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Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post-*Kiobel*

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For thirty years, the Alien Tort Statute (ATS) has provided U.S. courts with civil jurisdiction over human rights abuses committed abroad and a small group of victims a modest measure of justice. The Supreme Court's April 2013 decision to limit the extraterritorial reach of the ATS in Kiobel v. Royal Dutch Petroleum *prompted declarations from experts that human rights litigation in the United States is dead. This view overstates the value of ATS litigation to human rights victims and ignores the availability of other legal strategies.*

This Article explores the implications of Kiobel *for the interests of those most affected by human rights violations—its victims—and identifies strategies for how advocates can best use existing legal remedies in the United States to vindicate victims' rights. First, the Article defines a metric to evaluate the significance of U.S. legal strategies from a victim-centered perspective. The metric is based on international standards related to victims' rights: the rights to truth, justice, and reparations.*

Second, the Article catalogues the multiple legal strategies available in the United States to hold perpetrators accountable for human rights abuses committed abroad. Even after the Supreme Court's holding in Kiobel*, the United States remains the only country in the world where a nonnational victim can bring a civil action against a nonnational perpetrator for human rights abuses committed on foreign soil. U.S. courts also have extraterritorial jurisdiction*

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over international crimes, such as genocide, war crimes, torture, and the recruitment of child soldiers. Under crime victims' rights legislation, the foreign victims of these crimes have participatory rights in criminal proceedings. U.S. immigration authorities have also denaturalized and deported hundreds of perpetrators of human rights abuses who were discovered residing in the United States in violation of immigration laws.

Third, the Article looks beyond the mere existence of these formal opportunities to explore how available legal mechanisms can advance the rights of victims. The Article uses a victim-centered metric to dissect the myriad vague and unproven claims about the objectives of human rights litigation and identify concrete opportunities to advance victims' rights to truth, justice, and reparations through legal advocacy in the United States.

> Those who want American courts to adjudicate on the world's problems will have to look elsewhere.
>
> *The Economist* on *Kiobel v. Royal Dutch Petroleum*

> The report of my death was an exaggeration.
>
> Mark Twain

INTRODUCTION

Until recently, the most prominent human rights litigation tool in the United States was the Alien Tort Statute (ATS)—a tort law enacted in 1789 to address the inadequate vindication of international law by state courts. The law gives federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[1] In 1980, the eighteenth-century statute was reincarnated as a remedy for human rights violations. In *Filártiga v. Peña-Irala*, the U.S. Court of Appeals for the Second Circuit held that the ATS provided jurisdiction to recognize a claim by a foreign national against a foreign national for tortious acts committed on foreign territory.[2] After *Filártiga*, the ATS became the most prominent vehicle for bringing legal claims in U.S. courts against state and non-state actors involved in human rights abuses committed outside the United States. On April 17, 2013 in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court unanimously overturned thirty years of lower court precedent to hold that the ATS does not provide U.S. courts jurisdiction over extraterritorial conduct.[3] Critics and supporters of the ATS alike announced an end to the "*Filártiga* human rights revolution"[4] and the imminent dismissal of "virtually all pending ATS cases."[5]

Concerned that "[t]he blunderbuss of litigation was no substitute for the scalpel of diplomacy,"[6] ATS critics praised the Supreme Court's decision as a proper application of "judicial restraint and deference to the role of Congress

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1. 28 U.S.C. § 1350 (2012).

2. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

3. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663–65 (2013) (holding that plaintiffs had not overcome the presumption against the extraterritorial application of federal law).

4. Roger Alford, Kiobel *Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013, 5:48 PM), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation.

5. Rich Samp, *Supreme Court Observations: Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*, FORBES (Apr. 18, 2013, 10:51 AM), http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation.

6. Eric Posner, *The United States Can't Be the World's Courthouse*, SLATE (Apr. 24, 2013, 2:56 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_supreme_court_and_the_alien_tort_statute_ending_human_rights_suits.html; *see also* John Bellinger, *Reflections on* Kiobel, LAWFARE (Apr. 22, 2013, 8:52 PM), http://www.lawfareblog.com/2013/04/reflections-on-kiobel.

and the President to set American foreign policy."[7] The Supreme Court decision affirmed a "presumption that United States law governs domestically but does not rule the world" to eliminate the global cause of action pursued through the ATS.[8] Others bemoaned the decision as "a major setback for . . . victims, who often look to the United States for justice when all else fails."[9] One human rights advocate asked, "Now what will [the victims] do?"[10]

A small group of lawyers pioneered ATS human rights litigation as part of a broader transnational justice network using foreign courts to hold individuals legally accountable for human rights crimes when the governments of the countries in which the abuses occurred refused or were unable to do so.[11] Legal actions against former Chilean dictator Augusto Pinochet in England and Spain, former Guatemalan dictator Efrain Rios Montt in Spain, and Rwandan genocidaires in Belgium and France were premised on the concept of universal criminal jurisdiction. Under this legal concept, certain crimes, such as genocide, crimes against humanity, extrajudicial killings, torture, and forced disappearance, are so heinous that they give rise to a state duty to prosecute, even if the crimes were committed on foreign territory.[12] Some argued that the ATS created a form of universal civil jurisdiction by authorizing U.S. courts to recognize torts proscribed by international law.[13] In *Kiobel*, the Supreme Court majority rejected this interpretation of the statute and narrowed U.S. court jurisdiction to suits that "touch and concern" U.S. interests.[14]

The symbolic and strategic significance of *Kiobel* is much greater than its practical impact on victims. For most victims of extraterritorial violations, the financial, political, and legal obstacles to reaching the doors of a U.S. courthouse are insurmountable. *Kiobel* however compels advocates to reassess

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7. Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES (Apr. 21, 2013, 10:00 AM), http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction; *see also Alien Tort Rout*, WALL ST. J., Apr. 18, 2013, at A14.

8. *Kiobel*, 133 S. Ct. at 1664 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

9. Kiobel *Ruling Undermines U.S. Leadership on Human Rights*, HUM. RTS. FIRST (Apr. 17, 2013), http://www.humanrightsfirst.org/press-release/kiobel-ruling-undermines-us-leadership-human-rights; *see also* The Editorial Board, *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 18, 2013, at A26.

10. Kiobel *Ruling Undermines U.S. Leadership on Human Rights*, *supra* note 9.

11. KATHRYN SIKKINK, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS 194 (2011).

12. ANTONIO CASSESE, INTERNATIONAL LAW 451–52 (2d ed. 2005).

13. Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 149 (2006).

14. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663–65, 1669 (2013) ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.") (citing Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 264–73 (2010)). In a subsequent case, *Daimler AG v. Bauman*, the Supreme Court found that federal court did not have general jurisdiction for claims in which all the relevant conduct occurred outside the United States. 134 S. Ct. 746 (2014).

the promise and limitations of legal remedies in the United States by putting into sharp relief the gaps in the U.S. accountability regime. This Article will contribute to the discussion by advocates about the implications of *Kiobel* for human rights litigation by engaging in a broader reflection on the usefulness of U.S. legal remedies to victims.

Kiobel has prompted widespread speculation about which human rights cases are still viable under the ATS and a search for legal alternatives.[15] Some propose that transnational tort litigation—civil suits for murder, kidnapping, and rape that occurred in foreign territory—can continue in state courts. *Kiobel*, however, revealed the uncertain jurisdictional grounds on which such litigation is premised.[16] Litigants will continue to battle in federal and state courts over issues related to the extraterritorial application of U.S. law.[17] Surprisingly, commentators have largely ignored statutes that specifically grant federal courts jurisdiction over acts committed outside the United States and offer a measure of relief to victims of human rights abuses.

The ATS is only one of multiple legal strategies available to victims in U.S. courts to hold perpetrators legally accountable for human rights abuses committed abroad.[18] Indeed, federal statutes exist that provide the clear grounds for court jurisdiction that ATS or transnational litigation in state courts lack.[19] After *Kiobel*, the United States is still the only country in the world

15. Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749 (2014); Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional Universalism in Retreat*, CATO SUP. CT. REV. 149, 183 (2013); Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773 (2014); Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467 (2014); Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" The United States: Justice Kennedy's* Filártiga, 89 NOTRE DAME L. REV. 1695 (2014); Matteo M. Winkler, *What Remains of the Alien Tort Statute after* Kiobel*?*, 39 N.C. J. INT'L L. & COM. REG. 171 (2013).

16. *Kiobel*, 133 S. Ct. at 1669; *see* Donald Childress, Kiobel *Commentary: An ATS Answer with Many Questions (and the Possibility of a Brave New World of Transnational Litigation)*, SCOTUSBLOG (Apr. 18, 2013, 5:03 PM), http://www.scotusblog.com/?p=162624; Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/?p=162617; Beth Stephens, Kiobel *Insta-Symposium: Closing Avenues for Relief*, OPINIO JURIS (Apr. 23, 2013, 7:37 PM), http://opiniojuris.org/2013/04/23/kiobel-insta-symposium-closing-avenues-for-relief.

17. *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); Christopher A. Whytock, Donald Earl Childress III & Michael D. Ramsey, *Foreword: After* Kiobel*—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 6–8 (2013).

18. Legal accountability refers to the various processes, norms, and mechanisms—including criminal prosecutions, private lawsuits, exclusion from public office, truth and reconciliation commissions, and international courts—that ensure that state agents and non-state actors are held legally responsible for their actions, as well as sanctions imposed if the law is violated.

19. *See e.g.*, Torture Convention Implementation Act of 1994, 18 U.S.C. § 2340 (2012); Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442 (2012); 28 U.S.C. § 1350 (2012); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223, 122 Stat. 5044 (2008) (This is only the reauthorization statute, not the original statute, passed in

where a nonnational victim can bring a civil action against a nonnational perpetrator for human rights abuses committed in another country.[20] Some human rights perpetrators also are subject to criminal and immigration proceedings. Thus, although it is a significant loss, *Kiobel* does not mark the end to all human rights litigation in federal courts.

In evaluating the post-*Kiobel* legal landscape, this Article looks beyond the mere existence of formal opportunities and critiques how useful U.S. legal strategies are to those most impacted by human rights violations: the victims. Although the ATS is a popular topic in legal scholarship, the thousands of law review articles written on the subject focus on doctrinal issues related to the application of international law by U.S. courts.[21] More practical aspects such as how or whether the litigation serves the rights and interests of victims is almost entirely absent from the academic debate.[22]

Over the years, ATS advocates have made ambitious claims about the objectives of civil human rights litigation in the United States, arguing that ATS cases deter human rights abusers, develop human rights standards, spur reform in the countries where the abuses were committed, provide a therapeutic benefit for survivors, and create an official accounting of the crime.[23] There is little empirical evidence to support claims regarding the indirect impact of ATS litigation, and the direct economic benefit to individual plaintiffs has been limited.[24] Few ATS plaintiffs have received monetary compensation from their perpetrators.[25]

2000.); Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (amending 18 U.S.C. § 1091(e)).

20. 28 U.S.C. § 1350; *see also* Dacer v. Estrada, No. C-10-04165 WHA, 2013 WL 5978101 (N.D. Cal. Nov. 8, 2013) (granting default judgment in wrongful death action under the TVPA involving torture and killings in the Philippines).

21. There are at least 4,448 law review articles that mention the Alien Tort Statute according to a search of Westlaw's JLR ("journals and law reviews") database on June 20, 2014 for the phrase "alien tort."

22. Beth Van Schaack is one of the few scholars who has explored the impact of ATS litigation on the plaintiffs. Van Schaack describes ATS litigation as a "modest enterprise" and cautions that "practitioners of ATCA-style litigation should be wary of espousing an overabundance of objectives . . . because doing so may undermine or overshadow what these cases do accomplish for individual victims of human rights abuses." Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2306–07 (2004).

23. *Impact*, CTR. FOR JUST. & ACCOUNTABILITY, http://www.cja.org/section.php?id=87 (last visited Sept. 11, 2014).

24. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 459 (2001) (asserting that ATS litigation is attractive to "victims of human rights abuses because it offers them a forum of telling and publicizing their stories"); Van Schaack, *supra* note 22, at 2318–26.

25. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012) (noting that "only two TVPA plaintiffs have been able to recover successfully against a natural person—one only after the defendant won the state lottery"); *see also* Bradley, *supra* note 24, at 459 ("[E]ven though US courts have issued a number of large damage awards in these cases, essentially none of these awards has been collected."); Jonathan C. Dimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT'L L. 456, 460 (2011) ("Although

This Article will adopt a victim-centered perspective to analyze the opportunities for foreign victims of human rights abuses to hold perpetrators accountable in U.S. courts. On the upside, a panoply of criminal, civil, and immigration remedies in the United States offers victims a chance to advance multiple forms of justice, including restorative, rehabilitative, and retributive goals. On the downside, there is a mismatch between the interests of victims and the objectives, priorities, and outcomes of accountability mechanisms in the United States. For example, despite various domestic statutes criminalizing human rights and law of war violations, U.S. prosecutors are often reluctant to pursue perpetrators of human rights violations. Moreover when they do prosecute, the process may be undertaken in a manner that marginalizes victims' rights. More often, human rights violators living in the United States are punished for running afoul of U.S. immigration laws, rather than the human rights abuses committed in their home countries.

Pursuing a legal cause of action in a U.S. court is far from the optimal way to achieve justice for victims of human rights abuses committed in a foreign territory: U.S. court proceedings are inaccessible to most victims, do not address the causes of the violations, and cannot prevent future abuses. Victims, however, will continue to seek justice in U.S. courts because the American legal system places significant value on the independence and impartiality of proceedings, and for many victims, offers the best or only possibility of a just outcome. Drawing on the author's human rights litigation experience before domestic and international courts, this Article will assess what can realistically be expected and achieved from legal actions in U.S. courts.

Part I will define and conceptualize the victim-centered approach through which the Article examines the impact of accountability strategies in the United States. Human rights law has become the preferred prism through which to view state obligations to address violations of international law's most sacred norms. This Article will use international standards related to victims' rights to truth, justice, and reparations as the metric for evaluating the effectiveness of U.S. legal strategies. Numerous human rights treaties recognize a victim's right to a remedy.[26] For decades, the family members of those who were forcibly

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the cases led to hefty damage awards regularly in excess of ten million, and sometimes even 100 million, dollars, they presented little meaningful prospect of recovery.") (footnote omitted); Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 205, 208 (2005) ("[D]efendants often failed to defend these claims and courts often entered default judgments. Such judgments were rarely collected . . . ."); Stephens, *supra* note 15, at 1467 (stating "only a handful of lawsuits have produced enforceable judgments for plaintiffs"); Van Schaack, *supra* note 22, at 2313 (stating "most of the cases' damage awards were issued by default and/or are unenforceable").

26. International Covenant on Civil and Political Rights arts. 1–2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination arts. 2, 6, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465

"disappeared" under authoritarian regimes in Latin America argued in domestic and international fora that the right to remedy obligated the state to provide information about the missing, access to justice, and reparations. Their sustained advocacy efforts led various international, regional, and local courts to recognize the rights of victims of gross human rights violations to truth, justice, and reparations. To the extent that these rights reflect some—but not all—of the needs of many victims, they provide a legitimate metric for understanding how legal remedies in the United States further victims' interests.

Part II will review the legal tools available to victims of human rights abuses committed abroad by perpetrators who fall within the jurisdiction of U.S. courts. The Article will focus on four legislatively created legal avenues to address harms committed abroad: civil suits, criminal prosecutions, crime victims' rights legislation, and immigration enforcement.[27] Enacted in 1992, the Torture Victim Protection Act (TVPA) provides U.S. courts with extraterritorial jurisdiction over civil suits against individuals who carried out torture or extrajudicial killings outside of the United States.[28] Congress has also enacted several new laws that criminalize human rights abuses, such as the Genocide Accountability Act,[29] the Torture Convention Implementation Act ("Federal Torture Statute"),[30] the Child Soldiers Accountability Act[31] and the Trafficking Victims Protection Reauthorization Act.[32] Each statute provides jurisdiction over criminal acts committed abroad by non-U.S. national

U.N.T.S. 85, 113 [hereinafter CAT]; Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Rome Statute of the International Criminal Court arts. 68, 75, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; African (Banjul) Charter on Human and Peoples' Rights art. 7, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter]; American Convention on Human Rights arts. 8, 25, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

27. Other jurisdiction grounds or causes of actions, such as 28 U.S.C. § 1331, the Foreign Sovereign Immunities Act, the Anti-Terrorism Act, the Racketeer Influenced and Corrupt Organizations Act, and state law claims, may be available to human rights victims but do not allow for the application of human rights norms, and thus are beyond the scope of this Article.

28. The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an individual to torture shall, in a civil action, be liable for damages to that individual." Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a)(1), 106 Stat. 73 (1992).

29. Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821 (current version at 18 U.S.C. § 1091(e) (2012)).

30. Torture Convention Implementation Act of 1994, 18 U.S.C. § 2340 (2012).

31. Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442 (2012).

32. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223, 122 Stat. 5044 (2008).

perpetrators. Under crime victims' rights legislation, foreign victims of these crimes also have participatory rights in criminal proceedings, including the rights to be reasonably protected; to be notified, present, and heard at critical stages of the legal process; and to restitution.[33] Since 2004, U.S. Immigration and Customs Enforcement (ICE) has removed more than 640 known or suspected human rights perpetrators for lying on their immigration forms to gain entry into the United States or to procure U.S. citizenship.[34] ICE is currently handling 200 active human rights-related investigations that the agency reports may result in criminal prosecutions or removal proceedings.[35] This Article will use the metric described in Part I to examine how these legal avenues further victims' rights.

Lastly, Part III will identify three core principles that should order advocates' thinking about legal actions taken on behalf of human rights victims of abuses committed abroad. Rather than advancing a disconnected or disaggregated approach, advocates should think about the ATS/TVPA, criminal prosecutions, the Crime Victims' Rights Act (CVRA), and immigration enforcement as components in the mosaic of legal remedies available to human rights victims in the United States. First, advocates should be guided by a holistic approach to legal advocacy that takes into account the complexity of the U.S. legal landscape and the array of interests and priorities. Second, advocates should maximize the interrelatedness and potentially mutually reinforcing relationship between civil and criminal remedies. Third, any legal strategy should take into account practical limitations and opportunities.

I.
THE METRIC: TRUTH, JUSTICE, AND REPARATIONS

This Article will use international standards to assess the legal remedies available to human rights victims in the United States from a victim-centered perspective. The rights to truth, justice, and reparations make up the legal framework of rights and duties owed by the state to victims of gross human rights violations and serious breaches of international humanitarian law.[36]

33. Crime Victims' Rights Act, 18 U.S.C. § 3771 (2012).

34. Press Release, U.S. Immigr. & Customs Enforcement, *ICE Commemorates 10th Anniversary of the Human Rights Violators and War Crimes Program* (Dec. 2, 2013), *available at* http://www.ice.gov/news/releases/1312/131202washingtondc3.htm.

35. *No Safe Haven: Law Enforcement Operations Against Human Rights Violators in the U.S.: Hearing Before the Human Rights Comm'n of the H. Comm. on Foreign Affairs*, 112th Cong. (2011) (statement of John P. Woods, Deputy Assistant Director in the National Security Investigations Division, U.S. Immigration and Customs Enforcement), *available at* http://tlhrc.house.gov/docs/transcripts/2011_10_13_Human%20Rights%20Violators/13oct11_hearing_Woods_written%20statement.pdf [hereinafter *House Hearings No Save Haven*]; *The Human Rights Violators & War Crimes Unit*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/human-rights-violators (last visited Sept. 11, 2014).

