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Hurricane Katrina Victims: A Claim in the International Courts

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I. Introduction

Currently, international courts are not able to exercise jurisdiction over a claim brought by a third-party nation state on behalf of Hurricane Katrina victims against the United States for the suffering caused by its inadequate policies. However, another country should be permitted to bring such claims in international courts. Where do the citizens of any country go when their own nation has failed to answer a
call for help regarding a disaster—natural or man-made—that has caused its citizens to suffer indignity and humiliation? In 2005, Hurricane Katrina, one of the deadliest and costliest natural disasters in the history of the United States, struck the Gulf Coast.¹ The most severe loss of life due to Hurricane Katrina occurred in New Orleans, Louisiana as a result of the catastrophic failure of the levees and the federal flood protection system of the U.S.²

The federal government created the Federal Emergency Management Agency (FEMA) to be the leader in preparedness for all disasters, natural or man-made.³ FEMA’s mission is to “reduce the loss of life and property and protect the Nation from all hazards, including natural disasters, acts of terrorism, and other man-made disasters, by leading and supporting the Nation in risk-based, comprehensive emergency management system of preparedness, protection, response, recovery, and mitigation.”⁴ FEMA fell short of meeting its obligations when its management was overwhelmed, causing the loss of life of over 1,300 people and the suffering, indignity, and humiliation of more than one million others.⁵ FEMA was supposed to provide state and local government with experts in specialized fields and funding for rebuilding efforts and relief funds for infrastructure.⁶

The citizens of New Orleans, who were most affected by Hurricane Katrina, have suffered indignity and humiliation as a result of the failures of FEMA. Nearly four years later, the signs of Katrina linger as a result of the failures of FEMA to live up to its mission. New Orleans still struggles to recover. Many of the citizens remain displaced and have lost their homes. Where are these citizens to go for relief? What court, if any, has jurisdiction to address the atrocities suffered by the victims of Hurricane Katrina? Consider the possibility

¹. National Oceanic and Atmospheric Administration, http://www.katrina.noaa.gov (last visited Nov. 9, 2008) (insured losses of approximately $60 billion were far higher than those from Hurricane Andrew in 1992, which totaled $21 billion).
². The Flood Control Act of 1965 gave the U.S. Corps of Engineers control to design and construct flood control protections for New Orleans.
⁴. Id.
⁶. See generally FEMA Strategic Plan, supra note 3.
that as a result of the failures of federal government in responding to the aftermath of Hurricane Katrina, another nation State might bring a claim on behalf of the citizens of the U.S. in the international community. The prevailing question should be whether the international courts may exercise jurisdiction over such a claim.

This note will argue that a pattern of failed policies may be a crime against humanity. In addition, discussion will include the jurisdiction of international courts' over crimes against humanity as accepted under international law. Finally, recommendations are made on how to handle jurisdictional problems in the international community.

II. THE FEDERAL GOVERNMENT’S PATTERN OF FAILED DISASTER PREPAREDNESS POLICIES IS A CRIME AGAINST HUMANITY

Generally, a single incident does not constitute a crime against humanity; however, a systematic or widespread attack may establish a crime against humanity where there is a pattern of failures. The U.S. has demonstrated a pattern of inadequate responses to natural disasters that impact its citizens. An insufficient response to a natural disaster based on the federal government policies could be considered systematic or widespread so as to constitute a crime against humanity when there is a pattern of failures. The United States’ failure to prepare for Hurricane Katrina caused the citizens of New Orleans to suffer indignity, humiliation, and a significant loss of life. Thus, an international court would be justified in asserting universal jurisdiction over a claim brought by another nation state on behalf of the harmed citizens.

A. The Pattern of Inadequate Responses to Natural Disasters

In August 1992, Hurricane Andrew, with sustained winds of 165 miles per hour, struck the Florida and Louisiana Gulf

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8. Id.
9. Ed Rappaport, National Hurricane Center, Preliminary Report Hurricane Andrew (1992), available at http://www.nhc.noaa.gov/1992andrew.html#FOOT1 (last visited Nov. 16, 2008). Andrew was a small and ferocious Cape Verde hurricane that wrought unprecedented economic devastation along a path through the northwestern Bahamas, the southern Florida peninsula, and south-central Louisiana. Damage in the United States is estimated to be near $25 billion, making Andrew the most expensive natural disaster in U.S. history. The tropical cyclone struck southern Dade County, Florida, especially hard with violent winds and storm surges characteristic of a category 4 hurricane (see addendum on upgrade to category 5) on the Saffir/Simpson Hurricane Scale, and with a
coasts. The result was billions of dollars in property damage and tremendous loss of life. The criticisms of the federal government for FEMA's response to Andrew were summed up by the famous exclamation made by Kate Hale, "[w]here in the hell is the cavalry on this one?" Kate Hale was the emergency management director for Dade County, Florida. The federal government at large was accused of not responding fast enough to house, feed, and sustain the approximately 250,000 people left homeless in the affected areas. It took nearly five days for the federal government to dispatch active duty troops to South Dade County to set up temporary housing. FEMA had previously been criticized for its response to Hurricane Hugo, which hit South Carolina in September 1989, and many of the same issues that plagued the agency during Hurricane Andrew were also evident during the response to Hurricane Katrina in 2005.

It does not appear as though the federal government has learned the lessons of past natural disasters. There continues to be inadequate responses to natural disasters that cause loss of life and suffering by the citizens of indignity and humiliation. The policies of the federal government resulted in systematic and widespread chaos for the people of New Orleans. Thus, it is argued herein that the action, or inaction, of the federal government is a crime against humanity subject to universal jurisdiction in the international courts.

central pressure (922 mb) that is the third lowest this century for a hurricane at landfall in the United States. In Dade County alone, the forces of Andrew resulted in 15 deaths and up to one-quarter million people left temporarily homeless. An additional 25 lives were lost in Dade County from the indirect effects of Andrew. Id.

