No. 10-1491

In The Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF OF AMICUS CURIAE NAVI PILLAY, THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

DAVID SLOSS
Counsel of Record
Professor of Law
SANTA CLARA UNIVERSITY SCHOOL OF LAW
500 El Camino Real
Santa Clara, CA 95053
408-554-2170
dlsloss@scu.edu

JAN HESSBRUEGGE
OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS
Palais Wilson
52 rue des Paquis
CH-1201 Geneva, Switzerland
41-22-928-9251

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICUS CURIAE[1]

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads the Office of the High Commissioner for Human Rights (OHCHR) and spearheads the United Nations' human rights efforts.

OHCHR has a mandate to promote and protect the enjoyment and full realization of all human rights by all people. OHCHR is guided in its work by the mandate provided by the General Assembly in resolution 48/141, the Charter of the United Nations, the Universal Declaration of Human Rights and subsequent human rights instruments, the Vienna Declaration and Program of Action from the 1993 World Conference on Human Rights, and the 2005 World Summit Outcome Document.

SUMMARY OF ARGUMENT

International law authorizes States to exercise adjudicatory and prescriptive jurisdiction over civil cases involving gross human rights violations and serious violations of international humanitarian law, irrespective of whether the plaintiffs or the

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The petitioners and respondents have filed a letter of consent with the Clerk of the Court.

defendants are nationals of that State, and regardless of where the relevant conduct occurred. States may exercise such universal civil jurisdiction at least to the same extent as they are permitted to exercise universal criminal jurisdiction.

Without seeking to delineate fully the scope of universal jurisdiction, the High Commissioner submits that States are permitted to exercise universal jurisdiction, at a minimum, over genocide, crimes against humanity, war crimes, torture, slave trading, and enforced disappearances. These gross human rights violations are of concern to all States and all States have a legitimate interest in protecting victims and providing them with effective remedies.

Where universal criminal jurisdiction is permitted under international law, universal civil jurisdiction is also permitted. From the perspective of the victims, who enjoy the right to an effective remedy for gross human rights violations, it would be anomalous if international law allowed third States to offer one aspect of an effective remedy (prosecution of the perpetrators), but not the other (adequate, prompt and effective reparation). Also, the exercise of civil jurisdiction is far less intrusive than criminal jurisdiction vis-à-vis other nations and individual defendants, and hence not subject to more stringent limitations.

In practice, a number of States combine universal criminal with universal civil jurisdiction by allowing

victims to join criminal proceedings brought under universal jurisdiction as civil claimants. This State practice demonstrates that international law authorizes States to exercise universal jurisdiction in cases where victims seek civil remedies for gross human rights violations and serious violations of international humanitarian law.

The exercise of universal civil jurisdiction over gross human rights violations and serious violations of international humanitarian law is not only permitted, it is also beneficial from a human rights perspective. Universal criminal and universal civil jurisdiction complement each other. Both contribute to the establishment of an international culture of accountability. Both provide victims of the worst violations with access to justice and effective remedies in cases where they are denied access to justice in their home countries. The exercise of universal jurisdiction under the Alien Tort Statute has positive deterrent effects because the prospect of litigation before independent courts provides incentives for States, corporations, and individuals to prevent gross human rights violations and adapt their practices accordingly.

ARGUMENT

I. International Law Authorizes Universal Jurisdiction in Civil Cases Involving Gross Human Rights Violations or Serious Violations of International Humanitarian Law

International law distinguishes among prescriptive jurisdiction, adjudicatory jurisdiction, and enforcement jurisdiction. A State exercises extraterritorial prescriptive jurisdiction by prescribing rules to be applied outside its territory; extraterritorial adjudicatory jurisdiction when its courts adjudicate cases involving persons, property, or acts outside its territory; and extraterritorial enforcement jurisdiction when it directly exercises its power on the territory of another State. The present case concerns the exercise of prescriptive and adjudicatory jurisdiction in relation to acts committed outside U.S. territory that are illegal under international law.

In the *S.S. Lotus* case, the Permanent Court of International Justice set out the basic framework to determine the limits of jurisdiction international law imposes on sovereign states, and set forth the distinction between enforcement jurisdiction on the one hand, and prescriptive and adjudicative jurisdiction on the other. *See S.S. Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at 18-20 (Sept. 7). While the facts of the case concerned a criminal prosecution, the Court stated that its reasoning also applied to civil cases. *Id*. at 20.

Regarding the exercise of enforcement jurisdiction in another State's territory, the Permanent Court observed:

> [T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

Id. at 18.

Conversely, the Permanent Court established that the exercise of adjudicative and prescriptive jurisdiction in relation to acts abroad – the type of jurisdiction involved in this case – is in principle permitted, unless specifically prohibited by international law:

> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this

> general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.

Id. at 19.

