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The Long Arm of International Law

Giving Victims of Human Rights Abuses Their Day in Court

In late 1945, the Allied victors of World War II established a military tribunal in Nuremberg, Germany, which convicted Nazi leaders for their wartime atrocities. The animating principle of the trials was that conduct of extreme inhumanity violated the part of international law that protects fundamental human rights, which applies everywhere, even though the conduct was authorized by German law under the Third Reich. Since then, the world has accepted that the worst human rights abuses -- including genocide, slavery, torture, and war crimes -- are crimes prohibited by international law, even if they are expressly permitted by the laws of the state in which they occur.

Yet over 65 years after Nuremberg, although the world remains awash in these atrocities, the prohibitions of international law are largely toothless, especially when the abusive governments remain in power. The international community has established criminal tribunals to try abusers, but those who remain in power are ordinarily shielded from prosecution by their government and its protectors. Victims seeking recognition of the wrongs done to them and compensation for their suffering cannot get relief in their home countries, and they have practically no courts available to them elsewhere.

Since 1980, they have been able to turn to the United States. That year, a U.S. appeals court, invoking a previously obscure law known as the Alien Tort Statute (ATS), allowed U.S. federal courts to hear civil suits brought by foreign citizens against foreign defendants for crimes committed on foreign soil, provided that the defendant brought himself within the territorial reach of the court. The ATS offers victims of abuse a rare tool in their fight for justice; the United States remains the only country in the world to entertain such lawsuits. Now, however, the U.S. Supreme Court may slam shut the door on such plaintiffs, relying in part on the argument that other countries do not offer such relief. During proceedings held last year, the Court hinted that it may altogether ban ATS cases based on foreign abuses.

At the very least, keeping courts open to civil suits about human rights can bring solace and compensation to victims. More important, these suits draw global attention to atrocities, and in so doing perhaps deter would-be abusers. And they give substance to a body of law that is crucial to a civilized world yet so underenforced that it amounts to little more than a pious sham. The Supreme Court should continue to interpret the ATS as opening the doors of U.S. federal courts to victims of foreign atrocities who cannot get justice elsewhere, and other countries should adopt laws that open the doors of their courts as well.

THE ENFORCEMENT GAP

Respect for fundamental human rights in the world today is dismal -- better, no doubt, than it was 200 years ago, but dismal nonetheless. As in the past, despotic regimes murder, mutilate, and rape civilian populations and arbitrarily imprison and torture political opponents. Human traffickers, almost invariably operating with the protection of corrupt local officials and police, enslave children and young women in the sex trade. So long as the regimes that sponsor and protect these criminals remain in power, their crimes go unrecognized.

To deal with the effective immunity of abusers whose regimes remain in power, international law has developed the doctrine of universal jurisdiction, which holds that trials for certain offenses may be heard in courts throughout the world if the defendant cannot be brought to justice in the country where he committed them. And following the example of Nuremberg,

the international community has created international criminal courts, generally at The Hague, in the Netherlands, which hear trials of offenses committed anywhere.

Despite this framework, however, prohibitions against atrocities are rarely enforced. Criminal prosecutions in international tribunals are infrequent, slow, and inefficient. During its ten years of existence, the most prominent and permanent of those courts, the International Criminal Court, has brought only ten cases into the trial process and has convicted only one person (the Congolese warlord Thomas Lubanga). Fault for that paltry record lies with the court's limited jurisdiction and the intricacies of international politics: the ICC may prosecute only if the country of the defendant or the country where the crime was committed has ratified the treaty that created the court, the Rome Statute, or if the UN Security Council recommends prosecution. Not surprisingly, many of the countries that regularly flout human rights have not signed the treaty. Nonsignatories can also avoid punishment by relying on their friends among the five permanent members of the UN Security Council, each of which can use its veto to block a recommendation. Furthermore, the ICC prosecutes only those who appear in person before the court, and offending officials of a government that remains in power are not easily arrested. As a practical matter, then, it is only when a regime has lost power that its offenders will be vulnerable to prosecution.