36. While the concepts of truth, justice, and reparations assume a wide variety of meanings, this Article will define these concepts according to their normative meanings under international law.

Gross human rights violations and serious breaches of international humanitarian law refer to violations that annul the human person and human dignity, such as enforced disappearance; arbitrary and prolonged detention; summary and arbitrary executions; torture and cruel, inhuman, or degrading treatment; and slavery and forced labor.[37] This Article will employ the term "gross human rights violations" as shorthand for this legal category of violations.

The rights to truth, justice, and reparations standards are a language legitimized by victims and the basis for a doctrine codified in international law[38] that describes victims' priorities, interests, and needs. Victims worldwide, including the mothers of the Plaza de Mayo in Argentina, persons displaced by paramilitary violence in Colombia, survivors of the Khmer Rouge in Cambodia, and Maya Ixil targeted by the scorched earth military campaign in Guatemala, have invoked the rights to truth, justice, and reparations to demand accountability for state-sponsored human rights abuses. In recent years, these norms have become the central focus of most work with victims of conflict and have positioned the law as the predominant tool for addressing state-sanctioned violence.[39] Truth commissions, criminal prosecutions, reparation schemes, and lustration measures have been utilized in certain contexts to affirm the rights to truth, justice, and reparations.

In the aftermath of World War II, the international community awoke to the reality that gross human rights violations perpetuated by a state against its nationals could have serious and lasting consequences for global peace and security. Historical notions of state sovereignty, according to which a state's treatment of its citizens was impervious to international legal obligations, yielded to a new imperative: preventing future conflicts by guaranteeing inalienable rights to individuals independent of the state in which they resided.[40] Spurred to action by the atrocities of World War II, governments enacted international covenants and domestic laws that protected individual rights. While states moved forward in codifying substantive rights for individuals, they resisted articulating the full array of legal consequences for

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See, e.g., International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, U.N. Doc. A/Res/61/177, at pmbl. (Dec. 20, 2006) (affirming "the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation . . . the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person") [hereinafter ICED].

37. *See* ANJA SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS 281 (2009).

38. ICED, *supra* note 36, art. 24.

39. SIMON ROBINS, FAMILIES OF THE MISSING: A TEST FOR CONTEMPORARY APPROACHES TO TRANSITIONAL JUSTICE 63 (2013).

40. *See* CASSESE, *supra* note 12, at 142–43; M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203, 208–10 (2006).

violating these rights. Even today, there still is no specific international treaty on the rights of the victims of human rights abuses.[41]

However, numerous international instruments recognize and protect the right to an effective remedy.[42] Indeed, the right to a remedy is viewed as one of the fundamental pillars of international human rights law and the rule of law in a democratic society.[43] The Universal Declaration of Human Rights[44] recognizes the right of all persons "to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[45] The right to an effective remedy is also enshrined in human rights treaties.[46] The International Covenant on Civil and Political Rights (ICCPR), ratified by 167 nations,[47] obligates state parties to ensure that victims of violations of the rights and freedoms protected by the Covenant have access to an effective remedy.[48] Similarly, the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment ("Convention against Torture" or "CAT"), ratified by 153 states, obligates "[e]ach State Party [to] ensure in its legal system that the victim of an act of torture obtains redress

41. *See* Bassiouni, *supra* note 40, at 247–48 ("Governments did not want to assume any responsibility, even for the acts of their own agents, preferring to limit victims' rights to the commission of crimes committed by non-State actors. That position . . . is also the reason why there has never been a convention on the rights of victims, even though there are many treaties dealing with many other diverse human rights issues.")

42. ICCPR, *supra* note 26, arts. 1–2; CERD, *supra* note 26, arts. 2, 6; CAT, *supra* note 26, art. 14; CRC, *supra* note 26, art. 39; Hague Convention, *supra* note 26, art. 3; Geneva Convention III, *supra* note 26, art. 129; Protocol I, *supra* note 26, art. 91; Rome Statute, *supra* note 26, arts. 68, 75; African Charter, *supra* note 26, art. 7; American Convention, *supra* note 26, arts. 8, 25; European Convention, *supra* note 26, art. 13; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985) [hereinafter Principles of Justice for Crime Victims]; Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter UN Right to Remedy Principles].

43. *See* Castillo-Páez v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 34, ¶ 82 (Nov. 3, 1997).

44. Certain provisions of the Universal Declaration of Human Rights are considered to be part of international customary law. International customary law reflects those actions or practices that have become accepted by the international community as applicable law, and is binding upon all states regardless of whether the state has ratified a treaty containing the rule in question.

45. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 8 (Dec. 10, 1948).

46. ICCPR, *supra* note 26; CERD, *supra* note 26; CAT, *supra* note 26; CRC, *supra* note 26; ICED, *supra* note 36, art. 24; Hague Convention, *supra* note 26; Geneva Convention III, *supra* note 26, art. 122; Protocol I, *supra* note 26, art. 129; Rome Statute, *supra* note 26; African Charter, *supra* note 26; American Convention, *supra* note 26; European Convention, *supra* note 26.

47. ICCPR, *supra* note 26.

48. ICCPR, *supra* note 26, art. 2(3); *see also* Human Rights Committee, General Comment No. 29, States of Emergency (art. 4), ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001); Human Rights Committee, General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[49]

These terse references to the right to a remedy provide a limited understanding of the wide range of measures states must undertake in response to a violation. Approved by the United Nations' General Assembly in 2005, the *Basic UN Right to Remedy Principles 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* ("UN Right to Remedy Principles") is an authoritative statement that articulates the substantive and procedural relief owed to victims of state-sanctioned abuses under international law.[50] The document does not create new rights or duties and is not legally binding, but it identifies ways in which states should satisfy existing legal obligations.[51] The precise legal value of "soft law" instruments such as the *UN Right to Remedy Principles* is the subject of a debate that is beyond the scope of this Article.[52] International bodies and domestic courts have used the *UN Right to Remedy Principles* to understand the content of state obligations to discover and reveal the truth about violations, prosecute human rights perpetrators, and provide reparations to the victims of serious violations of human rights.[53] This Article will likewise employ the document to understand the scope and content of the rights to truth, justice, and reparations.

Rather than defining what constitutes a violation of international law, the *UN Right to Remedy Principles* "describe[] the legal consequences (the rights and duties) arising from such violations and establish[] appropriate procedures and mechanisms to implement these rights and duties."[54] The *UN Right to Remedy Principles* elucidate international law to impose a dual obligation on states: "to make it possible for [victims] to seek relief for the harm suffered *and* to provide a final result that actually addresses the harm."[55]

The *UN Right to Remedy Principles* define the right to a remedy to include three elements: the right to "access to relevant information concerning violations and reparation mechanisms," the right to "equal and effective access to justice," and the right to "adequate, effective and prompt reparation for harm

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49. CAT, *supra* note 26, art. 14(1).

50. UN Right to Remedy Principles, *supra* note 42; Bassiouni, *supra* note 40, at 247.

51. UN Right to Remedy Principles, *supra* note 42, pmbl.

52. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171 (2010).

53. *See* Inter-American Commission on Human Rights, Follow-Up on the Demobilization Process of the AUC in Colombia, Report on the Demobilization Process in Colombia, ¶ 41, OEA/Ser.L/V/II.120 doc. 60 (Dec. 13, 2004); Salvador Chiriboga v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 179, ¶ 90 (May 6, 2008); Stichting Mothers of Srebrenica & Others v. Netherlands, App. No. 65542/12, ¶ 161 (Eur. Ct. H.R. June 11, 2013), http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-122255.

54. REDRESS, IMPLEMENTING VICTIMS' RIGHTS 8, 10 (2006), *available at* http://www.redress.org/downloads/publications/Reparation%20Principles.pdf.

55. *Id*.

suffered."[56] The duties established by the rights to truth, justice, and reparations extend to violations committed by both state and non-state actors. Although the duty to fulfill these rights is primarily that of the state in which the violations occurred, the *UN Right to Remedy Principles* echo specialized treaties to call on all states to exercise universal jurisdiction, extradite, or surrender suspects of certain international crimes to other states or international tribunals.[57]

A. The Right to Truth

The right to truth has historical roots in international humanitarian law, which obligates parties to an armed conflict to provide information about the fate and whereabouts of combatants who disappeared or went missing during the conflict.[58] It is now widely accepted that the right to truth extends to all gross violations of international law.[59] In such cases, the right to truth establishes the state obligation to provide facts and disclose information about the causes, conditions, and circumstances of the crimes; the progress and results of the investigation; the fate and whereabouts of victims who were killed or disappeared; and the identity of perpetrators.[60]

The *UN Right to Remedy Principles* also highlight the restorative impact that the verification of facts and public disclosure of information can have on victims.[61] Victims, their relatives, and society at large "must be informed of all that occurred in regard to [] violations."[62] In this way, the right to truth has been linked to the effective realization of other rights, including the rights to information, an effective and exhaustive investigation, and a judicial remedy,[63]

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56. UN Right to Remedy Principles, *supra* note 42, princ. 11.

57. *Id.* princs. 5, 21; *see also* CAT, *supra* note 26, arts. 5(2), 7(1); ICED, *supra* note 36, art. 9(2).

58. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 16, 17, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention III, *supra* note 26, art. 122; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 136, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol I, *supra* note 26, arts. 33, 34.

59. *See, e.g.*, Moiwana Cmty. v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 204 (June 15, 2005); Human Rights Committee, Concluding Observations of the Human Rights Committee, ¶ 25, U.N. Doc. CCPR/C/79/Add.63, (Apr. 3, 1996); Office of the United Nations High Commissioner for Human Rights, Promotion and Protection of Human Rights: Study on the Right to the Truth, Comm'n on Human Rights, ¶ 55, U.N. Doc. E/CN.4/2006/91, (Feb. 8, 2006) [hereinafter Study on the Right to Truth] ("The right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels.").

60. Study on the Right to Truth, *supra* note 59, ¶ 38; UN Right to Remedy Principles, *supra* note 42, princ. 24.

61. UN Right to Remedy Principles, *supra* note 42, princ. 22(b).

62. Gomes Lund (Guerrilha do Araguaia) v. Brazil, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 200 (Nov. 24, 2010).

63. Mack Chang v. Guatemala, Inter-Am. Ct. H.R. (ser. C.) No. 101, ¶ 274 (Nov. 25, 2003); *see e.g.*, *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 197, 201; Study on the Right to Truth, *supra* note 59, ¶¶ 24–32.

as well as the state obligations to respect and guarantee fundamental human rights such as the rights to life, liberty, and humane treatment.[64] In the context of gross human rights violations, truth is a component of the right to a remedy but also a form of reparation for the victims.[65]

Criminal investigations and prosecutions are viewed as one of the primary vehicles by which a state can establish the truth.[66] The work of a truth commission or a civil case may supplement, but not replace, the "truth" established by a criminal investigation.[67] If sufficient admissible evidence is uncovered, those responsible—including individuals who directly participated in, conspired in, or concealed the crimes—must be prosecuted and duly punished by an independent, impartial, and competent tribunal.[68]

B. The Right to Justice

Under international law, victims of gross human rights violations are entitled to equal and effective access to justice. International law equates justice with legal accountability for crimes—specifically the criminal prosecution of the perpetrators. It is a general principle of international law that states must "ensur[e] that those responsible for serious crimes under international law are prosecuted, tried and duly punished."[69] International law has evolved to envision a criminal procedure that investigates and prosecutes gross violations while providing a role for victims. For example, the International Criminal Court (ICC) not only aims to bring perpetrators to justice but also to bring victims a sense of justice through access to criminal proceedings.[70] The Rome Statute, which established the ICC in 2002, provides victims with participatory rights at the pre-trial and trial stages, the right to legal representation, and the right to protection and reparations.[71]

In the domestic context, criminal prosecution of international crimes should aim to recognize victims as right-holders and to restore the confidence

64. *See e.g.,* Janowiec v. Russia, App. Nos. 55508/07, 29520/09, ¶ 163 (Eur. Ct. H.R. Oct. 21, 2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684.

65. *Gomes Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 201.

66. *See* Raquel Aldana-Pindell, *In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes*, 35 VAND. J. TRANSNAT'L L. 1399, 1409 (2002) ("[M]any surviving human rights victims view prosecutions as the superior forum to guarantee them their rights to truth and justice.").

67. Anzualdo Castro v. Peru, Inter-Am. Ct. H.R. (ser. C.) No. 202, ¶ 180 (Sept. 22, 2009).

68. Independent Expert to Update the Set of Principles to Combat Impunity, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Comm'n on Human Rights, princ. 19, U.N. Doc. E/CN.4/2005/102/Add.l (Feb. 8, 2005) (by Diane Orentlicher) [hereinafter Report on Impunity].

69. *See id*.

70. For example, the Rome Statute contains provisions that allow for victims to participate in all stages of the proceedings before the International Criminal Court. Rome Statute, *supra* note 26.

71. *Id*.

of victims in state institutions.[72] International instruments and case law increasingly recognize the procedural or participatory rights of victims in domestic criminal proceedings, although the nature and scope of these rights remains unclear.[73] Among those recognized are the rights to receive information and notification, to be heard, to access legal assistance, to avoid unjustified delay, and to receive protection.[74]

Administrative remedies and civil suits are not considered sufficient to fulfill the international state obligation to provide justice.[75] Violations must be promptly, thoroughly, and effectively investigated.[76] If sufficient admissible evidence is uncovered, those responsible must be prosecuted and duly punished by an independent, impartial, and competent tribunal.[77]

According to certain specialized human rights treaties, the duty to prosecute perpetrators of gross human rights violations extends to a state regardless of whether the crime was committed in its territory.[78] The state in which a gross human rights violator is present has a duty to either extradite that individual or to "submit the case to its competent authorities for the purpose of prosecution."[79] The legal concept that any state has jurisdiction to prosecute

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72. *See* Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Human Rights Council, ¶¶ 29–35, U.N. Doc. A/HRC/21/46 (Aug. 9, 2012) (by Pablo de Greiff) [hereinafter Report on Truth, Justice, and Reparations].

73. Aldana-Pindell, *supra* note 66, at 1425–37.

74. Principles of Justice for Crime Victims, *supra* note 42. The UN Principles of Justice for Crime Victims outline the international consensus on best practices in relation to the participation and services provided to crime victims.

75. Yaşa v. Turkey, 1998-VI Eur. Ct. H.R. 2411, ¶ 74 (holding with regards to civil law actions that "the investigations which the Contracting States are obliged . . . to conduct in cases of fatal assault must be able to lead to the identification and punishment of those responsible . . . . [T]hat obligation cannot be satisfied merely by awarding damages . . . Otherwise, . . . the State's obligation to seek those guilty of fatal assault might thereby disappear"); Mapiripán Massacre v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 214 (Sept. 15, 2005) (stating that reparation for a violation of a protected right "cannot be restricted to payment of compensation to the next of kin of the victim").

76. *See* Velásquez-Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 7 (July 21, 1989); Godínez-Cruz v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989); *see also* Geneva Convention IV, *supra* note 58, art. 146; Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951); CAT, *supra* note 26.

77. Report on Impunity, *supra* note 68.

78. *See, e.g.*, CAT, *supra* note 26, art. 5(2) ("Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him."); *id.* art. 7(1) ("The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution."); ICED, *supra* note 36, art. 9(2) ("[E]ach State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State . . . .").

79. CAT, *supra* note 26, arts. 5(2), 7(1); *see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287; International Convention on the Suppression and Punishment of the Crime of Apartheid, arts. 4–5, Nov. 30, 1973, 1015 U.N.T.S. 243; ICED, *supra* note 36, art. 9.

persons accused of international crimes regardless of where the crime was committed or the nationality of the perpetrator or victim, was first enshrined in the 1949 Geneva Convention and affirmed more recently in the 2006 Convention against Enforced Disappearance.[80] One rationale behind universal jurisdiction is that certain crimes, such as slavery, piracy, crimes against humanity, and war crimes, are of such "gravity and magnitude" that every state has an interest in holding accountable those responsible.[81]

C. The Right to Reparations

International law also provides victims with the right to "adequate, effective and prompt reparation" in proportion "to the gravity of the violations and the harm suffered."[82] Ultimately, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[83] For gross violations of international law, restitution often is an unachievable goal. In such cases, international law prescribes measures that may supplement the opportunity for restitution,[84] including compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[85] Measures of rehabilitation may include the provision of medical and psychological care. Public acknowledgement of wrongdoing may constitute a measure of satisfaction, while an exhaustive investigation of the facts, the public disclosure of the truth, and the criminal prosecution of those responsible are necessary to ensure that the violation does not recur.[86] For example, in a case involving forced disappearances carried out by Guatemalan security forces, the Inter-American Court ordered Guatemala to investigate, prosecute, and punish those responsible for the crimes, recover the victims' remains, construct a national park dedicated to the memory of the victims, and pay more than $8 million in damages to the victims' families as redress for the violations committed.[87]

D. The Rights-Based Framework

While the rights to truth, justice, and reparations are now widely recognized as autonomous, they are also interconnected and interdependent.

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80. ICED, *supra* note 36; *see also* CASSESE, *supra* note 12, at 451.

81. *Id.* at 452.

82. UN Right to Remedy Principles, *supra* note 42, princ. 15.

83. The Factory at Chorzow (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, ¶ 125 (Sept. 13) (stating that "[t]he essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").

84. UN Right to Remedy Principles, *supra* note 42, princ. 12.

85. *Id.* princ. 15.

86. *Id.* princs. 15–23.

87. Gudiel Álvarez ("Diario Militar") v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 253 (Nov. 20, 2012).

International norms emphasize the interdependent nature of these legal rights, but do not prioritize one right over another. For example, in the aftermath of state-sanctioned violence, truth without justice or reparations is little more than insight without action; on its own, it has done little to satisfy the interests of victims.[88] Similarly, "criminal prosecutions without reparations may be thought to provide no direct benefit to victims other than a sense of vindication that otherwise does not change the circumstances of their lives."[89] And "reparations in the absence of prosecutions, truth-seeking or institutional reform can easily be seen as an effort to buy the acquiescence of victims."[90] Under international law, these rights are not only linked as a practical matter, but as a normative one. The right to justice should require truth-seeking efforts. The obligation to provide reparations should include judicial and administrative sanctions against those responsible for the violations. The verification of facts should lead to the investigation and prosecution of perpetrators.

The rise of human rights law as the preferred prism through which to view state obligations to address violations of international law is not without controversy. The "most discussed issue in the theory of human rights" is the ongoing debate about cultural relativism.[91] A prominent concern raised by cultural relativists is the legitimacy, relevancy, and adequacy of "pro-Western" human rights norms and institutions, when applied to non-Western contexts.[92] For example, the ICC is often accused of being a tool of Western neo-imperialism in Africa.[93] Scholars have challenged the universality of human rights standards asserting that the human rights discourse purports to be universal, but is actually embedded in a Eurocentric colonial model that proselytizes values and institutions founded on principles of liberal democracies.[94] Far from an emancipatory script, critics argue that human rights law rejects multiculturalism in favor of pro-Western conceptions. In doing so,

88. Report on Truth, Justice, and Reparations, *supra* note 72, ¶ 22 (stating that "[i]nternational experience, as well as research, suggests that the comprehensive implementation of [truth, justice, reparations and measures of non-recurrence] provides stronger reasons for various stakeholders, foremost amongst them, the victims, to understand the measures as efforts to achieve justice in the aftermath of violations than their disconnected or disaggregated implementation").

89. *Id.* ¶ 24.

90. *Id.* ¶ 23.