11. Id.
12. Id. (three days had passed since Hurricane Andrew had made landfall and the people in Dade County were still waiting on supplies while community leaders were pleading for federal assistance).
13. Id.
14. Id. at 2 (testifying before the U.S. House Committee on Homeland Security on October 19, 2005, Governor Jeb Bush said “Florida learned a hard lesson about response and recovery after Andrew.”).
15. Rappaport, supra note 9.
16. Id.; see generally Himberger, supra note 10.
III. The Response to Hurricane Katrina Constitutes "Inhumane Acts" Against Victims of Katrina and a Crime Against Humanity Under International Law

Crimes against humanity have been defined in treaties and international law. Article 6 of the Charter of the International Military Tribunal defined crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before and during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated." Similarly, Article II of the Control Council Law No. 10 adopted the same definition of crimes against humanity stated in the Nuremberg Trials.

Article VII of the Rome Statute of the International Criminal Court, defines crimes against humanity as:

1. For the purpose of this Statute, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health
   (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant

to or in furtherance of a State or organizational policy to commit such attack;\(^{19}\)

Crimes against humanity committed during a time of war or peace do not have a statute of limitations.\(^{20}\) Thus, the international courts would always have the legal capacity to pursue an offender that committed a crime against humanity.

Customary international laws are binding upon all nations, even without a particular nation's consent; however, they can be modified within a state by subsequent legislation or a treaty, provided that the customary international law is not a preemiptory norm.\(^{21}\) A preemiptory norm, or \textit{jus cogens}, does not permit derogation, but prevails over and invalidates any prior conflicting international agreements or other rules of international law, and can be modified only by a subsequent norm of general international law having the same character.\(^{22}\) International law controls only when there is no treaty and no controlling executive or legislative act or judicial decision.\(^{23}\) "International law" is a part of the law of the U.S., and as such, is the law of all states of the Union, but it is a part of the United States law for application of its own principles.\(^{24}\) The application of international laws as part of U.S. law is solely concerned with international rights and duties and not with domestic rights and duties.\(^{25}\)

In \textit{Sosa}, the Supreme Court held that alien tort claims must "rest on a norm of international character accepted by the civilized world."\(^{26}\) The Court also identified three offenses that give rise to liability under the traditional law of nations: violation of safe conduct, infringement of the rights of ambassadors, and piracy.\(^{27}\) These of-


\(^{21}\) In re Agent Orange Product Liability Litigation, 373 F.Supp. 2d 7 (E.D.N.Y., 2005); \textit{see also} Princz v. Federal Republic of Germany, 26 F.3d 1166 (1994) (explaining that preemiptory norm, or \textit{jus cogens}, is a principle of international law that is based on values taken to be fundamental to the international community and that cannot be set aside (as by treaty)).

\(^{22}\) Agent Orange, 373 F.Supp. 2d 7.

\(^{23}\) \textit{See} Bradvica v. I.N.S., 128 F.3d 1009 (7th Cir. 1997) (asserting under international law, such claims are considered frivolous because customary international laws are not applicable in domestic courts where there is a controlling legislative act and a prior treaty does not trump provisions of a subsequent legislative act).


\(^{25}\) \textit{Id}.


\(^{27}\) \textit{Id.} at 715.
fenses were universally accepted and defined with specificity. The Court stated that “[a]ctionable violations of international law must be of a norm that is specific, universal and obligatory.” The prohibition against crimes against humanity constitutes such a specific, universal and obligatory norm. The loss of life during Hurricane Katrina, and the suffering the citizens of New Orleans endured would be actionable violations of specific, universal and obligatory international law, due to the federal government’s lack of preparedness. The federal government’s response to Hurricane Katrina is not acceptable in civilized society. There was a specific obligation on the part of the government to ensure the safety of the citizens of New Orleans during this disaster.

The international prohibition of crimes against humanity is explicitly codified in several multilateral agreements and has been extensively litigated in international tribunals, constituting a body of doctrinal exposition. The prohibition of crimes against humanity has been defined with an ever greater degree of specificity than the three offenses identified by the Court in _Sosa_. The prohibition was first recognized by the Charter of the International Military Tribunal at Nuremberg (“Nuremberg Charter”). The Nuremberg Charter was adopted to ensure punishment for serious human rights abuses committed by the military and political leaders of Nazi Germany during World War II. Under the Nuremberg Charter, acts constituting crimes against humanity included “murder, extermination, enslavement, deportation, persecution on political, racial or religious grounds, or other inhumane acts committed against a civilian population.” Criminal liability was acknowledged against Nazi leaders for crimes against humanity under international law. Since the adoption of the Nuremberg Charter, the prohibition of crimes against humanity has been expressly recognized in several international instruments.

29. _Sosa_ at 732 (quoting In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).
31. _Id_.
32. _Id_.
34. _See generally_ M. Cherif Bassiouni, Crimes against Humanity in International Criminal Law 1155 (2d ed. 1999).
35. Charter of International Military Tribunal art. 6(c), 82 U.N.T.S. 284.
With the recognition of liability for crimes against humanity, the federal government would be liable to the international community for any crimes committed against humanity for its failed policies that resulted in "other inhumane acts" against its citizens.

In 1993, the United Nations ("U.N.") Security Council established the International Criminal Tribunal for the former Yugoslavia ("ICTY") to prosecute serious violations of international law committed in that territory, including genocide, war crimes, and crimes against humanity.\(^{38}\) The International Criminal Tribunal for Rwanda ("ICTR") was established by the Security Council in 1994 to prosecute similar violations of international law committed in Rwanda.\(^{39}\) Both the ICTY and ICTR have affirmed the status of crimes against humanity under international law.\(^{40}\) At the very least, the U.N. Security Council should create an International Criminal Tribunal to investigate any violations of international law that may have been committed in New Orleans during Hurricane Katrina.