A prohibitive rule of customary international law of the type contemplated in *S.S. Lotus* requires "general practice accepted as law." *See* Statute of the International Court of Justice, Art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993; *see also Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987) ("Customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation."). In other words, according to the standard set by the *S.S. Lotus*, if the defendants in this case want to show that the exercise of prescriptive and adjudicatory jurisdiction in relation to acts committed abroad is prohibited, they would have to demonstrate that there is both a general practice among States to refrain from exercising such jurisdiction, *and* that States refrain from doing so because

they believe they are legally prohibited from doing so. Defendants cannot possibly satisfy this standard.

* * *

Without seeking to delineate fully the scope of prohibited and permissible jurisdiction under international law, the High Commissioner submits that international law permits States to exercise jurisdiction over civil cases involving gross human rights violations or serious violations of international humanitarian law regardless of where, by whom and against whom such violations were committed.

Gross human rights violations and serious violations of international humanitarian law include, at a minimum, conduct amounting to genocide, crimes against humanity, war crimes, slave trading, and enforced disappearances. These gross violations are of concern to the entire international community and are hence no longer considered to be an internal affair of the State where they occur. Any State is entitled to provide its courts with a special form of extraterritorial jurisdiction known as "universal jurisdiction" over these gross violations, even if the violations take place abroad and do not involve the State's nationals as perpetrators or victims.[2]

---

[2] The term "universal jurisdiction," as used in this brief, refers to the exercise of extraterritorial jurisdiction in cases where the *subject matter* of the case has no particular link to the State exercising jurisdiction, in particular because neither the perpetrator nor the victim has the nationality of the State

(Continued on following page)

A. Customary International Law, Emerging from the Practice of States and Reaffirmed by Several Widely Ratified Treaties, Permits States to Exercise Universal Jurisdiction in Cases Involving Gross Human Rights Violations or Serious Violations of International Humanitarian Law

In setting out restrictions on the exercise of prescriptive and adjudicatory jurisdiction in relation to acts abroad, international law strikes a balance between competing goals. On the one hand, States have legitimate interests in regulating acts committed abroad that concern their nationals or that have an impact on their territory or other sovereign interests. On the other hand, international law prohibits States from intervening in the internal affairs of other sovereign States.

---

exercising jurisdiction, and the underlying conduct occurred on the territory of another State.

In the terminology of U.S. lawyers, the term "universal jurisdiction" relates exclusively to the subject matter jurisdiction of the federal courts, not the separate issue of whether the court has personal jurisdiction over a particular defendant. With regard to personal jurisdiction, a few States exercise universal jurisdiction even when the defendant is not present on their territory (jurisdiction *in absentia*). However, many other States exercising universal jurisdiction (including the United States) require the defendant to have a presence or activity on their territory to justify *in personam* jurisdiction over the defendant.

When it comes to gross human rights violations, the balance tilts in favour of the State wishing to exercise jurisdiction, because these violations have been recognized as being of concern to the entire international community and are hence no longer considered an internal affair of the State where they occur. Instructive in this regard is the observation of the International Court of Justice:

> [A]n 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. . . . 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*.

Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

The Court went on to explain that "[s]uch obligations [*erga omnes*] 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 the basic rights of the human person*, including protection from slavery and racial discrimination." *Id.* (emphasis added).

In this narrowly defined area of gross human rights violations, there is no real concern that the State exercising jurisdiction would be projecting its own domestic policies or values onto the territory

of another State. Instead, that State merely offers a judicial forum allowing the victims to obtain effective remedies for violations that are so obvious and abhorrent that the forum state, the territorial state, and the international community as a whole recognize that they constitute gross violations and that the victims must have effective recourse.

* * *

The International Court of Justice has not yet pronounced itself on the issue of universal jurisdiction. The Court did not address the issue in its 2002 judgment concerning an arrest warrant issued by Belgium against the Foreign Minister of the Democratic Republic of the Congo pursuant to a statute providing Belgian courts with universal jurisdiction over war crimes and crimes against humanity. *See Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14). In individual opinions attached to the judgment, four judges took issue with Belgium's exercise of universal jurisdiction *in absentia*, which allowed for criminal proceedings even where the suspect was never present on Belgian territory. *See id*. at 35, 40-41 (separate opinion of President Guillaume); 54, 58 (declaration of Justice Ranjeva); 91, 92 (separate opinion of Justice Rezek); and 100, 126-127 (separate opinion of Justice Bula-Bula). At the same time, however, a larger number of judges expressed support for the position that international law permits the exercise of universal jurisdiction. Judges Buergenthal, Higgins, and Kooijmans found "certain indications that universal jurisdiction

for certain international crimes is clearly not regarded as unlawful." *Id*. at 63, 76 (joint separate opinion of Justices Higgins, Kooijmans, and Buergenthal). Judge Koroma stated that in his "considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide." *Id*. at 59, 61-62 (separate opinion of Justice Koroma). Likewise, Judge Van den Wyngaert found that international law does not prohibit Belgium from exercising universal jurisdiction and noted that "[t]o the contrary, international law permits and even encourages States to assert this form of jurisdiction to ensure that suspects of war crimes and crimes against humanity do not find safe havens." *Id*. at 137, 176-177 (dissenting opinion of Justice Van den Wyngaert).

