Brooklyn Journal of International Law

Volume 40 | Issue 2 Article 4

2015

Reparations for Mass Atrocities as a Path to Peace: After *Kiobel V. Royal Dutch Petroleum Co.,* Can Victims Seek Relief at the International Criminal Court?

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REPARATIONS FOR MASS ATROCITIES AS A PATH TO PEACE: AFTER *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*, CAN VICTIMS SEEK RELIEF AT THE INTERNATIONAL CRIMINAL COURT?

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INTRODUCTION

Justice is rightly known as the "road to peace."[1] One might go further and say that it is peace's home.[2] Outside of the confines of justice among peoples, peace is endangered, and war seems to be inevitable.

The pioneers of international law recognized this fact. Hugo Grotius referred to injustice as a "grounds for war," because international "peace is made with a view to the security of every individual subject."[3] Similarly, the founders of the U.S. Constitution saw the law of nations as guaranteeing world peace.[4] A key purpose of the United Nations is to settle international disputes peacefully according to justice and the rule of law.[5] Raphael Lemkin, the founder of the Genocide Convention, maintained that the origins of genocide are to be found in a nation's laws.[6]

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1. John J. Gilligan, *Law, the Path to Justice; Justice, the Road to Peace*, 19 DENVER J. OF INT'L L. & POL'Y 77 (1990).

2. "Language is the house of being. In its home human beings dwell. Those who think and those who create with words are the guardians of this home." MARTIN HEIDEGGER, PATHMARKS 239 (William McNeil ed., 1998).

3. HUGO GROTIUS, 3 THE RIGHTS OF WAR AND PEACE, INCLUDING THE LAW OF NATURE AND OF NATIONS 365–67 (A.C. Campbell ed., and trans., 1814), https://books.google.it/books?id=n9M8AAAAYAAJ&pg=PA367.

4. *See* MARK W. JANIS, AMERICA AND THE LAW OF NATIONS: 1776 – 1939, at 37–38 (2010).

5. *See* U.N. Charter, art. I(1); Amit K. Chhabra, *Autumnal Rage: Playing with Islamic Fire*, 34 U. PA. J. INT'L L. 389, 401 (2013) (citing U.N. Charter, art. I(1)).

6. *See* Case W. Res. Sch. L., *To Prevent and to Punish: Commemorating the 60th Anniversary of the Genocide Convention,* YOUTUBE (Sept. 28, 2007), http://www.youtube.com/watch?v=6cBuFLHEdrY. Echoing Lemkin, the U.N. Special Adviser for the Prevention of Genocide has urged all parties to the Genocide Convention to outlaw the predicate acts that lead to genocide by implementing in their "domestic legislation" the core human-rights treaties, namely the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination,

Advisers to the contemporary U.S. military believe that atrocity prevention requires "peaceful redress of grievances," regularly established courts, and the rule of law.[7]

The sweeping ruling in *Kiobel v. Royal Dutch Petroleum*[8] represents the culmination of a decade-long campaign to establish a unitary executive power over matters of international law, and to marginalize the courts, law, and treaties. Victims of mass atrocities and their descendants have suffered from this trend toward greater impunity.[9] The Alien Tort Statute ("ATS") barely survived its last encounter with the Supreme Court in 2004, and its usefulness has eroded steadily since that time, in a number of cases dealing with China, Nigeria, Saudi Arabia, South Africa, and Sudan.[10] Advocates for human rights, victimized groups, and genocide prevention have consistently supported the right of victims of mass atrocities to pursue lawsuits under the law of nations in countries other than those in which the extermination or persecution occurred.[11] The law is being politicized as amicus

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and the United Nations Declaration on the Rights of Indigenous Peoples. OFFICE OF THE SPECIAL ADVISER OF THE SECRETARY-GENERAL ON THE PREVENTION OF GENOCIDE, ANALYSIS FRAMEWORK: A GUIDE FOR STATES 2–4 (2012), http://aipr.files.wordpress.com/2012/05/foa-for-states-english.pdf.

7. SARAH SEWALL, ET AL., MARO: MASS ATROCITY RESPONSE OPERATIONS: A MILITARY PLANNING HANDBOOK 107 (2010), *available at* http://www.ntis.gov/search/product.aspx%3FABBR%3DADA525455.

8. Kiobel v. Royal Dutch Petro. Co., 133 S. Ct. 1659, 1660–61 (2013).

9. The United States has defined a "mass atrocity" as a widespread or systematic use of violence against civilians by state or non-state actors. *See* SEWALL, *supra* note 7, at 17; Maureen S. Hiebert, *MARO as the Partial Operationalization of R2P*, 6 GENOCIDE STUD. & PREVENTION: AN INT'L J. 52, 53–54 (2011); Henry Theriault, *The MARO Handbook: New Possibilities or the Same Old Militarism*, 6 GENOCIDE STUD. PREVENTION: AN INT'L J., 7, 26 (2011).

10. *See infra* notes 15, 73-188 and accompanying text. *See also* Beth Stephens, Comment, Sosa v. Alvarez-Machain: *"The Door Is Still Ajar" for Human Rights*, 70 BROOK. L. REV. 533 (2004).

11. *Cf.* Br. for Center for Constitutional Rights, Int'l Human Rights Org. and Int'l Law Experts as Amici Curiae Supp. Pet'rs, at 35–36, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2011) (No. 10-1491, 11-88); Br. for Earthrights Int'l as Amicus Curiae Supp. Pet'rs, at 8–9, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); Br. for Int'l Law Scholars as Amici Curiae Supp. Pet'rs, at 17–18, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 2794; Br. for Nuremberg Historians as Amici Curiae Supp. Pet'rs, *passim*, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 2795; Br. for Int'l Human Rights Org. and Int'l Law Experts as Amici Curiae Supp. Pet'rs, at 25, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 2795; Br.

briefs by the Department of Justice and "Statements of Interest" by the State Department override the rules of the law of nations, not to mention the intent of the American founders and basic principles of justice and fairness.[12]

The Roberts Court selected a case arising out of Nigeria, featuring a company with a generally glowing reputation in the United States, to restrict judicial remedies for mass atrocities to

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for Nuremberg Scholars Omer Bartov et al. as Amici Curiae Supp. Pet'rs, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491, 11-88), 2011 U.S. S. Ct. Briefs LEXIS 2814; Br. for Professor Juan Mendez, U.N. Special Rapporteur on Torture, as Amicus Curiae Supp. Pet'rs, at 21–22, Mohamed v. Palestinian Authority, 132 S. Ct. 1702 (No. 11-88), 2011 U.S. S. Ct. Briefs LEXIS 2805; Mot. to File and Br. for Int'l Law Scholars as Amici Curiae Supp. Pet. for Writ of Cert at 16, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 1153; Br. for The International Commission of Jurists and the American Association for the International Commission of Jurists as Amici Curiae Supp. Pet'rs, Presbyterian Church of Sudan v. Talisman Energy, Inc.*,* 582 F.3d 244 (No. 07-0016), *cert. denied*, 2010 U.S. S. Ct. Briefs LEXIS 1828; Br. for Nuremberg Scholars Omer Bartov, et al. as Amici Curiae Supp. Pet'rs, *Talisman Energy,* 582 F.3d 244 (No. 07-0016), 2009 U.S. Briefs 1262; Br. for Earthrights International as Amicus Curiae Supp. Pet'rs, at 20–21, *Talisman Energy,* 582 F.3d 244 (No. 07-0016), 2010 U.S. S. Ct. Briefs LEXIS 1826.

12. *See, e.g.,* Transcript of Oral Argument at 43–44, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) (upon being informed that office of the Solicitor General of the United States now took a narrow view of the Alien Tort Statute, Justice Antonin Scalia pointed out to him that the Supreme Court had heard from his "predecessors as well, and they took a different position. So, you know, why – why should we defer to the views of—of the current administration?"); *id*. at 43 ("Why should—why should we listen to you rather than the solicitors general who took the opposite position . . . in other cases, not only in several courts of appeals, but even up here?"); *id*. at 44–45 (Chief Justice John Roberts added that "Your successors may adopt a different view. And I think—I don't want to put words in his mouth, but Justice Scalia's point means whatever deference you are entitled to is compromised by the fact that your predecessors took a different position."); *id*. at 47 (Justice Scalia explained that the justices "are not very good at figuring out the foreign policy interests of the United States. And, you know, in the past we have tried to get out from under our prior case law in the sovereign immunity area of asking the State Department. And the State Department would come in here: This is good; this is bad. We abandoned all that in the sovereign immunity field. Why should we walk back into it here?"); *see also* Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interests" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns,* 37 RUTGERS L.J. 807 (2006); Margarita Clarens, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT'L L. 415, nn. 210–29 & accompanying text (2007).

a tiny subset of possible cases.[13] Nigeria has a fairly good image in the United States due to its thriving oil exports to this country in a time of energy insecurity, the success and prominence of many Nigerian-Americans, and a plethora of positive mass media references to Nigeria.[14] Most other countries out of which ATS suits have arisen are well-known to be plagued with mass atrocities, such as Burma, China, Guatemala, Indonesia, Liberia, Haiti, Papua New Guinea, Palestine, fascist Paraguay,

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13. Fortune placed Shell number 1 in 2012 by revenue. *Fortune Global 500*, RANKINGTHEBRANDS.COM, http://www.rankingthebrands.com/The-Brand-Rankings.aspx?rankingID=50&year=489 (last visited Nov. 16 2014). Market research firm Interbrand reported in 2012 that Shell had a positive perception of its environmental practices, despite being an oil company. Jacob Brown, *Automakers Rank as Four of Top 10 "Best Global Green Brands" of 2012,* AUTOMOTIVE.COM (June 28, 2012), http://blogs.automotive.com/automakers-rank-as-four-of-top-10-best-global-green-brands-of-2012-100687.html. "Mass atrocities" are defined to include, at a minimum, genocide and the crimes against humanity of deportation, extermination, and persecution. *See* JOHN QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 274 (2006). The category is typically used to refer to events such as the mass killings in German-occupied Europe, ethnic cleansing in the Balkans, and the massacres in Rwanda in 1994. *See id.* at 278. It is also used to discuss responses to transnational criminality under the rubric of genocide prevention and "the Responsibility to Protect." *See* Gareth Evans, The Responsibility to Protect: The Power of an Idea, Keynote Address at the "International Conference on the Responsibility to Protect: Stopping Mass Atrocities," University of California, Berkeley, (Mar. 14, 2007) (transcript available at www.crisisgroup.org/home/index.cfm?id=4780); *See generally* SEWALL, *supra* note 7; U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT, vi (2010), http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf.

14. *See, e.g.,* Office of the Press Secretary, Statement by the Press Secretary on the Visit of President Goodluck Jonathan of Nigeria to the White House (June 4, 2011) (transcript available at http://www.whitehouse.gov/the-press-office/2011/06/04/statement-press-secretary-visit-president-goodluck-jonathan-nigeria-whit) (describing "strong bilateral partnership between U.S. and Nigeria); Frank Pietrucha, *Bootlegging Threatens Nollywood*, AMERICA.GOV BLOGS (Mar. 27, 2009), http://blogs.america.gov/ip/2009/03/27/bootlegging-threatens-nollywood/ (describing thriving Nigerian film industry); U.S. DEP'T OF STATE, *Nigerian President's Visit Represents Start of New Relationship*, IIP (Dec. 11, 2007), http://iipdigital.usembassy.gov/st/english/article/2007/12/20071211130944wcyeroc0.1242945.html; THE WHITE HOUSE, *Mrs. Laura Bush Visits with Nigeria President Olusegun Obasanjo* (Jan. 18, 2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/01/images/20060118-1_p011806sc-0044jpg-1-515h.html.

apartheid South Africa, Somalia, Sudan, and the former Yugoslavia.[15] The headlines following a decision that the statute may not be used by the survivors of massacres or mass displacements from one of these countries, or by their family members, would have made for much worse headlines and television footage for the Roberts Court if the case involved Sudan or Burma rather than Nigeria. *Kiobel* is a triumph of "hard cases make bad law," and a textbook study of how to leverage a hard case into terrible law for easy cases.

Under an originalist approach to the ATS, reparations for mass atrocities would be available in a broad variety of situations. For example, if a multinational mining company knowingly facilitated attacks on civilians in Papua New Guinea, it could be liable for aiding and abetting war crimes, or even genocide, depending on the intent of the party or parties receiving the aid.[16] Large multinational banks and U.S. exporters, by knowingly fueling, funding, and supplying the government of apartheid-era South Africa, might be liable for aiding and abetting genocide and the crime against humanity of apartheid, among other crimes.[17] Multinational energy firms that "purchased security services with the knowledge that the security

15. *See, e.g.,* Sarei v. Rio Tinto*,* PLC*,* 671 F.3d 736 (9th Cir. 2011) (en banc) (Papua New Guinea), *vacated and remanded for further consideration in light of* Kiobel, 133 S. Ct. 1659 (2011), http://www.supremecourt.gov/orders/courtorders/042213zor_k5fl.pdf; Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d Cir. 2007) (per curiam) (South Africa); Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (China); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (Bosnian Serb Republic); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (Paraguay); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 285–94 (E.D.N.Y. 2007) (Palestine); Presbyterian Church of Sudan v. Talisman Energy Co.*,* 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (Sudan); Cabello v. Fernandez-Larios, 205 F. Supp. 2d 1325, 1331–33 (S.D. Fla. 2002) (Chile); Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627 (JSM), 1996 WL 164496, at *1–2 (S.D.N.Y. Apr. 9, 1996) (Rwanda); Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993) (Haiti); Xuncax v. Gramajo, 886 F. Supp. 162, 169 (D. Mass. 1995) (Guatemala). Compared to these easier cases, *Kiobel* may have been an exceptional case that was ill-suited to make law for the world as a whole. *Cf.* Suja Thomas, *How Atypical, Hard Cases Make Bad Law (See, e.g., The Lack of Judicial Restraint in* Twombly, Wal-Mart*, and* Ricci*),* 48 WAKE FOREST L. REV. 989, 989-902 (2013) (suggesting that when unusual facts appear at the Supreme Court level, precedent may be abandoned and justices may become activist policymakers, with poor results). *See generally infra* note 24.

16. *See* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc).

17. *See* Khulumani v. Barclay Nat'l Bank, 504 F.3d 254, 285-86 (2d Cir. 2007) (per curiam); *id*. at 311-26 (Korman, J., concurring in part and dissenting

forces would, or were likely to, commit international law violations," would encounter civil liability as a result.[18] Corporations would internalize more of the costs that they inflict on others when they lead, plan, facilitate, conspire in, or instigate crimes by state or non-state actors in violation of the law of nations.[19]

Moreover, foreign officials subject to service of process and personal jurisdiction in the United States would have to answer for genocide, the crimes against humanity of persecution and torture, aiding and abetting mass-casualty terrorist attacks, or war crimes such as murder or the wanton destruction of cities.[20]

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in part) (accepting the existence of an emerging international law norm that holds private parties liable for aiding and abetting genocide, war crimes or crimes against humanity).

18. *Id*. at 289–91 (Hall, J., concurring in part) (citing Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002)).

19. *See id*. at 272, 281 (Katzman, J., concurring in part) (citing Article 6 of the London Charter of the Nuremberg Tribunal and Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, para. 529 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998)).

20. *See* Ye v. Zemin, 383 F.3d 620 (7th Cir. 2004) (detailing allegations of religious persecution in China); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (endorsing ATS liability of Bosnian Serb leader for genocide, among other violations of international law); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (endorsing ATS liability for torture in Paraguay); Weixum v. Xilai, 568 F. Supp. 2d 35 (D.D.C. 2008) (similar to *Ye*); Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 285–94 (E.D.N.Y. 2007) (holding that there could be ATS liability on part of multinational banking corporation for aiding and abetting terroristic genocide against Jews targeted by Palestinian militants); Presbyterian Church of Sudan v. Talisman Energy Co., 244 F. Supp. 2d 289 (S.D.N.Y. 2003) (exploring limits of liability on part of multinational oil corporation for aiding and abetting war crimes in Sudan); Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (similar to *Ye* and *Weixum*); *In re* S. African Apartheid Litig., 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (discussing ATS liability for aiding and abetting crimes in South Africa); Zhou v. Peng, 286 F. Supp. 2d 255, 257 (S.D.N.Y. 2003) (dismissing suit against Chinese officials for human rights violations); Plaintiffs A, B, C, D, E, F v. Zemin, 282 F. Supp. 2d 875 (N.D. Ill. 2003) (similar to Weixum and Doe v. Qi); Cabello v. Fernandez-Larios, 205 F. Supp. 2d 1325, 1331–33 (S.D. Fla. 2002); Sarei v. Rio Tinto, PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (dismissing ATS claims under political question doctrine), *rev'd and remanded*, 550 F.3d 822, 832 n.10 (9th Cir. 2007) (holding that local remedies' exhaustion is not always a requirement in ATS cases), *further proceedings at* 671 F.3d 736 (9th Cir. 2011) (reversing dismissal and remanding for trial on genocide and war-crimes claims); Ge v. Peng, 201 F. Supp. 2d 14, 17 (D.D.C. 2000) (similar to Zhou); Mushikiwabo v. Barayagwiza, No. 94 Civ. 3627 (JSM), 1996 WL 164496, at *1-2 (S.D.N.Y. Apr. 9, 1996) (regarding torture, extrajudicial killing, and genocide in Rwanda); Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993) (involving torture and other crimes in Haiti prior to Aristede era); Xuncax v.

The Supreme Court's evisceration of the ATS in *Kiobel* therefore deprived international law of a key pillar of support. It arguably violates the international legal duties of the United States to prevent, punish, and remedy mass atrocities.[21] It conflicts with the original understanding of the law of nations as

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Gramajo, 886 F. Supp. 162, 169 (D. Mass. 1995) (suit against former Guatemalan Minister of Defense for arbitrary detention, summary executions, and torture); *See also* Xiaoning v. Yahoo, Inc., No. C 07-2151 CW, 2007 U.S. Dist. LEXIS 97566 (N.D. Cal. July 30, 2007) (case involving political dissent in China); Br. for Appellants at 19, Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d. Cir. 2007) (No. 03 Civ. 4624) (describing bases for ATS liability as aiding and abetting "apartheid; genocide; extrajudicial killing; official torture and other cruel, and inhuman, or degrading treatment, including sexual assault; and prolonged arbitrary detention.").

21. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide art. I, preamble, Jan. 12, 1951, 78 U.N.T.S. 277 (setting forth a duty to prevent and punish the crime of genocide); Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 (stating that parties must search for an exercise jurisdiction "before [their] own courts" over persons who have committed war crimes "regardless of their nationality"); GOVERNMENT STATEMENTS ON THE RESPONSIBILITY TO PROTECT: LATIN-AMERICA REGION 2005-2007, at 3 (2008), http://www.responsibilitytoprotect.org/files/R2P%20Government%20statements%20Latin%20America%202005-2007.pdf (stating that members of the United Nations have a duty to prevent war crimes). In Europe, all 27 member states of the European Union as of 2012, as well as three other members of the Council of Europe, are obligated by treaty to enforce judgments issued by the 10 European States that exercise jurisdiction over "exceptional" lawsuits where a victim has no other available remedy and there is a nexus with the forum State. Br. for The European Commission on Behalf of the European Union as Amicus Curiae Supp. Neither Party at 24–25, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), http://www.sdshhlaw.com/pdfs/European%20Commission%20on%20Behalf%20of%20the%20European%20Union%20(Revised).pdf. It appears that the major European States— Belgium, France, Germany, Italy, the Netherlands, Spain, and the United Kingdom—permit civil compensation to be awarded in cases involving mass atrocities (these may need to be filed as criminal cases in France, Germany, or the Netherlands). *See id*. at 25 (citing Cour d'Assises [Cour. ass.] [Court of Assizes] Brussels, July 5, 2007, The Case of the Major (Belg.); Rechtbank's Gravenhage, 21 maart 2012, No.400882/HA ZA 11-2252 (El-Hojouj/Derbal et al.) (Neth.); Br. for Juan E. Mendez, U.N. Special Rapporteur on Torture as Amicus Curiae Supp. Pet'rs at 30–31, 34–35, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), http://harvardhumanrights.files.wordpress.com/2012/06/juan-e-mendez.pdf (citing *Kovac v. Karadžic*, Tribunal de Grande Instance de Paris, Judgment of March 14, 2011 (Fr.); CODE DE PROCÉDURE PÉNAL [C. PR. PÉN.] [Criminal Procedure Code] Arts. 3, 689-1 & 689-2 (Fr.); STRAFGESETZBUCH [StGB] [Penal CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBl. I] 3322, as amended, § 6 (Ger.);

rules, enforceable under federal common law and the ATS, that limit executive power so as to promote peace.

This Article contains four principal parts. Part I describes the vision of early American leaders that a robust ATS would safeguard victims of transnational dangers. Part II argues that the key purpose of the ATS was to promote peace by offering an alternative to sovereign retaliation. Part III analyzes how the Bush and Obama administrations thwarted the promise of the ATS in five ways: advocating reduced extraterritorial application, opposing non-state actors' accountability under the ATS, pleading for deference to sovereign immunity in mass atrocity cases, undermining the law of nations as being ineffective (non-self-executing) verbiage, and invoking discretionary doctrines that destroy federal court jurisdiction over "political questions." These five strategies culminated in a trio of cases ending with *Kiobel*.[22] Part IV surveys promising recent developments that might lead to the International Criminal Court (ICC) filling the gap left by *Kiobel*, and promoting peace by providing a forum for the peaceful resolution of grievances. This Part explores how the ICC could fund local reconciliation under Article 75 of its statute.[23]

STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE], Apr. 7, 1987, BUNDESGESETZBLATT, Teil I [BGBl. I] 1074, 1319, as amended, §§ 403-406 (Ger.); Dutch Civil Law, art. 9(c) (Neth.); *LEY DE ENJUICIAMIENTO CRIMINAL* [L.E. CRIM.] [Code of Criminal Procedure] Art. 100 (Spain)); REDRESS & INT'L FED'N OF HUMAN RIGHTS (FIDH), LEGAL REMEDIES FOR VICTIMS OF "INTERNATIONAL CRIMES" – FOSTERING AN EU APPROACH TO EXTRATERRITORIAL JURISDICTION 73 (2004), http://www.redress.org/downloads/publications/LegalRemediesFinal.pdf; Br. for The American Jewish Congress as Amici Curiae Supp. Pet'r at 7–8, 32, 39, 41, Samantar v. Yousef, 130 S. Ct. 2278 (No. 08-1555), http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief__08-1555__1.pdf (Italian High Court concluded that *jus cogens* violations—such as genocide or torture—give rise to international jurisdiction because such violations may not be waived or overridden by contrary national laws) (citing *Ferrini v. Federal Republic of Germany* [Ferrini v. Republica Federale di Germania], Corte di Cassazione(Cass.), Joint Sections, Judgement 11 Mar. 2004, n. 5044 (It.)).

22. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1659 (2012); Republic of Austria v. Altmann, 541 U.S. 677 (2004); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

23. *See* Rome Statute of the Int'l Criminal Court art. 75(1), July 17, 1998, 37 I.L.M. 1002, 1003 [hereinafter "Rome Statute"] ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, the Court may . . . determine the scope and extent of any damage, loss and injury to, or in respect

I. LEGAL RESPONSES TO TRANSNATIONAL DANGERS IN THE VISION OF THE AMERICAN FOUNDERS

A. The Quest for Original Understandings

The search for the original understanding of constitutions, treaties, and statutes is an important task.[24] Originalism helps preserve the rule of law. It aims to block judges from introducing

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of, victims."); CARRIE MCDOUGALL, THE CRIME OF AGGRESSION UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 299 (2013) ("The Court can make orders directly against convicted persons in respect of reparations or can order that the award of reparations be made through the Trust Fund for Victims, provided for in Article 79(1) (Article 75(2))."); *id*. (Court may decree collective reparations). *See also* ICC, *ICC - Reparation for Victims* (2014), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx ("For the first time, an international criminal court has the power to order a criminal perpetrator to pay reparation to a victim. . . . [Reparation] for victims . . . may include restitution, indemnification and rehabilitation.").

24. *See, e.g*., *Sosa,* 542 U.S. at 714–25 (exploring history of ATS as guide to intent of its drafters, which controlled its legal effect in a pending case); *Khulumani*, 504 F.3d at 285–91 (Hall, J., concurring in part) (emphasizing original understanding of ATS in order to determine scope of civil liability for genocide and other international crimes); *id*. at 272–281 (Katzman, J., concurring in part) (similar); *id*. at 311–26 (Korman, J., concurring in part and dissenting in part) (similar); *Filartiga*, 630 F.2d 876 (2d Cir. 1980) (emphasizing early understanding of ATS); Jack Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 643, 718 (2013) ("Adoption history, and arguments from ethos, tradition, and honored authority are among those tools [of argument and persuasion available to lawyers]; indeed, in American legal culture, they are often quite powerful tools."); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221, 225, 232 (1995-1996) (suggesting that ATS begs the questions of what "law of nations" was, how a "tort" might violate it, and whether federal common law included crimes in violation of law of nations); Melvyn R. Durchslag, *The Supreme Court and the* Federalist Papers*: Is There Less Here Than Meets the Eye?,* 14 WM. & MARY BILL RTS. J. 243, 295, 297 (2005) (noting that U.S. Supreme Court increasingly cites *The Federalist* in search of original understandings); Ira C. Lupu, *Time, the Supreme Court, and The Federalist*, 66 GEO. WASH. L. REV. 1324, 1328 (1998) (rate of Supreme Court's use of *The Federalist* to decide cases has risen since 1980); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (suggesting that search for original understandings helps mitigate the "danger in judicial interpretation of the Constitution . . . that the judges will mistake their own predilections for the law").

ad hoc exceptions, additions, or other amendments to the Constitution, the Bill of Rights, treaties, or statutes.[25]

Numerous false claims are circulating about the original understanding of the law of nations, including the claims that the law of nations or the ATS had no applicability to civilians on land, that it did not provide a cause of action, and that the law of nations required additional enabling legislation on a case-by-case basis.[26] It is necessary to excavate these implicit or explicit assumptions, highlight their importance in adjudication, and interrogate their veracity and normative implications.

Implicit in the concept of an independent judiciary is the aim that the courts of justice will be the guardians of the Constitution and statutes, charged with resisting attempts by the President and Congress to destroy them.[27] The opposite of the original understanding of a provision is often the crafting of ad hoc exceptions or additions to it,[28] typically "influenced by factors that judges ought not consider, such as the ideology of the [litigant] or the perceived merits of the political movement to which he belongs."[29] On many occasions, the Supreme Court has restored

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25. *Cf.* Scalia, *supra* note 24, at 863–64. *See also* Heidi M. Hurd, *Interpretation without Intentions, in* REASONS AND INTENTIONS IN LAW AND PRACTICAL AGENCY 52 (George Pavlakos & Veronica Rodriguez-Blanco eds., 2015) ("Some originalists . . . [argue]: law is not law at all if those who are charged with its application can alter its scope or meaning."); *id.* ("Other originalists take the bonds between originalism and the rule of law to be of a moral sort: the values that lie behind the rule of law – liberty, fairness, and equality – are best protected by interpreting laws in a manner that does not permit their meaning to change with time."). The Author would amend Hurd's description to emphasize or add the clarification that it is most important in preserving the rule of law that the implementation of law does not vary with the national, racial, ethnic, religious, gender, or sexual orientation-related identity of the accused in a criminal case, the parties in a civil case, or the adjudicator in any case.

26. *See* Dodge, *supra* note 24, at 237, 243.

27. *Cf.* Barenblatt v. United States, 360 U.S. 109, 143 (1959) (Black, J., dissenting) (noting that when a provision is "incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against *every* assumption of power in the Legislative or Executive.") (emphasis in original) (quoting 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789)).

28. *Cf. id.* ("[The majority of the Court believes that] neither the First Amendment nor any other provision of the Bill of Rights should be enforced unless the Court believes it is *reasonable* to do so. . . . [T]his violate[s] the genius of our *written* Constitution.") (emphasis in original).

29. Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1137 (2005). The Author would revise Volokh's expression by adding the identity of

the original understanding of a constitutional article or statute against efforts by the executive or legislative branches to evade its intended effect.[30]

In 1790-1791, James Madison and other members of Congress believed that in "controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide."[31] Madison emphasized that: "Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties."[32] Members of Congress looked, in interpreting the Constitution, to what the drafters of its articles and amendments had proposed and debated.[33] Similarly, judges regarded the intentions of the parties to an instrument other than a constitution, like a treaty, as an authoritative guide to its meaning.[34]

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the litigant or the judge as a factor that ought not to be considered, but that is often critical.

30. *See, e.g.,* United States v. Booker, 543 U.S. 220, 238 (2005) (rejecting longstanding practice of Congress and executive branch to base sentencing of criminal defendants on factors that were not found by a jury, in violation of original understanding of Sixth Amendment); Crawford v. Washington, 541 U.S. 36, 54 (2004) (rejecting recent practice of federal and state prosecutors to deny criminal defendants the right to cross-examine witnesses that original understanding of Sixth Amendment would guarantee); Feltner v. Columbia Pictures Television, Inc.*,* 523 U.S. 340, 353 (1998) (rejecting practice that had emerged in twentieth century, due to various acts of Congress, which allowed money damages to be imposed on a defendant without a right of trial by jury).

31. James Madison, Speech in Congress Opposing the National Bank (Feb. 2, 1791), (transcript available at http://www.constitution.org/jm/17910202_bank.htm) (quoted in Louis J. Sirico, Jr., *Original Intent in the First Congress*, 71 MO. L. REV. 687, 690 (2006)).

32. *Id.*

33. *See id.*; *see also* Sirico, *supra* note 31, at 711–12; *see also* Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267 (1997). As Congressman Elbridge Gerry stated, "the fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most probable, and these signs are either the words, the context, the subject matter, the effect and consequences, or the spirit and reason of the law.'" II ANNALS OF THE CONGRESS OF THE UNITED STATES 1732 (Joseph Gales ed., 1834).

34. *See, e.g.,* Ware v. Hylton, 3 U.S. 199, 239 (1796) ("The intention of the framers of the treaty, must be collected from a view of the *whole* instrument, and from the *words* made use of by them to express their intention, or from *probable* or *rational conjectures*.") (emphasis in original); The Brutus, 4 F. CAS. 490, 494 (C.C.D. Mass. 1814) (No. 2,060) ("To construe the language [of an agreement] by the technical rules of literal interpretation would be to defeat the manifest intention of the parties."); WILLIAM W. STORY, A TREATISE ON THE

B. The Original Understanding of the Judicial Power over the Law of Nations

The American founders intended to preserve the honor of the United States, the sovereign power of the judiciary, and the protections of the law of nations.[35] "By providing for an impartial system of federal courts that had jurisdiction over [aliens'] controversies, the new Government could shun political entanglements and no-win situations."[36] The Constitution provides for a "judicial power" to govern "Controversies" between foreign States, citizens, or subjects and citizens of the States making up the United States.[37] It also extends the judicial power to controversies arising under federal law, which has long been understood to include the law of nations.[38] Courts have held that even controversies, such as torts, that "arise[] beyond the seas," may be brought where the parties happened to be found.[39] Prior to the Constitution, the Continental Congress called upon the States to "authorise suits . . . for damages by the party injured . . . by a citizen" of the United States in violation of the "law of

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LAW OF CONTRACTS NOT UNDER SEAL 149 (photo. reprint 1972) (1844) ("[W]henever such intent [of the parties to a contract] can be distinctly ascertained, it will prevail, not only in cases where it is not fully and clearly expressed, but also, even where it contradicts the actual terms of the agreement."); *see also* Bache v. Proctor, (1780) 99 Eng. Rep. 247, (K.B.) 247; Lessee of Thomson v. White, 1 Dall. 424, 426–27 (Pa. 1789); Ross v. Norvell, 1 Va. (1 Wash.) 14, 16–18 (Va. 1791); Kevin M. Teeven, *A History of Legislative Reform of the Common Law of Contract*, 26 U. TOL. L. REV. 35, 57–58 (1994).

35. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464, 475, 481–87 (1989).

36. Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 66 (1988).

37. U.S. CONST. art. III, § 2, cl. 1.

38. *See id.*; Illinois v. City of Milwaukee, 406 U.S. 91, 99–100 (1972); Louis Henkin, *International Law as Law in the United States,* 82 MICH. L. REV. 1555, 1557 (1984).

39. *See* McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843) ("[I]f A becomes indebted to B, or commits a tort upon his person or upon his personal property in Paris, an action in either case may be maintained against A in England, if he is there found . . . . [A]s to transitory actions, there is not a colour of doubt but that any action which is transitory may be laid in any county in England, though the matter arises beyond the seas.") (quoting Mostyn v. Fabrigas, (1774) 98 Eng. Rep. 1021 (K.B.) 1030–31, 1032, 1 Cowp. 161, 177–79, 181 (Lord of Mansfield, C.J.)); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

nations."[40] Failing to permit such suits might lead to war.[41] For these reasons, the ATS remedies international assaults in order to avoid entangling the United States in further wars and dishonorable acts.[42]

The Judiciary Act of 1789 established federal jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . five hundred dollars, and . . . an alien is a party," and over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[43] By a "tort only" Congress probably meant civil controversies arising out of common-law crimes in violation of

40. Dodge, *supra* note 24, at 227 (quoting 21 JOURNALS OF CONTINENTAL CONGRESS 1774-1789, at 1136–37 (1912)).

41. *See* Thomas H. Lee*, The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 881, 889, 903 (2006).

42. *Cf.* THE DECLARATION OF INDEPENDENCE OF THE UNITED STATES OF AMERICA (July 4, 1776) (suggesting that just rule and unalienable rights were violated by King of Great Britain's "repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states"); THE FEDERALIST No. 47, at 266 (James Madison)(E.H. Scott ed., 1984) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

43. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 STAT. 73, 75–78 (1789).

the laws of nations.[44] Those crimes were initially piracy, assaulting an ambassador, and assaulting other friendly civilians.[45] A letter to James Madison in 1789 identified "torts" as being different from contracts and debts, and as involving "wrongs."[46] Yet the Judiciary Act's language conferring jurisdiction over "alien" suits went well beyond ambassadors, whose suits were expressly

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44. *See* Br. of Professors of Federal Jurisdiction and Legal History as Amici Curiae Supp. Resp's at 110*,* Sosa v. Alvarez-Machain, 542 U.S. 372 (2004), (Nos. 03-339, 03-485), *reprinted in* 28 HASTINGS INT'L & COMP. L. REV. 99, 110 (2004) (word "tort" was used at the time for common-law crimes of assault and trespass) (collecting sources); *id*. at 112 n.12 ("[T]hroughout the 1790's the United States continued to bring criminal indictments at common law, particularly for violations of the law of nations."); *id*. at 106–07 (founders intended that "'cases arising upon treaties and the laws of nations ... may be supposed proper for the federal jurisdiction.'"); *id*. at 108 ("'The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary.'") (quoting Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 595 (2002)); *id*. at 116–17 ("[T]he ATS . . . provided jurisdiction to adjudicate disputes under a law that was already binding everywhere in the world—the law of nations."); Henkin, *supra* note 38, at 1557 ("[F]rom our national beginnings both state and federal courts have treated customary international law as incorporated and have applied it to cases before them without express constitutional or legislative sanction."); Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 276, 278 (1986) (arguing that during the founding generation, "Federal jurisdiction over piracy and the law of nations was the least contentious jurisdiction of the inferior federal courts."); *see also* Anthony D'Amato, *Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985); D'Amato, *The Alien Tort Statute, supra* note 36, at 66; Dodge, *supra* note 24, at 232.

45. *See* Lee, *supra* note 41, at 882, 845–46, 890 n.304 ("there can be no doubt" that "individuals" injured by "acts of hostility" overseas have a "tort" action under ATS) (citing Breach of Neutrality, 1 Op. Att'y Gen. 57, 58 (1795), and 4 WILLIAM BLACKSTONE, COMMENTARIES 68; 1 Op. Att'y Gen. 57, 59 (1795)); Transcript of Oral Argument at 52, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1659 (2012) (No. 10-1491), http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf ("[I]t's absolutely clear that what the British were concerned about was pillaging and plundering on land in the Sierra Leone colony. They were seeking redress for those things, for destroying libraries, for destroying Freetown, not just about things that happened on the high seas and not just about things that happened in territorial waters. It's absolutely clear that that's true, but . . . Attorney General Bradford said there was no doubt that there was an ATS action.").

46. *Id.* at 897 (quoting Letter from Edmund Pendelton to James Madison (July 3, 1789), *in* 4 DOCUMENTARY HISTORY OF THE SUPREME COURT, 1789-1800, at 444, 446 (Maeva Marcus eds., 1992)).

covered by a separate section of the Act.[47] Thus, Lee argues that suits involving injuries to federal detainees and victims of overseas military operations fall squarely within the grant of jurisdiction over "a tort only in violation of the law of nations or a treaty."[48] The grant implemented the law of nations in cases involving less than $500, carrying out Article III's intent to commit the "laws of nations" to the "judgment of courts."[49]

Historically, the drafters of ATS aspired to prevent "the risk of war" or a situation in which "serious blame [would] fall on the United States," by remedying the effects of unlawful private acts such as assaults on ambassadors, piracy, and actions of the "entire nation" in violating the security of foreign subjects.[50] Sovereign immunity did not apply to such private acts.[51]

The claim by the Bush and Obama administrations of a right to evade the law by means of Statements of Interest is an assault on the rule of law. Article III, as designed by the founders of the U.S. Constitution, provides no room for such a claim. The Constitution contains no express protection of the President from civil litigation. Sovereign immunity does not apply to many official acts in violation of constitutional rights or statutory proscriptions.[52] For this reason, until the 1990s, sitting presidents

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47. *See id*. at 860, 862. The Constitution also distinguished between ambassadors and mere foreign subjects, and grants more expansive Article III jurisdiction in cases involving the former. *See id*. at 853.

48. *Id*. at 901–03.

49. THE FEDERALIST No 3, at 41, 43 (John Jay) (Clinton Rossiter ed., 1961). *See also* THE FEDERALIST No. 80, at 475–76 (Alexander Hamilton).

50. Ali Shafi v. Palestinian Authority, 642 F.3d 1088, 1098–1100 (D.C. Cir. 2011) (Williams, J., concurring), http://www.cadc.uscourts.gov/internet/opinions.nsf/82785E4C0AAF10D6852578AF004FA420/$file/10-7024-1313044.pdf.

51. *See* United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (citing *In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988)).

52. *See* Nixon v. Fitzgerald, 457 U.S. 731, 774 (1982) (White, J., dissenting) ("'[The President] is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by *impeachment*.'") (quoting statement of Governor Wilson at Pennsylvania ratifying convention, in 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 480 (1876 ed.)); Butz v. Economou, 438 U.S. 478, 490 (1978) ("For example, *Little v. Barreme*, 2 Cranch 170 (1804), held the commander of an American warship liable in damages for the seizure of a Danish cargo ship on the high seas. . . . The Court, speaking through Mr. Chief Justice Marshall, held that the President's instructions could not 'legalize an act which, without those instructions, would have been a plain trespass.'") (quoting *Little*, 2 Cranch at 179); *see also* United States v. Nixon, 418 U.S. 683, 706–

had to answer to the judicial branch for documents or testimony in their possession or in the possession of their underlings, even if the evidence related to official acts.[53] The possibility that pending litigation would offend the President's foreign allies or distract the President from his or her political responsibilities, so often viewed as dispositive today, was originally no basis for abandoning the rule of law.[54]

The proper response to Statements of Interest seeking exemptions from constitutional, treaty-based, or statutory law is to declare that sovereign immunity ends when unlawful, *ultra vires* acts are committed.[55] Thus, private plaintiffs could sue soldiers

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707 (1974) ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. . . . [Such a privilege] would plainly conflict with the function of the courts under Art. III.").

53. *See* Jones v. Clinton, 520 U.S. 681, 704 (1997) ("Sitting Presidents have responded to court orders to provide testimony and other information with sufficient frequency that such interactions between the Judicial and Executive Branches can scarcely be thought a novelty.").

54. *See id*. at 717 (Breyer, J., concurring) (Supreme Court precedent suggests that "the Constitution does not offer a sitting President significant protections from potentially distracting civil litigation."); *Fitzgerald*, 457 U.S. at 774 (White, J., dissenting) ("'If an officer [of the United States] commits an offence against an individual, he is amenable to the courts of law. If he commits crimes against the state, he may be indicted and punished. Impeachment only extends to high crimes and misdemeanors in a *public office*.'") (quoting statement of Governor Randolph at North Carolina ratifying convention, 4 ELLIOT, *supra* note 52, at 48); *Butz*, 438 U.S. at 489 (immunity from suit does not apply to federal officer who "ignored an express statutory or constitutional limitation on his authority.").

55. *See, e.g., Butz*, 438 U.S. at 490–91 ("Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law, there could be no immunity defense.") (citing United States v. Lee, 106 U.S. 196, 218-223 (1882); Virginia Coupon Cases, 114 U.S. 269, 285–92 (1885)); *id*. at 520 (Rehnquist, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart, J., and Stevens, J., dissenting in part) (under majority opinion, "an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all: The 'immunity' disappears at the very moment when it is needed."); *see also* Nixon, 418 U.S. at 706–07 ("[N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances . . . . [Such a privilege] would plainly conflict with the function of the courts under Art. III.").

or naval officers for "wartime injuries."[56] Blackstone's maxim that "the king can do no wrong" finds no echo in the U.S. Constitution.[57] In one famous case, a Japanese general was held to account for mass atrocities, and the Supreme Court exercised federal question jurisdiction over issues of the laws of war and Fifth Amendment due process.[58] A contrary rule threatens to destroy the Constitution and the rule of law by barring access to the courts for vindication of rights precisely in those cases in which the intervention of the courts is most needed.[59]

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56. *See* Al Shimari v. CACI Premier Technology, Inc.*,* 657 F. Supp. 2d 700, 711 (E.D. Va. 2009) ("[Historically,] private plaintiffs were allowed to bring tort actions for wartime injuries. *See* Mitchell v. Harmony, 54 U.S. 115, (1851) (soldier sued for trespass for wrongfully seizing a citizen's goods while in Mexico during the Mexican War); Ford v. Surget*,* 97 U.S. 594, 24 L.Ed. 1018 (1878) (soldier was not exempt from civil liability for trespass and destruction of cattle if his act was not done in accordance with the usages of civilized warfare)…."), *rev'd*, 658 F.3d 413 (4th Cir. 2011), *reh'g en banc denied,* 679 F.3d 205 (4th Cir. 2012) (en banc); Little v. Barreme*,* 6 U.S. 170 (1804) (naval officer liable to ship owner for damages for illegal seizure of his vessel during wartime).

57. *See* Langford v. United States, 101 U.S. 341, 342–43 (1882).

58. Yamashita v. Styer, 327 U.S. 1 (1946); *see also* United States v. Yamashita*, in* 4 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948); Anthony D'Amato, *The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya*, 84 AM. J. INT'L L. 705, 708–09 (1990).

59. *See, e.g.,* Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395, 397 (1971) (victim of unlawful search could sue federal agents for damages because "'[the] very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws,'" and "[historically,] damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty") (quoting Marbury v. Madison, 5 U.S. 137, 163 (1803)); In re Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 99 (E.D.N.Y. 2005) ("The Executive and others are clearly bound by the laws of war as well as other types of international law.") (citation and internal quotation marks omitted) (citing U.S. Const., art. II, § 3); Br. for the United States as Amicus Curiae, *Filartiga*, *reprinted in* 19 I.L.M. 585, 603 (1984) ("Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But . . . the protection of fundamental human rights is not committed exclusively to the political branches of government.") (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 430 n. 34 (1964)). *Cf. also* Gilligan v. Morgan, 413 U.S. 1, 5, 11 (1973) (suit for damages against Ohio National Guard for shooting student protesters might be appropriate); Ford v. United States, 273 U.S. 593, 606 (1927) (if "federal officers" conspired with private persons in a crime, then all parties involved would be guilty of conspiring to violate U.S. statute and treaty, "whether they are in or out of the country"); Expert Op. of Prof. Jordan Paust, *In re Agent Orange*, 2005 WL 6041235 (Jan.