91. Jack Donnelly, *The Relative Universality of Human Rights*, 29 HUM. RTS. Q. 281, 282 (2007).

92. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 207–08 (2001).

93. Charles Chernor Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 446 (2009) (quoting Paul Kagame, President of the Republic of Rwanda who stated "Rwanda cannot be party to ICC for one simple reason . . . with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries"); *id*. at 462–65 (discussing criticisms by African academic and political leaders of the ICC).

94. Mutua, *supra* note 92, at 214–15 ("A critically important agenda of the United Nations has been the universalization of principles and norms which are European in identity. Principal among these has been the spread of human rights which grow out of Western liberalism and jurisprudence.").

human rights re-entrenches an international racial, ethnic, and socio-economic hierarchy according to which the saviors are white middle-class human rights professionals and their institutions, and the victims are helpless, innocent people of color.[95]

A related criticism is that human rights law is disconnected from the local context and circumstances it seeks to address.[96] Critics argue that "[a]bstract rights are so removed from their place of application and the concrete circumstances of the persons who suffer and hurt that they are unable to satisfy their real needs."[97] The peril of the human rights framework is that it imposes cultural homogeneity by supplanting local community values, traditions, and institutions in favor of individual rights. And, in displacing traditional norms, the human rights discourse does little to emancipate oppressed or marginalized community members, such as women, racial minorities, or indigenous peoples.[98] Instead, critics contend, human rights law reinforces existing power relations, institutes an elitist view that rights came "from above," and advances particular rights while marginalizing those rights prioritized by victims and their family members, such as social and economic rights.[99]

Although an empirical study may be better suited than human rights law to understanding the agenda of particular victims by providing a concrete articulation of individual needs, an empirical assessment is beyond the scope of this Article. This Article relies on a rights-based framework to understand what legal strategies can achieve and how they can best be used to advance the rights of victims. An empirical study would not address the duties of states under international law, while a rights discourse permits an exploration of moral and legal claims against the state. Truth, justice, and reparations are not conceptualized simply as needs of victims; they are internationally recognized principles that impose corresponding obligations and responsibilities on duty-bearers. The rights framework requires that states address the deprivation of truth, justice, and reparations as an effective denial of rights.

This Article does not claim that the rights to truth, justice, and reparations encapsulate all the needs of victims of gross violations. Nor does this Article make the claim that a judicial proceeding in a foreign court is the optimal way to achieve justice for all victims. Indeed, litigation in foreign courts is replete

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95. *Id.* at 207–08 ("In the human rights narrative, savages and victims are generally non-white and non-Western, while the saviors are white. . . . [T]here is also a sense in which human rights can be seen as a project for the redemption of the redeemers, in which whites who are privileged globally as a people—who have historically visited untold suffering and savage atrocities against non-whites—redeem themselves by 'defending' and 'civilizing' 'lower,' 'unfortunate,' and 'inferior' peoples.")

96. ROBINS, *supra* note 39, at 31.

97. *Id.* (quoting COSTAS DOUZINAS, THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY 154 (2000)).

98. A recent study of approaches to transitional justice in Nepal found a stark mismatch between the needs and priorities expressed by the family members of victims and the transitional justice agenda advanced by elites and justified by a narrow legalism. *Id.* at 156–60.

99. *Id.*

with its own shortcomings. Proceedings in foreign courts are removed, are inaccessible to most victims, address the consequences but not the cause of the conflict, and can do little to repair the relationship between the individual and the state. Yet, however imperfect, foreign court proceedings are for many victims the only recourse available, and thus are vital to affirming the rights and interests of victims of human rights abuses.

II.
THE LEGAL LANDSCAPE

The United States became concerned with increasing accountability for human rights violations committed by perpetrators living in the country only relatively recently. In 2002, Amnesty International issued a report revealing that as many as 1,000 alleged human rights criminals, including 150 individuals accused of torture, were living in the United States.[100] The report sparked extensive media coverage, which then drew political attention to the issue and triggered government action.[101] From tacit impunity, the U.S. government moved toward promoting greater accountability for human rights violations committed abroad by enacting legal and political reforms.[102] This section will survey the legal remedies available in U.S. courts to victims of human rights abuses committed in foreign territory. The section will describe the four types of legal actions that comprise the main components of the United States' human rights accountability regime: civil litigation, criminal prosecutions, crime victims' rights, and immigration enforcement.

Legal accountability for gross violations of international law is one of the few ways in which U.S. courts have incorporated and developed international human rights norms. As a general matter, U.S. courts are hesitant to adopt principles of international human rights law. For one, the United States has not ratified all of the major human rights treaties,[103] and the provisions of those human rights treaties that it has ratified are not considered judicially enforceable, absent attendant legislation by Congress.[104] While Article VI of

100. WILLIAM J. ACEVES, UNITED STATES OF AMERICA: A SAFE HAVEN FOR TORTURERS 23–24 (2002).

101. AMNESTY INTERNATIONAL, SHINING A LIGHT FOR 50 YEARS: ADVOCATING FOR HUMAN RIGHTS (2011), https://www.amnestyusa.org/sites/default/files/pdfs/amnesty50.pdf.

102. *No Safe Haven: Accountability for Human Rights Violators in the United States: Hearing Before Senate Subcomm. on Human Rights and the Law of the Comm. on the Judiciary*, 110th Cong. (2007) (statement of Sen. Patrick Leahy, Chairman, S. Subcomm. on Human Rights and the Law and the Comm. on the Judiciary).

103. For example, the United States has not ratified the International Covenant on Economic, Social, and Cultural Rights; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention for the Protection of all Persons from Enforced Disappearance.

104. Some examples of ratified human rights treaties that the United States does not consider as judicially enforceable are the International Covenant on Civil and Political Rights, the International

the U.S. Constitution establishes that international treaties are part of "the supreme Law of the Land,"[105] Congress routinely attaches a reservation to human rights treaties upon ratification indicating that the provisions are non-self-executing. This means that, in the absence of implementing domestic legislation, victims of a treaty breach may not seek redress in U.S. courts. In addition, federal and state courts are generally hostile to using international law as a dispositive method of statutory and constitutional interpretation.[106] Indeed, the Supreme Court has only referred to international human rights and humanitarian practice and law in a handful of cases involving individual rights.[107]

Faced with this challenging legal and political landscape, victims of human rights abuses and their advocates have devised creative strategies to enforce human rights norms in U.S. courts. Litigation under the ATS is an example of that creativity.[108] Human rights groups have also successfully advocated for legislation recognizing international crimes and for dedicating institutional resources to tracking, identifying, and prosecuting human rights abusers who are discovered inside the United States.[109] Still, gaps in accountability abound; therefore, U.S. legal remedies' impact on the lives of victims remains modest. The remainder of this section will examine the goals and limitations of each of these strategies.

A. Civil Suits

A phenomenon unique to the United States, tort actions under the ATS and the TVPA are the most prominent vehicles for bringing human rights lawsuits before U.S. courts. Ostensibly, the goal of private lawsuits is to collect monetary damages. Proponents of ATS/TVPA litigation, however, describe

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Convention on the Elimination of All Forms of Racial Discrimination, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

105. U.S. CONST. art. VI, cl. 2.

106. A vocal critic of using international and foreign law to interpret the U.S. Constitution, Supreme Court Justice Anthony Scalia has argued that "foreign law [has been used] to determine the content of American constitutional law—to be sure that we're on the right track, that we have the same moral and legal framework as the rest of the world. But we *don't* have the same moral and legal framework as the rest of the world, and never have." Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005).

107. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003); Atkins v. Virginia, 536 U.S. 304 (2002).

108. *See generally* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

109. *No Safe Haven: Law Enforcement Operations Against Foreign Human Rights Violators in the United States*: *Hearing Before the Human Rights Comm'n of the H. Comm. on Foreign Affairs*, 112th Cong. (2011) (testimony of the Center for Justice & Accountability Executive Director Pamela Merchant), *available at* http://www.cja.org/downloads/CJA%20Testimoney%20October%2013,%202011.pdf; AMNESTY INTERNATIONAL, *supra* note 101.

these tort actions as "one piece of th[e] global push for accountability."[110] They extol the non-pecuniary virtues of bringing the suits, claiming that civil litigation prevents the United States from becoming a safe haven for human rights abusers; holds human rights perpetrators accountable; provides victims with official acknowledgement of the harm they suffered; clarifies human rights norms; and creates domestic support for the promotion of human rights in the United States.[111] This section will discuss the origin and practice of ATS/TVPA litigation and the role of civil litigation in advancing victims' rights to truth, justice, and reparations.

1. The Alien Tort Statute

Enacted in 1789 as part of the first Judiciary Act, the ATS provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[112] In 1976, Judge Henry Friendly described the ATS as a "legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."[113] Without "a consensus understanding of what Congress intended," the statute's original meaning and purpose is a matter of considerable debate.[114] Despite its jurisdictional nature, the ATS was meant to have a practical effect—namely to address the inadequate vindication of the law of nations.[115]

For almost 200 years, the ATS was infrequently invoked[116] until family members of 17-year-old Joelito Filártiga used the statute to obtain relief in the wake of his brutal torture and murder by a Paraguayan police officer. When Paraguayan officials helped Filártiga's killer flee to the United States in hopes of quelling the outrage sparked by the crime, family members sought redress in a U.S. courtroom.[117] In *Filártiga v. Peña-Irala*, the Second Circuit held that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[118] This landmark decision to allow a suit by a nonnational

110. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS, at xxv–xxvi (2d ed. 2008).

111. Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 174 (2005).

112. 28 U.S.C. § 1350 (2012).

113. IIT v. Vencap Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

114. Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004).

115. *Id.* at 724–25.

116. *See* Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Claim Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 4–5 n.15 (1985) (noting that only twenty-one cases had invoked jurisdiction under ATCA before 1980).

117. STEPHENS ET AL., *supra* note 110, at 8.

118. 630 F.2d 876, 880 (2d Cir. 1980).

against a nonnational for acts committed abroad opened the door for other victims of extraterritorial human rights abuses to seek redress in U.S. courts.

Although *Filártiga* was celebrated by human rights activists,[119] the decision left many unresolved questions about the statute. What constitutes a violation of the "law of nations" has been the focus of protracted litigation, extensive legal commentary, and several court rulings, including a Supreme Court decision. In *Sosa v. Alvarez-Machain*, the Supreme Court's first decision regarding the ATS, the Court addressed the federal court's jurisdiction to recognize violations of international customary law.[120] The Court held that ATS permits federal courts to recognize a "narrow class" of human rights violations that implicate "specific, universal, and obligatory" norms of international law.[121] While the decision established a test, it did not identify which international human rights norms were actionable under ATS. Courts have allowed victims to bring suit for violations of international norms against torture,[122] disappearances,[123] extrajudicial killings,[124] crimes against humanity,[125] and war crimes,[126] among others.

2. The Torture Victim Protection Act

In 1992, Congress passed the Torture Victim Protection Act (TVPA) to give U.S. citizens as well as non-citizens standing to bring claims for torture and extrajudicial killings committed in foreign countries.[127] In contrast to the ATS, which is a jurisdictional statute, the TVPA created a substantive cause of action. The House Report accompanying the TVPA stated that it was "an explicit . . . grant by Congress of a private right of action before U.S. courts" to "consider cases likely to impact on [sic] U.S. foreign relations."[128] The goal of the statute was to provide a "clear and specific remedy" to victims and "ensure that torturers are held legally accountable for their acts."[129] Although Congress did not intend to substitute the TVPA for the ATS, which has "other important uses,"[130] courts have diverged in their opinions about how Congress intended

119. Koh, *supra* note 108, at 2366 (stating that human rights lawyers had found their *Brown v. Board of Education*).

120. 542 U.S. 692 (2004).

121. *Id*. at 719, 732 (2004) (quoting *In re* Estate of Marcos, Human Rights Litigation, 25 F.3d 1467, 1475 (9th Cir. 1994)).

122. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005).

123. Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

124. Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App'x 7 (D.C. Cir. 2013).

125. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

126. Sarei v. Rio Tinto, PLC, 671 F.3d 736, 760 (9th Cir. 2011), *vacated*, 133 S. Ct. 1995 (2013).

127. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2012)).

128. H.R. REP. NO. 102-367, at 4 (1991).

129. *Id.* at 3.

130. *Id.*

for the two statutes to interact.[131] A minority of circuits has found that the TVPA replaces torture and killing claims under the ATS,[132] while the majority of circuits have held that the TVPA and the ATS provide independent claims.[133] In practice, claims under the ATS and the TVPA are routinely filed in conjunction with each other.[134]

3. Expansion of Civil Liability

Human rights civil suits fall into three categories: claims against individuals, claims against corporate actors, and claims against U.S. state actors.[135] Regardless of the nature of the claim, courts have required that the defendant be directly or indirectly responsible for the human rights violations, have minimum contact with the United States, and be personally served with the lawsuit while in the United States.[136]

The first civil human rights cases involved defendants "hailing from defunct, pariah or politically unimportant regimes."[137] The direct progeny of *Filártiga*, these actions arose from conduct constituting the most egregious forms of human rights abuses, such as torture, disappearances, and extrajudicial killings, committed by foreign officials acting under the color of law. Plaintiffs

131. The TVPA provides guidance where the ATS does not. The TVPA includes a clear definition of extrajudicial killing and torture (§ 3), an exhaustion of remedies provision (§ 2(b)), and a ten-year statute of limitations (§ 2(c)). Some courts have imported the more detailed provisions of the TVPA to interpret the ATS. Ekaterina Apostolova, *The Relationship Between the Alien Tort Statute and the Torture Victim Protection Act*, 28 BERKELEY J. INT'L L. 640, 647–52 (2010). In general, courts have not applied the exhaustion of domestic remedies included in the TVPA to claims under the ATS. Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 343 n.44 (S.D.N.Y. 2003). Several courts have found that the ten-year statute of limitations applies in both statutes. Chavez v. Carranza, 559 F.3d 486, 492 (6th Cir. 2009); Arce v. Garcia, 400 F.3d 1340, 1346 (11th Cir. 2005); Deutsch v. Turner Corp., 324 F.3d 692, 717 (9th Cir. 2003). Some courts look to international law for a definition of torture for ATS claims instead of the more limited definition established in the TVPA. Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005) (using the definition established by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

132. Enahoro v. Abubakar, 408 F.3d 877, 885 (7th Cir. 2005).

133. *Aldana*, 416 F.3d at 1250–51; Kadic v. Karadžić, 70 F.3d 232, 241 (2d Cir. 1995).

134. Cabello v. Fernández-Larios, 402 F.3d 1148 (11th Cir. 2005).

135. Van Schaack, *supra* note 22, at 2310 (stating that "ATCA-style litigation comes in three primary forms: actions against individual perpetrators, actions against corporations doing business in countries where human rights abuses are occurring, and actions against U.S. government officials or employees involving alleged abuses in or attributable to the United States"); *see also* Ku, *supra* note 25, at 205–06 ("Unlike the 'first wave' of ATS lawsuits that generally involved suits by aliens against other aliens, or the 'second wave' of ATS lawsuits against multinational corporations alleged to be 'aiding and abetting' foreign government violations of customary international law . . . , what I call the 'third wave' of ATS lawsuits are directed at the legality of the actions of the U.S. government itself.").

136. *The Alien Tort Statute*, CTR. FOR JUSTICE & ACCOUNTABILITY, http://www.cja.org/article.php?id=435 (last visited Sept. 11, 2014). In *Daimler AG v. Bauman*, the Supreme Court recently held that a federal court may not exercise general personal jurisdiction over a foreign corporation unless that corporation's contacts with the forum state are so continuous and systematic as to render the corporation "at home" there. 134 S. Ct. 746, 749 (2014).

137. Van Schaack, *supra* note 22, at 2311.

won multi-million dollar judgments against members of the Marcos family for executions, torture, and disappearances committed in the Philippines;[138] a Serbian soldier for acts of genocide and crimes against humanity;[139] Salvadoran generals for torture;[140] and a former member of the Haitian Military's High Command for the arbitrary detention, torture, and summary executions.[141] Defendants in the suits have included high-ranking foreign officials not entitled to diplomatic immunity under the Foreign Sovereign Immunities Act.[142]

In the 1990s, the Second Circuit's decision in *Kadic v. Karadžić* expanded the scope of civil human rights litigation by upholding for the first time a civil action against a non-state actor.[143] Radovan Karadžić, a Bosnian Serb politician and self-proclaimed president of the Republic of Srpska, argued that as a private individual he could not have violated the law of nations.[144] The court rejected the defendant's argument, holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."[145] The Second Circuit concluded that genocide by private actors violates international law.[146]

The decision laid the foundation for a second category of cases involving corporate entities. After *Kadic v. Karadžić*, an estimated 120 suits have been filed identifying a corporate defendant operating in a variety of industries—including extractive, financial services, food and beverage, transportation, and manufacturing.[147] These suits have advanced two theories of corporate liability for breaches of international law: (1) corporate responsibility for violations of international law that do not require state action, such as genocide, war crimes, crimes against humanity, slavery, and forced labor;[148] and (2) corporate

138. Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

139. Mehinovic v. Vuckovic, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

140. Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006).

141. Jean v. Dorélien, 431 F.3d 776 (11th Cir. 2005).

142. Samantar v. Yousuf, 560 U.S. 305, 324–26 (2010) (ruling that high-ranking officials might benefit from some form of "immunity under the common law").

143. 70 F.3d 232, 241–42 (2d Cir. 1995) (holding that ATS grants jurisdiction over claims against non-state actors who commit international law violations that do not require state action, such as genocide and war crimes, or act in concert with state actors).

144. *Id.* at 239.

145. *Id.*

146. *Id.* at 241–42 (referring to international legal sources the Court reasoned that "the proscription of genocide has applied equally to state and non-state actors").

147. *See* Brief for Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Respondents at 5–6, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013) (No. 10-1491), 2012 WL 392544. One article estimates 155 suits have been filed against corporate actors as of 2011. Dimmer & Lamoree, *supra* note 25, at 461 (citing Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, AM. LAW. (Oct. 12, 2010), http://www.americanlawyer.com/id=1202472914956/The-Global-Lawyer:-The-Life-and-Death-of-the-Corporate-Alien-Tort). Twenty-two percent were against companies in the extractive industries, 15 percent against financial institutions, and 15 percent against food and beverage industries. *Id*.

148. Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (alleging direct corporate liability for performing medical studies on children without consent).

responsibility for conspiring with or aiding and abetting foreign governments in the violation of international human rights law.[149] Approximately twenty "corporate alien tort" cases led to protracted litigation; some were settled, and only one has reached a favorable judgment by a jury.[150]

The United States' "war on terror" and post-9/11 security measures gave rise to a third category of claims against the U.S. government and officials. These suits questioned the legality and confinement conditions of detainees in Cuba, Afghanistan, and Iraq,[151] and the extraordinary rendition of terrorism suspects to third countries.[152] Defendants in these suits included prison guards, agents of the Federal Bureau of Investigation (FBI), other high-ranking government officials, and government contractors. The suits faced a number of procedural and evidentiary obstacles—such as sovereign immunity, state secrets, and political question doctrine—and most have been dismissed during preliminary pleadings.[153] Referencing the near impossibility of successful causes of action against U.S. government defendants, one textbook on the subject cautions that "[g]iven the difficulties, plaintiffs may prefer to proceed instead under the Constitution or U.S. civil rights laws."[154]

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149. Sarei v. Rio Tinto, PLC, 550 F.3d 822 (9th Cir. 2008) (corporation accused of aiding and abetting war crimes committed by military in Papua New Guinea).

