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## Compounding the Countermajoritarian Difficulty Through “Plaintiff’s Diplomacy”: Can the International Criminal Court Provide a Solution?

*In the past twenty-five years the United States has had three major exports: rock music, blue jeans, and United States law. The first two have acquired an acceptance the last can never achieve. People resent being told what to do.*

*Justice William J. Brennan, Jr.*<sup>1</sup>

### I. INTRODUCTION

The eighteen judges of the International Criminal Court (ICC), each elected by a two-thirds majority of states parties to the ICC,<sup>2</sup> took their oath of office in The Hague on March 11, 2003.<sup>3</sup> These judges then selected by absolute majority<sup>4</sup> one of their own—Philippe Kirsch, a distinguished Canadian jurist<sup>5</sup>—to serve a three-year term as President of the ICC. No two judges may be nationals of the same state,<sup>6</sup> but no judge is a national of the United States. It is true that on December 31, 2000, President Bill Clinton signed the

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1. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting).

2. *Rome Statute of the International Criminal Court*, U.N. ICC, at art. 36(6)(a), U.N. Doc. A/CONF.183/9 (1998), [http://www.un.org/law/icc/statute/99\\_corr/cstatute.htm](http://www.un.org/law/icc/statute/99_corr/cstatute.htm) [hereinafter *Rome Statute*].

3. Keith B. Richburg, *International War Crimes Court Is Inaugurated, but Without U.S.*, WASH. POST, Mar. 12, 2003, at A18, available at <http://www.washingtonpost.com/ac2/wp-dyn/A12630-2003Mar11>.

4. *Rome Statute*, *supra* note 2, at art. 38(1) (“The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or until the end of their respective [nine year, nonrenewable] terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.”).

5. Marlise Simons, *World Court for Crimes of War Opens in The Hague*, N.Y. TIMES, Mar. 12, 2003, at A10 (reporting the inauguration of the body of judges and their subsequent selection according to Article 38(1) of the ICC Statute of Philippe Kirsch, a Canadian judge and specialist on international law, as President and Akua Kuenuhia of Ghana and Elizabeth Odio Benito of Costa Rica as Vice-Presidents).

6. *Rome Statute*, *supra* note 2, at art. 36(7)(a).

final draft of the Statute of the International Criminal Court (ICC Statute or Rome Statute), adopted at the Rome Conference of July 17, 1998, despite “concerns about significant flaws in the Treaty.”<sup>7</sup> But he did this so that the United States would remain “in a position to influence the evolution of the Court.”<sup>8</sup> This controversial move did not invite U.S. support of the ICC in the end.

To the contrary, the United States has wholly rejected the ICC in the three years since President Clinton signed the final draft ICC Statute. In doing so, the United States has argued both that U.S. participation in the ICC would violate the U.S. Constitution and that U.S. hegemony in a unipolar world would subject the United States to politically motivated prosecutions in the ICC arising out of U.S. peacekeeping activities. The constitutional concerns surrounding U.S. participation in the ICC focus largely on jurisdictional considerations and on vague or ambiguous language in the ICC Statute’s definition of jurisdiction-conferring crimes.

But such arguments alone neither necessarily render U.S. participation in the ICC unconstitutional nor even seem to constitute the true U.S. objection to the ICC. Rather, these arguments may stem from a more fundamental concern inherent in the ICC’s institutional nature: the countermajoritarian difficulty. That is, the ICC’s substantive authority over the citizens of the states parties independent of these states’ duly elected governments seems undemocratic. Such facial countermajoritarianism, however, does not automatically violate U.S. constitutional principles, as the United States’ own experience with the countermajoritarian difficulty has shown. In the end analysis, U.S. rejection of the ICC may stem more pragmatically from entrenched U.S. perspectives on the force of international law and simple U.S. mistrust of the political motives of some states parties to the ICC. Rejecting the ICC on these grounds reciprocally invites scrutiny of the U.S. posture toward the rest of the world—both through reliance on the principles of international law and through the use of international law to achieve political objectives—in civil litigation under the Alien Tort Statute, a long-idle provision of the Judiciary Act of 1789.

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7. Bill Clinton, Statement by the President, Signature of the International Criminal Court, *in* Clinton Announces U.S. Is Signing International Criminal Court Treaty (Dec. 31, 2000), <http://usinfo.state.gov/topical/pol/usandun/00123101.htm>.

8. *Id.*

*A. Background: Confronting a Disturbing Asymmetry in U.S. Law*

The same “concerns” to which President Clinton alluded in 2000 had already led to vehement objections to the ICC in Senate hearings on July 23, 1998. Senator Rod Grams declared, “I hope that now the administration will actively oppose this Court to make sure that it shares the same fate as the League of Nations and collapses without U.S. support[,] for this court truly I believe is the monster and it is the monster that we need to slay.”<sup>9</sup> Subsequently, despite Clinton’s signature on the ICC Statute, the United States under the Bush Administration abstained from becoming a party to the treaty just months before the ICC Statute came into effect on July 1, 2002.<sup>10</sup> In fact, concerns over the ICC’s jurisdictional reach, prosecutorial responsibilities, and the definitions of crimes in the ICC Statute convinced the Bush Administration to insist on “a 100 percent ironclad guarantee that no American servicemen will be investigated and prosecuted by the court.”<sup>11</sup> On July 13, 2002, after diplomatically tense weeks of U.S. threats to pull its support from U.N. peacekeeping missions around the world unless U.S. troops obtained immunity from prosecution in the ICC, the U.N. Security Council unanimously passed Resolution 1422 granting the U.S. military immunity for a one-year period.<sup>12</sup> The United States then began seeking bilateral agreements with individual governments to exempt U.S. military personnel from ICC prosecution.<sup>13</sup> Additionally, “statements made by U.S. representatives reveal that

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9. *Is a U.N. International Criminal Court in the National Interest?: Hearing Before the Subcomm. on Int’l Operations of the S. Comm. on Foreign Relations*, 105th Cong. 4 (1998) [hereinafter *ICC Hearings* (1998)] (statement of Sen. Rod Grams).

10. Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary General, entitled “International Criminal Court: Letter to UN Secretary General Kofi Annan” (May 6, 2002), at <http://www.state.gov/r/pa/prs/ps/2002/9968pf.htm> (“This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”).

11. Glenn Kessler, *Concerns over War Crimes Court Not New*, WASH. POST, July 2, 2002, at A9, available at 2002 WL 22785191 (quoting Richard Dicker, director of Human Rights Watch).

12. S.C. Res. 1422, U.N. SCOR, 57th Sess., 4572d mtg. at 1, U.N. Doc. S/RES/1422 (2002); Serge Schmemann, *U.S. Peacekeepers Given Year’s Immunity from New Court*, N.Y. TIMES, July 13, 2002, at A3; Colum Lynch, *U.S. Wins 1-Year Shield from War Crimes Court*, WASH. POST, July 13, 2002, at A16, available at 2002 WL 23853232.

13. *Uncle Sam Lays Down the Law*, ECONOMIST, Oct. 5, 2002, at 49.

Resolution 1422 was an obvious step toward thwarting the ICC's powers,"<sup>14</sup> a step consistent with Senator Grams's hope that U.S. rejection of the ICC would send that body the way of the League of Nations.

But invoking the fate of the League of Nations—although, as envisioned by Woodrow Wilson, it undoubtedly had its weaknesses<sup>15</sup>—by inviting the demise of the ICC seems dangerous in today's world of globalization, and may lead to undesired or unforeseen results.<sup>16</sup> That is, the inability of the western democracies to cede some sovereignty to the League of Nations after World War I in the interest of peace created a divisiveness exploited by Hitler in his quest for domination. This resulted in an unfortunate irony, as one astute observer noted as early as 1939: "Woodrow Wilson tried to unite the postwar world in an idealism for which it was not yet ripe. It would be the height of paradox if Hitler, of all persons, were destined by his statesmanship finally 'to make the world safe for Democracy.'"<sup>17</sup> The irrelevancy of the League of Nations taught the

14. Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503, 1507 (2002) (arguing for rejection of Resolution 1422 on the grounds that it contradicts the United Nations Charter and the Law of Treaties and violates certain preemptory norms).

15. See generally Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT'L & COMP. L.Q. 99 (1994) (assessing the values and weaknesses of Wilsonian self-determination and its continued effects and implications in the post-cold war world).

16. See ROBERT S. MCNAMARA & JAMES G. BLIGHT, *WILSON'S GHOST: REDUCING THE RISK OF CONFLICT, KILLING, AND CATASTROPHE IN THE 21ST CENTURY* 59 (2001) (highlighting current "[p]ublic opinion in the United States and the West [which] dangerously fails to appreciate the possibility of a Great Power clash and/or to make plans to prevent it"). Much like Senator Trent Lott's gaffe at Senator Strom Thurmond's 100th birthday party, in which he appeared to condone Thurmond's segregationist platform as a presidential candidate in 1948 for the Dixiecrat Party, current citation to the precedent of the American torpedoing of the League of Nations in justifying rejection of the ICC risks identification with some of the socially unacceptable and discriminatory reasons that the United States declined joining the League in 1919. For example, in the debates concerning the Permanent Court of International Justice under the proposed League of Nations, a senator from Missouri objected to U.S. participation in the Court or League stating, "Think of submitting questions involving the very life of the United States to a tribunal on which a nigger from Liberia, a nigger from Honduras, [and] a nigger from India . . . each have votes equal to that of the great United States." David P. Forsythe, *The United States and International Criminal Justice*, 24 HUM. RTS. Q. 974, 990 n.47 (2002) (quoting PAUL GORDON LAUREN, *POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION* 113 (1988)).

17. C., *Will Hitler Save Democracy?*, 17 FOREIGN AFF. 455, 464 (April 1939) (observing that "Hitler's crudeness . . . has ended by creating . . . what Bismarck always most

world about the necessity of the post–World War II United Nations the hard way—through Hitler. And “a future Adolf Hitler may point to the U.S. action [in not joining the ICC] in telling his followers that they need not fear being held accountable.”<sup>18</sup> But of more immediate concern, perhaps, than abstractly sending a mixed message to human rights violators, is that U.S. hopes of impairing the ICC like the League of Nations create a problematic asymmetry in the American legal relationship with the rest of the world.

True, legitimate concerns about the ICC Statute led to the U.S. rejection of the ICC. Certain flaws in the ICC Statute might constitute a threat to U.S. national interests.<sup>19</sup> In general, U.S. opponents to the ICC believe that the ICC Statute “created a court with [1] hitherto unprecedented jurisdictional reach and with [2] substantive authority to adjudicate a long list of crimes previously unknown in the established canon of customary international law.”<sup>20</sup> These two overarching concerns with the ICC refer, on the one hand, to the “*de facto* universal jurisdiction which emerged from the treaty,”<sup>21</sup> and on the other, to the perceived failure of the ICC’s definitions of crimes “to give adequate notice of exactly what they prohibit under the [U.S.] ‘void for vagueness’ doctrine.”<sup>22</sup> Ironically, then, in light of the U.S. opposition to the ICC’s universal jurisdiction and its definitions of crimes, the U.S. Alien Tort Claims Act (ATCA)<sup>23</sup> allows aliens to sue foreign defendants in U.S. courts for certain crimes committed abroad amounting to violations of

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feared: an almost universal anti-German coalition”). Ironically, having rejected the peaceful way to a union of democratic nations, the world’s democracies were forced to achieve such a union through the horrors of another world war fought “to defend the principles of freedom which make individual lives worth living.” *Id.*

18. *ICC Hearings* (1998), *supra* note 9, at 74 (prepared statement of Michael P. Scharf, Professor of Law and Director, Center for International Law and Policy, New England School of Law, Boston, MA) (arguing that “the U.S. may have lost far more than it gained by voting against the ICC Statute”).

19. *Id.* at 6 (statement of Sen. Jesse Helms).

20. Richard G. Wilkins, *The Right Thing the Wrong Way: Implications of the New International Criminal Court*, *WORLD & I*, Oct. 2002, at 265, 268.

21. *ICC Hearings* (1998), *supra* note 9, at 15 (statement of Hon. David J. Scheffer, U.S. Ambassador-at-Large for war crimes issues).

22. *Id.* at 59 (prepared statement of Hon. John R. Bolton, Former Assistant Secretary of State for International Organization Affairs; Senior Vice President, American Enterprise Institute, Washington, D.C.).

23. 28 U.S.C. § 1350 (2000). Hailing originally from 1789, the Alien Tort Statute now reads, “The 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.” *Id.*

customary international law—a list of crimes substantially similar to the three crimes enumerated in the ICC Statute—precisely under the idea of universal jurisdiction.<sup>24</sup> Essentially, as the world's sole superpower, the United States has created “supercourts”<sup>25</sup> that employ universal jurisdiction, dubbed federal subject matter jurisdiction, to judge citizens of countries that have not subjected themselves to U.S. law.<sup>26</sup> This trend has exacerbated a perception of legal asymmetry from the perspective of other countries:

The juxtaposition of this increased involvement of U.S. courts in foreign affairs with the continued American refusal to participate in bodies like the International Criminal Court creates the image of a country happy to haul foreign defendants into its own courts while stubbornly resisting even the remote possibility that its own citizens might be called to account [in the ICC].<sup>27</sup>

In short, U.S. courts administer the rule of law against foreign defendants for these crimes, but the United States does not trust the ICC because judges from places like “Sudan or . . . Iran”<sup>28</sup> may do the same.

### *B. Assuaging the Asymmetry*

Not only U.S. foreign policy suffers from ATCA litigation; rather, just as the admitted flaws in the ICC Statute constitute possible constitutional obstacles,<sup>29</sup> ATCA suits raise constitutional

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24. Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, 40 GERMAN Y.B. INT'L L. 117, 135 (1997) (outlining and applauding U.S. courts' application of the ATCA since 1980 as a means of combating human rights abuses).

25. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept./Oct. 2000, at 102, 115.

26. Cf. *ICC Hearings* (1998), *supra* note 9, at 7 (statement of Sen. Jesse Helms) (criticizing the ICC because “this court declared that the American people are under its jurisdiction no matter what the U.S. government says or does about it”).