Victims of atrocities have few avenues to seek justice on their own. With rare exceptions, they cannot bring suits against governments, which are protected under the concept of sovereign immunity, nor can they bring civil suits against individual offenders before international criminal tribunals, which are not authorized to hear civil suits. Although the ICC does have the power to award compensation once it has secured a conviction, it never has done so. The court may be reluctant to get into the messy business of granting compensation; the number and identity of many of the victims of such crimes are likely unknown, and such a pursuit would divert the court, with its limited resources, from its principal mission of trying and punishing abusers. So letting victims file civil suits in foreign courts would fill an important gap.

JUSTIFYING JUSTICE

In most countries, courts act only with statutory authorization and, under existing legal codes, have no power to entertain suits between foreign parties alleging foreign violations of international law. For the most part, then, such suits can be heard only if a legislature grants its country's courts the specific authority to hear them. No country other than the United States has. But the lack of these statutes today does not necessarily mean other governments have made a policy decision against hearing foreign human rights suits; in all likelihood, their legislatures have simply never considered granting their courts such authority. If human rights advocates were to lobby governments to accept these suits, opponents would no doubt line up with arguments against doing so. Some of these arguments would have merit, at least in certain circumstances. But none would justify categorically excluding all such cases.

Among the strongest arguments likely to be made is that allowing victims to bring suits accusing foreign officials of human rights abuses could interfere with the foreign policy of the government where the suit was brought. This objection is certainly not frivolous, and any foreign ministry, unless it was reassured on this score, would likely fight against allowing these lawsuits. But there is no reason to bar all such lawsuits: some cases have the potential to disrupt foreign policy, whereas others do not. When its courts are faced with a suit that does, a government could advise them that entertaining the suit would harm the national interest. Human rights advocates may object to handing governments what would amount to veto power, but making that compromise is far preferable to the likely alternative of totally excluding the cases.

Some countries worry about reciprocity, too -- that if their courts hear suits claiming violations of international law in other countries, those countries will retaliate by entertaining suits against them. The fear is not trivial, and a court's judgments could well be fueled more by

enmity or bias than objective facts. But that sort of risk is always inherent in establishing laws and mechanisms to enforce them.

Another argument is that the proliferation of countries hearing cases of foreign atrocities would allow plaintiffs to "forum shop" for a court that was prejudiced against the defendant's country, producing a system of injustice that would neither command nor deserve respect. There is some merit to this argument. The remedy, however, is not to prevent the expansion of the practice but rather to establish standards governing the circumstances in which a foreign defendant may be sued. Perhaps jurisdiction should be limited to cases that present a reasonable basis for imposing it on the particular defendant -- such as the defendant's having brought himself within the court's customary territorial reach, as with ATS suits in the United States.

The biggest obstacle to any country's adopting such an authorization is the perception that atrocities committed by foreigners against foreigners in a foreign land are not that country's problem. This view is wrong for a number of reasons. For starters, it overlooks the fact that courts already adjudicate wholly foreign disputes, such as cases involving transnational trade when the parties have contracted to bring their disputes before the courts of a selected country and maritime cases. More problematic, this view is at odds with the idea that legal protections of the most fundamental human rights derive from the consensus of nations. Most countries have already crossed this bridge. By underwriting the international criminal courts charged with enforcing the law of nations, they have repeatedly accepted that violations of these fundamental rules are in fact their business.

Accepting universal jurisdiction for human rights violations would not represent a drastic extension of most governments' existing laws. Many countries have long authorized courts to entertain suits against absent foreigners alleging wrongs committed elsewhere if one of two conditions is met: the plaintiff is a national of the state where the suit is filed or that state's interests are in some way involved. All it would take for countries to start allowing civil suits concerning foreign human rights abuses would be to recognize that all atrocities in violation of international law, regardless of where they are committed, affect the interests of every law-respecting country -- thus satisfying the second condition.