150. Brief for Petitioners at 57 n.55, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 WL 6396550.

> In fact, there have been only a handful of settlements in corporate ATS cases in the last two decades. Defendants have prevailed in two trials. *See Bowoto v. Chevron Corp*., 621 F.3d 1116 (9th Cir. 2011); *Romero v. Drummond Co., Inc*., 552 F.3d 1303, 1315 (11th Cir. 2008). Plaintiffs have prevailed in one trial. Judgment, *Chowdhury v. WorldTel Bangladesh Holding, Ltd*., No. Civ-08., 1659 (BMC), (E.D.N.Y. Aug. 4, 2009) ($1.5 million torture verdict against defendant holding company); *see also Licea v. Curacao Drydock Co*., 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (judgment against a corporation involved in labor trafficking). Many cases have been dismissed and a relatively small number of cases are pending.

Id.; *see* Stephens, *supra* note 15, at 1518–19, 1522 ("Since the few [ATS] cases [with corporate defendants] that survived pre-trial motions settled out of court, none of the plaintiffs actually proved their factual allegations at trial.").

151. *See e.g.*, Rasul v. Bush, 542 U.S. 466, 480 (2004) (filed by Guantanamo Bay detainees questioning the conditions and legality of confinement); Saleh v. Titan Corp., 580 F.3d 1, 2 (D.C. Cir. 2009) (filed by detainees alleging torture by U.S. military contractors in Iraq at Abu Ghraib); *In re* Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85 (D.D.C. 2007) (filed by detainees in Afghanistan and Iraq alleging torture by United States military personnel); *see also* Padilla v. Yoo, 678 F.3d 748, 750–51 (9th Cir. 2012) (filed by an American citizen detained in a military brig in South Carolina alleging illegal detention and mistreatment).

152. Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009) (dual citizen of Syria and Canada alleging rendition to Syria where he was tortured); El-Masri v. United States, 479 F.3d 296, 300 (4th Cir. 2007) (describing the detention of a German citizen by Macedonian officials and transfer to CIA custody).

153. Stephens, *supra* note 15, at 1530.

154. STEPHENS ET AL., *supra* note 110, at 281.

4. The Kiobel *Shift*

On April 17, 2013, the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.* overturned thirty years of lower court precedent to hold that the ATS does not provide U.S. courts with jurisdiction over extraterritorial conduct.[155] The Court originally granted certiorari in *Kiobel* and a companion case, *Mohamad v. Palestinian Authority*,[156] to determine whether corporations could be sued under the ATS and the TVPA, respectively.[157] Later, however, the Court expanded the scope of its inquiry to consider when courts could recognize a cause of action under the ATS for conduct that occurred within the territory of a foreign sovereign.[158] Foreshadowing the ruling, Justice Samuel A. Alito Jr. asked at oral arguments, "[W]hat business does a case like that have in the courts of the United States? . . . There's no connection to the United States whatsoever."[159]

In *Kiobel*, the Court eliminated the global cause of action pursued through the ATS. The plaintiffs, twelve Nigerians living in the United States at the time of the decision, alleged that Dutch and British oil companies had violently oppressed resistance to oil exploration in the Nigerian delta between 1992 and 1995. Writing for the majority, Chief Justice John G. Roberts, Jr. held that the ATS could not be the basis for a lawsuit for a case in which all relevant conduct occurred in a foreign country due to a "presumption that United States law governs domestically but does not rule the world."[160] The Court reasoned that the presumption against extraterritoriality applied absent a clear statement that Congress "intended causes of action recognized under [the legislation] to have extraterritorial reach."[161] The Court also stressed that the "danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS."[162] The concurring opinion by Justice Stephen G. Breyer left the door open to claims involving conduct that occurred inside the United States, a defendant that is a U.S. national, or conduct that impacts the U.S. national interest.[163] The majority opinion, however, limited the ATS to

155. 133 S. Ct. 1659, 1663–65, 1669 (2013) ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.") (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 264–73 (2010)).

156. Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

157. SUPREME COURT, 10-1491 KIOBEL V. ROYAL DUTCH PETROLEUM, *available at* http://www.supremecourt.gov/qp/10-01491qp.pdf (last visited Sept. 12, 2014); SUPREME COURT, 11-88 MOHAMAD V. RAJOUB, *available at* http://www.supremecourt.gov/qp/11-00088qp.pdf (last visited Sept. 12, 2014).

158. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

159. Transcript of Oral Argument at 11–12, Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 1738 (2012) (No. 10-1491).

160. *Kiobel*, 133 S. Ct. at 1664 (quoting Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007)).

161. *Id.* at 1665.

162. *Id*. at 1664.

163. *Id*. at 1671 (Breyer, J., concurring).

claims that "touch and concern" the United States "with sufficient force to displace the presumption against extraterritorial[ity]."[164]

As Justice Kennedy noted, the *Kiobel* decision does not resolve "a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."[165] It remains unclear who can be sued under the ATS for violations of the law of nations. For example, *Kiobel* did not resolve whether suits against U.S. corporate defendants for conduct that occurred in part in the United States but led to injury in a foreign territory may proceed.[166] In a subsequent case, *Daimler AG v. Bauman*, involving a claim by Argentine plaintiffs against a German corporation for human rights violations in Argentina, the Supreme Court again concluded that the ATS cannot be the basis for a lawsuit in which all the relevant conduct occurred outside the United States.[167] But once again, the Court did not reach the question of whether U.S. courts could recognize claims against corporations for gross violations of international law under the ATS.[168]

In *Mohamad*, the Court unanimously affirmed the lower court's holding that the TVPA allows only lawsuits against natural persons.[169] As discussed, the TVPA creates "clear and specific remedy" in U.S. courts for non-citizens to bring claims for torture and extrajudicial killings committed in foreign countries.[170] The Court noted that the text of the statute imposes liability on persons and looked to "the ordinary meaning of the word" to hold that "the Act authorizes suit against natural persons alone."[171] In practice, the decision in *Mohamad* bars TVPA lawsuits against corporations and organizations. Thus, only claims against foreign individuals for torture and death are able to proceed under the TVPA.

5. Civil Suits and Victims' Human Rights

Putting aside the uncertainty regarding its future, civil human rights litigation has provided some victims with different forms of justice. "[T]he most common principle in all legal systems is that a wrongdoer has an

164. *Id*. at 1669.

165. *Id*. at 1669 (Kennedy, J., concurring).

166. Du Daobin v. Cisco Systems, Inc., Civ. No. PJM 11-1538, 2014 WL 769095, at *9 (D. Md. Feb. 24, 2014) (stating in dicta that an ATS claim may proceed against U.S. corporation for a product developed in the United States that is primarily used to violate international law).

167. 134 S. Ct. 746 (2014).

168. *See* Mwani v. Laden, 947 F. Supp. 2d 1 (D.D.C. 2013) (allowing case involving bombing of U.S. Embassy in Kenya to proceed on the merits); Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 310 (D. Mass. 2013) (allowing ATS claim "where Defendant is a citizen of the United States and where his offensive conduct is alleged to have occurred, in substantial part, within this country").

169. Mohamad v. Palestinian Auth., 132 S. Ct. 1702 (2012).

170. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2012)).

171. *Mohamad*, 132 S. Ct. at 1706.

obligation to make good the injury caused."[172] Tort law aspires to right wrongs primarily through the payment of compensatory and punitive damages. Economic compensation is also a traditional form of remedy in international law.[173] International bodies have ordered monetary awards for pecuniary damages; non-pecuniary damages, such as pain and suffering; and legal costs and expenses resulting from human rights abuses.[174] In contrast to tort actions in the United States,[175] however, international human rights treaties have been interpreted to exclude punitive damages even in cases of gross violations.[176]

In the three decades since *Filártiga v. Peña-Iral*, fewer than two-dozen civil cases involving fewer than twenty-five perpetrators have been successful.[177] These favorable judgments ordered defendants to pay millions in material, moral, and punitive damages.[178] A small group of cases against

172. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 60 (2d ed. 2006).

173. JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 229 (2d ed. 2013).

174. Both the European and Inter-American Court of Human Rights have discretion to assess and award what constitutes "fair and just compensation." European Convention, *supra* note 26, art 50; American Convention, *supra* note 26, art. 63; *see also* Scozzari & Giunta v. Italy, App. Nos. 39221/98, 41963/98, 35 Eur. H.R. Rep. 12, ¶ 250 (2000) (awarding non-pecuniary damages on an equitable basis and stating that the purpose of monetary compensation is to "provide reparation solely for damage suffered . . . [as] a consequence of the violation that cannot otherwise be remedied" at the national level).

175. In *Filártiga v. Peña-Irala*, for example, the court awarded punitive damages of $5 million to each plaintiff "to reflect adherence to the world community's proscription of torture and to attempt to deter its practice." 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

176. *See* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 7, ¶ 38 (July 21, 1989) (holding that use of punitive damages to deter or to set an example is not currently applicable to international law).

177. The majority of ATS actions have been dismissed for failing to state a violation of international law cognizable under the ATS. STEPHENS ET AL., *supra* note 110, at 12. Successful cases include *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (Marcos II); *Todd v. Panjaitan*, Civ.A. No. 92-12255-PBS, 1994 WL 827111, at *1 (D. Mass. Oct. 26, 1994); *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996); *Mushikiwabo v. Barayagwiza*, No. 94 CIV. 3627 (JSM), 1996 WL 164496, at *1 (S.D.N.Y. Apr. 9, 1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004); Doe I v. Qi, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); *Arce v. Garcia*, 434 F.3d 1254 (11th Cir. 2006); *Reyes* v. Lopez *Grijalba*, No. 02-22046-CIV (S.D. Fla. Mar. 31, 2006); *Doe v. Constant*, 04 Civ. 10108 (S.D.N.Y. Oct. 24, 2006); *Jean v. Dorélien*, No. 03-20161-CIV-KING/GARBER, slip op. (S.D. Fla. Aug. 16, 2007); *Lizarbe v. Hurtado,* No. 07-21783-CIV-JORDAN (S.D. Fla. Mar. 4, 2008); *Chavez v. Carranza,* 559 F.3d 486 (6th Cir. 2009); *Samantar v. Yousuf*, 560 U.S. 305, 324–26 (2010); *M.C. v. Bianchi* (consolidated cases), 782 F. Supp. 2d 127 (E.D. Pa. 2011).

178. *See e.g.*, Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006) (jury ordering more than $54 million in damages); Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (jury ordering damage award of $745 million); Paul v. Avril, 901 F. Supp. 330 (S.D. Fla. 1994) (court ordering $41 million in

corporate defendants also have settled for large dollar amounts.[179] For example, plaintiffs in Holocaust restitution cases, the most successful ATS claims in monetary terms, have settled for several billion dollars.[180]

Taking into account the pervasiveness of human rights violations, the large pool of human rights abusers living the United States, the costs associated with civil litigation, and the number of lawsuits filed, there have been few successful cases. Even when a victim prevails against a perpetrator, most outcomes are default judgments against individual defendants for which the monetary damages have been impossible to recover.[181] Only two TVPA plaintiffs have successfully recovered a portion of the damages ordered by a judgment against an individual.[182] In one of the cases, partial recovery was possible only because the defendant won the state lottery.[183]

If recovery of monetary awards is impossible, how does civil litigation further the interests of victims? Are cases merely symbolic? One scholar has argued that "[t]hose who consider ATS victories insignificant because they are 'merely' symbolic miss the importance of symbolism."[184] In support, she points

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compensatory and punitive damages to six Haitian victims of torture and false imprisonment); In re Estate of Marcos, Human Rights Litig., 978 F.2d 493 (9th Cir. 1992) (ordering Defendant to pay $766 million in compensatory damages, and $1.2 billion in exemplary damages).

179. Press Release, Ctr. for Constitutional Rights, Statement of the Plaintiffs in Wiwa v. Royal Dutch/Shell, Wiwa v. Anderson, and Wiwa v. SPDC (June 8, 2009), *available at* http://ccrjustice.org/files/Wiwa_v_Shell_Statement_of_Plaintiffs-1.pdf (settling claims for $15.5 million). Many of the settlements are for undisclosed amounts. *See e.g.*, Al-Quraishi et al v. Nakhla et al., CTR. FOR CONST. RTS., http://ccrjustice.org/Al-Quraishi-v-Nakhla-L3 (settling for undisclosed amount claims against military contractor for detainee treatment at Abu Ghraib) (last visited Sept. 11, 2014); Final Settlement Reached in Doe v. Unocal, EARTHRIGHTS INT'L (Mar. 21, 2005), http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal.

180. MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 328–34 (2003) (discussing the success of Holocaust restitution cases in which plaintiffs settled with banks for several billions of dollars).

181. The $10.4 million judgment in *Filártiga v. Peña-Irala* has never been collected. Peter Weiss, *On the 35th Anniversary of His Death, Filártiga Lives!*, THE GUARDIAN (Apr. 4, 2011, 2:30 PM), http://www.theguardian.com/commentisfree/cifamerica/2011/apr/04/us-constitution-and-civil-liberties-us-supreme-court; *see also* Bradley, *supra* note 24, at 459 ("[E]ven though US courts have issued a number of large damage awards in these cases, essentially none of these awards has been collected."); Dimmer & Lamoree, *supra* note 25, at 460 ("Although the cases led to hefty damage awards regularly in excess of ten million, and sometimes even 100 million, dollars, they presented little meaningful prospect of recovery.") (footnote omitted); Ku, *supra* note 25, at 208 ("[D]efendants often failed to defend these claims and courts often entered default judgments. Such judgments were rarely collected . . . ."); Van Schaack, *supra* note 22, at 2313 (stating "most of the cases' damage awards were issued by default and/or are unenforceable").

182. Mohamad v. Palestinian Auth., 132 S. Ct. 1702, 1710 (2012).

183. Plaintiffs have recovered almost $580,000 of a $4.3 million verdict because the Defendant won the state lottery. *Jean v. Dorelien*, CTR. FOR JUST. & ACCOUNTABILITY, http://www.cja.org/article.php?list=type&type=78 (last visited Sept. 11, 2014). In 2006, three Salvadoran torture survivors recovered $300,000 of their $54.6 million verdict against General Vides Casanova, the former commander of El Salvador's National Guard who oversaw their torture sessions. *Romagoza Arce v. Garcia and Vides Casanova*, CTR. FOR JUST. & ACCOUNTABILITY, http://cja.org/article.php?list=type&type=82 (last visited Sept. 11, 2014).

184. Stephens, *supra* note 15, at 1542.

to the experiences of individual plaintiffs who gained empowerment and satisfaction from the "symbolism" of filing a civil case against a human rights abuser.[185] Financial compensation is not the only interest of victims furthered by these tort actions. TVPA/ATS suits may also advance victims' right to truth and constitute a measure of satisfaction.

Private lawsuits create opportunities for plaintiffs to seek and ascertain the truth of what happened, why it happened, and who was involved through the process of discovery. The informal discovery undertaken by human rights plaintiffs prior to filing the complaint may include investigations by private investigators, the collection of documentary evidence, interviews with human rights experts and witnesses, and Freedom of Information Act (FOIA) requests to obtain declassified U.S. government documents.[186] For those cases in which a default judgment is not entered and the defendant remains in the country, court-supervised discovery may be available to plaintiffs if discoverable material exists.[187] Court-supervised or formal discovery is undertaken through document requests, interrogatories, depositions, and requests for admission.[188] Formal discovery may lead to document production, the identification of additional witnesses, and the subpoena of documentation from a third party, such as the U.S government or foreign governments.[189] Truth-telling upholds the victims' dignity and equal rights through an acknowledgement of the facts and perhaps the discovery of new information.[190] During the civil process, victims exercise greater control over the truth-telling function than in a criminal case. Plaintiffs have agency in determining the timing of the filing and the direction of the case.

Civil cases culminate in a finding of liability, which in most successful ATS cases is determined by a judge after a default judgment.[191] Although the scope of the decision varies, some include an extensive discussion of facts related to the case, including details related to political and social context, the violations, domestic investigations, and the impact on victims and the community.[192] In finding liability, a civil verdict in favor of a victim of human

185. *Id*. Many victims may also feel inadequately compensated by money and ambivalent about awards paid by perpetrators. *See* Pablo de Greiff, *Justice and Reparations*, *in* THE HANDBOOK OF REPARATIONS 451, 461 (Pablo de Greiff ed., 2006) ("reparations in the absence of truth telling can be seen by beneficiaries as the attempt, on the part of the state, to buy the silence or acquiescence of victims and their families, turning the benefits into 'blood money'").

186. STEPHENS ET AL., *supra* note 110, at 474–76.

187. *Id*. at 473.

188. *Id*. at 473–502.

189. *Id*.

190. Pablo de Greiff, *supra* note 185, at 460–66.

191. Van Schaack, *supra* note 22, at 2313 (stating "most of the [ATS] cases' damage awards were issued by default").

192. *Compare* Doe v. Rafael Saravia, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (exploring factual holdings related to the assassination of Archbishop Oscar Romero in El Salvador in almost forty pages), *with* Jean v. Dorélien, No. 03-20161-CIV-KING/GARBER, slip op. (S.D. Fla. Aug. 16,

rights abuses provides an official accounting, an acknowledgment of harm suffered by the victim, and a repudiation of human rights violations. This is a form of reparation recognized in international human rights law as a measure of satisfaction.[193] Civil litigation, however, does not fully satisfy a victims' right to reparations, for it does not mete out a punishment in proportion to harm caused by gross violations.

A handful of U.S. civil cases have triggered government investigations regarding the immigration status of defendants and resulted in criminal prosecutions or deportation proceedings.[194] For example, General Vides Casanova had received the Legion of Merit award from former U.S. President Ronald Reagan, become a permanent resident of the United States, and settled in Florida when the Salvadoran torture survivors initiated civil litigation against him.[195] The plaintiffs also pressed the Department of Justice (DOJ) and Department of Homeland Security (DHS) to pursue criminal prosecution and deportation.[196] In February 2012, an immigration court found that General Casanova had assisted in the torture and execution of civilians and ruled that he could be deported.[197] In 2013, *The New York Times* obtained a copy of the deportation decision by an immigration judge through a FOIA request.[198] The 157-page decision found that General Casanova "assisted or otherwise participated" in the 1980 rape and murder of four American churchwomen.[199]

2007) (summarizing verdict against a former member of the Haitian Military's High Command for egregious human rights abuses).

193. PASQUALUCCI, *supra* note 173, at 204 ("This form of reparations acknowledges the dignity of the victims, rectifies the misinformation that may have been disseminated about them or about the events in question, and attempts to provide some consolation to their family and friends.").

194. According to Sandra Coliver, the former director of the Center for Justice and Accountability, "[o]f the eighteen individuals who have been successfully sued using the ATCA, one was deported based on information uncovered by the plaintiffs; one was denaturalized, detained, and placed in deportation proceedings; one was extradited; one died; and ten left the country never to return (as far as we know), including five who had moved to the United States to settle. Only four of the eighteen remain in the United States and, of those, all are subject to deportation investigations based in large part on evidence uncovered during the course of the ATCA cases." Sandra Coliver, *Bringing Human Rights Abusers to Justice in U.S. Courts: Carrying Forward the Legacy of the Nuremberg Trials*, 27 CARDOZO L. REV. 1689, 1694–95 (2006) (footnotes omitted).

195. *A Landmark Decision for War Crime Accountability*, COUNCIL ON HEMISPHERIC AFF. (Mar. 9, 2012), http://www.coha.org/a-landmark-decision-for-war-crime-accountability; Julia Preston, *Salvadoran May Face Deportation for Murders*, N.Y. TIMES, Feb. 23, 2012, http://www.nytimes.com/2012/02/24/us/salvadoran-may-be-deported-from-us-for-80-murders-of-americans.html.