27. Slaughter & Bosco, *supra* note 25, at 115.

28. *ICC Hearings* (1998), *supra* note 9, at 3 (statement of Sen. Rod Grams).

29. For a discussion of the constitutional obstacles decried by the United States in the ICC Statute, see Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 382 (2002) (detailing the various constitutional concerns surrounding the ICC statute, including “prosecutorial power, immunity, rights of the accused, fugitive transfer, and imprisonment,” and showing that these “obstacles . . . may be surmountable, but not without significant political will to ratify”). Even those countries that support and thus have ratified the ICC face constitutional questions in conjunction with the operation of the court. See generally Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. &

concerns of their own. Particularly, the “plaintiff’s diplomacy”<sup>30</sup> resulting from ATCA litigation infringes on separation of powers principles, not only between the judicial and executive branches within the U.S. governmental system, but also, strikingly, between U.S. courts and the legislative prerogatives of other countries.<sup>31</sup> In this sense, ATCA litigation actually compounds the “countermajoritarian difficulty”<sup>32</sup> already heavily scrutinized in U.S.

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INT’L L. 5, 6, 8 (2001). Duffy identifies three overarching constitutional issues in ratifying countries: (1) “the compatibility of a state’s constitutional prohibition on the extradition of its nationals with the absolute obligation on state parties to the Rome Statute to arrest and surrender suspects to the Court”; (2) “the consistency of constitutional immunities, such as those conferred on heads of states or parliamentarians, with the duty imposed on state parties to arrest and surrender suspects, irrespective of their official status”; and (3) “the compatibility of constitutional prohibitions on life imprisonment with the Statute’s provisions on penalties, which allow the ICC to impose a life sentence in exceptional circumstances.” *Id.* at 6. Duffy concludes that ratifying countries have generally divided themselves into two groups over these questions: those “that have decided to amend their constitutions to ensure that they are in line with the Rome Statute,” and those that simply “have concluded that their constitutional provisions are consistent with the Statute, and thus amendment is unnecessary.” *Id.* at 8.

30. Slaughter & Bosco, *supra* note 25, at 103 (employing the term “plaintiff’s diplomacy” to describe the “new trend toward [ATCA] lawsuits that shape foreign policy” and grouping such suits by foreign plaintiffs in United States federal court into three broad categories: (1) “suits against individuals for grave violations of international law committed in the name of governments”; (2) “suits against corporations for violations of international law”; and (3) “suits against foreign governments . . . filed in an effort to achieve justice for victims of terrorism and oppression”).

31. Suits brought under the ATCA against corporations operating in foreign countries poignantly exemplify this phenomenon because in addition to “focus[ing] greater attention on the human rights and environmental implications of corporate investment,” judgments in U.S. courts in favor of alien plaintiffs “may produce . . . de facto sanctions against states with poor environmental and human rights records,” *id.* at 110, which in turn may “overturn” or “undermine” development policies of “governments of both developing and developed countries,” *id.* at 111. *Cf.* *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (expressing that U.S. federal courts should be wary of these suits’ potential for substituting U.S. policies for the policies of other governments); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 552–53 (S.D.N.Y. 2001) (following *Beanal* in recommending caution in these cases); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 519–520 (S.D.N.Y. 2002) (exercising the caution that the *Beanal* court suggested in regard to situations where judgments might have the effect of substituting U.S. policy for the policy of another government in finding a lack of international consensus in customary international law as a basis for dismissing the plaintiffs’ claims). See *infra* Part III.B.3.b for treatment of the effect of ATCA suits against corporations.

32. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962) (“The root difficulty is that judicial review is a counter-majoritarian force in our system.”); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) (defining the “countermajoritarian difficulty” as “the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy”).



constitutional jurisprudence. That is, ATCA litigation internationalizes nonelected federal judges' countermajoritarianism by extending it from intrusion into the policymaking responsibilities of the elected legislature or the executive branch within the United States to direction of political and social policy in other, usually developing, countries. But U.S. participation in the ICC—which will unavoidably also engage in judicial “legislation” on some public policy issues<sup>33</sup>—could assuage the tension in U.S. law between use of ATCA litigation and opposition to the ICC, a court built on remarkably similar principles to those underlying modern ATCA litigation.

This Comment does not aim to give a comprehensive overview of minutia concerning the ICC. Numerous lengthier studies aptly treat the advantages<sup>34</sup> and disadvantages<sup>35</sup> of the ICC Statute. Rather, this Comment examines the compounded—internationalized—counter-majoritarian difficulty of ATCA litigation's “plaintiff's diplomacy” in relation to the U.S. rejection of the ICC based in part on the ICC's similar capacity for judicial legislation.

First, Part II briefly defines the countermajoritarian difficulty for use in this framework. Part III spotlights civil litigation under the ATCA and its more current supplement, the Torture Victim Protection Act of 1991 (TVPA).<sup>36</sup> Although the ATCA amounts to a rather “unusual statute”<sup>37</sup> that “lay nearly dormant for 191 years,”<sup>38</sup>

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33. Forsythe, *supra* note 16, at 986 (discussing ICC opponents' argument that “[s]ince the ICC will in effect ‘legislate’ on a variety of weighty issues, and since its prosecutor and judges will have the opportunity to overturn policy established by national democracies, the court should be opposed”).

34. See, e.g., Joshua Bardavid, *The Failure of the State-Centric Model of International Law and the International Criminal Court*, 15 N.Y. INT'L L. REV. 9 (2002); Michael P. Scharf, *The United States and the International Criminal Court: The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS., Winter 2001, at 67. An overwhelming number of articles support both sides of the issue, including, for example, the entire volume of 64 LAW & CONTEMP. PROBS., Winter 2001.

35. See, e.g., Marcus R. Mumford, *Building upon a Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference*, 8 J. INT'L L. & PRAC. 151 (1999); Robert Christensen, *Getting to Peace by Reconciling Notions of Justice: The Importance of Considering Discrepancies Between Civil and Common Legal Systems in the Formation of the International Criminal Court*, 6 UCLA J. INT'L L. & FOREIGN AFF. 391 (Fall/Winter 2001–2002).

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

37. Stephens, *supra* note 24, at 122.

it is nevertheless “one of the most widely discussed provisions in modern international law.”<sup>39</sup> As such, this Comment defers to the previous conscientious studies and criticisms<sup>40</sup> of the U.S. use of the ATCA as a “human rights watchdog,”<sup>41</sup> focusing more narrowly on the ATCA’s and the TVPA’s implications for the compounded countermajoritarian difficulty that renders America’s wholesale rejection of the ICC contradictory.

Part IV investigates the roots of the ICC’s own countermajoritarian difficulty—its “democratic deficit”<sup>42</sup> coupled

38. Ivan Poullaos, Note, *The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations*, 80 WASH. U. L.Q. 327, 327 (2002) (investigating the expansion of ATCA litigation since 1980).

39. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 221 n.2 (1996) (providing a survey of numerous treatments of the ATCA up to 1996, and arguing that modern ATCA litigation expresses the original intent behind the statute).

40. See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that “[i]t is important to remember that in 1789 there was no concept of international human rights”); Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16, available at [http://www.aei.org/include/news\\_print.asp?newsID=17727](http://www.aei.org/include/news_print.asp?newsID=17727) (“[I]t is clear not only that *Filartiga* [*v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), the leading ATCA case,] is wrong but that it is a serious incursion by courts into the domain of Congress, involving, as it does, the enactment of world-wide law by an unholy alliance of imperialistic judges and a leftist cadre of international law professors.”); Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT’L L.J. 1 (1993); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445 (1995).

41. Cf. Debra A. Harvey, Comment, *The Alien Tort Statute: International Human Rights Watchdog or Simply Historical Trivia?*, 21 J. MARSHALL L. REV. 341, 341 (1988) (showing how the unclear origins of the ICC Statute in 1789 lead to uncertainty of the ATCA’s scope).

42. Forsythe, *supra* note 16, at 986 (examining the “democratic deficit” of the ICC as a budding U.S. concern). Many international institutions face the criticism that a perceived democratic deficit inherent in their supra-national nature renders them illegitimate. See, e.g., Joseph S. Nye, Jr., *Globalization’s Democratic Deficit*, FOREIGN AFF., July/Aug. 2001, at 2, 4–5. Nye argues that “governments can do several things to respond to the concerns about a global democratic deficit. First, they can try to design international institutions that preserve as much space as possible for domestic political processes to operate.” *Id.* at 4. Second, “[g]overnments should also make clear that democratic accountability can be quite indirect. Accountability is often assured through means other than voting, even in well-functioning democracies.” *Id.* at 5. Finally, “[i]ncreased transparency is also essential. . . . In some instances, such as judicial procedures or market interventions, it is unrealistic to provide information in advance, but records and justifications of decisions can later be disclosed for comment and criticism—as the Federal Reserve and the Supreme Court do in domestic politics.” *Id.* The European Union displays a marked example of a democratic deficit in international institutions. See, e.g., L. NEVILLE BROWN & TOM KENNEDY, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* 3 (4th ed. 1994) (“[The Maastricht Treaty]

with its capacity for judicial legislation—through structural and prudential arguments arising out of the ICC’s institutional nature and its reliance on universal jurisdiction in administering justice. The ICC’s institutional newness entails risks, including the possibility of ceding some sovereignty to participate in the court, but “a state may consent to limitations on its sovereignty”;<sup>43</sup> indeed, the United States has excelled in “split[ting] the atom of sovereignty.”<sup>44</sup> Moreover, current U.S. use of legal principles such as universal jurisdiction and the substance of customary international law as a basis for the expansion of ATCA litigation and as a justification for enacting the TVPA lessens the validity of these issues as prohibitive constitutional risks of participation in the ICC. Instead, the truly difficult constitutional concern arising out of the ICC relates to the countermajoritarian difficulty: the institutional nature of the ICC will allow it to pass judgment on, and so in a certain sense to direct, domestic public policy relating to the three crimes under its jurisdiction.

Finally, Part V notes that with some effort, U.S. ratification of the Statute could provide a (constitutional) solution, allowing the United States to continue using the ATCA in civil suits without eliciting the disdain of a world all too eager to mistakenly equate U.S. hegemony with empire building.<sup>45</sup> Rather than subjecting the world to a de facto universal law in the form of U.S. federal subject matter jurisdiction to the exclusion of the ICC, a participatory international panel, U.S. ATCA litigation could simply provide civil remedies for criminal offenses authoritatively tried in the ICC. But Part V concludes that because the United States “remains mired in

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enhances the powers of the European Parliament to help meet the so-called ‘democratic deficit’ within the Community.”).

43. Amann & Sellers, *supra* note 29, at 401 (citing John Marshall’s opinion in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (noting that states can consent to limit their sovereignty)).

44. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

45. On views of America as a type of neo-Roman Empire, see G. John Ikenberry, *America’s Imperial Ambition*, FOREIGN AFF., Sept./Oct. 2002, at 44; Allister Sparks et al., *How the World Views America*, WILSON Q., Spring 2001, at 46 (a collection of seven articles by seven authors from around the world addressing this question and finding largely that America deserves the designation of empire). For an explanation of why accusations of American empire building are misguided, see Martin Walker et al., *An American Empire?*, WILSON Q., Summer 2002, at 35 (essays by five scholars refuting the comparison between America and Rome and exposing the fallacy in identifying America with other past empires).

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history, exercising power in an anarchic Hobbesian world where international laws and rules are unreliable,”<sup>46</sup> the ICC’s capacity for judicial legislation will continue to dissuade the United States from joining the ICC, at least until the ICC establishes itself.

## II. THE COUNTERMAJORITARIAN DIFFICULTY IN THE U.S. CONSTITUTIONAL FRAMEWORK

### *A. From Judicial Review to the “Countermajoritarian Difficulty”*

Ever since *Marbury v. Madison*<sup>47</sup> the concept of judicial review has thrived in U.S. constitutional jurisprudence. But the fact that unelected judges can override legislation created by elected representatives of the people seems undemocratic, even antidemocratic; in short, as Alexander Bickel notes, “judicial review is a counter-majoritarian force in our system.”<sup>48</sup> However, Alexander Hamilton in *The Federalist No. 78* “denied . . . that judicial review constituted control by an unrepresentative minority of an elected majority.”<sup>49</sup> This conclusion “only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former.”<sup>50</sup> But even the highly valued stability that this ensures is “a countermajoritarian factor”<sup>51</sup> because in upholding the Constitution against an inconsistent current legislative enactment “it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the

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46. ROBERT KAGAN, *OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER* 3 (2003). President George W. Bush confirmed this feeling following the deadlock among the permanent members of the Security Council over how best to disarm Iraq in the months preceding the U.S.-led invasion of Iraq in March 2003 in his verdict that “[t]he United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.” President George W. Bush, *Speech Delivering Ultimatum to Iraq* (Mar. 17, 2003), <http://www.cbsnews.com/stories/2003/03/17/iraq/main544377.shtml> (issuing a 48-hour ultimatum to Saddam Hussein and his sons to leave Iraq or face “military conflict commenced at a time of our choosing”).

47. 5 U.S. (1 Cranch) 137 (1803).

48. BICKEL, *supra* note 32, at 16.

49. *Id.*

50. THE FEDERALIST NO. 78, at 395–96 (Alexander Hamilton) (Garry Willis ed., 1982).

51. BICKEL, *supra* note 32, at 17.

prevailing majority, but against it.”<sup>52</sup> In short, the power of appointed justices not directly accountable to the voting public—such as those on the U.S. Supreme Court—over the elected legislature through judicial review renders the resulting de facto creation of political and social policy undemocratic.

And yet the United States is also wary of a politicized judiciary. “We disdain the notion of judges rendering decisions under the threat of political retribution,”<sup>53</sup> which threat can arise in the case of elected judges. Similarly, in the case of appointed judges, “[w]e expect that judges will decide cases based on the facts and existing precedents, rather than on the preferences of those in power.”<sup>54</sup> These two concerns express America’s priority on the rule of law free from politics, perhaps even over the criticism that appointed justices are an unelected minority with power over the elected representatives of the majority. To divorce politics from federal adjudication, the Constitution provides for an independent judiciary, in part through life tenure.<sup>55</sup> A sufficiently independent judiciary allows courts to decide according to reasoned principle, a role they are institutionally uniquely suited to perform. “When we speak of the rule of law—at home and abroad—this [adjudication free from political pressure] is in large part what we mean.”<sup>56</sup> Allowing an independent judiciary to administer the rule of law in a system of horizontal separation of powers provides an essential check on legislative and executive power; judicial review facilitates the judiciary’s designated role in the U.S. system of checks and balances.

