

Human rights claims vs. the state: is sovereignty really eroding?

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“Courts throughout the world can be a forum in which people can assert the primacy of their human rights in all situations in which states are impeding the realization of those rights.” –Anthony D’Amato¹

Introduction

Human rights theorists and advocates have often suggested that the increased role and standing of the individual in international law, and the possibility within some human rights regimes that the individual can bring suit against her own state for its internal actions, is systematically undermining sovereignty, or that sovereignty itself has had to be re-conceptualized as a result of the discourse of human rights.² In particular, the relatively novel use of civil and criminal accountability in domestic courts for international crimes can be seen to challenge not only the primacy of the state, but the basic principle of non-interference in internal affairs that is often considered central to the functioning of international society. I will seek in this essay to assess this general claim, which is often made with relatively little empirical support, through the examination of such civil and criminal cases. I find that while significant inroads in the traditional preserve of sovereignty have indeed been made by human rights litigation, there is also significant backlash and

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¹ Anthony D’Amato, “The Relation of the Individual to the State in the Era of Human Rights,” *Texas International Law Journal* vol. 24, no. 1 (1989), pp. 1-12.

² The literature is too broad to be fully assessed here, but see, as examples of the problematization of the state in the context of individual claims and human rights, D’Amato, “Individuals as Subjects,”; Martti Koskenniemi, “The Future of Statehood,” *Harvard International Law Journal* vol. 32, no. 2 (Spring 1991) pp. 397-410; Mark W. Janis, “Individuals as Subjects of International Law,” *Cornell International Law Journal* vol. 17 (1984), pp. 61-78.

countervailing trends that suggest that these inroads ought not be overstated.

This article examines human rights claims as a challenge to state primacy in international affairs in the context of claims made through criminal accountability via the exercise of universal jurisdiction, and civil accountability through the use of the Alien Tort Claims Act (ATCA) in the US. I examine how prosecutions for serious human rights violations using universal jurisdiction challenge the state in two senses: they constitute a direct challenge to state actors and state policy, and, while they take place in state courts, can be filed by individuals. These two developments undermine the two primary protections that states (and their agents) have so often been able to invoke: the inviolability of state agents and the virtual unchallengeability of internal state behavior, and the rule that only states might have standing in international law. While the development of human rights and international humanitarian law since the end of the Second World War have driven these two changes, I will not examine that historical trajectory in detail, as that has been thoroughly addressed by many authors elsewhere. Rather, I will focus primarily on the way in which the use of universal jurisdiction exemplifies and perhaps expands this trend. Similarly, the protection of immunity has been increasingly limited as against civil cases as well, and I discuss this in the context of cases under the Alien Tort Claims Act in the US and civil cases for torture in the UK. However, I note that this trend is not without critics, and not irreversible. I thus examine the challenges that have been raised against universal jurisdiction, and some countervailing trends in international law that seek to firmly situate the state as the primary actor. These are the recent International Law Commission Draft Articles on State Responsibility and the challenges to autonomous international criminal courts, with the concomitant emphasis on local justice.

Human rights as a challenge to the primacy of the state

The rise of human rights discourse and instruments has arguably significantly challenged state sovereignty in the sense that the black box of sovereignty or the state can be opened up: states can be called to task for activities that are purely internal, at least in some instances. A more radical argument has run that human rights do more than challenge sovereignty--they re-define it--sovereignty is defined not as state or popular sovereignty, but rather state compliance with human rights norms establishes state legitimacy or lack of it.³ This line of argumentation challenges the pure statist logic common to the disciplines of international relations and international law, which would have it that human rights are either agreed to by cynical states with no intention of upholding them, or actually constitute a somewhat dangerous challenge to the bases of international order.⁴ Instead, it is suggested, constraints of state jurisdiction do matter, but so too do other conceptions, such as naturalist conceptions of rights as inhering in individuals, transnational conceptions of society, etc. These theoretical foundations may be buttressed by empirical claims about effective implementation of human rights. Such empirical claims are not always fully elaborated, although they are becoming more common; this essay seeks to contribute to these.⁵

Conception of state and state actor inviolability

Traditional respect for sovereignty and the principle of non-interference in internal

³ Yasemin Nuhoglu Soysal, *Limits of citizenship: migrants and post-national membership in Europe* (Chicago: University of Chicago Press, 1994); see also, for a less radical argument but one that nonetheless views state legitimacy through the treatment of citizens, Thomas Franck, "The emerging right to democratic governance" *American Journal of International Law* vol. 86 (1992), p. 46.

⁴ See Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes and Meier Publishers, 1981), chapters 1 and 3, articulating this line of logic and challenging it.

⁵ An example might be Christof Heyns and Frans Viljoen, "The Impact of the United Nations human Rights Treaties on the Domestic Level," *Human Rights Quarterly* vol. 23

affairs are well established in the international legal and political systems, enshrined clearly in the UN Charter. While states have engaged in ever-more elaborate bilateral and multilateral agreements, many of these are not directly enforceable, either in domestic courts or international courts, although as we shall see below this trend is changing. Thus, for example, while as early as 1900 the US Supreme Court declared that “international law is part of our law”, the Court has notoriously been loath to apply international law and standards absent clear implementing legislation, and particularly wary of applying customary international law.⁶ The same may be said of many other countries as well. The prevailing expectation is that set forth in the UN Charter, article 2(4), preventing the threat or use of force against the territorial integrity and political independence of member states, and article 2(7), preventing interference in essentially internal matters of states. While these absolute restrictions, as discussed below, have been eroded over time by human rights norms and other developments, it is worth noting that even the enforcement of those norms, discussed below, remains limited by practices and doctrines developed to protect states and state actors, in part to ensure international comity and avoid conflicts. This includes sovereign and diplomatic immunity and act of state and similar doctrines. It is important, then, to understand the primary barriers to legal actions against states or their officials in international law, which may often be raised as bars to human rights cases.