196. Carolyn Patty Blum, *Removal in Store for Salvadoran General*, INTLAWGRRLS (Feb. 28, 2012, 7:00 AM), http://www.intlawgrrls.com/2012/02/removal-in-store-for-salvadoran-general.html.

197. Preston, *supra* note 195.

198. Julia Preston & Randal C. Archibold, *U.S. Justice Department Releases Judge's Ruling on Ex-Salvadoran General*, N.Y. TIMES, Apr. 11, 2013, http://www.nytimes.com/2013/04/12/world/usjustice-dept-releases-judges-ruling-on-salvadoran-general.html.

199. *Id*. A copy of the decision is available on *The New York Times* website at http://www.nytimes.com/interactive/2013/04/12/world/12salvador-docviewer.html?ref=world&_r=0.

The value of civil cases as a vehicle to further victims' rights to truth and reparations is not insignificant. There are relatively few examples of perpetrators of gross violations being held to account in any form. On the other hand, what can be realistically achieved for victims through a civil suit alone may no longer justify the resources they require. In the year since the *Kiobel* decision, no civil suits have been filed under the ATS or TVPA.[200]

B. Criminal Prosecutions

Domestic criminalization of internationally recognized crimes is part of a government initiative to establish a "no safe haven" policy in the United States that involves the enforcement of criminal and immigration statutes.[201] The goal is to deny human rights abusers safe haven by reforming and modernizing U.S. human rights law, providing enforcement agencies with the authority and resources to bring perpetrators to justice, and vindicating the rights of victims.[202]

1. A Brief Overview

In recent years, the United States has made progress in the criminalization of the most egregious human rights abuses. Genocide,[203] war crimes,[204] and torture[205] are now prosecutable under federal law. U.S. law also criminalizes hostage-taking,[206] recruitment of child soldiers,[207] slavery,[208] and trafficking in persons.[209] Common crimes, such as murder, kidnapping, sexual abuse, and rape, are also prohibited by U.S. law.

Institutional reforms have focused on the agencies tasked with identifying, tracking, prosecuting, or removing human rights perpetrators. The Justice Department's Office of Special Investigations (OSI), also referred to as the

200. JOHN BELLINGER, III & REEVES ANDERSON, INST. FOR LEGAL REFORM, *AS* KIOBEL *TURNS ONE, ITS EFFECT REMAINS UNCLEAR* (2014), *available at* http://www.instituteforlegalreform.com/resource/as-kiobel-turns-one-its-effect-remains-unclear.

201. *No Safe Haven: Accountability for Human Rights Violators, Part II: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2012) [hereinafter *Senate Hearings No Safe Haven II*] (statement of Lanny A Breuer, Assistant Att'y Gen., Criminal Division, Dep't of Justice).

202. *Id*. at 1 (statement of Sen. Richard Durbin, Chairman, S. Comm. on Human Rights and the Law).

203. 18 U.S.C. § 1091 (2012).

204. 18 U.S.C. § 2441 (2012).

205. 18 U.S.C. § 2340A (2012).

206. 18 U.S.C. § 1203 (2012).

207. In October 2008, Congress enacted the Child Soldiers Accountability Act, which amends the Immigration and Nationality Act to declare any alien who has engaged in the recruitment or use of child soldiers removable. The Act also criminalizes the recruitment of children under the age of fifteen and allows the United States to prosecute individuals in the United States who have recruited children, even if the recruitment took place in other countries. Child Soldiers Accountability Act of 2008, 18 U.S.C. § 2442 (2012).

208. 18 U.S.C. ch. 77 (2012).

209. *Id*.

"Nazi-hunting organization," was established in 1979 to identify and prosecute persons living in the United States who assisted the Nazi regime in its persecution of the civilian population.[210] The office led efforts to denaturalize, remove, or prevent the entry of approximately 145 individuals.[211] It garnered the reputation as the "most successful program of its kind in the world . . . [and] a model of proactive investigation and prosecution of Holocaust perpetrators."[212] In 2009, the OSI merged with another unit within the DOJ's criminal division to create the Human Rights and Special Prosecutions Section (HRSP).[213] The expanded mission of the HRSP included prosecuting human rights violators under federal criminal statutes and pursuing immigration proceedings in coordination with the FBI, DHS, and the Department of State (DOS).[214] Despite institutional reforms, there is a notable absence of any concerted effort by U.S. agencies to bring criminal prosecutions for human rights violations. Investigations, prosecutions, and immigration enforcement seem to be carried out on an ad hoc basis.

There has been only one federal prosecution for a gross violation of international law: in 1998, Charles McArthur Emmanuel, paramilitary leader and son of former Liberian dictator Charles Taylor, was convicted and sentenced to ninety-seven years imprisonment for his role in the torture of Liberian civilians.[215] Furthermore, the United States has never undertaken a prosecution in federal courts for genocide or war crimes. However, the HRSP has successfully prosecuted war criminals and a genocidaire under immigration fraud statutes.[216]

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210. JUDY FEIGIN, THE OFFICE OF SPECIAL INVESTIGATIONS: STRIVING FOR ACCOUNTABILITY IN THE AFTERMATH OF THE HOLOCAUST, at iv (2006), *available at* http://www.scribd.com/doc/42944549/The-Office-of-Special-Invesigations-Striving-for-Accountability-in-the-Aftermath-of-the-Holocaust.

211. *Id.* at v.

212. EFRAIM ZUROFF, SIMON WIESENTHAL CTR., WORLDWIDE INVESTIGATION AND PROSECUTION OF NAZI WAR CRIMINALS (2010), *available at* http://www.wiesenthal.com/atf/cf/%7B54d385e6-f1b9-4e9f-8e94-890c3e6dd277%7D/ASR-2010.PDF.

213. *Assistant Attorney General Lanny A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division*, U.S. DEP'T OF JUSTICE (Mar. 30, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-347.html.

214. *See generally Human Rights and Special Prosecutions Section*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/hrsp/about (last visited Sept. 11, 2014).

215. Press Release, U.S. Dep't of Justice, Roy Belfast Jr., A/K/A Chuckie Taylor, Sentenced on Torture Charges (Jan. 9, 2009), *available at* http://www.justice.gov/opa/pr/2009/January/09-crm-021.html.

216. Gilberto Jordan, a member of Guatemala's Special Forces, was convicted of unlawful procurement of U.S. citizenship in September 2010 and sentenced to ten years. Press Release, U.S. Dep't of Justice, Former Guatemalan Special Forces Solider Sentenced to 10 Years in Prison for Making False Statements on Naturalization Forms Regarding 1982 Massacre of Guatemalan Villagers (Sept. 16, 2010), *available at* http://www.justice.gov/opa/pr/2010/September/10-crm-1042.html. Zeljko Boskovic, a Bosnian military police officer, was convicted of visa fraud in August 2010 and sentenced to three years' probation. Press Release, Bosnian Human Rights Violator Convicted of Immigration Fraud, U.S. Immigr. & Customs Enforcement (Aug. 13, 2010), *available at* http://www.ice.gov/news/releases/1008/100811portland.htm. Jean-Marie Vianney Mudahinyuka, a

There are several barriers to criminal prosecutions that may explain the lack of government action. First, criminal statutes impose significant jurisdictional limits.[217] In addition, federal prosecutors lack political will to undertake human rights prosecutions.[218] Finally, prosecuting crimes that occurred in foreign countries is a resource–intensive and time-consuming endeavor, involving significant evidentiary and logistical challenges.

With the exception of hostage-taking,[219] none of the aforementioned criminal statutes provides federal courts with the jurisdiction to consider offenses irrespective of the nationality of the offender or victim or the place where the conduct occurred. For example, under the War Crimes Act, an offense is prosecutable only if the perpetrator or the victim is a U.S. citizen or a member of the U.S. armed forces.[220] Originally, the Genocide Accountability Act limited prosecutions to conduct committed by U.S. citizens or on U.S. soil,[221] but later it was expanded to apply to any person present in the United States, regardless of where the offense was committed.[222] Similarly, recruitment of child soldiers,[223] slavery, and trafficking of persons[224] require that the accused be present in the United States. Under most circumstances, common criminal prosecutions are not authorized for offenses committed

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Rwandan genocidaire, was convicted of immigration fraud in April 2005 and sentenced to fifty-one months in prison. Press Release, U.S. Immigr. & Customs Enforcement, ICE Deports Rwandan Wanted for Committing War Crimes During 1994 Genocide: Subject Turned Over to Rwandan Authorities on International Arrest Warrant (Jan. 29, 2011), *available at* http://www.ice.gov/news/releases/1101/110129chicago.htm.

217. *Senate Hearings No Safe Haven II*, *supra* note 201 (statement of Arthur M. Cummings, Exec. Assistant Dir., Federal Bureau of Investigations) ("Human rights offenses under Title 18 of the U.S. code generally require the human rights violator to be a U.S. national, to have committed the offense against a U.S. national, or to be present in the U.S. The identification of targets that satisfy this nexus is challenging because the majority of these abuses occur in foreign countries where access to witnesses and evidence is often limited."). David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 Nw. J. INT'L HUM. RTS. 30, 33 (2009) ("U.S. citizens and U.S. government employees and contractors who may commit certain atrocity crimes not covered in federal law or common crimes for which there is no extraterritorial jurisdiction may entirely escape any prosecution in the United States.").

218. Coliver, Green & Hoffman, *supra* note 111, at 177 n.21 ("[T]he U.S. government, including the Department of State, lacks the political will to prosecute many abusers . . . .").

219. 18 U.S.C. § 1203(B) (2012).

220. 18 U.S.C. § 2441 (2012).

221. For example, in 2007, Congress enacted the Genocide Accountability Act, which allows for the prosecution of anyone who commits genocide anywhere in the world, amending a previous law that limited prosecutions to U.S. nationals who commit genocide or foreigners who commit genocide in the United States. The gap in this law frustrated the prosecution of Elizaphan Ntakirutimana who was indicted by the International Criminal Tribunal for Rwanda and arrested in Texas in 1996. *See* Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999), *aff'g In re* Ntakirutimana, No. CIV. A. L-98-43, 1998 WL 655708 (S.D. Tex. Aug. 6, 1998); *In re* Surrender of Ntakirutimana, 988 F. Supp. 1038 (S.D. Tex. 1997).

222. 18 U.S.C. § 1091(e)(2) (2012) ("There is jurisdiction over the offenses described . . . regardless of where the offense is committed" if the perpetrator is a U.S. national or present in the United States.).

223. 18 U.S.C. § 2442(c)(3) (2012).

224. 18 U.S.C. § 1596(a) (2012).

outside the United States.[225] In contrast, federal law limits federal torture prosecutions to extraterritorial cases.[226]

Moreover, statutes of limitations require swift action by prosecutors and bar prosecution for past atrocities. For most federal offenses, U.S. federal prosecutors have five years to deliver an indictment. The Child Soldiers Accountability Act imposes a statute of limitations requiring an indictment "not later than 10 years after the commission of the offense."[227] In keeping with international standards, the amended version of the Genocide Accountability Act does not contain a statute of limitations.[228]

Although jurisdictional limits or statutes of limitations bar some prosecutions, the prevailing reason for inaction is a lack of political will.[229] There currently is a large pool of unindicted, potential criminal defendants in the United States. ICE is investigating 1,900 suspected human rights violators from ninety-six countries.[230] Many of these perpetrators live or work in the United States alongside survivors of torture. For each perpetrator identified, there are many more that reside in the United States in anonymity or will visit the United States unnoticed. Some human rights abusers are in U.S. custody but face prosecution for common crimes, which are not internationally recognized human rights offenses.[231] David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, commented that "U.S. Attorneys, in even the best of jurisdictional circumstances, appear not to have pursued the types of investigations and possible prosecutions one might expect if there were an aggressive commitment to bringing perpetrators of atrocity crimes to justice and if the law provided a clear basis for such prosecutions."[232]

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225. In contrast, terrorism, narcotics trafficking, and hostage-taking criminal laws incorporate an expansive use of extraterritorial jurisdiction. Scheffer, *supra* note 217, at 17.

226. 18 U.S.C. § 2340A (2012).

227. 18 U.S.C. § 3298 (2012).

228. 18 U.S.C. § 1091(f) (2012).

229. Coliver, Green & Hoffman, *supra* note 111, at 177 n.21 ("[T]he U.S. government, including the Department of State, lacks the political will to prosecute many abusers . . . .").

230. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *supra* note 35.

231. In May 2008, for example, fifteen paramilitary leaders were extradited from Colombia to the United States to face drug charges although they are implicated in terrorizing and killing tens of thousands of innocent Colombian civilians. UNIV. OF CAL., BERKELEY, SCH. OF LAW INT'L HUMAN RTS. LAW CLINIC, TRUTH BEHIND BARS: COLOMBIAN PARAMILITARY LEADERS IN U.S. CUSTODY 2 (2010). For example, Rodrigo Tovar-Pupo was among the extradited paramilitary fighters. *Id.* Colombian government investigators have linked troops commanded by Tovar-Pupo to 768 forced disappearances and 200 massacres. *Id.* While still in Colombia, Tovar-Pupo confessed to his involvement in over 600 crimes, including forcibly disappearing seven government investigators and slaughtering forty fishermen. *Id.* A U.S. court sealed and removed the suspected war criminal's case records from the public view, making it impossible to ascertain whether he has reached a plea deal with federal prosecutors or has been sentenced. *Id.* at 15.

232. Scheffer, *supra* note 217, at 32–33.

2. Criminal Prosecutions and Victims' Human Rights

Traditionally, the primary purpose of criminal prosecutions in the United States is to determine culpability and an appropriate punishment.[233] Crime is a public wrong that injures the community as a whole; crime is therefore a matter between the state and the offender. Under this model, victims' interests and needs are irrelevant. The private wrong suffered by the victim is subsumed by the public interest, and while individual victims may derive satisfaction from the punishment, victim satisfaction is not the purpose of punishment.[234] The only contribution victims have to make to the determination of guilt or appropriate punishment is as witnesses.

In the international law context, criminal justice is held out as a superior form of accountability and the preferred option of survivors and victims.[235] International law describes domestic criminal prosecutions as the primary vehicles by which a state can establish the truth and secure justice.[236] It is a general international law principle that states must "ensur[e] that those responsible for serious crimes under international law are prosecuted, tried and duly punished."[237] Human rights bodies and experts have recognized that a state's obligation to investigate, prosecute, and punish perpetrators of gross human rights violations co-exists with the victim's right to justice.[238] Criminal prosecutions have the potential to advance each dimension of victims' rights: truth, justice, and reparations.

The right to justice in international law is based on several rationales. International standards describe criminal prosecution and punishment of human rights perpetrators as a necessary and indispensable method of combating impunity. Impunity is "the total lack of investigation, prosecution, capture, trial

233. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843 (2002).

234. Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 75 (1999) ("What the victim wants by way of amount or kind of punishment, whether a certain process makes the victim happy or sad, is simply irrelevant to how a court should proceed in a criminal case.").

235. Naomi Roht-Arriaza, *Prosecuting Core Crimes in the United States: Recent Changes and Prospects for 2010*, 17 WILLAMETTE J. INT'L & DISP. RESOL. 80, 89 (2009) ("Prosecution is often the mechanism of choice for victims . . . ."); Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. DISP. RESOL. 263, 267 (2003) ("The imperative to adjudicate international crimes and the concomitant proliferation of criminal justice institutions are largely viewed in a celebratory sense by international criminal lawyers."); Aldana-Pindell, *supra* note 66, at 1409 ("[M]any surviving human rights victims view prosecutions as the superior forum to guarantee them their rights to truth and justice.").

236. *See supra* note 235.

237. Report on Impunity, *supra* note 68, princ. 19.

238. Fernando Felipe Basch, *The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers*, 23 AM. U. INT'L L. REV. 195 (2007); *see* Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. Joinet Pursuant to Subcommission Decision 1996/119, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, 49th Sess., ¶¶ 16–30, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997).

and conviction of those responsible for violations[,]"[239] which if unchecked "fosters the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin."[240] Moreover, criminal justice affirms the victims' rights as equal members of society.[241]

A criminal prosecution is also a powerful truth-seeking mechanism. Criminal proceedings "test the truth according to rigorous evidential and procedural standards and lay down the facts in a court record."[242] Similar to civil cases, the physical, documentary, and testimonial evidence compiled for a criminal prosecution can serve to inform both the victims and society about the tragedy. One international expert explains that "many victims and their relatives . . . insist on the revelation of truth as the first requirement of justice."[243] Through a public acknowledgement and an official accounting of wrongdoing, criminal proceedings provide a means to combat impunity and address the total defenselessness of the victims.[244]

In contrast to the plaintiff driven civil suit, the effort to determine the defendant's guilt in a criminal case is backed by the power and resources of the state. In the United States, a network of investigators, legal experts, researchers, analysts, historians, and intelligence professionals at the DOJ, DHS, and DOS exists to contribute to the investigation of human rights abusers.[245] In prosecuting Charles McArthur Emmanuel for torture, for example, agents from various agencies participated in the effort to gather physical, documentary, and eyewitness testimony scattered across three continents.[246] The U.S. government secured travel documents, transportation (including air ambulance transport for an injured witness), medical care, and protective measures to facilitate the testimony of ten foreign witnesses at trial.[247] The criminal justice system in the United States is well equipped to conduct a thorough and independent investigation with the aim of determining criminal liability.

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239. Paniagua-Morales et al. v. Guatemala, 1998 Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 173 (Mar. 8, 1998).

240. La Cantuta v. Peru, Inter-Am. Ct. H.R. (ser. C) No.162, ¶ 222 (Nov. 29, 2006).

241. Aldana-Pindell, *supra* note 66, at 1451.

242. Study on the Right to Truth, *supra* note 59, ¶ 48.

243. Special Rapporteur, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report*, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, ¶ 134, U.N. Doc. E/CN.4/Sub.2/1993/8 (July 2, 1993) (by Theo van Boven).

244. Manuel Cepeda Vargas v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 213, ¶ 237 (May 26, 2010).

245. *House Hearings No Safe Haven*, *supra* note 35, (statement of John P. Woods, Deputy Assistant Dir. Nat'l Security Investigations Div. Homeland Security Investigations U.S. Immigration and Customs Enforcement).

246. Clearetha Wright, *Services in the Prosecution of the Commander of Liberia's Demon Forces*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/usao/briefing_room/vw/liberia.html (last visited Sept. 11, 2014).

247. *Id.*

C. Crime Victims' Rights Legislation

Since the trials at Nuremburg, the suffering of victims has been invoked to justify international justice.[248] International criminal prosecutions of those responsible for gross human rights violations have been conceived as "'a duty owed to the victims' that would 'give significance to their suffering and serve as a partial remedy for their injuries.'"[249] International criminal courts purportedly give victims "a forum in which to express their suffering."[250] Similarly, domestic prosecutions of human rights perpetrators have come to be viewed not only as the mark of a commitment to peace and democracy, but also part of the debt owed to the victims.[251] When the International Criminal Court was established as the first international criminal tribunal to provide victims with participatory rights, it was welcomed as an "unprecedented" and innovative development that would contribute to the truth-seeking function of court proceedings and foster victim agency and empowerment.[252] International law has also evolved to recognize victims' interests in an effective prosecution and has balanced the need to carve out a role for victims in criminal proceedings with the need to preserve the rights of the accused.[253]

Similarly, the criminal justice system in the United States has increasingly recognized victims' interest in a criminal justice process that provides

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248. Luke Moffett, *The Role of Victims in the International Criminal Tribunals of the Second World War*, 12 INT'L CRIM. L. REV. 245 (2012).

