Address

Distant Genocides*

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I am deeply honored to be invited to deliver the Leslie H. Arps Memorial Lecture. I never met Les Arps, but I understand we had a kinship of trial by fire. We both worked as young lawyers for the great, and not easily pleased, Henry Friendly. By all that I have heard, Les Arps was an extraordinary lawyer, a distinguished public servant, a mensch. And what a spectacular achievement to have been one of the progenitors of the great Skadden Arps firm. I will speak on two subjects. The first does not exist. The second may be about to disappear. This may therefore be the most useless talk of all time.

Both of my subjects concern a private, civil suit by which a plaintiff seeks redress for atrocities in violation of the law of nations committed in another nation—a nation where the plaintiff cannot get justice because the abusing regime remains in power. By a private, civil suit, I mean a suit that seeks only a private, civil remedy, such as money damages in compensation for personal injury, and does not seek imprisonment, fine, or any sort of criminal punishment.

My first subject is such a suit in the courts of any nation other than the United States. There is little to talk about because, so far as I am aware, no other nation’s courts will entertain such a suit. My second subject is such a suit in the courts of the United States. Federal courts in the United States have had statutory authority to entertain a private suit claiming compensation for a tort in violation of the law of nations since the birth of the nation, and for the last thirty years, suits of this nature seeking compensation for atrocities committed in other nations have flourished. However, the authority of the federal courts to entertain such a suit may perish in the current Supreme Court term—in large part because such suits have not been authorized elsewhere in the world.

So why do I waste your time on something so unimportant that it scarcely exists? I hope you will join me in the belief that it is not unimportant. Where it does not exist, it should exist. And where it does exist, it should remain.

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† Judge, Second Circuit Court of Appeals. I am grateful for the generous advice of Professors Sarah Cleveland, Charles Fried, Jack L. Goldsmith, Michael Reisman, Linda Silberman, and Beth Stephens, and the valuable assistance of my law clerks Diana Cieslak, Jennifer Clark, Eric Fish, Caitlin Hall, Ezekiel Hill, Karen Lin, David Noll, Connor Raso, Anitha Reddy, Ben Schweigert, Steven Winter, and David Zhou.
I. STATUS OF HUMAN RIGHTS VIOLATIONS IN THE WORLD

The observance of fundamental human rights in the world today is dismal—better no doubt than it was two hundred years ago, but nonetheless dismal. In our lifetimes, we have seen, and continue to see, genocides and mass murders of civilian populations, often adorned by systematic mutilation and rape; arbitrary imprisonment and torture of a government's political opponents (a daily occurrence in dozens of nations); mass disappearances, preceded of course by torture and murder; and a surging scourge of enslavement of children and young women in sex trafficking. Because exploitation of sex slaves is done in concealment, it is impossible to estimate the number of victims. It is believed to be vast. Such trafficking is not properly viewed as private criminal enterprise; it is almost always done with protection of the local police, secured through bribery. Thus, local government officials are partners in it.

What is the status under law of such atrocities? They violate international law and are punishable. Ordinarily, however, either because of the abuser's immunity, legal or practical, or because the acts were part of the local government's policy, such acts are not redressable, or at times even unlawful, under the local law of the place of the offense—in law-Latin, the lex loci delicti. Hitler's Gestapo, for example, did not violate the laws of the Third Reich in carrying out a genocide. Nonetheless, it has been clear since the prosecutions of Nazi war criminals at Nuremberg that, regardless of legality under local law, such atrocities violate the law of nations. Nazi abusers were thus subject to prosecution before the Nuremberg Tribunal for violation of that part of the law of nations known as "customary international law."

Customary international law incorporates the concept of jus cogens, which refers to law that is mandatorily imposed on all nations by the consensus of nations. Under the concept of jus cogens, that consensus prohibits a small core of particularly heinous abuses, which are viewed in the community of nations as so incompatible with civilization as to render the abuser hostis humani generis—the enemy of all mankind. While there is not universal agreement as to the outer limits of the category, it includes genocide, slavery, and official torture.

A related concept, which has become a part of this body of law and is necessary to its effectiveness, is universal jurisdiction. Because such offenses can rarely be challenged in the place where an abusive regime committed them, the law of nations supplies the principle of universal jurisdiction, which allows for the prosecution of such violations anywhere in the world.

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2. There is no consensus on the precise meaning of universal jurisdiction. Under some views of universal jurisdiction, the presence of the defendant before the court is required. This has generally been the rule in the international criminal tribunals; they do not prosecute a case against a defendant who has not been brought into the presence of the court. On other views, however, the defendant need have neither presence nor any other connection to the tribunal. Thus, in a recent case in the local courts...
Either by treaties specifically devoted to the prosecution of such offenses, or under the general authority of the United Nations Charter, international tribunals have been created for the prosecution of atrocities in violation of customary international law. These tribunals have generally been established at The Hague in the Netherlands, but have prosecuted offenses committed anywhere in the world.