The Rome Statute of the International Criminal Court provides the most current definition of crimes against humanity under international law.\(^{41}\) Article 7 of the Rome Statute defines a crime against humanity as one of a number of defined acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack.\(^{42}\) Its recent codification in the Rome Statute makes Article 7 an authoritative interpretation of crimes against humanity in international law.\(^{43}\) The Rome Statute has been ratified or acceded to by 94 countries and signed by an additional 47, including four of the five members of the U.N. Security Council, signifying widespread acceptance.\(^{44}\) Since the Rome Statute is the authoritative interpretation of crimes against humanity in interna-

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41. Rome Statute, Part II. Art. VII.
42. *Id.* at 1004.
44. Rome Statute, Part II. Art VII. (the United States is not a signatory of the Rome Statute).
HURRICANE KATRINA VICTIMS

It follows that the definition of crimes against humanity is now a preemptory norm that permits the international court to exercise jurisdiction over member states to the U.N. under the Rome Statute for violations of crimes against humanity.

The Rome statute requires four elements to establish a crime against humanity: (1) an act committed in violation of a provision; (2) committed as part of a widespread or systematic attack; (3) directed against a civilian population; and (4) committed with knowledge of the attack. Significantly, even a single act by an individual, taken within the context of a widespread or systematic attack against a civilian population, can constitute a crime against humanity.

According to Antonio Cassesse, the former President of the International Criminal Tribunal for the former Yugoslavia:

This principle was illustrated in Prosecutor v. Msksic where the court stated in pertinent part:

Under this analysis, the federal government's failure to prepare for a storm—as a result of a system of inadequate policies or overall inhu-

46. Id. at 1156.
48. Prosecutor v. Msksic, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61, ¶ 30 (Apr. 3, 1996); see also Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 649 (May 7, 1997) (“Clearly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offenses to be held liable.”); Doe, 348 F. Supp. 2d 1112, 1154-1157.
manity—despite having notice of the harm it could inflict, demonstrates systematic or widespread attack on a civilian population.

Several federal courts in the U.S. have accepted the well-established nature of crimes against humanity and that “[c]ustomary international law rules proscribing crimes against humanity, including genocide, and war crimes, have been enforceable against individuals since World War II.49 “Crimes against humanity have been recognized as a violation of customary international law since the Nuremberg Trials in 1944.”50 “It is well-settled that a party who commits a crime against humanity violates international law.”51 “[T]he ruling of the Nuremberg Tribunal memorialized the recognition of ‘crimes against humanity’ as customary international law.”52 The U.S. and other nations have recognized ‘war crimes’ and ‘crimes against humanity,’ including ‘genocide,’ as crimes for which international law permits the exercise of universal jurisdiction.”53

Several U.S. courts have referenced the specific, universal, and obligatory nature of crimes against humanity in their rulings.54 In Mehinovic, the district court applied the “specific, universal and obligatory” test and held that crimes against humanity are actionable.55 The district court in Wiwa, also followed this approach, analyzing several claims under the “specific, universal and obligatory” standard, holding the prohibition of crimes against humanity to be “a norm that is customary, obligatory, and well-defined in international jurisprudence.”56 It has also been recognized that crimes against humanity constitute a specific, universal, and obligatory norm, thus making them actionable

49. See, e.g., Flores v. Southern Peru Copper Corp., 343 F.3d 140, 151 (2d Cir. 2003).
51. Sarei v. Rio Tinto PLC, 221 F.Supp. 2d 1116, 150 (C.D. Cal. 2002) (concluding a party may be held liable for violating international law under the Alien Tort Crime Act).
52. Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 2001); see also Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 440 (D.N.J. 1999) (recognizing crimes against humanity as a violation of international law); see Quinn v. Robinson, 783 F.2d 776, 799 (9th Cir. 1986) (“crimes against humanity, such as genocide, violate international law”).
53. See also United States v. Yousef, 327 F.3d 56, 105 (2d Cir.2003); Sosa, 542 U.S. at 762 (Breyer, J., concurring) (recognizing that international law views crimes against humanity as universally condemned behavior that is subject to prosecution).
54. Doe, 34 F. Supp. 2d 1112, 1154-1157 (recognizing liability under Alien Tort Criminal Act (“ATCA”)).
55. Mehinovic, 198 F.Supp. 2d at 1344, 1352-54 (crimes were actionable under the ATCA).
under international law. The assassination of Archbishop Romero met the elements for establishing a crime against humanity. The Romero assassination occurred in an environment of state-sanctioned violence that was both widespread throughout El Salvador and constituted systematic, inhumane attacks on the civilian population by the ruling military. The death squad, which perpetrated the murder of Archbishop Romero, acted as part of a calculated strategy by the military to terrorize the civilian population into submission. The decision to kill Romero was made to silence his criticism of the state security forces and state implemented repression. At or about the same time, other priests were being murdered by the military and death squads to deter their practice of liberation theology. Saravia knew that he was involved in an operation to murder the revered Archbishop, one of the most important civilians in El Salvador. Given that this particular act took place within the context of other widespread and systematic attacks against the civilian population by state security forces and state-sponsored death squads, the assassination of Romero meets the four criteria for establishing it as a crime against humanity. This extrajudicial killing meets the Supreme Court's requirements identified in Sosa. It will be challenging to establish the elements of a crime against humanity as a result of the policies of the U.S. regarding preparedness for all natural disasters such as Hurricane Katrina. However, this article suggests that some form of liability for the inadequate response during Katrina is warranted, even if it is found not to be criminal. Generally, relief for crimes against humanity is punitive, although it may be time to establish some sort of civil liability.