Human rights advocates should try to allay predictable objections to countries' opening their courts. They should start by drafting proposed legislation with modest and realistic goals, building in limitations that may disappoint the most ardent activists but hugely increase the chances of success. For example, a proposed bill for a country should require the approval of the foreign ministry before each suit can proceed to trial and specify that a suit will be allowed only if the plaintiff has no access to just relief in the country of the defendant or in the country where the abuse occurred. The bill should also require a court to dismiss a suit when the defendant can show that the plaintiff has forum-shopped and has access to justice in a country far better suited to hear the dispute, on the condition that the defendant agrees to face trial in that other country's courts. And it should require an initial showing of probable cause to stave off frivolous, politically motivated suits. Limitations such as these would do much to disarm or convert opponents.

A PRACTICE IN PERIL

The prospects that legislatures will pass bills allowing foreign human rights suits would get much dimmer if the country at the vanguard of the practice stopped hearing them. In the past few decades, U.S. federal courts have heard suits brought by foreigners involving human rights abuses in Ethiopia, Myanmar (also called Burma), Paraguay, the Philippines, Serbia, Sudan, and other countries. But it was only by historical accident that the United States started welcoming these plaintiffs into its courts. In 1789, Congress passed the ATS, allowing foreigners to sue in the federal courts for a wrong that was "in violation of the law of nations." Back then, however, the law of nations expressed no concern for human rights, much less for a sovereign government's treatment of its own citizens. It focused on matters of state-to-state relations, such as national boundaries, aggression, safe passage of ambassadors, and

piracy. Only in the mid-twentieth century, at Nuremberg, did international law begin to deal with human rights abuses committed by governments. And only since 1980 have U.S. federal courts interpreted the ATS as authorizing suits based on violations of human rights.

But the Supreme Court may soon stop letting foreign plaintiffs use the ATS to sue the perpetrators of foreign atrocities. In February 2012, the Court heard oral arguments in *Kiobel v. Royal Dutch Petroleum*, a case filed by inhabitants of the Ogoni region of Nigeria against an oil conglomerate that allegedly aided the Nigerian military in carrying out torture and executions in the early 1990s. Although no party had raised the issue of whether the ATS has extraterritorial reach, the line of questioning by the justices suggested that some of them were considering ruling that atrocities in foreign countries lie outside the jurisdiction granted by the statute. The Court then took the exceptional step of directing the parties to prepare briefs on that issue. It is expected to decide the matter in the coming months.

The arguments that the defendants submitted in favor of limiting the ATS in this way are distortions of both U.S. and international law. First, the defendants claim that U.S. statutes apply only to acts committed in the United States. That is true for U.S. statutes that prescribe norms of conduct, which are clearly intended to govern conduct within U.S. borders (perhaps of Americans outside U.S. borders, too), but not all conduct throughout the world. But the argument does not apply to the ATS, because a court hearing a case under the ATS is not imposing norms prescribed by the United States for the rest of the world. It is merely giving effect to norms that were prescribed by the international community with the intent that they would apply throughout the world. (What is more, the ATS was most likely originally intended to apply to acts committed outside the United States; in the eighteenth century, the law of nations was understood to apply to piracy on the high seas.)

The defendants also claim that foreign courts, by declining to exercise comparable jurisdiction, have either implied or ruled that doing so would violate international law. Indeed, courts declining to hear foreign human rights suits have pointed out that most other countries' courts also do not hear such cases. That observation can undoubtedly give comfort to any country deciding that it, like so many others, will not assume the unwelcome burden of hearing foreigners' claims of foreign atrocities. It does not, however, imply that any country's court would violate international law by carrying out international law. Global human rights law prescribes global norms of conduct. It leaves the question of how to enforce those norms to the countries themselves.

That other countries have not yet empowered their courts to hear foreign human rights lawsuits is no reason for the United States to withdraw the jurisdiction its courts have exercised for over 30 years. If the Supreme Court barred federal courts from hearing suits about foreign atrocities under the ATS, it would be making a sad mistake. For one thing, the ruling would not necessarily terminate such litigation in the United States; it might merely move the cases from federal courts to state courts, where the Supreme Court would exercise less control. (Unlike federal courts, state courts do not need explicit statutory authorization to hear cases.) More troubling, the Supreme Court, through such a ruling, would embrace the retrograde proposition that distant genocides are not the business of the United States -- and deal a devastating blow to hopes of expanding global recognition of human rights.

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