* * *

Since the International Court of Justice issued its *Arrest Warrant* decision in 2002, State practice has reaffirmed the legality of universal jurisdiction as more States have adopted legislation allowing them to exercise such jurisdiction. As of September 2011, at least 145 out of 193 United Nations Member States – more than three-quarters of the world's nations – had adopted laws providing for some form of universal jurisdiction over genocide, war crimes, crimes against humanity, and/or torture. *See* Amnesty Intn'l, *Universal Jurisdiction: A Preliminary Survey of*

Legislation Around the World 1 (2011) [hereinafter, "*Survey of Legislation*"].

* * *

That States accept universal jurisdiction also emerges from several widely ratified treaties, which are based on the premise that international law authorizes the exercise of universal jurisdiction.

The four Geneva Conventions of 1949, which have been ratified by the United States of America and virtually all other States, require States parties to search for and bring to justice any person, regardless of his or her nationality, who is alleged to have committed or ordered grave breaches of the Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 147, Aug. 12, 1949, 75 U.N.T.S. 287.

The "search and bring to justice" obligation logically implies that States must also be authorized by international law to exercise universal jurisdiction over any perpetrators their search identifies, no matter where they are from and where and against whom they committed war crimes. As also established

by the comprehensive study of the International Committee of the Red Cross on customary international humanitarian law, States may therefore vest universal jurisdiction over war crimes in their courts. *See* Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* at 604 (2005) (rule 157).

* * *

The legal acceptance of universal jurisdiction also follows from the Convention against Torture. The Convention, adopted without vote by the world's States gathered in the United Nations General Assembly, has 150 States parties (including the United States of America). *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

Article 5 of the Convention stipulates:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences [of torture] referred to in article 4 in the following cases:
>
> (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is a national of that State;
>
> (c) When the victim is a national of that State if that State considers it appropriate.

> 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

Id., art. 5.

Seen in comparison with Article 5(1), it is clear that Article 5(2) relates to cases committed abroad that do not involve nationals as either perpetrators or victims. Thus, Article 5(2) requires each State to exercise universal jurisdiction over torturers found on its territory, unless the State chooses to extradite the person. *See also* Committee against Torture, *Concluding Observations and Recommendations: Nepal*, U.N. Doc. CAT/C/NPL/CO/2, ¶ 18 (15 December 2005); *Concluding Observations and Recommendations: Uganda*, U.N. Doc. CAT/C/CR/34/UGA, ¶ 10(c) (21 June 2005). Since a treaty that has been adopted with the approval of all States *obligates* States parties to exercise universal jurisdiction over torture, it follows that international law does not *prohibit* the exercise of universal jurisdiction.

States have adopted this norm fully cognizant of this implication. The Working Group of States that

drafted the text noted specifically that "the inclusion of universal jurisdiction in the draft convention was no longer opposed by any delegation." *See Report of the Working Group on the Draft Convention against Torture,* U.N. Doc. E/CN.4/1984/72, at § 26 (1984).

The legislative practice of the United States of America also embraces this understanding of Article 5(2), given that U.S. federal criminal law renders torture committed anywhere in the world subject to universal jurisdiction "as long as the offender is present in the United States, irrespective of the nationality of the victim or alleged offender." *See* 18 U.S.C. § 2340A(b)(2) (2006).

B. Universal Jurisdiction Extends, at a Minimum, to Genocide, Crimes Against Humanity, War Crimes, Torture, Slave Trading, and Enforced Disappearances

Universal jurisdiction was initially applied to serious crimes whose perpetrators tended to operate outside the jurisdiction of any particular State, namely pirates, and later also slave traders, roaming the high seas. However, this pragmatic argument was always paired with the principled argument that perpetrators of such serious crimes violated universal values and could hence be considered enemies of all mankind. In this respect, Emerich de Vattel, the

preeminent international legal scholar of his time, explained:

> [A]lthough the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling underfoot the foundation of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall.

Emerich de Vattel, *Law of Nations* 179 (1758, reprinted ed. 1805) (§ 233).

Building on this moral underpinning, universal jurisdiction has also come to be applied to violations so abhorrent that they shock the conscience of humanity as a whole. In the context of Israel prosecuting holocaust organizer Adolf Eichmann for international crimes under universal jurisdiction, the Supreme Court of Israel explained:

> Not only do all crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The State of Israel therefore was entitled, pursuant to the principle of universal

> jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.

Attorney General of Israel v. Eichmann, 36 I.L.R. 277, 304 (Israel Sup. Ct. 1962).

In addition to the international public order argument, framed so eloquently by the Supreme Court of Israel, the application of universal jurisdiction to human rights-related violations also rests on a pragmatic argument that is directly rooted in international human rights law. The pirate is covered by universal jurisdiction to ensure that he can be brought to justice. For the same reason, the perpetrators of gross human rights violations are subject to universal jurisdiction so that the victims are not left without recourse. In many cases, the State where such gross violations are committed is complicit and hence unwilling to bring the perpetrators to justice. In other cases, such violations are committed in States that lack the capacity to govern their territory and are hence unable to bring perpetrators to justice. In both cases, universal jurisdiction is necessary so that the victim is not left without recourse. In that sense, universal jurisdiction derives legitimation directly from international human rights law, because it offers a complementary tool to ensure that victims of gross violations can realize their right to an effective remedy for human rights violations. On the foundation of the human right to an effective remedy in international law, see *Brief of Amicus Curiae Navi Pillay, the United Nations High Commissioner for*

Human Rights in Support of Petitioners, pp. 4-12 (filed in December 2011 in the prior round of briefing in this case).

