. Whatever that choice may be, given the precise state of international law on remedies and the lack of coherence in the structure of the international human rights enforcement system, it is submitted that the claim of the individual victim will result in some level of stasis (by this we refer at the very least to severe delay in pursuing the remedy, and at its most extreme, the denial or foreclosure of the remedy) at any of the following points: **the acquisition of jurisdiction by the chosen forum, the extent of the chosen forum's authority, and the enforcement and execution of the forum's judgment.** It is finally posited that the individual victim's ability to obtain a specific relief is **inversely proportional** to the severity of the liability sought against the respondent. This peculiar correlation is the natural product of inter-state relations and accommodations made by States.

### A. Acquisition of Jurisdiction by the Forum

Individual claimants have to examine the originating charter, treaty, or convention governing the forum chosen to ascertain at the first instance whether or not they are permitted to **directly** avail of proceedings in the forum. If they may only present their claims upon the sponsorship or adoption of other entities (usually States, as in the case of the International Court of Justice and the European Court of Justice), they must consider the specific rules of the adopting or sponsoring entities that would entitle them to representation before the chosen forum. With respect to States, a deficiency in fulfilling any of the **significant 'preconditions'**

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<sup>75</sup> See K.K. SHELL SEKIYU OSAKA HATSUBAISHO, ET AL. vs. COURT OF APPEALS, ET AL., G.R. Nos. 90306-07, 30 July 1990, 188 SCRA 145 (1990) ; *Shaffer v. Heitner*, 433 U.S. 186 (1977).

for individual claimants under the doctrine of diplomatic protection has, in practice, yielded an unfavorable result (whether simple delay or outright denial of claim) for the individual claimants:

- (1) The issue of **the claimants' eligibility** under the laws of the adopting or sponsoring State, which includes the prior **exhaustion of local remedies**<sup>76</sup> (applicable in cases where the violation is a breach of both municipal and international law, or where the violation is a breach of local law and the subsequent conduct of the State amounts to a denial of justice);
- (2) The **procedure for preparation of the international claim** under the laws of the adopting or sponsoring State, which includes the ability to secure *a priori* a **framework or agreement** with the adopting or sponsoring State as to the treatment of their causes of action and prayers for relief with the chosen forum (noting that the State is under no international obligation to pay any reparation received by it to the individual claimant actually injured);
- (3) The **consent** of the States involved to the jurisdiction of the forum court (as in the case with arbitration commissions and regional courts of human rights) and the **manner of presentation of the international claim** to the chosen forum;
- (4) The **existence of sufficient contacts** between the individual claimants and the adopting or sponsoring State that would uphold the exercise of diplomatic protection.<sup>77</sup>

The completion of the four preconditions earlier stated should also be accompanied by the recognition of inherent limitations to the filing of individual claims. Some of the limitations are **institutional or structural** (where the procedures under the chosen forum themselves stipulate that non-compliance with certain conditions will result in inadmissibility of the claim, as in the case of the Torture Convention Committee or the ICCPR Committee which only receives communications from named individuals), while others are **conventional** or

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<sup>76</sup> See BROWNIE, 496-506; Norwegian Loans case (France v. Norway), I.C.J. Reports (1957), (J. Lauterpacht, sep. op.); ELSI case (US v. Italy), I.C.J. Reports (1989).

<sup>77</sup> R. LILICH AND G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION (1962); See also C. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 366-379 (2001); G. Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, \*935; M. DIXON AND R. MCCORQUODALE, CASES AND MATERIALS ON INTERNATIONAL LAW, 422 (4<sup>th</sup> ed. 2003).

determined by the terms of the agreement or conformity of the adopting or sponsoring State to the jurisdiction of the chosen forum. 'Conventional' limitations include the **operation of the 'Calvo clause'**<sup>78</sup> (where the individual claimant himself previously agrees not to seek the diplomatic protection of his own state and submits matters to local jurisdiction), **express denial of waivers of immunity** (particularly in the case of respondent States under the Foreign Sovereign Immunities Act where the United States government, in a Statement of Interest also affirms that there is no waiver of immunity by the respondent State), and **terms for extinctive prescription** of the right to bring a cause of action to a chosen forum, which are usually indicated in the rules of procedure of the forum and agreed to by the States involved in the dispute (the only notable exception being the non-applicability of statutory limitations in cases of war crimes and crimes against humanity<sup>79</sup>).

In summary, the success of the individual claimant in the admission of his claim to the jurisdiction of the chosen forum depends upon his satisfactory **fulfillment of the four identified preconditions** and the **tailoring of his claim according to either or both the structural or conventional limitations** on the jurisdiction of the chosen forum.

## B. Extent of the Chosen Forum's Authority

Even as the individual claimant may seek admission of his claim to the jurisdiction of the chosen forum, the pursuit of his claim and his prayers for certain types of relief will inevitably be limited by the extent of the chosen forum's authority. If the claimant simply submits his claim (or complaint) to institutions undertaking fact-finding missions and monitoring (such as the UNCHR or truth commissions), he cannot expect any relief particularized to him because such institutions tend to issue recommendations to the States concerned. The recommendations are non-obligatory in nature and are, in practice, observed by States only to the minimum behavior that satisfies international comity.<sup>80</sup> At best, the individual claimant can only expect a unilateral change in State policy or

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<sup>78</sup> North American Dredging Co. claim, 4 RIAA 26 (1926); C. CALVO, DERECHO INTERNACIONAL TEORICO Y PRACTICO DE EUROPA Y AMERICA (1868). The clause has been frequently used in concession contracts, but the original text of Calvo's book does not preclude its use for other types of international claims.

