Human Rights Realism

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ABSTRACT

In the aftermath of gross human rights abuses, when, if at all, should we forego legal accountability? Human rights scholars debated this question in the 1980s and 1990s, in what was referred to as the “peace versus justice” debate. The “justice” side won the day among human rights advocates, among whom the dominant position is that legal accountability is a necessary response to atrocity and cannot be limited by political considerations (a position this Article terms “human rights absolutism”). However, this question has resurfaced in the twenty-first century, in intense debates with interlocutors outside the field of human rights. Faced with the development of international criminal justice, Alien Tort Statute litigation, and regional human rights court jurisprudence on the right to a remedy, courts, state officials, and conservative scholars argue that legal accountability should be limited to avoid hampering states’ control of their internal affairs and international relations (a position this Article terms “sovereigntism”). Some scholars take a middle ground and argue that legal responses to gross human rights abuses should be limited only to avoid harm to peace or democratic decision-making. However, the latter have not yet offered a persuasive justification for their position nor a rationale for distinguishing peace and democratic decision-making from other values advanced by sovereigntists as limits to accountability.

This Article offers a new middle ground between sovereigntism and human rights absolutism, under a position it terms “human rights realism.” Drawing on American legal realism and grounded in human rights values, this approach mandates limiting legal accountability to avoid those consequences that threaten certain core human rights, and the Article identifies armed conflict and economic inequality as relevant consequences. This approach overcomes both human rights absolutists’

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denial of the politics of accountability mechanisms and sovereigntists' subordination of accountability to values other than human rights. Moreover, drawing on legal realist writing on the right-remedy relationship, this Article offers a robust justification for accepting limitations to legal accountability across a wide range of mechanisms and a principled framework for considering such limitations in light of evolving empirical evidence.

The argument is developed by revisiting the debate about universal civil jurisdiction and expanding the analysis to international criminal law and regional court jurisprudence. The Article shows that human rights realism offers not only a promising normative framework for integrating political considerations into human rights enforcement but also that it sheds new light on recent developments, such as African state threats of withdrawal from the International Criminal Court.

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I. INTRODUCTION

Since the 1980s, human rights advocates have argued for legal accountability in cases of gross human rights abuses, seeking the prosecution of individual perpetrators and the compensation of victims. As a result, regional human rights bodies now impose on states a duty to investigate, prosecute, and provide compensation for serious human rights abuses, ruling that even democratically reached amnesties violate victims' right to an effective remedy and to a hearing. The International Criminal Court (ICC) was established to prosecute grave crimes, and its rules of admissibility are designed to incentivize states to prosecute those crimes committed within their territory. Prodded by victim groups, domestic criminal courts have also exercised universal jurisdiction over heinous crimes. In addition, civil domestic courts have been asked to entertain tort lawsuits concerning abuses occurring in foreign countries under universal civil jurisdiction (UCJ). Since the 1980s, US federal courts have created a
form of universal jurisdiction in civil cases by entertaining damage
lawsuits under the Alien Tort Statute (ATS) against individuals
alleged to have violated, even outside the United States, norms of
international law enjoying universal acceptance. In other jurisdictions,
victims have brought civil claims against foreign states and state
officials for torture under ordinary tort or obligations law in the
jurisdictions in which they reside.5

These transnational mechanisms of legal accountability for
egregious human rights abuses appear acutely challenged today. In the
first decade of the twenty-first century, some European states such as
Belgium and Spain amended their universal criminal jurisdiction
legislation so as to restrict the possibility of taking jurisdiction in
foreign cases.6 In 2013, in Kiobel v. Royal Dutch Petroleum Co., a
conservative majority of the U.S. Supreme Court severely narrowed
the possibility of bringing claims under the ATS, requiring a strong
connection between the claims and the United States.7 In other
jurisdictions, the principal obstacle to exercises of UCJ is the doctrine
of sovereign immunity, which courts interpret to bar lawsuits
concerning governmental acts not only against foreign states (as is the
general rule in the United States) but also current and former foreign
officials. The supreme courts of Canada and England, as well as the
European Court of Human Rights (ECHR), have rejected attempts to
recognize a torture exception to sovereign immunity from civil
proceedings in decisions that cross-reference each other heavily.8 The
ICC, for its part, is at risk of losing state parties. The Republic of
Burundi withdrew from the treaty establishing the ICC a few weeks
after the Office of the Prosecutor announced it would open an
investigation for crimes against humanity allegedly committed in that
country, and the African Union has published a set of demands for
reform of the ICC presented as conditions for African states to remain
members of the court.

The challenges to these transnational accountability mechanisms
are typically defended on grounds of the protection of state sovereignty.
While a populist version of this challenge simply denies the validity of
international norms,9 the version found in academic and legal

5. See infra Part I.
6. See Luc Rey dams, The Rise and Fall of Universal Jurisdiction, in ROUTLEDGE
HANDBOOK OF INTERNATIONAL CRIMINAL LAW 337, 337 (William A. Schabas & Nadia
Bernaz eds., 2011).
9 This position is exemplified by Donald Trump’s assertion that torture “works”
and should be used by the U.S. government. Matthew Weaver & Spencer Ackerman,
Trump Claims Torture Works but Experts Warn of Its ‘Potentially Existential’ Costs,
commentary condemns the commission of atrocities but questions the
turn to transnational institutions to directly administer justice or
determine states' remedial obligations. Under the latter position,
which this Article terms "sovereigntism," scholars point to a range of
risks posed by transnational accountability mechanisms for states' control of their internal affairs and/or international relations. These
include concerns for domestic institutions' discretion to address violations and allocate resources within their political community; the
smooth conduct of inter-state relations; or, with respect to universal jurisdiction, the power of the legislative and executive branches of
government to conduct foreign relations in relation to the judiciary.\(^\text{10}\)

The common response from the human rights camp is to affirm
the non-derogable character of accountability for serious abuses. While
in the 1980s and 1990s human rights advocates debated the legality and benefits of amnesties in transitions away from dictatorship or conflict, over time they came to deny that legal justice conflicts with truth and peace, under the motto of "anti-impunity."\(^\text{11}\) Though many human rights advocates and scholars recognize the privileged role played by domestic legal institutions in responding to abuses,\(^\text{12}\) the dominant position among them is that, subject to guarantees of due process for defendants, international law mandates criminal proceedings and compensation of victims as necessary responses to atrocity. A clear illustration of this position—which this Article terms "human rights absolutism" for its inflexible view of the need for a legal response—can be found in the following recent statement by Theodor Meron:

\begin{quote}
We insist on accountability for violations of international law because that is how we defend the law and demonstrate our insistence on respect for the law going forward. If we fail to ensure accountability across the board, we risk undermining the very beneficial effects to which the nascent accountability drive that has built over the past quarter-century has given rise. We risk telling states and individuals that the requirements set forth in international law—whether
\end{quote}
customary or conventional in nature—are not actually binding. That is the last message we would wish to send.13

This Article challenges both sovereigntism and human rights absolutism and offers a novel, intermediate approach to accountability for human rights abuses. Drawing on legal realism, this approach acknowledges that legal accountability can have unintended, negative political consequences. Yet, because it is grounded in human rights values, it does not accept all political considerations as trumping accountability. Rather, the Article argues that accountability can be limited to avoid those political consequences that provide fertile ground for the commission of gross human rights abuses, and it suggests armed conflict and rises in economic inequality as examples of such consequences. Put differently, the Article claims that human rights protection is strengthened by the recognition of some limitations to legal accountability for gross human rights abuses.

A number of scholars have argued that legal responses to atrocity should be limited. Ruti Teitel suggests that international and regional human rights courts defer more to domestic political arrangements.14 Sarah Nouwen urges states to recognize an exception to the duty to prosecute in the proposed Convention on Crimes against Humanity in order to enable processes such as the South African transition from Apartheid.15 Miles Jackson similarly urges the European Court of Human Rights to recognize the validity of amnesties furthering peace.16 Scholars have also argued that alternatives to trial should preclude ICC jurisdiction when they further peace or justice.17 However, if the critics of full legal accountability point to the harm posed to values such as peace, they do not address the counterclaim,

14. See Teitel, supra note 2, at 416.
17. See, e.g., Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, 14 EUR. J. INT’L L. 481 (2003); Eric Blumenson, The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court, 44 COLUM. J. TRANSNAT’L L. 801 (2005) (each arguing that while blanket amnesties are never justified, good faith alternative justice programs should preclude ICC jurisdiction); see also Martha Minow, Do Alternative Justice Mechanisms Deserve Recognition in International Criminal Law?: Truth Commissions, Amnesties, and Complementarity at the International Criminal Court, 60 HARV. INT’L L.J. 1, 42 (2019) (suggesting that domestic restorative justice processes should preclude ICC jurisdiction when such processes produce individualized assessments of responsibility, require truthful testimony, and aim to restore communal trust or the rule of law, or alternatively when such processes are primarily a means to achieve peace).
exemplified by Meron’s quote above, that the absence of legal accountability lessens the value of human rights norms. In addition, because the advocates of a middle ground point to peace and democratic decision-making as countervailing values that self-evidently merit protection, they do not offer a rationale for distinguishing these values from the other considerations advanced by sovereigntists to limit accountability, such as the smooth conduct of international relations. Thus, while human rights institutions such as the Inter-American Court of Human Rights have at times demonstrated flexibility in pushing states to prosecute in the context of peace-making, the normative ground for such flexibility remains to be elaborated. This Article seeks to offer a robust justification, grounded in human rights norms, for accepting limitations to legal accountability across a wide range of mechanisms. Contrary to calls for compromise in order to save transnational legal institutions, it argues for limitations on accountability as the normatively preferable position.

The argument is developed by revisiting the debate about UCJ in light of realist writing on the relationship between rights and remedies. This involves three methodological choices. First, while UCJ raised issues specific to civil litigation, the heated debate across jurisdictions concerning it offers a convenient window onto the assumptions and argumentative strategies of both sovereigntists and human rights absolutists. This is because the debate on UCJ concerned the very existence of the accountability mechanism at issue and, hence, brought up foundational questions about the nature and effects of legal accountability. While the Article demonstrates the argument’s applicability to the ICC, universal criminal jurisdiction, and the jurisprudence of regional human rights courts, focusing on UCJ allows an in-depth analysis of the arguments put forth on both sides.

Second, the Article conceptualizes UCJ and other transnational accountability mechanisms as remedies for breaches of international human rights norms. With respect to UCJ, the ICC, and universal criminal jurisdiction, this approach follows Dinah Shelton’s definition of “remedies” as encompassing not only the relief given to successful claimants but also the processes through which claims of violations are heard. The Article similarly considers the development of a duty to investigate, prosecute, and compensate in regional human rights courts as a remedy, in that, like the other three mechanisms, it

20. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 16 (3d ed. 2015).
constitutes a transnational legal response to gross human rights abuses that promotes criminal prosecution and monetary compensation. Conceptualizing these institutions as remedies reflects the view advanced by Meron that legal accountability is a mode of enforcement of international human rights norms that signals these norms' binding character. Through the prism of the right-remedy relationship, this Article aims to directly address the human rights absolutist claim that the lack of legal accountability weakens human rights norms.

Third, the Article draws on a particular interpretation of American legal realism. Legal realism is a pragmatic approach to law that asks how law operates in a social context. It is based on the view that "any undertaking of law application and development to address social problems should be grounded in a study of factual context and potential consequences or the resulting intervention risks being counterproductive." This requires turning to empirical studies of law. Yet contrary to the realist approach to international relations, which views international law primarily through the lens of power, the reconstruction of legal realism on which this Article relies insists on the necessity of value judgments in law. Legal realism's complex approach to law, combining empiricism with normativity, offers a particularly promising framework for considering questions related to the political implications of accountability for egregious human rights abuses. While it does not prescribe any simple formula, legal realism suggests that some limitations to legal accountability are justified where such accountability would undermine its underlying purpose—the protection of human rights.

Placing various legal mechanisms in the category of remedies does not imply that individual liability in international criminal law, individual or corporate liability under UCJ, and state responsibility for failure to provide adequate remedies are equivalent, though they may have overlapping justifications and effects, such as accountability, truth-seeking, and victim empowerment. Neither does this Article assert that all these legal mechanisms are normatively desirable. Each


form of liability should be grounded in a specific set of justifications derived from the type of defendant (individual, corporation, state) and type of process (criminal, civil, international), and its desirability, assessed by taking into account its real-world effects. This Article does not delve into the normative grounds and overall desirability of each mechanism. Instead, it argues that, even if we assume that all these legal mechanisms are normatively justified, a similar set of considerations should lead us to accept some limitations to them.