* * *

The fact that universal jurisdiction extends beyond the historical examples of piracy and the slave trade has been recognised by the *Restatement (Third) of Foreign Relations Law*:

> A State has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction [deriving from the territorial, nationality or protective principles] is present.

Restatement (Third) of the Foreign Relations Law of the United States § 404 (1987).

In addition to the non-exhaustive list of examples offered by the Restatement, the High Commissioner submits that States may, at a minimum, also exercise universal jurisdiction with regard to crimes against humanity, torture, and now also enforced disappearances.

* * *

The United Nations International Law Commission and numerous other renowned jurists have endorsed the position that crimes against humanity are subject to universal jurisdiction. *See* International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind,* U.N. GAOR, 51st Sess., Supp. No. 10, at 9 (art. 8), U.N. Doc. A/51/10/10 (1996); International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences* 5 (2000); Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* 28 (2001) (principles 1.2 and 2.1).

The nature of crimes against humanity, a notion embodied in the very term "crime against humanity," makes them of concern to the entire State community. Therefore, they can be pursued by any State. The Special Court for Sierra Leone observed that "one consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes." *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, Cases No. SCSL-04-15-AR72 and SCSL-04-16-AR72 (Special Court for Sierra Leone, Appeals Chamber, Mar. 13, 2004), at ¶ 70.

State practice confirms that States are allowed to exercise universal jurisdiction over crimes against humanity. As of 1 September 2011, at least 78 States had national laws providing for universal jurisdiction over crimes against humanity. *See Survey of Legislation*, *supra*, at 13.

* * *

State practice is even more pronounced with regard to the exercise of universal jurisdiction over the crime of torture. As of 1 September 2011, at least 85 United Nations member States had enacted national laws providing for universal jurisdiction over torture. *See id.* As noted above (pp. 13-15), those States that do not yet exercise universal jurisdiction over torture have signalled their agreement with the principle in supporting the adoption of the Convention against Torture, which is based on the premise that universal jurisdiction over torture is permitted.

Further support for the finding that torture is subject to universal criminal jurisdiction derives from the fact that the prohibition of torture – just like the prohibitions of genocide, crimes against humanity, and war crimes – forms part of peremptory international law (*jus cogens*). The International Criminal Tribunal for the Former Yugoslavia (ICTY) has stated:

> [I]t would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute, and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty making power of sovereign States, and

> on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime.

Prosecutor v. Anto Furundzija, Case No. IT-95-17/I-T10, Trial chamber, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 10, 1998).

* * *

The legislative practice of States is gradually expanding the permissible scope of universal jurisdiction. A number of States now have universal jurisdiction legislation covering other serious crimes involving gross human rights violations. For a comprehensive review of state practice, see *Survey of Legislation*, *supra*. In order to address gross violations targeting children, for instance, the United States of America asserts universal jurisdiction over anyone present in its territory who recruits, enlists, or conscripts a child under 15 years in an armed force or group, irrespective of the nationality of the offender. *See* Child Soldier Accountability Act, Pub. L. No. 110-340, § 2442 (2008).

* * *

The process of recognizing additional bases of universal jurisdiction has also advanced with regard to enforced disappearances, which at this point are

subject to universal jurisdiction. The High Commissioner notes that the Convention for the Protection of all Persons from Enforced Disappearance, which was adopted unanimously by the member States of the United Nations, obligates States parties to prosecute or extradite any alleged offender present in any territory under its jurisdiction. Article 9 reads as follows:

> 1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:
>
> (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
>
> (b) When the alleged offender is one of its nationals;
>
> (c) When the disappeared person is one of its nationals and the State Party considers it appropriate.
>
> 2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

> 3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

International Convention for the Protection of all Persons from Enforced Disappearance, May 1, 2007, 46 I.L.M. 441.

Article 9 of the Disappearances Convention closely tracks the language in Article 5 of the Convention against Torture. It follows *mutatis mutandis* that States must be *allowed* to exercise universal jurisdiction over perpetrators of enforced disappearances found on their territory, given that the Disappearances Convention *requires* the exercise of universal jurisdiction where no extradition request is made.

Furthermore, the argument set out by the International Criminal Tribunal for the Former Yugoslavia that all *jus cogens* crimes are subject to universal jurisdiction (*see supra* pp. 20-21), also applies to enforced disappearances, given that the latter also violate *jus cogens*. *See Goiburú et al. v. Paraguay,* Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 128 (Sept. 22, 2006); *see also Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, ¶ 106, U.N. Doc. A/HRC/19/69 (2012).