<sup>79</sup> U.N. CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY, G.A. Res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. No. 18 at 40, U.N. Doc. A/7218 (1968). See Federation Nationale des Deportés et Internes Résistants et Patriotes and Others v. Barbie, reprinted in 78 I.L.R. 125. It declared that the non-applicability of the statutory limitations to crimes against humanity and war crimes is already part of customary international law.

<sup>80</sup> See T. Buerghenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. R. Q. 703-723 (1997).

behavior but only if there is massive international reportage of the findings of the institution, projecting a derogatory public image of the State concerned, affecting the conduct of a State's international relations (or the pursuit of its strategic interests) that would impel it to take action to 'disprove' such an image.<sup>81</sup>

If the individual claimant seeks particularized reliefs through full-dress judicial proceedings in the chosen forum (such as in the Inter-American Court of Human Rights, the European Court of Human Rights), the success of his claim against State agents depends not only upon proof that the internationally wrongful acts may be attributed to the State involved but also upon several 'extraneous factors': (1) the **preservation of the evidence**; (2) **compliance with the modalities of judicial procedure of the chosen forum**; (3) the ability to **overcome the political question doctrine** when applicable, and (4) the **standard of evidence required** by the chosen forum to grant the plaintiff's claim. Each factor will necessarily be adjusted according to the level of accountability sought by the individual claimant against State agents: whether administrative, civil, or criminal, or a combination of any of them.

The first 'extraneous' factor (preservation of the evidence) has found fair application in cases brought before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. In most of these cases, evidence presented by the prosecution was testimonial in character, with witnesses given considerable latitude during examinations-in-chief to answer leading questions or even make hearsay statements, without objections from opposing counsel.<sup>82</sup> Judges in these courts were more flexible, unbound by strict rules in their consideration of questions in order to uphold the interests of justice, or to speed up the proceedings.<sup>83</sup> Such courts recognized other forms of evidence would usually be destroyed due to the pervasive nature of the regional conflict, and that the best evidence obtainable as to the atrocities committed would be from the victims themselves. (The sole exceptions to this tendency were the Nuremberg trials, where the widespread atrocities committed by Nazi authorities using German state machinery were well-documented by the Nazis themselves, as well as testified to by witnesses.)

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<sup>81</sup> See STATEMENTS OF COMMENTATORS ON CHINA BEFORE THE UN COMMISSION, in HUMAN RIGHTS WATCH, CHINESE DIPLOMACY, WESTERN HYPOCRISY, AND THE UN HUMAN RIGHTS COMMISSION, 634-638 (1997).

<sup>82</sup> E.g. Prosecutor v. Furundzija (ICTY Case 10 December 1998), reprinted in 38 I.L.M. 317 (1999); Rutaganda Judgment, (The Prosecutor v. Georges Rutaganda, Judgment, ICTR Trial Chamber I, 6 December 1999); Musema Judgment (The Prosecutor v. Alfred Musema, Judgment, ICTR Trial Chamber I, 27 January 2000).

<sup>83</sup> A. CASSESE, INTERNATIONAL CRIMINAL LAW (2003).

The second (compliance with the modalities of judicial procedure) and fourth 'extraneous' factors (standard of evidence) are of little dispute. Individual claimants should expect a 'stricter' adherence to such modalities (the conduct of prosecutorial, pre-trial, trial, and appellate proceedings) in criminal judicial proceedings (as in the ICTY and ICTR, which to a large extent, has also been replicated in the Statute of the International Criminal Court<sup>84</sup>) than in civil proceedings (as in litigation before US courts under the Alien Tort Claims Act or the Torture Victim Protection Act) or administrative proceedings (usually quasi-judicial in nature, as in the complaints procedure under the 1949 Geneva Conventions). Under Art. 69(3) of the Rome Statute (substantially similar to the Rules of Procedure and Evidence for the ICTY and ICTR) the standard of evidence as to admissibility in international criminal proceedings is still "relevance" and "necessity"<sup>85</sup> While the Rome Statute does not indicate what standard of proof is sufficient to produce a conviction, actual practice in previous international criminal proceedings have shown that the standard of "proof beyond reasonable doubt" may be subsidiarily applied.<sup>86</sup> On the other hand, civil proceedings in the United States under the ATCA still apply "preponderance of evidence" as their standard of proof.<sup>87</sup>

The third 'extraneous' factor (the political question doctrine) elicits some considerable burdens for the individual litigant where the chosen forum is a national court. The use of the political question doctrine operates as a form of judicial restraint, with courts refusing to rule upon certain issues of the case due to the existence of a nonjusticiable 'political question'. The doctrine has been justified by the effect of "international civil adjudication on foreign governmental and private interests,"<sup>88</sup> and has been traditionally employed by national courts in cases where the respondent is the executive branch of Government of the national court, particularly in civil liability claims (arising from gross violations of human rights or tort actions) against States.<sup>89</sup> While the doctrine has come under considerable

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<sup>84</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/CONF.183 (1988); RULES OF PROCEDURE AND EVIDENCE FOR THE INTERNATIONAL CRIMINAL COURT <<http://www.un.org/law/icc/statute/rules/rulefra.htm>> ; For similar practice in courts exercising universal criminal jurisdiction, see K. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1998); C. Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VIRG. J. INT'L L. 82 (2001); Demjanjuk v. Petrovsky, 776 F.2d, 571 (1985); L. Sadat, *Redefining Universal Jurisdiction*, 35 NEW ENG. L. REV. 256 (2001).