Challenging states: some limits in practice

This section will examine several limits to the possibility of challenging internal state action, whether in the courtrooms of another state or in international tribunals: sovereign

(2001), pp. 483-535.

⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900); T. Alexander Aleinikoff, “International law, Sovereignty, and American Constitutionalism: Reflections on the Customary International

and diplomatic immunity, the act of state doctrine, and the general absence of standing for individuals before international bodies.

Sovereign and diplomatic immunity

Under international law, states have certain immunities from legal action, specifically from the exercise of jurisdiction. These immunities may hold in civil or criminal cases, although as we shall see there are some differences. While traditionally these immunities are understood to be quite broad,⁷ national legislation may seek to restrict or regulate these immunities; the US has sought to do so through the Foreign Sovereign Immunities Act (FSIA) of 1976, and the UK has done so through the State Immunity Act of 1978.⁸ Other states have subsequently enacted analogous legislation, but it is the practice of the US and the UK that will be addressed in this paper on this issue.⁹ This legislation tends to represent a move away from an absolute conception of immunity to a more pragmatic balancing act, considering the ramifications of a failure to allow the exercise of jurisdiction. This approach is known as the restrictive approach to immunity.¹⁰ It is worth noting, however, that in recent litigation, the European Court of Human Rights declined to override state immunity in a case alleging human rights violations.¹¹

Law Debate,” *American Journal of International Law* vol. 98, no. 1 (January 2004), pp. 91-108.

⁷ For an early US Supreme Court case representing absolute immunity, see *The Schooner Exchange v. McFaddon* 11 US (7 Cranch) 116, 3 L.Ed. 287 (1812).

⁸ *Foreign Sovereign Immunities Act*, 90 Stat. 2891, 28 USCA 1330, 1332, 1391,1441, 1602-11, as amended by Pub.L. 100-640, 102 Stat. 3333 (1988); *State Immunity Act* 26 & 27 Eliz. 2, Ch. 33, 17 I.L.M. 1123.

⁹ Canada, Pakistan, Australia, Singapore, and South Africa are examples of states with similar legislation: see Louis Henkin, Richard Crawford Pugh, Oscar Schachter, and Hans Smit, *International Law: Cases and Materials* 3d ed. (St. Paul, MN: West Publishing Group, 1993), p. 1127.

¹⁰ Henkin, et. al., *International Law* p. 1127.

¹¹ In so doing, it rejected the emerging “normative hierarchy theory”, which suggests that because the norm against torture is a *jus cogens* norm and state immunity is not *jus cogens*, the torture claim ranks higher, hierarchically. Lee M. Caplan, “State Immunity, Human Rights, and *Jus Cogens*: A Critique of the Normative Hierarchy Theory,” *American Journal of*

In the US, the primary exception to sovereign immunity under the FSIA has been the so-called commercial exception, whereby foreign states are not immune from suit in relation to their commercial activities; precisely what constitutes a commercial activity has been extensively litigated.¹² The FSIA itself thus constituted an exception to absolute immunity, but for commercial torts, not for non-commercial ones, such as torture or other bodily harm as we shall see below.¹³

To that end, certain federal courts in the US began to interpret the Alien Tort Claims Act to serve as a basis for jurisdiction for civil claims against agents of foreign states acting in an official capacity. The Alien Tort Claims Act was passed by the First Congress of the US in 1789, and establishes federal district court jurisdiction over “all causes where an alien sues for a tort only [committed] in violation of the law of nations.”¹⁴ In the absence of legislative history, commentators are uncertain what the original purpose of this provision was, but some analyses suggest it was meant to address piracy, slave-trading, and attacks on foreign diplomats.¹⁵ The act thus enables claims to be brought civilly for certain acts; victims may seek reparation, but criminal charges cannot be brought.¹⁶

International Law vol. 97, no. 4 (October 2003, pp. 741-81.

¹² *Republic of Argentina v. Weltover, Inc* 504 US 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), US LEXIS 3542.

¹³ *Siderman v. The Republic of Argentina, et al.* 965 F.2d 699 (9th Cir., 1992).

¹⁴ Judiciary Act of 1789, ch.20, sec. 9(b), 1 Stat. 73, 77 (1789), *codified at* 28 U.S.C. 1350.

¹⁵ See generally Ralph Steinhardt and Anthony D’Amato, eds., (London: Transnational Publishers, 1999); Kenneth C. Randall, “Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute,” *New York University Journal of International Law and Policy*, vol. 18 (1985), p. 1; Paul Hoffman, “Civil litigation of corporate behavior in conflict zones: the US Alien Tort Claims Act,” in Karen Ballentine and Heiko Nitzschke, eds., *Peaceful Profits: Approaches to Managing the Resource Dimensions of Armed Conflict* (Boulder, CO: Lynne Rienner Publishers, forthcoming 2004); Anne-Marie Burley, “The Alien Tort Claims Statute and Judiciary Act of 1789: A Badge of Honor,” *American Journal of International Law*, vol. 83 (1989), p. 461; Terry Collingsworth, “The Key Human Rights Challenge: Developing Enforcement Mechanisms,” *Harvard Human Rights Journal*, vol. 15 (Spring 2002), p. 183.