Part I presents the Article’s interpretation of legal realism, including a realist position that sees limited gaps between rights and remedies as normatively desirable. Part II describes the cases from the past decade limiting UCJ. Drawing on the realist approach discussed in Part I, it critiques both sovereigntist and absolutist human rights commentary on these cases and on UCJ more broadly. It shows that the sovereigntist position, relying on a sharp distinction between rights and remedies, is untenable from a realist perspective as, in practice, it empties human rights of concrete meaning. While the absolutist human rights position insists on the provision of remedies for human rights violations, it is also untenable, as it refuses to account for the consequences of remedy-seeking.

Having shown the inadequacy of the existing positions on UCJ and the salience of these positions in debates about other accountability mechanisms, Part III takes on the reconstructive strand of legal realism. It offers human rights realism as a normative framework that integrates the valuable features of both human rights absolutism and sovereigntism without their weaknesses. Like human rights absolutists, it views human rights norms as superior to other norms, but it acknowledges, like sovereigntists, that the enforcement of these norms may have undesirable political consequences. Accordingly, Part III argues that legal accountability should be limited, but only where it risks counterproductively enabling the commission of certain gross human rights abuses. Part IV illustrates how this approach would operate in relation to various accountability mechanisms. With respect to each, it offers a two-tiered approach to limiting legal accountability based on the degree of empirical certainty concerning the risk of materialization of a threat to human rights. Part IV shows that human rights realism offers not only a promising framework for integrating political considerations into human rights enforcement in light of evolving empirical evidence but also that it sheds new light on recent debates, such as African state threats of withdrawal from the ICC.

25. For critiques of the turn to criminal law to address mass violence, see ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA 42–43 (Karen Engle, Zinaida Miller & D.M. Davis eds., 2016).
II. LEGAL REALISM, RIGHTS AND REMEDIES

By "legal realism," this Article refers to the legal movement that developed in the United States under that name, starting with Oliver Wendell Holmes's 1897 address and then more forcefully from the 1930s.\(^\text{26}\) This Article follows the particular reading of legal realism offered by Hanoch Dagan, who emphasizes the implications of legal realism for private law theory.\(^\text{27}\) Deploying this approach with respect to international norms prohibiting gross human rights abuses, in particular while holding the view that human rights norms are hierarchically superior to other norms, requires various adjustments detailed in this Part and in Part III.

A. Legal Realism from Domestic to International Law

Legal realism is grounded in pragmatism.\(^\text{28}\) This pragmatism is expressed in realists' view of law as a social practice rather than a set of concepts and their call to study both the law as applied by courts and the forces shaping courts' decisions.\(^\text{29}\) This pragmatism also imbues the normative part of the realist project, which is most relevant to this Article. Insisting that law is a vehicle for policy, realists urge lawyers to reconsider the law in light of desired policy choices. This normative task has two components. The first is a deconstructive or explanatory stage, exposing the political, social, distributional, and other concrete consequences of legal rules. The second is a reconstructive stage whereby a policy preference is chosen, and the law is redesigned accordingly. Neither stage is straightforward, and, taken together, they can be contradictory. In fact, Dagan and other scholars of legal realism describe this approach as a set of productive tensions.\(^\text{30}\) This Part explains what each stage requires, suggesting that, despite the complexities of its application, legal realism offers a promising way to consider the political implications of legal accountability for gross human rights abuses.

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\(^{26}\) See generally Oliver Wendell Holmes, The Path of the Law, 110 HARv. L. REV. 991 (1997). This article does not draw on other legal realist writing, whether from Scandinavia or elsewhere.

\(^{27}\) DAGAN, supra note 24, at 104–05.

\(^{28}\) On the relationship between legal realism and philosophical pragmatism, see Shaffer, supra note 22, at 193.

\(^{29}\) Holmes, supra note 26, at 997.

\(^{30}\) On the productive tension between empiricism, which requires a belief in the possibility of objectively assessing the world, and pragmatism, which views absolute truths with skepticism, see Andrew Lang, New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science, 28 LEIDEN J. INT'L L. 231, 254 (2015). More generally, Hanoch Dagan portrays legal realism as a set of constitutive tensions between power and reason, science and craft, and tradition and progress. See DAGAN, supra note 24.
The explanatory stage of normative realist analysis involves both piercing the veil of legal discourse to expose the allocations of power and resources effected by legal rules and conducting empirical studies on the effect of legal interventions. The starting point of legal realism is the critique of formalism. Legal realism famously challenged the formalist view of law as an autonomous sphere by exposing the distributional effects of even private law, that area of law appearing most detached from public considerations. For realists, formalism is not only inaccurate as a descriptive matter because of inevitable doctrinal indeterminacy, but it is also harmful as it obscures the value judgments made by judges and thus shields normative choices from scrutiny. The formalist obscuring of politics is effected, argued Felix Cohen, through the use of legal fictions, the "language of transcendental nonsense" that has no connection to reality. The absence of economic, social, and ethical substance in the legal fictions invoked as justifications for normative solutions has the effect of concealing the social forces which mold the law, as well as the consequences of law. Part II will demonstrate that both sovereigntists and human rights absolutists rely heavily on such abstract legal fictions to obscure the undesirable concrete consequences of their respective positions.

To overcome this practice, Cohen urged lawyers to develop analytical categories reflecting concrete phenomena. Additionally, realists advocated shifting attention to the concrete social life of the law, by conducting empirical studies of law's implications. The early realists' enthusiasm and faith in social science is difficult to sustain after the mid-1980s, when critical and feminist approaches to social science questioned scholars' ability to objectively access knowledge about the world. Even assuming a positivist approach to sociology, it can take decades to accumulate a sufficient body of knowledge to build scholarly consensus about the concrete consequences of a given legal arrangement. Yet, from a realist perspective, there is no choice but to at least try to ascertain empirically the consequences of legal

32. Id. at 18–24, 33.
33. Id. at 22.
35. This faith is exemplified by Holmes's famous statement that "the man of the future is the man of statistics and the master of economics." Holmes, supra note 26, at 1001.
37. Only after four decades of research have criminologists in the United States reached the consensus that the likelihood of punishment deters crime more effectively than the severity of punishment. Hyeran Jo & Beth A. Simmons, Can the International Criminal Court Deter Atrocity?, 70 INT'L ORG. 443, 446–47 (2016).
choices. For lawyers to give up on empiricism is to limit their vision of
the law to the realm of ideas and to forego responsibility for the
concrete implications of their normative choices.

The reconstructive stage of realist analysis involves deciding on a
policy course and designing the law accordingly. In other words, legal
realists insist not only on explaining but on making value judgments.\(^{38}\) Recognizing that law inescapably involves making value judgments
does not, however, require endorsing a fixed set of ideals. To the
contrary, realists view claims of absolute truths with skepticism.\(^{39}\) The
process of formulating a normative position is therefore complicated
not only by the fact that in many cases the empirical evidence on which
such position is to be based is inconclusive but also by value skepticism.
Yet to avoid nihilism or the abandonment of the law to groups
promoting undesirable political, distributional, or ethical choices, legal
realists must try to formulate the best normative stance they can.
Their solution to these tensions is to conceive of normativity as an
ongoing methodology: the constant critique and search for
improvement of the law.\(^{40}\)

For American legal realists, an important aspect of this
methodology is contextualism. Dagan has persuasively dismissed the
view that realist contextualism can be equated with particularist
adjudication on a case-by-case basis, as this would carry the risk of
endorsing and perpetuating unjust social norms.\(^{41}\) Contextualism, for
most realists, refers instead to the preference for narrow legal
categories, enabling legal analysis to be tailored to the specific features
of legal interactions.\(^{42}\) Transposing this approach, heavily reliant on
value judgments, to the international realm can therefore not justify
cultural relativism in the area of human rights such that crimes
against humanity, for instance, would be interpreted differently across
cultures. Neither can it justify giving states full discretion as to the
remedies available for gross human rights violations. Yet, in the
international context, a legal realist methodology should include
contextualism in the procedural sense of allowing some domestic
tailoring of remedies for the breach of universal norms where such
tailoring would promote human rights better than internationally
mandated remedies. Such an understanding of contextualism flows
from the geographic and cultural distance between international

\(^{38}\) DAGAN, supra note 24.

\(^{39}\) See Felix S. Cohen, Field Theory and Judicial Logic, in THE LEGAL
CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 121, 125–26 (Lucy Kramer Cohen
ed., 1960); see also DAGAN, supra note 24, at 7 (citing id.).

\(^{40}\) Hessel E. Yntema, Jurisprudence on Parade, 39 MICH. L. REV. 1154, 1169
(1941).

\(^{41}\) DAGAN, supra note 24, at 57.

\(^{42}\) Id. at 54–56. The focus on narrow legal categories is admittedly at odds with
this article’s approach, which offers a single analytical framework for determining
limitations to widely divergent accountability mechanisms.
institutions and the sites of gross human rights violations, which make assessments of the concrete social consequences of transnational remedies—by the drafters of treaties establishing remedies or the judges awarding them—exceedingly difficult. Domestic institutions’ proximity to the societies where the abuses occurred supports taking into consideration those institutions’ good faith assessments of the contextual application of remedies.

Many of these realist insights, not least among them the critique of legal formalism and the desire to avoid counterproductive results, are now accepted by numerous schools of legal thought. Legal realism has also left its mark on various approaches to international law, most notably the New Haven School, which takes as its starting point the realist understanding of adjudication as policy-making and adopts an interdisciplinary methodology, and critical approaches to international law, which expose international law’s implications for power relations. However, as pointed out by Dagan in the context of domestic law, each school of thought has emphasized some aspects of realism over others. For instance, while the New Haven School emphasizes decision-making processes, it lacks realism’s emphasis on the concrete consequences of particular legal interventions. Critical approaches, for their part, are vaguer than legal realists about how to design the law to further policy. Because the realist blend of empiricism with normativity is not sufficiently captured by the heirs of realism, this Article, following Dagan, returns to the “origins.” In doing so, the present approach is close to the New Legal Realist school of international law identified by Gregory Shaffer, a school that examines international law empirically in order to solve normative quandaries. However, in the area of international human rights, it is mostly the empirical aspect of realism that has been taken up by New Legal Realists. This Article therefore turns to realist writing about private law—from the 1930s and more recently—which provides a realist framework for considering the relationship between right and remedies from a normative perspective.

B. Legal Realism and the Right-Remedy Relationship

As part of early legal realists’ pragmatism, they insisted on the importance of remedies and enforcement to understanding the extent to which rights are recognized in the law. Accordingly, Karl Llewelyn

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44. DAGAN, supra note 24, at 3–4.
45. Shaffer, supra note 22.
47. DAGAN, supra note 24, at 148.
insisted on viewing rights and remedies symbiotically and avoiding both a pure remedies discourse and a pure rights discourse. As recounted by Dagan, Llewelyn discussed the historical transition in the common law from a discourse focused on remedies to one focused on rights. "Under the former, the pertinent question was: 'On what facts could one man make use of any specific one of the specific ways of making the court bother another man?'"\textsuperscript{48} This approach was criticized for not giving sufficient weight to the underlying purposes of remedies, that is, rights. Legal thinkers thus shifted attention from often archaic procedural law to rights and the purposes they furthered. Remedies were "relegated to the periphery of attention" and viewed as "'adjective law' merely—devices more or less imperfect for giving effect to the important things, the substantive rights which make up the substance of the law."\textsuperscript{49} While this shift accorded with realism in that legal categories were no longer to be accepted simply because they existed, but, in view of the purposes they served (thus opening the law to criticism and reform), Llewelyn pointed to the price of the move to a discourse of rights: "to clothe one's statement about what rules of law are in terms of rights, is to double the tendency to disregard the limitations actually put on rules or rights by practice and by remedies."\textsuperscript{50} This tendency is especially heightened due to the use of the word "'rights" which implies a "notion of 'rightness' (in the sense of what ought to be)."\textsuperscript{51}

For Llewelyn, one cannot understand the content and meaning of a right without examining the remedies available to protect that right. As a result, he rejected the existence of gaps between rights and remedies, similarly to human rights absolutists. Contemporary realist writers, however, reject what Stephen Smith calls the "rubber-stamp view" of the relationship between rights and remedies on the grounds that it fails to account for the significance of the institution enforcing rights.\textsuperscript{52} Under this view, the realist call to pay profound attention to law's impact requires us to explore the wider social and political implications of proposed institutional interventions, including the implications of full remedial enforcement itself. And because some of those interventions produce effects negative for human welfare, in these authors' view, limited gaps between rights and remedies are justified.