<sup>85</sup> W. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2001).

<sup>86</sup> See Judgment against Schacht and von Papen, International Military Tribunal at Nuremberg; Prosecutor v. Tadic (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997; Prosecutor v. Akayesu (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

<sup>87</sup> Hilao v. Estate of Marcos, No. 95-15779 O.C. No. MDL-00840, 1996.

<sup>88</sup> K.L. Boyd, *Are Human Rights Political Questions?* 53 RUTGERS L. REV. 281-282 (2001).

<sup>89</sup> Hwang v. Japan, F.Supp. 172 F. Supp. 2d 52 (D.D.C. 2001); *Prinz v. Germany*, 26 F.3d 1166 (D.C. Cir. 1994), 513 U.S. 1121 (1995); *Iwanowa v. Ford Motor Co.* 67 F. Supp. 2d 424 (D.N.J. 1999).

attack in countries with 'liberal' judiciaries, it has not entirely been eliminated to uphold jurisdiction over human rights claims.

### C. Enforcement and Execution of Judgment

Where the chosen forum is a specialized court or tribunal, the execution of judgment promises to be less cumbersome for the individual claimant. International criminal tribunals such as the ICTY, the ICTR, and the International Criminal Court (ICC) often provide for their own procedures for sentencing and execution of judgment. International 'human rights' courts such as the Court of Human Rights (in Europe) or the Inter-American Court of Human Rights<sup>90</sup> that permit individual claimants to sue for civil liability arising from human rights violations, similarly have jurisdiction under their respective Charters or originating conventions to issue enforcement, seizure or protective orders to expedite the execution of judgments for individual claimants.

The case is vastly different where the chosen forum is a national court. Individual claimants who are successful in litigating their civil liability claims against respondents outside the territorial jurisdiction of the forum court may very well find themselves with mere 'pyrrhic' victories. In the *Karadzic* case, for example, the US District Court awarded several millions of dollars in damages to the plaintiffs, but such award has never been enforced due to Karadzic's absence from US territory.<sup>91</sup> Where the properties of the respondents are located in another jurisdiction, traditional conflicts-of-laws rules in the recognition and/or enforcement of foreign judgments<sup>92</sup> will govern.

### D. Inverse Proportionality: Specific Relief And Severity of Liability

As seen in the discussion in Part II, individual claimants usually apply more easily to forums that provide only recommendatory action and factual reportage. The procedures are simpler, less strenuous, and less financially burdensome on the part of the individual. (In the ICCPR mechanism, for example, there is no prescribed or detailed form for the filing of written communications by individuals.) In contrast, individual claims that involve specific administrative, civil, or criminal

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<sup>90</sup> For examples of such orders, see *Ringeisen v. Austria*, (1971) 13 Eur. Ct. H. R. (ser. A) and *Ringeisen v. Austria* (1972) 15 Eur. Ct. H. R. (ser. A); *de Ribemont v. France*, (1995), 308 Eur. Ct. H. R. (ser. A); See also *Velasquez Rodriguez case*, Inter-Am. Ct. H. R. Order of 10 September 1996, OAS/Ser.L/V/III.35 Doc. 4 (1997) at 209.

<sup>91</sup> *Kadic v. Karadzic*, (13 October 1995), 70 F.3d 232.

<sup>92</sup> See Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 1 February 1971 <<http://www.legallanguage.com/Hague/haguetx16e.html>>; Sec. 4 of the Uniform Foreign Money Judgment Recognition Act of the United States.

liability require conformity with several preconditions developed by international practice and custom (as outlined in the preceding sections) tend to create more legal obstacles for potential individual claimants. There now appears an inverse proportionality between the individual's success in obtaining a specific relief and the severity of the liability that he seeks to establish.

The correlation between specific relief and the severity of liability may be explained by the precise uniqueness of international human rights cases,<sup>93</sup> which involve State actors whose willingness to submit themselves to another jurisdiction is variable. Precisely because the international human rights system is a product of negotiation and not multilateral imposition (there being no 'world court'),<sup>94</sup> it is easier for States to obligate themselves to respect 'actions' which are less 'severe' on their sovereign interests (such as mere recommendations or fact-finding). Where the reliefs sought by the individual claimants are more 'severe' on the State or its nationals (as in the case of damages), States will expectedly demand more exhaustive procedures before they may be granted.