58. Id.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id. at 1154-57.
64. Id.
65. Id.
IV. INTERNATIONAL COURTS Asserting Universal Jurisdiction on Crimes Against Humanity

International law recognizes five general principles by which a sovereign State may exercise jurisdiction.66 Though the universality principle will primarily be discussed,67 the other principles are described as follows. The territorial principle permits jurisdiction where the alleged crime was committed within the state's territory, or "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he [the perpetrator] had been present at the effect, if the State should succeed in getting him within its power."68 The Act does not have to be committed within the territory, just intended to have an effect within the territory asserting jurisdiction;69 nationality principle grants the authority to exercise jurisdiction over nation citizens based upon the allegiance they owe the country and its laws;70 protective principle allows a state to exercise authority to the extent that is reasonably necessary to protect itself and its citizens from harm;71 passive personality principle is a state establishing jurisdiction based on the victim being a national of the state.72

66. Chua Han Mow v. United States, 730 F.2d 1308 (9th Cir. 1984) (permitting extraterritorial jurisdiction over a Malaysian citizen who violated importation and distribution laws on controlled substances, arrested and incarcerated in Malaysia for drug smuggling).

67. United States v. Yunis, 924 F.2d 1086 (9th Cir. 1991) (stating universal jurisdiction refers to the competence of any state which obtains custody of an offender to proscribe and punish an offense with which it has no connection based on territory or nationality and that criminal act does not affect the state).

68. Chua Han Mow, 730 F.2d 1308.

69. United States v. Ricardo, 619 F.2d 1124 (5th Cir. 1980) (finding jurisdiction appropriate where a conspiracy that occurred outside the U.S. extraterritorial jurisdiction was in furtherance of an intended effect within the U.S. territory).

70. United States v. Walczak, 783 F.2d 852 (9th Cir. 1986) (finding a false statement on a customs declaration form by a U.S. citizens was a basis for jurisdiction under the nationality principle).

71. United States v. Gonzalez, 776 F.2d 931 (11th Cir. 1985) (finding foreign nationals defendants charged with possession and distributing marijuana in the custom waters were within U.S. jurisdiction under the protective principle); see also THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g (1986) ("The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorism and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials.").

72. United States v. Roberts, 1 F.Supp. 2d 601 (1998) (holding the U.S. established jurisdiction over the defendant, a sexual abuser, because the victim on the cruise ship that was out to sea was a national of the U.S.).
The primary focus here is the universal principle, which allows a state to exercise jurisdiction over a criminal act even if there is no connection between the offense in question and the state exercising jurisdiction. Countries generally established jurisdiction under international law for criminal cases based on a connection between the state and the crime. Under the universal principle, states may prescribe and prosecute "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," even in the absence of a special connection between the state and the offense. Universal jurisdiction relies primarily on the nature of the crime and not the place where the crime was committed, the nationality of the accused, or that of the victim. Crimes that are "universally condemned," which are particularly heinous and recognized as such by almost all cultures, established the notion that a state may prosecute a crime based on the universal jurisdiction principle. The international community as a whole has an interest in prosecuting those heinous crimes because the offenders are considered "enemies of all people." A state asserting authority under universal jurisdiction is thereby enforcing customary international law on behalf of the international community. The duty and obligation upon a state to use universal jurisdiction is to prevent offenders from escaping responsibil-


74. Amanda L. Morgan, U.S. Officials Vulnerability to "Global Justice": Will Universal Jurisdiction Over War Crimes Make traveling for Pleasure Less Pleasurable?, 50 HASTINGS L.J. 407, 428 (December 2005) (explaining universal jurisdiction and how a duty to act may be created upon another country to act to bring violators to justice).

75. Yunis, 924 F.2d 1086 (affirming convictions for hijacking of aircraft in Jordanian passenger aircraft in Beirut, Lebanon even though hostage taking was not recognized as a universal crime; it was recognized as a domestic crime in the U.S.); see generally Restatement (Third) of the Foreign Relations Law of the U.S. §§ 404, 423 (1987).

76. Princeton Project on Universal Jurisdiction, July 23, 2001, available at http://www.globalpolicy.org/intljustice/universal/2001/princetonprinciples.htm (last visited Nov. 15, 2008) ("The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled - and even obliged - to bring proceedings against the perpetrator, regardless of the location of the crime or the nationality of the perpetrator or victim.").

77. Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985); Morgan supra note 74, at 429.

78. Demjanjuk, 776 F.2d at 582; see Morgan, supra note 74, at 429.

ity by finding a safe haven in another country not connected to the offense.80

Universal jurisdiction establishes a method for a state to enforce sanctions for some crimes that are independently based in international law.81 Universal jurisdiction applies to crimes that “are so universally condemned that the perpetrators are the enemies of all people.”82 For an international crime to be subject to universal jurisdiction there must be an express recognition of this jurisdiction through international custom or convention.83 A state traditionally has had authority to exercise universal jurisdiction for certain international crimes: piracy, war crimes, genocide, crimes against humanity, and torture.84 The determination of what constitutes a crime against humanity varies with each international convention.85 Under the Rome Statute, the International Criminal Courts recognize apartheid, forced disappearances of persons, and torture as crimes against humanity and thereby subject to universal jurisdiction under certain treaties.86 Universal jurisdiction has also been exercised for the crime of torture under customary international law, outside the framework of any convention.87

The principle that it is a state’s duty to bring justice to individuals who commit war crimes when they are not prosecuted in their own country arose out of the Nuremberg trials.88 The Israeli Supreme Court also recognized the notion of universal jurisdiction when it reasoned that jurisdiction extends to acts that “damage vital international interests; they impair the foundations and security of the international community [and] violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations.”89 The Geneva Convention created a duty to prosecute