Smith conceptualizes the right-remedy relationship by distinguishing among three types of "right": 

\begin{itemize}
  \item \textit{private right}—"the rights
\end{itemize}
that citizens hold against other citizens prior to any judgment by a court, "action right"—the right to a court order as a consequence of the defendant's violation of private right, and "court-ordered right"—the right that is created when a court makes an order. While private rights concern the relations among citizens, and thus form part of private law, action and court-ordered rights (the categories corresponding to remedies as defined in this Article) "are rights against courts, and the rules that govern action rights are rules that tell courts how they should behave. The law of court orders is fundamentally a branch of public law." Because court orders implicate state action, considerations other than the plaintiffs' rights come into play and, in Smith's view, justify limiting the availability of remedies. Smith envisions three such considerations. First, courts are public institutions funded by taxpayer money, and, hence, cost considerations become relevant. Second, court orders are an invocation of the state's coercive powers. Third, while private law rules of conduct among citizens are abstract commands, "court orders are personalized directives, issued by a court, that command a specific individual to do a specific thing." The last two considerations mean that action and court-ordered rights involve state violence in a way that respecting the underlying right does not. These considerations lead Smith to accept various types of gaps between rights and remedies, among them substitute remedies, such as damages instead of specific performance, and the preclusion of remedies, for instance, through statutes of limitation.

The prohibition of torture and other gross human rights abuses are norms regulating the exercise of public power by the state or state-like entities. With respect to these norms it is therefore difficult to apply Smith's neat distinction between private and public relationships. However, this Article draws from Smith's analysis an underlying rationale, which is the realist understanding that the

53. Smith, supra note 52, at 40–42.
54. Id. at 44.
55. Id. at 44–45.
56. Id. at 45.
57. Id.
delivery of justice by courts entails social costs (in the case of private law litigation—use of public funds and exercise of the state's coercive powers) additional to the costs of respecting the underlying right. In other words, once the right has been infringed, providing a legal remedy for it does not simply return the victim to the status quo ante or perform justice between the individual parties, but produces various effects in the world that would not have been produced if the defendant had respected the victim's right. These effects represent limitations on human freedom and welfare and should therefore not be accepted unquestioningly. Thus, to adopt a realist approach to law mindful of the concrete social consequences of legal interventions requires not only to strive in principle for the granting of remedies, but also to limit the grant of remedies in order to avoid harmful consequences, that is, to account in legal design for the concrete consequences of remedy-seeking itself.

Drawing on these insights, Part III will offer a legal realist critique of the UCJ debate. Part IV will thereafter present and justify an alternative position: human rights realism, which Part V will illustrate.

### III. A Realist Critique of Sovereignism and Human Rights Absolutism in Debates about Universal Civil Jurisdiction and Beyond

This Part analyses legal arguments in the debate about UCJ to expose the lack of persuasiveness of each of the sovereigntist and human rights absolutist positions. In order to make the debate on UCJ intelligible, subpart A briefly describes the cases limiting UCJ in the United States, where UCJ has been most developed, as well as in other jurisdictions and international courts. Subpart B then offers a realist critique of the debate. Subpart C demonstrates the prevalence of the sovereigntist and human rights absolutist arguments beyond UCJ.

#### A. Introducing the Universal Civil Jurisdiction Debate

1. In the United States

The Alien Tort Statute (ATS) grants US federal courts "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."\(^{59}\) Since Filártiga v. Peña-Irala,\(^{60}\) US federal courts had interpreted the ATS as granting them jurisdiction over damage claims by foreign victims of gross violations of international law, even in the absence of any clear


\(^{60}\) Filártiga v. Peña-Irala, 630 F.2d 876, 885–87 (2d Cir. 1980).
link between the parties or facts of the case to the United States.\textsuperscript{61} Some authors saw in this interpretation of the ATS the American "translation" of UCJ, explained by features of the American legal system and culture that lead to a preference for civil litigation.\textsuperscript{62} While initially used against former heads of state and state officials of former US allies with little political clout in the United States, the targets of litigation under the statute expanded in the mid-1990s to multinational corporations and state officials of powerful nations.\textsuperscript{63} These expansions led to a sustained campaign by conservatives and business interests in the United States to limit litigation under the statute. In \textit{Sosa v. Alvarez-Machain}, in 2004, the Supreme Court rejected the argument that further congressional authorization was required for courts to recognize rights of action under the ATS. The Court nevertheless restricted the applicability of the statute to those international law norms enjoying definite content and a high level of acceptance.\textsuperscript{64} One author explains the \textit{Sosa} court's preservation of the possibility of bringing international law violations under the ATS as a reaction to the Bush administration's strong assertions of power in the aftermath of September 11, 2001.\textsuperscript{65}

By the time of the 2013 holding in \textit{Kiobel}, however, the political context had changed. In that case, Chief Justice Roberts, writing for the Court, held that the ATS does not apply to conduct occurring on the territory of another sovereign, based on the presumption against extraterritoriality, a canon of statutory interpretation.\textsuperscript{66} He opined that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against territorial application." The statute was passed in 1789 because the US government was embarrassed by its inability to provide judicial relief to foreign officials injured in the United States, that is, in order to avoid diplomatic strife. Yet, in the court's view, diplomatic strife is precisely what would be caused by extraterritorial jurisdiction under the statute, referring to objections to the extraterritorial application of the ATS by various states filed in \textit{Kiobel} and previous cases.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{62} See, e.g., GEORGE P. FLETCHER, \textit{TORT LIABILITY FOR HUMAN RIGHTS ABUSES} 9 (2008); see also Stephens, \textit{Translating}, supra note 61, at 35.
  \item \textsuperscript{63} See Beth Stephens, \textit{The Curious History of the Alien Tort Statute}, 89 NOTRE DAME L. REV. 1467, 1469 (2014) [hereinafter Stephens, \textit{Curious History}].
  \item Stephens, \textit{Curious History}, supra note 63, at 1506.
  \item \textsuperscript{67} \textit{Id.} at 124.
\end{itemize}
Having thus restricted the possibilities of using ATS litigation as a form of UCJ, the U.S. Supreme Court further hampered the availability of this mechanism by ruling in April 2018, in Jesner v. Arab Bank, that the ATS could not be invoked against foreign corporations under the view that the legislature, not the judiciary, should create new causes of action given its "responsibility and institutional capacity to weigh foreign-policy concerns."68 The case concerned a lawsuit by victims of terrorism in the Middle East against Arab Bank, a Jordanian institution with a branch in New York, alleged to have helped finance attacks by terrorist groups. Justice Kennedy, delivering the Court's opinion, emphasized the threat posed by the lawsuit to Jordan's economy and, hence, to its cooperation with the United States.69

2. Outside the United States

The conflict between sovereignty and human rights also took center stage in UCJ-related cases outside the United States, principally in common-law jurisdictions. While these jurisdictions lack legislation comparable to the ATS, they share with the United States the view that jurisdiction is primarily a procedural matter. This means that, excepting matrimonial cases, the law does not usually require a connection between the parties to the dispute and the forum.70 In those jurisdictions, as in civil law jurisdictions, such as the Netherlands, which allows the taking of jurisdiction where the claimant has no alternative forum (forum necessitatis), it is the doctrine of sovereign immunity that has constituted a major obstacle to the exercise of UCJ.71 In Al-Adsani, the English House of Lords dismissed, on grounds of sovereign immunity, a lawsuit filed in 1992 by a British-Kuwaiti national against Kuwait for torture,72 a decision which the ECHR held, in 2002, did not constitute a disproportionate restriction on the right of access to court, since it reflected the generally recognized rule of international law on state immunity.73 The court sat in Grand Chamber and divided nine to eight, with the minority arguing that jus cogens (peremptory) prohibitions supersede national immunity laws. A Chamber of the ECHR reiterated the Al-Adsani majority position in 2014 in Jones v. United Kingdom. Four British nationals had sued the Saudi Ministry of the Interior and other Saudi

69. See id. at 1406-07.
70. JAMES FAWCETT & JANEEN M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 354 (14th ed. 2008).
officials for torture while the claimants were imprisoned in Saudi Arabia. The House of Lords held that Saudi Arabia and its officials were entitled to state immunity under the State Immunity Act as torture is an act *jure imperii* (public act) and there is no applicable exception under the Act. The ECHR upheld this ruling, extending its *Al-Adsani* approach to state officials. The court did so after having determined that since *Al-Adsani* there had been no “evolution in the accepted international standards as regards the existence of a torture exception to the doctrine of State immunity.” As pointed out by Chimène Keitner, “[t]he Court treated the International Court of Justice’s 2012 decision in *Germany v. Italy* as ‘authoritative’ for the proposition that at that time ‘no *jus cogens* exception to State immunity had yet crystallised’ under customary international law (para. 198).”

In January 2020, when dismissing a civil claim brought by a Palestinian individual against the former Israeli Chief of General Staff and Air Force Chief in connection with the bombardment of a civilian residence in Gaza, a Dutch court relied extensively on the above rulings of the ECHR and ICJ to hold that there is no exception in customary international law to the functional immunity of incumbent and former state officials from civil proceedings in foreign domestic courts when the claim alleges the commission of war crimes.

Citing with approval both the House of Lords and the ECHR in *Jones*, the Supreme Court of Canada held in 2014, in *Kazemi Estate v. Iran*, that customary international law does not mandate UCJ such that states would be compelled to recognize a torture exception to the immunity of foreign states and foreign state officials from civil proceedings. The court reflected the view expressed by the majority in *Kiobel* that the legislature, not the courts, is the proper venue for deciding whether to allow UCJ.

The ECHR in Grand Chamber has also recently rejected the view that international law requires states to exercise UCJ when reviewing member states’ interpretation of jurisdictional norms. In *Nait-Liman*
v. Switzerland, the ECHR ruled that the Swiss judiciary’s interpretation of its rules of jurisdiction, which foreclosed a lawsuit by a Tunisian resident of Switzerland against the former Tunisian Minister of the Interior for torture in Tunisia, did not violate the claimant’s right of access to court, as it pursued a legitimate aim and was reasonably proportionate to the aim pursued. The aim was legitimate, as it was to ensure the proper administration of justice, an aim not attainable in the court’s view with exercises of UCJ, which create practical difficulties for courts concerning the administration of evidence and enforcement of judicial decisions, in addition to “potential diplomatic difficulties.”

As to proportionality, it was present given that Switzerland was not bound to accept UCJ under norms of international law, despite the undisputed peremptory nature of the prohibition of torture.

B. Deconstructing the Universal Civil Jurisdiction Debate

Subpart A establishes that different actors argued in favor of or against UCJ (or aspects of UCJ) in widely diverging legal contexts. This subpart reconstructs the arguments put forth on each side of the UCJ debate, emphasizing the commonalities among sovereigntists, on the one hand, and human rights advocates, on the other, across jurisdictions. This subpart argues that, from a realist perspective, these two reconstructed positions are unpersuasive.

Neither position in the UCJ debate is reducible to formalism nor to any other coherent jurisprudential approach. The various actors on each side advanced an assortment of functional and pragmatic arguments in favor of their positions. Yet both suffer from the formalist reliance on legal fictions disconnected from reality to defend their respective normative stances. Specifically, each side refused to acknowledge the concrete implications of its own legal position, finding refuge in legal abstraction from the pragmatic concerns raised by the other side. Sovereigntist judges and commentators insisted on the validity of the decisions barring UCJ by relying on a sharp distinction between substance and procedure, accepting that in practice a right deemed important (freedom for torture) remains, in many cases, without remedy. The human rights advocates, for their part, denied the concrete implications of remedy-seeking by appealing to the distinction between law and politics and to a hollow conception of remedies as “adjective”—mechanically accruing from rights.