249. Paige Arthur, *How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice*, 31 HUM. RTS. Q. 321, 355 (quoting ALICE H. HENKIN, *Conference Report*, *in* STATE CRIMES: PUNISHMENT OR PARDON 1, 3 (Justice & Society Program of the Aspen Institute ed., 1989)).

250. Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 333 (2008).

251. One of the early leaders in the global accountability movement, Aryeh Neier, argued that "punishment is the absolute duty of society to honor and redeem the suffering of the individual victim." Arthur, *supra* note 249, at 358 (quoting LAWRENCE WESCHLER, A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS 244 (1998)).

252. Memorandum from Human Rights Watch to the International Criminal Court (Mar. 4, 2004), *available at* http://www.hrw.org/news/2004/03/02/memorandum-international-criminal-court. ICC policy documents emphasized that "victims' participation empowers them, recognizes their suffering and enables them to contribute to the establishment of the historical record, the truth as it were of what occurred." REDRESS, THE PARTICIPATION OF VICTIMS IN INTERNATIONAL CRIMINAL COURT PROCEEDINGS 5 (2012), *available at* http://www.redress.org/downloads/publications/121030 participation_report.pdf. International lawyers continue to use victims to justify the establishment of criminal courts. For example, in a meeting to discuss the establishment of the Specialized Mixed Court for the Prosecution of Serious International Crimes in DR Congo, proponents argued that "[t]he primary beneficiaries of the specialized mixed court's work will be the victims of atrocities committed in the DRC." *DR Congo: Establishment of a Specialized Mixed Court for the Prosecution of Serious International Crimes*, HUMAN RTS. WATCH (Apr. 15, 2011), http://www.hrw.org/news/2011/04/15/dr-congo-establishment-specialized-mixed-court-prosecution-serious-international-cri.

253. For example, the Rome Statute contains provisions that allow for victims to participate in all stages of the proceedings before the International Criminal Court. Rome Statute, *supra* note 26; *see also* Principles of Justice for Crime Victims, *supra* note 42; United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001); UN Right to Remedy Principles, *supra* note 42.

information about the proceedings and outcome, the opportunity to participate in the proceedings, fair and respectful treatment, economic restitution, and reparations.[254] During the last thirty years, legislation, state constitutional amendments, and judicial decisions have all expanded crime victims' rights to participate in criminal proceedings—including the right to information, the right to be heard, and the right to restitution. Currently, all states statutorily protect victims' rights; thirty-three have passed victims' rights constitutional amendments.[255]

The crime victims movement in the United States has been described as "one of the most successful civil liberties movements of recent times."[256] It has also been described as conservative and controversial.[257] The debate on victims' rights in the United States has often been framed as a zero-sum game that pits defendants' rights and interests against those of the victims.[258] The protections afforded to defendants—such as the presumption of innocence and fair trial standards—are cast as coming at the expense of victims. And any improvement or expansion of the victims' role in the criminal justice system is criticized as jeopardizing or impinging upon defendants' constitutional rights. Given the success of the victims' movement, the debate has moved in recent years from the questions of *whether* victims should participate in the criminal justice system to *how* victims should participate in way that addresses their needs and respects the rights of defendants.[259]

1. The CVRA

At the federal level, in 2004, President George W. Bush signed the Crime Victims' Rights Act (CVRA).[260] The new federal law was heralded as a watershed achievement for crime victims' rights in the United States.[261] Victims' rights advocates celebrated the CVRA for fostering a "new respect for victims' rights through all stages of the federal criminal justice process."[262] The

254. HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 2–3 (2002).

255. *State Victim Rights Amendments*, NAT'L VICTIMS' CONST. AMENDMENT PASSAGE, http://www.nvcap.org/states/stvras.html (last visited Sept. 11, 2014).

256. John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 MCGEORGE L. REV. 689, 691 (2002).

257. Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV 937, 951 (1985).

258. Payne v. Tennessee, 501 U.S. 808 (1991).

259. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 188–90 (1995).

260. Crime Victims' Rights Act, 18 U.S.C. § 3771 (2012).

261. Mary L. Boland & Russell Butler, *Crime Victims' Rights: From Illusion to Reality*, 24 SPG CRIM. JUST. 4, 5 (2009). "[V]ictim advocates may be assured that a significant and dramatic shift is occurring in the criminal and juvenile justice systems. With the recent sweeping changes in the federal landscape for victims' rights under the Crime Victims' Rights Act (CVRA), victims have been given the teeth of standing to enforce their rights." *Id*.

262. *The Crime Victims' Rights Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary United States House of*

statute provides victims of federal offenses with participatory rights, including the right to (1) be reasonably protected from the accused; (2) be notified of any public court proceeding or of the release of the accused; (3) attend the proceeding; (4) be reasonably heard at any public proceeding in the district court including those involving release, plea, sentencing, or parole; (5) reasonably confer with prosecutors; (6) full and timely restitution as provided by law; (7) proceedings free from unreasonable delay; and (8) be treated with fairness and with respect for their dignity and privacy.[263] The foreign victims of international crimes, such as torture and war crimes, are also entitled to these rights under federal law.[264]

The CVRA expanded existing federal protections for crime victims by creating greater visibility for victims' rights in the federal criminal justice system,[265] providing greater access to criminal proceedings, and creating a judicial enforcement mechanism.[266] CVRA rights attach with the initiation of criminal proceedings and continue through the period of the defendant's incarceration (or any alternative to incarceration including supervised release, probation, and parole).[267] Victims of a clearly identifiable crime are entitled to rights notwithstanding the absence of a charge, conviction, or even a suspect.[268] Under CVRA, federal government officials engaged in the "detection, investigation, or prosecution" of a crime should make their "best efforts" to ensure that crime victims are notified of and afforded these rights.[269]

Representatives, 111th Cong. (2009) (testimony of Susan Smith Howley, Public Policy Director, National Center for Victims of Crime). There is some empirical evidence to support this claim. The number of notifications issued by the Department of Justice tripled from 3.3 million in 2004 to 8.6 million in 2008. *The Crime Victims' Rights Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary United States House of Representatives*, 111th Cong. (2009) (statement of Laurence E. Rothenberg, Deputy Assistant Att'y Gen., Office of Legal Policy, Department of Justice).

263. Crime Victims' Rights Act, 18 U.S.C. § 3771 (2012).

264. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, ATTORNEY GENERAL GUIDELINES FOR VICTIM AND WITNESS ASSISTANCE 12 (2011).

265. Existing federal law already protected many of the same rights enshrined in the CVRA—including the right to privacy, dignity and fairness, the right to confer with the prosecutor, and the right to attend court proceedings — but these rights remained unfamiliar to federal judges and practitioners. The rights afforded by the CVRA are now codified in the section of the U.S. Code addressing most criminal law issues as part of the Federal Criminal Code and Rules, instead of the Public Health and Welfare section as was previously the case.

266. David E. Aaronson, *New Rights and Remedies: The Federal Crime Victims' Rights Act of 2004*, 28 PACE L. REV. 623, 662 (2008) ("The enactment of the CVRA's remedies granting crime victims standing along with an expedited right of appeal and the resulting nascent development of appellate case law are the CVRA's most important contributions to the advancement of crime victims' rights.").

267. U.S. DEP'T OF JUSTICE, *supra* note 264, at 8.

268. *In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (recognizing the right to confer prior to the filing of charges); Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011) ("The United States argues that . . . the CVRA applies only after formal charges are filed. The Court finds this argument unavailing.").

269. 18 U.S.C. § 3771(c)(1) (2012).

Victims who are foreign nationals are eligible for CVRA rights whether or not they reside in the United States.[270] The CVRA broadly defines "crime victim" to mean a person "directly and proximately harmed as a result of the commission of a Federal offense" or a victim's family member, guardian, or representative.[271] To qualify, the harm suffered must be a "but for" and reasonably foreseeable consequence of the behavior constituting the offense.[272] Victims who are foreign nationals are eligible for CVRA rights whether or not they reside in the United States.[273] If the crime has multiple victims, the statute provides the court with the discretion to fashion a reasonable procedure to give effect to the rights.[274] Guidelines issued by the Attorney General on victim and witness assistance instruct DOJ personnel to be "creative" and use new technology to provide victims—even when a crime results in hundreds or thousands of victims—with notice of their rights under the CVRA.[275]

One of the CVRA's distinguishing features is the judicial enforcement mechanism established by the statute. Under the CVRA, a crime victim may move in federal district court for an order enforcing his or her rights.[276] If denied the relief sought, the crime victim may immediately petition the court of

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270. U.S. DEP'T OF JUSTICE, *supra* note 264, at 12. For example, federal prosecutors submitted a dozen victim impact statements obtained from Cambodian survivors of a failed attempt to overthrow the Cambodian government orchestrated by Yasith Chhun. Chhun, who fled Khmer Rouge in 1982 and became a naturalized citizen in the U.S., was sentenced to life imprisonment by a California court for conspiracy to commit murder in a foreign country. *The Crime Victims' Rights Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary United States House of Representatives*, 111th Cong. (2009) (statement of Laurence E. Rothenberg, Deputy Assistant Att'y Gen., Office of Legal Policy, Department of Justice).

271. 18 U.S.C. § 3771(e); *see* 150 CONG. REC. S4270 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl) (stating that the definition of "crime victim" was made "intentionally broad" because "all victims of crime deserve to have their rights protected"); *see also* United States v. Sharp, 463 F. Supp. 2d 556, 561 (E.D. Va. 2006) ("[T]his definition is to be interpreted 'broadly' . . . .").

272. 18 U.S.C. § 3771(e). The courts have interpreted the phrase "directly and proximately harmed" to encompass "the traditional 'but for' and proximate cause analyses." *In re* Rendón Galvis, 564 F.3d 170, 175 (2d Cir. 2009) (citing *In re* Antrobus, 519 F.3d 1123, 1126 (10th Cir. 2008) (Tymkovich, J., concurring)); *Sharp*, 463 F. Supp. 2d at 567; *see also In re* Fisher, 649 F.3d 401, 402–03 (5th Cir. 2011); *In re* McNulty, 597 F.3d 344, 350–52 (6th Cir. 2010); United States v. Atl. States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 469 (D.N.J. 2009).

273. U.S. DEP'T OF JUSTICE, *supra* note 264, at 12; *The Crime Victims' Rights Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary United States House of Representatives*, 111th Cong. (2009) (statement of Laurence E. Rothenberg, Deputy Assistant Att'y Gen., Office of Legal Policy, Department of Justice).

274. 18 U.S.C. § 3771(d)(2); *see also* 150 CONG. REC. S4269–70 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl) ("I want to turn to section 2, subsection (d)(2) because it is an unfortunate reality that in today's world there are crimes that result in multiple victims. The reality of those situations is that a court may find that the sheer number of victims is so large that it is impracticable to accord each victim the rights in this bill. The bill allows that when the court makes that finding on the record the court must then fashion a procedure that still gives effect to the bill and yet takes into account the impracticability. . . . Importantly, courts must seek to identify methods that fit the case before that [sic] to ensure that despite numerosity of crime victims, the rights in this bill are given effect.").

275. U.S. DEP'T OF JUSTICE, *supra* note 264, at 14.

276. 18 U.S.C. § 3771(d)(3).

appeals for a writ of mandamus.[277] The federal appellate court must take up and decide the writ in a written opinion within seventy-two hours.[278] Not only does the CVRA establish an expedited review process, but it authorizes the appellate court to stay or continue the district court proceedings for up to five days while considering the appeal.[279] Senator Dianne Feinstein, one of the bill's sponsors, described the CVRA's appellate review process as "just as important as the initial assertion of a victim's right."[280]

Despite additional enforcement rights, the CVRA provides only participatory, not substantive, rights to crime victims. The statute's vague language lends itself to multiple interpretations and raises the question of whether the rights created are mandatory or discretionary. Moreover, various rights are limited by a "reasonableness" standard: officials have the duty to "reasonably" protect the accused, provide "reasonable" notice of any public proceeding, ensure proceedings are free from "unreasonable" delay, and ensure that victims have the right to be "reasonably" heard at public proceedings.[281]

The procedural rights afforded by the CVRA are already affecting how some victims experience the criminal system and the course the process takes. CVRA rights have been invoked to allow victims to obtain timely and accurate scheduling information about public proceedings,[282] to move to set aside pre-charge prosecutorial agreements,[283] to participate in plea negotiations,[284] to

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277. *Id.*

278. *Id*.

279. The CVRA enumerates limitations on relief: "In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if:

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 14 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged."

18 U.S.C. § 3771(d)(3)(5).

280. 150 CONG. REC. S4270 (2004) (statement of Sen. Dianne Feinstein). A crime victim may also file an administrative complaint if Department employees fail to respect the victim's rights. 18 U.S.C. § 3771(f)(2)(A).

281. Aaronson, *supra* note 266, at 645. Officers and employees of the Department of Justice engaged in the detection, investigation, or prosecution of crime shall make their *best efforts* to see that crime victims are notified of, and accorded, the rights contained in the CVRA. 18 U.S.C. §3771(c)(1); *see also* U.S. DEP'T OF JUSTICE, *supra* note 264, at 35.

282. United States v. Turner, 367 F. Supp. 2d 319, 332 (E.D.N.Y. 2005) ("Each of the three adjectives—'reasonable, accurate, and timely'—is important: 'reasonable' provides vital flexibility; 'accurate' may well impose an affirmative obligation to advise victims of schedule changes (most states have similar statutory requirements); and 'timely' is designed to be a flexible concept that ensures a victim can reasonably arrange her affairs to attend the proceeding for which notice is given."); *see also* United States v. Ingrassia, 392 F. Supp. 2d 493, 495 (E.D.N.Y. 2005) (describing an online victim notification system that provided outdated scheduling information as inadequate).

283. Doe v. United States, No. 08-80736-CIV, 2013 WL 3089046, at *3 (S.D. Fla. June 19, 2013) (the CVRA authorizes "a 're-opening' or setting aside of pre-charge prosecutorial agreements made in derogation of the government's CVRA conferral obligations").

284. 18 U.S.C. § 3771(a)(4); *see also In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008) ("In passing the Act, Congress made the policy decision . . . that the victims have a right to inform the plea

confer with prosecutors,[285] to avoid delays,[286] to present victim-impact testimony in person at a public proceeding prior to sentencing,[287] to unseal court records,[288] and to remove identifying information from victim correspondence.[289] In practice, victims also have used the procedural rights available through the CVRA to enforce their substantive rights to restitution recognized by other federal statutes.[290]

Practical problems with implementation have limited the CVRA's impact. In 2008, the Government Accountability Office surveyed victims about their awareness and perceptions of the CVRA. Seventy-seven percent of respondents were unaware of the right to file a motion in district court to enforce their CVRA rights.[291] Unsurprisingly, only forty-three motions were filed in district court to assert CVRA rights during a four-year period.[292] Many courts are still unfamiliar with the statute and have not settled when CVRA rights attach,[293]

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negotiation process by conferring with prosecutors before a plea agreement is reached. That is not an infringement, as the district court believed, on the government's independent prosecutorial discretion . . . instead, it is only a requirement that the government confer in some reasonable way with the victims before ultimately exercising its broad discretion.").

285. 18 U.S.C. § 3771(a)(5); *see also In re* Dean, 527 F.3d at 394–95 (5th Cir. 2008).

286. United States v. McDaniel, 411 F. Supp. 2d 1323, 1325 (D. Utah 2005) (refusing to allow a last-minute substitution of defense counsel based in part upon the victim's right to a proceeding free from unreasonable delay). Courts have also allowed delays to the benefit of victims. *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 559–60 (2d Cir. 2005) (refusing to find abuse of discretion in the trial court's refusal to approve more extensive but time-consuming procedures to identify additional victims of a large scale fraud).

287. In *Kenna v. U.S. District Court for the Central District of California*, the Ninth Circuit ruled that "[v]ictims now have an indefeasible right to speak, similar to that of the defendant" and ordered the district court to consider a motion to reopen sentencing being "cognizant that the only way to give effect to [the alleged victim's] right to speak as guaranteed to him by the CVRA is to vacate the sentence and hold a new sentencing hearing." 435 F.3d 1011, 1016–17 (9th Cir. 2006).

288. *In re* Simons, 567 F.3d 800, 801 (6th Cir. 2009).

289. United States v. Madoff, 626 F. Supp. 2d 420, 426–27 (S.D.N.Y. 2009).

290. *See* Emily Bazelon, *The Price of a Stolen Childhood*, N.Y. TIMES MAG. (Jan. 24, 2013), *available at* http://www.nytimes.com/2013/01/27/magazine/how-much-can-restitution-help-victims-of-child-pornography.html?hp&pagewanted=all (recounting efforts by victims of child pornography to collect restitution from offenders who possessed their images). The CVRA was intended to make already existing restitution laws more effective and to assure that victims are compensated for the harms inflicted upon them by the crimes attributable to the defendant. *See* 150 CONG. REC. S4260, S4268 (daily ed. Apr. 22, 2004) (statement of Sen. Jon Kyl). The Mandatory Victim Restitution Act, for example, requires restitution to a victim of any offense that is a crime of violence. *See* 18 U.S.C. § 3663A(c)(1)(A)(i) (2012). The Victim Witness Protection Act gives judges discretion to award restitution for misdemeanor or felony violations involving violent and victimless crimes. 18 U.S.C. § 3663A(a)(1) (2012).

291. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-54 CRIME VICTIMS' RIGHTS ACT: INCREASING AWARENESS, MODIFYING THE COMPLAINT PROCESS, AND ENHANCING COMPLIANCE MONITORING WILL IMPROVE IMPLEMENTATION OF THE ACT 10 (2008).

292. *Id.* at 47.

293. Paul G. Cassell, Nathanael J. Mitchell & Bradley J. Edwards, *Crime Victims' Rights During Criminal Investigations?*, 104 J. CRIM. L. & CRIMINOLOGY 59 (2014).

what it means for victims to be "reasonably heard"[294] or "confer with prosecutors,"[295] or what is the standard of review for an appeal by a victim.[296]

2. The CVRA and Victims' Human Rights

International instruments and case law increasingly recognize the procedural or participatory rights of victims in domestic criminal proceedings, although the nature and scope of the crime victims' rights remains unclear.[297] Victims' procedural rights recognized by international standards include the right to receive information about the progress of the proceedings and of the disposition of their cases, to express their views and concerns, to obtain legal assistance, to avoid unnecessary delay, and to have their privacy and safety protected.[298]

For example, the International Convention for the Protection of All Persons from Enforced Disappearance, one of the more recently enacted human rights treaties, guarantees the victim's right to know "the progress and results of the investigation."[299] International bodies have also outlined the contours of victims' procedural rights. The Inter-American Court has stated that a victim of gross violations of international law "should have substantial possibilities of being heard . . . in the [domestic criminal] proceedings"[300] and "full access and competence to act at all stages and in all bodies of these investigations, in accordance with domestic law and the provisions of the American Convention."[301] The European Court has found violations of a state's procedural obligation to effectively investigate gross violations when the investigation was conducted without the participation of victims' relatives,[302] victims' family members lacked access to case files during the investigative stage of criminal proceedings,[303] or authorities failed to inform victims'

294. Kenna v. U.S. Dist. Ct. for C.D. Cal., 435 F.3d 1011 (9th Cir. 2006) (holding the right to be "reasonably heard" included oral statements); *In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 563 (2d Cir. 2005) (holding the district court has discretion to grant relief for victims under the CVRA).