¹⁶ The ATCA is not the only tool to impose civil liability for international crimes: see generally John F. Murphy, “Civil Liability for the Commission of International Crimes as an

The Act was invoked very infrequently for nearly 200 years, until 1980, when a federal court issued an historic decision in *Filartiga v. Peña-Irala*, a case brought against a police inspector general arising out of the torture and murder of Joelito Filartiga.¹⁷ In *Filartiga*, the Court of Appeals considered and rejected the defense that the law of nations could not, for the purposes of the statute, include human rights complaints; it found instead that such law would include existing law at the time of the events rather than of the enactment of the statute. The court further found that the ban on torture had become part of customary international law. Subsequent jurisprudence has established extrajudicial execution, disappearances, war crimes and crimes against humanity, and genocide as acts contrary to the law of nations for the purposes of interpreting the statute.¹⁸

The *Filartiga* line of cases allowed individuals to bring suit in US courts against foreign *officials*. However, it remained unclear whether the ATCA and these cases would allow for jurisdiction over foreign *states* for tortious acts under the law of nations. In *Argentine Republic v. Amerada Hess Shipping Corp*, the US Supreme Court had occasion to consider this issue.¹⁹ The court there determined that the FSIA was the sole legal basis to obtain jurisdiction over a foreign state in federal court, and that, therefore, unless the case against the state could be made under an FSIA exception, the case, currently framed as deriving jurisdiction from the ATCA, could not proceed.

Similar issues have arisen in the UK with regard to state and state official immunity

Alternative to Criminal Prosecution,” *Harvard Human Rights Journal*, vol. 12 (Spring 1999) pp. 1-56.

¹⁷ *Filartiga v. Peña-Irala* US Ct. App., 2nd Cir., 630 F.2d 876 (1980).

¹⁸ A few salient cases, some of which continue in litigation, include *Kadic v. Karadzic*, US Ct. App., 2nd Cir. 70 F.3d 232 (1995); *Wina v. Royal Dutch Petroleum*, 226 F. 3d 88 (2000); *Doe v. Unocal*, 248 F. 3d 915 2001); *Presbyterian Church of Sudan v. Talisman Energy, Inc*, 2003 U.S. Dist. LEXIS 4085 (S.D.N.Y. 2003); *Tel-Oren v. Libyan Arab Republic* 726 F.2d 774 (D.C. Cir. 1984).

¹⁹ *Argentine Republic v. Amerada Hess Shipping Corp*, 488 US 428, 109 SCt 683, 102 L.Ed.2d 818 (1989).

against civil torts claims. The UK does not have a statute analogous to the ATCA, but has had occasion to hear civil cases against foreign state officials in respect of torture cases, in circumstances similar than those that give rise to many ATCA cases. In October 2004, the Supreme Court of Judicature issued a decision regarding immunity in two civil cases involving alleged torture by foreign states and officials. In both cases, *Jones v. The Ministry of the Interior* and *Mitchell v. Al-Dali*, British and/or Canadian citizens alleged torture at the hands of Saudi officials, and instituted civil cases for damages arising from the alleged torture, including “aggravated and exemplary damages for assault and battery, trespass to the person, torture and unlawful imprisonment.”²⁰

The Kingdom of Saudi Arabia sought to challenge the claims on the grounds of immunity under the State Immunity Act 1978 of the UK.²¹ The courts in earlier proceedings had upheld the immunity of the Kingdom of Saudi Arabia itself, findings which the court in *Jones* confirmed. The court carefully considered claims that there had occurred some relaxation of standards of official immunity, focusing particularly upon the distinction between official acts and acts which could not be viewed as in pursuit of official functions, and the distinction between official and private acts, before turning to the crime of torture, which is by definition an act that occurs in an ‘official’ capacity.²² A review of relevant precedent including the *Pinochet* cases led the court to the conclusion that official immunity *rationae materiae* could not preclude prosecution for systematic torture. However, because the cases at hand involved civil liability, the extent of civil immunity had also to be considered.

²⁰ *Jones v. The Ministry of the Interior Al-Mamlaka Al Arabiya as Saudia (The Kingdom of Saudi Arabia) & Anor.* Case Numbers A2 2003/2155 & A2 2004/0489 (Supreme Court of Judicature, United Kingdom) (28 October 2004), available at <http://www.redress.org/news/Jones%20v%20Saudi%20Arabia.pdf>, para 1.

²¹ *Jones v. the Ministry of the Interior* para 5.

²² *Jones v. the Ministry of the Interior* paras 44-53.

Examining dicta in relevant criminal cases, as well as *Sosa v. Alvarez-Machain*, and other US practice, the court concluded that while the Saudi government might be immune from civil suits, the officials themselves could not be. The court concluded, after considering issues such as *forum non conveniens*, that while such a conclusion did not empower English courts to act in all such cases, upon engaging in a balancing act considering all relevant issues, an English court could do so.²³

While the *Filartiga* and *Jones* lines of cases meant that former state officials could face civil charges for acts committed in the official line of duty, it is important to recognize that these cases did not allow for suits against currently serving heads of state or diplomatic representatives. The FSIA does not deal directly with this issue, although as we shall see below the ICJ case *DRC v. Belgium* did address the issue. However, customary international law as well as a web of bilateral and multilateral conventions do address diplomatic, consular, and state official immunity.²⁴ The fundamental reason for these protections are relatively obvious—they are meant to ensure that states are not hampered in their foreign relations, and to ensure stability in diplomatic and therefore international relations. The concern to protect diplomats and foreign officials, then, is driven by a concern that the arrest or seizure of their assets would lead to diplomatic conflict; therefore only a state might judge the acts of its own officials.²⁵ As we shall see, similar immunities protect foreign officials against

²³ *Jones v. the Ministry of the Interior* paras 92-99.

²⁴ See, inter alia *Vienna Convention on Diplomatic Relations* 23 UST 3227, TIAS 7502, 500 UNTS 95 signed 18 April 1961, entry into force 24 April 1964 (for the US 13 December 1972). *American Diplomatic Relations Act* 22 USCA 254a-e available at http://assembler.law.cornell.edu/uscode/html/uscode22/usc_sec_22_00000254---a000-.html; *Vienna Convention on Consular Relations* 596 UNTS 261, 21 UST 77, TIAS no. 6820; *Convention on the Privileges and Immunities of the United Nations* 1 UNTS 15, 21 UST 1418, TIAS No. 6900 (13 February 1946); see also the *American International Organizations Immunities Act* 22 USCA 288a-e.