In spite of all this doctrinal and institutional apparatus, however, the international law that prohibits such atrocities is more theoretical than real in any practical sense. Enforcement of customary international law’s prohibitions of human rights abuses is exceedingly rare. Criminal prosecutions in the international tribunals are infrequent and slow. The International Criminal Court (ICC) has been in existence for ten years, during which time it has brought only ten cases into trial-track, and has achieved only one conviction. The international courts achieved one notable success a few months ago when in the United Nations Special Court for Sierra Leone, the former Liberian dictator Charles Taylor was convicted for his role in unspeakable horrors committed in Sierra Leone. These included giving countless children “smiles” and “short sleeves” by cutting off their lips and hands. The trial took nearly five years. The conviction of a single man, notwithstanding his prominence as an abuser of human rights, hardly makes a dent.

Given the huge numbers of human rights violations that take place in the world, why is it that the ICC has had so few prosecutions? This is in part because of the court’s limited jurisdiction and the intricacies of international politics. The ICC may prosecute a nation’s violations only if one of two conditions is satisfied. Either the state of which the defendant is a national or the state where the crime was committed must have joined in the treaty known as the Rome Statute, by which the court was created, or the prosecution must be recommended by the Security Council of the United Nations. Not surprisingly, many of the world’s worst offenders have not joined the treaty through which they could be prosecuted. And approval of the Security Council is often impossible to secure if the offending regime remains in power because, almost inevitably, the offending nation has a strategic relationship with some permanent member, and each permanent member has veto power. Furthermore, offending officials of a government that remains in power are not easily arrested by the international court. As a practical matter, therefore, it is only when the offending regime has been ejected from power that the offender will be vulnerable to prosecution in the ICC.

Criminal prosecution for such violations in the courts of nations other than the nation that sponsored the abuses is also rare. One stunningly
successful example was the prosecution of Nazi war criminal Adolph Eichmann in the courts of Israel. Belgium has been struggling for years without success to realize another—by seeking extradition from Senegal of the barbaric former dictator of Chad, Hissène Habré, to face criminal prosecution. Another example is the ultimately unsuccessful effort of Spain’s Judge Baltasar Garzon to bring to trial Augusto Pinochet, who presided over a long reign of terror and atrocities in Chile. Unless the forum nation or its nationals were victims of the abuses, it has little incentive to undertake a prosecution for offenses committed elsewhere.

For a victim of atrocities who seeks to initiate a civil suit for redress, the options are few or none. With very rare exceptions established by treaty, no suit can be brought against the offending nation itself because of the nation’s sovereign immunity. The international tribunals established to bring criminal prosecutions against such offenders do not have jurisdiction to entertain a victim’s private, civil suit seeking a civil remedy. In no nation other than the United States will the courts entertain a private civil suit brought by a foreigner against a foreigner for violations of customary international law committed in another nation. And while the federal courts in the United States do hear such suits, they do so only if the defendant has in some manner brought himself within the territorial jurisdiction of the court; otherwise the United States constitutional doctrine of due process forbids the court’s exercise of power over the defendant.

The ICC has power to grant a compensatory award in favor of victims against a defendant, but only after it has convicted him of the criminal offense. To this date it has not made such an award. This is perhaps because the criminal conviction is a pre-requisite, and, until a few months ago, the Court has never had a conviction. Making such awards, where the number and identity of the vast majority of the victims is unknown, would be a complex and burdensome endeavor, diverting the Court from its principal mission to convict and punish abusers. The responsible officials may have less motivation to take on these challenges.

II. POSSIBILITIES OF SUIT IN NATIONS OTHER THAN THE UNITED STATES

To be sure we are all on the same page, let us contemplate a hypothetical case arising out of the conduct of an abusive dictatorship. Let’s call it Despotamia. The defendant in our suit is the Chief of Police. Throughout his career, the defendant has supervised Despotamia’s abuses. He regularly vacations in the forum state, which is one of the law-respecting democracies of the world. While he is in the forum state, he is sued in its national courts. The complaint alleges as follows:

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2011) (citing some two dozen individuals tried for war crimes committed outside the forum states and noting that most of those cases were brought with the support of the defendant’s home country).

