

REPARATIONS FOR DISPLACED TORTURE VICTIMS

Kathryn Metcalf

TABLE OF CONTENTS

I. INTRODUCTION	451
II. EVOLUTION OF AN INTERNATIONAL VICTIMS' RIGHT TO A REMEDY	455
III. INTERPRETING ARTICLE 14 OF THE CAT	461
IV. THE CASE FOR UNIVERSAL CIVIL JURISDICTION	468
A. What is Universal Jurisdiction?.....	468
B. The Benefits of Civil Proceedings.....	471
C. The Plight of Refugees and Asylees	472
V. A FRAMEWORK FOR REPARATIONS.....	474
A. The Torture (Damages) Bill	474
B. Judicial Enforcement.....	477
C. Overcoming Doubts and Recognizing Shortcomings..	479
1. Political Implications.....	479
2. Opening the Floodgates of Litigation	482
3. Providing an Illusory Remedy	483
VI. CONCLUSION	484

I. INTRODUCTION

Survivors of torture¹ and other brutal and de-humanizing

¹ Under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, *adopted and opened for signature* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT], torture is defined as:

[A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other

452 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 19:451]

treatment are often forced to flee their country of nationality for fear of continued persecution. Although these individuals are victims of grave abuses that lead to permanent physical, psychological, and economic harm, few ever obtain justice or redress for these violations.² The right to a remedy for torture is codified in international and regional covenants,³ as well as in many domestic laws,⁴ yet most victims of torture cannot successfully assert this right in any court once they have fled the country of persecution.⁵ Refugees rarely can obtain redress for

person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id.

² REDRESS TRUST, LEGAL REMEDIES FOR VICTIMS OF "INTERNATIONAL CRIMES" FOSTERING AN EU APPROACH TO EXTRATERRITORIAL JURISDICTION 2 (2004), <http://www.redress.org/downloads/publications/LegalRemediesFinal.pdf>.

³ See CAT, *supra* note 1, art. 14; Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 8, U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>; International Covenant on Civil and Political Rights art. 2(3), opened for signature Dec. 19, 1966, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, adopted Dec. 21, 1965, 660 U.N.T.S. 195; Convention of the Rights of the Child art. 39, adopted Nov. 20, 1989, 28 I.L.M. 1448 (1989); Rome Statute of the International Criminal Court art. 75, adopted July 17, 1998, 2187 U.N.T.S. 90; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights art. 63, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁴ For example, Argentina has several different statutes concerning reparations. See generally REDRESS TRUST, REPARATION FOR TORTURE: A SURVEY OF LAW AND PRACTICE IN THIRTY SELECTED COUNTRIES (ARGENTINA COUNTRY REPORT) (2003), <http://www.redress.org/downloads/country-reports/Argentina.pdf>. Article 1067 of Argentina's Civil Code provides tort victims the right to compensation against those responsible, including state actors. *Id.* at 14. Argentina also enacted reparations measures to provide redress to the massive numbers of victims who were tortured, forcibly disappeared and killed by the military forces, paramilitary groups, or other security forces throughout Argentina's history. *Id.* at 16-17. Colombia enacted Act No. 975 of 2005, also known as the Justice and Peace Act, which provides a right to compensation, restitution of property, rehabilitation payments, and restoration of legal rights to victims of the conflict between Colombian armed forces and paramilitary groups. See Inter-American Comm'n on Human Rights, OAS, *Statement by the Inter-American Commission on Human Rights on the Application of the Justice and Peace Law in Colombia*, OEA/Ser/LV/II.125, doc. 15, Aug. 1, 2006, <http://www.cidh.org/Pronunciamiento.8.1.06ENG.pdf>. Morocco, South Africa, and Peru (among other countries) created truth and reconciliation commissions that also have the capacity to provide reparations to victims of torture. See *Morocco's Truth Commission: Honoring Past Victims during an Uncertain Present*, HUMAN RIGHTS WATCH, Nov. 27, 2005, <http://www.hrw.org/en/reports/2005/11/27/moroccos-truth-commission-0>; Comm. Against Torture, *Initial Report of State Party to the Committee Against Torture: South Africa*, ¶¶ 176-83, U.N. Doc. CAT/C/52/Add.3 (Aug. 15, 2005); Comm. Against Torture, *Fourth Periodic Report to the Committee Against Torture: Peru (Addendum)*, ¶¶ 120-21, U.N. Doc. CAT/C/61/Add.2 (May 27, 2005).

⁵ See Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of*

their persecution, and they are often precluded from filing suit in the asylum country for lack of contacts with the forum state.⁶ The emergence of universal civil jurisdiction provides a basis to fill this egregious gap in international law by ensuring that all torture victims have access to reparations.⁷ Universal civil jurisdiction enables domestic courts to assert jurisdiction in claims for damages resulting from certain universally reprehensible crimes (like torture) regardless of the adjudicating country's ties to the crime, victim or accused.⁸

In recent years, a debate has centered on whether Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁹ requires a State Party to invoke universal civil jurisdiction to provide redress for victims of torture within their borders regardless of the victim's nationality or where the torture occurred.¹⁰ Two recent decisions in Canada and the United Kingdom, *Bouzari v. Iran*¹¹ and *Jones v. Saudi Arabia*¹² respectively, determined that state immunity bars claims under Article 14 of CAT if there is no link between the forum state and the underlying torture claim. If the Canadian and U.K. interpretations are accepted as correct, refugees and asylees who are forced to flee their country of nationality after being tortured will have no recourse to pursue a remedy in the jurisdiction where they ultimately take up residence unless that country enacts legislation on its own accord.

Human Rights Norms in the Context of the Proposed Hague Judgments Convention, 42 HARV. INT'L L.J. 141, 181 (2001).

⁶ *Id.*

⁷ Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 142 (2006). The term "reparation" should be read in the context of the "Basic Principles and Guidelines" as a holistic concept encompassing restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. 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. 147, ¶ IX, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter Basic Principles and Guidelines].

⁸ Donovan & Roberts, *supra* note 7.

⁹ CAT, *supra* note 1.

¹⁰ See MANFRED NOWAK & ELIZABETH MCARTHUR, THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY 492 (2008); Donovan & Roberts, *supra* note 7, at 148-49; Christopher Keith Hall, *Duty of States Parties to the Convention Against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT'L L. 921, 922 (2007).

¹¹ *Bouzari v. Islamic Republic of Iran*, [2002] 71 O.R.3d 675 (Can.).

¹² *Jones v. Ministry of Interior Al-Mamlaka A-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 (U.K.).

The Committee Against Torture, the U.N. body created to monitor the implementation of obligations under CAT, expressed concern at such an interpretation of the CAT and stated that countries have a positive obligation to ensure “all victims of torture” are afforded access to reparations under national legislation.¹³ Narrow domestic court interpretations of the CAT arguably defeat the Convention’s broad goals to universally prohibit and prevent torture.¹⁴ A primary component of preventing torture is providing a remedy to those who have been harmed and reintegrating those victims into society.¹⁵

This Note argues that Article 14 of the CAT obligates each State Party to ensure in their domestic legislation that all torture victims have access to reparations. The rise of universal criminal jurisdiction has chipped away at the doctrine of state immunity. Considering that universal civil jurisdiction is less intrusive on state sovereignty than universal criminal jurisdiction, state immunity should not be used to bar civil actions from torture victims who will otherwise go without a remedy.

Part II of this Note details the emergence of victims’ rights to a remedy in international law, tracing the origins of victims’ rights to the post-World War II era. The right to redress for torture, though specifically codified in the CAT, is given meaning in the U.N. General Assembly Resolution on the 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 (Basic Principles and Guidelines).¹⁶ These guidelines, though not binding, are indicative of an emerging international consensus regarding a State Party’s obligation to provide a remedy to domestic torture victims. The Basic Principles and Guidelines are “a widely accepted source of inspiration for domestic practices and a useful tool for establishing victim-oriented policies.”¹⁷

¹³ Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Canada*, U.N. Doc. CAT/C/CR/34/CAN (Jul. 7, 2005) [hereinafter *Committee Against Torture: Canada*].

¹⁴ See Hall, *supra* note 10, at 922.

¹⁵ See Agiza v. Swed., Comm. Against Torture Decision on Communication No. 233/3003, ¶ 13.6, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005).

¹⁶ Basic Principles and Guidelines, *supra* note 7.

¹⁷ INSTITUTE FOR INTERNATIONAL LAW AND HUMAN RIGHTS, REPARATIONS FOR TORTURE VICTIMS IN IRAQ: IMPLEMENTING ARTICLE 14 OF THE CONVENTION AGAINST TORTURE 6 (2009) (internal quotations omitted). See *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*, OFFICE OF THE UNITED NATIONS HIGH

Though a number of states have implemented laws enabling victims of torture to pursue a remedy in national courts,¹⁸ most states fail to provide redress to victims who were tortured outside the forum's jurisdiction. Part III analyzes the legal obligations entailed in Article 14 of the CAT in light of general principles of treaty interpretation and discusses why current state practice distorts the plain meaning of Article 14.

Part IV argues that despite the misguided view of several national courts, states must provide for universal civil jurisdiction for victims of torture with a focus on refugees and stateless individuals. Bearing in mind the gravity of the violations involved, states must fulfill their obligations under international law to ensure all victims have a forum where they can bring a suit for reparations. Refugees and stateless individuals who are torture victims are among the most vulnerable members of the world's population; not only have they been violently uprooted from their homelands, but they also face countless obstacles in their efforts to recover from the harms they have suffered. Denying these individuals access to a remedy induces re-victimization and sanctions impunity for the most heinous crimes.

In arguing for the acceptance of universal civil jurisdiction, Part V will confront obstacles to implementation, particularly state immunity, and offer a framework for addressing these concerns in light of the proposed Torture Bill in the United Kingdom and the jurisprudence from the Inter-American Court of Human Rights.

II. EVOLUTION OF AN INTERNATIONAL VICTIMS' RIGHT TO A REMEDY

Historically, the doctrine of state sovereignty dominated international law, preventing the emergence of an effective system guaranteeing the rights of individuals.¹⁹ The dominant theory ensured that "[n]o State or group of States has the right to

COMMISSIONER FOR HUMAN RIGHTS, HR/PUB/08/1, U.N. Sales No. E.08.XIV.3 (2008), [http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7DDHAY\\$file/ohchr_apr2008.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/PANA-7DDHAY$file/ohchr_apr2008.pdf?openelement) [hereinafter RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES].