²⁵ Letter of 16 March 1906 from US Secretary of State Elihu Root to the US Secretary of Commerce and Labor, excerpted in Henkin, *et al International Law* pp. 1200-1201.

criminal suits, for so long as they are in office.

Act of state doctrine

In the United States, a further limitation to actions against foreign states exists: the Act of State doctrine. This is a judge-made doctrine, developed by the US Supreme Court, that limits the effect of international law in US courts in cases brought against foreign states. This doctrine was developed to ensure a respect for foreign states, but has been used to prevent the exercise of jurisdiction in cases against states even where those states' actions clearly constitute violations of international law. The rationale for this doctrine is similar to that of foreign sovereign immunity—a desire to avoid judicial interference in the foreign affairs of the nation. This, as the court recognized in *Banco Nacional de Cuba v. Sabbatino*, was not required by international law but arose out of US federalism and concern to avoid excessive interference in one branch of government by another.²⁶ However, while the doctrine is particular to, and arises from, the US Constitution, the underlying principle is not unknown elsewhere.

Restriction of legal standing before international courts to states

Traditionally, it has been understood that not only is it only states that can create international law, but also that only states have standing before international courts. This arises from a more general understanding of international law as applicable between states, or between states and their own citizens; if there is no recourse domestically for the latter relationship, there is also no recourse internationally. This remains in large part the case even today. Only states have standing before the International Court of Justice, for example,

²⁶ *Banco Nacional de Cuba v. Sabbatino* 376 US 398, 84 SCt 923, 11 L.Ed. 2d 804 (1964).

although organs of the United Nations such as the General Assembly do have the authority to request advisory opinions of the court. While individuals may be the subjects of international law, attracting individual criminal responsibility for acts such as war crimes and genocide, there are few fora where individuals may bring suit themselves. However, this does not mean that there are no fora in which individuals have standing.

Challenges to state authority

Universal jurisdiction and civil actions as a challenge

Universal jurisdiction and civil cases such as those under ATCA are challenges to state action and actors, casting light and judgment upon state policies and simultaneously establishing that certain acts cannot be shielded by doctrines such as those of immunity or act of state.

Cases whereby states exercise universal jurisdiction constitute more significant challenges to state sovereignty, whereby one state, usually prompted by actions by activists or by victims themselves, challenges the internal actions of another state.

“Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.”²⁷ It can be applied only a very limited number of crimes. These include war crimes, crimes against humanity, genocide, and torture; it is sometimes said to include slavery and for historical reasons encompasses piracy. The cases brought against Augusto Pinochet Ugarte in Spain and the

²⁷ International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* (2000), p. 2. On the infringement upon sovereignty, see Brad R. Roth, “Liberalism, Anti-Sovereignism and Excesses in the Drive Against Impunity,” *Finnish Yearbook of International Law* vol. XII (2001). See also Maria Luisa Bartolomei, “Universal Jurisdiction versus National Sovereignty—Implementing Human Rights in a Global World—Some examples from Latin America,” paper presented at the annual conference of the Law and

case filed against Ariel Sharon in Belgium are only the most famous examples of the use of universal jurisdiction to seek to obtain custody of a defendant for crimes committed far from the nation and court seeking to try him or her.²⁸

The exercise of universal jurisdiction may constitute a significant challenge to national sovereignty and may constitute a deviation from the principle, enshrined in Article 2(7) of the UN Charter, of non-interference in the internal affairs of states. Jurisdiction has historically been closely tied to territorial sovereignty, with quite limited exceptions for extraterritorial application.²⁹ With the exception of universal jurisdiction, extraterritorial application of jurisdiction has tended to require a nexus with the state seeking to hear a case. There are four other commonly cited bases for extraterritorial jurisdiction: territorial, basing jurisdiction upon the place where the offence was committed or had its effects; national, based upon the nationality of the offender; protective, based upon injury to the national interest; and passive personal, based upon the nationality of the victim.³⁰

Significant or high-profile cases have included those brought against Augusto Pinochet Ugarte in Spain and elsewhere, those filed against Israeli President Ariel Sharon in

Society Association (Budapest, 2001).

²⁸ For a broad survey of recent cases, see Chandra Lekha Sriram, “Contemporary practice of universal jurisdiction: disjointed and disparate, yet developing,” *International Journal of Human Rights* vol. 6 (Fall 2002). The Belgian case against Sharon was dropped on the grounds that a case could only be carried out against persons found on Belgian territory. “War Crimes Charges Against Sharon Dropped,” *The New York Times* online (26 June 2002), at <http://www.nytimes.com>; “Belgian court ruling throws doubt on Sharon trial,” *Ha’aretz* (16 April 2002), at <http://www.haaretzdaily.com/hasen/>.

²⁹ For a fuller articulation of the relationship between sovereignty and the jurisdictional powers to prescribe, adjudicate, and enforce, see M. Cherif Bassiouni, “The history of universal jurisdiction and its place in international law,” in Macedo, ed., *Universal jurisdiction*. See also Ellen S. Podgor, “Extraterritorial Criminal Jurisdiction: Replacing ‘Objective Territoriality’ with ‘Defensive Territoriality,’” paper presented at the annual conference of the Law and Society Association (Vancouver, 2002).

³⁰ *United States v. Yunis*, Pretrial Memorandum Order No. 4; see generally Thomas M. Franck and Michael J. Glennon, *Foreign Relations and National Security Law: Cases, Materials, and Simulations*, 2d. ed. (West Publishing Co.: St. Paul, MN, 1993) 212-215.