5. In the ICC’s sole conviction, the case of Thomas Lubanga, the Court has issued a set of principles to eventually govern the compensation of victims. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Establishing the Principles and Procedures To Be Applied to Reparations, ¶ 172 (Aug. 7, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf.
When I was a six-year-old child in a tribal village in Despotamia, the defendant supervised a genocidal massacre against my tribe that killed my parents, cut off my right hand, kidnapped me, and sold me to sex traffickers. For ten years, the traffickers kept me imprisoned in a brothel. The defendant saw to it that my exploiters received police protection for their operation in return for a share of their profits.

All this was done in violation of the standards of customary international law.

No remedy is available to me in the courts of Despotamia, where the despot's regime continues.

My demand is for the profits the defendant earned from my exploitation, as well as an award of compensation for the murder of my parents and for the pain and suffering inflicted on me.

What will be the result of the lawsuit? The judgment will be, "Suit dismissed. The courts of this nation do not hear such cases."

Nowhere in the world (outside the United States) will such a suit be heard. It is not that these nations do not recognize the validity of the law of nations. It is rather that these national courts have not been authorized to hear such cases.

Is that how the world should be? Shouldn't a law-respecting nation allow such a suit?

Some of the reasons seem pretty obvious.

The offenses classed in customary international law as violations of jus cogens norms are so classed because they are deemed by the community of nations to be the worst abuses known to mankind. Is it then not incumbent on the nations of the world to give substance to the classification by offering relief to the victims when, as is generally the case, relief is not available in the place of the abuse? Refusal by the law-respecting nations of the world to offer relief means that victims will have no place to turn.

Allowance of civil suits could bring a number of benefits to the victims of atrocities. It offers the satisfaction of confrontation of the abuser. It offers compensation, or at least the vindication and solace derived from a judgment, even if the money award proves to be uncollectible.

Perhaps even more important, it offers world-wide exposure of the abusers' atrocities. Exposure of atrocities helps to improve the conduct of rogue governments. Even the most cruel and arrogant of despots care about their image in the world and are averse to being known as monsters.

By offering the civil suit, the forum nation aligns itself with the protection of human rights and thus helps to elevate the law of nations to something more meaningful.

A. Obstacles

Contemplation of widespread adoption of such suits in the jurisprudence of nations requires consideration of both reasons that argue against such adoption and of obstacles that would need to be overcome or circumvented. The obstacles are undoubtedly substantial. The adverse reasons in my view are not.
In the vast majority of nations, the status of courts is quite different from the Anglo-American common law tradition. Most nations operate under codes derived from ancient Roman law, as established in the Napoleonic Code. In code nations, courts have considerably less independent authority than in the common law tradition. They act only with statutory authorization. And under existing codes the courts have no statutory authorization to entertain such actions. Such suits accordingly could not be entertained unless the legislatures of their nations amended the codes to grant that authority.

In addition, the practice rules of most nations include features very different from the rules that prevail in the United States, which would dissuade or effectively prevent potential plaintiffs from initiating suits in those nations, even if the suits were authorized by statute.

In many nations, for example, the losing party in a lawsuit is required to pay the winner's legal fees, and the plaintiff, upon starting the suit, is required to post a bond to guarantee payment. Plaintiffs in this category are usually poor and unable to post such a bond. Contingency arrangements, common in the United States, whereby the plaintiff's attorney receives a fee as a percentage of any winnings, and fronts the expenses of the suit, working for nothing in the event there are no winnings, are forbidden under the practice rules of most nations. Furthermore, the practice rules of most nations, unlike the United States, do not allow for pre-trial discovery. Inability to take discovery often makes it difficult for a plaintiff to prove even a well-justified case. Because of these practice rules, even the passage of statutes authorizing the courts to entertain such cases would probably not offer potential plaintiffs meaningful access to the courts of those nations, unless accompanied by further facilitating changes.

The question thus arises whether these practical obstacles are so great as to make it pointless even to discuss statutory changes that would authorize the courts to hear such suits. Although the odds are against its happening, I do not believe it is out of the question that some nations might change the rules to make such suits not only theoretically possible but realistically so. It might depend on whether advocates of human rights can succeed in persuading legislatures of the desirability of supporting the human rights cause.

In the first place, the absence of statutory authorization to the courts of any nation to entertain such suits does not necessarily represent a policy of that nation not to allow them. More likely, the legislature has simply never confronted the question of the desirability of extending the jurisdiction of its courts to cover such cases. Were they to confront that question, legislatures might well find that authorization furthers their national policies.