¹⁸ See discussion *supra* note 4.

¹⁹ See Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L.J. 241, 249-56 (2001) ("The individual does not have any legal capacity under general international law. The individual cannot bring a claim against a State when the State is alleged to have violated his rights, only the State of the individual's nationality can bring a claim in international forums."); Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 784-87 (2006).

456 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 19:451]

intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”²⁰ In this spirit, a state’s treatment of its own citizens was considered to be a matter of state sovereignty in which the international community could not intervene.²¹ Traditionally, a violation by one state against a national of another state only gave rise to a claim for redress by the victimized national’s state.²² The victim had no role to play in international law.

In the aftermath of World War II, the international community significantly shifted gears, acknowledging that human rights were no longer exclusively a matter of domestic jurisdiction. Rather, states began to recognize that victims of human rights abuses had a right to seek redress for their violations.²³ Accordingly, many countries created international covenants requiring states to protect the rights of individuals and to enact domestic legislation protecting those rights.²⁴ The atrocities committed during World War II called attention to “large-scale victimization [and] brought about a new social basis for redress.”²⁵

Though states began providing a remedy to victims harmed by other individuals, states resisted providing reparations when violations were committed by state officials or as the result of state policy.²⁶ Over time, however, states’ reluctance to provide a remedy has diminished with the rise of regional court systems and other international judicial bodies that provide a legal basis for individuals to obtain redress.²⁷ The need for victims’ rights became apparent from the devastating effects of mass atrocity as states’ realized accountability is essential to prevention and the maintenance of global security.²⁸ The notion that a person is

²⁰ Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 123 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

²¹ See Buergenthal, *supra* note 19, at 785-87.

²² Theo van Boven, *Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 19, 21 (Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009).

²³ *Id.*

²⁴ M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 209 (2006).

²⁵ *Id.* at 210.

²⁶ *Id.* at 211.

²⁷ *Id.*

²⁸ *Id.* at 210.

entitled to redress after a right is violated is now a fundamental principle of international law that is enshrined in domestic legislation in most countries around the world.²⁹

The CAT is the premier international covenant addressing the rights of torture victims to redress. The CAT imposes on each State Party positive obligations to enact domestic legislation to “prohibit, prevent, and redress torture” and other cruel and dehumanizing conduct.³⁰ The standards promulgated in the CAT do not create new legal obligations, but, rather, codify long-established norms of international law regarding the prohibition on torture and the right to an effective remedy after a violation.³¹

In ratifying the CAT, each State Party agrees procedurally to create domestic institutions to provide redress to victims,³² and, substantively, to provide reparations to victims that are “best suited to restore their dignity and humanity.”³³ In regards to the procedural aspects, Article 14 requires State party to the Convention to enact legislation to provide redress and “an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”³⁴ This right to an

²⁹ Bassiouni, *supra* note 24, at 207. The underpinnings for the right to a remedy stem from *Factory at Chorzów*, an early case in the Permanent Court of International Justice in which the court declared: “It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form.” *Factory at Chorzów* (Jurisdiction) (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 8, at 21 (July 26). In regards to national legislation, the Alien Tort Claims Statute and Torture Victims Protection Act in the United States are the most prominent examples of comprehensive legislation providing torture victims with redress regardless of whether the torture was committed extraterritorially. Other countries have taken other steps to provide a remedy to victims of grave human rights abuses. Germany, for example, enacted the 1953 Final Federal Compensation Law to pay \$714 million to the Israeli government for the repatriation of displaced individuals from Germany and \$110 million to the Conference of Jewish Material Claims against Germany for Holocaust victims. Jeremy Sarkin, *Reparation for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, to Pursue African Human Rights Claims*, 32 INT’L J. LEGAL INFO. 426, 436-37 (2004). Argentina enacted legislation to provide redress to thousands of victims who were tortured and forcibly disappeared from 1976 to 1983 during a brutal military dictatorship. See Human Rights Council, *Nat’l Report Submitted in Accordance with ¶ 15(a) of the Annex to Human Rights Council Resolution 5/1: Argentina*, ¶ 29, U.N. Doc. A/HRC/WG.6/1/ARG/1 (Mar. 10, 2008).

³⁰ Comm. Against Torture, *General Comment No. 2*, ¶ 15, U.N. Doc. CAT/C/GC/2, (Jan. 24, 2008).

³¹ See van Boven, *supra* note 22, at 32.

³² The Special Rapporteur on Torture, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak*, ¶ 63, U.N. Doc. A/HRC/4/33 (Jan. 15, 2007).

³³ *Id.* ¶ 64.

³⁴ CAT, *supra* note 1, art. 14.

effective remedy “underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory.”³⁵ The term “victim” within the CAT is not only confined to the individual who suffered from torture, but can also include “groups of persons who are targeted collectively[,]”³⁶ as well as indirect victims, such as family members.³⁷ As defined in Article 1, obligations under CAT are targeted at acts of torture committed “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”³⁸ The right to reparations is a right to a remedy for an ongoing wrong, in which “the passage of time has no attenuating effects.”³⁹ Accordingly, victims seeking to enforce their right to a remedy should not be restricted by a statute of limitations.⁴⁰

With respect to the substantive component of the right to redress, full rehabilitation often necessitates “a combination of medical assistance, financial support, social re-adaptation, legal redress and, in some cases public acknowledgement.”⁴¹ Similarly, the Committee Against Torture in *Kepa Urra Guridi v. Spain*⁴² emphasized that the redress envisioned in Article 14 required states to do more than just provide monetary compensation. In a

³⁵ *Agiza v. Swed.*, Comm. Against Torture Decision on Communication No. 233/3003, ¶ 13.6, U.N. Doc. CAT/C/34/D/233/2003 (May 20, 2005). See *Factory at Chorzów*, 1927 P.C.I.J. at 21 (“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention . . .”).

³⁶ Basic Principles and Guidelines, *supra* note 7, pmbl.

³⁷ *Id.* ¶ 8. According to the CAT:

[V]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Id.

³⁸ CAT, *supra* note 1, art. 1.

³⁹ The Secretary-General, *Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 58, U.N. Doc. A/59/324 (Sept. 1, 2004).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Kepa Urra Guridi v. Spain*, ¶ 6.8, U.N. Doc. CAT/C/34/D/212/2002 (2005). The Committee Against Torture recently reiterated the need for states to provide more than compensation in *Ali Ben Salem v. Tunisia*. *Ali Ben Salem v. Tunisia*, U.N. Doc. CAT/C/39/D/269/2005 (Nov. 7, 2007).

2011] REPARATIONS FOR TORTURE VICTIMS 459

more recent decision, *Ali Ben Salem v. Tunisia*, where a human rights activist was brutally beaten by Tunisian police officers, the Committee Against Torture elaborated on *Kepa Guridi v. Spain*, reiterating that “redress should cover all the harm suffered by the victim, including restitution, compensation, rehabilitation of the victim and measures to guarantee there is no recurrence of the violations.”⁴³ Furthermore, the Special Rapporteur, Manfred Nowak, determined that Article 14 “should be interpreted in light of the Basic Principles and Guidelines.”⁴⁴

The Basic Principles and Guidelines, which were adopted by the U.N. General Assembly in 2005 after extensive negotiations, complement Article 14 of CAT and provide guidance to States Parties on the implementation of their legal duties to provide redress to victims of torture.⁴⁵ According to the Basic Principles and Guidelines, “full and effective reparation” must be provided to victims in proportion “to the gravity of the violations and the harm suffered,”⁴⁶ and should include: (1) restitution; (2) compensation; (3) rehabilitation; (4) satisfaction; and (5) guarantees of non-repetition.⁴⁷

Restitution is intended to restore the victim to his or her condition prior to the violations and requires the state to take measures to restore the victim’s “liberty, enjoyment of human rights, identity, family life and citizenship, employment and property.”⁴⁸ Though restitution is the “preferred remedy,”⁴⁹ the Special Rapporteur has underscored the difficulty of providing adequate restitution to torture victims “as the suffering inflicted cannot be taken away.”⁵⁰

Compensation should be provided to torture victims for any “economically assessable damage.”⁵¹ Compensation should encompass damages arising from both physical and mental harm,

⁴³ *Ali Ben Salem*, U.N. Doc. ¶ 16.8.

⁴⁴ The Special Rapporteur on Torture, *supra* note 32, ¶ 61.

⁴⁵ van Boven, *supra* note 22.

⁴⁶ Basic Principles and Guidelines, *supra* note 7, ¶ 15. The creation of a national reparations program is encouraged to provide compensation to victims when the liable party is insolvent or unwilling to pay the victim. *Id.* ¶ 16.

⁴⁷ *Id.* ¶ 18.

⁴⁸ *Id.* ¶ 19.

⁴⁹ DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 272 (Oxford Univ. Press 2005).

⁵⁰ The Special Rapporteur on Torture, *supra* note 32, ¶ 65.

⁵¹ Basic Principles and Guidelines, *supra* note 7, ¶ 20.

and must correspond to the gravity of the violations.⁵² Remuneration should account for “lost opportunities, including employment, education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”⁵³ Scholars and non-governmental organizations (NGOs) argue that compensation is critical for a victim’s “reintegration in society” and is often “easier to pursue than criminal prosecution because it is less threatening to authorities.”⁵⁴

Rehabilitation compels states to provide “medical and psychological care as well as legal and social services” to victims of torture.⁵⁵ The purpose of rehabilitation is to help victims overcome the physical and mental effects of victimization and to “empower them to move past their pain.”⁵⁶ While acknowledging that rehabilitation measures are usually costly to implement, the Special Rapporteur nonetheless stresses that an effective remedy requires a long-term commitment to victims’ rehabilitation.⁵⁷

Satisfaction is intended to recognize that torture harms the victim, as well as the community, and calls on the community to stop the violations, investigate the abuse, document and publicize what occurred, call for justice, and collectively remember the atrocities perpetrated.⁵⁸ These actions are forward-looking and “help to bridge a gap between victims and their community.”⁵⁹ Measures to provide adequate satisfaction include “a broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, [and] human rights training.”⁶⁰ Some argue that commemorations to the victims can be more meaningful to victims than monetary compensation.⁶¹

Guarantees of non-repetition include “broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening

⁵² van Boven, *supra* note 22.