295. *Compare* Doe v. United States, No. 08-80736-CIV, 2013 WL 3089046, at *3 (S.D. Fla. June 19, 2013) (the CVRA authorizes "a 're-opening' or setting aside of pre-charge prosecutorial agreements made in derogation of the government's CVRA conferral obligations"), *with In re* W.R. Huff Asset Mgmt. Co., 409 F.3d 555, 559–60 (2d Cir. 2005) ("Nothing in the CVRA requires the Government to seek approval from crime victims before negotiating or entering into a settlement agreement.").

296. *Compare In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (applying traditional standard for writ of mandamus review), *with Kenna*, 435 F.3d at 1017 (9th Cir. 2006) (applying a lesser standard).

297. Aldana-Pindell, *supra* note 66, 1425–37.

298. Principles of Justice for Crime Victims, *supra* note 42.

299. ICED, *supra* note 36, art. 24(2).

300. Villagrán Morales v. Guatemala, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 227 (Nov. 19, 1999).

301. 19 Merchants v. Colombia, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 263 (July 5, 2004).

302. Güleç v. Turkey, App. No. 54/1997/838/1044, ¶¶ 82–83 (Eur. Ct. H.R., July 27, 1998), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58207.

303. Oğur v Turkey, App. No. 21594/93, ¶¶ 92–93 (Eur. Ct. H.R. May 20, 1999), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58251.

relatives of progress of the investigation.[304] The European Court has stressed that "the next-of-kin of the victim must be involved in the [criminal] procedure to the extent necessary to safeguard his or her legitimate interests."[305]

The participatory rights afforded by the CVRA mirror many of the rights recognized by international standards. Although the CVRA provides only participatory, and not substantive, rights to crime victims, the statute may create opportunities for victims to further their interests in truth, justice, and reparations. For example, victims of violations of human rights have attempted to use the right to confer with prosecutors to promote a plea negotiation that requires the defendant to reveal information about his human rights crimes.[306]

D. Immigration Enforcement

Around 2008, ICE identified four individuals living in the United States who had been involved in one of the worst atrocities committed during Guatemala's thirty-six-year civil war. In 1982, these individuals were part of an elite squad of military commandos who attacked the village known as "Las Dos Erres," slaughtering more than 200 men, women, and children. Two of the commandos moved to the United States and obtained U.S. citizenship. After discovering his identity, ICE prosecuted one of the commandos, Gilberto Jordan, for concealing his military service and participation in the massacre on his naturalization forms. In 2010, he was sentenced to ten years in prison for unlawfully procuring his U.S. citizenship.[307] Of the three remaining perpetrators known to have entered the United States, one was removed to Guatemala, one was sentenced to ten years in federal prison for unlawfully procuring U.S. citizenship, and the fourth former Kaibil was arrested for re-entry to the United States after deportation.[308] The "Las Dos Erres" case

304. Orhan v. Turkey, App. No. 25656/94, ¶¶ 346–48 (Eur. Ct. H.R. June 18, 2002), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60509.

305. McKerr v. U.K., App. No. 28883/95, ¶ 115 (Eur. Ct. H.R. May 4, 2001), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59451.

306. *See* Jennifer Janisch & Oriana Zill de Granados, *Colombian Victims of Paramilitary Violence Plead for Access to U.S. Justice* System, PBS (Sept. 10, 2010), http://www.pbs.org/wnet/women-war-and-peace/features/colombian-victims-of-paramilitary-violence-plead-for-access-to-u-s-justice-system.

307. Sebastian Rotella & Ana Arana, *Finding Oscar: Massacre, Memory and Justice in Guatemala*, PROPUBLICA (May 25, 2012, 5:59 AM), http://www.propublica.org/article/finding-oscar-massacre-memory-and-justice-in-guatemala; Press Release, U.S. Dep't of Justice, Former Guatemalan Special Forces Solider Sentenced to 10 Years in Prison for Making False Statements on Naturalization Forms Regarding 1982 Massacre of Guatemalan Villagers (Sept. 16, 2010), *available at* http://www.justice.gov/opa/pr/2010/September/10-crm-1042.html.

308. On July 12, 2011, Pedro Pimentel Rios was removed from the United States and handed over to Guatemalan law enforcement officials. Two former Kaibils, Gilberto Jordan and Jorge Vincio Sosa Orantes, have been sentenced to ten years in federal prison for failing to disclose their prior military service and involvement in the killings on their citizenship applications. ICE officials also arrested the fourth former Kaibil, Santos Lopez Alonzo, on criminal charges for re-entry after deportation. Press Release, U.S. Immigr. & Customs Enforcement, Former Guatemalan Special Forces Officer Sentenced for Covering Up Involvement in 1982 Massacre (Feb. 10, 2014), *available at*

reveals the spectrum of immigration actions available to deny immigration benefits to human rights abusers. These include: (1) denial of entry or visas[309] and other forms of immigration relief based on the "persecutor bar;"[310] (2) removals based on other grounds such as material misrepresentation[311] or a "crime involving moral turpitude;"[312] and (3) criminal prosecutions for fraud or false statements in visa, passport, or naturalization applications.[313]

Housed within the ICE's National Security Division, the Human Rights Violators and War Crimes Unit is tasked with preventing foreign human rights abusers from entering the country and investigating, prosecuting, and deporting those who do. The agency reports the arrest of more than 250 suspected perpetrators, the denial of visas to 117 individuals,[314] and the removal of more than 640 suspected or known human rights perpetrators since 2004.[315] Currently, ICE is following up on more than 1,900 human rights removal cases involving suspected human rights perpetrators from 96 countries.[316]

These statistics suggest a U.S. preference for holding human rights abusers accountable by denying them safe haven in the United States rather than undertaking criminal prosecutions. Prosecutors seeking removal or other denials of immigration benefits face a lower burden of proof than those pursing criminal prosecutions. Additionally, in some cases, statutes of limitations (five years for visa fraud and ten years for naturalization fraud) have foreclosed the possibility of pursuing criminal charges because the evidence of the suspect's

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http://www.ice.gov/news/releases/1402/140210washingtondc2.htm; Press Release, U.S. Immigr. & Customs Enforcement, *ICE Removes Former Member of Guatemalan Army Linked to 1980s Massacre: Deportation Represents Victory for ICE's Human Rights Violators and War Crimes Center* (July 12, 2011), *available at* http://www.ice.gov/news/releases/1107/110712losangeles.htm.

309. 8 U.S.C. § 1182(a)(3)(E)(i)-(iii) (2012) (defining "[i]nadmissible aliens" as "[p]articipants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing"); 8 U.S.C § 1182(a)(3)(G) (2012) (recruitment or use of child soldiers); *see also* Presidential Proclamation No. 8697, 76 Fed. Reg. 49275 (Aug. 4, 2011) (expanding grounds to deny entry to immigrants and nonimmigrants who have "planned, ordered, assisted, aided and abetted, committed or otherwise participated" in widespread or systematic violence, war crimes, crimes against humanity, or other serious human rights violations).

310. *See* 8 U.S.C. § 1158 (2012); 8 U.S.C § 1227(a)(4)(D) (2012) (defining grounds of "[d]eportable aliens" as participation "in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing").

311. Immigration and Nationality Act § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C)(i) (2012).

312. Immigration and Nationality Act § 212(a)(2)(A), 8 U.S.C. § 1182(a)(2)(A)(i)(I).

313. 8 U.S.C. § 1325(a) (2012); 8 U.S.C. § 1227(a)(1)(C)(i) (2012).

314. U.S. IMMIGR. & CUSTOMS ENFORCEMENT, *supra* note 35.

315. Press Release, U.S. Immigr. & Customs Enforcement, *ICE Commemorates 10th Anniversary of the Human Rights Violators and War Crimes Program* (Dec. 2, 2013), *available at* http://www.ice.gov/news/releases/1312/131202washingtondc3.htm.

316. *House Hearings No Save Haven*, *supra* note 35. In a first-of-its-kind action, ICE conducted a nationwide operation that ended in the arrest of 19 known or suspected human rights violators. Press Release, U.S. Immigration Customs Enforcement, ICE Arrests 19 Fugitives Across US During "Operation No Safe Haven" (Sept. 24, 2013), *available at* http://www.ice.gov/news/releases/1409/140924washingtondc.htm.

fraud was not discovered in time.[317] However, little is known about how charging decisions are made or the reasoning used by immigration judges or courts in deciding these cases. Information related to charging decisions is not public and most decisions made by immigration judges are neither public nor precedential.[318]

Removal through immigration enforcement does not satisfy the victim-centered principles of truth, justice, and reparation for several reasons. The immigration decisions are often based on defendants' false statements about participation in human rights abuses. The cases concern liability for violations of immigration law and not human rights crimes. Victims may only participate in the proceedings as witnesses and will not receive economic compensation, and most decisions made by immigration authorities are not public.[319] The non-disclosure rule prevents victims from deriving any measure of satisfaction from an official accounting of the defendant's human rights record.[320] Once removed, perpetrators often are returned to home countries where they have powerful allies, are shielded by amnesty laws, or live outside the reach of a weak or corrupt criminal justice system. One advocate has observed, "Often these human rights abusers . . . either become repeat offenders or continue to live freely without consequence."[321] Moreover, human rights violators criminally prosecuted for visa or naturalization fraud or misrepresentations frequently receive sentences of zero to six months and are placed in removal

317. *Senate Hearings No Safe Haven II*, *supra* note 201 (statement of John T. Morton, Assistant Secretary, Immigration and Customs Enforcement, Dep't of Homeland Security).

318. Glenna MacGregor & Jessica C. Morris, *Human Rights Enforcement in U.S. Immigration Law: A Missed Opportunity for Engagement with International Law?*, 5 J. MARSHALL L.J. 467, 472 (2012).

319. *Id*.

320. In two decisions disclosed only after *The New York Times* filed FOIA requests, the immigration judges provided a detailed accounting of the defendant's human rights record. *See* Julia Preston, *Salvadoran General Accused in Killings Should Be Deported, Miami Judge Says*, N.Y. TIMES, Apr. 11, 2014, http://www.nytimes.com/2014/04/12/us/salvadoran-general-accused-in-killings-should-be-deported-miami-judge-says.html (describing the judge's findings that former El Salvadoran Defense Minister, General José Guillermo García, "assisted or otherwise participated" in eleven human rights violations, including the 1980 assassination of Archbishop Óscar Arnulfo Romero, as "unusually expansive and scalding"); Julia Preston & Randal C. Archibold, *U.S. Justice Dep't Releases Judge's Ruling on Ex-Salvadoran General*, N.Y. TIMES, Apr. 11, 2013, http://www.nytimes.com/2013/04/12/world/us-justice-dept-releases-judges-ruling-on-salvadoran-general.html (describing the judge's findings that that former Salvadoran Defense Minister General Carlos Eugenio Vides Casanova had "assisted or otherwise participated in" the killings of four American churchwomen in El Salvador and failed to prevent hundreds if not thousands of other extrajudicial killings of security forces under his command).

321. *From Nuremberg to Darfur: Accountability for Crimes Against Humanity: Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. (2008) (testimony of CJA Executive Director Pamela Merchant before the U.S. Senate Judiciary Subcommittee on Human Rights and the Law), *available at* http://www.cja.org/downloads/senate_testimony_jun08.pdf.

proceedings.[322] Defendants generally receive relatively short sentences because they are being prosecuted for fraud or misrepresentations and not for the underlying human rights crimes.

III.
STRATEGIES TO ADVANCE TRUTH, JUSTICE, AND REPARATIONS THROUGH U.S. HUMAN RIGHTS LITIGATION

Criminal justice is held out as a superior form of accountability and the preferred option of survivors and victims.[323] Supporters of this approach to accountability claim that criminal prosecutions serve victims by punishing the offender, deterring future offenses, establishing facts related to past abuses, and providing an appropriate condemnation by the state.[324] Civil suits are described as playing a critical role in achieving justice for victims by awarding monetary damages, deterring future abuses, reconceptualizing the victim as a rights-holder, promoting a sense of agency and empowerment of the victim, providing an official accounting and acknowledgement of wrongdoing, and creating a venue for the victim to recount his or her experience.[325] Immigration proceedings against human rights violators—the most common approach to human rights accountability in the United States—ostensibly provide a measure of justice to victims by exposing the defendants' wrongdoing and deprive defendants refuge in the United States.[326]

This section will move beyond these general claims about the objectives of legal mechanisms to examine how civil and criminal remedies can advance victims' rights to truth, justice, and reparations. Given the nature of the U.S. legal framework, no one course of legal action entirely satisfies every dimension of internationally recognized victims' rights. For example, civil human rights litigation promises monetary compensation and a declarative statement about wrongdoing, but it does little to deter the reoccurrence of violations. Indeed, most defendants escape the "punishment" of monetary

322. *Senate Hearings No Safe Haven II*, *supra* note 201 (statement of John T. Morton, Assistant Secretary, Immigration and Customs Enforcement, Dep't. of Homeland Security).

323. Drumbl, *supra* note 235, at 267 ("The imperative to adjudicate international crimes and the concomitant proliferation of criminal justice institutions are largely viewed in a celebratory sense by international criminal lawyers."); Roht-Arriaza, *supra* note 235, at 89 ("Prosecution is often the mechanism of choice for victims . . . ."); Aldana-Pindell, *supra* note 66, at 1409 ("[M]any surviving human rights victims view prosecutions as the superior forum to guarantee them their rights to truth and justice.").

324. Aldana-Pindell, *supra* note 66, at 1444–59.

325. Kathryn Metcalf, *Reparations for Displaced Torture Victims*, 19 CARDOZO J. INT'L & COMP. L. 451, 471 (2011); *see* Koh, *supra* note 108, at 2368–70; Jenny S. Lam, *Accountability for Private Military Contractors Under the Alien Tort Statute*, 97 CALIF. L. REV. 1459, 1498 (2009); John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1, 48 (1999); Van Schaack, *supra* note 22, at 2318–26.

326. STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 284–85 (3d ed. 2009).

awards by defaulting, making it impossible for plaintiffs to recover damages.[327] On the other hand, criminal prosecutions advance retributive justice and, in the case of violent crimes such as torture, war crimes, and recruitment of child soldiers, federal law requires courts to order mandatory restitution for the victims.[328] However, a victim has a limited role in an adversarial criminal proceeding, which does little to rehabilitate the victim through the provision of medical and psychological care or identify and address the structural causes of the violations to prevent their reoccurrence.[329] Immigration enforcement, the U.S. government's most commonly used tool against human rights perpetrators, may have a retributive impact by denying defendants immigration benefits in the United States. However, as discussed above, deportation also may return a defendant to a country of origin where he wields political power and is shielded from prosecution. Moreover, victims have no participatory rights in immigration proceedings, no right to compensation, and limited access to information. Thus, "[t]he weakness of each of these measures alone provides a powerful incentive to seek ways in which each can interact with the others in order to make up for their individual limitations."[330]

It is unrealistic to expect that any one legal remedy will fully satisfy every dimension of victims' rights to truth, justice, and reparations. After all, the primary purpose of civil and criminal remedies is not to advance victims' human rights, but to serve another set of goals, values, and principles.[331] Rather than separate these measures, advocates should think about the ATS/TVPA, criminal prosecutions, the CVRA, and immigration enforcement measures as pieces in the broader mosaic of legal avenues available to human rights victims in the United States. Although there is no combination of civil, criminal, and immigration actions that advances every component of victims' rights, there are better and worse combinations. To identify those strategies that maximize victims' rights, advocates should take a comprehensive and integrated view of the legal landscape.

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327. Dimmer & Lamoree, *supra* note 25, at 460 ("Although the cases led to hefty damage awards regularly in excess of ten million, and sometimes even 100 million, dollars, they presented little meaningful prospect of recovery.") (footnote omitted); Van Schaack, *supra* note 22, at 2313 (stating "most of the cases' damage awards were issued by default and/or are unenforceable"); Ku, *supra* note 25, at 208 ("[D]efendants often failed to defend these claims and courts often entered default judgments. Such judgments were rarely collected . . . ."); Bradley, *supra* note 24, at 459 ("[E]ven though US courts have issued a number of large damage awards in these cases, essentially none of these awards has been collected.").

328. *See* 18 U.S.C. §§ 1593, 3663 (2012).

329. UN Right to Remedy Principles, *supra* note 42, princs. 15–23.

330. Report on Truth, Justice, and Reparations, *supra* note 72, ¶ 22.

331. The purpose of the modern criminal justice system, according to many legal theorists, is to punish moral wrongdoing. *See* Moore, *supra* note 234, at 76. The punishment should be proportional and dispensed consistently among offenders. *See id.* Victims and their interests are at best an unnecessary distraction from this objective and at worst threaten to transform the criminal justice system into "an engine of victim vengeance rather than a realization of abstract justice." *Id.*

This section identifies three core principles that should order advocates' thinking when considering legal actions on behalf of victims of human rights abuses committed abroad. First, advocates should be guided by a holistic approach to legal advocacy that takes into account the complexity of the U.S. legal landscape and the array of interests and priorities of victims. Second, advocates should seek to maximize the interrelatedness and potentially mutually reinforcing relationship between civil and criminal remedies. Third, any legal strategy should take into account practical limitations and opportunities. The first two principles focus on what the law formally allows to describe an idealized version of the menu of legal options available to victims, while the last principle injects reality into the analysis.

A. The Holistic Approach

As discussed, the United States provides a range of opportunities to advance victims' rights through legal action, although none of the available legal remedies fully satisfy every dimension of victims' rights to truth, justice, and reparations. How should we make sense of the patchwork of legal opportunities available in the United States? Advocates should adopt a holistic approach to accountability efforts in the United States based on a clear understanding of how each remedy can advance victims' rights.[332] Under the relevant international standards, legal remedies should not only have retributive impact by punishing perpetrators through imprisonment, fines, or deportation, but they also should seek to accomplish a range of other objectives. These objectives include: establishing an official accounting of the violations; providing information about the identities of those responsible and the legal consequences they face and, in cases of forced disappearances, the location of the remains of the victims; and contributing to the restoration of victims' livelihoods through restitution, rehabilitation, and measures of satisfaction, such as formal apologies and guarantees of non-repetition.[333] In addition, legal processes should be crafted to allow victim participation to ensure that victims are treated with dignity.

While victims have an array of interests, legal remedies are limited in reach and unevenly satisfy those interests. A holistic approach aims to address the different dimensions of victims' rights. At the center of holistic advocacy is a client-centered approach that considers the needs and interests of the clients

332. "Holistic" advocacy is used in other areas of legal practice to emphasize the importance of a multi-disciplinary and client-centered approach to representation. In the field of criminal defense, for example, "holistic" advocacy is defined as an approach to criminal defense that encompasses four pillars: seamless access to legal and non-legal services, dynamic and interdisciplinary communication, interdisciplinary advocacy, and a robust understanding of the community served. Robin Steinberg, *Heeding* Gideon*'s Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013).

333. UN Right to Remedy Principles, *supra* note 42, princ. 15.

in defining the legal strategy.[334] This strategy requires representatives to communicate effectively with victims, treat them with dignity, and provide them with information to decide on a course of action, but also to be knowledgeable about the structural causes and consequences of the violations beyond the conduct of a particular defendant. To implement a holistic approach, lawyers with expertise in different practice areas—civil litigation, criminal law, and immigration—should collaborate with victims to craft a legal advocacy strategy.