C. The Development of Institutions for Responding to Transnational Dangers

Between 1933 and 1945, Raphael Lemkin, who coined the term "genocide," developed an influential theory of transnational dangers, including genocide. In 1933, he proposed at an international conference to criminalize "transnational dangers," which he defined as barbarous attacks on the lives or cultures of ethnic, national, or religious groups.[60] In 1945, he coined the term "genocide" for "destroying institutions" of "captive" or colonized peoples, such as by taking over their governments, seizing their businesses, burning their places of worship, or by the "mass killing" of them either immediately or over time by starvation or poverty.[61] The concept proved useful to the Nuremberg Tribunal in 1945, the United Nations General Assembly in 1946, and the signatories to the Genocide Convention in 1948 and down to today.[62]

Since 1945, the United Nations has proliferated institutions for responding to mass atrocities, including the International Court of Justice (ICJ), U.N. Security Council, the U.N. General Assembly, the office of the U.N. Secretary-General, the ICC, the ad hoc U.N. international criminal tribunals, U.N. supported hybrid domestic-international criminal tribunals, and a variety of special advisers, special rapporteurs, and investigators of mass

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5, 2005) (suit for damages against United States for violations of law during Vietnam War would be appropriate under Articles II and III of Constitution). *But cf. Fitzgerald*, 457 U.S. at 755–56 ("In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility."); Barr v. Matteo, 360 U.S. 564 (1959) (recognizing federal official's absolute privilege in civil defamation cases) (citing Spalding v. Vilas, 161 U.S. 483 (1896)).

60. Raphael Lemkin, *Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations,* PREVENT GENOCIDE, http://www.preventgenocide.org/lemkin/madridl933-english.htm (last updated Dec. 9, 2000).

61. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS, at ix (1944).

62. Raphael Lemkin, *Genocide—A Modern Crime*, 4 FREE WORLD 39 (1945), *available at* www.preventgenocide.org/lemkin/freeworld1945.htm; Eugene Taylor & Abraham Krikorian, *Educating the Public and Mustering Support for the Ratification of the Genocide Convention: Transcript of United Nations Casebook Chapter XXI: Genocide, a 13 February 1949 Television Broadcast Hosted by Quincy Howe with Raphael Lemkin, Emanuel Celler and Ivan Kerno, in* 5 WAR CRIMES, GENOCIDE & CRIMES AGAINST HUMANITY 91, 111–12 (2011).

atrocities. In 1993, for example, the ICJ ordered Yugoslavia to desist from aiding perpetrators of the crime of genocide in Bosnia and Herzegovina,[63] and the Security Council established the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), to be followed by the International Criminal Tribunal for Rwanda (ICTR).[64] In 1998, the ICTR issued the first genocide conviction since World War II against an official responsible for massacres of the Tutsi in Rwanda,[65] and, responding to Secretary-General Annan's request for a report on the situation in the Democratic Republic of the Congo (DRC), an investigative team concluded that "the systematic massacre of the [surviving] Hutus," after the Rwandan Patriotic Army invaded the DRC, revealed "the intent to eliminate the Rwandan Hutus remaining in the country."[66] The Rome Statute of the International Court, ratified by more than 100 states by 2007, entered into force in 2002 with a promise to end impunity for transnational crimes such as genocide, crimes against humanity, and war crimes.[67]

These institutions carried their work forward in the years since 2000, repeatedly condemning mass atrocities such as ethnic cleansing and localized massacres. In 2001, the ICTY issued a verdict against a Bosnian Serb general for complicity in genocide, based on the "accounts given by the survivors of [] execution sites," and forensic evidence suggesting a minimum of 2,000 separate bodies buried in mass graves in the Srebrenica region of

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63. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325 (Sept. 13), *available at* http://www.worldcourts.com/icj/eng/decisions/1993.09.13_genocide_convention.htm.

64. Prosecutor v. Krstic, Case No. IT-98-33-T, Judgement, paras. 1–4 (Int'l Crim. Trib. For the Former Yugoslavia Aug. 2, 2001), http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf; M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court,* 10 HARV. HUM. RTS. J. 1, 11–12, 42–49 (1997).

65. Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, paras. 523–24 (Sept. 2, 1998), *available at* http://www.un.org/ictr/english/judgements/akayesu.html.

66. *Report of the Secretary-General's Investigative Team Charged with Investigating Serious Violations of Human Rights and International Humanitarian Law in the Democratic Republic of the Congo*, paras 4, 95–96 U.N. Doc. No. S/1998/581 (June 29, 1998), *quoted in* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 478 (1st ed. 2000).

67. DAVID WEISSBRODT & CONNIE DE LA VEGA, INTERNATIONAL HUMAN RIGHTS LAW: AN INTRODUCTION 228–30, 238 (2007).

Bosnia and Herzegovina.[68] Also in that year, the prosecutor indicted the commander of the Croatian defense forces for perpetrating crimes against humanity affecting Croatian Serbs, including murder, deportations, cruelties, and racial, religious, or political persecutions, as well as the war crimes of wanton destruction of cities, plunder, and murder.[69] The indictment described "killing, arson, looting, harassment, terror and threats of physical harm" of the Croatian Serb minority, which caused "a large-scale deportation and/or displacement of an estimated 150,000 - 200,000 Krajina Serbs to Bosnia Herzegovina and Serbia."[70] In 2004, the U.N. Secretary-General, Kofi Annan, announced that massive war crimes had been perpetrated in the Darfur region of Sudan.[71] The next year, an Independent Commission of Inquiry on Darfur commissioned by the Security Council found that Arab militias had been massacring non-Arabs since the 1980s, with the militias' men expressing a goal to exterminate or subjugate the "blacks" [*Nuba* or *Zurga*] or "slaves" [*abid*], which goal was carried out in Darfur through a "pattern of indiscriminate attacks on civilians in villages and communities" including the "systematic killing of civilians belonging to particular tribes."[72] While in 1994 there was an atmosphere of impunity for violations of international law, by 2009 Mendez argued that there had been prosecutions in domestic or international tribunals with respect to crimes in Bosnia, East Timor, Kosovo, Lebanon, Sierra Leone, Rwanda, Argentina, Colombia, Ethiopia, Guatemala, and Peru.[73]

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68. Prosecutor v. Krstic*, supra* note 64, paras. 4, 73–75, 81.

69. *See id*.; Prosecutor v. Gotovina, Case No. IT-01-45-I, Indictment, paras. 1–20 (Int'l Crim. Trib. For the Former Yugoslavia May 21, 2001), *available at* http://www.icty.org/x/cases/gotovina_old/ind/en/got-ii010608e.htm.

70. *Prosecutor v. Gotovina, supra* note 69, para. 20.

71. Editorial*, Darfur,* N.Y. SUN, July 21, 2004, http://www.nysun.com/editorials/darfur/78477/. ("Based on reports that I have received, I can't at this stage call it genocide. There are massive violations of international humanitarian law, but I am not ready to describe it as genocide or ethnic cleansing yet." (quoting Kofi Annan, U.N. Secretary-General)).

72. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004*, paras. 126–27, 184, 238, 254, 507, 511 & n.10 (Jan. 25, 2005), http://www.un.org/news/dh/sudan/com_inq_darfur.pdf.

73. *See* Juan Mendez, *A History of Genocide*, YOUTUBE (Jan. 2009), http://www.youtube.com/watch?v=2wnPox-DXh0.

Developments in 2006-2008 threatened to make hollow many of the promises of the ICC and the United Nations to end impunity. In 2006, the International Court of Justice found that it lacked jurisdiction over an application filed by the DRC against Rwanda for committing genocide by invading and plundering the DRC, and then "killing, massacring, raping, throat-cutting, and crucifying . . . more than 3,500,000 Congolese, including the victims of the recent massacres in the city of Kisangani."[74] Following a guilty plea by the Rwandan prime minister a decade earlier, in 2008 the ICTR convicted high-ranking military officers from Rwanda for culpability in massacres committed in Kigali, the capital of Rwanda, as well as at other sites outside Kigali, including places of worship.[75] At the same time, in a blow for the Tutsi victims of the Rwandan military, the ICTR rejected significant evidence of a military role in the conspiracy to commit genocide against the Tutsi in 1994.[76] The ICC's Pre-Trial Chamber I echoed this conclusion in rejecting genocide charges against President Omar al-Bashir of Sudan, despite the findings of the international inquiry in 2005.[77] In 2010, the Office of the High Commissioner for Human Rights announced the results of an investigation of the massacres in the DRC, which concluded that Rwandan president Paul Kagame had been the architect of a plan formulated in 1996 or 1997 to "destroy the [Hutu] refugee camps" in the DRC; this plan caused 3.8 million people to perish

74. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. 32, para. 67 (Feb. 3).

75. *See* Prosecutor v. Bagosora et al., Case No. ICTR-98-41-T, Judgement and Sentence, Trial Chamber I, para. 2158 (Dec. 18, 2008). Although the head of the operations bureau of the army general staff was acquitted of the crime of genocide, the head of what was apparently the provisional military government of Rwanda, the commander of the Gisenyi operational sector, and the commander of the elite Para Commando Battalion were convicted of genocide. *See id*., paras. 1, 16, 2158–61, 2258.

76. EDWARD HERMAN & DAVID PETERSON, THE POLITICS OF GENOCIDE 54–55 (2011).

77. *See id*. at 104–05. The Appeals Chamber of the ICC reversed this decision on a blended rationale of procedural and substantive grounds. *See* Hannibal Travis, *On the Original Understanding of the Crime of Genocide*, 7 GENOCIDE STUD. & PREVENTION: AN INT'L J. 30, 38 (2012), *available at* http://scholarcommons.usf.edu/gsp/vol7/iss1/6.

of war-related causes by 2004.[78] Kagame created militias and rebel armies who answered to the Rwandan military.[79] This group massacred refugees in the DRC.[80] Yet, by 2013, Kagame had not been held accountable for massacres in the DRC, despite the findings of the investigation.[81]

II. THE TREND TOWARD IMPUNITY FOR VIOLATIONS OF INTERNATIONAL LAW SINCE 2001

A. The Trends toward Impunity and Non-Transparency

Despite promises that the ICC would bring an end to impunity, the results have been disappointing. No one was convicted of anything by the ICC for more than eight years.[82] A number of Afri-

78. OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, REPORT OF THE MAPPING EXERCISE DOCUMENTING THE MOST SERIOUS VIOLATIONS OF HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW COMMITTED WITHIN THE TERRITORY OF THE DEMOCRATIC REPUBLIC OF THE CONGO BETWEEN MARCH 1993 AND JUNE 2003, at 257, 323 (Aug. 2010), http://www.genocidewatch.org/images/DRC10_06_xx_Report_Draft_Democratic_Republic_of_the_Congo_1993-2003.pdf.

79. *Id*. at 257.

80. *Id*. at 77.

81. *See* Kambale Musavuli, *Syria, the DRC and the 'Responsibility to Protect': The U.S. Double Standard,* HUFFINGTON POST (Nov. 14, 2013), http://www.huffingtonpost.com/kambale-musavuli/syria-the-drc-and-the-res_b_4248673.html?utm_hp_ref=paul-kagame.

82. *See* Joshua Rozenberg, *ICC Prosecutors Should Not Be Grandstanding on Their Own Cases*, GUARDIAN (U.K.), (Aug. 18, 2010, 8:29 AM), http://www.guardian.co.uk/law/2010/aug/18/luis-moreno-ocampo-omar-bashir (no convictions or completed trials in eight years of operations); *see also* Jelena Pia-Comella, Talking Points for Panel Presentation, Prosecuting Gender-based Crimes at the ICC, at 3 (Mar. 6, 2013), http://www.iccnow.org/documents/CSW-panelMarch62013.pdf (although International Criminal Court looked into grave crimes in eight countries, and brought thirteen charges for gender-based crimes, for example, "half of the sexual violence counts sought by the Prosecution do not make it to the trial stage mainly due to the poor quality of evidence and insufficient evidence"); *Did You Know . . . Egypt*, U.S. COMM'N ON INT'L RELIGIOUS FREEDOM (Jan 28, 2013), http://www.uscirf.gov/reports-briefs/spotlight/did-you-knowegypt (no convictions for Maspero massacre of twenty-six people, mostly Copts, in Cairo); Michael Wahid Hanna, *Egypt and the Struggle for Accountability and Justice, in* TRANSITIONAL JUSTICE AND THE ARAB SPRING 175–77, 183 (Kirsten J. Fisher & Robert Stewart eds., 2014) ("impunity" for "military" action against "predominantly-Christian" protesters at Maspero site, although there were convictions of Ministry of the Interior officials for

can nations decided to ignore the ICC's arrest warrant for genocide in Sudan.[83] The ICC dismissed the case of Iraq as minor, despite 1.8 million deaths since 1990.[84] Despite dozens of massacres in Iraq and elsewhere, constituting probable crimes against humanity,[85] the ICC began with the arguably less grave crime of using child soldiers.[86]

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criminal negligence in deaths of seventy soccer "fans" and five other security officials for death of a "Salafi" leader).

83. *See* RICHARD GOLDSTONE, ENSURING COOPERATION WITH THE ICC 55 (2013), http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/05/Cooperation-with-the-ICC.pdf (although "Sudanese President Bashir is subject to an arrest warrant in respect of alleged genocide, war crimes and crimes against humanity committed in Darfur," he "has visited Kenya, Chad, Malawi and Djibouti (sometimes repeatedly), all of which have ratified the Rome Statute. . . . The inability of the ICC to enforce compliance with arrest warrants is one of its biggest challenges.").

84. *See* HERMAN & PETERSON, *supra* note 76, at 34–35, 38, 107–09.

85. In 2015, a Commission of Inquiry accused Islamic State forces in northern Iraq of carrying out crimes against humanity and genocidal acts; a principal target was the Yezidi minority, although other groups were also subjected to massacres and kidnappings of civilians including of women and children. *See, e.g., ICC Should Prosecute Islamic State for Iraq Genocide, War Crimes: U.N.*, CENTRAL CHRONICLE (Mar. 22, 2015), http://www.centralchronicle.com/icc-should-prosecute-islamic-state-for-iraq-genocide-war-crimes-un.html. *See also 60 Minutes Season 47 Episode 26: Iraq's Christians, Rare Earth Elements, Starstruck,* YOUTUBE (Mar. 22, 2015), https://www.youtube.com/watch?v=O3-ij76hYO0; Daniel Costa-Roberts, *8 Things You Didn't Know About Assyrian Christians*, PBC ONLINE NEWSHOUR RUNDOWN BLOG (Mar. 21, 2015), http://www.pbs.org/newshour/rundown/8-things-didnt-know-assyrian-christians/.

86. *See* HUMAN RIGHTS REPORT: 1 JANUARY – 30 JUNE 2008*,* U.N. ASSISTANCE MISSION FOR IRAQ (UNAMI), paras. 34–37, 43, 56 (2007), http://www.ohchr.org/Documents/Countries/IQ/UNAMI_Human_Rights_Report_January_June_2008_EN.pdf (describing daily attacks on civilians in Iraq by insurgents, and homicides by Iraqi security forces, in early 2008); HUMAN RIGHTS REPORT: 1 APRIL – 30 JUNE 2007*,* UNAMI, paras. 1–2, 17, 40 (2007), http://www.ohchr.org/Documents/Countries/IQ/HRReportAprJun2007EN.pdf (describing daily attacks on civilians in Iraq by insurgents, and homicides by Iraqi security forces, as of spring 2007); HUMAN RIGHTS REPORT: 1 JANUARY – 31 MARCH 2007*,* UNAMI (2007), http://www.ohchr.org/Documents/Countries/jan-to-march2007_engl.pdf (describing daily attacks on civilians in Iraq by insurgents, and homicides by Iraqi security forces, in early 2007); UN-IRAQ HUMANITARIAN UPDATE, DECEMBER 2005 AND JANUARY 2006*,* UNAMI 2, http://reliefweb.int/sites/reliefweb.int/files/resources/740A3161AF02F10C85257131005DEFBC-unami-irq-31jan.pdf (last visited Jan. 20, 2015) (describing daily attacks on civilians in Iraq by insurgents, and homicides by Iraqi security forces, as of late 2005

In the United States, the political elites have successfully resisted the jurisdiction of the ICC for more than a decade. Acting on behalf of the United States, President Bush's Undersecretary of State, John Bolton, announced the administration's intention not to pursue ratification of the Rome Statute of the ICC in 2002.[87] Issuing a signing statement shortly after 9/11, President Bush suggested that he could withhold information from the other branches of government under his power of supervising a "unitary executive branch."[88] This invoked the unitary executive

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and early 2006); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546,* paras. 46, 66–67, U.N. Doc. S/2006/945 (Dec. 5, 2006) (up to 600,000 Iraqi civilians perished in targeted attacks against them, waged on a daily basis by militias and terrorists in a climate of "prevailing impunity"); *2005 Country Reports on Human Rights Practices: Iraq,* U.S. DEPT. OF STATE (Mar. 8, 2006), www.state.gov/j/drl/rls/hrrpt/2005/61689.htm (torture, a crime against humanity, "commonplace" in Iraq as early as 2005); *2008 Country Reports on Human Rights Practices: Iraq,* U.S. DEPT. OF STATE (Feb. 25, 2009), www.state.gov/j/drl/rls/hrrpt/2008/nea/119116.htm (torture continued in Iraq in 2008); William Schabas, *Lubanga Sentenced to Fourteen Years*, PHD STUDIES IN HUMAN RIGHTS (July 13, 2012), humanrightsdoctorate.blogspot.com/2012/07/lubanga-sentence-to-fourteen-years.html. Schabas expressed disappointment with the ICC after the first sentence issued from it, stating: "The Lubanga sentence confirms the mythology of the International Criminal Court, whereby prosecutions in situations that threaten major powers are avoided while relatively insignificant cases in soft African targets attract the considerable resources of the institution." *Id*. Professor Schabas attended the drafting process of the Rome Statute of the ICC. *See* WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 96 (1st ed., 2000).

87. *See* Press Release, Amnesty International, U.S. Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes (Sept. 2, 2002), *available at* http://web.archive.org/web/20060807041852/http://web.amnesty.org/library/index/engior400252002; Press Statement, Richard Boucher, Spokesman, U.S. Dep't of State, International Criminal Court: Letter to U.N. Secretary General Kofi Annan (May 6, 2002), http://www.state/r/pa/prs/ps/2002/9968.htm; White House Office of Communications, Statement by President on Signature of the ICC Treaty (Jan. 2, 2001), *available at* 2001 WL 6008.

88. *Presidential Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2002*, 37 WEEKLY COMP. PRES. DOC. 1723, 1724 (Nov. 28, 2001). Similarly, President Bush refused to commit to enforcing laws passed by Congress on several occasions after 9/11, because he believed that the rule of law might infringe upon his "constitutional authorities . . . to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the

theory of Ronald Reagan and his supporters, under which the President wields U.S. sovereignty directly, in a way that renders optional compliance with treaties, the Constitution's requirement that the Congress declare a new war, and the Fifth Amendment's due process guarantee.[89] In 2005, President Bush's delegate to the United Nations insisted that while violators of international law should be "held accountable," the ICC could not "exercise jurisdiction over the . . . government officials[] of States not party to the Rome Statute."[90] Those States include Iraq, Saudi Arabia, and the United States.

The Bush administration coupled opposition of the ICC with dismissals of the illegality of aggressive war, and insistence that there could be no further international human-rights cases in the U.S. courts. In 2002, President Bush signed the authorization for war with Iraq by using the expression that he "appreciated" but did not need the resolution due to his unitary authority to wage war to "deter" or "prevent" any "threats to U.S. interests."[91] The Bush administration and like-minded corporations

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performance of the Executive's constitutional duties." *Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act*, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002), http://www.presidency.ucsb.edu/ws/?pid=73177.

89. *See* Br. for United States as Amicus Curiae, *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) (Nos. 87-5261, 87-5264, and 87-5265), *rev'd sub nom*. Morrison v. Olson, 487 U.S. 654 (1988), *reprinted in* 16 HOFSTRA L. REV. 97, 101–02 (1987) (executive branch should not be subject "in whole or in part to the control and cooperation of other[branch]es.") (quoting Hamilton, *supra* note 49); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 IOWA L. REV. 601, 701–02 (2005) ("When the question arose whether to invade and liberate the tiny Caribbean nation of Grenada [without a declaration of war or Security Council resolution], Reagan tersely ordered his joint chief of staff, 'Do it.'"); *see also* R.J. Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive's Power,* WASH. POST, July 4, 2004, at A12; Peter Spiro, *What Happened to the "New Sovereigntism"?,* FOREIGNAFFAIRS.ORG (July 28, 2004), http://www.foreignaffairs.org/20040728faupdate83476/peter-j-spiro/what-happened-to-the-new-sovereigntism.html.

90. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), http://www.un.org/News/Press/docs/2005/sc8351.doc.htm.

91. President George W. Bush, Presidential Statement on Signing the Authorization for the Use of Military Force Against Iraq, University of California at Santa Barbara (Oct. 26, 2002), http://www.presidency.ucsb.edu/ws/index.php?pid=64386.

then began advocating that the Supreme Court ban international human rights litigation.[92] This theory of a "unitary" executive is contrary to the vision of the Founders, in which the executive cannot overrule the courts.[93] Both Reagan and Bush broke with a tradition of presidential compliance with the courts by declining to comply with subpoenas, congressional and quasi-congressional requests for documents and depositions.[94] The administration of President Barack Obama, in turn, is known as

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92. *Cf.* Adam Liptak, *U.S. Courts' Role in Foreign Feuds Comes Under Fire,* N.Y. TIMES, Aug. 3, 2003 at N1, N18. *See also* Supp. Br. for the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 3245482.

93. THE FEDERALIST No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961) (executive power should not have "overruling influence over the other[] [powers], in the administration of their respective powers"). For example, in *Clinton v. Jones*, the Supreme Court unanimously rejected the proposition that the president can evade civil or criminal claims on the grounds that "the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch that would be transgressed by allowing [an] action to proceed." 520 U.S. 681, 697–98 (1997). Although, as it is often pointed out, Alexander Hamilton wrote that a "feeble Executive implies a feeble execution of the government," later in the same letter or article he clarified that he was advocating a single President rather than a privy council as in "England," not an executive who decides matters of law or announces rules of law in addition to executing the laws. Hamilton added that one advantage of a unitary executive is that it makes it easier to determine where the "blame or the *punishment* of a pernicious measure, or series of pernicious measures, ought really to fall," implying that judicial punishment of the President is possible. THE FEDERALIST No. 70 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis added), http://www.constitution.org/fed/federa70.htm. Hamilton also wanted a king and a house of lords instead of a democratic president and senate. *See* Letter from Thomas Jefferson to President George Washington (Sept. 9, 1792), *quoted in* GEORGE TUCKER, THE LIFE OF THOMAS JEFFERSON, THIRD PRESIDENT OF THE UNITED STATES 438 (1837) ("[M]y objection to the constitution was the want of a bill of rights—Colonel Hamilton's, that it wanted a king and house of lords."). The republicans, or Jeffersonians, beat back his monarchical instincts. *See id.* ("The sense of America has approved my objection, and added the bill of rights, and not the king and lords."). At the urging of Jefferson, James Madison condemned Hamilton's efforts to import the "royal prerogative" power of Great Britain into the presidency as both "vicious" and "dangerous." James Madison, *Helvidius, in* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 152 (J.B. Lippincot ed., 1865). *See also* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1458 (1997).