⁵³ *Id.* at 39.

⁵⁴ Bassiouni, *supra* note 24, at 269.

⁵⁵ Basic Principles and Guidelines, *supra* note 7, ¶ 21.

⁵⁶ *Id.*

⁵⁷ The Special Rapporteur on Torture, *supra* note 32, ¶¶ 66-8.

⁵⁸ Basic Principles and Guidelines, *supra* note 7, ¶ 22.

⁵⁹ Bassiouni, *supra* note 24, at 272.

⁶⁰ van Boven, *supra* note 22, at 39.

⁶¹ Bassiouni, *supra* note 24, at 272.

judicial independence, the protection of human rights defenders, the promotion of human rights standards in public service, law enforcement, the media, industry, and psychological and social services.”⁶² While some of these measures could be sought in a judicial proceeding, the state legislature is the primary body responsible for ensuring non-repetition.⁶³

According to the Basic Principles and Guidelines, domestic remedies should be flexible, enabling the state to provide one or more of the five forms of reparations depending on the circumstances of the violation and the needs of the victim.⁶⁴ Though the Basic Principles and Guidelines are not legally binding on states party to the CAT, they are generally accepted as representative of international consensus and serve as a widely accepted benchmark for gauging torture victims’ rights to a remedy.⁶⁵

III. INTERPRETING ARTICLE 14 OF THE CAT

States party to the CAT are required to provide reparations to victims of domestic torture, yet a major question surrounding Article 14 is whether it could be interpreted “as requiring States Parties to provide the same civil right to redress for torture which occurs outside its jurisdiction as it is obliged to provide for torture which is alleged to have occurred within its territorial and other jurisdiction.”⁶⁶ This issue came under close scrutiny in Canada⁶⁷ and the United Kingdom⁶⁸ when individuals sought relief in domestic courts for torture committed extraterritorially. In equally controversial opinions, both courts determined that state immunity precludes extending Article 14 to extraterritorial torture.⁶⁹ Before analyzing the merits of these cases, it is useful to look to the text of Article 14 in light of the purpose of the CAT, as well as the *travaux preparatoires*,⁷⁰ for guidance on the legal

⁶² van Boven, *supra* note 22, at 39.

⁶³ Bassiouni, *supra* note 24, at 274-75.

⁶⁴ van Boven, *supra* note 22.

⁶⁵ See *Rule-of-Law Tools for Post-Conflict States*, *supra* note 17.

⁶⁶ NOWAK & MCARTHUR, *supra* note 10.

⁶⁷ Bouzari v. Islamic Republic of Iran, [2002] 71 O.R.3d 675 (Can.).

⁶⁸ Jones v. Ministry of Interior Al-Mamlaka A-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), [2006] UKHL 26 (U.K.).

⁶⁹ See Bouzari, 71 O.R.3d ¶ 73; see also Jones, [2006] UKHL ¶ 35.

⁷⁰ *Travaux preparatoires* is the formal term for the official negotiation history of a treaty.

implications of the provision.

Article 14 provides that “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.”⁷¹ As was pointed out in *Bouzari v. Iran*:

The absence of a territorial constraint in Article 14, in contrast with the wording of Articles 11 through 13, mean[s] that there [is] no geographical limitation in Article 14 . . . [and implies] an obligation to provide a civil remedy for torture, even if the acts are committed outside the jurisdiction.⁷²

Some scholars interpret the drafters’ decision to geographically restrict certain provisions but not others as an indication that the drafters only intended such restrictions to apply where they expressly indicated territorial limitations in the article.⁷³ Although Article 14 does not expressly limit redress to territorial acts of torture, neither does it expressly require states to provide redress to victims for acts of torture committed anywhere. Considering that the primary objective of the CAT is to “deal with the global scourge”⁷⁴ of torture and “to defeat impunity,” many argue that reading the provision in favor of universal civil jurisdiction arguably would be more consistent with the object and purpose of the CAT.⁷⁵

Rather than providing clarity, the negotiating history only generates more questions as to the intended meaning of Article 14. In the original 1980 draft of the CAT, Article 14 did not expressly provide a territorial limitation, nor did anyone suggest that one

⁷¹ CAT, *supra* note 1, art. 14(1).

⁷² *Bouzari*, 71 O.R.3d ¶ 46. In contrast to Article 14, Articles 11 through 13 of the CAT are limited to non-extraterritorial jurisdiction. Article 11 provides that each State Party must systematically review “interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in *any territory under its jurisdiction*.” CAT, *supra* note 1, art. 11 (emphasis added). Articles 12 and 13 contain similar references. Article 12 requires States Parties to investigate allegations “where there is reasonable ground to believe that an act of torture has been committed in *any territory under its jurisdiction*.” *Id.* art. 12 (emphasis added). Likewise, Article 13 requires States Parties to “ensure that any individual who alleges he has been subjected to torture in *any territory under its jurisdiction* has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities.” *Id.* art. 13 (emphasis added).

⁷³ Hall, *supra* note 10, at 926.

⁷⁴ *Id.* at 923.

⁷⁵ NOWAK & MCARTHUR, *supra* note 10, at 495.

should be added.⁷⁶ The 1981 Session of the Working Group of the CAT inserted a territorial limitation, but the 1982 Working Group removed the geographic restriction with no explanation as to why it was deleted.⁷⁷ Though some argue in favor of interpreting the removal of territorial limitation as an intentional decision to incorporate universal civil jurisdiction into Article 14, others claim that territorial limitation was so obvious that it did not need to be spelled out.⁷⁸ Both interpretations are logical but neither is conclusive.

Regardless of the reasoning for removing the provision, Article 14, along with the entire convention, underwent considerable scrutiny by the U.N. General Assembly before the convention was finalized and approved.⁷⁹ Not one state objected to the language of Article 14.⁸⁰ However, the lack of an objection is not dispositive. The language of Article 14 continues to be a source of much controversy with several States Parties arguing against an extraterritorial application,⁸¹ while the Committee Against Torture,⁸² the Special Rapporteur,⁸³ and a number of scholars and NGOs contend that Article 14 permits the exercise of

⁷⁶ *Id.*

⁷⁷ *Id.* See Hall, *supra* note 10, at 931-32.

⁷⁸ NOWAK & MCARTHUR, *supra* note 10, at 495. See Hall, *supra* note 10, at 933 (“The Commission on Human Rights . . . carefully scrutinized the Working Group’s text at its 1982, 1983, and 1984 sessions and it appears that not a single state objected to the Working Group’s decision to omit the geographic restriction or contended that it was a ‘mistake’”).

⁷⁹ Hall, *supra* note 10, at 933-35.

⁸⁰ *Id.* at 933. It should be noted, however, that upon submitting the ratifying instruments for the United States in 1988, President Reagan stated that the restrictive languages must have been “deleted by mistake” since no explanation from the drafters accompanied the removal. *Id.* at 934. Apparently President Reagan did not provide any authority to justify his conclusion, and “[t]here are almost no academic articles that give any credence to [this] claim.” *Id.* at 934-935.

⁸¹ Courts in Canada and the United Kingdom have publicly denounced an extraterritorial application, and neither legislature has enacted legislation to the contrary. See Bouzari v. Islamic Republic of Iran, [2002] 71 O.R.3d 675 (Can.); Jones v. Ministry of Interior Al-Mamlaka A-Arabiya AS Saudiya (the Kingdom of Saudi Arabia), [2006] UKHL 26 (U.K.). Parliamentarians in the United Kingdom have put forward the Torture Bill which would essentially overrule *Jones v. Kingdom of Saudi Arabia* by providing for universal jurisdiction; however, the bill is still being deliberated. See *infra* Parts III, IV.C, V.A. Despite providing universal civil jurisdiction in the Alien Tort Claims Act, the United States has argued forcefully that Article 14 does not have extraterritorial effect. See NOWAK & MCARTHUR, *supra* note 10, at 494-95. The United States has even entered a reservation clarifying that it understands Article 14 as subject to territorial limitations. *Id.*

⁸² See *Committee Against Torture: Canada*, *supra* note 13, ¶ 4(g).

⁸³ See NOWAK & MCARTHUR, *supra* note 10, at 495-502.

universal jurisdiction.⁸⁴

With only a few exceptions, state courts that have addressed the extraterritoriality question have typically relied on the uncertainty surrounding the *travaux preparatoires* and the unresolved language of Article 14 to give credence to their conclusion that states are not obligated under Article 14 to provide reparations to victims of extraterritorial torture.⁸⁵ In *Bouzari v. Iran*, Houshang Bouzari, an Iranian national in the process of applying for Canadian citizenship, filed suit in Canada to recover damages for acts of torture against him that allegedly took place in Iran by the Iranian government.⁸⁶ The Ontario Superior Court of Justice concluded that Article 14 does not obligate States Parties to provide a civil remedy for torture occurring outside the state's jurisdiction. The court found support for its holding on several grounds: (1) Article 14 is silent on its territorial applicability;⁸⁷ (2) no state had interpreted Article 14 to apply to foreign acts committed "other than in the forum state;"⁸⁸ and (3) the Committee Against Torture had not expressed concern regarding state practice to provide a remedy only for acts occurring within the state's jurisdiction.⁸⁹

Furthermore, the Canadian court found that state immunity bars a civil action for torture committed in a foreign jurisdiction. The *Bouzari* court relied heavily on a European Court of Human Rights Case, *Al-Adsani v. The United Kingdom*, which stated:

Notwithstanding the special character of the prohibition of torture in international law, the Court is unable to discern . . . any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil

⁸⁴ See Hall, *supra* note 10; Donovan & Roberts, *supra* note 7; AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE SCOPE OF UNIVERSAL CIVIL JURISDICTION 4, AI Index: IOR 53/008/2007 (July 2007) [hereinafter AMNESTY INTERNATIONAL, THE SCOPE OF UNIVERSAL CIVIL JURISDICTION]; REDRESS TRUST, REHABILITATION AS A FORM OF REPARATION UNDER INTERNATIONAL LAW (2009), <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf>.

⁸⁵ *Id.* at 62.

⁸⁶ *Bouzari*, 71 O.R.3d ¶ 1.

⁸⁷ *Id.* ¶ 47.