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52. *Id.*

53. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part IV: Law’s Politics*, 148 U. PA. L. REV. 971, 972 (2000).

54. *Id.*

55. *Id.* (“Article III’s tenure and salary guarantees for federal judges are the constitutional embodiment of this value of judicial independence from political pressure.”). But others have argued the opposite: that the lifetime tenure of federal judges can compromise the independent judiciary. See, e.g., L.A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 77–79 (William Eskridge & Sanford Levinson eds., 1998) (arguing that a solution to the way that lifetime tenure detracts from the independence of the judiciary “is a non-renewable eighteen-year term . . . with vacancies occurring every two years” because “[t]he turnover would remain roughly the previous average (2.2 years) but would be less random”).

56. Friedman, *supra* note 53, at 972–73.

B. “[N]either Force nor Will, but [M]erely [J]udgment”<sup>57</sup>

Because each branch of the U.S. government represents the interest of the people, the countermajoritarian nature of the federal judiciary in providing an essential check on the other branches must not necessarily constitute a difficulty for the U.S. democratic system. True, “judicial review is a deviant institution in the American democracy”<sup>58</sup> when compared to the actions of legislators and the executive whom the people elect directly, but that does not necessarily detract from the republican nature of American democracy or implicate a “crisis of legitimacy”<sup>59</sup> for judicial review. Indeed, it is difficult to imagine how the independent judiciary could fulfill its constitutional role as “an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority”<sup>60</sup> without Justice Marshall’s ingenious solution to the deadlock in *Marbury v. Madison*: formalized judicial review.

Furthermore, the fact that the people do not directly elect federal judges does not automatically de-legitimize judicial review; rather, it amounts to a gradation of representation, resulting from elected officials’ constitutionally prescribed powers of appointment. The United States never was a “pure Democracy . . . consisting of a small number of citizens, who assemble and administer the Government in person,” because such a government “can admit of no cure for the mischiefs of faction.”<sup>61</sup> Rather, the republican U.S. system rejects the Greek model of democracy by providing for “*the total exclusion of the people in their collective capacity* from any share in the [American

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57. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Garry Willis ed., 1982).

58. BICKEL, *supra* note 32, at 18.

59. Barry Friedman, *Diagolue and Judicial Review*, 91 MICH. L. REV. 577, 579 (1993). Friedman argues that legal scholarship following Bickel concerning judicial review and the countermajoritarian difficulty “rests upon a descriptively inaccurate foundation.” *Id.* at 580. He suggests that in reality federal courts “do not trump majority will, or remain unaccountable to majority sentiment, nearly to the extent usually depicted. Measured by a realistic baseline of majoritarianism, courts are relatively majoritarian,” *id.* at 586, on the basis that (1) “courts frequently draw upon evidence of majoritarian will in reaching decisions,” and (2) an examination of “whether the selection and accountability of judges somehow differs so significantly from that of other governmental officials as to account for the countermajoritarian label affixed to courts,” shows that the American system indeed places “accountability constraints on the judiciary,” *id.* at 590.

60. THE FEDERALIST NO. 78, at 395 (Alexander Hamilton) (Garry Willis ed., 1982).

61. *Id.* NO. 10, at 46 (James Madison).

Governments].”<sup>62</sup> In truth, the Constitution removes federal judges one more step from the people than it did even the pre-Seventeenth Amendment Senate—whose senators were elected by the state legislatures from among themselves, and not directly by the people—that Madison describes in *The Federalist No. 63*. Nevertheless, presidential appointment of federal judges coupled with their ratification by the “Advice and Consent of the Senate”<sup>63</sup> still effects Madison’s “policy” of “successive filtrations”<sup>64</sup> meant to place the most qualified and virtuous people into such offices. Thus, the republican nature of American democracy and the policy of successive filtration recast the admitted countermajoritarianism of judicial review as an integral part of the U.S. constitutional system of representative democracy, rather than as deviant to it.

But twentieth-century scholarship has largely stigmatized judicial review. Particularly since Bickel’s 1962 description of the countermajoritarian difficulty, judicial review has carried with it a presumption of illegitimacy.<sup>65</sup> Concerns about judicial review often stem from a natural side effect of the use of judicial review to strike down a statute passed by the legislature on the grounds of unconstitutionality: the impact of such a decision on political or social policy may constitute judicial legislation. Moreover, a judge or court may consciously pursue a course of judicial activism intended to create public policy favorable to a particular ideology. Indeed, political ideology plays a large role in how one perceives the exercise of judicial review. A liberal will decry the Rehnquist Court for judicial activism; a conservative will reply that the Rehnquist Court is merely reining legislative power back into its constitutional scope, accusing the Warren and Burger Courts of unacceptable implementation of judicial review amounting to judicial legislation. Either way, a perception of countermajoritarianism inheres in the

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62. *Id.* NO. 63, at 322 (James Madison).

63. U.S. CONST. art. II, § 2.

64. 1 JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 81 (E.H. Scott ed., Chicago, Albert, Scott & Co. 1893) (1840).

65. See Friedman, *supra* note 59, at 578 (“At least since Alexander Bickel’s *The Least Dangerous Branch*, constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review.”); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984) (quoted in Friedman, *supra* note 59, at 578 n.3) (“Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble.”).

nature of the federal judiciary, implicating a “difficulty” in federal judges’ capacity for judicial legislation.

Concerns about the countermajoritarian difficulty apply not only to the judicial review exercised by the Supreme Court in constitutional decisions, but also more broadly to decisions of the lower federal courts, and even to the role of courts in general. Lower federal judges face the countermajoritarian difficulty for the same reasons as the Supreme Court: they are unelected, and so when they engage in judicial legislation through the creation of public policy that either naturally or intentionally accompanies their decisions, their actions seem undemocratic. The role of federal judges in ATCA litigation provides a strident example of this effect. The Constitution reserves to the executive branch the prerogative of conducting foreign policy.<sup>66</sup> But through their decisions on cases brought under the ATCA, federal judges intrude into the executive’s sphere, facilitating “plaintiff’s diplomacy” by allowing alien victims to sue despots for certain violations of customary international law committed in a foreign country.<sup>67</sup> Compounding this applied countermajoritarianism, ATCA litigation allows federal judges to preempt the policymaking role of foreign legislatures by participating in the creation of political or social policy in those countries.<sup>68</sup> Part III explores both “plaintiff’s diplomacy” and judicial legislation resulting from federal judges’ (countermajoritarian) decisions under the ATCA.

Other courts engage in judicial legislation through their decisions as well; indeed, a court can hardly avoid doing so if the natural consequences of its decisions have the effect of creating policy. Some courts engage in judicial legislation more consciously than others. For example, the Supreme Court of India maintains a decidedly activist reputation.<sup>69</sup> Similarly, the European Court of

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66. U.S. CONST. art. II, § 2; *see also* H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS* 152 (2002) (providing a “taxonomy” for “the general principle that the Constitution vests the president with the authority to formulate and implement the foreign policy of the United States”).

67. *See infra* Part III.B.1 for a discussion of the Falun Gong cases which exhibit “plaintiff’s diplomacy” in action as a tool for attempting to achieve human rights reform in China through accountability.

68. *See infra* Part III.B.3.b for an examination of federal courts’ capacity to preempt legislative policymaking in foreign countries through ATCA litigation.

69. *See* Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World’s Most Active Judiciary*, in *COMPARATIVE JUDICIAL REVIEW & PUBLIC POLICY* 77



Justice has pursued an agenda of judicial activism with regard to Community Law.<sup>70</sup> Generally speaking, judicial activism is on the rise in a global “judicialization of politics,”<sup>71</sup> in which judicial activism means “the transfer of decision-making rights from the legislature, the cabinet, or the civil service to the courts.”<sup>72</sup> Not surprisingly, judicial legislation—the judicial creation of public policy, whether through explicit judicial activism or not—will also surface in the decisions of the ICC. Considering U.S. preoccupation with “legitimizing” the domestic countermajoritarian difficulty, the ICC’s own structural “democratic deficit” coupled with its potential for judicial legislation, arguably a countermajoritarian difficulty on an international scale, is a constitutional concern for the United States.<sup>73</sup> Part IV addresses the countermajoritarian difficulty in terms of the ICC. Interestingly, the ICC’s potential for judicial legislation on certain policy issues seems to worry the United States more than the possibility that U.S. federal judges might create public policy in foreign countries through ATCA litigation.

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(Donald W. Jackson & C. Neal Tate eds., 1992); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989).

70. Christoph Henkel, *Constitutionalism of the European Union: Judicial Legislation and Political Decision-Making by the European Court of Justice*, 19 WIS. INT’L L.J. 153, 154 (2001) (noting that “the expansion of judicial review by the European Court of Justice remains the driving force behind the development of constitutionalism of the European Union,” and positing that “the case law of the Court of Justice in part reflects the judicial activism comparable to early U.S. Supreme Court assertions of federal power”); Mark C. Miller, *A Comparison of Two Evolving Courts: The Canadian Supreme Court and the European Court of Justice*, 5 U.C. DAVIS J. INT’L L. & POL’Y 27, 58 (1999) (concluding that “[t]he European Court of Justice has been much less hesitant to use judicial activism” than the Canadian Supreme Court in its “quasi-federal polity”); Jürgen Schwarze, *Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation*, 51 INT’L & COMP. L.Q. 17 (2002) (identifying problems with judicial review exercised by the European Court of Justice and focusing on the relationship between the European Court of Justice and the German *Bundesgerichtshof*). But see David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT’L L. J. 97, 130 (1994) (observing that the European Court of Justice is becoming less activist).

71. C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 2 (C. Neal Tate & Torbjörn Vallinder eds., 1995) (designating the United States as the “home of the judicialization of politics”).

72. Torbjörn Vallinder, *When the Courts Go Marching In*, in THE GLOBAL EXPANSION OF JUDICIAL POWER 13 (C. Neal Tate & Torbjörn Vallinder eds., 1995).

73. See *infra* Parts IV.B.1–2 for a treatment of structural and prudential arguments arising from the ICC’s “democratic deficit.”

### III. THE COUNTERMAJORITARIAN DIFFICULTY IN ATCA LITIGATION

ATCA litigation incorporates the countermajoritarian difficulty as nonelected federal judges both participate in foreign policy—constituting an encroachment by the nonelected judiciary on the responsibilities of the elected President—and create public policy in foreign countries, a job that elected legislatures in those countries are best suited to perform. Of course, despite criticisms of the countermajoritarian difficulty in the U.S. judiciary, it has “long been an integral part of our system of government,” and is “both firmly entrenched and fully accepted.”<sup>74</sup> So an expression of it arising out of civil litigation under the ATCA conducted in U.S. federal courts might not be very distressing, even if it were on an international scale. But the United States strongly opposes the ICC partly on the basis that it may engage in judicial legislation, preempting Congress’s policymaking role in the United States. Remarkably, though, U.S. ATCA litigation relies on a legal framework that closely resembles the rejected premises underlying the ICC: universal jurisdiction and a substantially similar list of crimes to which universal jurisdiction attaches in both the ATCA and the ICC. This Part gives a broad overview of ATCA litigation, surveying the U.S. expansion of universal jurisdiction—which the United States denies exists in the context of the ICC—to cover violations of evolving customary international law under its auspices.

#### *A. Universal Jurisdiction and Customary International Law in the ATCA*

At first, the concept that an alien can sue another alien in U.S. federal court for an offense committed in a foreign country seems, frankly, alien. In fact, the ATCA permits *only* aliens to sue, and not U.S. citizens,<sup>75</sup> a situation that Congress remedied in attaching the TVPA to the ATCA in 1991.<sup>76</sup> But the principle of universal jurisdiction clarifies how the United States could possibly claim

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74. Friedman, *supra* note 59, at 578.

75. Stephens, *supra* note 24, at 125.

76. H.R. REP. NO. 102-367, at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (“While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad.”).

jurisdiction<sup>77</sup> in a case between two aliens for a crime committed abroad.

Universal jurisdiction is an instrument of international justice that reaches violators of certain customary international laws or *jus cogens* norms<sup>78</sup> regardless of where they may be. “Under the principle of universal jurisdiction a state is entitled or even required to bring proceedings in respect of certain serious crimes, irrespective of the location of the crime, and irrespective of the nationality of the perpetrator or the victim.”<sup>79</sup> The concept of universal jurisdiction implies some consensus on what crimes should trigger it: “[b]y qualifying certain crimes as being subject to universal jurisdiction the international community signals that they are so appalling that they represent a threat to the international legal order.”<sup>80</sup> Under the precursor to international law, the “law of nations” provided a “system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world,” and which “must necessarily result from those principles of natural justice, in which all the learned of every nation agree.”<sup>81</sup> An early example of an offender subject to this type of jurisdiction was the pirate, who was seen as *hostis humani generis*, or an enemy of all mankind, by virtue of having “renounced all the benefits of society

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77. Once it is clear that universal jurisdiction attaches to a certain offense, then serving process on a potential defendant while physically present in the territory of the United States, no matter how temporarily, provides the requisite personal jurisdiction over a foreign defendant. This is called “transient jurisdiction” or “tag jurisdiction.” Thomas E. Vanderbloemen, Note, *Assessing the Potential Impact of the Proposed Hague Jurisdiction and Judgments Convention on Human Rights Litigation in the United States*, 50 DUKE L.J. 917, 928 (2000).

78. “Peremptory norms.” See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. k (1987). The RESTATEMENT defines “peremptory norms” as rules of international law [which] are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. It is generally accepted that the principles of the United Nations Charter prohibiting the use of force . . . have the character of *jus cogens*.