83. Cohen, supra note 34, at 820.
1. The Sovereigntist Position: Substance and Procedure as Distinct

Courts restricting the possibility of UCJ advanced various functional justifications for their decisions. Among such consequences, courts raised concerns about (1) risks to the separation of powers within the forum if courts become involved in what amounts to foreign policy,\(^84\) (2) the financial burdens that would be imposed on the forum from entertaining such lawsuits,\(^85\) (3) risks to the sovereignty of the state in which the abuses occurred,\(^86\) and (4) in turn endangering relations between the forum and the state in which the abuses occurred.\(^87\)

Nevertheless, for those courts and sovereigntist commentators who frame the discussion as part of international law (namely, courts and approving commentators outside the United States), the peremptory status of the international prohibition of torture has to be addressed. As the next subpart details, the human rights advocates’ argument has been that given the *jus cogens* (peremptory) status of the prohibition of torture and the non-*jus cogens* status of the customary international law rules on sovereign immunity, the rules of immunity should give way to rules allowing remedies for breach of the prohibition of torture.

The courts, in response, recognize the peremptory character of prohibition of torture. However, they insist on a sharp distinction between norms and procedure that denies that there is any substantive conflict between the prohibition of torture and the existence of immunity. Lord Hoffman, in *Jones v. Saudi Arabia*, stated: “[T]he

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\(^{85}\) See infra note 164 and accompanying text.

\(^{86}\) See Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 108 (Pellonpää & Bratza, JJ., concurring) (arguing that if the Court held that immunity from suit was incompatible with the Convention for the Protection of Human Rights and Fundamental Freedoms, “the Court would have been forced to hold that the prohibition of torture must also prevail over immunity of a foreign State’s public property . . . .”); Philippines v. Pimentel, 553 U.S. 851, 865 (2008). In *Kazemi Estate*, Justice LeBel referred approvingly to Lord Bingham’s opinion for the House of Lords in *Jones* that civil proceedings against individual state officials indirectly implead the state. *Kazemi Estate*, 3 S.C.R 176, para. 90 (citing *Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26 [31], [2007] 1 AC (HL) 270 (appeal taken from Eng.)).

\(^{87}\) Judge Pellonpää suggested that the litigation’s impact on foreign state property could in turn affect the forum state’s ability to effectively conduct international relations by entering into inter-governmental settlement arrangements or using foreign assets as leverage in international negotiations. Al-Adsani v. Kuwait, 107 I.L.R. 536, ¶ 27 (U.K. Ct. App. 1996); see Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018) (referring to the “significant diplomatic tension” between Jordan and the United States caused by the litigation). In *Nait-Liman*, the ECHR Grand Chamber similarly referred to diplomatic difficulties posed by UCJ as legitimate concern of states justifying refusal to exercise it. *Nait-Liman*, App. No. 51357/07, ¶ 127.
United Kingdom, in according state immunity to the Kingdom, is not proposing to torture anyone. Nor is the Kingdom, in claiming immunity, justifying the use of torture. It is objecting in limine to the jurisdiction of the English court to decide whether it used torture or not. 88 Similarly, the court in Kazemi insisted that "the issue in the present case is not whether torture is abhorrent or illegal. That is incontestably true. The question before the Court is whether one can sue a foreign state in Canadian courts for torture committed abroad. 89 Having made that distinction, they point to the absence of conflict or incoherence in their position, due to the different conceptual categories (substantive/procedural) in which the prohibition of torture and remedies therefor are located. Such an approach was most eloquently articulated by Hazel Fox QC in her book The Law of State Immunity cited approvingly by Lord Bingham in Jones v. Saudi Arabia: 90

State immunity is a procedural rule going to the jurisdiction of a national court. It does not go to substantive law; it does not contradict a prohibition contained in a jus cogens norm but merely diverts any breach of it to a different method of settlement. Arguably, then, there is no substantive content in the procedural plea of State immunity upon which a jus cogens mandate can bite. 91

Similarly, in Germany v. Italy, the International Court of Justice asserted that there can be no conflict between jus cogens prohibitions of atrocity and sovereign immunity because rules of immunity are procedural in character and "do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful . . . notwithstanding that the effect was that a means by which a jus cogens rule might be enforced was rendered unavailable." 92

In the United States, after the Supreme Court settled in Sosa that courts could entertain damage suits for international law violations under the ATS without further congressional authorization, opponents of a broad interpretation of the ATS shifted from formalist to primarily functional arguments related to the separation of powers between the judiciary and the political branches. 93 They have framed their analysis

89. Kazemi Estate, 3 S.C.R 176, para. 53.
90. [2006] UKHL 26 [24].
91. Id. (quoting Hazel Fox, The Law of State Immunity 525 (2004)).
93. For a review of the formalist critiques initially voiced against Filártiga, see Julian Ku & John Yoo, Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute, 2004 SUP. CT. REV. 153, 159–160.
mostly in terms of domestic US law and have thus not addressed with the same frequency as non-US sovereigntists the peremptory status, under international law, of the prohibition of atrocities previously litigated under the ATS. However, when they do recognize the importance of international respect for fundamental human rights, they too resort to the substance/procedure distinction. Thus, in Jesner, Justice Kennedy distinguished between international law duties and the nature of the defendant (corporate or individual), noting that

"[t]he singular achievement of international law since the Second World War has come in the area of human rights," where international law now imposes duties on individuals as well as nation-states . . . . It does not follow, however, that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities.94

Sovereigntists thus transport the UCJ debate to the abstract level of legal categories of substance/procedure, removing from immediate view the harsh practical consequence of their position: the lack of enforcement of one of the most important norms of international law. Such formalism may serve to preserve courts' legitimacy. Yet, from a normative realist perspective, where remedies are a core component of rights, such a position is untenable. The strict divorce of rights and remedies pays lip service to human rights values. Immunity in principle "merely diverts"95 the victims' claim to a different mode of settlement, yet, in practice, victims turn to civil litigation in foreign courts precisely because no other redress is available in domestic and international legal institutions. Upholding immunity in these cases requires adopting a vision of law as an institution radically detached from justice, as evidenced in one scholar's relegation of the victims' claims to the realm of emotions that cannot form part of sound legal analysis.96

From a realist perspective, the position of sovereigntists in the United States who object to UCJ primarily on grounds relating to the separation of powers and comity towards foreign sovereigns is more

96. Roger O'Keefe notes that though judges are not heartless, "most tend also to be conscious of the fact that a judicial forum is no guarantor of a happy ending and that, as tragic as it may be, many morally deserving cases are lost." Roger O'Keefe, State Immunity and Human Rights: Heads and Walls, Hearts and Minds, 44 VAND. J. TRANSNAT'L L. 999, 1032 (2011). Similarly, Stefan Talmon has rejected criticism of the International Court of Justice's resort to the procedure/substance distinction in Jurisdictional Immunities of the State by defending the formalism of law. Stefan Talmon, Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished, 25 LEIDEN J. INT'L L. 979, 1002 (2012).
defensible, as it is grounded in a concern for practical consequences. Nevertheless, that position is also unpersuasive: in practice, most if not all impositions of legal accountability involve some reputational damage to the state whose officials are held to account, potentially affecting comity, and, hence, the separation of powers between the judiciary and the political branches. To adopt these general political concerns as criteria for the establishment of accountability mechanisms is to subject accountability to the whims of state discretion and consent, leaving the underlying human rights norms rarely enforced in practice.

2. The Absolutist Human Rights Position: Remedies as Adjective to Norms

Perhaps unsurprisingly given the ideological fervor surrounding human rights, human rights advocates arguing for UCJ have adopted a pure rights discourse that, as the rights discourse described by Llewelyn, sees remedies as “adjective law,” that is, as mechanically accruing from the supremacy of human rights norms. This discourse obscures the potential negative implications of remedy-seeking for gross human rights abuses, implying that no limitations on remedies for such abuses are justifiable.

This approach is clearly visible in debates surrounding the ATS. In response to claims that human rights litigation under the ATS is an undemocratic interference of the judicial branches in foreign policy, human rights advocates argue that such litigation does not raise any concerns as long as it is limited to norms of international law enjoying international consensus. Put differently, by focusing on human rights norms, human rights advocates shift attention away from the concrete consequences of litigation. A prime example of this strategy can be seen in Harold Koh’s theory of transnational public law litigation, the leading theoretical model of ATS litigation. Koh recognizes that ultimate resolution of the litigation often requires a political solution to be negotiated among the various actors involved. However, because the theory attempts to justify transnational public law litigation, it emphasizes the elaboration and internalization of international law norms as central outcomes of the litigation. In order to deal with concerns raised for comity toward foreign sovereigns, Koh

97. I do not include in the category of “sovereigntists” those scholars who, like Ku & Yoo, supra note 93, at 199–200, oppose UCJ under the ATS but would agree to UCJ in state courts.

98. For Koh, ATS litigation is a primary instance of “transnational public law litigation,” which merges classical domestic private law litigation and classical international litigation involving nation-states. HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 25 (2008).

invokes the universally accepted character of the norms litigated in transnational public law litigation. Koh then derives from this argument about comity a rebuttal of concerns that ATS litigation infringes on the separation of powers within the US government. Where the relevant international norms are the subject of clear international consensus, US courts cannot be said to infringe on the executive branches of the United States, since they are not really intervening in other countries’ affairs, and, by extension, in US foreign affairs. By shifting the discussion to universally accepted international norms, Koh creates the illusion of a conflict-less world, leaving unaddressed conservatives’ pragmatic concerns about the diplomatic strife caused by litigation.

Other scholars present remedies as “adjective” to norms by arguing that there is no material distinction between the various remedies, thereby obscuring the divergent consequences of the different mechanisms. In a seminal article, Beth Stephens argued in 2002 that the differences between the United States and Europe in response to human rights violations, namely the preference in Europe for criminal proceedings, reflected different “translation[s]’ into domestic law of identical international law mandates.” Similarly, George Fletcher argued that UCJ is less controversial or problematic than universal criminal jurisdiction, as the existence of principles of conflicts of laws in tort cases—but not criminal cases—signifies that universal jurisdiction is actually more compelling in the civil sphere than in the criminal sphere. Justice Breyer put forward another version of this argument in his concurrences in Sosa and Kiobel. He argued that “universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well,” since many countries allow victims to file claims for compensation in the course of criminal prosecutions. Thus, he concludes, UCJ “would be no more threatening” to comity among nations than universal criminal jurisdiction, for which there is abundant normative consensus in his view.

For Stephens, Fletcher, and Breyer, UCJ should not raise concerns, as it is not substantially different from universal criminal jurisdiction, which itself enjoys wide international acceptance. While universal criminal jurisdiction may appear in some respects more threatening to international relations than UCJ, because of the role of

101. Id. at 2387–88.
102. Koh, supra note 98, at 34.
106. Id. at 762–63.
forum state actors (prosecutors) and the severity of the criminal sanction, the view of UCJ as milder in its effects is questionable. The absence of prosecutors and the possibility of litigation even in the defendant's absence from the jurisdiction once he has been served mean that, if allowed, exercises of UCJ are much more likely to occur than their criminal counterpart, multiplying concerns about foreign relations complications. Their view further ignores the specific concerns raised by damage awards, which, as ATS litigation shows, can rise to several billion US dollars in the event of a class action. A study of the repercussions of In re Estate of Ferdinand E. Marcos in the Philippines revealed that the large ATS damage award conflicted with a transitional justice policy based on economic redistribution in the post-Marcos era.

The strategy of proponents of UCJ in cases outside the United States is, like their American colleagues, to adopt a pure rights discourse in order to avoid addressing claims that the process of litigation might have negative consequences. Echoing Koh's strategy, dissenting Justice Abella in Kazemi invoked the universality of the litigated human rights norms to assuage fears of infringing on foreign state sovereignty:

In the face of universal acceptance of the prohibition against torture, concerns about any interference with sovereignty which may be created by acting in judgment of an individual state official who violates this prohibition necessarily shrink. The very nature of the prohibition as a peremptory norm means that all states agree that torture cannot be condoned.

Moreover, proponents of UCJ argue that the supremacy of human rights norms automatically bears a host of procedural consequences, including that civil remedies for human rights abuses be made available even in foreign countries. Where opponents of UCJ refuse to see a conflict between the prohibition of torture and immunity by placing these rules in different categories (substantive and procedural), proponents of UCJ see the prohibition of torture and procedural rules relating to immunity as hierarchically related, procedural rules being subordinate to peremptory substantive rules:

110. Such a view was clearly expressed by the minority of the European Court of Human Rights in Al-Adsani when it pointed out that "[t]he majority, while accepting that the rule on the prohibition of torture is a jus cogens norm, refuse to draw the consequences of such acceptance." Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79 (Joint Dissenting Opinion ¶ 4).
It is not the nature of the proceedings which determines the effects that a jus cogens rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically lower rule. . . The criminal or civil nature of the domestic proceedings is immaterial.\textsuperscript{111}

Reduced to “adjective law,” remedies are presented as automatic and unproblematic.