⁸⁸ *Id.* ¶ 50. Though this statement may have been true at the time, see *Ferrini v. Federal Republic of Germany*, where the Italian Court of Cassation has since found jurisdiction under Article 14 for acts of torture committed extraterritorially. See Andrea Bianchi, *Italian Court of Cassation, March 11, 2004*, 99 AM. J. INT'L L. 242, 244 (2005).

⁸⁹ *Bouzari*, 71 O.R.3d ¶ 51. Ironically, the Committee Against Torture took the opportunity to express concern about state practice as a result of *Bouzari v. Iran*. See *Committee against Torture: Canada*, *supra* note 13, ¶ 5(f).

2011] REPARATIONS FOR TORTURE VICTIMS 465

suit in the courts of another State where acts of torture are alleged.⁹⁰

As a result of the *Bouzari* court's adoption of the *Al-Adsani* reasoning, Bouzari was essentially left with no available remedy.⁹¹

After the case was decided the U.N. body authorized to interpret the CAT, the Committee Against Torture,⁹² expressed concern regarding the "absence of effective measures to provide civil compensation to victims of torture in all cases" in Canada.⁹³ The Committee Against Torture recommended that Canada "review its position under [A]rticle 14 of the [CAT] to ensure the provision of compensation through its civil jurisdiction to all victims of torture."⁹⁴ The Committee Against Torture has since made numerous similar comments reiterating that States Parties should provide reparations to all victims of torture.⁹⁵ Though these comments are not binding on States Parties, they are an authoritative source for interpretations of the CAT.⁹⁶

⁹⁰ *Al-Adsani v. The United Kingdom*, 34 E.H.R.Rep. 11, 291 (2002).

⁹¹ NOWAK & MCARTHUR, *supra* note 10, at 497.

⁹² See CAT, *supra* note 1, art. 19.

⁹³ *Committee Against Torture: Canada*, *supra* note 13, ¶ 4(g).

⁹⁴ *Id.* ¶ 5(f).

⁹⁵ See Comm. Against Torture, *Concluding Observations of the Committee Against Torture: Nicaragua*, ¶ 25, U.N. Doc. CAT/C/NIC/CO/1 (June 10, 2009), <http://www.unhcr.org/refworld/pdfid/4a85632bd.pdf> (inquiring as to whether Nicaragua's reparation program is "available only to nationals or also to other groups, such as refugees"); Comm. Against Torture, *List of issues: Benin*, ¶ 20, U.N. Doc. CAT/C/BEN/Q/2 (July 9, 2007), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/403/52/PDF/G1040352.pdf?OpenElement> (inquiring whether reparations in Benin are also available to refugees and non-nationals); Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Japan*, ¶ 23, U.N. Doc. CAT/C/JPN/CO/1 (May 18, 2007), <http://www.unhcr.org/refworld/pdfid/46cee6ac2.pdf> (Japan "should take all necessary measure to ensure that all victims of acts of torture or ill-treatment can exercise fully their right to redress, including compensation and rehabilitation"); Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Republic of Korea*, ¶ 8, U.N. Doc. CAT/C/KOR/CO/2 (May 18, 2006), <http://www.unhcr.org/refworld/pdfid/45c30b9b0.pdf> (Korea "should ensure in its legal system . . . all victims obtain redress and have an enforceable right to fair and adequate compensation"); Comm. Against Torture, *Conclusions and Recommendations of the Committee Against Torture: France*, ¶ 4(f), U.N. Doc. CAT/C/FRA/CO/3 (Apr. 3, 2006), <http://www.unhcr.org/refworld/pdfid/45c30b7c0.pdf> (commending France for establishing a "mechanism that enables victims of terrorism to obtain compensation even in respect of acts that took place outside French territory"); Comm. Against Torture, *List of Issues: Ukraine*, ¶ 30, U.N. Doc. CAT/C/UKR/Q/5/Rev.1 (Feb. 26, 2007), <http://helsinki.org.ua/files/docs/1178804408.pdf> (requesting information on whether Ukraine's "procedures in place to obtain rehabilitation and compensation for victims of torture . . . are also available to non-nationals").

⁹⁶ See NOWAK & MCARTHUR, *supra* note 10, at 500 ("[I]n ratifying the [CAT], a State accepts that although the views of the relevant treaty body are not binding, its

However, the paucity of the Committee Against Torture's statements makes it difficult to glean authoritative guidance on the legal obligations of Article 14. The Committee could have expressly clarified that states are obligated to provide reparations regardless of where the torture was committed and by whom, but it chose to rely on vague implications to that effect.⁹⁷ Unfortunately, the Committee has yet to directly address the territoriality issue in more detail or provide more guidance to States Parties regarding its position.⁹⁸ Consequently, it seems that while Article 14 has not yet been interpreted to require states to provide a remedy for extraterritorial torture, the CAT also does not "preclude States from adopting a universal approach to redress."⁹⁹

Notwithstanding the Committee Against Torture's comments in the wake of *Bouzari v. Iran*, the British House of Lords recently followed the course set by the Canadian court and expressly held that "[A]rticle 14 of the Torture Convention does not provide for universal civil jurisdiction."¹⁰⁰ In *Jones v. Saudi Arabia*, British citizens brought a civil action in the United Kingdom against the State of Saudi Arabia and certain government officials for acts of torture committed in Saudi Arabia.¹⁰¹ Disappointingly, the British court acknowledged but then disregarded the Committee Against Torture's comments to Canada, stating: "Whatever its value in influencing the trend of international thinking, the legal authority

interpretations are authoritative.").

⁹⁷ *Id.* at 493.

⁹⁸ The Committee Against Torture is beginning to request information from States Parties regarding the scope of their reparations programs and, in the case of Chile and Benin, specifically inquiring as to whether the programs are available to non-nationals and refugees. See generally Comm. Against Torture, *List of issues: Benin*, *supra* note 95. The Committee may be gathering information in order to provide more guidance to States Parties in their next reports. The Committee has not received a report from the United Kingdom since *Jones v. Saudi Arabia* was announced, so it has not had the opportunity to comment on the UK's decision. Likewise, Canada has not submitted a report in response to the Committee's suggestion that Canada reconsider its Article 14 position. The territorial applicability of Article 14 remains unclear but seemingly the Committee is preparing to clarify its authoritative opinion in the future. For access to State Party reports and the Committee's concluding observations, see Office of the United Nations High Commissioner for Human Rights, Comm. Against Torture, <http://www2.ohchr.org/english/bodies/cat/sessions.htm> (last visited Feb. 18, 2011).

⁹⁹ NOWAK & MCARTHUR, *supra* note 10, at 494.

¹⁰⁰ *Jones v. Ministry of Interior Al-Mamlaka A-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 ¶ 24 (U.K.).

¹⁰¹ *Id.*

2011] *REPARATIONS FOR TORTURE VICTIMS* 467

of this recommendation is slight.”¹⁰² This indifference implies that the court deems itself better situated to interpret the CAT than the designated authoritative body.¹⁰³

As in *Bouzari v. Iran*, the British court maintained that it is bound by the doctrine of state immunity, yet the *Jones* court took a step backwards by “failing to do justice to the distinction between State immunity and immunity of individual State officials.”¹⁰⁴ Though the Canadian court also found state immunity to be a bar to an extraterritorial civil remedy, the British court has now essentially sanctioned impunity for grave violations of human rights committed by foreign officials.¹⁰⁵ Since the victims will not otherwise be able to secure redress in Saudi Arabia, “[i]mpunity is the implication of the deprivation of the only available remedy.”¹⁰⁶ The House of Lords speculated on the meaning of Article 14 and disregarded the Committee Against Torture’s recommendation to Canada after a similar decision. In doing so, the British court handed down a decision that contributed to a now growing number of international precedents,¹⁰⁷ which deny torture victims a forum to bring claims against their torturers, thereby, permitting impunity and torture to continue.

Despite the expanding negative precedents from a handful of national courts, there is also a positive trend in the making. Significantly, the British House of Lords introduced legislation, known as the Torture (Damages) Bill (Torture Bill), which would effectively reverse the decision of the *Jones* court and enable victims of extraterritorial torture to bring an action for damages in the United Kingdom.¹⁰⁸ The Torture Bill passed the first reading in the House of Lords and is awaiting its second reading.¹⁰⁹ It is

¹⁰² *Id.* ¶ 23.

¹⁰³ See Alexander Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 EUR. J. INT’L L. 955, 963 (2008).

¹⁰⁴ NOWAK & MCARTHUR, *supra* note 10, at 499.

¹⁰⁵ See Orakhelashvili *supra* note 103, at 957.

¹⁰⁶ *Id.*

¹⁰⁷ See *Al-Adsani v. The United Kingdom*, 34 E.H.R.Rep. 11, 291 (2002); see also *Bouzari v. Islamic Republic of Iran*, [2002] 71 O.R.3d 675 (Can.).

¹⁰⁸ REDRESS TRUST, JUSTICE FOR TORTURE SURVIVORS IN THE UK: THE TORTURE (DAMAGES) BILL (2009), <http://www.redress.org/downloads/torture-bill/Torture%20Damages%20Bill%20REDRESS%20Briefing.pdf>.

¹⁰⁹ JOINT COMM. ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP: UK LAW ON GENOCIDE (AND OTHER RELATED CRIMES) AND REDRESS FOR TORTURE VICTIMS, 2008-09, H.L. 153, H.C. 553, ¶ 86, <http://www.official-documents.gov.uk/document/cm77/7704/7704.pdf> [hereinafter JOINT COMM. ON HUMAN RIGHTS, CLOSING THE IMPUNITY

468 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 19:451

also under consideration in the House of Commons.¹¹⁰

If this legislation is approved, the United Kingdom will be one of the first countries to enact laws allowing victims to bring claims for torture committed outside the United Kingdom's jurisdiction.¹¹¹ Furthermore, the Torture Bill would amend the U.K.'s state immunity laws so that "[l]iability would encompass not only an individual, but also any state whose servants or agents committed the torture."¹¹² If enacted, this United Kingdom would be the first State Party to change its position on Article 14 and would thereby encourage other States Parties to follow suit by embracing a broader territorial understanding of Article 14.