*Id.*

79. Menno T. Kamminga, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 HUM. RTS. Q. 940, 941–42 (2001).

80. *Id.* at 943.

81. 4 WILLIAM BLACKSTONE, COMMENTARIES \*66–67.

and government, and ha[ving] reduced himself afresh to the savage state of nature, by declaring war against all mankind.”<sup>82</sup>

This concept has lived on and been elaborated upon in the notion of predicating universal jurisdiction on certain egregious violations of modern customary international law. International law is constantly evolving as practices “ripen” into legal norms over time;<sup>83</sup> however, Blackstone’s notion of the necessity that a nation first consent before it can be bound by international law has survived as well in the notion of *opinio juris*, which means the point at which a country feels obligated to integrate a custom as law.<sup>84</sup> The United States recognizes the concept of customary international law as an evolving body of law: in order to ascertain what the “law of nations”—or in modern parlance, international law—is, U.S. courts look to “the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.”<sup>85</sup> And over one hundred years ago, the Supreme Court declared that “[i]nternational law is part of our law, and must be ascertained and administered by the courts of

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82. *Id.* at \*71.

83. Poullaos, *supra* note 38, at 332.

84. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. c (1987). The RESTATEMENT describes how *opinio juris* functions:

For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions.

*Id.*

85. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820) (referring to the definition of piracy as found in the law of nations, “which is part of the common law,” in upholding the death sentence for a convicted pirate). Furthermore, the Supreme Court has found established international custom authoritative as a valid description of international law:

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*The Paquete Habana*, 175 U.S. 677, 700 (1900).

justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”<sup>86</sup> Therefore, once a custom has evolved into customary international law as evidenced by treaties, scholarly works, and judicial decisions, etc., then it is also U.S. law, provided there is *opinio juris*.

Universal jurisdiction then attaches to certain violations of this evolved customary international law. Viewed conservatively, “[i]n customary international law, these crimes are piracy, the slave trade, and traffic in children and women. . . . The application of universal jurisdiction is also widely recognized for genocide, crimes against humanity and war crimes, that is, for the core crimes of the Rome Statute.”<sup>87</sup> The law can develop further still into *jus cogens* norms—or peremptory norms of international law that are “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>88</sup> In this sense, *jus cogens* norms constitute the highest level of international law.<sup>89</sup> Conceivably then, universal jurisdiction entailed in violations of *jus cogens* maintains a greater degree of certain validity than even universal jurisdiction inherent in certain grave breaches of customary international law,<sup>90</sup> which requires the consent of states to be binding.

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86. *The Paquete Habana*, 175 U.S. at 700.

87. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 60 (2001). Furthermore, “[m]ore recently, some multilateral treaties have also recognized universal jurisdiction for particular offenses such as hijacking and other threats to air travel, piracy, attacks upon diplomats, nuclear safety, terrorism, apartheid, and torture.” *Id.*

88. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 332.

89. Marc Rosen, Note, *The Alien Tort Claims Act and the Foreign Sovereign Immunities Act: A Policy Solution*, 6 CARDOZO J. INT’L & COMP. L. 461, 486 n.169 (1998) (“[T]here is no consensus among commentators as to how a norm precisely attains *jus cogens* status or what the consequences are if one does.”).

90. *But see* *Prinz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994). In *Prinz*, a Holocaust survivor sued the Federal Republic of Germany directly for damages attendant to injuries inflicted on him at, and to slave labor performed in, a concentration camp. The survivor argued that “[a] foreign state that violates these fundamental requirements of a civilized world [i.e., *jus cogens* norms] thereby waives its right to be treated as a sovereign,” *id.* at 1173, meaning that Nazi Germany’s violation of *jus cogens* norms in perpetrating the Holocaust constituted an implied waiver of its sovereign immunity as a state, *id.* at 1176. But writing for the court, Judge Ruth Ginsburg rejected this argument, holding that despite Nazi Germany’s atrocious violations of *jus cogens* norms, the Foreign Sovereign Immunities Act required that a foreign government signal its submission to the jurisdiction of

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1129] *Compounding the Countermajoritarian Difficulty*


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*B. The Expansion of Universal Jurisdiction  
Through “Plaintiff’s Diplomacy”*

The reach of the ATCA has extended significantly since its inclusion in the Judiciary Act of 1789 as the Alien Tort Statute.<sup>91</sup> What originally seems to have filled a conspicuous gap in U.S. law<sup>92</sup> by allowing foreign nationals to recover damages while in the United States, facilitating a respectable U.S. entrance into the community of nations,<sup>93</sup> now “empower[s] the United States judiciary to bring to justice autocratic leaders who have little or no concern for human rights.”<sup>94</sup> Essentially, alien plaintiffs can now use the ATCA to achieve human rights reforms in other countries by forcing accountability for human rights abuses through U.S. courts, even—and usually—absent the alien defendants’ consent to U.S. jurisdiction. “Plaintiff’s diplomacy” currently thrives in federal courts.

*1. A case study of “plaintiff’s diplomacy” in action: the Falun Gong experience*

On October 23, 2002, during a brief visit to Chicago, Chinese President Jiang Zemin was served process for a class-action lawsuit charging him “with orchestrating a campaign of torture and murder against countless Falungong [sic] practitioners in China.”<sup>95</sup> Since

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the country in which the suit is filed, which the government of Nazi Germany had not done. *Id.* at 1174. *But cf.* Slaughter & Bosco, *supra* note 25, at 107–08 (discussing successful Holocaust recovery cases in the late 1990s in which the plaintiffs successfully sued corporations that contributed to or benefited from the atrocities, rather than the state directly).

91. The original language of the Alien Tort Statute read: “That the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act, ch. 20, § 9, 1 Stat. 73, 76–77 (1789). Compare *supra* note 23 for the modern reading of the ATCA, in which “original jurisdiction” replaces “cognizance” and “any civil action” replaces “all causes.”

92. *See generally* *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784) (having to resort to the criminal common law of Pennsylvania, which incorporated the “law of nations,” in order to grant French plaintiff, an injured French diplomat to the United States, relief from defendant, a French citizen, for an assault that occurred in the United States).

93. *See, e.g.*, THE FEDERALIST NO. 80 (Alexander Hamilton) (observing that the United States must be in a position to fulfill its legal obligations vis-à-vis other nations).

94. Poullaos, *supra* note 38, at 356.

95. *Falungong Sues Jiang for Damages for Rights Abuses in U.S. Court*, AGENCE FRANCE-PRESSE, Oct. 24, 2002, 2002 WL 23632580 [hereinafter *Falungong Sues Jiang*].

1999, the Chinese government has cracked down brutally<sup>96</sup> on adherents of the Falun Gong,<sup>97</sup> which the Chinese government characterizes as an “evil cult and a threat to society.”<sup>98</sup> In response to the systematic abuse of their human rights, Falun Gong practitioners have turned to, among other things, the ATCA both for a remedy and in an attempt at prevention. Actually, attorneys for the Falun Gong have indicated that these lawsuits aim more at prevention than at monetary satisfaction: “this lawsuit is not about money, it’s about stopping the persecution.”<sup>99</sup> The Center for Justice and Accountability<sup>100</sup> is handling another pending case for the Falun Gong, *Doe v. Liu Qi*<sup>101</sup> (as well as cases for other victims), with

96. See Kelly A. Thomas, *Falun Gong: An Analysis of China’s National Security Concerns*, 10 PAC. RIM L. & POL’Y J. 471, 472 (2001) (“The government-sponsored attack on Falun Gong has been marked by arbitrary arrests and detentions, torture, custodial deaths, show trials resulting in lengthy prison sentences, and government-imposed psychiatric commitments.”).

97. Erin Chlopak describes Falun Gong or Falun Dafa as an ancient Chinese meditation practice, or gigong, which seeks to nurture the mind and body through the mixture of Buddhist beliefs, slow movements, and martial-art-type exercises, while emphasizing the fundamental principles of “truth, benevolence, and forbearance.” Literally, “Falun Gong” means “Cultivation of the Wheel of Law,” while “Falun Dafa” translates to “Great Wheel of Buddha’s Law.”

Erin Chlopak, *China’s Crackdown on Falun Gong*, 9 NO. 1 HUM. RTS. BRIEF 17, 17 (2001); see also Falun Dafa website at <http://www.clearwisdom.net> (last visited May 1, 2003).

98. John Pomfret & Philip P. Pan, *Torture Is Breaking Falun Gong; China Systematically Eradicating Group*, WASH. POST, Aug. 5, 2001, at A01 (“But the underlying reason for the crackdown is the [Chinese] leadership’s view that Falun Gong is an independent organization that threatens the Communist Party’s monopoly on power.”); see also Chen Huanzhong, *A Brief Overview of Law and Religion in the People’s Republic of China*, 2003 BYU L. REV. 465, 473 (“Few governments would likely tolerate a confrontational force like the one presented by the Falun Gong, regardless of its depiction as a religion.”).

99. *Falungong Sues Jiang*, *supra* note 95 (quoting Terri A. Marsh, attorney for the Falun Gong).

100. See Center for Justice and Accountability (“CJA”) website, <http://www.cja.org/cases/cases.shtml> (last visited March 15, 2003) [hereinafter CJA website] (“CJA brings civil lawsuits in U.S. courts against human rights violators who live, visit or keep assets in the U.S. . . . The Alien Tort Claims Act (ATCA) forms the principal [sic] legal basis of suits brought by the CJA.”).

101. Civil No. C 02-0672 CW (EMC) (N.D. Cal.) (case pending) (alleging that Liu, the Mayor of Beijing, knew or should have known about the human rights abuses perpetrated against Falun Gong practitioners in Beijing and that he violated a duty under both Chinese and international law by not preventing the abuses); Plaintiff A. v. Xia Deren, Civil No. 02-0695 CW (EMC) (N.D. Cal.) (case pending) (bringing a complaint against a defendant acting in his official capacity as a member of the Chinese government). See the CJA website for regularly published updates on the progress of these two pending Falun Gong cases that have been consolidated.

precisely this goal, as are numerous other public interest groups interested in effecting changes in foreign governments whose policies violate human rights. In other words, private plaintiffs are entering the diplomatic ring through the U.S. courts.

For the Falun Gong, this approach has already obtained results—though perhaps not exactly what the Falun Gong had in mind. In *Peng Liang v. Zhao Zhifei*,<sup>102</sup> Peng Liang, a Chinese plaintiff, entrusted Falun Gong contacts in America to bring a \$50 million wrongful death lawsuit under the ATCA and the TVPA on his behalf against Zhao Zhifei, Head of Public Security for the Hubei Province in China.<sup>103</sup> Police in Hubei under Zhao's command had tortured Peng's mother and brother to death. Zhao was served process while on a visit to New York City.<sup>104</sup> Rather than appearing in New York City for trial, Zhao allegedly returned to China and promptly arrested Peng on August 30, 2001, after which Peng disappeared until January 2002.<sup>105</sup> Additionally, Zhao's security police "arrested and cruelly tortured"<sup>106</sup> Falun Gong practitioners who were thought to be associated with Peng. Because Zhao did not appear in court to defend himself against the charges, the court entered a default judgment against him. Attorneys for the Falun Gong hailed the outcome as a victory because "[t]oday, the Chinese Government's persecution of Falun Dafa in violation of international law has been acknowledged in the United States District Court. The defendant cannot deny this judgment."<sup>107</sup> Due to the extreme difficulties in

102. No. 01 Civil 6535 (DLC) (S.D.N.Y. default judgment entered Dec. 21, 2001), reported in Falun Dafa Information Center, *Judgment Against High-Ranking Chinese Official Handed Down by U.S. Court*, FRIENDS OF FALUN GONG, USA, Dec. 23, 2001, at [http://www.fofg.org/news/news\\_story.php?doc\\_id=233](http://www.fofg.org/news/news_story.php?doc_id=233) (last visited Mar. 15, 2003) [hereinafter *Judgment Against High-Ranking Chinese Official*].

103. See Falun Dafa Information Center, *Plaintiff in Lawsuit Against High-Ranking Chinese Official Arrested; Denied All Contact with Outside World*, FRIENDS OF FALUN GONG, USA, Jan. 13, 2002, at [http://www.fofg.org/news/plaintiff\\_arrested.html](http://www.fofg.org/news/plaintiff_arrested.html) (last visited Mar. 15, 2003) [hereinafter *Plaintiff in Lawsuit*].

104. *Sect Sues Chinese Official in New York*, N.Y. POST, July 19, 2001, at 21, available at 2001 WL 23409485.

105. *Plaintiff in Lawsuit*, supra note 103.

106. Falun Dafa Information Center, *US Lawsuit Against Official Zhao Zhifei Results in Massive Arrests and Torture of Falun Gong Practitioners in China's Hubei Province*, FALUN Dafa CLEARWISDOM.NET, Oct. 13, 2001, at <http://clearwisdom.net/emh/articles/2001/10/16/14733p.html> (last visited Mar. 15, 2003).

107. *Judgment Against High-Ranking Chinese Official*, supra note 102 (quoting plaintiff's co-counsel, Terri A. Marsh).



trying to collect on massive damage awards in these ATCA suits,<sup>108</sup> such victories are largely symbolic; but those who bring these suits also hope for a deterrent effect,<sup>109</sup> since U.S. courts can attach defendants' U.S. assets in satisfaction.

*2. The evolution of ATCA litigation as the tool of "plaintiff's diplomacy"*

Under current application of the ATCA, human rights groups can seek out past victims<sup>110</sup> who will make likely plaintiffs in cases that these groups hope will impact the policies of regimes that abuse human rights. Since 1980, the list of such cases has grown longer year by year. How did the ATCA transform into a judicial instrument of such positive action in approaching human rights abuses? The answer surfaces in the dynamic nature of customary international law, which has replaced the appellation "law of nations," a violation of which triggers liability under the ATCA. U.S. courts have not shied away from (re)interpreting the "law of nations" for use in U.S. courts,<sup>111</sup> and the very nature of the sources listed in *United States v. Smith* and endorsed in *The Paquete Habana* from which to deduce the current state of customary international law implies that it is dynamic, or in other words, evolving.