94. *Compare, e.g.,* JOHN DEAN, WORSE THAN WATERGATE: THE SECRET PRESIDENCY OF GEORGE W. BUSH (2004),

the least transparent in recent history due to noncooperation with congressional committees and judicial matters in which evidence from the executive branch is requested by the press, the public, and litigants.[95]

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http://books.google.com/books?id=zLx91XOMElQC&pg=PT75 ("The White House took an unprecedented stance in refusing to permit either Don Rumsfeld, as secretary of defense, or Colin Powell, as secretary of state, from testifying about matters relating to pre-9/11 counterterrorism activities."), Dana Milbank, *Barriers To 9/11 Inquiry Decried; Congress May Push Commission,* WASH. POST, Sept. 19, 2004, at A14 (describing creation of 9/11 Commission after Bush White House refused to cooperate with bipartisan congressional requests for information about what happened in months leading up to attacks), and Joe Pichirallo and Ruth Marcus, *Reagan, Bush Subpoenaed by North: White House to Fight Testimony Demand,* WASH. POST, Dec. 31, 1988, at A1, A12 (describing noncooperation of Reagan administration with criminal inquiry into provision of arms to Nicaraguan rebels), *with Clinton*, 520 U.S. at 704–06 ("President Nixon . . . produced tapes in response to a subpoena duces tecum, . . . President Ford complied with an order to give a deposition in a criminal trial,. . . and President Clinton has twice given videotaped testimony in criminal proceedings. Moreover, sitting Presidents have also voluntarily complied with judicial requests for testimony. President Grant gave a lengthy deposition in a criminal case under such circumstances, and President Carter similarly gave videotaped testimony for use at a criminal trial.") (citations omitted) (citing United States v. McDougal, 934 F. Supp. 296 (E.D. Ark. 1996); United States v. Branscum, No. LRP-CR-96-49 (E.D. Ark., June 7, 1996); United States v. Nixon, 418 U.S. 683 (1974); United States v. Fromme, 405 F. Supp. 578 (E.D. Cal. 1975); RONALD ROTUNDA & JOHN E NOWAK, TREATISE ON CONSTITUTIONAL LAW § 7.1 (2d ed. 1992)).

95. *See* Letter from the Association of American Law Libraries et al., to President Obama concerning a Security Classification Reform Steering Committee (Apr. 23, 2013), *available at* http://www.pogo.org/our-work/letters/2013/20130423-pogo-and-allies-urge-obama-classification-reform.html (arguing that public is unnecessarily denied foreign-affairs information because "classification activity has been dramatically on the rise for many years, with over 92 million decisions to classify information in fiscal year 2011 alone"); Ted Cruz, *Benghazi Eight Months Later*, NATIONAL REVIEW (May 8, 2013), http://www.nationalreview.com/article/347683/benghazi-eight-months-later (Congress could not get information from administration about what happened during attack on Sept. 12, 2012, why requested security was denied, how administration responded, why it edited talking points in certain ways, and why images of suspects were not released for more than seven months); Josh Gerstein, *President Obama's Muddy Transparency Record,* POLITICO (Mar. 5, 2012), http://www.politico.com/news/stories/0312/73606.html#ixzz2W1G4hzIy (Katherine Meyer, an attorney who specializes in access to government documents under the Freedom of Information Act, told Politico that Obama "administration is the worst [since President Gerald Ford's] on FOIA issues. The worst. There's just no question about it"); *Special Report with Bret Baier,* FOX NEWS (June 2013),

In 2005, President Bush nominated Judge John Roberts to be Chief Justice of the United States Supreme Court.[96] Senator Patrick Leahy expressed concerns that Judge Roberts, as an attorney in the Reagan administration, had indicated that Congress had no authority to end ongoing military hostilities.[97] Judge Roberts explained that he was being "vigilant to protect the executive's authority."[98] He argued that regardless of the presidential administration, the decision of when "hostilities should cease" would be reserved to the President.[99] Ted Kennedy, who played a prominent role in promoting greater U.S. respect for international law,[100] called the Roberts nomination process a "choreographed appearance[]" in the context of "unprecedented claims by the White House for sweeping expansions of presidential power that are grave threats to the rule of law."[101]

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http://archive.org/details/tv?time=201306&q=washington&fq=program:%22Special+Report+With+Bret+Baier%22 (Sen. John McCain, Ranking Member of the Senate Committee on Armed Services, argued that Obama administration is "least transparent in recent times"); Sabrina Siddiqui, *John McCain, Lindsey Graham Stand By Susan Rice Claims Despite Release Of Benghazi Emails [Update],* HUFFINGTON POST (May 21, 2013), http://www.huffingtonpost.com/2013/05/21/john-mccain-susan-rice_n_3314212.html (McCain told The Huffington Post that with respect to Sept. 11, 2012, attack on the U.S. outpost in Benghazi, Libya, members of Congress "still don't know the names of the survivors. We still haven't had any interviews with them. . . . There's now more questions to be answered than there were eight months ago."). The Obama administration has been more hostile to disclosure of information to the press concerning its foreign policy than was the Bush administration. *Cf. Morning Joe*, MSNBC (May 15, 2013), http://dailybail.com/home/bush-attorney-general-we-refused-to-target-the-media.html.

96. *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2008).

97. PBS Newshour, *John Roberts: Supreme Court Nomination Hearings* YOUTUBE (2005), http://www.youtube.com/watch?v=PNF_pwkP6gg.

98. *Id*.

99. *Id*.

100. For example, he cosponsored the Genocide Accountability Act and the Torture Victims Protection Act. 153 CONG. REC. S8325 (daily ed. Mar. 29, 2007); 137 CONG. REC. S1369-S1380 (daily ed. January 31, 1991).

101. Senator Edward Kennedy, Sen. Kennedy Speaks on the Nomination of Samuel Alito (Jan. 19, 2006), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/01/19/AR2006011902515.html.

B. The Doctrinal Pillars of Impunity for Violations of International Criminal Law

Under the Bush and Obama administrations, the Department of Justice and Office of Legal Counsel painted a complex tapestry of impunity under the ATS for genocide, other mass atrocities, and massive human rights violations.[102] The pillars of this theory of comprehensive impunity are as follows: (1) no extraterritorial application of the ATS to foreign defendants or crimes committed abroad, (2) no responsibility on the part of nonstate actors for crimes, (3) the sovereign immunity of foreign states and their current and former officials, (4) no enforceability of human-rights or war-crimes treaties or the law of nations—along with the unfettered discretion on the part of Congress and the executive to gut international law using reservations and declarations—and (5) the routine invocation of courts' alleged discretion to withhold jurisdiction in most ATS cases. The theory as a whole follows logically from the "Bush doctrine" and "Obama

102. Impunity is the state of affairs in which serious crimes are going unpunished. *Cf.* Rome Statute, *supra* note 23, at 1003 ("[a]ffirming that the most serious crimes...must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation"). The fight against impunity is hundreds of years old. *Cf.* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1675 (2013) (Breyer, J., joined by Ginsburg, Sotomayor, and Kagan, concurring in the judgment) (citing EMMERICH DE VATTEL, LAW OF NATIONS, BOOK II, § 76, 163 (1758), as stating that it is "pretty generally observed" practice in "respect to great crimes, which are equally contrary to the laws and safety of all nations," that a sovereign should not "suffer his subjects to molest the subjects of other states, or to do them an injury," but should "compel the transgressor to make reparation for the damage or injury," or be "deliver[ed] ... up to the offended state, to be there brought to justice") (internal quotations omitted). Impunity is a term often used by the United States government to refer to violations of international humanitarian law or of human rights law that have not been remedied, often in African countries such as Cote d'Ivoire, Libya, Rwanda, or Sudan, or in Latin American countries such as Colombia or Guatemala. *See, e.g.,* Press Release, The White House, EU-US Declaration on Working Together to Promote Peace, Stability, Prosperity, and Good Governance in Africa (June 20, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/06/20050620-3.html ("We are . . . [s]upporting broad and inclusive processes of implementing the comprehensive peace agreement in Sudan, capable of reconciling and accommodating the aspirations of all sectors of society and all regions of the country, while ensuring that the fight against impunity from violations of international humanitarian law and human rights law is sustained.").

doctrine" of preemptive war in violation of the U.N. Charter.[103] Rather than basing the legality of war exclusively on self-defense, these doctrines call for the consideration of "vital national interests" in the determination of a conflict's legality under the law of nations.[104]

First, although the ATS traditionally applied extraterritorially by its very terms,[105] the executive branch attempted to change that. It had long been known that torture was a prime candidate for ATS jurisdiction.[106] During the 1990s, the United States supported extraterritorial application of the ATS, at least as against

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103. *See* Tai-Heng Cheng & Eduardas Valaitis, *Shaping an Obama Doctrine of Preemptive Force*, 82 TEMP. L. REV. 737, 740, 753–56 (2009).

104. *Id*. at 740 (citing Senator Barack Obama, Address to the B'nai Torah Congregation in Boca Raton, Florida (May 22, 2008) (transcript available at http://votersforpeace.us/press/index.php?itemid=320)). *See also* Interview with Secretary of State Hillary Clinton, Remarks on "American Global Leadership" at the Center For American Progress (Oct. 12, 2011), *available at* http://www.state.gov/secretary/20092013clinton/rm/2011/10/175340.htm (noting that Obama administration's military action in support of President Obama's "values and interests" included "military action" in Libya to destroy the nation's air defenses; no claim of self-defense).

105. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) (ATS conferred federal jurisdiction over dispute relating to trespass or replevin of human "property," although it arose on high seas). This was in accordance with the principle of English law that a tort committed in Paris could follow the tortfeasor to London. McKenna v. Fisk, 42 U.S. (1 How.) 241, 248 (1843); The Antelope, 23 U.S. (1 Wheat) 66, 116–17 (1825) (Marshall, J.) (under English law, an American engaged in slave trade and intercepted by a British cruiser attempting to prohibit the trade could nevertheless sue for violation of "some right that has been violated by the capture, [or] some property [other than slaves] of which he has been dispossessed and to which he ought to be restored.") (quoting *The Amedie*, 1 Acton 240). The drafter of the ATS applied this doctrine as a judge prior to enactment of the ATS. *See* Br. of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, *supra* note 44, at 23 (citing Stoddard v. Bird, 1 Kirby 65, 68 (Conn. 1786) (Ellsworth, J.)).

106. *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(n) (1987). Torture is a vague and ambiguous concept under U.S. law, but it probably includes harsh beatings, electric shocks, and "extreme pain" caused by binding a detainee tightly, or by suspending him or her in midair. *See* 18 U.S.C. § 2340 (2000); COMMITTEE ON FOREIGN RELATIONS, THE UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, S. EXEC. DOC. NO. 101-30, at 9, 14 (1990); Implementation of the Convention Against Torture, 8 C.F.R. § 208.18(a)(3) (2003); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Comm.

official enemies of the administration such as the leaders of the Bosnian Serb Republic (*Republika Srpska*).[107] In the 1970s, it even supported such application against acts taking place in current or former allies such as Paraguay.[108] Starting in late 2001, and with growing frequency from 2002 through 2004, there were allegations of abuse of detainees and violations of international law at Guantanamo Bay naval station, in Cuba, and at Abu Ghraib prison, in Iraq.[109] In response, the government argued "that the Executive Branch possesses the unchecked authority to imprison indefinitely any persons, foreign citizens included, on territory under the sole jurisdiction and control of the United States, without permitting such prisoners recourse of any kind to any judicial forum, or even access to counsel, regardless of the length or manner of their confinement."[110] In 2006-2007, the Bush administration filed several amici briefs with the U.S.

Against Torture, U.N. Comm. Against Torture on its 36th Sess., May 1-19, 2006, ¶¶ 13–14, 24, U.N. Doc. CAT/C/USA/CO/2 (May 18, 2006), http://www.state.gov/documents/organization/133838.pdf; Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions,* 43 VAL. U. L. REV. 1535, 1537–45, 1553–69 (2009); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1241, 1250–54 (2005).

107. *See* Kadic v. Karadzic, 70 F.3d 232, 235 (2d Cir. 1995).

108. *See* Burley, *supra* note 35, at 463.

109. Al Odah v. United States, 215 F. Supp. 2d 55, 60–61 (D.D.C. 2002), *on appeal*, Case No. 03-343 (2003); Coalition of Clergy v. Bush*,* 189 F. Supp. 2d 1036, 1038–39 (C.D. Cal. 2002), *aff'd in part*, *rev'd in part sub nom.* Coalition of Clergy, Lawyers and Professors v. Bush 310 F.3d 1153 (9th Cir. 2002); Gherebi v. Bush, 262 F. Supp. 2d. 1064, 1066 (C.D. Cal. 2002), *rev'd*, 374 F.3d 727 (9th Cir. 2004); Hamdi v. Rumsfeld, 316 F.3d 450, 458–62 (4th Cir. 2003), *vacated,* 542 U.S. 507 (2004); Rasul v. Bush, 215 F. Supp. 2d 55, 60–61 (D.D.C. 2002) *rev'd sub nom.* Al Odah v. U.S., 103 Fed. App'x. 676 (D.C. Cir. 2004); Supreme Court, Orders in Pending Cases [Rasul v. Bush, 03-334 (2003) and Al Odah v. United States, No. 03-343], Decided June 28, 2004, http://www.supremecourtus.gov/orders/courtorders/111003pzor.pdf; *cf.* Br. for Pet'r, at 4–6, El Shifa Pharmaceutical Indus. Co. v. United States*,* 607 F.3d 836 (D.C. Cir. 2010) (No. 07-5174) (arguing that the Supreme Court rejected Bush administration's argument in a series of cases that determinations of the status of enemy combatants under Uniform Code of Military Justice, Geneva Conventions, and laws and customs of war were non-justiciable political questions).

110. *Gherebi*, 352 F.3d at 1283. *See also* Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power,* 2007 UTAH L. REV. 345, 397 (2007); M. Cherif Bassiouni, *The Institutionalization of Torture Under the Bush Administration,* 37 CASE W. RES. J. INT'L L. 389, 391 (2006).

Courts of Appeals contending that the ATS is "'narrow'" and should have no "extraterritorial application."[111] One brief argued that Congress did not intend the ATS to reach "purely extraterritorial claims," even though it has no "geographical limitation" on "torts."[112]

The argument against an extraterritorial ATS blended into one for a unitary executive, which requested significant expansions of executive immunity for *jus cogens* violations and the act of state doctrine. The core of the argument consisted of a plea that the courts never "review a foreign government's treatment of its own citizens" or tolerate any "significant risk to the foreign policy interests of the United States."[113] President Bush's head of the Office of Legal Counsel, Jack Goldsmith, persuaded Justice Anthony Kennedy that no other nation has recognized universal civil jurisdiction over torts arising under the law of nations.[114] This conclusion was erroneous, according to the amici

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111. Br. for the United States as Amicus Curiae in Supp. of Def. at 10–15, Sarei v. Rio Tinto, 550 F.3d 822 (9th Cir. 2007) (en banc) (citing Br. for the United States as Amicus Curiae, Corrie v. Caterpillar, Inc., No. 2 05-36210 (9th Cir.); Br. for the United States as Amicus Curiae, Mujica v. Occidental Petroleum Corp., No. 05-56175 (9th Cir.), and quoting *Sosa*, 542 U.S. at 715); *see also* Br. for the United States as Amicus Curiae at 1–15, 28, Presbyterian Church of Sudan v. Talisman Energy, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) 2007 WL 7073754; *Talisman Energy,* 244 F. Supp. 2d 289.

112. Br. for the United States as Amicus Curiae, *Sarei* at 11–13, *supra* note 111.

113. *Id*. at 13–14. *Jus cogens* or peremptory norms of international law are binding, non-derogable norms, such as the prohibitions on genocide, the slave trade, and torture. *See, e.g.,* Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002); The Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331 (May 23, 1969); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987). Such norms are also generative of a sort of universal standing to assert them, i.e. of *erga omnes* duties to all States and correlative interests of all States in invoking them. *See* Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems,* 113 PENN ST. L. REV. 671, 683 n.43 (2009) (citing Barcelona Traction, Light & Power Co. (2d Phase) (Belg. v. Spain), 1970 I.C.J. 3, 33 (Feb. 5)).

114. Justice Kennedy stated "no other nation in the world permits its court to exercise universal civil jurisdiction over alleged extraterritorial human rights abuses to which the nation has no connection." Transcript of Oral Argument at 3–4, Kiobel v. Royal Dutch Petro. Co., 133 S. Ct. 1659 (2013) (No. 10-1491), http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf, *quoted in* Jeffrey Rosen, *Corporations Are People When They Donate to Campaigns—But Not When They Violate Human Rights*, NEW

briefs in *Kiobel, Samantar,* and *Sosa.*[115] These arguments culminated in the decision in *Kiobel*, in which Chief Justice Roberts

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REPUBLIC PLANK BLOG (Oct. 2, 2012), http://www.newrepublic.com/blog/plank/107998/corporations-are-people-when-they-donate—campaigns—-not-when-they-violate-human-ri#.

115. *See* Br. for the American Jewish Congress as Amici Curiae Supp. Pet'r, at 8, 37, Samantar v. Yousef, 560 U.S. 305 (No. 08-1555), http://www.oyez.org/sites/default/files/cases/briefs/pdf/brief__08-1555__1.pdf; Br. for Australian Law Scholars as Amici Curiae in Supp. of Pet'rs, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491), http://www.losangelesemploymentlawyer.com/Australian-Law-Scholars.pdf; Br. for the European Commission on Behalf of the European Union as Amicus Curiae, at 25–26, *Kiobel*, 133 S. Ct. 1659; Br. of Amicus Curiae Juan E. Mendez, *supra* note 21, at 13, 34–35; Br. for International Human Rights Organizations on Reargument as Amici Curiae in Supp. of Pet'rs, at 19–23, 30–39, *Kiobel*, 133 S. Ct. 1659, https://ccrjustice.org/files/10-1491%20tsac%20International%20Human%20Rights%20Organizations.pdf; Br. for Professors of Public International Law as Amici Curiae in Supp. of Resp's, Samantar v. Yousef, 130 S. Ct. 2278 (No. 08-1555), *reprinted in* 15 LEWIS & CLARK L. REV. 609, 622–28 (2011), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1315&context=faculty_scholarship; Br. for South African Jurists as Amici Curiae in Supp. of Pet'rs, at 5–6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). The Court of Appeals for the United Kingdom of Great Britain and Northern Ireland ruled in 1994 that a Kuwaiti could sue three other Kuwaitis for torture in Kuwait followed by threatening phone calls to him in Britain. *See* Al-Adsani v. Kuwait, 100 ILR 463 (Eng. C.A. 1994), *further proceedings at* 103 ILR 420 (Eng. Q.B. 1995), 107 ILR 536 (Eng. C.A. 1996). Under the civil procedure code of France, the criminal procedure code of Germany, and the judiciary law of Spain, a victim may bring a claim for monetary compensation ancillary to a criminal charge for extraterritorial genocide, crimes against humanity, or war crimes. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 762–63 (2004) (Breyer, J., concurring in part) ("criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.") (citing Br. for European Commission as Amicus Curiae, at 21, n.48, *Sosa*, 542 U.S. 692 (Nos. 03-339, 03-485); Br. of Amicus Curiae Juan E. Mendez, *supra* note 21, at 34–35 (citing *Kovac v. Karadžic*, Tribunal de Grande Instance de Paris, Judgment of March 14, 2011); 3 YVES DONZALLAZ, LA CONVENTION DE LUGANO DU 16 SEPTEMBRE 1998 CONCERNANT LA COMPETENCE JUDICIAIRE ET L'EXECUTION DES DECISIONS EN MATIERE CIVILE ET COMMERCIALE, ¶¶ 5203-5272 (1998); EC Council Regulation Art. 5, § 4, 2001/44, 2001 O.J. (L 012) (Jan. 16, 2001)); AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: THE SCOPE OF UNIVERSAL CIVIL JURISDICTION (2012), http://documents.law.yale.edu/sites/default/files/Amnesty%20International%20-%20Universal%20Jurisdiction_%20The%20scope%20of%20universal%20civil%20jurisdiction%20_%20Amnesty%20International.pdf ("[M]any states, including Aus-

concluded that the ATS could not apply to conduct outside the United States even though the defendant was present in the United States, reasoning that "accepting [the contrary] view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[116]

Second, there was a trend away from non-state responsibility for mass atrocities under the ATS. Theoretically, non-state liability should be even more readily subject to ATS actions, due to the lesser impact on U.S. foreign policy priorities and on the judicial doctrine of sovereign immunity.[117] As long as the person

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tria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden, permit their courts to entertain civil claims in an action civile in criminal cases which are based on universal criminal jurisdiction.") (citing Br. for European Communities as Amicus Curiae, *Sosa,* 542 U.S. 692); *id*. ("courts in [many] countries can exercise jurisdiction in criminal cases over civil claims based on torts committed abroad") (collecting sources). *See also* Kate Parlett, *Universal Civil Jurisdiction for Torture,* 4 EUR. HUM. RTS. L. REV. 385, 385 (2007) (arguing that it should be allowable under international law for domestic courts to exercise jurisdiction in civil claims for torture on the basis of universal civil jurisdiction); Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, n.82 (2006) (collecting statutes). France and Germany exercise universal criminal jurisdiction over extraterritorial genocide, in fact. *See, e.g.,* AFP, *France Orders First Rwandan Genocide Trial – Rwanda*, FRANCE 24 (Apr 3, 2013), www.france24.com/en/20130402-france-rwanda-genocide-trial-pascal-simbikangwa. The U.S. Supreme Court has noted that British law provided for transitory actions for trespass to be filed by one foreigner against another in England "for trespasses committed . . . out of the realm, or . . . without the king's foreign dominion." McKenna v. Fisk*,* 42 U.S. (1 How.) 241, 241, 249 (1843). The South African courts have exercised civil jurisdiction over torts committed by one foreigner on another on the high seas. *See* Br. for South African Jurists Anton Katz, Maz Du Plessis, and Christopher Gevers, in Supp. of Pet'rs at 5–6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) (citing *Wallace v. Hill & Scheinman* (1828) 1 Menz. 347; Hill v. Wallace, (1829) 1 Menz. 347).