One legal strategy may prove instructive for advocates seeking to achieve a just and successful outcome on behalf of their clients. After the top fourteen leaders of Colombia's largest paramilitary group, the *Autodefensas Unidas de Colombia*, were extradited to the United States to face drug charges in 2008, human rights advocates and victims worked together to implement a holistic human rights litigation strategy. At the time of the extraditions, the paramilitary leaders had been implicated in terrorizing and killing civilians. Although they were under investigation or had been convicted in Colombia for human rights crimes, the extraditions severely curtailed victims' access to remedies in Colombia. So a team of U.S. lawyers with diverse legal expertise collaborated with activists, victims, and survivors in Colombia to identify and pursue all legal remedies available in the United States.[335] The coalition developed a multi-pronged approach. In the first stage, victims used the CVRA to intervene in the defendants' U.S. drug trials with the aim of ensuring that the victims' voices were heard and their interests were represented. For example, at sentencing, victims requested that the judge consider the amount and quality of information a defendant provided about his involvement in human rights crimes in Colombia.[336] Concurrently, organizations and victims engaged in public and private advocacy with the DOJ to press for criminal investigations of the perpetrators. Lastly, U.S. lawyers gathered evidence to file ATS and TVPA lawsuits against extradited leaders to obtain monetary compensation for victims and judicial validation of the defendants' responsibility for specific atrocities in Colombia. The coalition bolstered their legal efforts in the United States with legal advocacy in international fora.[337]

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334. Steinberg, *supra* note 332, at 977.

335. Hernando Salazar, *Víctimas de "Paras" Piden ser Oídas*, BBC MUNDO (Jul. 25, 2008), http://news.bbc.co.uk/hi/spanish/latin_america/newsid_7524000/7524604.stm.

336. Berkeley Law's International Human Rights Law Clinic, *Family of Colombian Murder Victim Asks for Maximum Sentence, Represented by Berkeley Law*, BERKELEY LAW (Apr. 21, 2009), http://www.law.berkeley.edu/4492.htm.

337. For example, in litigation before the Inter-American Court of Human Rights, legal representatives argued that Colombia had failed to fulfill its obligation to exhaustively investigate and punish those responsible for paramilitary atrocities by extraditing paramilitary leaders to the United States. Reports from advocacy groups led the Prosecutor's Office at the International Criminal Court to express concern about the adequacy of Colombia's criminal investigations into paramilitary violence.

While holistic advocacy should be the goal, whether a claim is filed ultimately will depend on a host of factors. A victim may be unwilling to participate in a particular legal strategy. For example, victims may consider monetary damages inadequate to address the harm they suffered. They may choose to forgo civil suits because they do little to punish the defendant or prevent recurrence of the crime. The possibility of moving forward with a case will also depend on jurisdictional, evidentiary, or procedural considerations, and in the case of criminal prosecutions and immigration enforcement actions, the will of U.S. government officials.

B. Strategic Leveraging

To maximize victims' rights to truth, justice, and reparations, criminal prosecutions, civil suits, and immigration sanctions can be used in a mutually reinforcing manner. Indeed, experience has shown that there is a complementary relationship between the different legal mechanisms available to human rights victims in the United States. For instance, ATS and TVPA lawsuits have triggered investigations by immigration authorities and criminal prosecutors. To fully realize the promise of an integrated and holistic approach to human rights litigation in the United States, advocates should strengthen the bidirectional relationship among the available legal remedies.

First, advocates can use one strategy to trigger another. Second, one legal strategy can help bolster the truth-seeking, retributive, or reparatory impact of another strategy. Below, the Article describes ways that one legal action can be strategically leveraged to further another with the aim of strengthening the bidirectional relationship between legal mechanisms.

Civil suits have exposed the presence of human rights perpetrators in the United States and led immigration authorities to deny them safe haven. For instance, after a civil case was brought and won against two former Salvadoran generals,[338] both defendants faced deportation proceedings for immigration fraud.[339] Civil suits have also spurred immigration authorities to extradite human rights perpetrators to face criminal charges in the country where their human rights crimes were committed.[340]

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338. Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006).

339. Preston, *supra* note 320; Julia Preston & Randal C. Archibold, *supra* note 320. Similarly, military intelligence chief Juan López Girjalbo was prosecuted for immigration fraud shortly after a complaint was filed against him in a civil case alleging his involvement in torture, extrajudicial killings, and disappearances during the civil war in Honduras in the 1980s. *Reyes v. Lopez Grijalba – Honduras: Forced Disappearances*, CTR. FOR JUST. & ACCOUNTABILITY, http://cja.org/article.php?list=type&type=81 (last visited Sept. 11, 2014).

340. Former Peruvian army officer Telmo Hurtado was ordered to pay $37 million in damages to the plaintiffs for his role as the commander of patrol units that massacred 69 men, women, and children in the highland village of Accomarco in Peru. In the same year as the verdict, Hurtado was also sentenced to six months in prison on two criminal counts of immigration fraud. In 2011, he was extradited to Peru to face criminal charges for the massacre. During the trial, he confessed to killing thirty-one villagers and conspiring with his superiors to cover up the military's role in the

ATS/TVPA lawsuits can also be leveraged to further criminal prosecutions.[341] The evidence of the defendant's involvement in human rights abuses presented at a civil trial can be used to substantiate criminal charges for immigration fraud and substantive crimes such as torture and war crimes. To date, however, U.S. prosecutors have not brought criminal charges against defendants for human rights abuses committed abroad, despite the presence of a large pool of unindicted human rights abusers in the United States.[342] Similarly, immigration and criminal investigations can also lead to civil actions.

Unlike civil law countries, victims in the United States do not have standing to initiate a criminal prosecution.[343] Nonetheless, under the CVRA, victims of a clearly identifiable crime are arguably entitled to participatory rights even in the absence of a charge.[344] By asserting their CVRA rights, specifically the right to confer with prosecutors, victims of human rights abuses may be able to influence prosecutors' charging decisions and contribute to the criminal investigation. For example, they may help provide evidence and facilitate access to witnesses.[345]

CVRA rights also create opportunities for criminal prosecutions to better serve victims' rights during the entire course of the criminal proceedings, including release, plea, sentencing, or parole.[346] Some circuits have held that the right to be heard confers on victims a right to *speak* at the public

massacre. *Ochoa Lizarbe v. Hurtado – Peru: The Accomarca Massacre*, CTR. FOR JUST. & ACCOUNTABILITY, http://cja.org/article.php?list=type&type=22 (last visited Sept. 11, 2014). Other legal actions that expose the presence of perpetrators in the U.S. have generated similar actions by immigration officials. Former Salvadoran Minister of Defense Inocente Orlando Montano was indicted on federal criminal immigration fraud and perjury charges and sentenced to twenty-one months in prison. Karla Zabludovsky, *Salvadoran Linked to Killing to Serve Time in U.S. Prison*, N.Y. TIMES, Aug. 28, 2013, at A10.

341. Almudena Bernabeu & Carolyn Patty Blum, *The Road to Spain: The Jesuit Massacre and the Struggle Against Impunity in El Salvador*, 18 J. PEACE PSYCHOL. 96 (2012); Zabludovsky, *supra* note 340, at A10.

342. The Colombian paramilitary commanders who currently reside in U.S. custody, for example, have not faced criminal charges in the United States for the human rights atrocities they committed in Colombia although they include some of this hemisphere's most violent war criminals. In 2010, lawyers filed a civil case against one of the extradited paramilitary commanders, Carlos Mario Jiménez Naranjo, on behalf of the family members of two activists who were tortured and killed by troops under Jiménez's command, allegedly for their opposition to the defendant's actions in the region. One of the goals of supporters of the lawsuit is to spur federal prosecutors to indict Jimenéz for his criminal acts in Colombia.

343. Verónica Michel & Kathryn Sikkink, *Human Rights Prosecutions and the Participation Rights of Victims in Latin America*, 47 LAW & SOC'Y REV. 873, 874, 879–80 (2013) (arguing that private prosecutions open the door for human rights accountability).

344. *In re* Dean, 527 F.3d 391, 394 (5th Cir. 2008) (recognizing the right to confer prior to the filing of charges); Does v. United States, 817 F. Supp. 2d 1337, 1342 (S.D. Fla. 2011) ("The United States argues that . . . the CVRA applies only after formal charges are filed. The Court finds this argument unavailing.").

345. The CVRA seeks to preserve prosecutorial discretion by establishing that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. §3771(d)(6) (2012).

346. 18 U.S.C. § 3771(a)(4).

proceedings referred to above.[347] Before sentencing, for example, victims have exercised this right to introduce a subjective account of the harm suffered to the fact finder.[348] The designation or recognition of victim status under the CVRA may also provide a strategic advantage in an ATS/TVPA lawsuit. Civil litigants may be able to use the granting of CVRA victim status in a civil lawsuit to strengthen the plaintiff's claim of civil liability.[349]

C. A Reality Check

While the goal is to use a comprehensive and integrated approach to further legal accountability in a manner that satisfies victims' rights, advocates may encounter an array of obstacles and limitations that undermine the potential of human rights litigation in the United States to serve victims. This section will draw on the record of human rights civil and criminal actions in United States to make observations about the practical limitations that may constrain advocates' ability to implement a holistic approach to human rights litigation and leverage one strategy to further another. Some of those practical limitations can be addressed through client-centered and innovative lawyering strategies while others—such as politics, bureaucratic inertia, and inter or intra-agency power struggles—may be more difficult for advocates to change.

For example, the truth-seeking impact of a civil suit and the ability of plaintiffs to collect monetary damages partially will depend on how the defendant reacts to the lawsuit. A review of the record of ATS/TVPA lawsuits in the United States reveals that only a small group of plaintiffs have been successful during civil human rights litigation's thirty-year history.[350] While this small group of successful plaintiffs has been awarded multi-million dollar judgments, victims rarely recover monetary damages because the defendants have no assets, hide their assets, or default. Plaintiffs can search for assets in advance of filing suit and before a defendant is alerted to the possibility of a monetary award; they also can request a preliminary injunction to prevent the

347. United States v. Vampire Nation, 451 F.3d 189, 197 n.4 (3d Cir. 2006); Kenna v. U.S. Dist. Court for the Cent. Dist. of Cal., 435 F.3d 1011 (9th Cir. 2006); United States v. Degenhardt, 405 F. Supp. 2d 1341, 1349, 1351 (D. Utah 2005).

348. Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1257 (2012) ("[V]ictim impact statements narrate the sheer complexity of criminal harm in a way that would be impossible without the victim's 'voice' . . . .").

349. The victims of environmental disasters, such as an explosion at a BP plant in Texas City that killed fifteen persons and resulted in civil suits and criminal charges against BP, have used "their rights under the CVRA to gain a tactical advantage in their civil lawsuits." Judson W. Starr, Brian L. Flack & Allison D. Foley, *A New Intersection: Environmental Crimes and Victims' Rights*, NAT. RES. & ENV'T, Winter 2009, at 1, *available at* http://www.venable.com/files/Publication/7beef7a3-c08b-4ca6-8821-1aeba7c5e942/Presentation/PublicationAttachment/77f449c0-c181-4536-90cb-19eeb0df6c2d/01_09_Starr_Flack_Foley.pdf.

350. *Supra* note 177.

transfer of assets outside the United States.[351] These tactics, however, have been successful only in a couple of ATS/TVPA cases.[352]

By defaulting, defendants also can limit the truth-seeking potential of civil suits. Court-supervised discovery—document requests, interrogatories, depositions, requests for admission, and the subpoena of documentation—is only available to human rights plaintiffs in a civil suit if a default judgment is not entered, the defendant remains in the country and cooperates with the process, and discoverable material exists.[353] Most defendants default in most human rights lawsuits, and the gathering of evidence and the production of "truth" will depend on the resources the plaintiff can bring to bear on the effort. Large private firms often lend pro bono support, contributing expertise and resources to the expensive enterprise of gathering evidence to hold human rights perpetrators civilly liable.

Criminal prosecutions or immigration proceedings have a distinct advantage over civil lawsuits as a truth-seeking mechanism because a prosecutor's effort to prove the defendant's guilt is backed by the power and resources of the state. Prosecutors and immigration officials can draw on a network of investigators, legal experts, researchers, analysts, historians, and intelligence professionals at DOJ, DHS, and DOS to contribute to the investigation of criminal and civil charges against human rights abusers.[354] Yet, for a variety of political, procedural, and evidentiary reasons, these resources are rarely deployed to benefit human rights victims. As described above, there has been only one federal criminal prosecution of an international crime in U.S. history. The efforts of advocates and victims to press for criminal prosecutions of human rights abuses committed abroad have been largely unsuccessful.

The most common strategy in the United States is to remove or deport a human rights violator from the country. However, the vast majority of the hundreds of immigration decisions denying immigration benefits to human rights abusers are not public, and victims have no way of accessing the facts established by the proceedings or determining whether the defendant was deported because of his human rights record.[355] As such, victims are unlikely to receive any truth-seeking benefits from an official finding of wrongdoing issued by immigration authorities.

One notable exception to the practice of nondisclosure is the publication of a decision by the Orlando Immigration Court to deny Carlos Eugenio Vides Casanova, a former defense minister of El Salvador, relief from removal

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351. STEPHENS ET AL., *supra* note 110, at 455–57.

352. Jean v. Dorélien, 431 F.3d 776 (11th Cir. 2005); *In re* Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994).

353. STEPHENS ET AL., *supra* note 110, at 473–502.

354. *House Hearings No Safe Haven*, *supra* note 35, (statement of John P. Woods, Deputy Assistant Dir., Immigration and Customs Enforcement, Homeland Security Investigations, U.S. Dep't of Homeland Security).

355. MacGregor & Morris, *supra* note 318, at 472.

because he had participated in torture and extrajudicial killings during that country's civil war.[356] Casanova is the first foreign military leader ordered to leave the United States for human rights violations. The U.S. government released the written decision only after *The New York Times* filed a FOIA request, submitted multiple appeals, and sued the DOJ.[357] The 157-page ruling implicates Casanova in several cases of torture and extrajudicial executions, including the 1980 rape and killing of four American churchwomen in El Salvador, and provides what one reporter referred to as "the most comprehensive legal assessment of General Vides's role in human rights abuses to date."[358] As the *Casanova* case shows, FOIA requests may provide a viable strategy toward ensuring that immigration decisions regarding human rights perpetrators are available to victims and the public.[359]

The "truth" established by criminal verdicts looks quite different from the detailed accounting established in the *Casanova* immigration case. The criminal process builds an archive of information based on physical, documentary, and testimonial evidence submitted during discovery and at trial. The trial transcript, for example, can be a treasure trove of information about the crime that often includes testimony by witnesses, experts, and victims. Trial transcripts are usually available through a public database. Criminal verdicts in the United States, however, are not legal opinions that establish facts, but simple forms establishing guilt or innocence. For example, the jury verdict against Charles McArthur Emmanuel, the only person criminally prosecuted, convicted, and sentenced in the United States for crimes of torture committed abroad, consisted of a two-page document with check marks next to the word "guilty" for each of the eight counts charged.[360] For some victims, this declaration of wrongdoing will suffice; others expect the verdict to establish a more capacious truth that includes an explanation of the reasons why the violations occurred, who was responsible, and what were the consequences.[361]

The victim's right to truth, justice, and reparations applies not only to the outcome of legal proceedings, but also establishes expectations about victims' participation in the process. In civil lawsuits, victims are in control of the timing and direction of the suit, even though their efforts must adhere to rigid procedural and evidentiary requirements. Victims often have the opportunity to

356. Preston & Archibold, *supra* note 320.

357. Complaint, N.Y. Times Co. v. U.S. Dep't Justice (S.D.N.Y. 2013) (No. 13-CV-02179), *available at* https://archive.org/details/676807-nys-1-2013cv02179-complaint.

358. *Id.* at 28.

359. *The New York Times* also filed a FOIA request to obtain the immigration judges in the case against former El Salvadoran Defense Minister, General José Guillermo García. The judge found that Gen. García "assisted or otherwise participated" in 11 human rights violations. Preston, *supra* note 320.

360. Verdict, United States v. Belfast, No. 06-20758-CR-ALTONAGA (S.D. Fla. Oct. 30, 2008).

361. Tristram Hunt, *Whose Truth? Objective Truth and a Challenge for History*, 15 CRIM. L.F. 193, 195 (2004).

testify as witnesses in civil, criminal, and immigration proceedings. Additionally, the CVRA provides victims with "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[362] Accordingly, victims can testify as witnesses about the liability of the defendant as well as the harms suffered as a result of the defendant's conduct.

The act of testifying gives victims the opportunity to tell their story and potentially brings the public in closer contact with the brutal truth of what happened. However, some commentators dispute the reparatory or therapeutic effects for victims who testify.[363] The act of testifying can be a traumatic event for victims and witnesses who must speak about the most horrifying and painful moments of their lives only then to be subjected to cross-examination. Moreover, procedural and evidentiary rules limit the story the witnesses are allowed to tell to facts relevant to the liability or guilt of the defendant. Adequate preparation with their legal representative and access to psychological support may help prepare victims for or mitigate the traumatic impact of testifying.

Under the CVRA, crime victims have additional participatory rights, including the right to confer with the government prosecutors about plea negotiations and terms.[364] For example, in a drug conspiracy case involving an extradited Colombian paramilitary leader, victims requested that any plea agreement incentivize the defendant to provide information about the extrajudicial killing of an environmental activist who publically denounced the defendant's cocoa cultivations in Colombia.[365] Due to such reluctance to prosecute international crimes, no human rights victims have had the opportunity to invoke the CVRA in the context of human rights criminal prosecutions.

CONCLUSION

This Article has shown that the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum* did not end human rights litigation in the United States. Litigation under the ATS was not the only—nor the most commonly used—legal strategy to hold accountable human rights perpetrators. The U.S. accountability regime is composed of multiple legal mechanisms. Each

362. 18 U.S.C. § 3771(a)(4) (2012).

363. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 597–601 (2002); Jamie O'Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT'L L.J. 295, 328–29 (2005).

364. 18 U.S.C. § 3771(a)(5); *see also In re* Dean, 527 F.3d 391, 395 (5th Cir. 2008); United States v. BP Prods. N. Am., Inc., Criminal No. H-07-434, 2008 WL 501321, at *11 (S.D. Tex. Feb. 21, 2008); United States v. Heaton, 458 F. Supp. 2d 1271, 1272 (D. Utah 2006); United States v. Ingrassia, No. CR-04-0455ADSJO, 2005 WL 2875220, at *17 (E.D.N.Y. Sept. 7, 2005).

365. Janisch & de Granados, *supra* note 306.

mechanism advances some dimension of victims' rights to truth, justice, and reparations, but no mechanism can achieve all of those goals on its own. By employing a holistic approach to this complex legal landscape and identifying opportunities to leverage one legal mechanism to further another, human rights litigation in the United States can be crafted to serve the victims' rights in a more comprehensive and integrated manner.

The victim-centered analysis developed in this Article comes at an opportune time, as advocates reassess legal strategies available in the United States post-*Kiobel* and chart a course forward for human rights litigation in the United States. In moving forward, advocates should look beyond the mere existence of formal mechanisms to how available remedies advance or marginalize the rights of victims. A victim-centered assessment can contribute to a more accurate understanding on the part of advocates and victims of the objectives, as well as the risks and benefits of each legal strategy. A victim-centered analysis also indicates where gaps exist in the accountability framework. Some of these gaps can be overcome through client-centered representation and innovative legal strategies. Other gaps, including the extraterritorial limitation to ATS litigation established by *Kiobel*, will require advocates to raise the American public's awareness about accountability gaps and mobilize support to spur legislative action.