#### **E. Civil Litigation By Individual Human Rights Victims Against Non-State Entities**

Since *Filartiga v. Pena-Irala*<sup>95</sup> was successfully resolved in favor of the plaintiffs before a federal court of the United States in 1980, there have been a significant number of civil cases filed against individuals as well as juridical entities (particularly corporations) for torts predicated on breaches of international human rights norms.<sup>96</sup> Civil claimants have made ample use of the Alien Tort Claims Act and the Torture Victims Protection Act<sup>97</sup> to acquire legal standing within US jurisdiction and haul alleged perpetrators of human rights violations into US courts.

Publicists have since lauded the use of civil litigation (whether under the ATCA, TVPA, or in national courts) as an effective tool for human rights victims:

Civil litigation can play an important role in the search for accountability for human rights violations. Litigation that leads to an enforceable money judgment offers the plaintiff compensation for the injuries inflicted by the defendant, punishes those responsible for those harms, and serves as a deterrent to future abuses. Even if the collection of judgment is impossible, ...many lawsuits lead to judicial recognition of developing rules of law,

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<sup>93</sup> SHELTON, pp. 47-49.

<sup>94</sup> R. HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, 3-5, 107-110 (1999).

<sup>95</sup> Id. at note 59.

<sup>96</sup> Id. at note 61 and 93.

<sup>97</sup> See discussion, pp. 24-26.

producing a full factual investigation identifying those responsible and leading to public recognition of the victim's injuries and the defendant's culpability... Civil remedies play an important role where criminal prosecution is not possible, and complement criminal prosecutions where they take place.<sup>98</sup>

The practice of using civil litigation has not been unique to the United States. Lawsuits have been filed in several common law legal systems, specifically challenging human rights violations committed by domestic corporations in their operations abroad. While framed as 'corporate negligence' claims, they remain fundamentally human rights violations.<sup>99</sup> This practice has been more extensively utilized in violations of the individual's right to a 'decent, healthy, or viable environment'<sup>100</sup>, whether such right is treated as an 'autonomous' human right or as within the penumbra of the universally-recognized 'right to life'.<sup>101</sup> Transboundary civil litigation arising from violations of individual environmental rights has also increased in frequency in recent years.<sup>102</sup>

As with any other remedy, there are inherent limitations in civil litigation also apparent in the three 'stasis' points (acquisition of jurisdiction, extent of forum's authority, enforcement and execution of judgment) earlier enumerated in this section. Subject matter jurisdiction in cases filed in US courts under the ATCA and the TVPA are rights under the 'law of nations' and customary international norms on torture, respectively. For cases filed in national courts, the extent of subject matter jurisdiction based on international conventional rights or those that have customary international legal status would depend on the extent of the application of the doctrine of incorporation in municipal jurisdictions.<sup>103</sup> (In the United Kingdom, for example, courts make an initial choice of law based on the subject matter of the suit, applying judicial notice in cases involving international law. Nonetheless, they still have to determine the reasonable parameters within which the rules of international law will be applied in the municipal sphere.

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<sup>98</sup> Stephens, Beth. *Accountability Without Hypocrisy: Consistent Standards, Honest History*, NEW ENGLAND L. REV. 2002 at 919, 926.

<sup>99</sup> Stephens, Beth. *Individuals Enforcing International Law: The Comparative and Historical Context*. DE PAUL L. R. 2002 at 433.

<sup>100</sup> 1989 Hague Declaration on Environment and Development; Article 24 of the African Charter on Human and Peoples' Rights; Article 12 of the 1966 UN Covenant on Economic and Social Rights; Article 11 of the 1988 Additional Protocol to the Inter-American Convention on Human Rights; 1989 European Charter on Environment and Health; Article 24(2)(c) of the 1989 Convention on the Rights of the Child; UN General Assembly Resolution 45/94 (1990).

<sup>101</sup> *Yanomani Indians v. Brazil*, Decision 7615, Inter-American Commission on Human Rights, 1985, in BIRNIE, PATRICIA and ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* (2<sup>nd</sup> ed., 2002).

<sup>102</sup> *Id.* at 267-270.

<sup>103</sup> BROWNLEE, at 42-47.

Jurisprudence has tended to incorporate customary law only insofar as the rules have been adopted by legislation, judicial precedent or established usages.<sup>104</sup>)

Jurisdiction over the person of the defendant is conceptually more divergent in its application than subject matter jurisdiction. Traditionally, jurisdiction over the defendant is acquired by the voluntary appearance of a party and his submission to authority, in contrast to the acquisition of jurisdiction over the plaintiff the moment he files suit. General jurisdiction is largely undisputed where the suit is brought in the forum court of the defendant's domicile or place of business/incorporation. In tort cases in particular, the forum court of the place where the tortious act occurred, the place where the injury resulted (variants include the court of the place 'where the harmful event occurred' or 'where the harmful effects are felt'),<sup>105</sup> and the domicile of the defendant may acquire jurisdiction.<sup>106</sup>

However a more liberal (and necessarily more controversial) approach to jurisdiction has been manifest in the cases brought in US courts invoking the ATCA and the TVPA, where jurisdiction over the defendant requires a mere physical presence, **even transitory**, of individual defendants, or in the case of corporations, 'minimum contacts' of corporations doing business in the United States. This concept of 'transitory' presence has been clearly rejected in the Hague Conference's attempt to codify jurisdictional rules under the Convention on the Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, implying that other bases for jurisdiction over the person of the defendant may be availed of **only** where litigation involves the domiciliaries of States that are **not** parties to the Convention. For example, the United Kingdom, as a non-party to the Convention, has applied 'transitory' presence as a basis for jurisdiction, whereas France, another non-party to the Convention, has made use of the nationality of the plaintiff or the defendant as a basis for jurisdiction. Admittedly, 'transitory' presence and 'minimum contacts' have not found wide application in various municipal courts, which primarily utilize the doctrine of *forum non conveniens* to decline jurisdiction over the suit.