Belgium, those filed and then abandoned against former Chadian dictator Hissène Habré, and many more.³¹ Of particular note is that these were high-profile challenges not simply to acts within states, but to official acts carried out by heads of state. While the Sharon case has been dropped for the duration of his tenure as a head of state, and the issue of immunity was never litigated in relation to Habré, the UK courts did not recognize Pinochet's claim to former head of state immunity. The Law Lords initially found that ex head of state immunity could not be found for acts such as torture, hostage-taking, and other grave international crimes. For unrelated reasons that initial decision was overturned; the Law Lords subsequently held that while ex-heads of state did enjoy immunity in the U.K. with respect to the exercise of official functions, torture could not be viewed as an official function.³² Thus the claim against Pinochet could have proceeded, as it was not barred by immunity; Pinochet was returned to Chile on other grounds.

ATCA cases and civil cases in the UK have already been discussed above and will be addressed briefly. Increasingly, defenses of state immunity, or bars such as the Act of State doctrine in the US, are viewed as illegitimate defenses to charges of torture and other serious violations of human rights because, it is argued, such activities cannot be viewed as legitimate instruments of state policy. As already discussed above in the context of the ATCA, former officials are not allowed to claim immunity in civil cases. Similarly, federal courts in the US have found that the Act of State doctrine is not a bar to a civil suit against

³¹ For a survey see Chandra Lekha Sriram "Exercising Universal Jurisdiction: Contemporary Disparate Practice," *International Journal of Human Rights* vol. 6, no. 4 (Winter 2002).

³² *Judgment: In Re Pinochet* (Oral judgment: 17 December 1998; Reasons: 15 January 1999), available at <http://www.parliament.the-stationery-office/>; *Judgment--Regina v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet; Regina v. Evans and Another and the Commissioner of Police for the Metropolis Ex Parte Pinochet* (24 March 1999), available at <http://www.parliament.the-stationery-office/>, reprinted in 38 ILM 581 (1999).

officials for torture. It is worth noting, however, that in the relevant cases the acts of torture were not clearly authorized by the foreign state's law itself; were they authorized or specifically required by the foreign state itself it remains unclear whether an act against the *state* could proceed under the act of state doctrine.³³

Standing of individuals in international law

While the traditional conception of international law presumes that only states can be subjects, and thus only states have rights and obligations, and the possibility of enforcing these or being subject to enforcement action, the rise of human rights discourse and agreement has meant that this is increasingly not the case. Individuals have standing to make claims against states for violations of rights in a variety of fora , indirectly and, increasingly, directly. For example, while individuals cannot petition the Inter-American Court of Human Rights directly, they can file a complaint before the Inter-American Commission, which can forward this complaint to the Court for action. Individuals can petition the European Court of Human Rights directly, and individual petitions to the court now number in the thousands, far exceeding the inter-state complaints before that body.³⁴ Individuals also have standing before the European Court of Justice, and optional protocols to the ICCPR and CEDAW permit individuals and groups to submit petitions. The Torture Convention and the International Convention on the Elimination of all forms of Racial Discrimination also have optional individual complaint procedures. Finally, as already discussed, individuals can bring civil cases under ATCA in the US or under universal jurisdiction in several countries. In some states such as Belgium individuals can not only

³³ *Forti v. Suarez-Mason* 672 F.Supp 1531 (N.D.Cal. 1987). *Filartiga* also found that unauthorized torture by a foreign official could not be properly treated as an act of state. .

³⁴ European Court of Human Rights, "Case Law Information Notes," at

bring complaints for prosecutors to carry out, but can act as *parties civiles* to bring cases on their own behalf.³⁵

Countervailing trends

While the trends detailed above may lead to the implication that state sovereignty is progressively being eroded by human rights claims in national courts, whether civil or criminal, and by implication perhaps that international courts may also erode sovereignty, these claims ought not be overstated. I note in particular three developments that might suggest a backlash by states: the US challenges to the International Criminal Court, the challenges at the ICJ by the Democratic Republic of Congo to cases against its officials through the exercise of universal jurisdiction in Belgium and France, and the latest draft articles on state responsibility by the International Law Commission.

The US v. the ICC

The American objections to the International Criminal Court have been public and vehement, and are viewed by many as but another instance of American exceptionalism. This may well be, but it is also important to note that US objections are also couched in more familiar language of state sovereignty, and claim that domestic rather than foreign or international courts ought to have jurisdiction over a state's citizens. As is well known the US has used a number of tools to protect its citizens, and in particular its troops in peacekeeping operations, from possible jurisdiction of the ICC. In addition to "unsigned" the treaty the US has used so-called "Article 98" agreements and renewal of peacekeeping mandates to attempt to eliminate possible avenues of court jurisdiction. It has done so

<http://www.echr.coe.int/Eng/InfoNotesAndSurveys.htm>.

³⁵ Luc Reydam, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford: Oxford University Press, 2003), p. 108.

because, while jurisdiction is consent-based and the US clearly has not consented, the court has jurisdiction over any cases arising on the territory of a state party, even if committed by a non-state party.³⁶ Article 98 agreements refer to that article of the ICC Statute, which seeks to ensure that provisions for jurisdiction do not undermine previous bilateral agreements regarding jurisdiction of foreign nationals, usually included in agreements regarding military bases. The US has sought, in deviation from the original purpose of this article, to create new bilateral agreements with states parties to the ICC Statute to ensure that those states will not surrender US citizens to the Court. The US has also vetoed the renewal of peacekeeping mission mandates in order to compel the passage of UN Security Council Resolution 1422, deferring investigation of cases involving personnel in UN-authorized operations.³⁷

The DRC v. universal jurisdiction

In April 2000, a Belgian magistrate issued an international arrest warrant, seeking the detention for extradition of the Democratic Republic of the Congo's (DRC) Minister for Foreign Affairs, Yerodia Ndombasi for alleged crimes constituting "serious violations of international law". The DRC filed a case before the International Court of Justice (ICJ) contesting Belgium's jurisdiction and seeking provisional measures to discharge the warrant immediately. The DRC contended that as there was no evidence of jurisdiction based on territory, *in personam* jurisdiction, or harm to the security or dignity of Belgium, grounds for arrest were lacking and the actions of Belgium violated, *inter alia*, the principle of sovereign legal equality. The DRC contended that a variety of multilateral conventions addressing specific international offenses created universal jurisdiction, but only where the alleged

³⁶ Madeline Morris, "The Disturbing Democratic Deficit of the International Criminal Court," *Finnish Yearbook of International Law* vol. XII (2001), pp. 109-118.