IV. THE CASE FOR UNIVERSAL CIVIL JURISDICTION

A. *What is Universal Jurisdiction?*

The principle of universal jurisdiction has been slowly emerging as a valuable tool for combating and redressing certain categories of egregious crimes, like genocide, war crimes, crimes against humanity, and torture.¹¹³ Under international law, national courts are permitted under the principle of universal jurisdiction to hear cases involving such heinous crimes even when there is little or no connection to the forum state (i.e. the crimes are committed extraterritorially, do not involve the state's nationals, and are committed by nationals of other states).¹¹⁴ Universal jurisdiction is not a new concept. Historically, states utilized the principle of universality to exercise jurisdiction over crimes such as piracy.

In recent years, universal jurisdiction has expanded with the

GAP]. The Torture Bill passed in the House of Lords during the 2007-08 but did not successfully progress through the House of Commons. *Id.* In the House of Lords, the Bill was introduced by Lord Archer of Sandwell. *Id.* During the 2007-08 parliamentary readings, the legislators acknowledge that *Jones v. Saudi Arabia* gave rise to the Torture Bill as a way to ensure that British law on state immunity would not be an impediment if a similar case were brought again. 701 PARL. DEB., H.L. (2008) 1220.

¹¹⁰ See JOINT COMM. ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP, *supra* note 109.

¹¹¹ United Kingdom Parliament, Torture (Damages) (No. 2) Bill 2008-09: Summary of the Bill, <http://services.parliament.uk/bills/2008-09/torturedamagesno2.html> (last visited Feb. 18, 2011).

¹¹² *Id.*

¹¹³ Donovan & Roberts, *supra* note 7, at 142.

¹¹⁴ *Id.*

growth of the international justice system based on the idea that certain crimes are so reprehensible as to be deemed crimes against the entire international community.¹¹⁵ The establishment of international courts, namely the Nuremberg Tribunal, International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and International Criminal Court (ICC), paved the way for senior government officials and heads of state to be held accountable by the international community for heinous crimes perpetrated against their own nationals.¹¹⁶ The 1998 arrest of former Chilean dictator Augusto Pinochet triggered the modern use of universal jurisdiction for grave human rights abuses.¹¹⁷

At least 125 countries have now enacted national legislation permitting universal criminal jurisdiction in certain circumstances.¹¹⁸ Another study of more than fifty European proceedings on universal jurisdiction “illustrates that universal jurisdiction is no longer a seldom-used theoretical concept, but a widespread practice.”¹¹⁹ Though the zeal for universal criminal jurisdiction has not spread as quickly to civil suits, there is growing

¹¹⁵ Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927, 931 (2009).

¹¹⁶ *Id.* at 928-31.

¹¹⁷ *Id.* Pinochet was arrested in the United Kingdom under a warrant issued by a Spanish Court alleging Pinochet had perpetrated crimes against humanity against Spanish citizens in Chile. See AMNESTY INTERNATIONAL, UK: THE PINOCHET CASE: UNIVERSAL JURISDICTION AND THE ABSENCE OF IMMUNITY FOR CRIMES AGAINST HUMANITY, AI Index EUR 45/001/1999 (Jan. 1, 1999), <http://www.amnesty.org/en/library/asset/EUR45/001/1999/en/63cc2d71-e35a-11dd-a06d-790733721318/eur450011999en.pdf>.

¹¹⁸ AMNESTY INTERNATIONAL, THE SCOPE OF UNIVERSAL CIVIL JURISDICTION, *supra* note 84, at 4. Belgium, for example, has become one of the most active states in implementing universal jurisdiction laws and prosecuting international crimes pursuant to its treaty obligations. Kaleck, *supra* note 115. Belgian courts have heard cases against former Chadian Dictator Hissène Habré, former Israeli Prime Minister Ariel Sharon, and four alleged orchestrators of the Rwandan genocide, to name a few examples. *Id.* Other states that expressly provide for universal jurisdiction over various international crimes or have proscribed international crimes in their national legislation include Canada, Germany, Ghana, New Zealand, and Austria. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE DUTY OF STATES TO ENACT AND IMPLEMENT LEGISLATION: CHAPTER EIGHT (STATE PRACTICE AT THE NATIONAL LEVEL), AI Index IOR 53/011/2001 (Sept. 2001), <http://www.amnesty.org/fr/library/asset/IOR53/011/2001/en/cc0c14c0-d8ef-11dd-ad8c-f3d4445c118e/ior530112001en.pdf>.

¹¹⁹ Kaleck, *supra* note 115. For examples of the exercise of universal jurisdiction in national courts, see AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: IMPROVING THE EFFECTIVENESS OF STATE COOPERATION 2-4, AI Index: IOR 53/006/2007 (June 2007), <http://www.amnesty.org/es/library/asset/IOR53/006/2007/en/9c06b0cf-d388-11dd-a329-2f46302a8cc6/ior530062007en.pdf>. See Schaack, *supra* note 5.

470 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 19:451]

support for such proceedings despite *Bouzari* and *Jones*.¹²⁰

Civil law countries with universal criminal jurisdiction permit victims to bring civil claims in criminal proceedings for abuses committed abroad.¹²¹ Where the prosecutor does not bring criminal charges, a victim is often permitted to initiate criminal proceedings as a *partie civile*.¹²² In an *action civile*, the victim may be awarded reparation or restitution in a judgment that can be “executed wherever the defendant’s assets are found under general principles governing the enforcement of foreign judgments or any operative enforcement treaty.”¹²³

The opportunity to recover in criminal proceedings has encouraged victims to bring suits in *action civiles*.¹²⁴ For example, Spanish, Argentine, and Chilean torture victims initiated criminal proceedings in Spain against former Chilean dictator Augusto Pinochet.¹²⁵ The torture was committed abroad by foreign nationals, yet Spain issued an arrest warrant and ordered Pinochet’s extradition from the United Kingdom.¹²⁶ During the criminal suit, the victims “reserved the right to seek civil reparations at the conclusion of the criminal proceedings.”¹²⁷

Unlike civil law jurisdictions, victims in common law jurisdictions can only initiate civil (not criminal) proceedings. In the absence of statutes authorizing reparations for extraterritorial torture or universal civil jurisdiction, common law courts usually will not entertain the victim’s civil proceedings.¹²⁸ Although many countries have implemented universal criminal jurisdiction legislation, the same does not hold true for common law countries

¹²⁰ Donovan & Roberts, *supra* note 7, at 142. Though universal criminal jurisdiction is now an established practice, a number of obstacles must still be ironed out before it is fully accepted by every State in the international community. For information on the challenges of universal jurisdiction in Europe, see Kaleck, *supra* note 115, at 958-64.

¹²¹ See AMNESTY INTERNATIONAL, THE SCOPE OF UNIVERSAL CIVIL JURISDICTION, *supra* note 118; Schaack, *supra* note 5, at 143-47.

¹²² Schaack, *supra* note 5, at 143-47.

¹²³ *Id.* at 146.

¹²⁴ *Id.*

¹²⁵ *Id.* at 146-47.

¹²⁶ *Id.*

¹²⁷ Schaack, *supra* note 5, at 146. Unfortunately, the victims never had the opportunity to pursue reparations because Pinochet, at age 82 and suffering from considerable brain damage, was deemed medically unfit to stand trial and the case was dismissed. Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415, 437-38 (2000).

¹²⁸ See generally *Bouzari v. Islamic Republic of Iran*, [2002] 71 O.R.3d 675 (Can.); *Jones v. Ministry of Interior Al-Mamlaka A-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)*, [2006] UKHL 26 (U.K.).

which have enacted legislation to provide only for civil jurisdiction.¹²⁹ Nevertheless, the international community appears to be warming to the idea.¹³⁰

B. The Benefits of Civil Proceedings

Civil suits play a critical role in achieving a sense of justice for victims. They compensate victims for their financial losses, provide an official acknowledgment of the past acts, and deter potential aggressors from committing future abuses.¹³¹ Whereas criminal suits are centered on the societal goals of punishing crime for the sake of deterrence, civil suits are victim-oriented and intended to restore the individual's dignity. Civil tort suits alone may "constitute an important form of recognition and closure to victims."¹³²

Though civil suits aim to restore victims to the position they were in prior to the violation by awarding monetary compensation, "money damages will be incommensurate to the harm the individual victim suffers" in the context of torture and grave human rights abuses.¹³³ Nonetheless, civil tort suits "can compensate the victim for pain, emotional distress, bodily harm, and lost wages and earning potential," as well as provide for medical and psychological expenses.¹³⁴ As the Basic Principles and Guidelines contemplate, compensation is only one way to provide redress for victims and should be accompanied by other measures, such as a public apology, memorial, or guarantees of non-repetition.¹³⁵

Furthermore, civil tort suits provide an important forum to validate victims' claims and restore their dignity.¹³⁶ Torture is

¹²⁹ Kaleck, *supra* note 115, at 970-73.

¹³⁰ For example, see discussion *supra* Part III regarding the Torture Bill that is under review in British Parliament. Most civil suits for extraterritorial torture are filed in civil law countries that also provide for universal criminal jurisdiction. REDRESS TRUST, ENDING IMPUNITY IN THE UNITED KINGDOM FOR GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES, TORTURE AND OTHER CRIMES UNDER INTERNATIONAL LAW 20 (2008), http://www.redress.org/downloads/publications/UJ_Paper_15%20Oct%2008%20_4_.pdf. The United States is currently the only common law country to allow civil claims for extraterritorial torture. *Id.*

¹³¹ Sarkin, *supra* note 29, at 429-30.

¹³² Donovan & Roberts, *supra* note 7, at 154.

¹³³ Schaack, *supra* note 5, at 157.

¹³⁴ *Id.* at 157.

¹³⁵ Basic Principles and Guidelines, *supra* note 7. See discussion *supra* Part II.

¹³⁶ Schaack, *supra* note 5, at 158.

usually committed behind closed doors with no eye-witnesses other than those involved in the crime. Torturers aim to control the victims' psyche and break down their spirit by, for example, telling victims "no one will ever believe this happened to you—you'll always be alone with this."¹³⁷ Many victims resort to silence for fear of being discredited and, more importantly, out of fear for their own safety and that of their families if they speak out about what happened to them.¹³⁸

C. The Plight of Refugees and Asylees

Leaving the country may be a torture victim's only chance to live without fear. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that 10.5 million refugees¹³⁹ and 838,000 asylum-seekers¹⁴⁰ have been forced to flee their country due to persecution or conflict. A refugee is someone who: "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country."¹⁴¹ Similar to refugees, asylum-seekers are individuals who have made a claim for refugee status and are awaiting a legal determination from outside their country of nationality.¹⁴² According to the Center for Victims of Torture,¹⁴³ up to thirty percent of refugees are torture

¹³⁷ U.S. DEP'T OF JUSTICE, SURVIVORS OF POLITICALLY MOTIVATED TORTURE: A LARGE, GROWING, AND INVISIBLE POPULATION OF CRIME VICTIMS (Jan. 2000) (internal quotations omitted), http://www.ncjrs.gov/ovc_archives/reports/motivatedtorture/torture.pdf.