The argument for 'transitory' presence has been stretched to the extreme by some publicists,<sup>107</sup> relying on the principle of universal jurisdiction<sup>108</sup> under

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<sup>104</sup> Id.

<sup>105</sup> BIRNIE, PATRICIA and ALAN BOYLE, at 277-279; *See also* Article 5 of the 1968 European Community Convention on Jurisdiction and Enforcement of Judgments; 'Lotus case' (1927) PCIJ, Ser. A. No. 10.

<sup>106</sup> Article 2 of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 29, 1968, reprinted in 29 I.L.M. 1413 (1990).

<sup>107</sup> Id. at note 103.

international law. Universal jurisdiction dispenses with traditional links of residence and nationality to permit courts to acquire subject matter and personal jurisdiction in some limited cases (such as egregious human rights violations such as genocide, crimes against humanity, and grave breaches of the Geneva Conventions). Both in theoretical treatment and actual state practice, universal jurisdiction has been confined to **criminal proceedings**.<sup>109</sup> It is now argued that universal jurisdiction may be a basis for acquiring jurisdiction even in **civil cases** based on the historical right to compensation of human rights victims as a form of reparations, dating back to the norms prohibiting piracy. Moreover, it is claimed that the 'right to an effective remedy' under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights did not distinguish between criminal and civil proceedings, such that the greater sanction (criminal prosecution) should necessarily include the lesser (civil litigation). Finally, it is further claimed that the accepted definition of 'impunity' (which is the evil addressed by universal jurisdiction) recognizes the use of civil remedies:

Impunity...is the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations to account --- whether in criminal, civil, administrative, or disciplinary proceedings.<sup>110</sup>

The use of universal jurisdiction to empower any forum court to accept jurisdiction over civil **tort** claims (whose causes of action depend upon violations of international law) from individual human rights victims throughout the world is potentially dangerous and vexatious. It can itself be used as the means to cause deprivations of individual human rights, especially when employed in a politically-motivated manner. While the nature of torts and criminal actions in some jurisdictions such as the United States show a strong kinship, the same may not be said in other civil law countries such as the Philippines. Even the few countries that apply universal jurisdiction (such as Belgium, France, Australia) have enacted internal legislation to govern its use --- an implied recognition of the potential of universal jurisdiction to disrupt foreign diplomacy and amicable relations between States. At best, what may be accepted (although not clearly contemplated nor provided for by treaty law nor customary law) is the pursuit of **civil liability ex**

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<sup>108</sup> Randall, Kenneth C. *Universal Jurisdiction Under International Law*. 66 TEX. L. REV. 785 (1998); See also Princeton Principles on Universal Jurisdiction.

<sup>109</sup> Bassiouni, M. Cherif. *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*. VIRG. J. I.L. 82 (2001); Sadat, Leila. *Redefining Universal Jurisdiction*. NEW ENG. L. REV. 256 (2001). Demjanjuk v. Petrovsky, 776 F.2d, 571 (1985); Federation Nationale des Deportés et Internes Résistants et Patriotes and Others v. Barbie, 78 ILR 125 (Fr. Cour de Cassation 1985); Touvier, 100 ILR 338 (Fr. Cour de Cassation 1992); Attorney-General of the Government of Israel v. Eichmann, 36 ILR 277 (Israel Sup. Ct. 1962); Prosecutor v. Dusko Tadic, Judgment, ICTY Trial Chamber II, 7 May 1997.

<sup>110</sup> Stephens, Beth. *Civil Lawsuit as a Remedy for International Human Rights Violations Against Women*, 5 HASTINGS WOMEN'S L. J. 143, 165-69 (1994).

***delicti or arising from the crime.*** This type of civil claim would not altogether sever the use of universal jurisdiction in criminal proceedings, but would still recognize the valid claims for damages by individual human rights victims. It would, however, preclude the unfettered use of universal jurisdiction throughout the world to unduly harass alleged perpetrators of human rights violations due to the far-reaching consequences of tort litigations on their property rights.