In contrast, the restrictive rules relating to attorneys fees and discovery do represent policy choices. They represent a policy to protect the nation's government and its enterprises from the burdens of defending against baseless litigation. Those policies, however, would not be undermined by creating exceptions limited to cases of our category. The suits we contemplate involve the foreign activities of foreign defendants. To the extent that a nation's practice rules disfavor litigation for the protection of the nation's enterprises
and its government from baseless litigation, that protective policy would not be undermined by carving exceptions for cases alleging atrocities in violation of customary international law committed by foreign defendants on foreign soil. And to the extent the rules seek to protect the courts from being overwhelmed with baseless litigation, this could be achieved by establishing a requirement to show probable cause at the outset, before the litigation could proceed. Is it out of the question that nations might be persuaded to make limited, balanced exceptions to their customary rules for the purpose of providing relief to victims of the world’s most heinous atrocities?

B. Adverse Reasons

What are reasons why nations might resist any such changes? Contemplating that question is largely guesswork as there is little or no record of nations having faced the question. The literature suggests a number of possible reasons, some of which have merit in limited circumstances, but none of which would justify categorical rejection of all such suits.

One unreceptive view is that international law involves matters properly addressed in state-to-state diplomatic confrontation and not suitable for private litigation. This concept is rooted in a long superseded view of the limits of international law. It is true that in the eighteenth and nineteenth centuries, the law of nations concerned itself with issues involving state-to-state relations, such as national boundaries, aggression, sovereign immunity, safe conduct for ambassadors, and piracy, which was a shared concern of all nations because piracy, generally occurring outside any victim-nation’s borders, posed a serious threat to commerce among nations.

The view that international law matters involve relations among nations and are thus not suited to private litigation ignores the vast change instituted at Nuremberg. In response to world-wide horror at the Nazi program of genocidal extermination, by consensus among nations the law of nations was expanded to encompass a sovereign nation’s treatment of its own subjects. When a nation’s rulers inflict atrocities on its own citizenry, there is no other nation that has an interest in representing those victims in a state-to-state confrontation. This view of the limited scope of the law of nations is simply out of date and incompatible with modern international law.

Some might argue, contemplating the Nuremberg experience as a model, that atrocities of such magnitude are properly addressed only in a criminal proceeding and are trivialized by hearing them in a private civil suit. This would mean that courts will offer civil remedies to plaintiffs who have suffered relatively trivial harms, while those who have suffered the worst of atrocities known to mankind can obtain no relief (unless they can persuade a public prosecutor to take up their cause). The argument is perverse, and unpersuasive.

Some might argue that there is no need for a civil remedy because under many systems private individuals are capable of initiating criminal prosecutions, and criminal prosecutions often offer the possibility of compensatory relief for the victim (as with a U.S. federal criminal sentence commanding that the defendant make restitution). The argument is based on half-truths. It is true that the complaints of private individuals can result in the institution of criminal proceedings. It is also true that criminal proceedings sometimes carry provisions that allow for compensation of the victim. But it does not follow that the existence of a privately instituted, civil remedy is superfluous. This is for several reasons.

Even if a victim's complaint can result in a criminal proceeding, the success, and even the launching, of the criminal proceeding generally depends on discretionary decisions of a public prosecuting authority. To have a hope of succeeding, a victim would need to persuade a public prosecutor not only to take up the cause as a matter to be prosecuted, but also to pursue it with sufficient commitment and intensity to succeed. A public prosecutor in such circumstances is not like an attorney representing the victim. The prosecutor does not owe a fiduciary duty to the victim. The prosecutor may have all manner of reasons for declining such an undertaking.

Among the reasons—the foreign regime responsible for abuse of the complainant might wield influence in the forum state. If the forum is the ICC (and the offending nation is not a state party to the Rome Statute), the offending nation's relations with a member of the Security Council may prevent the prosecutor from receiving authorization to prosecute. Or it may be simply that the public prosecutor, like all public prosecutors, operates with limited resources. This is especially likely because the prosecutor might well (with considerable justification) see criminal conduct within his own nation as commanding a higher priority than abuses committed in a foreign land that are not directly related to his nation's interests.

Second, even after a criminal conviction has been obtained, the award of compensatory relief for victims of the crime is discretionary with the court, and the court may be reluctant to award it. Assuming the atrocities justifying the conviction had many victims, only some of whom have come to the court requesting relief, and only some of whom are known, the complications lurking in the question to whom compensatory relief should be awarded may well lead the court to limit its judgment to punitive provisions, simply ducking the question of compensation of victims.