¹³⁸ *Id.*

¹³⁹ *Refugee Figures*, UNHCR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c1d.html> (last visited Feb. 18, 2011). This number was estimated in early 2009 and does not include an additional 4.7 million displaced Palestinian refugees in camps in the Middle East. *Id.* Many refugees live in makeshift camps in rural areas, though the number of refugees living in urban areas has increased recently. *Id.* Although refugees are dispersed around the world, more than 50% are in Asia and around 20% in Africa. *Id.*

¹⁴⁰ *Asylum-Seeker Figures*, UNCHR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c20.html> (last visited Feb. 18, 2011).

¹⁴¹ Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

¹⁴² *Asylum-Seeker Figures*, *supra* note 140. Though asylees are distinct from refugees in terms of their legal status, they are just as affected by the lack of available remedies for the inhumane treatment they have suffered. Accordingly, asylees and refugees will be treated synonymously for the sake of this argument.

¹⁴³ The Center for Victims of Torture is an NGO headquartered in Minnesota

survivors,¹⁴⁴ yet most victims cannot avail themselves of any protection from their own government because their oppressors are often immune to suit, “either because they are agents of the state or because the state condones, is complicit in, indifferent to, or otherwise powerless in the face of, human rights abuses in its territory.”¹⁴⁵

Even if a legitimate mechanism for redress exists in the refugee’s home country, the refugee would have to return to the country to bring a suit against the oppressor. Such a requirement is unreasonable for two reasons. First, a refugee risks losing his or her legal status as a refugee by merely returning to the country of persecution.¹⁴⁶ Making use of the justice system could be considered re-availment of the benefits of the refugee’s former government and warrant the revocation of the refugee’s legal status.¹⁴⁷ Therefore, a refugee who pursues redress in his or her

dedicated to ending the practice of government-sponsored torture and “heal[ing] the wounds” of torture survivors and their families. *Who We Are*, CENTER FOR VICTIMS OF TORTURE, <http://www.cvt.org/page/62> (last visited Feb. 18, 2011).

¹⁴⁴ SURVIVORS OF POLITICALLY MOTIVATED TORTURE, *supra* note 137. Additionally, nearly two-thirds of the world’s “forcibly displaced” populations, around 26 million people, are internally displaced people (IDP), or those who are displaced within their country of nationality. *Internally Displaced People Figures*, UNCHR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646c23.html> (last visited Feb. 18, 2011). Like refugees and asylees, IDPs may have fled their homes due to torture or other dehumanizing treatment but are unable to bring suits for redress in their home country for various reasons: their oppressors are legally protected from suit, the country lacks an operative civil justice system, the refugee is a victim of state-sponsored terror precluding any opportunity for justice, or the perpetrator has fled to a foreign jurisdiction. Schaack, *supra* note 5.

¹⁴⁵ Schaack, *supra* note 5, at 181.

¹⁴⁶ See Convention Relating to the Status of Refugees, *supra* note 141, art. 1(C):

This Convention shall cease to apply to any person falling under the terms of section A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution

See also CAT, *supra* note 1, art. 3 (providing that “[n]o State Party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”).

¹⁴⁷ Convention Relating to the Status of Refugees, *supra* note 141, art. 1(C). In the case of refugees and asylees, the traditional “bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relation of an oppressor to a victim.” *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985). International law provides protection to refugees on the ground that is no longer safe to remain in their country of origin. *Id.* To qualify for refugee status, a person must be unable or unwilling to return to their country of origin. *Id.* Any indication that a

home country risks being forced to return to that country and face persecution. Second, requiring a refugee to return to the country of persecution violates the prohibition on *refoulement* that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁴⁸ Requiring a refugee to seek redress for torture in his or her home country is incongruent with international refugee law and international human rights law.¹⁴⁹

Since pursuing redress in the country of persecution is not a viable option for refugees and asylees, they should be afforded an alternative course where they can still maintain their security. Despite the trauma of being tortured and the anguish of being forcibly uprooted from their homelands, refugees and asylees are often no closer to pursuing justice once they are outside the country and safe from persecution. Many flee with only what they can carry and face a life of poverty and burdensome health problems and bills.¹⁵⁰ Financial constraints often mean serious medical and psychological needs go untreated. Providing another route to civil redress enables victims to pay for health care, contributes to the healing process, and facilitates the victim’s reintegration into society.¹⁵¹

V. A FRAMEWORK FOR REPARATIONS

A. *The Torture (Damages) Bill*

The first hurdle in paving the way for a viable reparations

person is able or willing to return to a particular country gives rise to the assumption that the person no longer feels the country is unsafe. *Id.*

¹⁴⁸ Convention Relating to the Status of Refugees, *supra* note 141, art. 33. The principle of *non-refoulement* is often associated with the *jus cogens* prohibition on torture, but scholars disagree as to whether *non-refoulement* itself has achieved the status of a preemptory norm. Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 373 (2008). *Jus cogens* is a preemptory norm of international law from which no State can derogate and which can only be amended by a new preemptory norm coming into being. Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291, 297 (2006).

¹⁴⁹ Schaack, *supra* note 5, 181-82.

¹⁵⁰ *Assistance*, UNCHR: THE UN REFUGEE AGENCY, <http://www.unhcr.org/pages/49c3646cd4.html> (last visited Feb. 18, 2011).

¹⁵¹ Sarkin, *supra* note 29, at 429-30.

2011] *REPARATIONS FOR TORTURE VICTIMS* 475

procedure for refugee torture victims is for each State Party to enact legislation providing for universal civil jurisdiction. The proposed Torture Bill in the United Kingdom provides the international community a framework for such legislation by providing that “[a] person who commits torture, wherever committed, shall be liable to an action for damages in civil proceedings.”¹⁵² In that provision, “person” is not restricted only to individual aggressors, but also encompasses foreign governments, heads of state, government agencies, and entities acting under the auspices of “sovereign authority.”¹⁵³ Accordingly, the bill also amends the State Immunity Act of 1978 by providing an exception to state immunity for proceedings initiated under the Torture Bill.¹⁵⁴ Significantly, a person can bring a civil suit even if the torture occurred outside the United Kingdom.¹⁵⁵

The Torture Bill also limits actions in two important ways. First, the bill allows civil suits for torture committed outside the United Kingdom “only when no adequate and effective remedy for damages is available in the State in which the torture is alleged to have been committed.”¹⁵⁶ Second, the bill imposes a statute of limitations of six years from “when it first became reasonably practicable for the person concerned to bring an action.”¹⁵⁷

The bill provides an effective mechanism by which torture victims can seek redress for the harm they have suffered. If Parliament takes the final steps to enact the bill into law, refugees like Patson Muzuwa may finally be able to access justice.¹⁵⁸ Prior to fleeing to the United Kingdom, Muzuwa was an activist in Zimbabwe and a founding member of the Movement for Democratic Change (MDC) opposition party.¹⁵⁹ Due to his political activities, Muzuwa was arrested more than nine times and

¹⁵² Torture (Damages) Bill [HL], 2007-8, H.L. Bill [30] cl. 1 (Gr. Brit.), <http://www.publications.parliament.uk/pa/ld200708/ldbills/030/08030.i-i.html> (last visited Feb. 18, 2011).

¹⁵³ *Id.* § 1.5.

¹⁵⁴ *Id.* § 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 1.2.

¹⁵⁷ *Id.* § 2.

¹⁵⁸ See REDRESS TRUST, MEETING THE NEEDS OF TORTURE SURVIVORS IN THE U.K.: CONSIDERING U.K. POLICY AND PRACTICE ON REFUGEES AND ASYLUM SEEKERS WHO HAVE SUFFERED TORTURE 25-7 (Oct. 2009), <http://www.redress.org/downloads/publications/FINAL%20Conference%20Report%203%20Nov%2009%20-%20new%20final.pdf> [hereinafter MEETING THE NEEDS OF TORTURE SURVIVORS IN THE U.K.].

¹⁵⁹ *Id.* at 25.

tortured. He suffered from *falanga* (foot whipping),¹⁶⁰ electric shocks and other assaults that have left him permanently disabled.¹⁶¹ Upon being granted asylum in the United Kingdom, he has sought ways to bring his abuser to justice but has yet to be successful.¹⁶² The Torture Bill, if passed, would provide Muzuwa a long-awaited avenue for redress.

Similar legislation has provided numerous torture victims in the United States with an opportunity to vindicate their rights against their torturers. The United States enacted the Alien Tort Statute (ATS) to provide federal courts with “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶³ Under the ATS, U.S. courts adjudicate claims based on extraterritorial acts of torture even when both parties have no ties to the United States.¹⁶⁴ For example, in *Filartiga v. Peña-Irala*, Paraguayan asylees residing in the United States brought suit against another Paraguayan citizen who was visiting the United States for allegedly causing the wrongful death of their son as a result of torture.¹⁶⁵

The ATS has proved beneficial to countless victims of grave human rights abuses who otherwise would have gone without a remedy, yet it is more limited than the proposed Torture Bill in the United Kingdom. To initiate proceedings in the United States, the court must have personal jurisdiction over the defendant, which means the defendant must be present in the United States at least for service of process.¹⁶⁶ The personal jurisdiction requirement

¹⁶⁰ *Falanga* often refers to a technique in which a victim is beaten on the bottoms of the feet while wearing shoes to distribute the force and disguise evidence of the beating. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, MANUAL ON THE EFFECTIVE INVESTIGATION AND DOCUMENTATION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (THE ISTANBUL PROTOCOL) (2004), <http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>. *Falanga* is designed to deliver “maximal pain and suffering with minimal evidence.” *Id.* ¶ 159. Though permanent injuries are uncommon, it can cause chronic disabilities and lead victims to have trouble walking. *Id.* ¶ 203.

¹⁶¹ See MEETING THE NEEDS OF TORTURE SURVIVORS IN THE U.K., *supra* note 158.