Should civil litigation for human rights violations be pursued *ex delicti* (or as arising from the international crime covering the human rights violation), it is submitted that rules on jurisdiction for money laundering offences may have some persuasion. While money laundering admittedly constitutes an international crime<sup>111</sup>, it has a distinct nature from other international offenses due to the use of civil forfeitures (characterized as **civil**, rather than criminal proceedings) alongside criminal prosecution. Jurisdiction for civil forfeitures accompanying criminal prosecution of money laundering offenses has been predicated on two theories under private international law: the **ubiquity theory** (which states that an offense is deemed to have taken place on the territory of a state as soon as a constituent or essential element of the offense has taken place on the said territory), and the effects doctrine (which grants jurisdiction where the effect of an offense is produced in the territory of a state, even if the effect is not a constitutive element of the offense).<sup>112</sup>

As regards issues on choice of law in civil litigations for human rights violations, there is no discernible 'heavy' consensus. Traditional tort doctrine in products liability cases employs *lex loci delicti commissi*, or the law of the place where the alleged tort was committed. In common law jurisdictions (which may subscribe to the vested rights theory), the reckoning point for the 'commission' of the alleged tort is the 'place where the last event necessary to make an actor liable for an alleged tort occurs'. Civil law jurisdictions, on the other hand, trace the 'commission' of the alleged tort to the 'place where the tortious conduct was committed'.<sup>113</sup> The Alien Tort Claims Act in the United States expands the choice of law to torts 'committed in violation of the law of nations', thus opening judicial application of customary norms under international law. (It may be noted that under Article 10 of the Draft Convention on Jurisdiction and Foreign Judgments in Civil and

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<sup>111</sup> STESENS, GUY. MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL. (2000).

<sup>112</sup> See also Apartheid Convention; UN Convention Against Transnational Organized Crime; Convention on Transboundary Movements of Hazardous Wastes; Arts. 6 and 7 of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, reproduced in 32 I.L.M. 1228.

<sup>113</sup> 1973 Hague Convention on the Law Applicable to Products Liability.

Commercial Matters,<sup>114</sup> tort jurisdiction has been restricted to genocide, crimes against humanity, and grave breaches of the Geneva Conventions.)<sup>115</sup>

Finally, the recognition and enforcement of judgments even in civil litigations for human rights violations would still be based on reciprocity rules across various jurisdictions.<sup>116</sup> The practice of states has been to treat foreign judgments under the rubric of the municipal doctrine of *res judicata*, and to exercise significant restraints on recognition or enforcement. This is exemplified the aforementioned Draft Convention, which makes **supplementary agreements** mandatory for all Contracting Parties before they can recognize or enforce a decision rendered in another Contracting State, denies enforcement of a foreign judgment when a specified period of time has elapsed, and requires enforceability of the judgment both in the State of origin and the enforcing State.

#### IV. Illustrative case: The 'Jugun Ianfu' of World War II

The 'Jugun Ianfu' (the Japanese term for those otherwise known as the 'comfort women') of World War II, presents a cogent illustration of the common issues affecting human rights victims' right to effective remedies. While the suffering of this class of claimants is well documented,<sup>117</sup> their desire for redress remains unmet by the remedies system of international human rights law, through no fault of their own.

Individual claimants have tried to obtain an official apology from the Japanese Government, as well as actual and moral damages for the atrocities perpetrated against them during World War II. None of these reliefs have ever been granted in any forum court. To date the only somewhat positive results for the Jugun Ianfu are the: (1) 1948 Batavia Military Trials<sup>118</sup> that convicted 11 Japanese officers and comfort station operators for committing war crimes against Dutch women forced to work in comfort stations in the Dutch East Indies and the

<sup>114</sup> Found at <http://www.hcch.net/e/workprog/jdgm.html> (last visited November 10, 2003).

<sup>115</sup> Von Mehren, Arthur T. *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191 (2001).

<sup>116</sup> Kessedjian, Catherine. "Hague Draft Convention on Jurisdiction and Enforcement of Foreign Judgments", Law in Transition: Advancing Legal Reform, European Bank for Reconstruction and Development, Autumn, 2000, p. 5.

<sup>117</sup> K. Parker and J. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L. & COMP. L. REV. 497, 508 (1994); G. HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR 164-65 (1994); K. ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS, (1997); Y. TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II, 99 (1996).

<sup>118</sup> Y. YOSHIKI, COMFORT WOMEN, 43 (2000).

*Yamashita* and *Kuroda* cases of the IMT for the Far East (which did not expressly deal with liability for the comfort women stations but imposed criminal liability for mass rapes and violence against women committed by Japanese forces during the war); (2) Former Japanese Prime Minister Murayama's 'vague apology' in 1995<sup>119</sup>; (3) The 15 October 2001 (also somewhat vague) personal apology by then Japanese Prime Minister Juichiro Koizumi to Korean victims of World War II; (4) The alleged establishment of an "Asian Women's Fund" privately financed by Japanese corporations and individuals, not the Japanese government; (5) Only one case in the Japanese courts which was NOT dismissed<sup>120</sup> where the lower found that Japan violated a Japanese governmental tort statute by failing to take some action following a 1993 governmental report that acknowledged the Japanese government's role involving the "comfort women" and awarded the plaintiffs a nominal sum that reflected the Diet's failure but did not compensate the plaintiffs for their actual wrongs. (Unfortunately, the Japanese Supreme Court reversed this ruling.)

Even in the liberal US district courts, ATCA Litigation against the Japanese government has yielded dismal results. In the landmark case of *Hwang Geum Joo v. Japan*<sup>121</sup>, the US district court denied jurisdiction on two principal grounds:

- (1) The States of the victims waived their claims under the San Francisco Peace Treaty with Japan;
- (2) Japan as a sovereign State cannot be sued under the **Foreign Sovereign Immunities Act**, since none of the FSIA exceptions apply.