C. Universal Jurisdiction Applies Also to Civil Cases and Extends, at a Minimum, as far as Universal Criminal Jurisdiction

While the preceding section focused on the universality principle in the context of criminal cases,

the principle applies equally to civil cases. Universal civil jurisdiction extends, at a minimum, to the same range of gross violations covered by universal criminal jurisdiction.

It would run counter to common sense and basic principles of legal reasoning to assume that international law prohibits States from exercising universal civil jurisdiction over the very same violations regarding which they may exercise universal criminal jurisdiction. Endorsing this reasoning, the Italian Court of Cassation, Italy's highest court, recently observed that international crimes "threaten humanity as a whole and undermine the very foundations of international coexistence" and hence "any State may suppress them, independent of the place where they were committed, in accordance with the principles of universal jurisdiction." "For the same reason," Italy's high court continued, "there can be no doubt that the principle of universality of jurisdiction also applies to civil suits relating to such crimes." *See Ferrini v. Germany*, Appeal decision, no. 5044/4, at ¶ 9, ILDC 19 (IT 2004) (Mar. 11 2004) (translation according to: http://www.adh-geneva.ch/RULAC/pdf_state/Ferrini.pdf).

* * *

The same principles of justice that underlie the application of universal criminal jurisdiction also call for the application of universal civil jurisdiction.

As discussed above (pp. 15-17), universal jurisdiction serves to address offenses against universally shared values and it seeks to ensure that victims of

such offenses are not left without the effective remedy to which they are entitled under international human rights law. The notion of an effective remedy extends beyond the need to bring the perpetrators to justice. A victim's right to an effective remedy for gross violations of human rights carries two legitimate expectations:

> (1) that crimes are investigated with due diligence, identified perpetrators prosecuted in a fair trial and, if found guilty, subjected to appropriate punishment; and
>
> (2) that the perpetrator or the entity on whose behalf he or she was acting must provide full, adequate and timely reparation for the monetary and non-monetary consequences of the crimes committed.

The second aspect has been endorsed *inter alia* by the United Nations General Assembly, in a resolution adopted without vote, and hence reflecting the unanimous consent of all States:

> In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the

> State has already provided reparation to the victim.

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 15, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter "*Basic Principles*"]; *see also* Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004) ("Without reparation to individuals whose [rights under the Covenant on Civil and Political Rights] have been violated, the obligation to provide an effective remedy . . . is not discharged.").

Retributive and compensatory justice go hand in hand. If international law allowed States to exercise universal criminal jurisdiction over gross violations, while prohibiting them from offering victims compensation for the same violations, this would cut off the second leg of the principle of effective remedy, which universal jurisdiction is meant to protect. The very foundation of universal jurisdiction therefore indicates that it must apply to both the criminal punishment and the reparation aspect of a case.

* * *

There is no principled reason why universal civil jurisdiction should be subject to more stringent limits than universal criminal jurisdiction. To the contrary,

the exercise of civil jurisdiction in relation to violations abroad is inherently less intrusive vis-à-vis both foreign nations and individual defendants than the exercise of criminal jurisdiction.

The exercise of criminal jurisdiction is one of the hallmarks of sovereign power. When prosecuting crimes committed abroad, the prosecuting State always applies its own substantive criminal laws and may thereby project peculiar values embodied therein onto another State's territory and people. In doing so, it might sometimes override deliberate sovereign choices of the territorial State, namely if the latter State wishes to forego punishment and grant amnesty or pardon. For the individual targeted by prosecution, his or her liberty is at stake. Moreover, where the territorial and another state assert criminal jurisdiction, the alleged perpetrator is placed at risk of being prosecuted or punished twice for the same crime; such double jeopardy can raise concerns from a human rights perspective.

Conversely, civil cases are typically initiated by a private party, rather than the State itself, and involve only pecuniary consequences. Moreover, the exercise of extraterritorial civil jurisdiction is subject to conflict of laws rules, according to which the State may forego the application of its own civil laws and apply those of the territorial State instead, in particular in relation to tort actions.

Some have asserted that the exercise of civil jurisdiction in relation to acts abroad might be subject to fewer safeguards because the State prosecutor's control over initiating a criminal case ensures that extraterritorial criminal cases are brought only after prudent consideration, whereas civil claims can be brought by any private person. *See* Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 Am. J. Int'l L. 142, 155 (2006). This neglects the fact that in many civil law jurisdictions, victims have an active role in the criminal process and can either force the prosecutor to bring an action or initiate criminal actions as civil parties. In addition, almost all states, applying the wide margin of discretion international law affords them, have adopted private international law doctrines allowing them to dismiss cases that are manifestly unfounded or could be better addressed by the courts of other jurisdictions. This gives the State, through its courts, a level of control akin to that exercised by the prosecutor in criminal cases.

In accordance with the principle that the greater includes the lesser (*argumentum a fortiori*), one must therefore conclude that whatever is not prohibited with regard to the more intrusive exercise of universal criminal jurisdiction is certainly not prohibited with respect to the less intrusive exercise of universal civil jurisdiction.