The Second Circuit looked precisely to such sources—and expressly to the precedent of *The Paquete Habana*—in a thorough survey of customary international law as it has evolved over time in order to find against the defendant in the seminal ATCA case of

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108. See Edward A. Amley, Jr., Note, *Sue and Be Recognized: Collecting § 1350 Judgments Abroad*, 107 YALE L.J. 2177 (1998) (discussing situations in which collection of these judgments might be easier and suggesting how to approach ATCA and TVPA suits so that foreign judiciaries and states will recognize them).

109. But see Letter from William H. Taft, IV, Legal Advisor, Department of State, to Honorable Robert D. McCallum, Assistant Attorney General, Civil Division, United States Department of Justice, "Re: *Doe, et al. v. Liu Qi, et al.*, and *Plaintiff A, et al. v. Xia Deren*, Civil Nos. C 02-0672 CW (EMC) and C 02-0695 CW (EMC) (N.D. Cal.);" (Sept. 25, 2002), <http://www.cja.org/ChinaStateDept.pdf> (last visited May 1, 2003) [hereinafter Taft Letter] ("In our judgment, adjudication of these multiple [Falun Gong] lawsuits [under the ATCA and the TVPA], including the cases before Magistrate Chen, is not the best way for the United States to advance the cause of human rights in China.").

110. See CJA website, *supra* note 100 ("CJA works with survivor communities, human rights organizations, and torture treatment centers throughout the United States to help torture survivors seek legal remedies for their injuries.").

111. See *supra* Part III.A and text accompanying notes 84-86.

*Filartiga v. Peña-Irala*.<sup>112</sup> Through this case, the court resurrected ATCA litigation and put it in the position to act as a tool against human rights abuses. In *Filartiga*, the Paraguayan father and sister of a man tortured and killed in Paraguay brought suit against the perpetrator—the former Paraguayan Inspector General of Police—in U.S. court. The court found that because the defendant was acting under color of state law at the time, he was capable of violating international law.<sup>113</sup> In order to ascertain exactly what the “law of nations” or international law was that the defendant had allegedly violated, the court looked to the exact types of sources listed in *United States v. Smith* and in the Statute of the International Court of Justice, Articles 38 and 59, to find what constituted ripened customary international law.<sup>114</sup> For the court in *Filartiga*, these sources included United Nations General Assembly Resolutions and the Universal Declaration of Human Rights,<sup>115</sup> as one of the “basic principles of international law,”<sup>116</sup> other international conventions, covenants, and treaties,<sup>117</sup> the Eighth Amendment to the U.S. Constitution,<sup>118</sup> and even to articles from the *Harvard International Law Journal* and the *International and Comparative Law Quarterly*.<sup>119</sup> On the basis of these authorities, which *The Paquete Habana* certified as “trustworthy evidence of what the [customary international] law really is,”<sup>120</sup> the court in *Filartiga* found that the Paraguayan defendant could be liable in a U.S. court for his crimes of torture and murder committed against Paraguayan citizens in Paraguay because “the torturer has become like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.”<sup>121</sup> In other words, universal jurisdiction has now attached to the torturer when acting under color of state law, just as it had attached to the pirate of the eighteenth century, whom Blackstone

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112. 630 F.2d 876 (2d Cir. 1980).

113. *Id.* at 884–85.

114. *Id.* at 880–81 & n.8; *see also* RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 102 (1987).

115. *Filartiga*, 630 F.2d at 882–84.

116. *Id.* at 882.

117. *Id.* at 884.

118. *Id.* at 884 n.13.

119. *Id.* at 883.

120. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

121. *Filartiga*, 630 F.2d at 890.

would see hunted by every country. The *Filartiga* court clearly affirmed the notion that customary international law is constantly evolving<sup>122</sup> and that official torture now stands on the list of crimes to which universal jurisdiction attaches in that canon of law.

Significantly, the dynamic nature of customary international law has come to allow U.S. courts to use it as a basis for obtaining jurisdiction in ATCA litigation since *Filartiga* over substantially the same three crimes that the ICC has jurisdiction to try criminally—genocide, war crimes, and crimes against humanity—through the universal jurisdiction that U.S. courts have recognized as inherent in these crimes. This expansion of the reach of universal jurisdiction has been gradual but well-founded and judiciously implemented. True, in *Tel-Oren v. Libyan Arab Republic*,<sup>123</sup> Judge Bork denied that customary international law had developed to include these crimes and insisted that the ATCA only be interpreted under the law of nations as it stood in 1789. Under this view, the only three crimes that could violate the law of nations and thus serve as a basis for an ATCA suit would be violations of safe conduct, infringements on the rights of ambassadors, and piracy.<sup>124</sup> But Judge Bork did not have the last word on ATCA litigation.

Seven years after *Tel-Oren*, Congress responded directly to Judge Bork's criticism of the *Filartiga* court's application of the ATCA. In addition to contending that in applying the ATCA the court should interpret the law of nations as in 1789, Judge Bork had also opined in *Tel-Oren* that the ATCA identifies "a class of cases federal courts can hear," but does not "authorize individuals to bring such cases."<sup>125</sup> In response, Congress enacted the TVPA<sup>126</sup> to provide "a private right of action" and "a clear and specific remedy, not limited to aliens, for torture or extrajudicial killing."<sup>127</sup> Specifically, the TVPA "authorizes the Federal courts to hear cases brought by or on behalf of a victim of any individual who, under actual or apparent

122. *Id.* at 881 ("[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.").

123. 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring).

124. *Id.* (Bork, J., concurring).

125. *Id.* at 811 (Bork, J., concurring). *But see* Dodge, *supra* note 39, at 224 ("*Filartiga* is more consistent with the original understanding of the Alien Tort Clause than the interpretations advanced by Judge Bork . . .").

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

127. H.R. REP. NO. 102-367, at 3 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86.

authority, or color of law, of any foreign nation, subjects a person to torture or extrajudicial killing.”<sup>128</sup> Acquiescing to international law, Congress explicitly stated that “[the TVPA] defines ‘torture’ and ‘extrajudicial killing’ in accordance with international standards,” especially the Torture Convention.<sup>129</sup> In fact, in implementing legislation for the Torture Convention in 1994, Congress further ratified the substance of international law on this point by creating a U.S. criminal statute allowing the Department of Justice to prosecute foreign defendants accused of torture, wherever committed.<sup>130</sup> Essentially, contrary to Judge Bork’s position in *Tel-Oren*, Congress encoded through the TVPA *Filartiga*’s notion that international law should be interpreted as evolved rather than as it stood in 1789.

More than a decade after *Tel-Oren*, ATCA litigation emerged stronger than ever in the courts. In fact, the Second Circuit expanded its applicability precisely on the basis of dynamic—“ripened”—customary international law, as acknowledged by Congress in passing the TVPA. In *Kadic v. Karadzic*,<sup>131</sup> a suit against the self-proclaimed President of the breakaway Republic of Srpska within Bosnia-Herzegovina, the Second Circuit expanded ATCA litigation’s universal jurisdiction in two ways. First, whereas the Second Circuit in *Filartiga* had found narrowly that the ATCA applied to violators of international law, which could only be state actors, the court in *Kadic* held that “certain forms of conduct violate the law of nations whether undertaken by those acting under the

128. *Id.* at 4, reprinted in 1992 U.S.C.C.A.N. 84, 87.

129. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No. 51, at 197, U.N. Doc A/39/51 (1984) (entered into force June 26, 1987). In language substantially similar to the Torture Convention, the TVPA defines torture as

any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that [an] individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind[.]

Pub. L. 102-256, § 3(b)(1), 106 Stat. 73 (1992).

130. Torture Convention Implementation Act of 1994, Pub. L. No. 103-236, Title V, § 506(a), 108 Stat. 463 (codified at 18 U.S.C. §§ 2340–2340B (1994)).

131. 70 F.3d 232 (2d Cir. 1995).

auspices of a state *or only as private individuals*.”<sup>132</sup> Then, through reference to customary international law as further evolved from the time of *Filartiga* fifteen years before, the *Kadic* court certified that genocide and war crimes now constitute such violations.<sup>133</sup> Based on its status in the international treaties that determine the state of customary international law, torture retained the requirement that it be conducted under color of state law, unless committed in the course of a genocidal campaign.<sup>134</sup> Thus, in ATCA litigation, U.S. courts can now try foreign individuals for crimes committed abroad—against foreign plaintiffs—that are substantially similar to the crimes in the ICC Statute on the basis of universal jurisdiction inherent in these violations of customary international law. Furthermore, U.S. courts have accepted and incorporated definitions of these crimes as found in customary international law in ATCA litigation in order to obtain the universal jurisdiction that attaches.

A more recent case hailing from the same turbulent region, this time a result of Serbian atrocities in their campaign of “ethnic cleansing,” reinforces the U.S. incorporation of the substance of customary international law. In *Mehinovic v. Vuckovic*,<sup>135</sup> four Bosnian Muslim plaintiffs sued their former torturer, a Bosnian Serb, in federal court after they discovered that the defendant had settled in Atlanta, Georgia. The plaintiffs’ complaint alleged that the defendant, previously their neighbor in the Bosnian town of Bosanski Samac, had perpetrated a long list of human rights abuses on them and others.<sup>136</sup> In a straightforward decision, the court found, based on the revolting and incredibly humiliating torture that the defendant inflicted upon the plaintiffs, that the defendant “committed the following violations of customary international law, which confer jurisdiction, and establish liability, under the ATCA: torture; cruel, inhuman or degrading treatment; arbitrary detention;

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132. *Id.* at 239 (emphasis added).

133. *Id.* at 240.

134. *Id.* at 244.

135. 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

136. The complaint reads: “First Amended Complaint for Civil Conspiracy; Genocide; War Crimes; Crimes Against Humanity; Torture; Cruel, Inhuman and Degrading Treatment; Arbitrary Detention Without Trial; Assault and Battery; False Arrest and False Imprisonment; and Intentional Infliction of Emotional Distress.” Complaint, *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002) (No. 1 98-CV.2470), [http://www.cja.org/cases/Mehinovic\\_Complaint.html](http://www.cja.org/cases/Mehinovic_Complaint.html).

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war crimes; and crimes against humanity.”<sup>137</sup> In so holding, the court followed *Kadic* and referred to both ATCA/TVPA case law and numerous international instruments for the definitions of these crimes.<sup>138</sup>

Interestingly, the ICC’s definitions of crimes also closely resemble the definitions of these crimes in customary international law, and, in some cases, are even more restrictive.<sup>139</sup> Such definitional resemblance is ironic in light of the U.S. objections to the ICC founded on universal jurisdiction and the definitions of the crimes in the ICC Statute. It also suggests that universal jurisdiction and the definitions of crimes in the ICC Statute do not necessarily constitute insurmountable barriers to U.S. participation<sup>140</sup>—for the sake of consistency with U.S. use of these factors to justify ATCA litigation it may even invite participation. Rather, these factors combine with aspects of the ICC’s structure and its potential for judicial legislation to form a countermajoritarian difficulty on an international scale that may threaten the role of American policymakers on these issues, which is likely the more fundamental objection to U.S. participation in the ICC. ATCA litigation’s “plaintiff’s diplomacy” provides an example of how such internationalized judicial legislation can interfere with domestic policymaking.

*3. The policymaking potential of “plaintiff’s diplomacy”: domestic and international intrusion*

*a. Infringing on the U.S. executive.* The very fact that private plaintiffs—or the pressure groups behind them—can enter the foreign policy arena using U.S. courts as their vehicle, as in the Falun Gong cases, implicates a separation of powers conundrum. True, the executive and legislative branches compete for supremacy in foreign policy because the Constitution foresees a role for both in it. “In periods when the president is energetic, popular and politically adept, or when the nation is at war or threatened by foreign developments, the executive ordinarily is dominant.”<sup>141</sup> But the overlap and competition in this arena exists between the executive

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137. *Mehinovic*, 198 F. Supp. 2d at 1344.

138. *See id.* at 1345–55 (examining the definitions of each of the crimes separately).

139. *See infra* text accompanying notes 188–192.

140. *See infra* Part IV.B.1–2.

141. POWELL, *supra* note 66, at 5.

and the legislative, not between the executive and the judicial branches. Indeed, “law, including the law of the Constitution, can provide little help in resolving most disputes over American foreign policy. . . . Foreign-policy arguments present issues that demand political consideration, with all the breadth of moral, social, economic and prudential concerns that political debate can encompass.”<sup>142</sup> Either way, foreign policy belongs in the hands of elected officials, not unelected federal judges.

The expansion of ATCA litigation and the goals of some of those who use it increasingly put judges into a position where their decisions infringe on foreign policy. Although “[n]ot every case touching foreign relations is nonjusticiable,”<sup>143</sup> federal judges lack the direct political accountability to influence foreign policy. The State Department anticipated complications inherent in such an intrusive judiciary in Senate hearings preceding the enactment of the TVPA:

From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes. . . . Even when the foreign government declines to defend and a default judgment results, such suits have the potential of creating significant problems for the Executive’s management of foreign policy.<sup>144</sup>

The State Department reiterated these concerns in the context of the “plaintiff’s diplomacy” in the Falun Gong cases:

The Executive Branch has many tools at its disposal to promote adherence to human rights in China, and it will continue to apply those tools within the context of our broader foreign policy interests.

. . . .

We ask the Court in particular to take into account the potential for reciprocal treatment of United States officials by foreign courts in efforts to challenge U.S. government policy. In addressing these cases, the Court should bear in mind a potential future suit by

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142. *Id.* at 7.

143. *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (internal quotation marks omitted).

144. *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs, S. Comm. on the Judiciary*, 101st Cong. 28 (1990) (prepared statement of David P. Stewart, Department of State).

individuals (including foreign nationals) in a foreign court against U.S. officials for alleged violations of customary international law in carrying out their official functions under the Constitution, laws and programs of the United States (e.g., with respect to capital punishment, or for complicity in human rights abuses by conducting foreign relations with regimes accused of those abuses). The Court should bear in mind the potential that the United States government will intervene on behalf of its interests in such cases.<sup>145</sup>

In reflecting upon the negative effect that “plaintiff’s diplomacy” can have on foreign relations, these State Department concerns also echo U.S. objections to the ICC.