116. *Kiobel*, 133 S. Ct. at 1669.

117. *Cf.* THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1986) ("Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide."); Justin Lu, *Jurisdiction over Non-State Activity Under the Alien Tort Claims Act*, 35 COLUM. J. TRANSNAT'L L. 531, 547 (1997) ("With respect to genocide and war crimes, the *Kadic* court was able to point to a number of international documents that impose liability on private individuals for such acts."); *see also* Almog v. Arab Bank, PLC, 471 F. Supp. 2d 257, 274 (E.D.N.Y. 2007)

acts under "color of law" or as a co-conspirator or aider and abettor of state action, there should be no issue with his or her status as a private individual, former official, militia leader, warlord, or head of an unrecognized state.[118] Restriction of non-state liability therefore tends toward judicial repeal of the ATS itself. When combined with sovereign immunity or the act of state or political question doctrine, refusal of non-state-actor liability has a whipsaw effect on victims. Nevertheless, the D.C. Circuit has rejected non-state liability for torture, even while noting that most of the offenses covered by the ATS, and especially piracy, may be committed by non-state actors.[119]

Third, the Bush and Obama administrations were vigorous proponents of the concept of sovereign immunity for state officials who perpetrate or conspire in mass atrocities such as genocide and large-scale terrorism. Prior to 2001, there was judicial authority to the effect that a foreign official has no immunity for "private or criminal" acts.[120] With respect to the ATS, the Bush

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(holding that non-state terrorist groups could be liable for targeting people under the ATS based on law of nations standards set forth in the Genocide Convention and the Rome Statute: "Acts of genocide and crimes against humanity violate the law of nations and these norms are of sufficient specificity and definiteness to be recognized under the ATS.").

118. *See, e.g.*, Doe v. Exxon Mobil Corp.*,* 654 F.3d 11, 41–42 (D.C. Cir. 2011); Flomo v. Firestone Natural Rubber Co.*,* 643 F.3d 1013, 1017–21 (7th Cir. 2011); Sarei v. Rio Tinto, PLC*,*671 F.3d 736, 747–49, 759–60, 764–65 (9th Cir. 2011) (en banc); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 254–55 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 122 and 131 S. Ct. 79 (2010); Abdullahi v. Pfizer, Inc.*,* 562 F.3d 163, 173 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3541 (2010); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1263 (11th Cir. 2009); Romero v. Drummond Co., 552 F.3d 1303, 1316 (11th Cir. 2008); Kadic, 70 F.3d 232; *Filartiga*, 630 F.2d 876; Doe v. Islamic Salvation Front, 993 F. Supp. 3, 5–6 (D.D.C. 1998); Statement of Interest of the United States, Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995) (No. 94-9035); Br. for the United States as Amicus Curiae, *Filartiga, supra* note 59; Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801 (2002).

119. *Ali Shafi*, 642 F.3d at 1089–1100; *Ali Shafi,* 642 F.3d. at 1099–1100 (Williams, J., concurring).

120. United States v. Noriega*,* 117 F.3d 1206, 1212 (citing *In re* Doe, 860 F.2d 40, 45 (2d Cir. 1988)); Al Shimari v. CACI Premier Technology, Inc., 657 F. Supp. 2d 700, 711 (E.D. Va. 2009) (citing Ford v. Surget, 97 U.S. 594, 24 L.Ed. 1018 (1878); Mitchell v. Harmony, 54 U.S. 115 (1851); Little v. Barreme, 6 U.S. 170 (1804); Br. for the United States as Amicus Curiae, *Filartiga, supra* note 59. *Cf. also* Gilligan v. Morgan, 413 U.S. 1, 5, 11 (1973); Von Zedtwitz v. Sutherland*,* 26 F.2d 525–26 (D.C. Cir. 1925); *In re Agent Orange,* 373 F. Supp. 2d

administration contended that the executive branch's extension of immunity to an official of China or some other state is conclusive on the courts, regardless of the death toll, heinousness of the conduct, or persecutory zeal of the official.[121] Harold Koh has argued that "America's new diplomatic strategy emphasizes strategic unilateralism and tactical multilateralism, characterized by a broad antipathy toward international law and global regime-building through treaty negotiation."[122] Sued for genocide and other offenses due to the mass spraying of poisonous gases in Vietnam, the Bush administration argued that it had "Commander in Chief" immunity from the suit under "separation of powers."[123] The Bush administration had previously been supportive of Asian dictatorships' attempts to dismiss ATS suits:

> [The] Bush administration changed course, filing a new statement of interest in Unocal objecting to the lawsuit, the start of a generally disapproving approach toward ATS litigation. This approach may have been driven in part by ideology and strong views of executive branch primacy. But there are functionalist justifications for the change in attitude toward ATS lawsuits, which in the 1980s and most of the 1990s "involved abuses committed under regimes that were defunct and repudiated by their successors, nearly universally shunned by other governments, possessed of, at best, uncertain claims to statehood or legitimate state power, lacking in geopolitical significance, politically unimportant to Washington, or clearly condemned by the United States." The first decade of the twenty-first century, by contrast, has seen a wave of ATS lawsuits against corporations and existing regimes that have prompted complaints from some foreign governments, including U.S. allies. . . .

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99 (citing U.S. Const., art. II, § 3; Ford v. United States, 273 U.S. 593, 606 (1927); Valentine v. Neidecker, 299 U.S. 5, 14, & n.12 (1936); Francis v. Francis, 203 U.S. 233, 240 (1906); *In re* Neagle, 135 U.S. 1, 64 (1890); Chew Heong v. United States, 112 U.S. 536, 563 (1884); Expert op. of Prof. Jordan Paust, *In re* Agent Orange, 373 F. Supp. 2d 7 (E.D.N.Y. 2005)); Bond v. United States, 2 Ct. Cl. 533 (1866).

121. Ye v. Zemin, 383 F.3d 620, 626 (7th Cir 2004). *See also* Doe v. State of Israel, 400 F. Supp. 2d 86, 111 (D.D.C. 2005) ("When, as here, the Executive has filed a Suggestion of Immunity as to a recognized head of a foreign state, the jurisdiction of the Judicial Branch immediately ceases.").

122. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2354 (2006).

123. *In re* Agent Orange Product Liability Litig., 373 F. Supp. 2d at 43–44.

The first example involves lawsuits against Chinese officials for human rights abuses, which present a critical case study for determining the foreign policy costs of ATS litigation. China has the most important and perhaps the most volatile bilateral relationship with the United States. China is a rising power and, some argue, a potential rival for geopolitical dominance. Due to its role as a major U.S. creditor, China holds some leverage over U.S. foreign policy. Moreover, China may be particularly sensitive to ATS litigation. The governing Communist Party of China (CPC) has proven especially skillful at invoking the long history of imperialism and abuses by Western countries to stoke the fires of nationalism and resentment against the United States. ATS litigation is arguably more likely to impose substantial foreign policy costs in this context than in any other.

Only five ATS lawsuits have been brought concerning activities in China. Three were dismissed on jurisdictional grounds, one ended in settlement, and one resulted in a declaratory judgment with no damages awarded. One suit was brought by student leaders of the 1989 Tiananmen Square protests against Li Peng, the former Premier of China, for alleged human rights abuses. Former prisoners also brought suit against Li Peng, various state entities, and the Adidas Corporation for human rights abuses, including forced prison labor. Although the service of the complaint on Li Peng during a visit to the United States prompted angry denunciations from the Chinese government, both claims against government officials were dismissed on sovereign immunity grounds. Three other cases arose from the 1999 crackdown by the Chinese government on the Falun Gong spiritual movement. Falun Gong practitioners filed lawsuits against three Chinese government officials, including former President Jiang Zemin, the Beijing Mayor, Deputy Governor of Liaoning Province, and the Chinese Communist Party Secretary for Sichuan Province. Two cases were dismissed on sovereign immunity grounds. In another, Doe v. Qi, the defendant refused to appear and the court issued a declaratory judgment in favor of the plaintiffs without awarding damages because it "pose[d] the least threat to foreign relations. . . ."

The U.S. State Department filed statements of interest in these cases on behalf of the defendant Chinese officials, arguing that

> the litigation would interfere with the conduct of U.S. foreign policy.[124]

Then, in 2006-2007, the Bush administration blended its argument against extraterritorial application of the ATS in *Sarei* and *Kiobel* with appeals for sweeping sovereign immunity for *jus cogens* violations, and/or a significant expansion of the act of state doctrine.[125] The administration justified immunity by asking that the courts never infringe upon a unitary executive by attempting to "review a foreign government's treatment of its own citizens" nor tolerate any other "significant risk to the foreign policy interests of the United States."[126] This trend culminated in 2009, when the Obama administration successfully urged the sovereign immunity of the Kingdom of Saudi Arabia for financ-

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124. Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1151–53 (2011) (citing, inter alia, Statement of Interest of the United States, at 7, Doe v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (No. C02-0672), http://www.cja.org/downloads/LiuQi_Statement_of_Interest_of_the_US_85.pdf; Statement of Interest of the United States at 2–3, Zhou v. Peng, 286 F. Supp. 2d 255 (S.D.N.Y. 2003) (No. 00 Civ. 6446), http://www.state.gov/documents/organization/16671.pdf; Supp. Br. for the United States of America as Amicus Curiae at 11-15, Doe I v. Unocal, 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628).

125. Br. for The United States as Amicus Curiae, *Sarei*, *supra* note 111, at 10–15; Br. for the United States as Amicus Curiae, *Talisman Energy*, *supra* note 107, at 5.

126. *See generally* Br. for the United States as Amicus Curiae, *Sarei*, *supra* note 111, at 13–14. In *Kiobel*, Nigeria's treatment of its citizens of the Ogoni ethnic and religious group was at issue. 133 S. Ct. at 1662−63. Amounting to less than one percent of Nigeria's population, the Ogoni people's language belong to a language family spoken by less than six percent of the population, and its religious beliefs of Christianity or traditional Yaa practice differ from the Muslim religion of the Hausa and Fulani plurality in Nigeria. *See Data: Assessment for Ogoni in Nigeria*, Minorities at Risk Project, University of Maryland, College Park (2014-2015), http://www.cidcm.umd.edu/mar/assessment.asp?groupId=47504. In the 1990s, the Nigerian government and its allies killed about 2,000 Ogoni people in response to what started out as peaceful protests. *See id*. In 2001, the African Commission on Human and Peoples' Rights recognized that Nigeria had "given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis." The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001), para. 58, http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

ing and materially supporting the persons behind the 9/11 attacks.[127] Some of the 9/11 families advocated unsuccessfully for a "long" time in favor of legislation that would make al Qaeda's financers liable for its massacres.[128] Four spouses and a parent of 9/11 victims have asked for an end to the cover-up of the Saudi role.[129] The entire episode has reflected an abdication of the right

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127. *See* Br. for the United States as Amicus Curiae, Federal Insurance Co. v. Kingdom of Saudi Arabia, 557 U.S. 935 (2009), (No. 08-640) http://www.justice.gov/osg/briefs/2008/2pet/6invit/2008-0640.pet.ami.inv.html; *see also* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 11–12 (2009), http://www.state.gov/documents/organization/153980.pdf:

> [T]he United States filed a brief in the Supreme Court opposing a petition for writ of certiorari by persons injured in the September 11, 2001 attacks, the families and representatives of decedents, and insurers, who alleged, among other things, that Saudi Arabia and several high-ranking Saudi officials bore responsibility for the attacks because they had funded ostensible charities they knew were diverting funds to al Qaeda.. . . The United States argued that the Supreme Court should not grant review of the case because "[t]he lower courts correctly concluded that Saudi Arabia and its officials are immune from suit for governmental acts outside the United States."

Id.

128. *See* Press Release, Office of Sen. Charles Schumer, On 9/11 Anniversary, Schumer Announces 'Justice Against Sponsors of Terrorism Act' - Long Sought After By 9/11 Families - Has Cleared Senate Judiciary Committee with Sweeping Support (Sept. 11, 2014), *available at* http//www.schumer.senate.gov/Newsroom/record.cfm?id=355300.

129. *See* Press Release, Office of Rep. Walter Jones, Jones, Lynch, And Massie Host Press Conference On Resolution To Declassify 28 Pages In The Joint Inquiry Report On The 9/11 Attacks (Sept. 10, 2014), *available at* https://jones.house.gov/press-release/jones-lynch-and-massie-host-press-conference-resolution-declassify-28-pages-joint-0 (as a new House "resolution states that declassification of the pages [on the Saudi government's role in 9/11] is necessary to provide the American public with the full truth surrounding the tragic events of September 11, 2001, particularly relating to the involvement of foreign governments," the survivors of 9/11 victims speaking in favor of the resolution "includ[ed] Terry Strada, co-chair of 9/11 Families United for Justice Against Terrorism and widow of Tom Strada (1 WTC victim); Matt Sellitto, father of Matthew Sellitto (1 WTC victim); Abraham Scott, widower of Janice Scott (Pentagon victim); Emanuel Lipscomb (WTC survivor); Ellen Saracini, widow of Victor Saracini (pilot of United Airlines Flight 175, which crashed into 2 WTC).").

and duty to protect U.S. persons.[130] This may contribute to mistrust and animus toward Arabs who had nothing to do with 9/11.[131]

Fourth, the idea that the law of nations is not "self-executing" was popularized by Judge Robert Bork in 1984.[132] The Bush administration supported the dismissal of many claims involving

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130. *Cf.* Michael J. Frank, *U.S. Military Courts and the War in Iraq,* 39 VAND. J. TRANSNAT'L L. 645, 755–56 & n.468 (2006) (describing a nation's right to protect its nationals from terrorist attacks, even if planned or committed overseas). In 2013, the Obama administration denied relief to 9/11 victims by declining to add Saudi Arabia to the list of state sponsors of terrorism even though Saudi government-sponsored organizations had allegedly funded Osama bin Laden and thereby the 9/11 attacks. *See* In re Terrorist Attacks on September 11, 2001, 714 F.3d 109, 111–18 & n.7 (2d Cir. 2013) (holding that because Saudi Arabia was not on the list, and tort of funding 9/11 occurred outside the United States, 9/11 survivors and families of those murdered had no claim under ATS, the Anti-Terrorism Act, or TVPA). The Foreign Sovereign Immunities Act provides for liability for foreign terrorist acts if the relevant nation-state is listed as a state sponsor as a result of the act giving rise to the suit. *See* 28 U.S.C. § 1605(a)(7)(A) (2000); Roeder v. Islamic Republic of Iran, 333 F.3d 228, 235 (D.C. Cir. 2003) (noting that this section, which was "added as part of the Antiterrorism and Effective Death Penalty Act of 1996, allowed an exception to the immunity bar if plaintiffs showed that the foreign state had been designated a state sponsor of terrorism when the act occurred or as a result of the act.") (citing 28 U.S.C. 1605(a)(7)(A) (2000)). Although the purpose of the Anti-Terrorism Act was to provide a claim for compensation to victims of international terrorism, it has not been fully implemented in the 9/11 case. *See* In re September 11 Litig., 751 F.3d 86, 93 (2d Cir. 2014) ("The purpose of the ATA was '[t]o provide a new civil cause of action in Federal law for international terrorism that provides extraterritorial jurisdiction over terrorist acts abroad against United States nationals.'") (quoting H.R. 2222, 102d Cong. (1992)).

131. *See* Adrien Katherine Wing, *International Law, Secularism, and the Islamic World*, 24 AM. U. INT'L L. REV. 407, 426 (2009).

132. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798–823 (D.C. Cir. 1984). Judge Bork was unable to find any quotations to support his use of the term "self-executing" to make the ATS "law of nations" clause unenforceable. The most relevant case he cited actually stated that a treaty may confer rights upon persons, is entitled to equal treatment with a statute, and may be enforced via a statute such as the ATS. Head Money Cases, 112 U.S. 580, 598–99 (1884). Prior to his opinion, the judicial consensus was that even the "practice of nations" and "writing[s]" of "jurists" could form the "law of nations," which could then be enforced as U.S. common law and under the ATS. The Paquete Habana, 175 U.S. 677, 701–12 (1900); Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 (2d Cir. 1980); 1 U.S. Op Att'y Gen. 26, 27 (1792). The other judges criticized Judge Bork for attempting to judicially void the ATS without constitutional warrant. *See Tel-Oren*, 726 F.2d at 775–823.

murders, assaults, and other human-rights and humanitarian-law violations on the grounds that the law of nations in this area is not "self-executing."[133] In *Sosa*, the Supreme Court held that a treaty could not provide the rule of decision in an ATS case if it was not "self-executing."[134] Between 2004 and 2006, it engaged in legal gymnastics in order to apply the Geneva Conventions without finding them to be self-executing treaties, perhaps in order to make violations of the conventions into a domestic rather than a global issue.[135] The Second Circuit declared the Nuremberg principles and the Geneva Conventions to be unenforceable under the ATS.[136] In 2008, the Supreme Court held that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or . . . cause[s] of action."[137] Such rulings violate the interests of all other States party to a treaty that it will be enforced.[138]

The effect of the Roberts Court's action in *Medellin* is to undermine the original understanding of the law of nations. It was well-established by the 1980s that treaties and other international law norms could be the "law of the land" under the Supremacy Clause, notwithstanding the failure of Congress to codify them separately.[139] The Vienna Convention on the Law of

133. *See* Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1025–27 (W.D. Wash. 2005) (extrajudicial killings and disproportionate use of force claims dismissed as based on non-self-executing International Covenant on Civil and Political Rights); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (dismissing claim based on cruel, inhuman and degrading treatment as based on non-self-executing norms of international law).

134. Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004): William Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. INT'L L.J. 1043, 1049 (2012).

135. *See* Aya Gruber, *Sending the Self-Execution Doctrine to the Executioner*, 3 FIU L. REV. 57, 87–94 (2007-2008) (citing *Hamdi*, 542 U.S. at 518–20, and *Hamdan*, 126 S. Ct. at 2794–98, as "roundabout," "by hook or by crook" approaches to burying issue of whether Geneva Conventions of 1949 represent the Supreme Law of the Land).

136. Vietnam Ass'n for Victims of Agent Orange, 517 F.3d at 122–23 (2d Cir. 2008) (war-crimes treaties lack *Sosa*'s "black-letter rules").

137. Medellin v. Texas, 552 U.S. 491, 508 n.3 (2008).

138. *See* John Quigley, *Judge Bork is Wrong: The Covenant is the Law*, 71 WASH. U. L. Q. 1087, 1102 (1993).

139. United States v. Duarte-Acero, 208 F.3d 1282, 1284 (11th Cir. 2000) (citing Eastern Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991); Kreimerman v. Casa Veerkamp, S.A. de C.V., 22 F.3d 634, 638–39 (5th Cir. 1994)); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, reporter's note 5 (1987).

Treaties provides that the United States has a duty to execute in "good faith" every treaty to which it is a party, and to limit treaty reservations to those which do not defeat a treaty's purpose.[140] Thus, prior to the Roberts Court, a treaty awaiting implementation or restricted in its implementation to a criminal rather than a civil matter could have had the force of law in the United States, including under the ATS.[141] The strong presumption against the creation of private rights by treaties—and other provisions of the law of nations—will prevent many principles of international law from having an effect in the United States.[142] The strict construction of federal statutes frequently prevents even the treaties that the Senate separately codifies from having their intended effect.[143]

There is a conflict between the principle that aiding and abetting is not actionable under ATS, and the pervasiveness of aiding and abetting under other U.S. laws, including other civil and international laws. The Bush administration recognized the incongruity of its argument that aiding and abetting genocide or torture is not actionable under the ATS, when it conceded that at least one other federal court of appeals had recognized aiding

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140. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

141. *See* Khulumani v. Barclay Nat'l Bank, 504 F.3d 254, 283 (2d. Cir. 2007) (rejecting position that non-self-executing treaties "are without any evidentiary value with regard to the state of current customary international law.… [I]n *Kadic* we relied on the Genocide Convention to determine the shape of the international proscription of genocide and made clear that 'the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the [ATCA].'"), *subsequent proceedings at* 02 MDL 1499 (SAS), 2014 WL 1569423 (S.D.N.Y. Apr. 17, 2014) (quoting Kadic v. Karadzic, 70 F.3d 232, 241–42 (2d Cir. 1995)). *See also* Safety Nat. Cas. Corp. v. Certain Underwriters, 587 F.3d 714, 728–29 (5th Cir. 2009) (treaty awaiting implementation had force of law for preemption purposes).

142. *See Medellin*, 552 U.S. at 508 n.3; *see also* John Quigley, *The New World Order and the Rule of Law,* 18 SYRACUSE J. INT'L L. & COM. 75, 109 (1992) ("If the world is to be, in President [George H.W.] Bush's words, 'stronger in the pursuit of justice,' the United States must change its attitude toward international adjudication and must not use military force in ways that violate the rights of other states and peoples.").

143. *See* Mohamed v. Palestinian Authority, 132 S. Ct. 1702 (2012) (term "individual" in Torture Victims Protection Act does not cover entities or organizations, even though at least one dictionary definition and some federal statutes define "individual" to include a group of beings).

and abetting liability under the ATS, that the law of nations recognizes both aiding and abetting under a knowledge standard and joint criminal enterprises to commit genocide, and that in 2002 the "United States successfully argued in favor of aiding-and-abetting liability" in cases of terrorism.[144] Under both federal and state common law of crimes and torts, aiding and abetting was traditionally actionable.[145] The writing of aiding and abetting liability out of the ATS effectively revises it by "treat[ing] torts in violation of the law of nations less favorably than other torts."[146]

As the concurring justices pointed out in *Kiobel*, Congress is not to blame for this "self-execution" problem, as it has taken many steps to make genocide, torture, and persecution actionable:

> Congress has ratified treaties obliging the United States to find and punish foreign perpetrators of serious crimes committed against foreign persons abroad. . . .
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> And Congress has sometimes authorized civil damages in such cases. . . .
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> Congress, while aware of the award of civil damages under the ATS—including cases such as *Filartiga* with foreign plaintiffs,

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144. Br. for United States as Amicus Curiae, *Talisman Energy*, *supra* note 111, at 17 (citing Cabello v. Fernandes-Larios, 402 F.3d 1148 (11th Cir. 2005)); Boim v. Quranic Literacy Institute, 291 F.3d 1000 (7th Cir. 2002); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 340 (S.D.N.Y. 2005); Prosecutor v. Blaškic, No. IT-95-14-A, ¶ 49 (ICTY App. Chamber, July 29, 2004).; Prosecutor v. Musema, ICTR-96-13-A, Judgment (ICTR Trial Chamber Jan. 27, 2000)).