When proponents of UCJ do acknowledge sovereigntists’ political concerns, they quickly dismiss them as nonlegal and, hence, not properly raised in legal argumentation. In \textit{Nait-Litman}, the dissenting judges dismissed potential diplomatic difficulties posed by exercises of UCJ as “a non-judicial argument” \textsuperscript{112} and “not a legal [consideration].”\textsuperscript{113} Discussing state immunity in foreign courts for torture, Lorna McGregor similarly characterized dignity and comity as “standing outside the legal regime”\textsuperscript{114} and noted that comity is nothing more than “rules of politeness, convenience, and goodwill.”\textsuperscript{115} Political concerns are either avoided through a single-minded focus on norm promotion or conveniently dismissed as nonlegal and, hence, not in conflict with UCJ in a relevant manner.

This position is no more convincing than the sovereigntists’ position. The international normative consensus about the prohibition of torture invoked by proponents of UCJ is an inadequate, formal answer to concerns that comity toward foreign sovereigns is harmed, in practice, by exercises of UCJ. The view that consensus about norms implies consent to a range of remedies, including UCJ, is tenable only to the extent that one sees remedies as substantively meaningless. That understanding of remedies is belied by the very practical consequences of litigation revealed by the UCJ cases. Some cases point to diplomatic conflict or to the inability to enter into interstate negotiations between the forum state and the state whose officials or corporations are being sued as a result of the litigation.\textsuperscript{116} Other cases point to conflicts between ATS litigation and economic distribution and restorative justice. As indicated above, the damage award in the \textit{Marcos} ATS case conflicted with a transitional justice policy in the

\begin{itemize}
\item \textsuperscript{111} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} ¶ 98 (Sergides, J., dissenting).
\item \textsuperscript{114} Lorna McGregor, \textit{Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty}, 18 EUR. J. INT’L L. 903, 917 (2007).
\item \textsuperscript{115} \textit{Id.} at 918 (quoting IAN BROWNLIE, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 28 (6th ed. 2003)).
\item \textsuperscript{116} In \textit{Jesner}, Justice Kennedy noted that the litigation “has caused significant diplomatic tensions with Jordan for more than a decade.” Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1399 (2018). In \textit{Al-Adsani}, Justice Pellonpää and Justice Bratza discussed the risks posed by litigation to settlement arrangements and cooperation between states. Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, 107–10 (Pellonpää & Bratza, JJ., concurring).
\end{itemize}
Philippines based on economic redistribution. In the early 2000s, the South African government initially opposed ATS lawsuits filed against multinational corporations for aiding and abetting South African apartheid, arguing that the damages sought conflicted with its policy of economic growth in partnership with corporations. Exercises of UCJ clash with amnesties, which are a necessary component of restorative justice. While some of these political repercussions might not justify limiting the availability of remedies for gross abuses, they expose the fallacy in the argument that legal accountability for gross human rights abuses merely enforces rights.

C. Sovereigntism and Human Rights Absolutism Beyond Universal Civil Jurisdiction

This subpart shows that the sovereigntist and human rights absolutist positions are also prevalent in commentary on other transnational accountability mechanisms.

The sovereigntist position is clearly expressed in states' opposition to the ICC and not only in crude critiques of the court voiced by authoritarian rulers, such as Rodrigo Duterte. The United States' consistent refusal to join the Rome Statute since the administration of Bill Clinton unless cases would be screened by the Security Council demonstrates that the United States' "understanding of 'international society'... is limited to 'a society of states.'" Sovereigntism is also expressed in the limitations enacted in domestic legislation on universal criminal jurisdiction. According to Mximo Langer's persuasive analysis, the number of worldwide prosecutions under universal criminal jurisdiction has not declined in the past three

117. Davidson, supra note 108.
120. After the ICC opened a preliminary inquiry into allegations that Philippine officials committed crimes against humanity in killing thousands of individuals accused of being drug dealers or users, President Rodrigo Duterte accused the court of violating "due process and the presumption of innocence" and announced that the Philippines was withdrawing from the Rome Treaty, with immediate effect. Referred to a provision in the statute giving a withdrawal effect one year after it is submitted, Mr. Duterte replied that provision was invalid because there had been "fraud" when the Philippines joined the treaty. Felipe Villamor, Philippines Plans to Withdraw from International Criminal Court, N.Y. TIMES (Mar. 14, 2018), https://www.nytimes.com/2018/03/14/world/asia/rodrigo-duterte-philippines-icc.html [https://perma.cc/LN5F-AQFF] (archived Sep. 22, 2020).
decades. Instead of the common perception of a “rise and fall” of this mechanism, he identifies a shift in universal criminal jurisdiction legislation from a conception of the state as “global enforcer” of international norms to one in which the state will exercise this form of jurisdiction only to avoid providing a safe haven to the perpetrators of atrocities.\(^\text{122}\) The rejection of the broader “global enforcer” model reflects sovereigntists sensibilities, in that it is motivated by the wish of the executive and legislative branches of government to avoid high costs in terms of international relations.\(^\text{123}\)

The human rights absolutist position has nevertheless encountered a large measure of success. If challenged today, the arrangement reached in South Africa would likely be held contrary to the state duty to prosecute and provide compensation for serious human rights abuses elaborated by various treaty bodies.\(^\text{124}\) The absolutist human rights position can also be found in interpretations of rules applicable to the ICC. Under Article 17 of the Rome Statute, a case is admissible where there are no relevant legal proceedings, or where domestic proceedings have been initiated but the state is unwilling or unable to genuinely prosecute.\(^\text{125}\) While Article 17 requires an investigation or prosecution for a case to be held inadmissible, it does not expressly require a criminal investigation. However, it is not clear that an amnesty would preclude ICC jurisdiction, given that section 6 of the Preamble of the Rome Statute states “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”\(^\text{126}\) The Office of the Prosecutor has, in addition, interpreted another relevant provision of the statute in accordance with the absolutist human rights

\(^{122}\) Hence one limitation in the legislation is that the defendant must be a permanent resident of the forum state. Máximo Langer, *Universal Jurisdiction is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction*, 13 J. INT'L CRIM. JUST. 245, 251 (2015).

\(^{123}\) *Id.* at 253-54.

\(^{124}\) Such is the opinion of Argentine human rights lawyer and former U.N. Special Rapporteur on Torture, Juan Méndez. See Juan E. Méndez, *Foreword to Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*, at xvii, xxiii (Francesca Lessa & Leigh A. Payne eds., Cambridge Univ. Press 2012), cited in Engle, *supra* note 11, at 1085. Amnesties for serious human rights violations have been held incompatible with a state duty to prosecute by the Inter-American Court of Human Rights, the Human Rights Committee (monitoring the implementation of the International Covenant on Civil and Political Rights) and the Committee against Torture, among other bodies. For a review of these decisions see Gomes Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 147-70 (Nov. 24, 2010).

\(^{125}\) Because of the sharp clash of views on amnesties during negotiations of the Rome Statute, the drafters of the statute left the matter ambiguous, neither explicitly requiring criminal prosecution as the only acceptable response in all cases nor creating an explicit exception for amnesties. Robinson, *supra* note 17, at 483.

position. Under Article 53 of the Rome Statute, the prosecutor may decide to not pursue a case based on the determination that an investigation or case would not serve the "interests of justice." The Office of the Prosecutor has given a very narrow interpretation to that provision, insisting that "the text and purpose of the Rome Statute clearly favour the pursuit of investigations and cases when those investigations and cases are admissible and the relevant standard of proof can be satisfied" and distinguishing the interests of justice from the interests of peace. Similarly to commentators on UCJ dismissing comity as an extralegal consideration, in this view, political considerations are not to form part of legal analysis by court personnel.

More broadly, human rights absolutism dominates nongovernmental human rights organizations' (NGOs) struggle against "anti-impunity," itself a term implying that the punishment of individual perpetrators is self-evidently desirable. Emblematic of this stance is the opposition of international NGO Human Rights Watch to the peace agreement reached in Colombia between the state and the Revolutionary Armed Forces of Colombia, on the grounds that the proposed agreement absolved perpetrators of human rights abuses of legal responsibility.


128. The court itself appears to take a different view. On 12 April 2019, the Pre-Trial Chamber rejected the Prosecutor's request to authorize her to open a formal investigation into crimes against humanity and war crimes allegedly committed in Afghanistan, on the grounds that an investigation "at this stage would not serve the interests of justice" given instability on the ground, the "lack of cooperation of relevant parties," and the ICC's "limited . . . resources." Situation in the Islamic Republic of Afghanistan, Case No. ICC-02/17, Pre-Trial Chamber II, 16, 31, 32 (Apr. 12 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF (last visited Oct. 13, 2020). Among the outraged critiques of this decision, can be found the human rights absolutist position that political considerations should never come to bear in the administration of accountability for atrocity. See, for example, Sergey Vasiliev's assertion that the Chamber's "treatment of the 'interests of justice' requirement went astray, bringing legally irrelevant desiderata within the judicial determination." Sergey Vasiliev, Not Just Another 'Crisis': Could the Blocking of the Afghanistan Investigation Spell the End of the ICC? (Part I), EJIL: TALK! (Apr. 19, 2019), https://www.ejiltalk.org/not-just-another-crisis-could-the-blocking-of-the-afghanistan-investigation-spell-the-end-of-the-icc-part-i/ (archived Oct. 13, 2020).

129. See generally Engle, supra note 11.

As in the debate on UCJ, the sovereigntist position on these mechanisms bars legal accountability by narrowing or eliminating courts' jurisdiction, or subordinates it to the will of sovereign states, emptying international norms of force. The human rights absolutist position, for its part, sees legal accountability as automatically applicable and excludes political considerations from the realm of legal analysis. In doing so, human rights advocates not only fail to address sovereigntists' concerns adequately, they also fail to acknowledge that in some cases legal accountability might actually create a dilemma from a human rights perspective, if one understands "human rights" to include not only backward-looking individual justice but also the promotion and protection of human rights going forward. It is thus essential for human rights advocates to cease denying that legal accountability has political consequences. The next Part provides a normative justification and outline of a framework for analyzing limitations to accountability mechanisms for human rights abuses.

IV. RECONSTRUCTING HUMAN RIGHTS REALISM

The previous Part showed that neither sovereigntist nor absolutist human rights position is tenable. Yet each puts forth valid considerations. The absolutist human rights position takes seriously the concept of human rights in Ronald Dworkin's sense of viewing rights as trumps over other considerations.131 The sovereigntist position takes seriously the political implications of accountability. This Part argues that it is possible to take seriously both the legal right and its political consequences, under a position this Article terms "human rights realism." Under this position, human rights norms enjoy a superior status in relation to other international legal norms, and thus legal accountability for human rights violations is the point of departure (though the desirability and justifications for the existence of any particular type of legal mechanism must be debated and assessed). However, even for those legal mechanisms that are normatively justified, their availability should be limited to avoid those political implications that undermine core human rights.132

Part IV will illustrate this approach in various institutional contexts. For the purposes of this Part, it suffices to clarify that, with respect to UCJ, this approach could be operationalized in the following

131. See RONALD DWORAKIN, TAKING RIGHTS SERIOUSLY 192 (1977) (discussing man's right to disobey laws that infringe his rights).
132. The term "core human right" is defined and justified in Section IV.B.
way: the objection of a foreign state\textsuperscript{133} to an exercise of UCJ on the grounds that it undermines peace negotiations or measures furthering economic equality would preclude the taking of jurisdiction by the court in the particular case, where the court is convinced both that the negotiations or conflicting measures are genuine and substantially threatened by the exercise of UCJ.\textsuperscript{134} However, mere diplomatic difficulties between the forum and the state where the abuses occurred would not bar the taking of jurisdiction.

This Part is devoted to justifying the proposed approach, human rights realism. Because this approach assumes the virtue of human rights norms generally, this Part does not delve into the justifications for enforcing those norms, taking the necessity of generally enforcing them as a given. Neither does it discuss the justifications for choosing criminal or civil law as means of enforcement. Various considerations such as legal pluralism and the quality of historical clarification (in particular the focus on individual perpetrators as opposed to structures of violence) may guard against privileging criminal and civil responses to atrocity\textsuperscript{135} and cannot be adequately addressed within the framework of this Article. Instead, this Article argues that even if the transnational remedies for atrocity currently privileged in international law—criminal prosecution and compensation—are normatively justified, a realist concern for the practical implications of remedy-seeking requires accepting gaps between human rights norms and remedies when those gaps protect core human rights.