*b. Infringing on foreign governments’ policies.* When ATCA litigation intrudes on the U.S. Executive Branch’s foreign policy prerogatives, it also necessarily engages in judicial legislation in foreign countries. Particularly, ATCA suits against corporations exemplify this countermajoritarianism. “By targeting major corporations and business concerns, private plaintiffs have thus become a diplomatic force in their own right, forcing governments to pay attention at the highest levels.”<sup>146</sup> These types of suits can more successfully force reform in other countries than the Falun Gong suits, or others like them, which make foreign government officials—who enjoy statutory sovereign immunity while still in office—the defendants:

[I]n most of these cases, the governments involved are of developing countries heavily dependent on foreign investment. They therefore find themselves caught in a painful bind. Public pressure and the possibility of a large payout may pull a state toward supporting a lawsuit, but the danger of scaring off future investment will tug in the other direction.<sup>147</sup>

In this way, federal judges may engage in judicial legislation through ATCA/TVPA suits because some countries may prefer to change policies rather than face “de facto sanctions” in the form of massive

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145. Taft Letter, *supra* note 109, at 7–8; cf. *Tremble, Holland, Tremble*, ECONOMIST, Sept. 1, 2001, at 27 (reporting that the U.S. “Hague Invasion Act,” or rather the pending American Servicemembers’ Protection Act of 2001, which would “authorise the president to send troops to release Americans or allies held by the international tribunal[,] . . . has not gone down well with allies”).

146. Slaughter & Bosco, *supra* note 25, at 107 (noting successful cases against German corporations and Swiss banks that participated in or gained from the Holocaust).

147. *Id.* at 110.



damages awards in U.S. courts against corporations doing business in the United States and the subsequent freezing of assets from which to pay the amounts due.

On the one hand, this judicial legislation—countermajoritarian on an international scale or not—has an undeniably positive effect if it stops ongoing atrocities in those countries. For example, in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,<sup>148</sup> the court denied the defendant's motion to dismiss a massive class action suit brought under the ATCA/TVPA. The Sudanese plaintiffs alleged that the defendant, a Canadian energy company, "collaborated with Sudan in 'ethnically cleansing' civilian populations surrounding oil concessions located in southern Sudan in order to facilitate oil exploration and extraction activities."<sup>149</sup> In order to clear non-Muslim residents from southern Sudan for these activities, the government of Sudan, which is "controlled by a 'Taliban-style Islamic fundamentalist movement,'"<sup>150</sup> resorted to "extrajudicial killing, forced displacement, military attacks on civilian targets, confiscation and destruction of property, kidnappings, rape, and the enslavement of civilians."<sup>151</sup> A massive judgment causing Sudan to rethink these policies—though highly unlikely—would be very positive. On the other hand, "[r]ulings by U.S. courts cannot substitute for the hard work of reaching consensus within foreign states on respect for human rights and responsible development."<sup>152</sup> Indeed, the product of such judicial legislation would be decidedly countermajoritarian. And the concept of reciprocity in such areas of law has not eluded the State Department, especially in light of the United States' use of the death penalty<sup>153</sup> and dealings with regimes that abuse human rights. The ICC's capacity for this kind of judicial legislation with regard to the three crimes under its jurisdiction evokes U.S. fears that it will attempt to preempt public policy in the United States, where a firmly established structure of ordered liberty

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148. 244 F. Supp. 2d 289, 354 (S.D.N.Y. 2003).

149. *Id.* at 296.

150. *Id.* at 298.

151. *Id.* at 296.

152. Slaughter & Bosco, *supra* note 25, at 111.

153. See generally, Patrick Hudson, *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law?*, 11 EUR. J. INT'L L. 833 (2000) (arguing that excessive delays on death row constitute a human rights violation and that international law will force states to modify their procedures).

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and the political process are far better institutionally suited to engage in this kind of policymaking.

#### IV. “DEMOCRATIC DEFICIT” AND THE COUNTERMAJORITARIAN DIFFICULTY IN THE ICC

The countermajoritarian difficulty enters discussion of the ICC through a perceived “democratic deficit” inherent in the court’s institutional nature. A similar democratic deficit exists in numerous other international institutions.<sup>154</sup> The existence of a democratic deficit in the nature of the ICC implies that any judicial legislation that results from its decisions will constitute a countermajoritarian difficulty on an international scale. Part IV examines the concerns of universal jurisdiction and the definitions of crimes in the ICC statute in relation to the ICC’s capacity for judicial legislation on policy issues relating to those crimes.

##### *A. Jurisdiction(s) and Judicial Legislation in the ICC*

The Ambassador-at-Large for War Crimes at the time of the Rome Conference, Adam Scheffer, stated in Senate hearings that one of the “major flaws” of the ICC Statute was its “*de facto* universal jurisdiction.”<sup>155</sup> Others decried vague language in the definitions of the three crimes over which the ICC has subject-matter jurisdiction.<sup>156</sup> Neither of these constitutes an insurmountable constitutional obstacle to U.S. ratification of the ICC Statute, particularly since the United States has already fully endorsed them and applied them in ATCA litigation.<sup>157</sup> Rather, the “democratic

154. See *supra* Part I.B and note 42 for a discussion of the “democratic deficit” in international organizations.

155. *ICC Hearings* (1998), *supra* note 9, at 15 (statement of Hon. David J. Scheffer).

156. See, e.g., *id.* at 6 (statement of Sen. Jesse Helms), 59–62 (prepared statement of Hon. John R. Bolton).

157. See, e.g., Amann & Sellers, *supra* note 29, at 400–04 (addressing these and other fundamental constitutional concerns—many of them procedural—in the ICC statute and concluding that “as long as the ICC’s practices meet minimum standards of fairness, they should not prevent U.S. participation in the international court”); cf. Scott W. Andreasen, Note, *The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?*, 85 IOWA L. REV. 697, 701–02 (2000) (highlighting potential constitutional concerns with procedural matters in the ICC Statute but suggesting ways to accommodate them in the interest of facilitating U.S. participation in the ICC).

deficit”<sup>158</sup> posed by the nature of the ICC as an international institution with substantive authority poses a more formidable constitutional objection in the form of an internationalized countermajoritarian difficulty.

*1. “De facto universal jurisdiction” against “complementarity with teeth”*

The ICC Statute indeed contains an element of true universal jurisdiction, but that is not what Ambassador Scheffer was referring to in identifying a major flaw of the ICC as its “*de facto* universal jurisdiction” constituting a constitutional obstacle to ratification. The ICC provides a “two-track system of jurisdiction.”<sup>159</sup> Under the first track, Article 13(b) gives the ICC full universal jurisdiction—as opposed to Scheffer’s *de facto* universal jurisdiction—over a crime, but only if “[a] situation in which one or more of such crimes [referred to in Article 5] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”<sup>160</sup> The concept of universal jurisdiction allows the Security Council to prosecute these crimes even absent the ICC.

Under the second track, Article 13(a) and (c) cover situations referred to the ICC by states parties or by the prosecutor *proprio motu*.<sup>161</sup> These referrals are restricted by the “[p]reconditions to the exercise of jurisdiction” under Article 12,<sup>162</sup> which provide for state

158. Forsythe, *supra* note 16, at 986. See *supra* Part I.B and text accompanying note 42 for a discussion of how international organizations often contain a perceived democratic deficit.

159. *ICC Hearings* (1998), *supra* note 9, at 73 (prepared statement of Michael P. Scharf).

160. *Rome Statute*, *supra* note 2, at art. 13(b); see also *ICC Hearings* (1998), *supra* note 9, at 73 (prepared statement of Michael P. Scharf) (“This track would be enforced by Security Council imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored, and would be likely to utilize in the event of a future Bosnia or Rwanda.”).

161. *Rome Statute*, *supra* note 2, at art. 13(a), (c).

162. The full text of Article 12 reads as follows:

Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

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consent—or rather “a right to dissent”<sup>163</sup>—to the ICC’s exercise of jurisdiction over a case: “[b]efore the ICC can act, its jurisdiction must be accepted either by the territorial state where the alleged crimes occurred or by the accused’s home state.”<sup>164</sup> Still, critics find that “[t]he statute purports to give this international court jurisdiction over American citizens even if the United States refused to sign or ratify the treaty.”<sup>165</sup> That is, Scheffer’s “*de facto* universal jurisdiction” arises out of Article 12’s language because of the general nature of a crime’s effect:

Since a crime is generally committed wherever an illegal act has a harmful effect, allegedly illegal action by a person in a non-ratifying nation that has an impact in a second, ratifying, nation will subject that person to prosecution—even though that person’s nation has not ratified the ICC Statute.<sup>166</sup>

Critics fear that members of the U.S. military stationed abroad might face prosecution under this *de facto* universal jurisdiction.<sup>167</sup> But the

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(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

*Rome Statute*, *supra* note 2, at art. 12.

163. KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* 24 (2000).

164. Bardavid, *supra* note 34, at 23.

165. *ICC Hearings* (1998), *supra* note 9, at 6 (statement of Sen. Jesse Helms).

166. Wilkins, *supra* note 20, at 269.

167. *See, e.g.*, Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, *FOREIGN AFF.*, July/Aug. 2001, at 86, 92–93; *ICC Hearings* (1998), *supra* note 9, at 6 (statement of Sen. Jesse Helms). This is a well founded contention and even highlights how Scheffer’s *de facto* jurisdiction may indeed constitute true universal jurisdiction:

[I]n certain situations jurisdiction is transferred to the Court from a state that does not approve of the Court’s establishment nor wishes to give up sovereignty in relation to the prosecution of its own nationals or on its own territory. It may be inferred that the Court has, according to the Statute, a limited amount of *inherent [universal] jurisdiction in the true sense*.

MISKOWIAK, *supra* note 163, at 25–26. *Cf.* *ICC Hearings* (1998), *supra* note 9, at 73 (prepared statement of Michael P. Scharf) (“[T]he ICC Statute specifies that the Court would have jurisdiction only over ‘serious’ war crimes that represent a ‘policy.’ Thus, random acts of

ICC Statute provides further restrictions on universal jurisdiction than requiring just the consent of the non-party state. This track is substantially weaker than the first track because, unlike the first track, it “would have no built-in process for enforcement, but rather would rely on the good-faith cooperation of the Parties to the Court’s statute.”<sup>168</sup> The ICC might claim jurisdiction under the second track over a citizen of a non-party state<sup>169</sup> but could not oblige the United States to comply with this claim by extraditing the accused to the ICC. Moreover, the principle of “complementarity with teeth”<sup>170</sup>—the ICC’s admissibility requirements for jurisdiction—under Articles 1 and 17 further restricts the ICC’s jurisdiction under this second track. Under these provisions, ICC jurisdiction over any crime is complementary to the domestic jurisdiction of the states parties.<sup>171</sup> By barring the ICC from prosecuting a case that is already being prosecuted in good faith by a state party, complementarity constitutes a significant restriction to the ICC’s personal jurisdiction.

Furthermore, U.S. acceptance of the dynamic nature of international law in the ATCA has at least three implications for ICC opponents’ objections to perceived universal jurisdiction in the Statute. First, even if U.S. law did not absorb customary international law, under the universal jurisdiction inherent in certain serious violations of international law, which evolves over time, “states can already try U.S. personnel under those general provisions [of genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions], regardless of the new regime

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U.S. personnel, such as the downing of the Iran Airbus by the *USS Vincennes*, would not be subject to the Court’s jurisdiction.”).

168. *ICC Hearings* (1998), *supra* note 9, at 73 (prepared statement of Michael P. Scharf).

169. Miskowiak provides the following example to illuminate this proposition:

An American serviceman has committed war crimes of a serious nature on a large scale in Iraq. If:

- (a) the United States has failed to prosecute him for the crime; and
- (b) neither the United States nor Iraq is a party to the Statute but Iraq decides to

accept the Court’s jurisdiction with respect to the crime in question; then the Court would have jurisdiction over the case.

MISKOWIAK, *supra* note 163, at 26.

170. *ICC Hearings* (1998), *supra* note 9, at 35 (statement by Michael P. Scharf).

171. *Rome Statute*, *supra* note 2, at arts. 1, 17.

constructed via the ICC.”<sup>172</sup> The early case of *United States v. Smith* exemplified this principle through the Court’s treatment of the capital offense of piracy as defined in the law of nations, referring in dictum to Blackstone’s *hostis humani generis* reasoning.<sup>173</sup> Regarding whether the listed offenses entail universal jurisdiction like their forerunner of piracy, even if the rather bold statement is true that “there is absolutely no authority in *international cases* or text to expand universal jurisdiction over piracy to reach other customary international crimes,”<sup>174</sup> U.S. case law under the ATCA provides ample authority that such expansion has indeed occurred and has already been the basis for U.S. judgments against foreign defendants.<sup>175</sup> Second, because the ICC Statute will itself be substantial evidence of the status of customary international law on the three crimes over which it has jurisdiction, U.S. law will incorporate those definitions under *The Paquete Habana*; thus even as a state party, the United States could evade the ICC’s universal jurisdiction by prosecuting these violations in good faith under Article 17’s “complementarity with teeth” principle. Finally, the United States could also bring the codified definitions of its own laws into convergence with the evolved definitions in customary international law as evidenced by the ICC definitions—which are not radically different since they are largely based on treaties to which the United States is a party—in order to avoid entanglements with the ICC’s de facto universal jurisdiction.<sup>176</sup> But, of course, this prospect anticipates the more fundamental overarching concern with the ICC: its capacity for judicial legislation.

172. Forsythe, *supra* note 16, at 986–87; Kenneth Roth, *The Case for Universal Jurisdiction*, FOREIGN AFF., Sept./Oct. 2001, at 150, 152 (“But the United States itself asserts such jurisdiction over others’ citizens when it prosecutes terrorists or drug traffickers, such as Panamanian dictator Manuel Noriega, without the consent of the suspect’s government.”).

173. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820).