¹⁶² *Id.*

¹⁶³ Alien Tort Statute, 28 U.S.C. § 1350 (1948) [hereinafter ATS]. The United States also extended the ATS to U.S. citizens who are tortured by enacting the Torture Victims Protection Act. See Schaack, *supra* note 5, at 150-51.

¹⁶⁴ See Donovan & Roberts, *supra* note 7, at 146; see also *Filartiga v. Peña-Irala*, 630 F.2d 876, 889 (2d Cir. 1980).

¹⁶⁵ *Filartiga*, 630 F.2d at 889.

¹⁶⁶ See Schaack, *supra* note 5, at 153-55; Bassiouni, *supra* note 24, at 234-35.

places considerable restraints on a victim's ability to obtain redress. If the victim happens to be fortunate and her torturer passes through or immigrates to the United States, then she can initiate proceedings.¹⁶⁷ Otherwise, she has no recourse. In contrast, the Torture Bill, as proposed, would seemingly remove that constraint since the defendant could be a foreign government. Unlike the ATS, the Torture Bill would provide an explicit exception to state immunity for acts of torture.¹⁶⁸ The ATS only permits suits against alleged perpetrators in their individual capacity, eliminating foreign states from suit as well as some high-ranking officials.¹⁶⁹

When the goal is ensuring torture victims can actually pursue a remedy against their abuser, the ATS is simply insufficient. For it relies on chance that perpetrator will enter U.S. territory and precludes suit against those most likely to torture, namely governments and their officials. The Torture Bill, on the other hand, presents a victim-oriented model that would be more likely to provide refugee torture victims access to courts.

B. Judicial Enforcement

Enacting legislation similar to the Torture Bill is a critical first step to enabling domestic courts to adjudicate reparations claims for torture victims. Though proceedings should be initiated in the state where the torture occurred if possible, oftentimes the “[S]tates where torture is most prevalent are precisely those where there is no rule of law, so there may well be no independent judiciary.”¹⁷⁰ Furthermore, refugees should not be expected to seek redress in the country where they were tortured and forced to flee.¹⁷¹

Domestic courts are better positioned than international and regional courts to address the needs of every victim. The International Criminal Court and other international criminal tribunals have limited subject-matter jurisdiction and narrow

¹⁶⁷ Bassiouni, *supra* note 24, at 234-35.

¹⁶⁸ Torture (Damages) Bill [HL], 2007-8, H.L. Bill [30] § 3 (Gr. Brit.).

¹⁶⁹ Bassiouni, *supra* note 24, at 234-35. In certain circumstances victims are permitted to bring a suit against a foreign government but only if the claim falls under an exception within the Foreign Sovereign Immunities Act (FISA) or if the defendant state fails to raise FISA as a defense. See Schaack, *supra* note 5, at 152-53.

¹⁷⁰ *Id.* at 21.

¹⁷¹ See discussion *supra* Part IV.C.

478 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 19:451]

mandates.¹⁷² Their jurisdiction is also contingent upon states' agreement to be bound by the courts decisions.¹⁷³ Furthermore, they are not easily accessible to most victims who may not have the resources to present their case before the court if given the opportunity.

Since international courts are unable to address every case, domestic courts should be entrusted with jurisdiction over certain egregious international and extraterritorial crimes to combat impunity and to ensure all victims have access to justice.¹⁷⁴ National courts should look to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) for guidance on issuing judgments in accordance with international standards, particularly the Basic Principles and Guidelines.¹⁷⁵ Though the IACtHR is quite progressive in its eagerness to provide reparations to victims, the court has created considerable jurisprudence in the area that could prove useful to national courts.¹⁷⁶

For example, in *Chumbipuma Aguirre et al. v. Peru* (Barrios Altos Case), survivors and relatives of deceased victims brought a suit against the Peruvian government after Grupo Colina, a death squad under the auspices of the Peruvian armed forces, stormed and indiscriminately attacked attendants of a neighborhood barbecue wrongly believed to be members of a Maoist guerilla group.¹⁷⁷ The IACtHR ordered the Peruvian government to compensate the victims, pay for all physical and psychological medical expenses, provide educational scholarships and textbooks to the victimized children, make a public apology, and erect a

¹⁷² Alexander Orakhelashvili, Book Review, 20 *EUR. J. INT'L L.* 457, 457 (2009) (reviewing MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* (2008)).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 457 (“[T]he growth of international criminal jurisdiction has been accompanied by the equally remarkable growth of national criminal jurisdiction to address international crimes, including those committed extraterritorially.”).

¹⁷⁵ See discussion *supra* Part II.

¹⁷⁶ ASSOCIATION FOR THE PREVENTION OF TORTURE & THE CENTER FOR JUSTICE AND INTERNATIONAL LAW, *TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE* 111 (2008), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=90331> (“The Inter-American Court goes much further than other international bodies in the types of reparations it will order.”).

¹⁷⁷ *Chumbipuma Aguirre et al. v. Peru*, Case No. 87 Inter-Am. Ct. H.R. (Ser. C) (Nov. 30, 2001), ¶¶ 38-40. See *Villagrán Morales and Others v. Guatemala*, Case No. 63 Inter-Am. Inter-Am. Ct. H.R. (Ser. C) (Nov. 19, 1999).

monument in the victims' honor.¹⁷⁸ The IACtHR has proclaimed sweeping decisions and member States have agreed to be bound by its judgments. Though there is no guarantee that foreign actors would abide by the decision of a domestic court on the other side of the world, the enactment of domestic legislation like the Torture Bill gives domestic courts jurisdiction to make similar judgments.

C. Overcoming Doubts and Recognizing Shortcomings

Undeniably, concerns abound that universal civil jurisdiction for torture victims will be manipulated as a political tool, open the floodgates for tenuous suits, and provide only illusory relief. These concerns are well founded, but surmountable.

1. Political Implications

One hurdle in establishing a viable reparations policy for extraterritorial torture is garnering legitimacy in the international community, despite fears that such policies will be exploited for political gain.¹⁷⁹ Overly zealous advocates and artful politicians could bring explosive claims “rooted in political vendettas” where legislation is expansive and jurisdiction is broad.¹⁸⁰ Likewise, powerful states eager to maintain control over their liability can strong-arm victims into dismissing claims. Belgium was browbeaten by the United States after attempting to utilize its universal criminal jurisdiction laws to sue former president George H.W. Bush for a bombing attack in Iraq during the first Gulf War.¹⁸¹ In retaliation, U.S. Secretary of Defense Donald Rumsfeld “threatened to withdraw NATO headquarters from Brussels unless the law was amended.”¹⁸² As a result, Belgian Parliamentarians changed the law to limit jurisdiction to cases where the victim or accused is Belgian.¹⁸³

¹⁷⁸ *Id.* ¶ 50.

¹⁷⁹ Adv. Irit Kohn, *Universal Jurisdiction, in ISRAEL AT 60: CONFRONTING THE RISING CHALLENGE TO ITS HISTORICAL AND LEGAL RIGHTS* 45, 47 (Dore Gold, et al. eds., 2009), http://www.jcpa.org/text/Israel60_Kohn.pdf.

¹⁸⁰ Paul Chevigny, *The Limitations of Universal Jurisdiction*, GLOBAL POLICY FORUM (March 2006), <http://www.globalpolicy.org/component/content/article/97/32133.html> (last visited Feb. 18, 2011).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

Abusive power politics are a real concern and should not be taken lightly. However, it may be a lesser cause for worry with universal civil jurisdiction than it seems, partially because individual victims, rather than states, will bring complaints. Theoretically, individuals would not be positioned to “instrumentalize judicial mechanisms” for political gain in the same way as in suits initiated by the State.¹⁸⁴ Furthermore, the exercise of universal civil jurisdiction is arguably less intrusive than the exercise of universal criminal jurisdiction.¹⁸⁵ Considering that torture is reprehensible, regardless of whether a criminal or civil penalty is at issue, permitting criminal proceedings but denying civil jurisdiction for the same act is nonsensical.¹⁸⁶ Universal civil jurisdiction is less intrusive because the “host [S]tate is merely an adjudicator rather than the actor,” and the penalties in civil proceedings are less severe.¹⁸⁷ Civil actions concern reparations, whereas criminal proceedings affect a person’s very freedom.¹⁸⁸ The exercise of universal criminal jurisdiction may not simply mean incarceration for the accused. The mere speculation that universal criminal jurisdiction may be exercised is enough to restrict an apprehensive individual’s movement to the extent that they may not be able to travel to certain countries.

For example, the former Foreign Minister of Israel, Tzipi Livni, recently canceled a trip to Britain after she learned an arrest warrant had been covertly issued to take effect upon her arrival.¹⁸⁹ Britain had relied on universal jurisdiction to order the arrest warrant over Ms. Livni for her involvement in Israel’s invasion of the Gaza Strip at the end of 2008.¹⁹⁰ Restricting the foreign minister of a given state from international travel substantially infringes upon the affected state’s sovereignty and ability to

¹⁸⁴ *Basic Facts on Universal Jurisdiction*, HUMAN RIGHTS WATCH, Oct. 19, 2009, <http://www.hrw.org/en/news/2009/10/19/basic-facts-universal-jurisdiction> (internal quotations omitted).

¹⁸⁵ NOWAK & MCARTHUR, *supra* note 10, at 495.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Donovan & Roberts, *supra* note 7, at 155; NOWAK & MCARTHUR, *supra* note 10, at 495.

¹⁸⁹ *Britain to End Arrest Threat on Officials From Abroad*, N.Y. TIMES, Dec. 16, 2009, at A17, available at <http://www.nytimes.com/2009/12/16/world/europe/16britain.html>.

¹⁹⁰ *Id.* Britain subsequently announced that it would no longer permit British judges to issue arrest warrants against high-ranking foreign officials without first informing a prosecutor. *Id.* Regardless, the change may not put foreign officials at ease, but it does call attention to the sensitive political issues at stake, particularly since Britain cited its close strategic partnership with Israel as a reason for the new procedure. *Id.*

conduct international relations; the same cannot be said for the exercise of universal civil jurisdiction.