Critics of the decision<sup>122</sup> raise the following objections:

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<sup>119</sup> The statement reads: "During a certain period in the not-too-distant past, Japan, after adopting a mistaken national policy, marched down the path to war and provoked a crisis jeopardizing the very survival of our people. Japan's colonial rule and aggression inflicted immense harm and suffering upon people in many countries, especially in other Asian countries. I humbly acknowledge these irrefutable facts of history, express my deep remorse once again, and offer an apology from the bottom of my heart, in the hope that no such mistake will ever be made in the future. I also offer my sincere condolences to all the victims of this period of history in Japan and abroad." Prime Minister Tomiichi Murayama, Statement Issued on the Fiftieth Anniversary of the end of World War II (Aug. 15, 1995).

<sup>120</sup> See "*Comfort Women*" Case: Judgment of April 27, 1998, Shimonoseki Branch, Yamaguchi Prefectural Court, Japan, 8 PAC. RIM. L. & POL'Y J. 63-100; B. Fisher, *Japan's Postwar Compensation Litigation*, 22 WHITTIER L. REV. 35, 36 (2000).

<sup>121</sup> Id. at 88.

<sup>122</sup> S. Lee, *Comforting the Comfort Women: Who Can Make Japan Pay?* UNIV. PENN. J. INT'L & ECON. L. (Summer, 2003); S. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, ASIA-PAC. L. & POL'Y. J. (Winter, 2002).

- (1) Nowhere in the text of the San Francisco Peace Treaty was individual criminal accountability as well as state responsibility for international crimes waived by the Parties to the Treaty; in any case, States cannot waive the human rights violation and injury claims of its citizens;
- (2) Japan is covered under 2 exceptions to the FSIA, namely, the **express or implied waiver of immunity** (allegedly made by Japan in the Potsdam Declaration) or the **foreign state commercial activity exception that has a direct effect on the United States** (where the comfort women system was held to be such a commercial activity which affected the US due to the medical expenses and other recovery expenses it was forced to incur for comfort women left by Japanese forces in the Philippines).

There has been ceaseless debate about the validity of the issues aforementioned in permitting individual claimants to file cases under the ATCA in US courts, with strong support advanced for critics of the *Hwang* decision.

At present, litigation in Japanese courts has had little, if any, success. Government officials are reluctant to sue Japan for wartime atrocities given political-economic considerations, such as Japan's Official Development Assistance to developing countries and favorable foreign policy relations with influential actors in the international community such as the United States.

Given the improbability of obtaining favorable verdicts in Japanese national courts or in the United States district courts (much less even the mere acquisition of jurisdiction), what other forum for redress is available to the Jugun Ianfu, if any?

It is submitted that a case may be brought by the States of the individual claimants against the State of Japan before the International Court of Justice. To state briefly, the state responsibility of Japan may be predicated on two grounds:

- (1) The **attribution** to the State of Japan of the operation of the comfort station system as an internationally wrongful act for which reparations are proper;
- (2) The continued failure of the State of Japan to prosecute individuals who committed war crimes and crimes against humanity (sexual enslavement, torture and rape) against the

Jugun Ianfu amounts to a breach of the *aut dedere aut judicare* principle and the denial of justice and effective remedies to the Jugun Ianfu for which reparations are proper.

**On the first ground.** It may be argued that the operation of the comfort women system was part of government policy of the Japanese government, implemented by military authorities including General Yamashita.<sup>123</sup> The comfort women system could be characterized as sexual enslavement, torture and rape, all of which constitute war crimes and crimes against humanity.<sup>124</sup> The operation of the comfort women system could be directly attributed to the State of Japan as government acts committed by its agents under actual authority (doctrine of objective responsibility).<sup>125</sup> The internationally wrongful acts (operation of comfort women system amounting to sexual enslavement, torture and rape) being attributable to the Japan, its international responsibility may be engaged.<sup>126</sup>

**On the second ground.** It may be further argued that there is now a customary norm of international law requiring States to prosecute perpetrators of war crimes and crimes against humanity<sup>127</sup>, or to provide victims of such crimes with effective

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<sup>123</sup> In Re Yamashita, 327 U.S. 1 (1945); Trial of General Tomoyuki Yamashita, 1948 L. REP. WAR. CRIM. 1, 35-37 (1945); M. Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 TULSA J. COMP. & INT'L L. (Fall, 2001).

<sup>124</sup> A. Korkeakivi, *Consequences of 'Higher' International Law: Evaluating Crimes of State and Erga Omnes*, J. INT'L L. 82, 110-113 (1996); 1863 Lieber Code, Instructions for the Government of the United States in the Field by Order of the Secretary of War" 24 April 1863, General Orders No. 100; Art. II(1)(c) of the CHARTER OF ALLIED CONTROL COUNCIL LAW NO. 10, PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY, 3 Official Gazette Control Council for Germany 50-55 (1946); Art.5(c) of the CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, approved and published by the Supreme Commander for the Allied Powers (SCAP) 1946; arts. 14 and 97 of GENEVA CONVENTION III; Art. 27 of GENEVA CONVENTION IV; Art. 76(1) of PROTOCOL I; Art. 4(2)(e) of PROTOCOL II; Art. 5(g) of the Amended Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 25 May 1993, last amended by S.C. Res. 1329 (2000); Art. 3(g) of the Statute of the International Criminal Tribunal for Rwanda; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, last amended by S.C. Res. 1329 (2000); Art. 7(1)(g) of the Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/\*9). The ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) entered into force on 1 July 2002 and it is expected that the Court will be operational in 2004.