174. Wilkins, *supra* note 20, at 271 (emphasis added).

175. Moreover, even outside the substantial weight of ATCA litigation—which shows that the United States accepts the expansion of universal jurisdiction from piracy alone to certain crimes substantially resembling the core crimes of the ICC Statute when cases are brought in U.S. courts—the United States has accepted universal jurisdiction in relation to at least genocide. See MISKOWIAK, *supra* note 163, at 27; see also *supra* Part III.B.2.

176. David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J., Nov. 2001–Feb. 2002, at 47, 98.

## 2. *Void for vagueness? The subject matter jurisdiction of the ICC*

Problems with the language in the definitions of the crimes may be the easiest flaws of the ICC to fix vis-à-vis U.S. constitutional concerns, but only if the United States remains in a position to participate in the development of the court and its jurisprudence. Even proponents of the Statute admit that “there are areas of the Rome Statute that are vague and poorly drafted.”<sup>177</sup> In addition to vague and ambiguous points in the definitions of the three crimes within the court’s subject matter jurisdiction—genocide,<sup>178</sup> crimes against humanity,<sup>179</sup> and war crimes<sup>180</sup>—the ICC Statute also provides for future inclusion of a crime of “aggression.”<sup>181</sup> The addition of the new crime can occur following a statutory delay of seven years after the ICC Statute comes into effect<sup>182</sup> and pursuant to a two-thirds majority of states parties.<sup>183</sup> The prospect of adding the crime of aggression to the enumerated list greatly worries critics<sup>184</sup> and disappoints some moderate proponents.<sup>185</sup> But because any definition of aggression “shall be consistent with the relevant provisions of the

177. Bardavid, *supra* note 34, at 27.

178. *Rome Statute*, *supra* note 2, at art. 6.

179. *Id.* at art. 7.

180. *Id.* at art. 8.

181. *Id.* at art. 5(1)(d), (2). Concerning the future crime of aggression, this article of the *Rome Statute* provides the following:

The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

*Id.* at art. 5(2).

182. *Id.* at art. 121(1) (“After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all State Parties.”); *see also id.* at art. 123(1).

183. *Id.* at art. 121(2)–(3).

184. *See, e.g., ICC Hearings* (1998), *supra* note 9, at 6 (statement of Sen. Jesse Helms). Helms stated:

Well, I think I can anticipate what will constitute a crime of aggression in the eyes of this court. It will be a crime of aggression when the United States of America takes any military action to defend the national interest of the American people unless the United States first seeks and receives the permission of the United Nations. And I say baloney to that.

*Id.* (statement of Sen. Jesse Helms).

185. *See, e.g., Bardavid, supra* note 34, at 27.

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Charter of the United Nations,”<sup>186</sup> the ICC “will give deference to the Security Council to determine whether an act of aggression has occurred,”<sup>187</sup> which the United States would view favorably. As an outsider to the treaty, however, the United States cannot contribute to the creation of a satisfactory definition of aggression or prevent the court from adding such a definition.

Some ambiguity exists in the language of the other three enumerated crimes, but not to the extent that it would render them void for vagueness under constitutional ex post facto concerns. Indeed, “the provisions on crimes against humanity and war crimes were scrubbed and negotiated with tireless effort by U.S. negotiators, including in Rome.”<sup>188</sup> The result was a list of three crimes all with “demarcated definitions which are, in most cases, considered more limited than their definitions in general international law.”<sup>189</sup> The definition of the crime of genocide “mirrors the text of the [Genocide] Convention [of 1948] verbatim.”<sup>190</sup> The definition for crimes against humanity predicates the crime on committing the proscribed acts “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>191</sup> Finally, war crimes can only be committed as “part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>192</sup> These definitions have largely been incorporated into U.S. case law under ATCA litigation. But the components of crimes against humanity include ambiguous terms such as “forced pregnancy” and “persecution.”

Certain pressure groups and non-governmental organizations (NGOs) have made obvious their intention to exploit ambiguities in the ICC Statute to achieve their own radical agendas. This could conceivably have adverse effects, e.g., for the free exercise of traditional religions.<sup>193</sup> Although this abuse of an international

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186. *Rome Statute*, *supra* note 2, at art. 5(2).

187. Bardavid, *supra* note 34, at 26.

188. *ICC Hearings* (1998), *supra* note 9, at 17 (statement of Hon. David J. Scheffer).

189. Bardavid, *supra* note 34, at 24.

190. *Id.* at 25.

191. *Rome Statute*, *supra* note 2, at art. 7(1).

192. *Id.* at art. 8(1).

193. See, e.g., Wilkins, *supra* note 20, at 273, 279, 283–87 (relaying the overt intention of pressure groups “hostile to religion and traditional values,” to use the court to achieve ends amounting to social engineering).



institution meant “to exercise its jurisdiction over persons for the most serious crimes of international concern”<sup>194</sup> is aggravating, it does not mean that such groups will be successful in their efforts. To the contrary, during the negotiations leading up to the Rome Statute, NGO Family Voice, a conservative pressure group, successfully lobbied against the attempts of such groups to insert ambiguous and exploitable language under the head of crimes against humanity in the form of a component vaguely described as “deprivation of liberty.”<sup>195</sup> NGO Family Voice, working with other conservative pressure groups and governments, changed this ambiguous language to the more exact definition that now stands: “severe deprivation of physical liberty in violation of fundamental rules of international law.”<sup>196</sup> It stands to reason that continued effort will produce similar results, just as the U.S. delegation was able to achieve the great majority of its objectives in the negotiations,<sup>197</sup> as testified by Article 17’s “complementarity with teeth” provision. This and the other concessions made by the conference body to U.S. wishes in the negotiations “were sufficient for the other major powers, specifically the United Kingdom, France, and Russia.”<sup>198</sup> And the NGOs hostile to traditional values enjoy the same freedom to promote changes favorable to their views as do the NGOs defending religion and traditional values.

In fact, in an ironic application of the same logic employed to suggest the ICC may enable the persecution of traditional religions, the ICC could actually put itself into the position of defending the free exercise of religion against abuses by both obvious and seemingly unlikely perpetrators. Of course, under this slippery slope logic, groups like the Falun Gong<sup>199</sup> could resort to a centralized,

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194. *Rome Statute*, *supra* note 2, at art. 1.

195. Richard G. Wilkins et al., *The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* 5 (1999) (unpublished manuscript, on file with author) (describing NGO Family Voice’s activities while at the Rome Conference negotiations and their various successes in contributing to the ICC Statute).

196. *Rome Statute*, *supra* note 2, at art. 7(1)(e).

197. *ICC Hearings* (1998), *supra* note 9, at 12 (statement of Hon. David J. Scheffer) (listing the numerous specific objectives that the body of the conference conceded to the U.S. delegation).

198. *Id.* at 36 (statement by Michael P. Scharf).

199. For treatment of the Falun Gong’s attempt to use the ATCA to achieve policy change in China’s human rights record, see *supra* Part III.B.1 and *supra* text accompanying notes 95–110.

international body in the ICC and seek criminal prosecution for the abuses they have suffered. Perhaps this recourse would free the Falun Gong from the danger of retribution for filing civil suits in the United States, to whose law China does not consent; or it might eventually prevent the abuses in the first place, especially if subordinates “cannot raise ‘following orders’ as a defense to their prosecution under the ICC statute . . . ; the fact that he was commanded by a superior is irrelevant.”<sup>200</sup> In the case of seemingly unlikely persecutors, developments hostile to the free exercise of religion have been surfacing lately in Western democracies such as France,<sup>201</sup> Germany,<sup>202</sup> Belgium,<sup>203</sup> and Russia.<sup>204</sup> With their commitment to the rule of law and their dependence on international law,<sup>205</sup> the prospect of prosecution in the ICC might actually promote a higher level of religious toleration in these countries. Of course, this, like the argument that the ICC will be used against leaders of traditional religions, is off base since the ICC only has jurisdiction over the three crimes enumerated in the statute. It merely illustrates that the same slippery slope logic can be applied both ways in relation to the ICC’s jurisdiction and definitions of

200. Wilkins, *supra* note 20, at 281 n.12.

201. Jacques Robert, *Religious Liberty and French Secularism*, 2003 BYU L. REV. 637. In France, a juridical theory of *secte* [“cult” or “dangerous sect”] has been painstakingly elaborated after many years and through a constant flow of often passionate debates. This theory distinguishes *sectes* from religions; thus, the theory does not provide *sectes* with the same protection provided to religions by international texts.

*Id.* at 647. Professor Robert notes that in France, “there remains a de facto regime of ‘recognized religions’ consisting of the Catholic Church, the Reformed Church, the Lutheran Church, and the Jewish religion,” and that any other religions “are simply ‘tolerated’ and do not enjoy ‘official status.’” *Id.* at 647 n.23.

202. Gerhard Robbers, *Religious Freedom in Germany*, 2001 BYU L. REV. 643, 650–51 (discussing the struggle of the Jehovah’s Witnesses in the German courts to gain the status of a public corporation).

203. Adelbert Denaux, *The Attitude of Belgian Authorities Toward New Religious Movements*, 2002 BYU L. REV. 237, 240 (arguing that the appearance of 189 religious organizations—“new religious movements”—on an official list of the Information and Advice Center Concerning Harmful Sectarian Organizations in no way implied that groups included in the list were “harmful” or “sectarian”).

204. J. Brian Gross, Comment, *Russia’s War on Religious and Political Extremism: An Appraisal of the Law “On Counteracting Extremist Activity,”* 2003 BYU L. REV. 717, 737–58 (analyzing the broad potential for abuse in Russia’s new Extremism Law and comparing it to the heavy-handed approach taken to religion in other related laws in Russia in the mid and late 1990s).

205. See KAGAN, *supra* note 46, at 5, 37.

crimes. But still, the fact that some NGOs so openly express their intent to use the ICC to promote changes in national laws in their respective countries emphasizes the ICC's capacity for judicial legislation, which would constitute a far greater constitutional obstacle than vague—but changeable—language in the ICC Statute.

*B. Analyzing the "Democratic Deficit" in the Structure and Function of the ICC*

From a U.S. perspective, the institutional structure of the ICC and the ICC's substantive decision-making power combine to form a countermajoritarian difficulty that is perceived as an infringement of American constitutional principles. But through the Supreme Court's well-established tradition of judicial review, the countermajoritarian difficulty already raises constitutional concerns from within the United States. Despite these concerns, judicial review is grudgingly accepted since it has been part of the U.S. structure of ordered liberty for more than two hundred years. But the appearance of the countermajoritarian difficulty in the ICC enjoys far less tolerance in the United States.

*1. Structural implications of the "democratic deficit"*

Some of the most cogent U.S. objections to the ICC revolve around the practical results implicit in the structure of the ICC, the relationship of the world's inhabitants to the ICC, and in the types of decisions that the ICC will be institutionally suited to make. Under this structural argument,<sup>206</sup> critics of the ICC universally decry the fact that the ICC "circumvent[s] the authority of the Security Council,"<sup>207</sup> which, until the ICC Statute, had the sole responsibility to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . [to] decide what measures shall be taken."<sup>208</sup> Because all of the crimes under the ICC's jurisdiction also fall within the Security Council's jurisdiction, the United States

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206. See, e.g., Amann & Sellers, *supra* note 29, at 390–91 ("Underlying all these objections is the claim that the ICC structure is less democratic, and so less independent, than U.S. domestic political and judicial institutions.").

207. *ICC Hearings* (1998), *supra* note 9, at 1 (statement of Sen. Rod Grams).

208. U.N. CHARTER art. 39.

argued for a “Security Council-controlled Court,”<sup>209</sup> which would only have jurisdiction over matters referred to it by the Security Council. This prior review would allow any permanent member of the Security Council to veto the recommended criminal prosecution. But because the ICC was intentionally created as a body independent of the United Nations, this idea did not become reality. The Security Council still plays a role in safeguarding against politically motivated prosecutions through the option to halt an investigation, but in this case the U.S. veto does not work to its advantage because “revoking an indictment is subject to the veto of any permanent Security Council member.”<sup>210</sup>

As a body outside the control of the U.N., the ICC manifests a democratic deficit in its structure. “The ICC’s principal difficulty is that its components do not fit into a coherent ‘constitutional’ structure that clearly delineates how laws are made, adjudicated and enforced, subject to popular accountability and structured to protect liberty. Instead, the Court and the Prosecutor are simply ‘out there’ in the international system . . . .”<sup>211</sup> Without being embedded in a more distinct “constitutional structure” that provides ascertainable accountability, and in light of the capability of any state party or the prosecutor *proprio motu* to initiate an investigation, the ICC will be in the perfect position to make policy by the very nature of its institutional framework. “So the argument runs, the ICC will make a number of very broad judgments, not just narrow and technical ones.”<sup>212</sup> At this point the structural argument spills over into the prudential argument against the ICC.

## *2. Prudential implications of the “democratic deficit”*

The prudential argument highlights a different type of democratic deficit in the way the court functions that would seem to render the ICC institutionally unsuited to adjudicate because of the certainty that judicial legislation or policymaking will result from its actions. The ICC Statute provides for an Assembly of States Parties

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209. *ICC Hearings* (1998), *supra* note 9, at 73 (prepared statement of Michael P. Scharf).

210. *See* Kissinger, *supra* note 167, at 94.

211. *ICC Hearings* (1998), *supra* note 9, at 58 (prepared statement of Hon. John R. Bolton).

212. Forsythe, *supra* note 16, at 986.

in which each state party has one vote for electing<sup>213</sup> and removing<sup>214</sup> the eighteen judges on the court and the prosecutor.<sup>215</sup> The judges must be qualified as “persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices.”<sup>216</sup> In this context, the idea of democratic deficit applies not to the selection process of the judges, which is democratic,<sup>217</sup> but rather to the nature of the states voting on the judges and the prosecutor: “nondemocratic governments could control the personnel and activities of the ICC.”<sup>218</sup> That is, “the judges will not be confined to those from democratic countries with rule of law.”<sup>219</sup> Because of the perceived democratic deficit in the identity of its judges, under this prudential argument, the ICC will not be institutionally suited to make decisions that are likely to set policy in democratic states with the rule of law. This is particularly the case because of how even the safeguard of “complementarity with teeth” could function as an “international supremacy clause”:

Rather than protecting national sovereignty and local democratic self-determination, the concept [of “complementarity”] operates much like an international supremacy clause. In essence, it is a back-hand way of asserting that the ICC’s rules govern. Whenever a nation departs from an ICC ruling, it will be found unwilling or unable to follow ICC law, thereby triggering complementary jurisdiction.<sup>220</sup>

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213. *Rome Statute*, *supra* note 2, at art. 36(6)(a).