80. J. G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 234 (10th ed. 1989) (asserting that the reason for universal jurisdiction is to ensure that certain heinous crimes do not go unpunished).
81. Paust, supra note 79, at 61.
82. Demjanjuk, 776 F.2d at 582 (6th Cir. 1985).
83. Bottini, supra note 73, at 515; see Regina v. Bartle (Ex Parte Pinochet), (1998) 37 I.L.M. 1302, 1303 (H. L.) (“[t]he fact even that an act is recognized as a crime under international law does not mean that the Courts of all States have jurisdiction to try it”).
84. See Nuremberg Trials, supra note 36; Morgan, supra note 76, at 430.
85. Bottini, supra note 73, at 539.
86. Morgan, supra note 74, at 432 n.63.
88. Morgan, supra note 74, at 433 n.73.
89. Attorney-Genn. of Isr. v. Eichmann, 36 I.L.R. 277, 291 (Isr. S. Ct. 1962); see Morgan, supra note 74, at 434 n.79.
offenders who commit "grave breaches"\textsuperscript{90} of the Geneva Convention.\textsuperscript{91} Article 15 of the International Covenant on Civil and Political Rights also recognized some form of universal jurisdiction.\textsuperscript{92} Additionally, articles 5 and 7 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment permitted universal jurisdiction over nationals of state parties to the treaty.\textsuperscript{93} The U.S. is a signatory to all three of the conventions above that recognize some form of universal jurisdiction.\textsuperscript{94} The U.S. as a signatory to these conventions and other countries has a duty to prosecute offenders of international law; especially since a violation of international law is a crime against humanity. A country which carries out its duty would then have the benefit of an international court that may exercise universal jurisdiction. Precedent indicates there is an international duty for nation states to prosecute violators of international law that grants universal jurisdiction in the international community.

Many more countries are recognizing the application of universal jurisdiction.\textsuperscript{95} The U.S. has recognized universal jurisdiction in civil cases by aliens, under the Alien Tort Criminal Act (ATCA), the Torture Victim Protection Act (TVPA), and in situations where the offender was present in the U.S.\textsuperscript{96} During the Yugoslav and Rwandan

\textsuperscript{90} See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31, 62; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85, 116; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135, 236; Geneva Convention Relative to the Prosecution of Civilian Person in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287, 386 ("grave breaches" include willful killing, torture or inhumane treatment, causing great suffering or serious injury to body or health, and other serious violations of the laws of war).

\textsuperscript{91} See Geneva Convention Relative to the Prosecution of Civilian Person in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287, 386 (stating "persons alleged to have committed, or to have ordered to be committed, such grave breaches" of the laws of war are subject to the jurisdiction of all the state parties); Morgan, \textit{supra} note 74, at 434.


\textsuperscript{94} \textit{Id.} (the United States is a signatory to the convention).

\textsuperscript{95} Morgan, \textit{supra} note 74, at 437 nn.108-118.

civil wars, the Security Council established the ICTY and the ICTR to investigate and prosecute international crimes including crimes against humanity.\(^97\) The authority of universal jurisdiction was affirmed against the Chilean military dictator Augusto Pinochet when Spain, France, Belgium and Switzerland initiated criminal investigations against him.\(^98\) Universal jurisdiction is gaining favor in the international community. It may be time to recognize jurisdiction over nations for citizens' claims against their nation state for its policy failures. Where would the international community get the authority to exercise jurisdiction over nations?

A. International Court of Justice (ICJ) Foundation for Jurisdiction

It appears as though the U.N., through the ICJ, may be able to exercise universal jurisdiction over any "member"\(^99\) state that threatens "justice and respect for the obligations arising from treaties and other sources of international law."\(^100\) Article 92 established that the ICJ "shall be the principal judicial organ of the U.N.,"\(^101\) and "[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice."\(^102\) Since the U.S. is a member of the U.N., it follows that the ICJ may exercise universal jurisdiction over a claim arising out of other sources of international law; for example, customary international laws and other such treaties. Thus, there appears to be authority for the ICJ to exercise jurisdiction over a nation in a civil claim brought by citizens.

V. Making the Case that the Situation in Darfur Was a Crime Against Humanity

If ever any event justified a call to action to address a crime, it would be the situation in Darfur.\(^103\) The circumstances in Darfur are not of nature, but of man and are offered to show that the government

\(^97\) Morgan, supra note 74, at 437 nn.103-107.
\(^98\) Morgan, supra note 74, at 440 (describing House of Lords affirmation that the principle of universal jurisdiction would apply for criminal charges of torture committed during the time Pinochet was in power).
\(^100\) Id. at 1152.
\(^101\) Id. at 92.
\(^102\) Id. at 93.
policies caused results similar to those in a natural disaster. The death and humiliation are the result of the government policies which constitute a systematic and widespread attack on the African people of Darfur.

In 2003 a major conflict began in Darfur after two rebel groups, the Sudanese Liberation Army and Movement and the Justice and Equality Movement, attacked government targets claiming the region was being neglected by the government. Darfur has faced many years of tension over land and grazing rights between the mostly nomadic Arabs, and farmers from the Fur, Massaleet, and Zagawa communities. The rebels claimed that the government oppressed the black Africans in favor of the Arabs and have waged attacks against the state to show disapproval. In response, the government waged a systematic campaign of “ethnic cleansing” against the rebels, and the civilian communities: Fur, Massaleet, and Zagawa. The Sudanese government and Janjaweed militias have burned and destroyed hundreds of villages and raped and assaulted thousands of women and girls, all while causing tens of thousands of civilian deaths and displacing millions of people. The Sudanese government does not want foreign countries to get involved in affairs in their country. The government of Sudan has carried out air strikes on civilian areas believed to be under rebel control. Sudan agreed in July 2007 to allow the U.N. Security Council to deploy peacekeeping troops under certain conditions. In February 2008, Sudanese forces and allied militia carried out a series of coordinated attacks on three villages in West Darfur.