³⁷ UN Security Council Resolution 1422 (2002); See discussion in Marc Weller, "Undoing the global constitution: UN Security Council Action on the International Criminal Court," *International Affairs* vol. 78, no. 4 (2002), pp. 693-712.

perpetrator was on the territory of the state seeking jurisdiction; it also asserted diplomatic immunity for the accused. Belgium requested that the case be removed from the ICJ's list; in December the court rejected that request but also refused to take the provisional measure of discharging the warrant requested by the DRC.

In February of 2002, the court issued its decision in the case.³⁸ Most importantly, it did not explicitly reject the exercise of universal jurisdiction by Belgium;³⁹ rather it found that the exercise in this instance was in violation of legal obligations of Belgium towards the DRC, as it failed to respect the immunity from criminal jurisdiction enjoyed by an incumbent minister under international law. The court did not accept claims that the acts for which the arrest warrant was issued could not be legal acts within the performance of official duties, but rather indicated that the warrant would have undermined the conduct of foreign relations by the minister. The court, thus, issued an order that Belgium cancel the international arrest warrant. The ramifications of this case will become clearer over time; certainly it means that the case prepared in Belgium against Prime Minister Ariel Sharon of Israel cannot go forward while he is in office. The limitation of the exercise of universal jurisdiction by diplomatic immunity has now been clearly articulated, but gray areas remain; in particular immunities attaching to former diplomats or heads of state for acts undertaken in office.

France initiated proceedings for torture and crimes against humanity in the DRC's (formerly Zaire) neighbor, the Republic of the Congo, under articles 689-1 and 689-2 of the French Code of Criminal Procedure.⁴⁰ The Republic of the Congo challenged attempts to

³⁸ *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium) measures), (ICJ, Order of 14 February 2002), General List No. 121

³⁹ Indeed Congo's final submissions withdrew the broader objection to universal jurisdiction and emphasized the immunity of foreign ministers.

⁴⁰ See *Certain Criminal Proceedings in France (Republic of the Congo v. France)* 2003 I.C.J.

undertake investigations against, *inter alia*, the sitting President, Denis Sassou Nguesso, and sought provisional measures to compel France to suspend these judicial proceedings. The case poses a more direct challenge to universal jurisdiction than the *DRC v. Belgium* proceedings in which the DRC challenged the legality of the arrest warrant but dropped the objections regarding the legality of the arrest warrant as a part of the exercise of universal jurisdiction. In its case against France, the Republic of the Congo has argued that a sitting head of state, or cabinet minister such as the Minister of the Interior (also a subject of investigations in France), is immune from any ‘act of authority’ by another state that would hinder them in the exercise of their duties, and further that the ‘unilateral’ exercise by a state of universal jurisdiction is a violation of the sovereign equality enshrined in article 2(1) of the UN Charter.

On 17 June 2003, the ICJ rejected the request by the Republic of the Congo for an order for a provisional measure. The court rejected claims by the Congo that immediate measures were necessary in order to prevent irreparable prejudice to the accused or the Congo, or damage to French-Congolese relations, largely on the grounds that Congo had failed to provide concrete evidence of such harm.⁴¹ The court reasoned that since French law recognizes the immunities of heads of state, there could be no urgent concern that a case would go forward against the sitting president, and that the other individuals being investigated had yet to be the subject of any proceedings. The order at this provisional measures stage did not address the direct challenge to universal jurisdiction raised by the application of the Republic of the Congo.

129, Requete et Demande D’indication de Mesure Provisoire (5 December 2001), at www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_application_20020209.pdf; see also Pieter H.F.Bekker, “Prorogated and universal jurisdiction in the international court: The Congo v. France,” (April 2003) at www.asil.org/insights/insigh103.htm.

⁴¹ *Certain Criminal Proceedings in France (Republic of the Congo v. France)* 2003 I.C.J. 129 (17

ILC draft articles

Since its initial report in 1956, the International Law Commission has been engaged in codification of the principles of state responsibility, which enumerate types of harms by and against states that are wrongful, and actions that may be taken in response. While at one time it was contemplated that such acts might be denoted not merely as harms or as wrongful, but as crimes, the most recent articles by the ILC do not so denote them.⁴² What is noteworthy about the articles for the purposes of this essay is that, *contra* the trends towards individual standing discussed above, the articles remain firmly state-focused.⁴³ Only states can invoke the responsibility of another state for violations of obligations, under the articles. This is the case even though the articles refer to those obligations as obligations to the international community as a whole, rather than, as noted by one eminent scholar, the international community *of states* as a whole.⁴⁴ This approach, focusing upon harms to states, thus deviates from an earlier set of draft articles, completed in the 1960s, that emphasized injury to alien persons and property; individuals would not then have gained standing but would have been the subject of harms generating claims by states.⁴⁵ What this implies is some recognition of actors other than states as possessors of rights that may be harmed, even though only states may then complain. It is worth noting, however, that states that are not harmed may complain of violations. Any such harms or violations would be cause for

June 2003) at www.icj-cij.org/icjwww/idocket/icof/icoforder/icof_order_20030617.pdf.

⁴² “Draft Articles of Responsibility for Internationally Wrongful Acts,” in *Report of the International Law Commission on the Work of its Fifty-third Session* UN GAOR, 56th Session, Supp. No. 10, UN Doc. A/56/10 (2001), on the turn away from the language of criminality see Anthony Lang, 2004 ISA paper.