145. *See* Br. for Earthrights International as Amicus Curiae, *Talisman Energy*, *supra* note 111, at 21–22 (citing, inter ala, Beck v. Prupis, 529 U.S. 494, 500 (2000); Hilao v. Estate of Marcos, 103 F. 3d 767, 776 (9th Cir. 1996); *In re* Terrorist Attacks on September 11, 2001, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005); Richardson v. Saltar, 4 N.C. 505, 507 (1817); State v. McDonald, 14 N.C. (3 Dev.) 468, 471–72 (1832); Purviance v. Angus, 1 U.S. (1 Dall.) 180, 184–85 (Pa. 1786); RESTATEMENT (SECOND) OF TORTS § 876(b) (1977)). Eighteenth- and nineteenth-century publicists of international law regarded the sufferance of injuries against foreign subjects to be an offense to their governments, and that approval or ratification of such acts makes them attributable and gives rise to just as much of a duty to make reparation as if the nation had committed the injury itself. *See* Anthony Bellia Jr. & Bradford Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 473–74 (2011).

146. Br. for Professors of Federal Jurisdiction and Legal History as Amici Curiae in Supp. of Resp's, Sosa v. Alvarez-Machain, 542 U.S. 372 (2004), (Nos. 03-339, 03-485), *reprinted in* 28 HASTINGS INT'L & COMP. L. REV. 99, 110 (2004).

> defendants, and conduct—has not sought to limit the statute's jurisdictional or substantive reach. Rather, Congress has enacted other statutes, and not only criminal statutes, that allow the United States to prosecute (or allow victims to obtain damages from) foreign persons who injure foreign victims by committing abroad torture, genocide, and other heinous acts. . . .
>
> [Congress provided a] private right of action on behalf of individuals harmed by an act of torture or extrajudicial killing committed "under actual or apparent authority, or color of law, of any foreign nation. . . ." [Its] purpose [was] to "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States," by "providing a civil cause of action in U.S. courts for torture committed abroad."[147]

In the course of confirming the cause of action for torture, Congress endorsed the "unambiguous basis for a cause of action that has been successfully maintained under an existing law [(i.e., the ATS)]."[148] The Supreme Court has held that torture claims against individuals are not subject to sovereign immunity, in a case involving an individual tortured by Somali government forces.[149]

Finally, discretionary doctrines such as political question, state secrets, forum non conveniens, and the act of state doctrine provide a formidable arsenal with which defendants may dismiss ATS cases. By invoking executive primacy, the federal government procured the dismissal of ATS and other law of nations

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147. *Kiobel*, 133 S. Ct. at 1676–77 (quoting 28 U.S.C. § 1350, § 2(a), note, and S. REP. NO. 102–249, pp. 1671–1672, and citing 28 U.S.C. § 1350; 18 U.S.C. § 2340A(b)(2) (2000); 18 U.S.C. §1091(e)(2)(D) (2006 ed., Supp. V); S. REP. NO. 102–249, p. 4 (1991); H.R. REP. NO. 102D–367, pt. 1, at. 4 (1991); *see also* International Convention for the Protection of All Persons from Enforced Disappearance, art. 9(2), Dec. 20, 2006, 2716 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 85, arts. 5(2), 7(1), Dec. 10, 1984, 1465 U. N. T. S.; Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 6 U.S. T. 3316; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641; RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 reporters' note 1, at 257 (1986).

148. S. REP. NO. 102D-249 Cong., 1st Sess., at 4 (1991).

149. Samantar v. Yousuf, 560 U.S. 305, 325 (2010).

cases repeatedly between 2002 and 2012.[150] In one case, it made perhaps the most fulsome such argument on record:

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150. *See, e.g.,* Sosa v. Alvarez-Machain*,* 542 U.S. 692, 727 (2004) (arguing that ATS should be unenforceable where it might be "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs," even though a past Congress passed and the President signed the ATS); El-Shifa Pharmaceutical Indus. Co. v. United States*,* 402 F. Supp. 2d 267 (D.D.C. 2005), *aff'd*, 607 F.3d 836 (D.C. Cir. 2010) (en banc) (suit for damages from allegedly wrongful bombardment and false accusations of illegal activity presented political question); Carmichael v. Kellogg, Brown & Root Services, Inc., 572 F.3d 1271 (11th Cir. 2009) (suit for damages involving a military contractor's negligence in Iraq presented a political question); Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008) (government's alleged facilitation of murder of U.S. citizen's husband in Guatemala presented political question); Corrie v. Caterpillar, Inc.*,* 403 F. Supp. 2d 1019, at 1031–32, *(*W.D. Wash. 2005) (corporation's alleged aiding and abetting of war crimes and human-rights violations in Israel and Palestine presented political question); Bancoult v. McNamara, 445 F.3d 427, 431 (D.C. Cir. 2006) (Defense Department's alleged deportation of the local population of an island in the Indian Ocean during the Cold War presented a political question); Gonzalez-Vera v. Kissinger, 449 F.3d 1260 (D.C. Cir. 2006) (Secretary of State's alleged condoning of military coup and related abuses presented a political question); Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005) (suit for damages by victims of Japanese war crimes in Asian countries presented political question); El-Shifa Pharmaceutical Indus. Co. v. United States, 378 F.3d 1346 (Fed. Cir. 2004) (Takings Clause claim arising out of missile strike presented political question); Vine v. Republic of Iraq*,* 459 F. Supp. 2d 10 (D.D.C. 2006) (claim based on detention and cruel and inhuman treatment of Americans by government of Iraq in 1990), *rev'd on other grounds by* Simon v. Republic of Iraq*,* 529 F.3d 1187 (D.C. Cir. 2008), *rev'd on other grounds by* Republic of Iraq v. Beaty, 129 S. Ct. 2183 (2009), *and vacated*, 330 F. App'x. 3 (D.C. Cir. 2009), *and aff'd sub nom.* Simon v. Republic of Iraq*,* 330 F. App'x. 3 (D.C. Cir. 2009); *In re Agent Orange,* 373 F. Supp. 2d 7, *aff'd sub nom.* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co, 517 F.3d 104 (2d Cir. 2008) (involving claims of genocide, crimes against humanity, and war crimes including interference with births within and health of communities in Vietnam due to aerial herbicide spraying by United States); Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1022–23 (W.D. Wash. 2005) (involving death of an American in home demolition carried out by Israel with bulldozer whose acquisition was funded by United States), *aff'd*, 503 F.3d 974 (9th Cir. 2007); Presbyterian Church of Sudan v. Talisman Energy, Inc.*,* No. 1 Civ. 9882 (DLC), 2005 WL 2082846, at *8 (S.D.N.Y. Aug. 30, 2005) (involving claim that oil company placed its property and personnel at disposition of government engaged in genocidal clearances of indigenous communities from their ancestral homes); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005) (involving military contractor's culpability for abuse of detainees in Iraq); Schneider v. Kissinger, 310 F. Supp. 2d 251 (D.D.C. 2004), *aff'd* 412 F.3d 190 (D.C. Cir. 2005) (involving claim by children and estate of Chilean general killed in military coup in which National Security Adviser Henry Kissinger was allegedly

> At bottom, this litigation seeks to challenge the means by which the United States prosecuted the Vietnam War, and ineluctably draws into issue the President's constitutional Commander in Chief authorities and invites impermissible second-guessing of the Executive's war-making decisions. . . .
>
> First, adjudication of plaintiffs' international law claims would require this Court to pass upon the validity of the President's decisions regarding combat tactics and weaponry, made as Commander in Chief of the United States during a time of active combat. Such judicial review would impermissibly entrench upon the Executive's Commander in Chief authority, and run afoul of basic principles of separation of powers and the political question doctrine. . . .
>
> *[T]he President's actions displace any contrary international legal norm as a rule of decision in this case*. Because these controlling executive acts preempt the application of customary international law in the domestic legal system, the Court should reject any claims based upon such law. . . .

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culpable); Mahorner v. Bush, 224 F. Supp. 2d 48, 52, 53 (D.D.C. 2002) (case involving U.S. military aid to Israel, allegedly used in violation of international law, presented political question). Other cases, while not successfully invoking the political question doctrine to obtain dismissal of an ATS case, appealed to similar policy arguments to get the cases thrown out. *See* Br. for the United States as Amicus Curiae, Khulumani v. Barclay Nat'l Bank, 504 F.3d 254 (2d. Cir. 2007) (No. 05-2326) (appealing to foreign policy of political branches to oppose treating material support to apartheid as crime against humanity); Br. for the United States as Amicus Curiae at 12–15, 18–23, *Talisman Energy supra* note 111. *See also* Br. for Pet'r, Republic of Iraq v. Beaty, 129 S.Ct. 2183, 129 S.Ct. 1935, 129 S.Ct. 1936 (2010) (Nos. 07-1090, 08-539), 2009 WL 434719, at *16 (S. Ct. brief filed Feb. 19, 2009) (appealing to foreign policy decision by President Bush to preserve Iraqi assets from U.S. victims of 1990s-era cruel and inhuman treatment by Iraq); Br. in Supp. of Pet'n for Certiorari, Republic of Iraq v. Simon, 129 S.Ct. 2183, 129 S.Ct. 1936 (S. Ct. 2010), 2008 WL 4678679, *15–19 (S. Ct. brief filed Oct. 22, 2008) (No. 08-539) (same); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 276 (Bush administration suggested that ATS suit against corporations that aided and abetted crimes in South Africa might infringe on unitary executive branch's foreign affairs authority to engage with human-rights-abusing governments); Br. for the United States as Amicus Curiae, American Isuzu Motors, Inc. v. Ntsebeza, No. 07-919 (S. Ct. 2008) (similar); Statement of Interest of U.S. Dep't of State, *Rio Tinto*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *rev'd*, *Sarei*, 671 F.3d 736, 756 (9th Cir. 2011) (ATS claim by victims of war crimes and crimes against humanity in Papua New Guinea might impinge on the foreign policy of the United States to persuade the government to continue a "peace process").

> The Executive branch has significant expertise in the formulation and interpretation of both treaties and customary international law, which this Court should accord the substantial deference it is traditionally afforded. . . .[151]

This argument recalls the dictum, condemned by James Madison and the other Founders, that the occupant of the presidency may "of himself make a law."[152] The state secrets doctrine, which was originally quasi-contractual in nature, or perhaps an incident of U.S. federal employment law, also increasingly invalidates constitutional and ATS claims against unlawful executive-branch policies.[153] The doctrine of forum non conveniens is very useful to defendants who argue that the courts of some other jurisdiction with a greater interest in an ATS claim should decide it using their local law.[154] Revealingly, the courts' alleged concern with the vagueness and judge-made character of the law of nations under the ATS[155] sometimes vanishes when defendants appeal to the copious judge-made doctrines of political questions, state secrets, forum non conveniens, executive deference, and sovereign/government contractor immunity.[156] The veneer of

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151. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 43–44 (E.D.N.Y. 2005) (emphasis added) (quoting Statement of Interest of the United States).

152. Medellín v. Texas, 552 U.S. 491, 527–28 (2008) (citing THE FEDERALIST No. 47 (James Madison)).

153. The government supported the dismissals of at least two such cases implicating state secrets, and perhaps more of them, from 2005 through 2010. *See* ACLU v. NSA, 128 S. Ct. 1334 (2008), *denying cert. to* 493 F.3d 644 (6th Cir. 2007); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc); El-Masri v. Tenet, 479 F.3d 296 (4th Cir. 2007); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (D.D.C. 2005); Jamie Rodriguez, *Torture on Trial: How the Alien Tort Statute May Expose the United States Government's Illegal Extraordinary Rendition Program through Its Use of a Private Contractor,* 14 ILSA J. INT'L & COMP. L. 189 (2007); Jeremy A. Telman, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, 63 ALA. L. REV. 429 (2011).

154. *See, e.g.,* Aguinda v. Texaco, Inc.*,* 142 F. Supp. 2d 534 (S.D.N.Y. 2001), *aff'd*, 303 F.3d 470, 473 (2d Cir. 2002); *In re* Union Carbide Gas Plant Disaster at Bhopal, India*,* 809 F.2d 195 (2d Cir. 1987).

155. *See, e.g., In re* Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*,* 517 F. 3d 104, 122 (2d Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 1663 (Mar. 2, 2009).

156. *See, e.g.*, *Mohamed*, 614 F.3d at 1084, 1087 (state secrets privilege is ambiguous "judge-made doctrine with extremely harsh consequences"); Br. for Earthrights International as Amicus Curiae in Supp. of Pet'n for Certiorari, at 17–18, *Talisman Energy*, 582 F.3d 244 (2d Cir. 2009) (No. 09-1262) ("Doctrines such as head-of-state immunity, government contractor immunity, and even the sovereign immunity of the United States itself are all federal common-law

"neutrality" underlying political-question dismissals of legal claims disappears when one realizes, with Professor Foley, that "too much political consensus" threatens militarism.[157]

Government contractors have made particularly extensive use of the political question doctrine since 2006, on the basis that any judicial action in a case involving a defense contractor would intrude upon "derivative sovereign immunity"[158] and the "separation of powers."[159] Traditionally, the government contractor defense did not shield gross violations of human rights, or mass atrocities under international law.[160] It remains to be seen whether the Supreme Court's 2012 decision that the "political question" doctrine may not displace lawsuits based on a "specific statutory right" will roll back at least one of these developments.[161] There is an analogy to be drawn between a government

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doctrines, not derived from international law.") (collecting cases) *id.* at 18; Alan Clarke, Rendition to Torture 97 (2011) ("state secrets privilege in U.S. law is a judge-made principle that protects state secrets from disclosure in court proceedings. . . ."); Harold Hongju Koh, *International Business Transactions in United States Courts,* 261 RECUEIL DES COURS 13, 148, 157 (1996) (although "statutory forum non conveniens" involves transfer to another federal judicial district under 18 U.S.C. § 1404(a), "judge-made" version involves dismissal under Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1982)); Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 893 (1998) (suggesting that international comity is imprecise doctrine).

157. *See* Brian J. Foley, *Reforming the Security Council to Achieve Collective Security, in* PROGRESS IN INTERNATIONAL LAW 591 (Russell A. Miller & Rebecca M. Bratspies eds., 2008).

158. Defs.' Reply Br. on Appeal at 4–6, 13, 15, Al Shimari v. CACI Premier Technology, Inc., 679 F.3d 205 (4th Cir. Brief filed Apr. 23, 2010) (No. 09-1335) (citing Ackerson v. Bean Dredging LLC, 589 F.3d 196 (5th Cir. 2009)).

159. *Id.* (citing Carmichael v. Kellogg, Brown & Root Services, Inc., 572 F.3d 1271 (11th Cir. 2009); Corrie v. Caterpillar, Inc., 403 F. Supp. 2d 1019, 1022–23 (W.D. Wash. 2005); Al Shimari v. CACI Int'l Inc., No. 1:08-cv-827, 2009 U.S. Dist. LEXIS 29995, at *3 (E.D. Va. Mar. 18, 2009); Whitaker v. Kellogg Brown & Root, Inc., 444 F. Supp. 2d 1277 (M.D. Ga. 2006); Smith v. Halliburton Co., No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006)). *See also* Br. for Appellant, at 4, 6, El Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010) (No. 07-5174) (en banc); Schneider v. Kissinger, 412 F.3d 190, 197 (D.C. Cir. 2005).

160. *See In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 18–19, 52, 58 (E.D.N.Y. 2005); Decl. of Professor Jordan J. Paust, *In re* Agent Orange, 373 F. Supp. 2d 7, 2005 WL 6041235 (Jan. 5, 2005).

161. Zivotofsky v. United States, 132 S. Ct. 1421 (2012).

contractor's claim that its actions have been endorsed by the government, and the claim in *Zivotofsky* that the question regarding the status of Jerusalem as Israel's capital was "political."[162]

The Obama administration echoed the Bush administration's position on executive branch primacy. In 2010, it opposed the courts adjudicating complaints that foreigners were injured within the meaning of state tort laws by "government contractors who provide services to the U.S. military in war zones. . . ."[163] Its brief warned that federal court jurisdiction over such matters threatens the unitary executive by "second-guessing military judgments, burdening the military and its personnel with onerous and intrusive discovery requests, and otherwise interfering with and detracting from the war effort."[164] In 2011, it suggested that there should be no "cause of action by foreign nationals against U.S. officials based on allegations of abuse in military detention" where the "military setting in a foreign country . . . raises a threshold question whether a federal common-law cause of action based on the jurisdictional grant in the ATS should be created in these circumstances."[165] The administration urged the Supreme Court to let stand the D.C. Circuit's decision in an ATS case to "free military commanders from the doubts and uncertainty inherent in potential subjection to civil suit."[166]

Many of the discretionary doctrines are purportedly justifiable by reference to the institutional incompetence of the courts in foreign-affairs matters. Several opinions of the Roberts Court allege that the courts are ill-equipped to decide foreign-affairs cases.[167] However, "[d]amage actions are particularly judicially manageable.... The granting of monetary relief will not draw the

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162. *Id*.

163. Br. for United States as Amicus Curiae at 13, Carmichael v. Kellogg, Brown & Root Services, Inc., 572 F.3d 1271 (11th Cir. 2009) (No. 09-683) (U.S., filed May 28, 2010).

164. *Id*.

165. Br. for the United States as Amicus Curiae at 22, Saleh v. Titan Corp., No. 09-1313 (filed May 2011), http://www.justice.gov/osg/briefs/2010/2pet/6invit/2009-1313.pet.ami.inv.pdf (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 725–28 (2004); Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009)

166. *Id*. at 4 (quoting Saleh v. Titan, 580 F.3d 1, 9 (D.C. Cir. 2009)).

167. *See, e.g.,* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2727 (2010) ("when it comes to collecting evidence and drawing factual inferences in [the national-security] area, 'the lack of competence on the part of the courts is marked.'") (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).

federal courts into conflict with the executive branch."[168] This is particularly true where a damages claim involves a former regime or regime official, or a regime's *ultra vires* actions not in support of legitimate state sovereignty or international relations, such as genocide, terrorism, or persecution, rather than war.[169] In such situations, there is little risk of contradicting a clear "political decision already made," or contradicting supporting pronouncements by the executive branch on the same question.[170] Moreover, once a decision has already been made, an award of compensation for injuries to private parties as a result

168. Gordon v. Texas, 153 F.3d 190, 195 (5th Cir. 1998).

169. *See, e.g.,* Kadic v. Karadzic, 70 F.3d 232, 250 (2d Cir. 1995) ("[W]e doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state."); Demjanjuk v. Petrovsky, 776 F.2d 571, 582–83 (6th Cir. 1985) ("International law recognizes a 'universal jurisdiction' over certain offenses . . . based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people."); Doe v. Qi, 349 F. Supp. 2d 1258, 1285–86 (N.D. Cal. 2004) (opining that torture and religious persecution were both unlawful even in China and therefore were not clothed with immunity); Paul v. Avril*,* 812 F. Supp. 207, 212 (S.D. Fla. 1993) ("[A]cts . . . [such as torture] hardly qualify as official public acts."); INTERNATIONAL MILITARY TRIBUNAL, *Judgment, in* XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 233 (1947) ("The principle of international law, which, under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law.... He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state, if the State in authorizing action moves outside its competence under international law."); Regina v. Bartle*, ex parte* Pinochet, 38 I.L.M. 581, 593–95 (H.L. 1999) (suggesting that acts of torture were not "official acts" after military coup in Chile). *Cf.* W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990) (federal judicial intervention in foreign affairs is less problematic where foreign government no longer exists or there is an international consensus that it acted unlawfully) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)); *Sosa*, 542 U.S. at 727–28 (noting that ATS jurisdiction might be most problematic where "potential adverse foreign policy consequences from the recognition of additional causes of action" will result).

170. Baker v. Carr, 369 U.S. 186, 217 (1962). *See* Al Shimari v. CACI Premier Technology, Inc., 679 F.3d at 232 (Wilkinson, J., joined by Niemeyer and Shedd., JJ., dissenting) (noting that Congress had condemned *ultra vires* acts of detainee abuse at Abu Ghraib prison); Br. for Plaintiffs-Appellants, Ntzebesa v. Daimler Chrysler Corp.*,* 509 F.3d 148, 504 F.3d 254 (2d Cir. 2006) (No. 05-2326), 2005 WL 6111792, at *24 (2d Cir. brief filed Nov. 22, 2005) ("Unless it was U.S. foreign policy to perpetrate such violations (which neither defendants nor amici assert), adjudicating plaintiffs' claims will not contradict foreign policy judgments of the political branches.").

of its violating domestic or international law is not a "political question," but a judicial one.[171] Therefore, applications of statutes to concrete cases or controversies "merit no special deference" to the executive.[172]

C. The Culmination of Impunity Theory in the Cases of 9/11 and the South Sudan Genocide

Many of these trends converged in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*[173] and *In re Terrorist Attacks on September 11, 2011* (the 9/11 case).[174] Issues of corporate complicity, sovereign immunity, the unitary executive branch, and the scope of the ATS made these very complex cases precedent-setting. The precedent was arbitrary injustice.

In *Talisman Energy*, the court initially ruled that corporations are capable of "violating the law of nations," based on precedents from "the trials of German war criminals after World War II."[175] The court articulated a knowledge standard for non-state material supporters of foreign war crimes or persecutions of civilians.[176] On appeal, the Bush administration argued that the ATS had no extraterritorial application, that Sudan and other states enjoyed sovereign immunity for genocide under the FSIA, that holding American corporations liable for aiding and abetting genocide threatened President Bush's foreign policy preferences, and that the justifiability of aiding and abetting genocide is a political question that the "courts lack institutional authority

171. Wilson v. Libby, 535 F.3d 701–04 (D.C. Cir. 2008).

172. Republic of Austria v. Altmann, 541 U.S. 677, 697 (2004) (court would not withhold adjudication under ATS of Holocaust-era reparations claim).

173. Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331 (S.D.N.Y. 2005).