A. The Benefits of Gaps Between Human Rights Norms and Remedies

Part I established that to adopt a realist approach mindful of the concrete social consequences of legal interventions requires not only to strive for the granting of remedies but also to account in legal design for the consequences of remedy-seeking itself. Where remedy-seeking produces negative consequences for human welfare, it should not be accepted unquestioningly. Are any such costs sometimes produced by exercises of the transnational accountability mechanisms discussed in this Article? The question matters, for if such costs are never produced or are negligible, there is no justification for even beginning to discuss gaps between rights and remedies. Based on an analysis of empirical and social scientific scholarship, this Part argues that full legal accountability for human rights abuses can have negative concrete

\textsuperscript{133} Even when states are not defendants in litigation, as was the case in most ATS cases, they have been able to express their position on exercises of UCJ by submitting amicus curiae briefs.

\textsuperscript{134} In 2001, Jennifer Llewellyn considered the conflict between UCJ and amnesties, and argued that courts should defer to those amnesties furthering restorative justice. Llewellyn, supra note 119.

\textsuperscript{135} ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA, supra note 25.
human rights norms.

A number of studies point to the costs of full enforcement of accountability mechanisms. A study of the domestic repercussion of the Filártiga and Marcos ATS litigation reveals that UCJ can empower subordinate groups to challenge power structures. However, this type of litigation does not always have positive effects. The Marcos ATS lawsuit conflicted with a policy of economic redistribution. Marcos was a class action against Ferdinand Marcos brought on behalf of 10,000 Philippine victims of torture, disappearance, and execution. It had led to a full jury trial and damage awards in 1994 and 1995 totaling approximately $2 billion. In order to enforce their damage awards, the plaintiffs sought to attach various assets around the world held for the benefit of the Marcos estate. They soon faced competing claims from the Republic of the Philippines, whose primary transitional justice policy had been to recover the billions of dollars stolen from national coffers by the Marcoses and use the recovered assets to combat economic inequality through land redistribution. Courts in various jurisdictions, including the U.S. Supreme Court, ruled against the ATS plaintiffs by reference to the Philippines’ sovereign immunity. It is safe to conclude that had they not done so—that is, had the multibillion-dollar damage award been fully enforced—the plaintiffs’ enforcement of their damage award would have precluded the funding of the Republic’s redistributive policy.

While conflicts with distributive justice might appear most likely in exercises of UCJ as a form of civil litigation geared toward the grant of damages, they can also be produced by the other mechanisms considered here. The imperative of criminal prosecution furthered by international criminal law and the state duty to prosecute developed by regional human rights courts has distributional implications, in that, to comply with complementarity or regional court rulings requiring prosecutions or compensation, funds may have to be diverted from other state programs. However, the more likely and troublesome negative consequence of international criminal

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137. See, e.g., id. at 104–79.
138. Id.
139. Id.
140. Id.
141. Id.
142. Id. See generally Philippines v. Pimentel, 553 U.S. 851 (2008) for the particular Supreme Court ruling in this case.
143. This point has been made by both economists and critical scholars in relation to transitional justice mechanisms generally. See Geoff Dancy & Eric Wiebelhaus-Brahm, Bridge to Human Development or Vehicle of Inequality? Transitional Justice and Economic Structures, 9 INT'L J. TRANSITIONAL JUST. 51, 53–54 (2015).
mechanisms is the much-debated risk of conflict with peace. In an economic analysis of universal criminal jurisdiction, one author persuasively argued that, by allowing all nations to prosecute human rights violations even when unconnected to the forum state, universal criminal jurisdiction makes it difficult for individual states to transact their entitlements to prosecute in peace negotiations as nonprosecution can never be guaranteed. 144 Analysing a data set of civil conflicts from 2002 to 2013, Alyssa Prorok found that active ICC involvement in a conflict decreases the likelihood of conflict termination when the threat of domestic punishment faced by leaders is low.145 In an earlier study analysing a database of regime transitions from 1998 to 2007, Monica Nalepa and Emilia Justyna Powell found that the combination of a state’s ratification of the Rome Statute and ratification by states in its region deters dictators’ decisions to peacefully relinquish power when the dictator faces a violent opposition willing to afford the dictator amnesty in exchange for stepping down.146

One of the challenges of legal realism is that it relies on social scientific scholarship to understand the impact of legal interventions, yet social science is rife with debates and disagreements. This means not only that the legal realist must revisit the law in light of changing conditions and findings but that her choice of empirical findings must be justified. This Article accepts that full legal accountability can sometimes negatively impact peace based on the fact that scholars from diverse theoretical and professional backgrounds, using a wide range of methodologies, are beginning to converge on these issues.147 It is true that international relations scholars continue to debate the overall influence of international criminal justice on peacemaking.148 Yet even the most fervent defenders of international criminal justice among those scholars admit that, under some conditions, peacemaking

147. See id. See generally Kontorovich, supra note 144; Prorok, supra note 145. Sarah Nouwen and Wouter Werner have also persuasively shown that the universalist language employed by the ICC has exacerbated the friend/enemy distinction in Uganda and Sudan. Sarah M. H. Nouwen & Wouter G. Werner, Doing Justice to the Political: The International Criminal Court in Uganda and Sudan, 21 EUR. J. INT’L L. 941, 941 (2010). While this could be taken as an indication that conflict has shifted from arms to the realm of law, it may plausibly signal that international criminal law exacerbates the social and political conditions for violent conflict.
efforts can be harmed. As will be detailed in Part IV, systemic limitations to accountability require a high degree of certainty based on more extensive evidence than is currently available. The present discussion of empirical studies does not imply that all limitations to accountability that purport to further peace are justified. More modestly, for the purposes of this Part, the existing empirical evidence substantiates the notion that full legal accountability can, in some cases, impede peace-making, and, therefore, that full legal accountability cannot be presumed to be desirable across the board.

Moreover, some empirical studies which purport to challenge the view that legal accountability mechanisms endanger peace ultimately confirm the view that gaps between norms and remedies can be beneficial. Notably, in a recent study of the parts played by the ICC and the Inter-American Court of Human Rights in the Colombian peace process, Courtney Hillebrecht, Alexandra Huneeus, and Sandra Borda argue that legal accountability norms should not be viewed with concern, as in practice they are not applied directly but rather reinterpreted by various domestic actors in novel ways. Thus, while the Colombian peace process was highly judicialized, the peace accords reinterpreted criminal accountability by disaggregating it into components and allowing punishment to be waived to further restorative justice, thereby resolving the conflict between peace and justice. This finding is in line with scholarship on the importance of domestic mobilization of human rights mechanisms and anthropological theories of the local “translation” of human rights norms. Yet what the study also reveals is that such a translation of the norm of criminal accountability was enabled by limitations on accountability at the international level: drafters of the peace agreement relied on the Inter-American Court ruling in Massacre of El Mozote and Nearby Places v. El Salvador, which recognized a state obligation to make peace as part of its commitment to human rights,

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149. See Jo & Simmons, supra note 37, at 445 ("There may be some cases in which the unreasonable insistence on prosecution could be antithetical to the more practical idea of making deals and compromising with atrocity offenders, and we do not deny that carefully calibrated amnesties may in some circumstances support peace processes . . . ").

150. See Hillebrecht, Huneeus & Borda, supra note 18, at 280–81.


and, hence, enabled peace-making to be balanced against accountability. Moreover, the authors insist that the peace negotiations operated in the shadow of the law rather than in conditions of perfect enforcement. Similarly, a study of the Marcos case reveals that the ATS damage award against Marcos triggered reparations legislation—the domestic “translation” of the ATS lawsuit—precisely because of difficulties enforcing the award in courts around the world because of the precedence given to sovereign immunity over human rights enforcement. These studies suggest that, for international law to play its “shadow” role and allow contextualized domestic reinterpretations of international norms that avoid conflicts with peace or economic redistribution, international legal norms should be imperfectly enforced. In fact, scholars increasingly point to the importance of weak enforcement of human rights norms at the international level as a condition of effective domestic mobilization and reinterpretation.

Thus, by fully granting transnational remedies, foreign and international courts would not merely be “giving teeth” to international human rights norms, as argued by human rights advocates, but also potentially limiting the ability of political communities around the world to engage in peace-making and forms of justice alternative to retributive and corrective justice. These consequences can be grave for human welfare, and, therefore, cannot be accepted unquestioningly. Yet under what circumstances can these consequences justify limiting the remedies available for gross human rights abuses?

B. Determining the Extent of the Gaps

What costs should count as relevant? In the private law context, Smith views the exercise of state violence and the use of public funds as costs that justify the existence of gaps between rights and remedies. However, at least in the human rights context, some more precise criterion must be developed to determine which costs can limit accountability. Transnational human rights enforcement necessarily entails some costs, if only the reputational costs to the state held liable

156. See Dai, supra note 151, at 95 (viewing international human rights instruments as intentionally weak instruments); Gráinne de Búrca, Human Rights Experimentalism, 111 AM. J. INT’L L. 277, 280 (2017) (arguing that enforcement weakness is required for international human rights law to function properly as a system of experimental governance in which stakeholders at the periphery reinterpret and mobilize the norms).
for abuses (including through its officials). If all costs or harms were to count as relevant, human rights norms could never be enforced.

Thus, some criterion must be developed to filter those political consequences that cannot legitimately limit remedies for human rights abuses. When developing an interest-balancing approach to remedies for human rights violations before international courts, Sonja Starr draws on the work of US constitutional lawyer Paul Gewirtz, who argues that interests that conflict with the underlying right cannot be part of interest-balancing. Under this approach, an interest in maintaining racial segregation cannot be taken into account by courts in desegregation cases. However, that approach only excludes those costs that, under the approach developed by Smith, are already excluded: the costs of respecting the underlying right itself (the “costs” of not committing torture). The question is, among the broad range of additional costs triggered by remedy-seeking, which costs to accept as legitimate?

In order to both respect norms prohibiting egregious violations of human rights and avoid negative consequences of remedy-seeking, this Article proposes that legal accountability be limited only to avoid a threat to what this Article calls a “core human right.” By “core human right” this Article refers to the right to be free from the atrocity that triggers transnational accountability mechanisms (such as torture, crimes against humanity, war crimes, and genocide), as well as to the right to life, which the Human Rights Committee views as “the supreme right . . . whose effective protection is the prerequisite for the enjoyment of all other human rights.” Under this proposal, the political consequences of imposing legal accountability can be taken into account to limit accountability if and only if those political consequences, in effect, threaten core human rights as so defined. The word “threat” is to be understood broadly to include more than the threat of an immediate, direct act of atrocity or violation of the right to life. Instead, it is sufficient to substantiate the conditions necessary, in practice, for the commission of egregious violations, such as a threat to peace or economic equality. To recall the illustration provided at the beginning of this Part, the objection of a foreign state to an exercise of UCJ on the grounds that it undermines peace negotiations or economic equality would preclude the taking of jurisdiction in the particular case where the court is convinced both that the negotiations or conflicting measure is genuine and substantially threatened by the exercise of

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158. Id.

UCJ. However, mere diplomatic difficulties between the forum and the state where the abuses occurred would not bar the taking of jurisdiction.

The principal justification for these limitations to accountability is the realist desire to avoid counterproductive applications of the law. Indeed, these limitations arguably further the underlying purpose of protecting human rights better than legal accountability itself. This argument assumes that remedies for human rights abuses do not only have a corrective rationale but also a forward-looking objective of protecting individuals from future human rights violations, whether through deterrence or the enunciation of norms. This presupposition is correct as a description of the social practice of human rights: human rights advocates often invoke the deterrent or norm-clarifying rationales of legal accountability. Indeed, the view that legal accountability prevents future violations is also enshrined in the preamble of the Rome Statute, which announces that the state parties are "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." This assumption is also normatively compelling. It would be highly antiegalitarian to enforce international human rights norms in total disregard of the enforcement's effect on the basic rights of individuals who are not victims. The argument here is that, based on the empirical scholarship surveyed in the previous subpart, this forward-looking aspect of the legal remedy may sometimes be undermined by legal accountability. The proposed limitations thus seek to avoid situations where the law is counterproductive and negatively affects the conditions for the enjoyment of the human rights it seeks to protect. In other words, the proposed limitations are tethered to the norms underlying the remedies.