⁴³ Daniel Bodansky and John R. Crook, “Symposium: The ILC’s State Responsibility Articles: Introduction and Overview,” *American Journal of International Law* vol. 96, no. 4 (October 2002), pp. 773-91, p. 790.

⁴⁴ Edith Brown Weiss, “Invoking state responsibility in the Twenty-First Century,” *American Journal of International Law* vol. 96, no. 4 (October 2002), pp. 798-816, 804.

⁴⁵ David J. Bederman, “Invoking State Responsibility in the Twenty-first century,” *American*

civil rather than criminal action; states can lodge claims for reparations.⁴⁶ States can also initiate non-forceful countermeasures; the ILC discussions centered around specific features of application, in particular proportionality.⁴⁷ At the moment the Articles exclude the possibility of individual action, and it seems unlikely that this will change in the near future.

As one commentator noted,

“The exclusion of individuals and international organizations from the scope of the articles was a relatively uncontroversial move, but it could be criticized for a lack of vision. Does it really make sense to hermetically seal state responsibility from that of other international actors, particularly at a time when nonstate actors are gaining in strength, power, prestige, and legitimacy? Ultimately all this may well matter the most at the intersection of state power, individual rights, and countermeasures.”⁴⁸

Backlash and demands for local justice

It is not only the United States, with its campaign against the ICC, or the DRC, with its challenges to universal jurisdiction at the ICJ, that have raised challenges to the use of specific tools such as universal jurisdiction and, more generally, international tribunals, to pursue cases challenging state violation of international human rights or humanitarian law abroad. The statute of the ICC rightly recognizes the principle of complementarity, just as the European Court of Human Rights preserves the principle of subsidiarity.⁴⁹ This is the case not merely because of state fear of intrusion into internal affairs, or judgment of their own abuses, but because such power could be wielded for political purposes rather than

Journal of International Law vol. 96, no. 4 (October 2002), pp. 817-32, p. 829.

⁴⁶ Dinah Shelton, “Righting Wrongs: Reparations in the Articles on State Responsibility,” *American Journal of International Law* vol. 96, no. 4 (October 2002), pp. 833-56.

⁴⁷ Bederman, “Invoking State Responsibility”.

⁴⁸ Bederman, “Invoking State Responsibility”, p. 829 (citations omitted).

⁴⁹ Rome Statute of the International Criminal Court, preamble and article 1, at <http://www.un.org/law/icc/>; as discussed by Leila Nadya Sadat, “complementarity has a substantive component, a procedural component, and a component that we may think of as ‘political’ or ‘prudential’”; the last element is of greatest concern for us here. See Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Ardsey, NY: Transnational Publishers, 2002), p. 119.

“justice”, and thus might merit some real constraints. This is noted by even such advocates of human rights and more humane governance as Richard Falk, who notes that those with the greatest capacity to act to protect rights are also those likely to have ulterior motives or other agendas.⁵⁰ Such concerns may rightly arise with respect to tools of civil and criminal accountability. To the degree that proceedings take place only in the courts of powerful Western states, and often in those of former colonizers, the argument that cases are selective, and even driven by imperialistic agendas, can be and has been raised. This has been raised by, for example, the International Law Association, an independent association of international legal experts with no particular political affiliation or preference based in London:

“...the decision to initiate proceedings on the basis of universal jurisdiction may be objected to. States exercising universal jurisdiction on this basis may be accused of jurisdictional imperialism because universal jurisdiction is only likely to be exercised in powerful states with regard to crimes committed in less powerful states.”⁵¹

Such concerns may naturally be overstated, but are worth noting in that they comprise a supplement to more obviously cynical objections to legal action challenging internal actions by sovereign states. One reader has suggested, for example, that the tools described in this paper might be turned to the “war on terror” with troubling consequences.⁵²

One outcome of suggestions that international justice is, alternately, too invasive, potentially imperialistic, or simply fails to have specific desired effects has been the development of alternate, hybrid forms of justice. I will not discuss these in detail here as I have done elsewhere; suffice to say that hybrid forms of justice, such as the mixed tribunals

⁵⁰ Falk, *Human Rights and State Sovereignty*, p. 36.

⁵¹ International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* (2000), pp. 19-20.

⁵² I am grateful to Anthony Lang for this point.

in East Timor, Sierra Leone, and elsewhere, involve the use of local and international law, and local and international justice, in venues based in countries affected by human rights violations and mass atrocities. They also, by design, include the participation of states that may themselves have been involved in atrocities, but may be seen as distinct from traditional transitional justice, which might involve little or no international interference.⁵³

Trying Saddam: the Special Case of the Iraqi Special Tribunal

The Special Tribunal established to try Saddam Hussein can be viewed as an attempt to pursue justice domestically, and in a state-oriented tribunal rather than accept any real international interference or participation by individuals. Iraq is not, of course, a “typical” transitional state with a negotiated transition; the transitional regime is a new one installed by force, and thus decisions about accountability could be taken by the state alone. There is no reason, *a priori*, why Hussein and his fellow Ba’athists could not be tried before an *ad hoc* tribunal like those created for the former Yugoslavia and Rwanda, or a mixed tribunal such as those created or in creation in Sierra Leone, Kosovo, East Timor, and Cambodia.⁵⁴ However, such devices were rejected in favor of a domestic tribunal. This does not in itself make the tribunal illegitimate—far from it—but may generate concerns about the conduct of trials. Rather it is important to note that the Tribunal, constituted as it is of Iraqis and with US support, but little general international participation, was not the only possible model: alternatives such as an *ad hoc* or mixed tribunal have already been mentioned. Cases might also have been brought through the tools discussed in this chapter, allowing individuals to bring civil or criminal claims in the courts of other states, or cases through

⁵³ See, for example, on challenges to universal jurisdiction specifically as potentially illegitimate or imperialistic, Sriram, “Revolutions in Accountability: New Approaches to Past Abuses,” *American University International Law Review* vol. 19, no. 2 (Winter 2003).