The attacks by the Sudanese government are representative of the types of crimes that international law was created to prevent. The Sudanese government’s systematic ethnic cleansing campaign resulting in the murder and displacement of millions of citizens in Darfur surely represents an attack against all man-kind, and is the type of offense that contradicts international preemptory norms, or jus cogens. All of the elements of a crime against humanity are present in Darfur.

104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Id.
111. Id. (troops must be of African countries and government refused to provide land for bases and critical equipment to arrive).
112. Id.
The murder and persecution against the black Africans, an identifiable group in the region, is a violation enumerated under Article 7 of the Rome Statute, which has become the authoritative interpretation of crimes against humanity in international law. The attack on the Africans of Fur, Massaleet, and Zagawa communities was part of a systematic or widespread attack directed against a civilian population through "ethnic cleansing," as shown by the burned and destroyed villages, civilian deaths, millions of displaced people and thousands of raped and assaulted women and girls. Furthermore, the government of Sudan does not want foreign countries to get involved in its affairs, and has carried out air strikes against civilian populations in the region, demonstrating that the government has knowledge of the attacks. Taken in this context, the acts by Sudan, which are systematic or widespread, even if they occurred only once, may be sufficient to constitute a crime against humanity. Thus, the atrocities in Darfur are crimes against humanity which require international intervention to prevent the offenders from escaping impunity.

Another country would be justified in seeking justice for the Sudanese government for its heinous acts. Any country would be justified under its international obligation to prevent crimes against mankind that cause this sort of suffering, indignity, inhumanity, and loss of life. It would be appropriate for the international courts to exercise universal jurisdiction to punish Sudan for its violations of international law.

VI. MAKING THE CASE THAT THE FEDERAL GOVERNMENT RESPONSE TO HURRICANE KATRINA VICTIMS WAS A CRIME AGAINST HUMANITY

In August 2005, the United States experienced Hurricane Katrina, one of the worst catastrophic natural disasters in history.113 The federal government response to the disaster was wholly inadequate.114


114. LESSONS LEARNED, supra note 5, at 1.

The awe that viewers held for the sheer ferocity of nature was soon matched with disappointment and frustration at the seeming inability of the 'government'—local, State, and federal—to respond effectively to the crisis. Hurricane Katrina and the subsequent sustained flooding of New Orleans exposed significant flaws in federal, State, and local preparedness for catastrophic events and our capacity to respond to
President George W. Bush accepted responsibility for the ineffective response time. Federal government plans created after September 11, 2001, failed to adequately account for widespread or simultaneous catastrophes. "[O]ne of the lessons of this storm is the decency of people, the decency of men and women who care a lot about their fellow citizens." That it took such a tragic event to make the federal government recognize that it should care for its citizens reveals a sad state of affairs. Katrina caused more property damage than any other natural disaster and was the deadliest since 1928. Thousands of people were displaced. The painful images of people suffering and in despair are forever seared into the minds of all Americans. The federal government acknowledged a duty for protecting the citizens of the U.S. after September 11, 2001, to "prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity." FEMA was a "multi-agency center that provided overall federal response coordination for Incidents of National Significance them. Emergency plans at all levels of government, from small town plans to the 600-page National Response Plan—the federal government's plan to coordinate all its departments and agencies and integrate them with State, local, and private sector partners—were put to the ultimate test, and came up short. Id.

115. LESSONS LEARNED, supra note 5 ("[F]our years after the frightening experience of September the 11th, Americans have every right to expect a more effective response in a time of emergency. When the federal government fails to meet such an obligation, I, as President, am responsible for the problem, and for the solution.").

116. Id. at 2.

117. Id. at 2.

118. Id. at 6-7 (estimating $96 billion in property damages, natural or man-made disasters; 1,330 deaths).

119. Id. at 8 (finding 770,000 people displaced and housing options arrived slowly; by October 2005, nearly 4,500 people were still living in shelters).

120. Id. at 9.

121. Id. at 12.

The President proposed that the initiative be led by the yet-to-be created Department of Homeland Security (DHS). In creating DHS in November 2002, Congress included the initiative as part of the Secretary of Homeland Security's responsibilities. The Homeland Security Act was officially signed into law by the President on November 25, 2002. On March 1, 2003, DHS assumed operational control of the nearly 180,000 employees from portions of 22 departments, agencies, and offices that were combined to constitute the newly created Department. In February 2003, the President issued Homeland Security Presidential Directive 5 (HSPD-5). Homeland Security Presidential Directives are presidential orders that establish national policies, priorities, and guidelines to strengthen U.S. homeland security. In HSPD-5, the President specifically directed the Secretary of Homeland Security to: (a) create a comprehensive National Incident Management System (NIMS) to provide a consistent nationwide approach for federal, state, and local governments to work effectively together to prepare for, respond to, and recover from domestic incidents, regardless of cause, size, or complexity, and; (b) develop and administer an integrated National Response Plan (NRP), using the NIMS, to provide the structure and mechanisms for national level policy and operational direction for federal support to State and local incident managers. Id.
and emergency management program implementation." The region's most vulnerable residents and those individuals with special needs suffered terribly from inadequate or nonexistent evacuation operations. In addition, hundreds of hospital patients were stranded inside dark and flooded facilities that lacked basic supplies. Some patients succumbed to the horrible conditions before they could be evacuated. At St. Rita's Nursing Home in St. Bernard Parish, Louisiana, thirty-four nursing home residents drowned in the floods. On the morning of August 30, the U.S. Department of Health and Human Services (HHS) assessed the Superdome as "uninhabitable." "By the morning of September 2, approximately fifteen thousand people had been evacuated from the Superdome, leaving approximately [five thousand] five hundred remaining." The government response has been summarized as follows:

Hurricane Katrina necessitated a national response that [f]ederal, [s]tate, and local officials were unprepared to provide . . . The [f]ederal response suffered from significant organization and coordination problems during this week of crisis. The lack of communications and situational awareness had a debilitating effect on the [f]ederal response. Even after coordinating elements were in place, [f]ederal departments and agencies continued to have difficulty adapting their standard procedures to this catastrophic incident. The [f]ederal government's problems responding to Hurricane Katrina illustrate greater systemic weaknesses inherent in our current national preparedness system: the lack of expertise in the areas of response, recovery, and reconstruction. Insufficient planning, training, and interagency coordination are not problems that began and ended with Hurricane Katrina. The storm demonstrated the need for greater integration and synchronization of preparedness efforts, not only throughout the [f]ederal government, but also with the [s]tate and local governments and the private and non-profit sectors as well.

FEMA also had difficulty delivering food, water, and other critical commodities to people waiting to be evacuated, most significantly at the Superdome. The experience the victims of Katrina had with the federal government vividly illustrates the devastation and misery that

122. LESSONs LEARNED, supra note 5, at 15.
123. Id. at 34.
124. Id.
125. Id.
126. id.
127. Id. at 39.
128. Id.
129. Id. at 50.
130. Id. at 57 n.32.
can occur when there is a lack of preparation coupled with a dismal response to a natural disaster.\textsuperscript{131}

According to Representative Tom Davis, Chairman of the U.S. House of Representatives Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, “[Hurricane Katrina was] a storm that was predicted with unprecedented timeliness and accuracy.”\textsuperscript{132} That committee had several findings:

1. The Secretary Department of Homeland Security should have designated the Principal Federal Official on Saturday, two days prior to landfall, from the roster of PFOs who had successfully completed the required training, unlike then FEMA Director Michael Brown. Considerable confusion was caused by the Secretary’s PFO decisions.

2. DHS and FEMA lacked adequate trained and experienced staff for the Katrina response.

3. The readiness of FEMA’s national emergency response teams was inadequate and reduced the effectiveness of the federal response.

Before Katrina, FEMA suffered from a lack of sufficiently trained procurement professionals.\textsuperscript{133}

Other failings were also noted. The Committee devoted an entire section of the report to listing the actions of FEMA. Their conclusion:

For years emergency management professionals have been warning that FEMA’s preparedness has eroded. Many believe this erosion is a result of the separation of the preparedness function from FEMA, the drain of long-term professional staff along with their institutional knowledge and expertise, and the inadequate readiness of FEMA’s national emergency response teams. The combination of these staffing, training, and organizational structures made FEMA’s inadequate performance in the face of a disaster the size of Katrina all but inevitable.\textsuperscript{134}

Pursuant to a temporary restraining order issued by Hon. Stanwood R. Duval, United States District Court Judge, Eastern District of Louisiana, and as a result of the \textit{McWaters v. FEMA} class-action,\textsuperscript{135} February 7, 2006, was set as the official deadline for any further coverage of tem-

\textsuperscript{131} See Himberger, \textit{supra} note 10, at 4.

\textsuperscript{132} Tom Davis, Chairman, Select Bipartisan Committee to Investigate the Preparation For and Response to Hurricane Katrina, Sep. 22, 2005 \textit{available at} http://katrina.house.gov/hearings/09_22_05/davis_open_state092205.doc (last visited Nov. 16, 2008) (opening statement outlining the purpose of the committee).

\textsuperscript{133} Id.

\textsuperscript{134} Id.

\textsuperscript{135} McWaters \textit{v. FEMA}, 408 F.Supp. 2d 221 (E.D. La. 2006) (order establishing the date for all claims to be filed).
Temporary housing costs for Katrina victims. After the February 7 deadline, Katrina victims were left to their own devices to either find permanent housing for the long term or to continue in social welfare programs set up by other organizations.

A. Tsunami in South Asia

On the other side of the world the U.S. was able to respond to a natural disaster that was on an even greater scale than Hurricane Katrina. On December 26, 2004, a major earthquake followed by a tsunami devastated the many Asian coastal areas. More than 200,000 people lost their lives, and at least 100,000 people are still missing. The brunt of the storm struck the coast of Indonesia and Sri Lanka. USAID immediately mobilized staff to respond to the humanitarian needs in the affected country. More than 150 USAID personnel were on the ground conducting assessments of the area. The Department of Defense ("DOD") brought into action military assets, providing nearly 16,000 military personnel, 26 ships, 58 helicopters, and 43 fixed wing aircraft. The DOD delivered over 10 million pounds of food and supplies, and over 400,000 gallons of fresh water. The pledge by the U.S. toward the relief and rebuilding for this region of the world stands at $350 million, and President Bush had requested an additional supplement of $701 million.

During the international crisis in South Asia, the U.S. was able to respond much faster to the needs of the Asian community on the other side of the world than it was to Hurricane Katrina victims of

136. USAID, USAID Rebuilds Lives After the Tsunami, http://www.usaid.gov/locations/asia_near_east/tsunami/ (last visited Nov. 9, 2008) (placing USAID personnel in the region to provide emergency disaster relief to the victims of Indonesia and Sri Lanka a day after the tsunami made landfall).
137. Id.
138. Id.
139. Id.
141. The White House, supra note 140.
142. Id.
143. Id.
New Orleans, which occurred within its' own borders. Hundreds of millions of dollars have been pledged by the federal government toward the relief and rebuilding of the Asian coastal communities and additional funding is still sought. Without a doubt, all Americans are sympathetic to the tragedy suffered by the people of South Asia and in New Orleans. However, the federal government should be held accountable to the taxpayers to uphold its obligations to its citizens with an equally aggressive commitment and pledge to relieve the suffering of the victims and rebuild the city of New Orleans.