<sup>125</sup> Caire claim (France v. Mexico), 5 RIAA 516 (1929). See also Corfu Channel Case (UK v. Albania) (Merits) I.C.J. Reports (1949) on the use of indirect or circumstantial evidence of facts giving rise to responsibility.

<sup>126</sup> Articles 1-3, 5, 12 and 28 of the ARTICLES ON STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS, INTERNATIONAL LAW COMMISSION, U.N. doc. A/CN.4/L.602/Rev.1 (2001). The International Law Commission's Draft Articles on State Responsibility. For a useful background of the Second Reading of the Draft Articles see: J. Crawford, J. Peel, S. Olleston, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963 (2001).

<sup>127</sup> D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537 (1991); C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability* 26 DENV. J. INT'L L. & POL'Y 591, 613 (1998); See also H.

remedies<sup>128</sup>. By repeatedly refusing to prosecute its own officials (even Emperor Hirohito) or to provide for a civil claims commission or some other forum that would permit the Jugun Ianfu access to effective remedies, Japan may be held internationally responsible.

Another alternative is also dependent upon the initiatives taken by the States of the individual Jugun Ianfu claimants. The States may try to negotiate an agreement with Japan to create arbitration or claims commissions that would decide on individual cases. Admittedly, States may not be compelled under any international legal obligation to enter into such negotiations.

A final possible forum rests with the national courts of the individual Jugun Ianfu claimants themselves. The *caveats* to this course of action are the acquisition of jurisdiction by the forum court (governed by the laws of the forum), and the ability of the forum court to execute and enforce its judgments (should there be favorable judgments for the Jugun Ianfu). As discussed in the previous section, any favorable result from litigation in national courts may amount to nothing more than symbolic victories.

As with any other international human rights case, the Jugun Ianfu case demonstrates (albeit to a more exaggerated degree), the three 'stasis' points affecting the individual claimants' rights to effective remedies (as discussed in Part II). It also highlights the intricacies of state involvement in advancing individual claims, and gives weight to the inversely proportional correlation (between success in the individual claim and the severity of liability sought by the claimant) also proposed in Part II.

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GROTIUS, DE JURE BELLI ET PACIS (THE RIGHTS OF WAR AND PEACE), ch. XXI, sec. IV (1) at 347 (W. Whewell trans. & ed. 1853); Art. 5 of the CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, 78 U.N.T.S. 277, 280; Art. 49 of GENEVA CONVENTION I; Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277 (1948); Art. 50 of Geneva Convention II; Art. 129 of Geneva Convention III; Art. 146 of Geneva Convention IV; Art. 7 of the TORTURE CONVENTION; Art. 4 of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73 (1968).

<sup>128</sup> Art. 8 of the Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 (1948); Art. 2 (3) of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966); International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 Mar. 1976; Arts. 1.1, 2, and 7 of the American Convention 37 U.N. GAOR Supp. (No. 40), U.N. Doc. No. A/37/40 (1982); American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 entered into force 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); Art. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 213 U.N.T.S. 222 (1950).

### Conclusion

Do international human rights norms have any coercive force in reality, against States, State agents, and non-State actors? It is a relevant question, particularly since the raging academic debate has largely been directed towards the substantive norms of international human rights law, while very little analytical treatment has been accorded to the adjective or procedural norms for the enforcement of international human rights law. It is submitted that the coercive force of the substantive norms still exist, insofar as they codify acceptable standards and prohibitions on human conduct and State behavior. However, human rights norms lose potency precisely due to the difficulty for injured victims to prove accountability for breaches of these norms, and to exact corresponding redress for such breaches. If States and individuals voluntarily observe human rights norms out of some level of deterrence, it is predictable that weakening remedial justice for individual victims will dilute voluntary observance of the norms.

Given the inherent weaknesses of the international remedies system (which is highly dependent on the consent and willingness of States to subject themselves or their nationals to suit or any other form of claim), the individual human rights victim, in deciding on a forum for redress and planning his/her subsequent strategies, has no recourse except to **familiarize himself/herself with the procedures, reliefs, and limitations** of various institutions for redress; **recognize the common 'stasis' points** that will affect the pursuit of his/her claim; and **take into account the correlation** between the success of his/her claim and the severity of liability he/she seeks to establish. This work hopes to assist the individual human rights claimant in those respects.

Since States are the ultimate arbiters of the success or failure of an individual human rights claim, there is a greater imperative for coherent rules to be agreed upon by them, particularly in individual civil liability suits (criminal proceedings largely being institutionalized with the ICC) involving the usual 'stasis' points for individual claimants: jurisdiction, extent of authority, enforcement and execution of judgment. Until and unless the 'secondary' rules are widely agreed upon by States, neither States nor individual litigants can expect the 'primary' rules to accomplish their objects and purposes in international human rights law.