* * *

These considerations of principle are also borne out by State practice, which shapes customary international law.

State practice suggests that the scope of universal civil jurisdiction might even be wider than that of universal criminal jurisdiction, bearing in mind that the "exercise of civil jurisdiction has been claimed by States upon far wider grounds than has been the case in criminal matters, and the resultant reaction by other States much more muted." Malcolm Shaw, *International Law* 651 (6th ed. 2008). Some renowned scholars even suggest that States are completely free in determining the scope of their civil jurisdiction in relation to acts abroad. Sir Gerald Fitzmaurice, a former judge of the International Court of Justice, has stated that "apparently, public international law does not affect any delimitation of spheres of competence in the civil sphere, and seems to leave the matter entirely to private international law – that is to say in effect to the States themselves for determination, each in accordance with its own internal law . . . ." Gerald Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, 92 Hague Recueil des cours 218 (1957-II). Similarly, Professor Akehurst, author of the well-known textbook on international law, has found it "hard to resist the conclusion that . . . customary international law imposes no limits on the jurisdiction of municipal courts in civil trials." Michael Akehurst, *Jurisdiction in International Law*, 46 Brit. Y.B. Int'l L. 145, 176 (1972-73); *see also* Peter

Malanczuk, *Akehurst's Modern Introduction to International Law* 110 (7th ed. 1997).

* * *

The absence of established state practice limiting jurisdiction in civil cases is also reflected in the failure of states to adopt a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, despite two decades of negotiations under the auspices of the Hague Conference on Private International Law.

A cross-regional alliance of states, including the United Kingdom, Sweden, Japan, and the Republic of Korea, has insisted that the Hague Convention must include a "human rights exception" to ensure that civil cases involving international crimes or gross violations of human rights are not subject to any of the jurisdictional limits that the Hague Convention might introduce. *See* Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L.J. 141, 186 (2001).

* * *

States' acceptance of universal civil jurisdiction goes beyond mere professions of support and is demonstrated by their legislative and adjudicative practice.

Several States exercise a type of mixed universal jurisdiction functionally akin to the universal civil jurisdiction asserted under the Alien Tort Statute.

Many States of the civil law tradition allow victims to join criminal proceedings as civil parties or civil claimants with their own procedural rights. In line with this tradition, several States allow victims to join criminal proceedings brought under universal jurisdiction and claim compensation from the perpetrators. Clearly, the exercise of universal civil jurisdiction on its own is "no more threatening" to other nations than the application of universal jurisdiction laws that combine both criminal and civil jurisdiction by attaching tort recovery options to prosecutions, as Justice Breyer has rightfully observed. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-763 (2004) (Breyer, J., concurring).

In 2007, for instance, a Belgian Court relied on universal jurisdiction to convict a Rwandan military officer of crimes against humanity that he had committed in Rwanda against other Rwandans (in addition to holding him accountable for the murder of Belgian peacekeepers). Several families of Rwandan victims who had joined the case as civil parties were awarded damages. *See Case of the Major*, Cour d'Assises de Bruxelles, Sept. 11, 2007 (decision on civil damages) (Belg.), *as reported by* Rwanda News Agency, *Rwanda: Ntuyahaga to Pay Rwf 406 Million to Genocide Victims*, September 12, 2007, http://allafrica.com/stories/200709120762.html.

Among the countries that assert universal jurisdiction over international crimes and also allow the victims of such crimes to lodge civil claims are

Germany and the Netherlands, two of the States whose amicus curiae interventions in the present proceedings have called into question the exercise of universal tort jurisdiction by the United States.

Germany asserts universal jurisdiction over genocide, crimes against humanity, and war crimes, including, at the prosecutor's discretion, where the perpetrator is not present in Germany. In accordance with general principles of German criminal procedure, crime victims can claim compensation from anyone prosecuted under the International Crimes Penal Code. *See* Völkerstrafgesetzbuch [International Crimes Penal Code], Jun. 26, 2002, BGBl. I S. 2254, §§ 1&2, *read in conjunction with* Strafprozeßordnung [StPO] [Code of Criminal Procedure], Apr. 7, 1987, BGBl. I S. 1074, 1319, *as amended by* BGBl. I S. 3044 §§ 153f, 403 (Ger.).

The Netherlands asserts universal jurisdiction over genocide, crimes against humanity, and war crimes, provided the suspect is present on its territory. The victims can join the proceedings as injured parties and claim damages. *See* Wet Internationale Misdrijven [Act on Int'l Crimes], Stb. 2003, p. 270, Section 2, *read in conjunction with* Wetboek van Strafvordering [Sv] [Code of Criminal Proceedings], § 51 art. a-f (Neth.).

Applying this framework in 2011, a Dutch Court convicted a Rwandan man for international crimes he committed in the context of the Rwandan genocide and awarded compensation to two Rwandan victims,

who had joined the proceedings. *See Gerechtshof 's-Gravenhage*, 22-002613-09, LJN: BR0686 (Neth.), Jul. 7, 2011, *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BR0686.