⁵⁴ See Diane F. Orentlicher, “Venues for Prosecuting Saddam Hussein: The Legal Framework,” *ASIL Insights* (December 2003) at www.asil.org/insights/insigh124.htm; Amy

Iraqi courts. It is perhaps notable then that this is a state-controlled exercise in two senses—the absence of individual claimants and the relative absence of international participation. It is certainly the case that, should the trials meet international standards, domestic courts elsewhere would, following the principle of *ne bis in idem*, be unable to pursue criminal cases, and might well decline to examine civil cases, although these would not necessarily be prohibited.

The Iraqi Governing Council adopted the a statute for an Iraqi Special Tribunal in December of 2003; the Tribunal was authorized to prosecute genocide, crimes against humanity, and war crimes perpetrated during the period 1968-2003. In April 2004, the Iraqi Governing Council announced the creation of the tribunal to try Hussein and others from his regime.⁵⁵ The tribunal came under swift attack by human rights organizations for its composition and its potential use of the death penalty. The latter is beyond the scope of this inquiry, but the appointment of the nephew of the head of the Iraqi National Congress political party raised immediate concerns by advocates that the trials might be politically driven, even constitute a ‘kangaroo court’ or victors’ justice.⁵⁶ Further, while some international actors will be engaged, including on Hussein’s defense staff, the composition of the tribunal’s prosecutors and judges is entirely Iraqi, although the Statute had permitted the use of some non-Iraqi judges. Further, the investigative support that has been offered internationally was provided by the United States, by a team of some 50 investigators from various agencies of the US Department of Justice, which may further to contribute to

Ross, “The Trial of Saddam Hussein,” *Atlanta Journal and Constitution* (16 December 2003).

⁵⁵ See generally United States Institute of Peace, “Building the Iraqi Special Tribunal: Lessons from Experiences in International Criminal Justice,” *Special Report 122* (June 2004), at www.usip.org/pubs/specialreports/sr122.html.

⁵⁶ Robert Collier, “Human rights shortcomings’ in Hussein Tribunal--Concern Grows that Trial Will be Seen as a Kangaroo Court,” *San Francisco Chronicle* (22 April 2004), at www.globalpolicy.org/intljustice/tribunals/iraq/2004/0422short.htm.

concerns about bias.⁵⁷ At the reading of the charges against him in mid-2004, Hussein certainly emphasized his claim that the court was illegitimate: while his claims are clearly driven by interest there may be cause for concern.⁵⁸

It would be unrealistic to expect that the previously corrupt, and largely destroyed, Iraqi justice system, could handle cases of such magnitude on its own. The knowledge of, much less practice in, international human rights or humanitarian law by domestic judges and lawyers was said to be non-existent.⁵⁹ The Tribunal proposes to address these limits in part by drawing upon the Iraqi exile community, some of whom are qualified jurists. However, critics contend that simply bringing back Iraqi exiles will not solve the problem, but rather bring in competing political agendas. Concerns about the court are compounded by the absence of some key protections of international human rights law, including that the judges and prosecutors working on cases have expertise in human rights or complex criminal cases.⁶⁰ An advisory meeting for the Iraqi judges and prosecutors on the tribunal confirmed these fears: even the Iraqi participants themselves acknowledged their lack of expertise. Further, the UN barred its own experts from participation in the meeting on the grounds that it did not meet international standards.⁶¹ Certainly, whether the trials are fairly conducted or not, the Special tribunal stands as a clear instance in which a state sought not to allow other actors, be they courts of other states or an international court, to examine

⁵⁷ “Iraqi tribunal to try Saddam Hussein,” at www.cnn.com/2004/WORLD/meast/04/20/iraq.main; Louis Mexler, “All-Iraqi tribunal formed to try Hussein: Longtime enemy at head of panel,” Associated Press (21 April 2004) at www.signonsandiego.com/uniontrib/20040421/news_in21tribunal.html.

⁵⁸ John F. Burns and Ian Fisher, “A Defiant Hussein Rejects Charges in Iraqi Court,” *New York Times* (1 July 2004) at www.nytimes.com.

⁵⁹ Paul van Zyl, “Transitional Justice in Iraq: an ICTJ Policy Paper,” (May 2003) at www.ictj.org.

⁶⁰ See Human Rights Watch, “Saddam Hussein as a P.O.W.,” (22 January 2004) at www.hrw.org/english/docs/2004/01/27/iraq7076.htm.

⁶¹ Simons, “Iraqis not ready for trials.”

internal atrocities, much less to allow individual claims against Hussein.

Conclusions

I began this essay with the suggestion that the increased role of the individual in international law, particularly through human rights claims, had begun to erode state sovereignty. This is a common enough assertion in international relations and international legal literature, but is seldom examined in any specific detail. I sought, therefore, to examine the claim more closely, identifying the traditional place of the state in international law and the legal protections erected around that state, such as sovereign immunity. I looked as well as the traditional exclusion of individuals, who have generally not been granted standing in international law. I then examined two specific legal tools, one civil and one criminal, that not only empower the individual to bring claims for violations of international law, but to bring claims against other states. These tools have allowed individuals to make significant inroads in state sovereignty, but even these have been limited by claims of immunity. It is worth noting that there has also been a backlash of sorts, against aspects of expansion of international justice, by the US against the ICC, by the DRC against cases based upon universal jurisdiction in Belgium, etc. While not constituting backlash *per se*, the ILC's 2001 draft articles on state responsibility clearly exclude individuals from claims, despite steps in an early draft to include them. Similarly, the trial of Saddam Hussein appears to be one in which significant international involvement might have been expected but over which the state has sought to maintain firm control.