Nonetheless, some argue that civil actions are more intrusive than criminal suits inasmuch as the victim controls the initiation of proceedings rather than the state, which ordinarily can use discretion in determining whether to bring a suit.¹⁹¹ While retaining control over proceedings is in a state's interest, courts can still utilize mechanisms like the political question doctrine and *forum non-conveniens* to consider the state's interests in dismissing a complaint.¹⁹² The experiences of other countries with universal civil jurisdiction suggest that it does not significantly interfere with foreign relations. There is little or no evidence that ATS claims in the United States have negatively affected U.S. foreign relations.¹⁹³ Nonetheless, Australia, Switzerland, and the United Kingdom argue "that broad assertions of extraterritorial jurisdiction would increase the risk of conflicting legal commands and proceedings, and expose foreign nationals and enterprises to costly and uncertain legal proceedings before foreign courts."¹⁹⁴ This may be the case, but the same is also true for universal criminal jurisdiction, which is arguably more burdensome on states than civil suits.¹⁹⁵

Furthermore, some civil law countries, (i.e. France, Italy, Spain, and Germany) allow torture victims to bring claims for compensation with the initiation of criminal proceedings under universal jurisdiction.¹⁹⁶ While this does not demonstrate conclusively that such proceedings do not create foreign policy implications, it does suggest that other countries have found that the benefits of universal civil jurisdiction can outweigh fears that proceedings will negatively impact foreign relations. According to some studies, less than twenty cases based on universal jurisdiction have gone to trial in domestic courts and nearly all "concern low

¹⁹¹ *Id.* In criminal cases, prosecutors might "weigh competing public policy factors, including considerations of foreign policy and international comity, that private plaintiffs have neither reason nor competence to entertain." *Id.*

¹⁹² See NOWAK & MCARTHUR, *supra* note 10, at 495.

¹⁹³ JUSTICE, TORTURE (DAMAGES) BILL: BRIEFING FOR HOUSE OF LORDS SECOND READING 3 (May 2008), http://www.redress.org/downloads/torture-bill/JUSTICE_Torture_Bill.pdf ("There is no evidence to show that this exception has proved unworkable for the US courts, nor that it has caused any appreciable harm to US diplomatic relations with other states, or indeed the comity of nations as a whole.").

¹⁹⁴ Donovan & Roberts, *supra* note 7, at 147.

¹⁹⁵ See NOWAK & MCARTHUR, *supra* note 10, at 495.

¹⁹⁶ JUSTICE, *supra* note 193.

or mid-level alleged perpetrators,” rather than high-level officials.¹⁹⁷ Exercising jurisdiction in these cases does not endanger foreign relations, but rather, “is an expression of respect for and compliance with international law.”¹⁹⁸ Moreover, states will not exercise jurisdiction for any tort that occurs abroad, but only under the extraordinary circumstances of egregious human rights abuses.

2. *Opening the Floodgates of Litigation*

The first few states to enact legislation similar to the Torture Bill may risk being inundated by torture victims fleeing to their countries for access to their courts.¹⁹⁹ However, the more states that enact legislation, the more dispersed would be the burden of trying cases. The Torture Bill also has built-in limitations. For example, courts will “reserve jurisdiction for cases where the judicial system of the country where the crimes were committed is either unwilling or unable to ensure accountability.”²⁰⁰ Additionally, the Torture Bill applies only to acts of torture committed after September 29, 1988 and incorporates a six-year statute of limitations.²⁰¹ These restrictions will also limit the amount and quality of complaints that are ultimately adjudicated.

Though most evidence corroborating the victim’s claim will likely be in the country where the torture occurred, the effects of torture tend to endure and can usually be uncovered in medical exams.²⁰² Additional evidence can be found in the application for asylum, by researching country conditions, and by deposing any available witnesses. In the event that tenuous suits are brought, domestic courts are accustomed to weighing the sufficiency of the evidence and dismissing deficient claims.²⁰³

¹⁹⁷ *Basic Facts on Universal Jurisdiction*, *supra* note 184.

¹⁹⁸ Letter from Carla Ferstman & Souhayr Belhassen to Head of Delegation to the Council Africa Working Group (Feb. 10, 2009), REDRESS TRUST, http://www.redress.org/downloads/publications/Letter%20to%20COAFR_10%20February%202009.pdf [hereinafter REDRESS, LETTER TO THE EU COUNCIL].

¹⁹⁹ 701 PARL. DEB., H.L. (2008) 1220, at 1204.

²⁰⁰ REDRESS, LETTER TO THE EU COUNCIL, *supra* note 198.

²⁰¹ Torture (Damages) Bill [HL], 2007-8, H.L. Bill [30] cl. 1 (Gr. Brit.). September 29, 1988 is the date that the Criminal Justice Act of 1988 established universal jurisdiction for torture. JUSTICE, *supra* note 193, at 5.

²⁰² MEETING THE NEEDS OF TORTURE SURVIVORS IN THE UK, *supra* note 158, at 22.

²⁰³ *Id.*

3. *Providing an Illusory Remedy*

Critics of universal civil jurisdiction contend that any remedy granted to an individual would be unenforceable and ultimately meaningless to victims, thereby wasting valuable resources for unproductive ends.²⁰⁴ Enforcing judgments against foreign persons is a challenge, but advocates of the Torture Bill contend that the bill concerns *access* rather than the *provision* of a remedy.²⁰⁵ The Torture Bill would be the first step to a remedy.²⁰⁶ Victims must have access to courts before the enforceability of a remedy even becomes relevant.²⁰⁷ From a victim's perspective, there can be value in simply getting to court.²⁰⁸ A state may choose to settle with the victim to avoid embarrassment; however, a case that goes to trial enables the victim to have his or her day in court.²⁰⁹

Victims who brought cases in the United States under the ATS have obtained considerable judgments against their abusers, but few have actually seen any money.²¹⁰ Nonetheless, most victims considered the judgments a significant victory.²¹¹ For some victims, the opportunity to confront their torturer is more important than whether they actually obtain reparations for their suffering.²¹² The decision to bring a suit is a very personal one; victims are motivated by different goals and are satisfied by different remedies.²¹³ Importantly, however, they have the option

²⁰⁴ JOINT COMM. ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP, *supra* note 109, ¶¶ 95-102.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ JOINT COMM. ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP, *supra* note 109, ¶¶ 95-102.

²¹⁰ Carolyn Patty Blum, Clinical Professor of Law, Emeritus, University of California, Berkeley, School of Law, Address to the Benjamin N. Cardozo School of Law Human Rights and Genocide Clinic (Oct. 12, 2009). In *Chavez v. Carranza*, victims from El Salvador were awarded \$500,000 in compensatory damages and \$1 million in punitive damages. *Chavez v. Carranza*, 559 F.3d 486, 491 (6th Cir. 2009). According to Blum, trying to enforce the award has been challenging for most victims. Blum, *supra* note 210. In the past, she has had some success with seizing the defendants' assets in the United States but they often do not account for the entire judgment. *Id.*

²¹¹ Blum, *supra* note 210.

²¹² *Id.* Blum contends that victims struggle to put a dollar amount on their suffering and many find it offensive to suggest that money will rectify the wrongs perpetrated against them. *Id.* A number of victims cite money damages as only a secondary goal as a way to pay for medical bills and account for lost profits from employment. *Id.*

²¹³ *Id.* Blum explains that the victims she has represented under ATS cite many

to choose to go to court to pursue these goals. The first step is providing victims access to courts; a secondary issue will be enforcement of a civil remedy.²¹⁴

VI. CONCLUSION

Torture is universally condemned as one of the most egregious violations of human rights, yet many victims have no access to reparations.²¹⁵ Those countries that have ratified the CAT have obliged themselves to enact legislation giving torture victims access to redress, which includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.²¹⁶ However, several States have construed Article 14 of the CAT to exclude acts of extraterritorial torture.²¹⁷ This restrictive reading is the source of an ongoing debate between States Parties, practitioners, and scholars that has yet to be resolved—although the Committee Against Torture may be preparing to provide authoritative guidance in the future.²¹⁸

In the meantime, torture victims who manage to flee the country of persecution typically have no recourse in domestic courts because their torture occurred outside the territory of the asylum country.²¹⁹ Likewise, refugees and asylees cannot initiate suits in the country where the torture occurred.²²⁰ While States Parties publicly condemn torture as dehumanizing and abhorrent, few common law countries have taken the initiative to provide torture survivors an avenue to bring suits for reparation.

The proposed Torture Bill in the United Kingdom, if enacted, would legitimize the universal prohibition on torture by providing

different goals for bringing suit. *Id.* One victim, who was pregnant at the time, was so severely tortured by Salvadoran soldiers that they dumped her body in an open mass grave assuming she was dead. *Id.* The extreme trauma induced labor and the baby's subsequent cries drew attention to her feeble body. *Id.* The woman was discovered and rehabilitated, but the baby died. *Id.* The survivor brought suit against her perpetrator to vindicate the death of the child who saved her life. *Id.* Other plaintiffs desire to confront and publicly shame their abusers, to send a message that torture will not be tolerated, or to empower other victims to speak out about their experiences. *Id.*

²¹⁴ JOINT COMM. ON HUMAN RIGHTS, CLOSING THE IMPUNITY GAP, *supra* note 109, ¶¶ 95-102.

²¹⁵ See discussion *supra* Part I.

²¹⁶ See discussion *supra* Part II.

²¹⁷ See discussion *supra* Part III.

²¹⁸ *Id.*

²¹⁹ See discussion *supra* Part IV.C.

²²⁰ *Id.*

2011] *REPARATIONS FOR TORTURE VICTIMS* 485

survivors with a means for vindicating their rights against their abusers.²²¹ The United Kingdom should take the lead by being the first State Party to fully implement Article 14 through the provision of a right to redress to *all* victims of torture. The Torture Bill would break new ground for victims by making a civil exception to state immunity and creating a secure avenue for victims that is not merely subject to chance like the ATS.²²² Most importantly, the Torture Bill can serve as model legislation for other States Parties to provide for universal civil jurisdiction. The Torture Bill, which is limited in scope and only applicable to extreme human rights violations, is a good starting point to placate critics' concerns about universal civil jurisdiction.²²³ States Parties have positive obligations under international law to provide redress for torture.²²⁴ Someone must take the lead to ensure victims have access to justice and torturers are held accountable.

²²¹ See discussion *supra* Part V.A.

²²² *Id.*

²²³ See discussion *supra* Part V.C.

²²⁴ CAT, *supra* note 1, art. 14.

486 *CARDOZO J. OF INT'L & COMP. LAW* [Vol. 19:451