VII. THE FEDERAL GOVERNMENT RESPONSE TO HURRICANE KATRINA AS A CRIME AGAINST HUMANITY

A crime against humanity is a crime under international customary law. For there to be a crime against humanity there must be inhumane acts committed against a civilian population. During Hurricane Andrew, the federal government policies failed to meet the emergency needs of the residents of South Florida by not responding fast enough to house, feed, and sustain the approximately 250,000 people left homeless. The civilian victims of Hurricane Andrew suffered inhumane acts as a result of policies instituted by the federal government. There were lessons to be learned following that disaster, but the implementation has shown to be unsuccessful. The same issue of not responding fast enough to the people plagued the federal government in South Carolina when Hurricane Hugo made landfall in 1989. With Hurricane Katrina, the federal government had advance notice of the threat and potential force and failed to adequately prepare and warn the citizens located in the Gulf Coast causing the civilians there to suffer inhumane acts, reflecting a pattern of failed policies in disaster preparedness. These policies resulted in death and caused injury to the physical and mental health of many of the Katrina victims. The conditions in the Superdome and Convention Center were "uninhabitable." The government had placed upon itself, and rightfully so after September 11th, the responsibility to ensure the safety of its citizens in a natural or man-made disaster.

Generally a single act does not constitute a crime against humanity; however, where there has been a "systematic and widespread"
attack on the civilian people, a single act can qualify. The federal government’s inadequate policies and failures in responding to natural disasters like Hurricane Katrina, Andrew, and Hugo show a systematic and widespread attack on the civilians of these regions. There is a pattern within the federal government that reveals a fundamental problem in protecting its citizens from natural disasters. If the federal government can coordinate a response to an unforeseen tsunami in South Asia within a day and have personnel on the ground, it ought to be able to respond just as quickly to the humanitarian needs of its own citizens. The lack of preparedness resulted in the death of hundreds of people and the humiliation and degradation of displaced people throughout the country. The failure of the federal government to properly prepare and train personnel in response to a natural disaster of this magnitude is a crime. Surely governmental responses to natural disasters in emergency circumstances were not the type of crimes the international community had in mind when developing the concept of universal jurisdiction.

On the other hand, the situation in Darfur would probably fit squarely into the type of conduct that is “universally condemned” by the international community. The ICJ has jurisdiction over those acts that are against customary international law, and crimes against humanity have traditionally been against customary international law. The Sudanese government has waged a systematic widespread “ethnic cleansing” attack on its civilian communities. The Sudanese government is murdering and exterminating its own citizens which is a crime against humanity under international law. Air strikes carried out by the Sudanese government against civilians are inhumane and cause suffering and humiliation. Although the Sudanese government is against international intervention, it is the duty, responsibility, and obligation of the international community to prevent and remove threats against international peace and security. The Sudanese government currently represents that threat toward international peace and security. Customary international law prohibits acts by leaders that are against the international community’s preeminent norms and values.

It is difficult to persuade anyone that the failures of the federal government in a natural disaster should be a crime, let alone a crime against humanity. However, just as in tort law, individuals have to accept responsibility for their actions; if governments act negligently, then private citizens should not be denied their day in court. Though

the U.S. courts have recognized universal jurisdiction for international tort claims and the crime of torture, it should recognize universal jurisdiction for other crimes that are prescribed in treaties and international law. The U.S., as signatory to the U.N. Charter, has accepted that the ICJ may exercise universal jurisdiction for the acts that threaten the peace and security of the world. One limitation on the exercise of jurisdiction over a nation is sovereign immunity. Sovereign immunity is recognized as a legitimate justification for the leader of a country to escape liability for his or her decisions while in office. This note is not a proposal that the President of the United States should face criminal charges for his decisions regarding Hurricane Katrina as the leader of the free world. However, the federal government should have to face civil liability for how it handled the situation in New Orleans. The holding in McWaters v. FEMA is an indication of how much responsibility the government wants to accept for its failed policies. This would be a circumstance where the international courts could exercise jurisdiction to remedy the wrong by a nation.

VIII. Conclusion

The U.S. is not a signatory to the Rome Statute therefore universal jurisdiction may not be exercised under this statute because it does not incorporate the U.N. Charter, nor does the charter confer jurisdiction to the ICJ or ICC over crimes where the states are not a signatory. Universal jurisdiction is recognized for certain international crimes that have been customary in international law. For instance, it has been found in the absence of a treaty pursuant to international common law for the crimes of torture because of the nature of the crime. In recent times, it has been recognized in the wake of terrorists acts because these crimes are heinous and against international law. Crimes against humanity are just as heinous and as offensive to the international community that universal jurisdiction should be readily available to the state that wants to bring a would-be offender to justice. The ICJ appears to have broad jurisdiction to prevent and remove threats to the peace and security of the international community. If the federal government policies on preparedness for Hurricane Katrina were to rise to the level of a crime against humanity that was so heinous as to constitute a crime against the international community, universal jurisdiction would be appropriate under a nation state’s duty and responsibility to prevent impunity under international law.
Although this note recognizes that the international courts may be able to exercise universal jurisdiction for crimes against humanity, the remedy of imprisonment, may not be appropriate to address the injury to a civilian population. This note does not discount that the ICC exercises jurisdiction over individuals and not nations.