Yet it remains to be explained why this approach should be limited to threats to core human rights—the right to life and the right to be free from atrocities—to the exclusion of other human rights, and other values beyond human rights. In addition, why adopt such a broad definition of threats to core human rights to include threats to peace and economic equality?

160. With respect to UCJ, see Beth Van Schaack, With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change, 57 VAND. L. REV. 2305, 2331–34 (2004). With respect to the ICC, the Court's prosecutor Fatou Bensouda has stated that "we hope to deter the commission of future crimes, and provide some comfort to survivors, restore dignity to lives devastated by atrocity crimes, and honour the memory of those whose lives have been lost. We must never forget the victims. We must work to prevent future victimization." Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, Visits Niger, Addresses National Assembly: We Must Never Forget the Victims (Apr. 28, 2017), https://www.icc-cpi.int/Pages/item.aspx?name=PR1300 [https://perma.cc/H2JD-PLGS] (archived Sept. 16, 2020).

161. Rome Statute, supra note 126.
The limitation to human rights, to the exclusion of values that may be categorized as outside the purview of human rights (such as diplomatic tension), reflects the fact that the proposed approach is firmly located within human rights advocacy and takes human rights norms as the starting point of the international legal system. It assumes the superiority of human rights over other norms, and, by recognizing only those limitations to accountability that are related to human rights, gives meaning to that hierarchy. This type of limitation will not be familiar to students of legal realism; realists accepted various social policies as constraints on legal design. The exclusive character of the limitation, to human rights values only, is an adjustment required by this Article's marriage of legal realism with the view that human rights norms are superior to other norms.

Of course, many human rights recognized in international law are subject to limitation clauses that give precedence to a range of values, some of which are difficult to justify in terms of human rights, such as the protection of public order or public morals. When protecting human rights in general, international law justifiably allows rights to give way to other values at times. However, this Article concerns only remedies for violations of human rights considered absolute, such as the right to be free from torture, slavery, and other atrocity crimes. Violations of these rights cannot be justified by reference to other values. While the realist approach developed here mandates accepting limitations to remedies for their breach, the proposed rules on remedies nevertheless reflect the normative hierarchy embedded in the prohibitions.

This normative hierarchy also explains why the proposed limitation is to core human rights as opposed to all human rights: this limitation reflects assumptions about the heightened gravity of torture and other atrocity crimes in comparison with other human rights violations and of the right to life in comparison with other norms. This limitation is also geared to avoiding a definition of human rights so broad as to be meaningless. Human rights are notoriously vague, and


163. See, for instance, article 8(2) of the European Convention on Human Rights, protecting the right to respect for private and family life, which provides that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

many contrary interests could be conceptualized as human rights values, thus allowing human rights enforcement to be trumped easily. For instance, in Al-Adsani, ECHR concurring judges Pelonpaa and Bratza invoked the financial and administrative burdens that would be imposed on forum states “which so far have been most liberal in accepting refugees and asylum-seekers” if a torture exception to immunity from civil proceedings were recognized, as those states “would have had imposed upon them the additional burden of guaranteeing access to a court for the determination of perhaps hundreds of refugees’ civil claims for compensation for alleged torture.”

Were human rights realism interpreted to allow threats to all human rights to limit accountability for atrocity, Pelonpaa and Bratza’s concern would arguably justify preserving sovereign immunity (at least in forum states with significant refugee populations) in order to avoid diminishing state funding for social programs such as education, health, and culture (i.e., programs that can be presented as furthering the human rights to education, health, and culture). Requiring that the criteria be in furtherance of the protection of core human rights preempts states from arguing that every countervailing interest is a human rights interest. This does not mean that the list of core human rights is frozen in time and only includes those rights recognized as triggering transnational accountability mechanisms at the time of writing. To the extent that under international law, the category of core human rights is expanded—whether by including additional norms in the list of norms grave enough to trigger universal jurisdiction; ICC jurisdiction; or a state duty to investigate, prosecute, and compensate; or by interpreting more broadly recognized norms such as torture so as to include forms of violence hitherto considered less grave—the category of core human rights should accordingly be expanded for the purposes of limiting accountability.

The broad understanding of what constitutes a threat to core human rights, to include threats to peace and economic equality, primarily reflects realism’s pragmatism. Pragmatism requires seeking out the conditions undermining rights rather than waiting to formally identify breaches (or imminent threats of breaches) of rights. These two phenomena—conflict and economic inequality—offer fertile ground for the breach of core human rights. Armed conflict unquestionably provides the conditions for the commission of atrocity and certainly

Infringements of the right to life. Yet domestic alternatives to criminal and civil accountability, such as restorative justice measures, are often necessary elements of peace and redistribution.

This proposal also furthers contextualism. As argued in Part I, domestic institutions' proximity to the site of the abuses makes them well placed to assess the contextual application of remedies and to determine whether atrocity prevention might not, in the short or long run, be better prevented by forms of justice alternative to criminal or civil liability. By making space in the design of transnational accountability mechanisms for deferring to domestic alternatives to legal accountability, international law would integrate such contextualized assessments of human rights protection.

This approach does not imply that peace and economic equality are best addressed through a human rights framework. Neither does the present proposal imply that peace and economic equality comprise an exhaustive list. Rather, this Article offers them as examples of the kind of consideration that can legitimately limit legal accountability. In principle, any condition that is demonstrated to threaten core human rights counts as justification for limiting accountability. For instance, environmental degradation might justify limiting legal accountability, as it is as harmful to core human rights as the other consequences considered here. Indeed, a growing scholarly consensus points to climate change as a cause of conflict. Moreover, environmental degradation often results in mass infringements of the right to life. However, it is not clear whether legal accountability could ever, in fact, conflict with environmental protection and such a scenario is quite difficult to imagine.


168. See, e.g., Marshall Burke, Solomon M. Hsiang & Edward Miguel, Climate and Conflict, 7 ANN. REV. ECON. 577, 578, 610 (2015) (surveying fifty-five studies in economics and other disciplines on the relation between climate and conflict, and finding that deviations from moderate temperatures and precipitation patterns systematically and often substantially increase the risk of conflict [both interpersonal and intergroup]).

Another potential justification for limiting accountability is democracy. What if, following an authentically participatory process, a legislature grants amnesties to perpetrators of atrocity for a reason not connected to the preservation of peace or economic equality? Should the democratic nature of the decision-making process not justify the decision to forego legal accountability? The answer to this question is not clear under the present framework. On the one hand, this framework’s value judgment that human rights are hierarchically superior to other norms counsels against giving states full discretion as to the remedies available for gross human rights violations. On the other hand, it could be argued that democratic decision-making in and of itself enhances the protection of core human rights as it promotes harmonious social relations. This question requires further analysis, which is beyond the scope of this Article.

The proposed approach does not involve simply foregoing accountability in every case where the specter of a threat to peace or economic inequality is raised. Having laid out the general contours of human rights realism, the next Part elaborates on the modes of operationalization of this approach with respect to various accountability mechanisms and suggests a differential system based on the strength of empirical evidence pointing to a threat to a core human right.

V. HUMAN RIGHTS REALISM IN ACTION

Subpart A begins by providing illustrations of the human rights realist approach in relation to various accountability mechanisms, showing how this approach accounts for empirical uncertainties. Subpart B then shows that human rights realism provides not only a normative program but also sheds new light on recent debates.

A. Operationalizing Human Rights Realism

This Article suggests a two-tiered approach based on the degree of certainty concerning the risk of materialization of a threat to core human rights. Institutionalizing limitations to accountability in a systematic manner that applies to all cases, such as through a rule granting all heads of state immunity from prosecution before the ICC, requires a high degree of certainty that the absence of such immunity would systematically threaten core human rights based on persuasive empirical evidence. Such a limitation to accountability this Article calls a "systematic limitation." In the absence of evidence of a systematic threat, indications of a threat to core human rights in a particular case being litigated could nevertheless justify limitations to accountability in that case ("case-based limitation"). Case-based limitations would not require waiting for the formation of an academic consensus following
years of empirical studies; persuasive evidence convincing a court of the likelihood of a threat to core human rights would suffice. As should become clearer in what follows, case-based limitations to accountability do not reflect an ad hoc, particularist form of justice of the sort rejected in Part I. Rather, this framework ensures that limitations to accountability are carefully circumscribed to those situations where the normative justifications for gaps between rights and remedies have, in fact, materialized. Moreover, because they do not rely on sustained empirical studies, case-based limitations allow actors from the countries where the atrocities occurred to contribute their local knowledge and to participate in the production of evidence and design of accountability mechanisms.

1. Human Rights Realism in Universal Civil Jurisdiction

With respect to UCJ, it is difficult to imagine that the very possibility of litigation against any type of defendant could constitute a threat to a core human right. It is therefore unlikely that, under the proposed approach, a systematic limitation on certain types of defendant in exercises of UCJ, or on UCJ as a whole, could be normatively justified. However, the rules regulating UCJ should be adapted so as to enable case-based limitations. Such limitations can concern the taking of jurisdiction or be more circumscribed, targeting the enforcement of damage awards where threats to core human rights materialize in particular cases. As indicated in Part III, this would mean that the objection of a foreign state to an exercise of UCJ on the grounds that it undermines peace negotiations or measures furthering economic equality would preclude the taking of jurisdiction in the particular case, where the court is convinced both that the negotiations or conflicting measure is genuine and substantially threatened by the exercise of UCJ. Even where a court entertains a case under UCJ, it could preserve immunity over foreign state property in matters of enforcement where it is convinced there is a potential conflict with peace negotiations or with local processes furthering economic equality, as the U.S. Supreme Court did in the Marcos ATS case: while US courts took jurisdiction over the case and awarded the plaintiffs damages, the U.S. Supreme Court ruled that the Philippines' sovereign immunity prevented US courts from adjudicating entitlement to certain assets held in the United States and to which the Philippine Republic and its Commission charged with recovering Marcos's assets to fund a redistributive land policy lay claim. In doing so the Supreme Court removed from the ATS plaintiffs' assets from which to

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enforce their damage award. While recognizing the interests of the ATS class, Justice Kennedy noted that:

Comity and dignity interests take concrete form in this case. The claims of the Republic and the [Philippine Commission charged with recovering Marcos’s assets] arise from events of historical and political significance for the Republic and its people. The Republic and the Commission have a unique interest in resolving the ownership of or claims to the . . . assets and in determining if, and how, the assets should be used to compensate those persons who suffered grievous injury under Marcos.171

Under the approach defended here, sovereign immunity in relation to the assets would be justified in this case not on grounds of protecting the foreign state’s sovereignty per se, as in Kennedy’s remarks, but to the more limited extent that such sovereignty is used to promote peace or distributive justice (the latter being precisely the objective of the Philippines’ transitional justice policy in recovering Marcos’s assets for redistribution). The exact mechanism whereby courts would make such a determination could vary by jurisdiction, depending on the legal culture, structure of the judiciary, and its relationship with the political branches of government. For instance, in some jurisdictions, courts could rely primarily on determinations by the executive branch of the forum. Nevertheless, as argued in Part I, a realist appreciation for contextualism would require taking heed of voices from the societies in which the litigated human rights abuses occurred, including but not limited to those societies’ governments.

Such limitations could also apply to exercises of UCJ where the defendant is a corporation. Corporate defendants cannot be categorically excluded from this analysis as they too can participate in alternative justice measures in the transition from conflict or authoritarianism. However, in practice it should prove very difficult to find convincing evidence that an imposition of corporate liability endangers peace or economic redistribution, as the effect of their legal liability on these values should be indirect. Thus, limitations should be imposed on corporate liability under UCJ only rarely.

2. Human Rights Realism in Regional Court Jurisprudence

In the context of regional court jurisprudence on the state duty to prosecute and compensate, a human rights realist approach would require regional courts to rule that states should forego prosecution and full compensation of victims when doing so would compromise core human rights. Implementing such an approach would involve the Inter-American Court extending the El Mozote ruling to situations

171. Id. at 866.
beyond armed conflict. Such an extension of El Mozote would allow case-based limitations and allow them to be determined contextually by states themselves, under the supervision of the regional court to which petitioners could appeal to allege that the state in question limited legal accountability for reasons other than to protect core human rights.