The High Commissioner also draws the Court's attention to a recent decision of a Dutch civil court, in which a non-national sued a group of Libyan nationals who had tortured him in a Libyan prison. The victim had since established residence in the Netherlands. Jurisdiction was asserted on the basis of a provision in the Dutch Code of Civil Procedure allowing the Court to exercise jurisdiction as a *forum necessitates* in case of a non-national plaintiff suing a non-national defendant without residence in the Netherlands. The court accepted the plaintiff's argument that, under the circumstances, it would have been unacceptable for him to seek a remedy in a Libyan court. The court held that the defendants had acted unlawfully and ordered them, *in absentia*, to pay €750,000 in material damages and €250,000 in non-material damages to the plaintiff. Rechtbank 's-Gravenhage, *Case of Ashraf Juma Hajuj* (Neth.), Mar. 21, 2012, *available at* http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BV9748.

* * *

The legislative practice of the United States also supports the position that international law permits the exercise of universal jurisdiction in civil cases involving gross human rights violations. Notably, the

Torture Victim Protection Act, adopted in 1991, provides U.S. courts with universal civil jurisdiction over torture and extrajudicial killings. According to Article 2 of that Act:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation –
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

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

The record of Senate deliberations demonstrates that the legislature approved the Act fully cognizant of the fact that it would establish universal civil jurisdiction over torture and extrajudicial killings. *See Hearing Before the Subcommittee on Immigration and Refugee Affairs of the Committee on the Judiciary United States Senate on S. 1629 and H.R. 1662*, 101st Cong. (1990). In briefings presented during the deliberations, representatives of the Departments of Justice and State expressed their opposition to the draft legislation on three grounds: 1) possible negative foreign policy implications; 2) the U.S. position that universal jurisdiction was not *required* by the

Convention against Torture; and 3) the assertion that the Act departed from common law doctrines applied by U.S. courts. *Id.* Notably, none of the participants on record asserted that the exercise of universal civil jurisdiction over torture and extrajudicial killings contravened U.S. obligations under international law. To the contrary, the Torture Victim Protection Act itself states that it aims to "carry out obligations of the United States under the United Nations Charter and other international agreements." Torture Victim Protection Act, *supra*, preamble.

II. The Exercise of Universal Jurisdiction in Civil Cases Involving Gross Human Rights Violations or Serious Violations of International Humanitarian Law Promotes the Full Realization of Widely Accepted International Norms

The international community has made great strides towards establishing a culture of accountability for gross violations of human rights and serious violations of international humanitarian law. This development has been spurred by the exercise of jurisdiction by international tribunals and national courts.

While the quest for accountability was initially largely focused on criminal prosecution, it has become apparent that an approach to accountability that embodies universal human rights values and ensures the sustainable participation of the victims must

place victims' legitimate demands at the centre of the response by providing them with realistic and effective avenues to obtain reparation for the unspeakable atrocities they have suffered.

* * *

Compensation constitutes one crucial element of reparation. According to the United Nations' *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*:

> *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
>
> (*a*) Physical or mental harm;
>
> (*b*) Lost opportunities, including employment, education and social benefits;
>
> (*c*) Material damages and loss of earnings, including loss of earning potential;
>
> (*d*) Moral damage;
>
> (*e*) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Basic Principles, *supra*, ¶ 19.

On a practical level, compensation is often crucial because many victims of gross violations have very tangible needs. Many victims have lost their livelihoods and the capacity to earn their living owing to the physical and psychological impact of atrocities endured. Likewise, the families of executed or disappeared persons often find themselves deprived of the household's primary breadwinner. Certain gross violations, namely sexual torture, also carry a heavy stigma and deprive the victims of the family and social support networks securing their survival. In many places, women who suffered sexual violence at the hands of State forces or armed groups find themselves struggling to secure their bare survival, because they cannot obtain compensation and have been ostracized by their own families and communities.

The reparation that a successful civil claim can afford extends far beyond mere pecuniary considerations and includes the satisfaction victims derive from having the responsibility of the perpetrators recognized by an independent and impartial court. Indeed, victims often pursue civil claims in human rights-related cases, knowing that they will be unable to collect damages from the perpetrators even if the court rules in their favor. The opportunity to become actors in the pursuit of their tormentors empowers victims, especially in jurisdictions where criminal procedural law affords victims only a passive role. A judicial decision emanating from such an action is itself an element of reparation "restoring the dignity,

the reputation and the rights of the victim and of persons closely connected with the victim." *See Basic Principles*, *supra*, ¶ 22(d).

* * *

Many victims, or their bereaved families, also pursue actions against the perpetrators with the primary goal of establishing the truth about violations and the surrounding circumstances under which they occurred. In this regard, civil actions support the right to know the truth about violations and their circumstances, which international law gradually has come to recognize. *See* Office of the High Commissioner for Human Rights, *Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91 (2006); *Right to the Truth,* U.N. Doc. A/HRC/5/7 (2007).