174. *In* re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

175. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 315 (S.D.N.Y. 2003) (citing United States v. Krauch *(The I.G. Farben Case) (Dec. 28, 1948), in* 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1153 (1952); *United States v. Krupp (The Krupp Case) (July 31, 1948), in* 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 467, 667 (1950).

176. *See Presbyterian Church of Sudan,* 244 F. Supp. 2d at 321–24.

and ability to decide."[177] The brief noted that each of these doctrines was "equally applicable to the *Kiobel* district court's determination that claims for aiding and abetting liability are available under the ATS."[178] The Second Circuit handed major victories to the Bush administration in both *Talisman Energy* and *Kiobel*, sharply curtailing extraterritorial ATS claims in those decisions by requiring corporations to act with a purpose to commit genocide or some other crime in *Talisman Energy*, and declaring that corporations were not liable under the ATS in *Kiobel*.[179] The Obama administration opposed the initial result in *Kiobel*, but argued for the final, Justice Roberts position.[180]

In the *9/11 case*, the court found that two Saudi officials had sovereign immunity for their alleged efforts in financing the massacre of nearly 3,000 Americans on 9/11.[181] The lawyers for 9/11 victims, first responders, and survivors had alleged that the officials aided banks and charities, as well as Taliban-era Afghanistan, in working directly with al-Qaeda leadership to send tens of millions of dollars to al Qaeda, some of which reached the

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177. *See* Br. for the United States as Amicus Curiae, at 1–15, 20–21, *Talisman Energy*, No. 07-0016*, supra* note 111.

178. *Id*. at 5 n.1 (citing Kiobel v. Royal Dutch Petroleum Corp.*,* 456 F. Supp. 2d 457, 463–64 (S.D.N.Y. 2006)).

179. Presbyterian Church of Sudan v. Talisman Energy, Inc.*,* 582 F.3d 244, 247–48 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 79 (2010); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 472 (2011); Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 73 (2d Cir. 2012) ("[U]nder the current law of this Circuit, as established after the district court decided this case, the ATS claims against [a bank] cannot be maintained in any event because the ATS does not provide subject matter jurisdiction to enable us to entertain civil actions against corporations for violations of customary international law."); U.S. DEP'T OF STATE, PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW 10 (2009), www.state.gov/documents/organization/153976.pdf.

180. *See* Br. for the United States as Amicus Curiae at 24–32, *Kiobel*, No. 10-1491; Transcript of Oral Argument at 41, 43–44, *Kiobel*, No. 10-1491, http://:www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf ("The Alien Tort Statute should not afford a cause of action to address the extraterritorial conduct of a foreign corporation when the allegation is that the defendant aided and abetted a foreign sovereign. . . .. We certainly have foreign relations interests in avoiding friction with foreign governments; we have interests in avoiding subjecting United States companies to liability abroad.").

181. *In* re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

9/11 hijackers beginning in the year 2000.[182] Confronted with the clear legislative history of the FSIA to the effect that sovereign immunity does not extend to foreign officials or even to foreign heads of state, the Second Circuit deferred to the view of the Bush administration that sovereign immunity should be so extended anyway.[183] It later found that Saudi Arabia, Saudi officials, and the Saudi High Commission had immunity despite the 9/11 families' allegation that Saudi Arabia and these officials participated in a scheme to create banks to support al Qaeda and appointed senior members of al Qaeda to international charities.[184] This decision was surprising because an Act of Congress clearly stated that sovereign immunity shall not apply to: (1) "act performed in the United States in connection with a commercial activity of the foreign state elsewhere,"[185] or (2) a case of "personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except . . . the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . ."[186]

Subsequently, the Second Circuit disregarded several U.S. statutes, many treaties, three Supreme Court decisions, and the practice of numerous U.S. allies in ruling that there was no

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182. Br. of Appellants on Personal Jurisdiction (Consolidated) at 16–47, 102–51, Federal Ins. Co. v. Saudi Arabia, 538 F.3d 71 (No. 06-319) (2d Cir. brief filed Jan. 20, 2012), http://www.motleyrice.com/files/docs/Docket%20298%20-%20Appellants%20Consolidated%20Brief%20with%20Respect%20to%20Personal%20Jurisdiction.pdf.; *see also, Saudi Princes Seek Immunity Against 9/11 Lawsuits*, CNN (Oct. 17, 2003), http://www.cnn.com/2003/LAW/10/17/saudis.lawsuit/.

183. *In* re Terrorist Attacks on September 11, 2001, 349 F. Supp. 2d 765 (S.D.N.Y. 2005). *In re* Terrorist Attacks on September 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008). *But see* Tachiona v. United States, 386 F.3d 205, 200 (2d Cir. 2004); *but see also* Samantar v. Yousuf, 560 U.S. 305, 325 (2010); Enahoro v. Abubakar, 408 F.3d 877, 881 (7th Cir. 2005).

184. Am. Compl. ¶¶ 398-400, Federal Ins. Co. v. Kingdom of Saudi Arabia, 538 F.3d 71 (No. 06-319); Br. for Appellees at 4–5, *In re* Terrorist Attacks on September 11, 2011, 538 F.3d 71 (2d. Cir. 2008).

185. 28 U.S.C. § 1605(a)(2) (2008). The plaintiffs in the *9/11 case* pointed out that Saudi officials used banks, charities, and other financial institutions in such schemes. *See supra* note 182, 184.

186. 28 U.S.C. § 1605 (a)(5)(A) (2008).

agreed-upon definition of terrorism for ATS purposes.[187] Only by totally ignoring international legal definitions of terrorism could

187. The Second Circuit's opinion devoted one paragraph to this issue and cited only one of its own prior decisions, a concurring opinion from 1984, and a handful of district court cases to resolve an issue that lies at the center of war, peace, and the law of nations in the twenty-first century. *See In re* Terrorist Attacks on September 11, 2001 (*Al Rajhi Bank, Saudi American Bank, Saleh Abdullah Kamel, Dallah al Baraka Group LLC, and Dar Al-Maal Al-Islami Trust),* No. 11-3294-cv(L), 2013 U.S. App. LEXIS 7669, at *15-16 (2d Cir. Apr. 16, 2013). As the plaintiffs pointed out, there are the following sources for a law of nations definition:

> The International Convention for the Suppression of Terrorist Bombings, U.N.T.S. (Dec. 15, 1997), and the International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999), 2178 U.N.T.S. 197, which defined it as an act to do death or violence to a civilian or a government employee in order to intimidate a civilian population or coerce a government to do a specific act.
>
> The Act to Combat International Terrorism of 1984, which referred in section 101(a) to a definition for purposes of U.S. law;
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> The Anti-Terrorism Act of 1990/1992, section 2333 of which referred for a definition of terrorism for purposes of a civil damages remedy to a definition under U.S. law;
>
> The Anti-Terrorism and Effective Death Penalty Act of 1996, section 2332b of which referred for a definition of terrorism to the international law offense of violent acts "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," *see* 110 Stat. 1293;
>
> 10 U.S.C . § 950v(b)(24), which defines it as killing or grievous wounding of a person to intimidate the government or civilian population into certain conduct, among other things;
>
> 18 U.S.C. § 2339A, which defined it as "a violation of section 32, 37, 81, 175, 229, 351, 831, 842 (m) or (n), 844 (f) or (i), 930 (c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title [18], section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123 (b) of title 49, or any offense listed in section 2332b (g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act";
>
> Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (which referred to several definitions);
>
> Almog v. Arab Bank, PLC, 471 F. Supp. 2d at 285–94, (which referred to several definitions under U.S. and international law); and

the court conclude that the offense was less definite than the offense of piracy, which was also defined in various ways before 1789.[188]

These shifts have not gone unnoticed around the world. Another non-party of the ICC, the Republic of Turkey, has noted through its Foreign Minister Ahmet Davutoğlu that the United States has been "attempting to establish an international order based on a security discourse, thus replacing the liberty discourse that emerged after the collapse of the Berlin Wall."[189] Likewise, the Kingdom of Saudi Arabia has insisted that it has the sovereign right to provide material support to terrorism.[190]

Executive Order No. 12947, 3 C.F.R. 319 (1996), which referred to a definition for U.S. purposes.

Br. of Appellants on Failure to State a Claim (Consolidated) at 123–39, Federal Ins. Co. v. Saudi Arabia, 538 F.3d 71 (No. 06-319) (2d Cir. brief filed Jan. 20, 2012), http://www.motleyrice.com/files/docs/Docket%20299%20-%20Appellants%20Consolidated%20Brief%20re%20Dismissals%20for%20Failure%20to%20State%20a%20Claim%20and%20FSI.pdf; Br. of Appellants on Personal Jurisdiction (Consolidated) at 56–77, Federal Ins. Co. v. Saudi Arabia, 538 F.3d 71 (No. 06-319). Several of these materials deal specifically with banks' support for terror. International Convention for the Suppression of the Financing of Terrorism (Dec. 9, 1999), 2178 U.N.T.S. 197; 18 U.S.C. § 2339A; Holder v. Humanitarian Law Project, 130 S. Ct 2705; 137 CONG. REC. S. 1771 (daily ed. Feb. 7, 1991). *See also* Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria, 937 F.2d 44, 49–50 (2d Cir. 1991) (noting that "both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations in federal court").

188. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

189. Ahmet Davutoğlu, *Turkey's Zero-Problems Foreign Policy*, FOREIGN POLICY (May 20, 2010), http://foreignpolicy.com/2010/05/20/turkeys-zero-problems-foreign-policy/. According to Armenian claimants, Turkey is a key beneficiary of the doctrine of a unitary federal authority over foreign affairs, executive branch at its center. *Cf. U.S. Supreme Court Not to Review Genocide-era Insurance Claims Cases*, PAN ARMENIAN (June 10, 2013), http://www.panarmenian.net/eng/news/161661/. *Cf. also* American Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).

190. Br. of Appellant at 2, 8, *In re* Terrorist Attacks, 538 F.3d 71 (2d Cir. 2008) (No. 06-0319) (2d Cir. brief filed Jan. 5, 2007). Although the Kingdom of Saudi Arabia insisted that the 9/11 Commission report found that neither the kingdom nor any senior officials were found to have "individually funded" the perpetrators, there was no finding that junior officials did not do so or that more senior officials did not "collectively" fund the perpetrators through charities or other pools of funding. *Id.* at 1. Moreover, the 9/11 Commission did not have subpoena power over Pakistani or Saudi documents, and received poor cooperation from portions of the U.S. government. *See* Mark Mazzetti, *Panel*

Saudi Arabia presaged the opinion of Justice Roberts in *Kiobel* by arguing that there is no U.S. federal court jurisdiction over terrorist acts planned outside the United States by foreign sovereigns.[191] Concerned for the fate of its many war criminals, including criminal industrial dynasties, the Federal Republic of Germany has asserted that "overbroad exercises of jurisdiction are contrary to international law," especially for "conduct that took place entirely within the territory of a foreign sovereign,"[192]

Study Finds That CIA Withheld Tapes, N.Y. TIMES, Dec. 22, 2007, http://www.nytimes.com/2007/12/22/washington/22intel.html?pagewanted=1&_r=1&hp&adxnnl=1&adxnnlx=1198350491-9XKfuW5/RLUihEnpPBCEzQ9/11u; *see also* Benjamin DeMott, *Whitewash as Public Service: How The 9/11 Commission Report Defrauds the Nation,* HARPER'S MAG., Oct. 2004, http://harpers.org/archive/2004/10/whitewash-as-public-service/. The briefing by 9/11 victims on this issue illustrates the incompleteness of the report. *See supra* notes 182, 184, 187; Burnett v. Al Baraka Investment & Dev. Corp., 292 F.Supp. 2d 9 (D.D.C. 2003).

191. *See* Br. of Appellant at 33–34, *In re* Terrorist Attacks, *supra* note 190.

192. Br. for the Federal Republic of Germany, the Association of German Chambers of Industry and Commerce, the Federation of German Industries, CBI, Confederation of Swedish Enterprise, Economiesuisse, and the International Chambers of Commerce of Germany, Netherlands, Switzerland and the United Kingdom as Amici Curiae in Supp. of Resps. at 1-2, *Kiobel*, No. 10-1491 (S. Ct. brief filed Feb. 2, 2012). Germany alleged that its own courts provided an adequate forum for victims of human-rights violations with "due process," that the ATS promotes "forum shopping by the plaintiffs' bar" and "cost intensive discovery," and that ATS litigation might "interfere with The Federal Republic of Germany's sovereignty, thus hugely affecting The Federal Republic of Germany's governmental interests in a way that is unacceptable." *Id.* at 8, 10, 13. An article in a German publication sheds light on "due process" in German courts for victims of Germany's crimes: "The 'Committee of State Secretaries on the Protection of State Secrets,' . . . established an interdepartmental task force, which included representatives of the Foreign Ministry, [and it] . . . warned German war criminals against traveling to countries where they had been sentenced in absentia and could now face arrest." Klaus Wiegrefe, *The Holocaust in the Dock: West Germany's Efforts to Influence the Eichmann Trial*, DER SPIEGEL (Apr. 15, 2011), http://www.spiegel.de/international/world/the-holocaust-in-the-dock-west-germany-s-efforts-to-influence-the-eichmann-trial-a-756915-2.html. This is corroborated by an American magazine: "In judging those who operated the [Nazi] machinery of death, postwar German courts actually employed SS standards of legality, designating as perpetrators only those individuals who could have been condemned by the SS's own tribunals." Lawrence Douglas, *Ivan the Recumbent, or Demjanjuk in Munich*, HARPER'S MAG., Mar. 2012, http://harpers.org/archive/2012/03/0083831.

even as its own courts adjudicated genocide cases arising out of Rwanda and Yugoslavia.[193]

III. PLANNING A REVIVAL OF THE ORIGINAL UNDERSTANDING IN THE WAKE OF *KIOBEL*

A. Reparations as Counter-Impunity Policy in the Service of World Peace

Just as the Founders conceived of the ATS as preventing war by achieving justice in concrete cases, so have experts on mass atrocities looked to reparation in the courts as a path to international peace. Juan Mendez, who for more than two years served as Special Adviser on the Prevention of Genocide to the U.N. Secretary-General, has argued that offering reparations to the victims of atrocities may help reconcile ethnic and intercommunal divisions.[194] For example, it is vital to reassure victims of the right of return to homes and villages, restitution of property and livelihoods, and access to land and water.[195] States have a legal duty to ensure that justice is served, he argued.[196] While the Geneva Conventions obligate states to remedy grave breaches of the laws of war in international conflicts, an analogous norm of customary international law applies to internal armed conflicts.[197] The U.N. General Assembly declared in 2006 that victims of war crimes or gross human-rights abuses have a right to "redress" and "justice."[198]

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193. *See* Andreas Illmer, *German Court Opens Rwandan Genocide Trial,* DEUTSCHE WELLE (Jan. 18, 2011), http://www.dw.de/german-court-opens-rwandan-genocide-trial/a-14772468 ("[A] former Rwandan mayor, is accused of organizing three massacres in which over 3,700 Tutsi were killed after seeking refuge in churches."); JOHN B. QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 46 (2006) (Bosnian Serb tried in Germany for genocide "against Bosnian Muslims in Bosnia"). *See also Rwandan Militia Leaders Face German Court Over Alleged War Crimes,* GUARDIAN (U.K.) (May 4, 2011, 10:57 AM), http://www.guardian.co.uk/world/2011/may/04/rwanda-militia-leaders-trial-germany ("Two Rwandan militia leaders have gone on trial in Stuttgart . . . for the killing of scores of civilians in the Democratic Republic of the Congo.").

194. *See A History of Genocide*, YOUTUBE (Jan. 2009), http://www.youtube.com/watch?v=2wnPox-DXh0.

195. *See id*.

196. *See id*.

197. *See id*.

198. U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

Reparations have been among the first instincts of the international community when confronted with genocide and other mass atrocities. In 1920, the Treaty of Sèvres called for Turkey to return the homes and businesses of "non-Moslems" who were victims of "massacres in Turkey perpetrated during the war,"[199] and the British Embassy at Constantinople established the Armenian-Greek Section in order to "obtain the restitution of their rights to owners of Christian properties which had been confiscated."[200] In the American zone of occupied Germany, the Jewish Restitution Successor Organization searched for and redistributed Jewish property, aided displaced Jews in Germany, and rebuilt synagogues to reestablish Jewish cultural and religious life.[201] Pursuant to the Dayton accords resolving the Bosnian-Croatian-Serbian war of 1992-1995, the international community ushered in new "Bosnian constitutional arrangements" designed to reverse and memorialize past ethnic cleansing.[202] In Rwanda, the government made available procedures for the restitution of "homes and lands."[203] Restitution is contemplated in

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and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, at 3, U.N. Doc. No. A/RES/60/147 (Mar. 21, 2006). The General Assembly added that "national funds for compensation for victims should be encouraged." *Id.* *See also* VICTIMS OF INTERNATIONAL CRIMES: AN INTERDISCIPLINARY DISCOURSE 1 (Thorsten Bonacker & Christoph Safferling eds., 2013).

199. TREATY OF PEACE BETWEEN THE ALLIED AND ASSOCIATED POWERS AND TURKEY (The Treaty of Sèvres) arts. 142–44, signed Aug. 10, 1920, 15 AM. J. INT'L L. 179, 209–11 (Supp. 1921).

200. VARTKES YEGHIAYAN, BRITISH REPORTS ON ETHNIC CLEANSING IN ANATOLIA, 1919-1922: THE ARMENIAN-GREEK SECTION, at xxvi (2007) (citation omitted).

201. Associated Press, *Heirless Jews to Rebuild Synagogues*, EVENING INDEPENDENT, Aug. 18, 1948, at 1.

202. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina with Annexes (signed December 14, 1995), 35 I.L.M. 75, 77–90 (1996); Constitution of Bosnia and Herzegovina, 35 I.L.M. 117 (1996) (setting forth constitutional guarantees for vital interests of minorities going forward); *Agreement on Commission to Preserve National Monuments*, 35 I.L.M. 141 (1996) (setting forth procedures to "decide on petitions for the designation of property having cultural, historic, religious or ethnic importance as National Monuments"); *Agreement on Refugees and Displaced Persons*, 35 I.L.M. 136 (1996) (creating an independent "Commission for Displaced Persons and Refugees" to reverse ethnic cleansing of the war).

203. U.N. OFFICE FOR HUMANITARIAN AFFAIRS/INTER-AGENCY DISPLACEMENT DIVISION, U.N. HABITAT, U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, U.H. HIGH COMMISSIONER FOR REFUGEES, U.N. FOOD AND AGRICULTURAL ORGANIZATION, THE NORWEGIAN REFUGEE COUNCIL (NRC) & THE NRC INTERNAL

other cases, ranging from 1912 to 2006, and from Europe to Africa to Asia.[204]

B. The Role of the ICC in Awarding Counter-Impunity Reparations

The Rome Statute looks beyond restitution and compensation to peace-building by "rehabilitation" of the victims.[205] The ICC's Trust Fund for Victims contends that rehabilitation could theoretically reintegrate unlawful combatants into civil society, including children conscripted into unlawful service as soldiers.[206] More completely than a criminal conviction, execution, or term of imprisonment, compensation and rehabilitation of the victim can bring about transitional justice by offering remedies for suffering, illegality, and degradation.[207]

The ICC is empowered to assess blame in episodes of mass violence; such findings may help to mobilize nations to prevent a recurrence. Truth-related measures are deemed "satisfaction;" they include disclosure and verification of the full facts surrounding a historical episode.[208] Other "satisfaction" remedies include the confirmation of the location of abducted persons and protection of witnesses; official acceptance of responsibility and restoration of the reputations of the victims; administrative and judicial sanctions against the systems that led to the victimization; and education and training to prevent violations.[209] In one

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DISPLACEMENT MONITORING CENTRE, HANDBOOK ON HOUSING AND PROPERTY RESTITUTION FOR REFUGEES AND DISPLACED PERSONS 27 (Mar. 2007), http:www.ohchr.org/Documents/Publications/pinheiro_principles.pdf. *See also id*. at 82 (under Rwandan scheme supported by United Nations, "the original inhabitant maintained the right to immediate restitution should they return home," while any trespasser or legitimate "secondary occupant was then given two months to vacate the premises voluntarily," with the government being charged to locate a dwelling or building materials to secondary occupants unable to find a place to live on their own).

204. *Cf. id.* at 27–28, 33, 77–78 (listing Croatia, Czechoslovakia, Kosovo, Iraq, South Africa, and Sudan).

205. Rome Statute, *supra* note 23, art. 75.

206. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trust Fund for Victims' First Report on Reparations, para. 317 (Sept. 1, 2011).

207. *Id.* para. 6.

208. *Id*. para. 327.

209. *Id*. *See also* Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?,* 2 J. INT'L L. & INT'L REL. 25, 41–42 (2006) ("The UN's Basic Principles on the Right to a Remedy and Reparation list five basic categories of reparations: . . .

innovative program, communities collaborate on a "collective history" of crimes in order to ascertain their causes and prevent their recurrence.[210] Allied to satisfaction is the process of guaranteeing non-repetition of violations of the law of nations, such as by legal reform and monitoring of the causes and risks of further conflict.[211]

Reparation, broadly construed to extend to rehabilitation, satisfaction, and guarantees of non-repetition, could be a peaceful solution to wars. The "supreme international crime"[212] has been identified as "recourse to war for the solution of international controversies" or "as an instrument of national policy," as opposed to "the settlement or solution of all disputes or conflicts of whatever nature . . . by pacific means."[213] Forcing nations to bear

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(iv) satisfaction, which is fairly broad and would include such varied measures as public apologies, truth-finding processes, [and] sanctioning perpetrators").

210. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Trust Fund for Victims' First Report on Reparations, para. 338 (Sept. 1, 2011).

211. *Id*., para. 338–40; Giovanni, *supra* note 209, at 42. *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, ¶ 23 (Mar. 21, 2006):

> Guarantees of non-repetition should include, where applicable, any or all of the following measures, which will also contribute to prevention: (a) Ensuring effective civilian control of military and security forces; (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; (c) Strengthening the independence of the judiciary; (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders; (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises; (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution. (paragraph breaks omitted)

212. Benjamin B. Ferencz, *Enabling the International Criminal Court to Punish Aggression,* 6 WASH. U. GLOBAL STUD. L. REV. 551, 552 (2007) (Symposium—Judgment at Nuremberg) (quoting *The Judgment: The Nazi Regime in Germany*, THE AVALON PROJECT, *available at* http://avalon.law.yale.edu/imt/judnazi.asp (last visited April 3, 2015)).