It is more difficult to apply the proposed approach to the ECHR’s jurisprudence on the right of access to court, which provides the framework for analyzing the limitations set by states on their courts’ exercises of universal jurisdiction (through interpretations of rules relating to foreign sovereign immunity and jurisdiction). This is because human rights realism addresses the limitations to an accountability mechanism once it is in existence, under the assumption that such mechanism is normatively justified. However, the questions raised by the ECHR’s rulings on immunity and jurisdiction go to the very recognition of UCJ in international law. The ECHR has held that Switzerland’s interpretation of rules of jurisdiction did not constitute a disproportionate restriction on the right of access to court of a victim of torture committed abroad, since customary international law does not mandate states to exercise UCJ. Similarly, it has held that the United Kingdom’s interpretation of immunity did not constitute a disproportionate restriction on the right of access to court since it reflected established rules of international law. Though human rights realism takes legal accountability as its starting point, it does not offer a comprehensive theory of accountability that can justify the specific accountability mechanism offered by UCJ. The current ECHR jurisprudence would therefore not be directly altered by human rights realism. However, were the court to recognize an international obligation on states to exercise UCJ, human rights realism would mandate that immunity and restrictive interpretations of jurisdiction be permissible in cases of torture and other gross human rights abuses only where such immunity or restrictive jurisdiction protect peace negotiations or economic redistribution. Such a change in approach could be implemented within the ECHR’s existing jurisprudence on limitations to rights, which requires the limitations to pursue a legitimate aim and be proportionate to the aim pursued.

173. See supra Part III.A.2 and the sources cited therein.
174. See id.
175. See supra note 82 and accompanying text.
176. See supra notes 72–76 and accompanying text.
177. See supra note 82 and accompanying text.
3. Human Rights Realism in International Criminal Law

In the context of international criminal law, human rights realism justifies adopting existing proposals to consider good faith domestic justice processes that fall short of criminal prosecution and full compensation, such as truth commissions, sufficient to preclude ICC jurisdiction as well as the exercise of universal criminal jurisdiction only where such domestic processes further peace or economic equality. With respect to the ICC, such a case-based limitation would require interpreting Article 17 of the Rome Statute so that domestic institutions granting immunity to potential defendants in order to further peace or economic equality would be deemed an investigation or prosecution, thus rendering the case inadmissible. In addition, Article 53 of the Rome Statute, according to which the prosecutor may decide to not pursue a case based on the determination that an investigation or case would not serve the “interests of justice,” would be interpreted so that the furtherance of peace or economic equality would be included in the category of “interests of justice.”

With respect to universal criminal jurisdiction, human rights realism requires domestic universal jurisdiction statutes to specify that courts shall not have jurisdiction over defendants who have benefitted from amnesties in the country where the crimes were committed where such amnesties further one of the two interests discussed here. It is important to note that these proposals do not depend on a scholarly consensus, based on extensive empirical studies, as to the general impact of international criminal justice on peace or economic equality. As case-based limitations, they only require demonstrating to the relevant court or legal officer that the alternative mechanism in the particular case is intended to further these values and is, in effect, designed to do so. In other words, they allow limitations to accountability only in those specific cases where the threat to core human rights is demonstrable.

Can more systemic limitations to accountability in international criminal law be justified at present under human rights realism? For instance, should demands for recognition of head of state immunity from prosecution under the ICC be accepted? As indicated above, such a position should be justified only in the presence of compelling evidence that overall, the absence of such immunity constitutes a substantial impediment to peace. The empirical studies on the subject

178. Rome Statute, supra note 126, art. 53(2)(c).
179. Accordingly, Principle 7 of the Princeton Principles on Universal Jurisdiction, which states that “[a]mnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law” should be reinterpreted so as to clarify that amnesties are acceptable where they further the protection of core human rights. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 31 (Stephen Macedo ed., 2001).
suggest such an impact on average, but they are still too few to offer the solid ground on which to base such a limitation to accountability. As the subject is further explored in coming years, head of state immunity may become justified.

It should be clear from the above that human rights realism is both broader and narrower than other proposals to limit accountability for atrocity. It is broader in that it applies to a wide range of accountability mechanisms and goes beyond peace to consider economic equality and possibly other values as values to be protected. Yet it is narrower in that, in human rights realism, those values count as justifications for limiting accountability, not in and of themselves, but as indirect vehicles for the protection of core human rights. Moreover, the adoption of restorative justice measures and of other domestic decisions to forego legal accountability are recognized under this view, not because of the local nature of the decision-making process, but because they purport to further the protection of core human rights (their local character being a sign that a contextual and, therefore, weighty assessment of the relationship between accountability, and core human rights protection has been made).

B. African Withdrawal from the ICC and Human Rights Realism

The previous subpart explained how human rights realism could be implemented across various transnational accountability mechanisms. This subpart further demonstrates the value of human rights realism as a theoretical framework by showing that it can make more intelligible recent debates on international criminal justice. Specifically, this subpart shows that it sheds light on African critiques of the ICC by delineating a third stance between human rights absolutism and sovereigntism.

Discussions of African states’ recent threats to withdraw from the ICC appear, at first sight, to reproduce the conflict between sovereigntism and human rights absolutism. In 2016, the governments of the Republic of Burundi, the Republic of South Africa, and the Islamic Republic of the Gambia announced their intention to withdraw from the Rome Statute. Only Burundi has followed through on its threat and formally withdrawn. However, these announcements

180. See supra notes 147–48 and accompanying text.
181. See supra notes 14–17 and accompanying text.
183. The Constitutional Court of South Africa ruled that such a withdrawal would require legislative action. Democratic All. v. Minister of International Relations and Cooperation 2017 (1) SACR 623 (GP) para. 81. As to Gambia, the newly elected government reversed its policy on the ICC. Pap Saine & Lamin Jahateh, Gambia
reflect a broader, ongoing crisis between the ICC and African states. In 2017, the African Union produced a “Withdrawal Strategy Document” for its members. In it, the Union denounced the disproportionate focus in the court’s caseload on African cases and set out a list of proposed reforms to the Rome Statute, reforms that can be read as implied conditions for African states to remain treaty members. Among these reforms are the grant of immunity from prosecution to heads of state while in office and an expansion of the possibilities for deferral of prosecution by enabling the UN General Assembly to decide on a request to defer prosecution where the Security Council is unable to do so under Article 16 of the Rome Statute. While complaints of disproportionate attention to African states are taken seriously by many commentators, a number of proponents of international criminal justice have denounced the withdrawal threats as attempts by corrupt African rulers to shield themselves from legal scrutiny, seeing in discussions of withdrawal from the ICC a manifestation of the rise of authoritarian populism—an extreme form of sovereigntism: Cherif Bassiouni presented the withdrawal as furthering “[the] political purposes” of “corrupt leaders,” while Luis Moreno Ocampo insisted that “[t]he African bias is a cover up argument like the denial of the Holocaust. It should not be considered as an argument but rather as an alibi to ignore crimes and it should be exposed as such.”

Withdrawal from the ICC is undoubtedly a way to escape legal responsibility for some leaders. Impunity seems to be the main motivation of Burundi’s withdrawal, which was announced a few weeks after the ICC’s Office of the Prosecutor announced that it intended to open an investigation for crimes against humanity allegedly committed in Burundi and targeting civilians who opposed or were perceived to oppose the ruling party. However, the realist framework developed here offers an alternative way of understanding African states’ demands for granting heads of state immunity and


185. Id. ¶¶ 2, 30–36.


expanding possibilities of deferring prosecution. Under this framework, these demands for reduced accountability should not be brushed off as "politics" beyond the pale of international law. They should instead be considered to better promote human rights protection:

First, in the Withdrawal Strategy Document, the African Union frames its proposal to grant the UN General Assembly the authority to decide on a deferral as a solution to the systemic imbalances in international decision-making processes. If General Assembly authority to defer prosecutions is limited to the situations in which the Security Council could have done so—maintaining peace—such a reform would be in line with the approach advocated here by broadening the possibilities of deferring prosecutions to further peace and granting African states more voice in the decision-making process about deferrals.

Second, the document explicitly expresses concerns for peacemaking, quoting the Republic of South Africa’s statement that it has found that its obligations with respect to the peaceful resolution of conflicts at times are incompatible with the interpretation given by the International Criminal Court. In complex and multi-faceted peace negotiations and sensitive post-conflict situations, peace and justice must be viewed as complementary and not mutually exclusive.

The South African crisis with the ICC resulted from the Republic's failure to extradite to the Hague Omar al-Bashir, president of Sudan, attending the African Union Summit in South Africa in 2015, despite

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[The decisions of the United Nations Security Council (UNSC) are made on the basis of the interests of its Permanent Members rather than the legal and justice requirements. Needless to say, these interests are not always in line with those of Africa, thereby leading to a perception of a double standard against African States. In this regard, questions about which states are under the ICC's jurisdiction and the processes of selectivity of case as well as the role of the United Nations Security Council (UNSC) and its referral and deferral mechanism under Article 16 of the Rome Statute raise questions about perceived fairness of the international justice system as whole.


191. *Id.* ¶ 24.
its obligation to do so under the Rome Statute. In the view of the
Republic, the duty to extradite a sitting head of state, even when he
attends a regional conference, “compromise[s] South Africa's efforts to
promote peace and security on the African Continent and to play an
essential part in international peacekeeping missions in Africa and in
related peace processes.” To remedy the situation, the Withdrawal
Strategy Document thus proposes amending Article 27 of the Rome
Statute, which currently provides for the irrelevance of a defendant's
official capacity, so as to grant immunity from prosecution to sitting
heads of state. The previous subpart argues that such a proposal
constitutes a systemic limitation on accountability and, thus, requires
more persuasive empirical evidence (i.e., more of a scholarly consensus
than currently available). However, the human rights realist stance on
this demand is a far cry from the outraged rejection of the African
Union's proposal to limit accountability voiced by human rights
advocates. It suggests that this proposal should be considered over
time in light of emerging empirical findings in order to facilitate peace
negotiations and nonviolent withdrawals of authoritarian power.

VI. CONCLUSION

This Article has developed a novel theoretical approach to
limitations to legal accountability for gross human rights violations,
one that takes seriously human rights norms, all the while
acknowledging and accounting for the political consequences of legal
interventions. It has proceeded by showing that the two dominant
alternative approaches are untenable and reconstructing a third
approach that avoids the flaws of each. Yet the Article has not
presented human rights realism as a theory mechanically yielding
precise normative outcomes and, therefore, much remains to be said
about the changes required by the proposed approach to existing legal
doctrines. Drawing on legal realism’s complex view of law as well as
contemporary prudence about the certainty attainable through social
science, human rights realism offers a principled framework for
considering limitations to legal accountability. This framework
mandates viewing international norms protecting core human rights
as superior to other norms, all the while acknowledging that enforcing
those norms may have undesirable political consequences, which local
actors with contextualized knowledge have a privileged position to

milan_italy/newsandevevents/rome_statute.pdf (last visited Sept. 22, 2020)
193. Id.
194. See African Union, supra note 184, ¶ 30.
assess. It requires relying on empirical studies but viewing them with a critical eye and periodically revisiting one's evaluation as well as accepting limitations to accountability in particular cases, even in the absence of systematic empirical evidence. Nonconsequentialist normative theories of accountability are, no doubt, simpler to apply. However, for the lawyer with legal realist inclinations, ignoring the concrete consequences of legal interventions is irresponsible. And while those consequences can be the subject of theoretical conjecture, they are best discovered through empiricism, a methodology which carries its own share of difficulties. The Article thus advocates a nuanced framework that honestly engages with the political effects of law and the challenges of relying on empiricism for normative purposes.

What about the consequences for human rights advocacy of adopting human rights realism? Viewing this Article's normative proposal through realist lenses, raises the question: How is such a proposal likely to operate in the current political context? At a time of backlash against international institutions, might this approach weaken human rights advocacy by leaving human rights advocates with a lower set of demands towards states and, therefore, less leverage in negotiations with them?

In the contemporary context, in which human rights norms are challenged by illiberal politics, a common stance among human rights professionals is to double down and insist on the authority and legitimacy of international accountability norms. This Article suggests that a different response is possible, one that acknowledges some of the political concerns of the "other side" and addresses them frankly. This author believes that, with human rights realism, ultimately human rights advocates' stance should be more persuasive, for, contrary to the current absolutist approach, it will openly acknowledge that rights-enforcement has practical consequences and doctrines protective of sovereignty have some value and, hence, be perceived as more genuine. This approach also recognizes potential dilemmas within human rights advocacy—between accountability on the one hand and peace or redistribution on the other—and thus furthers integrity as well as effectiveness in human rights promotion.