214. *Id.* at art. 46(2)(a).

215. *Id.* at arts. 42(4), 46(2)(b).

216. *Id.* at art. 36(3)(a).

217. Stated succinctly, the judges “are elected to single nonrenewable nine-year terms by a majority [two-thirds] vote of state parties. The judges selected are to represent the ‘principal legal systems of the world’ with no two being from the same state.” Bardavid, *supra* note 34, at 22. *But see* Nye, *supra* note 42, at 4 (“But who are ‘we the people’ in a world where political identity at the global level is so weak? ‘One state, one vote’ is not democratic.”).

218. Amann & Sellers, *supra* note 29, at 388.

219. *ICC Hearings* (1998), *supra* note 9, at 3 (statement of Sen. Rod Grams).

220. Wilkins, *supra* note 20, at 272–73; *see also* *ICC Hearings* (1998), *supra* note 9, at 19 (statement of Hon. David J. Scheffer). Scheffer notes:

There are provisions in this treaty that would require governments to change their national laws in order to comply with the provisions of this treaty, particularly with respect to the surrender or transfer of individuals on their territory to the treaty. There would have to be changes in certain national laws to facilitate that and the implementing legislation.

In this sense, the ICC Statute demands identification of national laws with its definitions of the three crimes under its jurisdiction in order to take full advantage of the principle of complementarity. Essentially, this exemplifies the countermajoritarian difficulty of the ICC because the judges, as a product of the structural and prudential democratic deficit, will have this capacity to effect changes in the laws of the states themselves, thus exercising a certain degree of power over the states' democratically elected legislatures.

*3. Facing America's real problem with the ICC: The countermajoritarian difficulty*

Undoubtedly, the institutional nature of the ICC as outside the exclusive control of the Security Council will allow it to make policy in some respects by virtue of its independence. Furthermore, the notion of complementarity implies that judges, including those who have been elected from "nondemocratic states," will be able to influence social policy within the states parties themselves. Together, the structural argument and the prudential argument illuminate the countermajoritarian difficulty of the ICC.

However, the ICC provides safeguards against the adverse effects of this countermajoritarian factor while also striving to empower the two most positive aspects of such countermajoritarianism. These two factors are stability and principled decision making (i.e., making decisions in the interest of long-term considerations, rather than for the immediate end of getting re-elected), which also render federal courts institutionally suited to adjudicate in U.S. judicial review jurisprudence. For example, the ICC Statute greatly inhibits politically motivated prosecutions, one of the biggest fears arising out of the structural argument's concern with the prosecutor's *proprio motu* powers,<sup>221</sup> in at least two ways. First, a prosecutor must submit a proposal for any investigation to the judges of the Pre-Trial Chamber who may by majority vote stop the investigation if they find a lack of genuine substance.<sup>222</sup> Second, there is accountability in

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*ICC Hearings* (1998), *supra* note 9, at 19 (statement of Hon. David J. Scheffer).

221. See generally Mumford, *supra* note 35, at 174–80.

222. *Rome Statute*, *supra* note 2, at art. 15(4). In the Senate hearings, Professor Scharf expatiated on these safeguards:

Let us say that the United States does something very controversial. It decides to invade another country. The rest of the world does not think that that was in self-

the structure of the ICC: “the prosecutor and judges of the ICC do answer to the assembly of states parties, which elected them.”<sup>223</sup> The ICC Statute also protects the independence of the judges, prohibiting any kind of undue influence in their activities.<sup>224</sup> Indeed,

[t]he court is sufficiently independent. The judges and prosecutors are elected from amongst the party states to non-renewable terms—thus they are insulated from the politics of re-election. The Security Council, outside of the crime of aggression, cannot hinder the operation of the court (except upon unanimous vote where they can temporarily block prosecution). These are significant guarantees that, at least on paper, the court can remain sufficiently isolated from political pressures.<sup>225</sup>

These protections do not erase the countermajoritarian difficulty inherent in the activity of the ICC, but they do render it less constitutionally dangerous to the United States as a state party.

The mere existence of a countermajoritarian difficulty in the ICC need not be a constitutional impediment to U.S. ratification. As shown by the Supreme Court’s method of enforcing the fundamental purpose of the U.S. Bill of Rights—the protection of the minority from majority tyranny—through its tradition of

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defense and decides to indict our Secretary of Defense or even our President. What would happen under that scenario?

Well, what would happen is at the first level, the United States would say this is not part of the Court’s jurisdiction because this is not a serious war crime, and if the prosecutor does his or her job, they will decide, no, this is not what the Court was about. This is not a serious war crime. This is not of the level of genocide. This is a peacekeeping effort. This is something that is appropriate. But we cannot trust the prosecutor to do his job. You do not know.

So, then the prosecutor has to go to the three-judge panel, and you hope that two of those judges will see the light. But if they do not, then you have to go to the full panel of all of the judges. During this time period, the United States can stop it in other ways. If we do our own investigation like a Lieutenant Calley, what if our Secretary of Defense was doing a rogue operation? We could investigate and we could decide to prosecute, in which case it turns off the Court, or we could decide that there is no grounds for prosecution, but that we made that decision in good faith, which also turns off the Court and that decision is appealable.

Finally, we can go to our friends on the Security Council and say, look, you do not want your leaders to be brought before the Court. Join us in voting to turn off the Court. The five permanent members are very likely to join us, and if we can get four out of the other nine members to do so, then the Security Council can stop.

*ICC Hearings* (1998), *supra* note 9, at 40 (statement by Michael P. Scharf).

223. Forsythe, *supra* note 16, at 986.

224. *Rome Statute*, *supra* note 2, at art. 40.

225. Bardavid, *supra* note 34, at 27.

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countermajoritarian judicial review,<sup>226</sup> “legitimacy can come from other than majority rule.”<sup>227</sup> “This argument,” proceeds Professor Forsythe, “is based in part on the observation that all liberal democracies restrain majority rule by independent courts with appointed judges for the precise intent of protecting human rights from the tyranny of the majority.”<sup>228</sup> And as an outsider to the ICC, the United States will not be able to make use of the democratic processes set up in the ICC for making amendments to provisions deemed problematic from the U.S. perspective. This point is particularly germane to the U.S. concern about the democratic deficit in the identity of the ICC’s judges and how that affects the ICC’s institutional penchant for judicial legislation on social policy concerning the crimes under its jurisdiction.

Only as a State Party would the United States be entitled to nominate candidates for ICC judges and vote for [or against] the election of all judges. Only nationals of States Parties may be elected judges, so a U.S. national, in most cases, could only become a judge if the United States is a State Party. Only as a State Party would the United States be entitled to vote for the Prosecutor and Deputy Prosecutors.<sup>229</sup>

Finally, even taking for granted the democratic deficit inherent in the structure and function of the ICC, the countermajoritarian difficulty that naturally results does not necessarily render the institution itself fundamentally undemocratic.<sup>230</sup> Despite the countermajoritarian aspects of the ICC, it surely still “operates under public scrutiny and criticism—but not at all times or in all parts [at once]. What we mean by democracy, therefore, is much more sophisticated and complex than the making of decisions in town meeting by a show of hands.”<sup>231</sup> “Democracy,” in this broader sense, demands active participation to be successful for the individual.

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226. See THE FEDERALIST NO. 78 (Alexander Hamilton).

227. Forsythe, *supra* note 16, at 986. See *supra* Part II.B for a discussion of how the countermajoritarian difficulty is more of an integral part of the republican U.S. system of government than deviant to it.

228. Forsythe, *supra* note 16, at 986.

229. Scheffer, *supra* note 176, at 97.

230. See *supra* Part II.B.

231. BICKEL, *supra* note 32, at 17.



## V. CONCLUSION

The ICC aims to bring those who commit genocide, war crimes, and crimes against humanity to justice. In response to those praising the ICC as a deterrent to these crimes by ending impunity, some doubt the efficacy of the ICC's de facto universal jurisdiction as a deterrent to these crimes.<sup>232</sup> But significantly, "this [deterrent] effect should not be overstated. . . . The key rationale for the exercise of universal jurisdiction, therefore, is not deterrence but justice."<sup>233</sup> This rationale applies with equal force to ATCA litigation,<sup>234</sup> in which U.S. courts have been allowing individuals to seek justice through the exercise of universal jurisdiction over aliens since 1980. The result has been a "plaintiff's diplomacy" that contradicts the U.S. stance against the ICC. Whereas the countermajoritarian difficulty inherent in the ICC is centralized and applies to all nations that consent to its jurisprudence through ratification of the ICC Statute, U.S. ATCA litigation subjects aliens of nations that have not subscribed to U.S. law to federal subject matter jurisdiction based on universal jurisdiction attached to certain violations of customary international law. U.S. economic and military might has contributed to ATCA litigation's capacity to dictate political and social policy in these countries, and such dominance will also perpetuate the asymmetry between the exportation of U.S. law in ATCA litigation and the U.S. rejection of the ICC.

In the end, even the countermajoritarian difficulty of the ICC—America's real problem with the ICC—does not strictly prohibit U.S. participation in that body; rather, the nature of the real world, or the way the United States views the world, precludes U.S. submission to the ICC at the present time. America has been living in the harsh, Hobbesian world where *Realpolitik* reigns and where since 1945 "international law regarding peace and security is largely whatever the Security Council says that it is."<sup>235</sup> In this world, the "mass murderers and ethnic cleansers [in this century] . . . got away

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232. See *ICC Hearings* (1998), *supra* note 9, at 50 (prepared statement of Hon. John R. Bolton) (arguing that "the deterrence argument has no empirical foundation"); Wilkins, *supra* note 20, at 278 (suggesting that arguments for deterrence only have force in an "ideal utopian world").

233. Kamminga, *supra* note 79, at 943–44.

234. See *supra* Part III.B.1–2 for a discussion of the ATCA's goal of prevention alongside, or perhaps even above and beyond, recovery of damages.

235. *ICC Hearings* (1998), *supra* note 9, at 1 (statement of Sen. Rod Grams).

with their crimes because no one dispatched soldiers to challenge them, not because there were no lawyers dispatched to indict them. Prosecutors do not deter evil. Armies do.”<sup>236</sup> Everyone is a threat; power is a zero-sum game; one cannot trust a neighbor to follow one’s lead in retiring the “big stick.”

Saddam Hussein’s evasion of the conditions in the Security Council Resolutions that ended the Gulf War in 1991 illustrates the weakness of unenforceable international law. Hussein neither respected international law nor feared prosecution in the ICC, as reflected by his ousting of the weapons inspectors and subversive actions in developing weapons of mass destruction. The success France claimed in influencing Hussein to destroy a few token missiles in the campaign to seek a peaceful disarmament—the original condition for cessation of conflict in the Gulf War of 1991—in the weeks preceding the U.S.-led invasion of Iraq in 2003 more likely derived from the threat of U.S. troops amassing on Hussein’s border, than from a mutual submission to international law.

Given this American skepticism of the force of international law, it is not surprising that the United States continues to reject the ICC while European countries have largely embraced it. This constellation might be explained as a function of power:

Europe’s relative weakness has understandably produced a powerful European interest in building a world where military strength and hard power matter less than economic and soft power, an international order where international law and international institutions matter more than the power of individual nations. . . . Europeans have a deep interest in devaluing and eventually eradicating the brutal laws of an anarchic Hobbesian world where power is the ultimate determinant of national security and success.<sup>237</sup>

The United States, on the other hand, still values military strength and hard power in deterring despots and human rights abusers. The Hitlers, Stalins, Pol Pots, Pinochets, Osama bin Ladens, and Saddam Husseins of the world do not fear a potential prosecution in the ICC—where torture or even the death penalty would be unthinkable as a just desert—for the atrocities they inflict.

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236. Mumford, *supra* note 35, at 171 (alterations in original) (quoting Editorial, *Courting Disaster*, NEW REPUBLIC, July 13, 1998, at 7).

237. KAGAN, *supra* note 46, at 37.

But they might think twice if 250,000 U.S. and Coalition troops are amassed on their borders. This nature of things is an indictment on the “Hobbesian” world, and not necessarily on the United States for being an “arrogant superpower”<sup>238</sup> in seeking to protect itself from what it sees as yet another threat—the new ICC. But even if international law successfully “eradicat[ed] the brutal laws of an anarchic Hobbesian world,”<sup>239</sup> U.S. ATCA litigation would still be inconsistent with U.S. constitutional concerns about the ICC.

Specifically, “[r]ulings by U.S. courts [through ATCA litigation] cannot substitute for the hard work of reaching consensus within foreign states on respect for human rights and responsible development.”<sup>240</sup> This type of judicial legislation in foreign countries engaged in by U.S. judges through ATCA litigation compounds the countermajoritarian difficulty by preempting the responsibility of foreign legislatures more institutionally suited to make those kinds of decisions. Still, U.S. ATCA litigation might not be as problematic or intrusive for other countries if the United States were a state party to the ICC Statute. In that case, the United States would consent together with the other states parties to the jurisdiction of the ICC—a central body with the same relationship to all states parties—over substantially the same crimes that form the basis of ATCA suits in the United States. Then the world might simply view the United States as providing a civil remedy for crimes that are subject to criminal attention in the ICC, rather than as an imperial superpower setting up “supercourts” of its own while shunning the real world courts.

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238. Erich Follath & Gerhard Spörl, *Das hochmütige Imperium des George W. Bush: Der Entfesselte Gulliver*, DER SPIEGEL, Mar. 17, 2003, at 116. *But see* Leon de Winter, “Es gibt keinen Frieden”: Ein offener Brief von Leon de Winter, DIE WELT, Mar. 8, 2003, <http://www.welt.de/data/2003/03/08/49427.html?>

239. KAGAN, *supra* note 46, at 37.

240. Slaughter & Bosco, *supra* note 25, at 111.

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