213. Roger S. Clark, *Nuremberg and the Crime Against Peace*, 6 WASH. U. GLOBAL STUD. L. REV. 527, 540 (2007) (Symposium—Judgment at Nuremberg)

the full social and human costs of their military "solutions" could promote adherence to the norm of pacific settlement.[214]

C. Remedying Defects in the ICC Compensation Process

The ICC's compensation process is experiencing growing pains, which are nevertheless amenable to being fixed in the not-too-distant future, assuming that the jurisprudential will is there to fix them. First, at least one judge opines that victims are not able to marshal new evidence, find new witnesses, elicit new testimony from documents and witnesses, or advance new legal theories.[215] Judge Van den Wyngaert argues there must be a unitary prosecutor, not multiple prosecutors, which would be "totally unfair."[216] She contends that victims' rights must not come at the expense of the rights of the accused under the ICC statute.[217] This is a rejection of the idea of "equal access to justice" in international criminal proceedings.[218]

(quoting *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 218 (1947) (quoting Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 46 Stat. 2343, 2345–46, 94 L.N.T.S. 59, 63 (1929))); *see also* Timothy Murphy & Jeff Whitfield, *Excerpts from the Nuremberg Trials*, 6 USAFA J. LEG. STUD. 5, 26–27 (1995/1996) ("Any resort to war-to any kind of a war-is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality.") (quoting Opening Statement of Chief Justice Robert H. Jackson, TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (Secretariat of the Tribunal, ed. and trans., 1947)); *id*. ("Of course, it was, under the law of all civilized peoples, a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding fire arms to bare knuckles, made it a legally innocent act? The doctrine was . . . foul [and] contrary to the teachings of early Christian and international law scholars such as Grotius. . . .").

214. *Cf*. Wing, *supra* note 131, at 427 ("We, as a country, need to shift from a policy that sells weapons and starts wars to one that fosters peace and understanding.").

215. Hon. Christine Van den Wyngaert, Victims Before International Criminal Courts: A Challenge for International Criminal Justice, Address at the Frederick K. Cox International Law Center's Klatsky Seminar in Human Rights (Nov. 21, 2011), http://www.youtube.com/watch?v=DYb19TIPOBU.

216. *Id*.

217. *Id*.

218. *Id*.

Second, there is the question of whether sufficient resources will be found to pay reparations. Victims have submitted more than 2,000 applications for compensation to the ICC, which, multiplied by the average award for serious injury or death at the U.N. Compensation Commission in 1995, would result in $6 million in awards, perhaps $10 million accounting for inflation since 1995.[219] Judge Wyngaert cites the "financial crisis" for the idea that there is not enough money to fund compensation for victims of mass atrocities.[220]

Donations from States Parties have materialized to fund rehabilitation, if not much compensation. By 2013, a representative of Botswana praised the ICC at the 12th Assembly of States Parties for having aided "more than 110 thousand victims and their families through the Trust Fund for Victims."[221] The Trust Fund for Victims claims to be funding services for 110,000 victims of mass atrocities "in northern Uganda and the Democratic Republic of Congo– including access to reproductive health services, vocational training, trauma-based counselling, reconciliation workshops, reconstructive surgery and more. . . ."[222]

Third, the process is very slow. The formalities required of victims who appeal to the ICC for compensation result in a "long and cumbersome" path to receiving aid.[223] Out of 9,910 applications for participation, which require "supporting evidence," only a third were allowed to participate by late 2011.[224] The number of victims allowed to participate was 127 in *Prosecutor v.*

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219. *See* MARK J. FINDLAY, INTERNATIONAL AND COMPARATIVE CRIMINAL JUSTICE: A CRITICAL INTRODUCTION 110 (2013); U.N. Compensation Commission Governing Council, Report and Recommendation Made by the Panel of Commissioners Concerning the Third Installment of Claims for Serious Personal Injury or Death (Category "B" Claims), at 12, U.N. Doc. No. S/AC.26/1995/6 (Dec. 13, 1995), http://www.uncc.ch/sites/default/files/attachments/documents/r1995-06.pdf.

220. Van den Wyngaert, *supra* note 215.

221. Quoted in, *TFV Receives Unprecedented Support at 12th Assembly of States Parties*, TRUST FUND FOR VICTIMS (Nov. 29, 2013), http://www.trustfundforvictims.org/news/tfv-receives-unprecedented-support-12th-assembly-states-parties-0.

222. *At Global Summit to End Sexual Violence in Conflict, U.K. Foreign Secretary Hague Announces £ 1 Million Contribution to TFV*, TRUST FUND FOR VICTIMS (June 12, 2014), http://www.trustfundforvictims.org/news/global-summit-end-sexual-violence-conflict-uk-foreign-secretary-hague-announces-%C2%A3-1-million-con.

223. Van den Wyngaert, *supra* note 215.

224. *Id*.

Lubanga, 266 in *Prosecutor v. Katanga*, and 1,889 in *Prosecutor v. Bemba*.[225] Perhaps as a result of competition between the court's own lawyers and judges and the victims for scarce funds, no reparations had been awarded by mid-2011, nearly a decade after the ICC's creation.[226] In 2012, the ICC declined to order that the Trust Fund for Victims compensate any specific victims of the crimes within its jurisdiction that had been committed in the DRC.[227] The draft ICC budget numbers for 2012 sought €10.3 million for victim-related investigations and participation, not including the portions of the prosecutors' and judges' salaries spent on victim-related issues.[228] In fall 2013, the ICC was unable to report that any specific compensation awards had been

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225. *See id*. *See also* Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT'L L. 475, 481–82 (2011), The case of *Situation in the Democratic Republic of the Congo (Prosecutor v. Thomas Lubanga Dyilo),* involved conscription into service as child soldiers, inflicting trauma through exposure to combat and violence, and the loss of childhood education and innocence. *See id.* at 494; *see also* Case No. ICC-01/04-01/046, Trial Chamber I, Public Redacted Version of Trust Fund for Victims' First Report on Reparations, para. 303 (Sept. 1, 2011). In such a case:

> if compensation were to be considered as part of a reparation order, . . . then Chambers would need to determine an amount equivalent to the harm suffered by the child soldiers and indirect victims. Chambers will also need to consider factors related to the fact that the damage varies from one victim to another, depending on gender, age, duration of time with the militia, and violence suffered or committed by the child. . . .
>
> Rehabilitation is expected to rescue the children from their newly acquired identity of a young person who exerts violent power over adult civilians by bringing them back to a pre-war state of innocence, vulnerability and need for guidance.

Id., paras. 305, 317.

226. Van den Wyngaert, *supra* note 215.

227. *See Situation in the Democratic Republic of the Congo*, Prosecutor v. Lubanga, Case No. ICC-01/04-01/046, para. 289 (Aug. 7, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf.

228. *See* ICC Assembly of States Parties, Proposed Programme Budget for 2012 of the International Criminal Court ¶ 20, ICC-ASP/10/10 (July 21, 2011), www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf. *Cf. also* Van den Wyngaert, *supra* note 215. The international criminal tribunals for Yugoslavia and for Rwanda spent more than $1.2 billion in the first 14 years of operation. *See* Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U.L. REV. 1257, 1276 n.97 (2007).

issued.[229] Victims from Uganda have decried the process as a "waste of time."[230] Others have acted as if it is possible that perpetrators will admit their crimes under the victims' pressure.[231]

Fourth, the ICC has expressed doubt about whether states should take responsibility for their officials' mass atrocities. Judge Wyngaert emphasizes the distinction between "reparations against states" and "against a convicted [natural] person."[232] Although the state or non-state group that the person led or fought for will likely have assets, there is a reluctance to use doctrines such as respondeat superior or state responsibility to attribute individual actions to collectivities. This will make the compensation process futile, because most suspected perpetrators may have exhausted their personal wealth by the time a trial could be held.[233]

Finally, to the extent that compensation is tied to a guilty verdict, it will be greatly delayed and probably denied. There were more acquittals than convictions in the first decade of the ICC's operation.[234] The court's report on the period from mid-2012 to mid-2013 indicated that only one conviction was reached out of fourteen individual perpetrators' cases and active cases or investigations involving fourteen countries.[235] If the perpetrator is a fugitive like Joseph Kony or Omar Hassan al-Bashir, the victims' cases may not be brought, or may not begin to be heard. The ICC referral of the situation in Darfur, Sudan, is more than a decade old.[236] Victims are whipsawed because nation-states,

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229. *See* U.N. Secretary-General, *Report of the International Criminal Court*, para 4, U.N. Doc. No. A/68/314 (Aug. 13, 2013). The Court was able to report that it had held or planned to hold six or more seminars. *See id*., paras. 108–13.

230. Quoted in JUAN CARLOS OCHOA, THE RIGHTS OF VICTIMS IN CRIMINAL JUSTICE PROCEEDINGS FOR SERIOUS HUMAN RIGHTS VIOLATIONS 258 (2013) (internal block quotation omitted).

231. *See* FINDLAY, *supra* note 219, at 110.

232. Van den Wyngaert, *supra* note 215.

233. *See id*.

234. *See* William Schabas, *The Banality of International Justice,* 11 J. INT'L CRIM. JUST. 545 (2013).

235. *Cf.* U.N. Secretary-General, supra note 229, para. 5.

236. *See* S.C. Res. 1593 (Mar. 31, 2005); Press Release, U.N. Security Council, Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court (Mar. 31, 2005), http://www.un.org/press/en/2005/sc8351.doc.htm; UPI, *Darfur Situation Frustrates ICC* (June 6, 2013), http://www.upi.com/Top_News/Special/2013/06/06/Darfur-situation-frustrates-ICC/UPI-12611370527325/.

which could pay compensation, are not accountable, while individuals, who are theoretically accountable, cannot pay compensation post-trial.[237]

To contribute to a solution of these problems, the United Nations itself could theoretically adequately fund the Trust Fund for Victims sufficiently to pay all reparations. Judge Wyngaert mentioned that a fund of one million Euros would support an award of 500 euros per each admissible victim in a case such as *Prosecutor v. Bemba*. [238] The permanent five members of the U.N. Security Council, and their key allies such as Germany, Japan, and Saudi Arabia, have more than adequate funds with which to contribute to the cause of victim compensation at the ICC. China has a thriving trade with Sudan, whose victims appear at the ICC;[239] it has more than $1 trillion in reserves, and has earned more than $1 billion per day in surplus foreign exchange revenue.[240] Britain and France sold large quantities of weaponry to Muammar Qaddafi's Libya, despite widespread

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237. *Cf. Situation in the Democratic Republic of the Congo*, Prosecutor v Lubanga, Case No. ICC-01/04-01/046, paras. 125–26, 269 (Aug. 7, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf; Press Release, ICC, Lubanga Case: Trial Chamber I Issues First ICC Decision on Reparations for Victims, U.N. Doc. No. ICC-CPI-20120807-PR831 (Aug. 7, 2012), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/press%20releases/Pages/pr831.aspx ("Mr. Lubanga has been declared indigent and no assets or property referable to him have been identified to date.").

238. Van den Wyngaert, *supra* note 215. This figure is far below what the Author believes that the U.N. Compensation Commission paid claimants between 1992 and 1995 for death or serious bodily injury occasioned by Iraq's war against Kuwait, Saudi Arabia, and Israel, or $3,400 per claimant.

239. *A Moral Sense, Divestment from Sudan*, ECONOMIST (May 10, 2007), www.economist.com/node/9153622; Helene Cooper, *Darfur Collides With Olympics and China Yields,* N.Y. TIMES, Apr. 13, 2007, at A1; Lucien J. Dhooge, *Darfur, State Divestment Initiatives, and the Commerce Clause*, 32 N.C.J. INT'L L. & COM. REG. 391 (2007); Jonathan Holslag, *China's Diplomatic Victory in Sudan's Darfur*, SUDAN TRIBUNE (Aug. 2, 2007), http://www.sudantribune.com/spip.php?article23090; Jad Mouawad, *Oil Wealth May Provide a Way for Sudan to Avoid the Full Pain of U.S. Sanctions*, N.Y. TIMES, May 30, 2007, at C3.

240. Michael Forsythe and Francine Lacqua, *China's Current-Account Surplus May Shrink, Zhou Says*, BLOOMBERG (Apr. 26, 2009, 1:29 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ajWVXL3E7ghM.

suspicions that it had massacred dozens of prisoners in 1996.[241] One might argue that the rich states have a moral obligation to fund the ICC, because their globalized supply chains fund the perpetrators of mass atrocities, according to the admissions, for example, of the U.N. Security Council.[242] Yet these powerful states seemingly refuse to make mass atrocities a top priority in their fiscal, foreign policy, and foreign aid programs and policies. Thus, the ICC over the past decade may have been mostly a mechanism for distribution of funds to lawyers, rather than from perpetrators of mass violence to victims and their families, and for the occasional publication of opinions, charges, warrants, and other legal memoranda.[243] Judge Wyngaert uses this record to question whether victims' participation could ever be useful, and to argue that such participation could create only symbolic relief and cause secondary victimization.[244]

CONCLUSION

During the Enlightenment, out of which the Constitution and the ATS arose, "justice" was the dividing point between tyranny and dissolution of the social contract, and the protection of human rights and private property. William Blackstone, one of the key figures in the development of the common-law system in Britain and the United States, wrote that "the public good is in nothing more essentially interested, than in the protection of every individual's private rights."[245] This is a classic statement of liberal and Enlightenment political theory, and finds echoes in John Locke, Thomas Paine, John Adams, Madison, Vattel, and von Pufendorf. To them, a commonwealth or republic would fail in important ways if it did not achieve justice.[246] Jurisdiction, or the ability to determine what the law is, is the basis of most forms of justice.

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241. *See, e.g.,* AMNESTY INTERNATIONAL, *Libya: Gross Human Rights Violations Amid Secrecy and Isolation*, AI Index No. MDE 19/008/1997 (June 25, 1997), http://www.archive.org/web/20021018104818/http://web.amnesty.org/web/content.nsf/pages/gbrcountry+page.

242. *See, e.g.,* S.C. Res. 1952, preamble, para. 5 (Nov. 29, 2010).

243. *See infra* n. 235 and accompanying text.

244. Van den Wyngaert, *supra* note 215.

245. 1 WILLIAM BLACKSTONE, COMMENTARIES 134.35 (1765), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch16s5.html.

246. EMMERICH DE VATTEL, LAW OF NATIONS, BK. II, § 84 (1759) (noting that one nation is not required to respect another's decisions in cases of "refusal of

The Framers' generation intended the ATS to enforce the "law of nations." Its courts looked to Grotius, Blackstone, and other publicists of international law to define torts in violation of the law of nations. One such tort, piracy, is a close analogue for crimes against humanity and transnational dangers such as genocide, enslavement of child soldiers, or terrorist massacres.

Today, transitional justice looks to the law of nations to remedy mass atrocities and make a better future.[247] Inattention to justice perpetuates civil wars, genocide, mass refugee flight, and destruction of essential infrastructure throughout Africa and Asia. The Greek word for justice, δικη, refers at the same time a division or contradiction, as in a dichotomy, and uniting a people or city by giving to each what is due to her, and assuring each

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justice, [or] palpable and evident injustice"); David Kopel, Paul Gallant & Joanne Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 78, 81–91 & n.258 (2007) (describing views of Adams, de Vattel, and von Pufendorf that tyrants may violate social contract with offended subjects of the realm, resulting in right of self-defense by subjects); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 410–17 (Peter Laslett ed., 1988) (describing failure of a government when rights of individuals are not protected as giving rise to rightful resistance); THE FEDERALIST NO. 51 (Feb. 6, 1788) (James Madison) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."); THOMAS PAINE, THE RIGHTS OF MAN 232–95 (1969); VON PUFENDORF, 2 DE JURE NATURAE, BK. VII, ch 4, § 3, at 1011 (cited in note 132) (1934) (1688) (declaring that "the chief end of states is that men should by mutual understanding and assistance be insured against losses and injuries which can be and commonly are brought upon them by other men, and that by these means they may enjoy peace or have sufficient protection against enemies."). *See also* Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1028 (1989) ("The Americans came to see rights . . . as inherent rights held by individuals prior to government and law, and not given away but retained under government. . . . The move to independence, to revolution 'as of right,' was blended with the idea of individual social contract, a contract . . . between the individual and the government.").

247. RUTI TEITEL, TRANSITIONAL JUSTICE 47–69, 119–212 (2000) (describing criminal trials, reparations, administrative remedies, and constitutional changes after World War II, Balkan Wars, and Rwandan Genocide). *See also* Maj. Leonard J. Law, *Rule of Law in Iraq: Transitional Justice under Occupation*, U.S. ARMY SCH. OF ADVANCED MIL. STUDIES (2004), http://handle.dtic.mil/100.2/ADA429242; Yoav Peled & Nadim N. Rouhana, *Transitional Justice and the Right of Return of the Palestinian Refugees*, 5 THEORETICAL INQUIRIES L. 317 (2004); Iavor Rangelov & Ruti Teitel, *Global Civil Society and Transitional Justice, in* GLOBAL CIVIL SOCIETY 2011: GLOBALITY AND THE ABSENCE OF JUSTICE 163–74 (2011).

person of her rights.[248] Justice is a bond among people that can help make peace. It draws a line between a period of human rights violations and unfairness, and a new period of legitimate and lawful governance.

Unfortunately, both the law of nations and transitional justice have withered in the United States since 2001. The doctrine of non-extraterritoriality has gutted the ATS, because the statute already had scant application to acts committed on U.S. territory as a result of U.S. sovereign immunity and the frequent decision by Congress to limit U.S. residents' remedies for domestic violations of the law of nations.[249] The executive branch, while asking

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248. In early Greek, as in Homer, δἰκη more often referred to a division of classes (as between women and men), a ruling among competing claims (as between kings and commoners), or a settlement of the natural order (as in the transition from life to death), than to fairness or morality. *See* RICHARD GARNER, LAW & SOCIETY IN CLASSICAL ATHENS 6–8 (1987). In later Greek, and particularly to the philosophers Plato and Aristotle, as well as to the poets such as Hesiod, δἰκη meant fairness and legal rightness, and to the use of judgment to resolve competing claims in a political way. *See* JEFFREY WALKER, RHETORIC AND POETICS IN ANTIQUITY 128–30 (2000); HARVEY ALAN SHAPIRO, THE CAMBRIDGE COMPANION TO ARCHAIC GREECE 133–36 (2007). Thus, in Plato's *Republic*, justice or δἰκη is what results when every citizen does her own job, claims her own rightful share, and does not meddle in matters of no legitimate concern to her. *See* NICKOLAS PAPPAS, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO PLATO AND THE REPUBLIC 22, 71–78, 185–86 (1995). Similarly, in English "justice" prevents tyranny by ensuring to the free their right of appealing the courts for administration of controversy, in addition to petitioning the king and parliament and keeping arms for self-defense. *See, e.g.,* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1:134–35, 140–41 (1765), *available at* http://press-pubs.uchicago.edu/founders/documents/v1ch16s5.html.

249. *See* Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001) (dismissing petition for a writ of habeas corpus filed by an individual on Texas' death row, who was only seventeen at the time of the murder for which he was convicted, based on International Covenant on Civil and Political Rights, because the United States Senate, in ratifying the treaty, had reserved the right to impose death sentences for such crimes); United States v. Duarte Acero, 208 F.3d 1282, 1288 (11th Cir. 2000) (although the International Covenant on Civil and Political Rights became the "supreme law of the land" upon its ratification by the Senate, it does not broaden protection of the Double Jeopardy Clause, or bar "a prosecution in the courts of the United States despite an earlier prosecution for the same offense in the courts of another state party."); Kyler v. Montezuma County, 203 F.3d 835 (10th Cir. 2000) (where plaintiffs alleged that a U.S. county's employees' conduct amounted to torture in violation of the United Nations Charter, the Universal Declaration of Human Rights, and the Interna-

the U.S. courts not to hear cases of genocide, terrorist massacre as a crime against humanity, or torture, has declined to follow the law of nations' procedures for such cases, such as the ICC.[250] The state secrets privilege, the doctrine that treaties are not "self-executing," and the *forum non conveniens* doctrine mopped up many of the other law of nations cases that arose after 2001.

The original understanding of the law of nations may undergo a revival at the ICC. Victims seeking reparations for mass atrocities are appealing to that body to exercise jurisdiction over their claims for relief. Matters such as *Lubanga* may someday resemble *Paquete Habana*, a modest beginning out of which a vast superstructure of ATS and other transnational litigation was built

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tional Covenant on Civil and Political Rights, court held that: "These provisions call upon governments to take certain action and are not addressed to the judicial branch of our government. They do not, by their terms, confer rights upon individual citizens and, thus, petitioner does not have standing to bring these claims."); Dickens v. Lewis, 750 F.2d 1251, 1254 (5th Cir. 1984) (dismissing claim by plaintiff who alleged that illegal seizure by ATF agents violated the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights); Johnson v. United States, 1995 WL 713502, at *1 (9th Cir. Dec. 4, 1997) (unpublished table disposition) (dismissing complaint by a plaintiff to sue the United States under the U.N. Charter for damages and an apology for human rights violations committed against slaves and their descendants, because federal government had never consented to be sued under the U.N. Charter, and therefore had sovereign immunity); Hawkins v. Comparet Cassani, 33 F. Supp. 2d 1244 (C.D. Cal. 1999) (prisoner subjected to electric shock for acting in a disruptive manner, who brought a section 1983 claim against Los Angeles County, a judge, the sheriff, and other defendants, claiming that he was tortured in violation of various international instruments, had claims dismissed because none of these instruments are enforceable in the federal courts, and International Covenant on Civil and Political Rights, and the Convention Against Torture, despite being ratified by U.S., are not self-executing and do not create a private right of action).

250. *See* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 119 n.16 (2d Cir. 2010) ("The United States has not ratified the [ICC] Statute. Under the Clinton Administration, the U.S. delegation voted against the text [of it]."); *id*. (in 2002, Secretary of Defense for United States justified non-participation due to "the lack of adequate checks and balances on powers of the ICC prosecutors and judges; the dilution of the U.N. Security Council's authority over international criminal prosecutions; and the lack of an effective mechanism to prevent politicized prosecutions of American service members and officials") (quoting Press Release, U.S. Dep't of Def., Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002)).

in the 1990s.[251] If there is no court to resolve disputes peacefully, resort to war may be inevitable, as the Founders feared.

251. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (citing The Paquete Habana, 175 U.S. 677, 694 (1900)).