Knowing the truth helps victims or their bereaved families obtain the sense of emotional closure necessary to reconstitute their lives. This is most apparent in cases of enforced disappearance, where the victims' families do not know the fate of their loved ones, and live in tormenting anguish about whether they are dead or still alive. Society as a whole also benefits from shedding light on violations and their circumstances, as the "right to the truth serves to advance respect for the rule of law, transparency, honesty, accountability, justice, and good governance – all key principles underlying a democratic society." *See* Tara E. Foley, *Panel Discussion on the Right to the Truth at the 13th Session of the Human Rights Council: Statement by the Delegation*

of the United States of America (Mar. 9, 2010), http://geneva.usmission.gov/2010/03/10/right-to-truth. In this regard, "public knowledge of [victims'] suffering and the truth about the perpetrators, including their accomplices, of these violations are essential steps towards rehabilitation and reconciliation. . . ." Commission on Human Rights Res. 2003/72, U.N. Doc. E/CN.4/RES/2003/72 ¶8 (Apr. 25, 2003).

* * *

Despite victims' dire needs for material compensation, restoration of dignity, and knowledge of the truth, national avenues to obtain redress are often foreclosed. In many cases, gross violations are committed by or with the connivance of State authorities, who are therefore unlikely to offer any timely and effective recourse. Other violations may occur in weak states that are unable to prevent violations and consequently also unable to ensure that victims can obtain reparations from the perpetrators. Many surviving victims also have fled their home countries and it is unrealistic to expect them to brave physical risk and rekindle traumatic memories to return to their home countries to file reparations cases.

* * *

In the current state of affairs, victims therefore must often rely on access to the courts of other nations, even though victims may share few links with those nations, apart from their common humanity.

This is in particular the case since many violations are beyond the reach of international mechanisms. For some victims, regional human rights courts with a mandate to order reparations can provide an effective avenue to obtain remedies. However, such courts do not exist in all regions. Even where they do exist, countries with problematic human rights records will often not accept their jurisdiction. In the same vein, the geographical reach of international criminal tribunals, some of which have the power to order convicted perpetrators to pay reparation, is also limited and States implicated in gross human rights violations often remain beyond their grasp. Moreover, criminal tribunals can order individual perpetrators to pay damages, but those tribunals cannot assess fines against corporate entities that have profited from gross human rights violations.

* * *

In the current state of affairs, therefore, victims must rely on the solidarity and comity of other nations. If no country exercised universal civil jurisdiction, many victims would be left without any avenue of recourse for lack of being able to demonstrate a jurisdictional link to any country but their own. Furthermore, without universal civil jurisdiction, corporations and individuals involved in the worst atrocities in one country could go about their business

in other countries, as if such atrocities were of no concern to humanity as a whole.

With these considerations in mind, the High Commissioner supports the exercise of universal jurisdiction for purposes of both prosecution and reparation, including through the Alien Tort Statute. Actions brought under the Alien Tort Statute have provided many victims with a beacon of hope, derived from the knowledge that there are independent and impartial courts willing to recognise that their tormentors violated the law of nations. The prospect of tort claims has also denied perpetrators a safe haven where they would be shielded from legal action.

Perhaps even more importantly, the existence of accountability mechanisms such as the Alien Tort Statute has had a positive deterrent effect. The prospect of facing legal action has brought many businesses to examine and, where necessary revise, their business practices to ensure that they will not become complicit in gross violations. This has spurred progress in developing voluntary industry initiatives aimed at ensuring that businesses apply due diligence to prevent their complicity in gross human rights violations. Incidentally, this has also "levelled the playing field" to some extent as any company profiting or participating in gross violations, whether American or foreign, may face scrutiny under the Alien Tort Statute based on the same universal standards. In turn, increased due diligence commitments on the part of business entities can

also have a positive effect on States with a problematic human rights record. Such States are becoming increasingly aware that they have to change their own governance practices if they want to continue obtaining the foreign investment and expert knowledge provided by respectable business enterprises.

In certain cases, actions brought in the U.S. under the Alien Tort Statute have triggered a genuine national debate in other countries about gross and systematic violations, such as the use of slave labor. As a result, compensation programs were set up that may not have otherwise been adopted.

The High Commissioner urges the Court to keep these positive implications in mind when deciding whether and under what circumstances the Alien Tort Statute allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. On an ethical level, comity is owed as much to fellow human beings who suffer from the worst atrocities as to the nations representing them.

CONCLUSION

For the above reasons, the High Commissioner urges the Court to state clearly that international law permits the exercise of universal civil jurisdiction in

tort cases involving gross human rights violations or serious violations of international humanitarian law.

Respectfully submitted,

DAVID SLOSS
Counsel of Record
Professor of Law
SANTA CLARA UNIVERSITY
SCHOOL OF LAW
500 El Camino Real
Santa Clara, CA 95053
408-554-2170
dlsloss@scu.edu

JAN HESSBRUEGGE
OFFICE OF THE UN HIGH
COMMISSIONER FOR
HUMAN RIGHTS
Palais Wilson
52 rue des Paquis
CH-1201 Geneva, Switzerland
41-22-928-9251

Attorneys for Amicus Curiae