Third, at least under some legal systems, including ours in the United States, a criminal conviction depends on proof supporting a higher degree of certainty than a civil compensatory judgment. Here, a criminal conviction depends on proof beyond a reasonable doubt. In contrast, in a civil suit pitting a plaintiff's contentions against the defendant's, the plaintiff wins if the jury finds it more likely than not that the facts were as the plaintiff contends. In addition, as a matter of human nature, courts are more likely to excuse a defendant from criminal liability on the ground that he acted under duress than to excuse him for the same reasons from civil compensatory responsibility to
the persons he abused. In short, evidence that would win a judgment in favor of a plaintiff seeking civil, compensatory relief may fail to secure a criminal conviction that serves as a prerequisite to an award of compensatory relief.

Another potential obstacle is the perception that the principle of universal jurisdiction is as yet not sufficiently well established in the world to justify its adoption by the forum nation. They are at least three answers: First, universal jurisdiction was established and implemented at Nuremberg in prosecutions of non-German nationals for offenses committed outside Germany. Second, because abusers of the law of nations so often remain in power, a meaningful law of nations depends on universal jurisdiction. Third, while the view that any nation should await widespread adoption by other nations has a deceptive aura of conservative respectability, it is in fact an insidious trap that dooms the law of nations to permanent irrelevance. If every nation waits for others to go first through the door, none will ever go through the door. The principle that other nations should go first would guarantee that this body of laws, although essential to a civilized world, will never outgrow its impotent infancy.

Perhaps the best reason supporting an individual nation’s reluctance to entertain a particular suit is its capacity to embarrass the nation’s executive and interfere with its foreign policy objectives. This is undoubtedly a reasonable concern. It is not, however, a reason for categorically denying a nation’s courts authority to entertain all such cases. There are cases with a potential to interfere with the forum nation’s foreign policy objectives, and other cases which have no such potential. In fact, in some cases, the nation’s executive may strongly favor such a suit. It is unnecessary for the nation to have a blanket rule that would require its courts to hear either all, or none, of this category of cases. A mechanism exists for the executive to advise the court that it is not in the interest of the nation for the court to entertain a particular case. On receipt of such advice the court would abstain. What is more, a grant of statutory authorization to a nation’s courts to hear such cases could be so structured that the court’s authorization to hear the case would depend on the executive’s approval. Accordingly, notwithstanding concern for the potential of such cases to harm the foreign relations of the nation, this concern does not justify categorical exclusion of all such cases from the court’s jurisdiction. A grant of jurisdiction can be tailored to guard adequately against the problem.

Arguments sometimes offered against allowing such suits include that abusers might be reluctant to relinquish power under a reconciliation and amnesty agreement for fear of being sued, and that such suits may result in judgments that violate the terms or intentions of such an agreement or may interfere with the reconciliation process. I cannot say those concerns have zero justification, but, if offered as a reason to block authorization of such suits across the board, it is grossly exaggerated. The probability that an abusive regime will refuse to relinquish power under an amnesty agreement because of the risk of civil suits in other nations seem small. And if the defendant in the suit is a beneficiary of a bona fide amnesty agreement under which the offending regime surrendered power (and not merely a golden parachute
granted to the offender by his successor—perhaps his son—at the comfortable end of his abusive career), it should be respected by a court.

Finally, a big obstacle to a nation’s adoption of authorizing legislation is the notion that atrocities committed by foreigners against foreigners in some other nation are simply “not our problem and not a proper subject for litigation in our courts.” This is wrong as a matter of law and of policy.

Looking first at the legal precedent for a court’s adjudication of a foreign dispute, it is not out of the ordinary for courts to adjudicate disputes that occurred entirely on foreign soil—even when none of the parties to the dispute are nationals of the forum state. This often occurs in maritime cases or suits alleging breach of contract of transnational trade. The parties often agree in a transnational trade contract or one for the shipment of goods that any dispute will be heard in the courts of some selected nation. Less common, but by no means a legal oddity, is a suit alleging a tort committed in another nation. If the alleged tortfeasor comes to the United States, for example, so that the plaintiff can serve process on him within the territorial jurisdiction of a state court, the fact that the dispute involves foreigners and events that occurred entirely in a foreign land presents no bar to the court hearing the case. Under choice-of-law principles, the court would apply whatever law governed the dispute. Most likely in a tort case, that would be the law of the place where the alleged tort was committed. To be sure, the defendant could ask the court to abstain from exercising its jurisdiction under the doctrine of forum non conveniens, on the ground that the case would more appropriately be litigated in another forum, perhaps the place where the dispute arose, but the court would ordinarily deny such a motion if the plaintiff could not get a fair trial in the foreign court. Such a case is quite analogous to the type of suit here considered, which presupposes the inability of the plaintiff to get a fair hearing in the place where the events occurred, and contemplates application of the law that governed at the place of occurrence—namely the law of nations, which applies throughout the world.

The argument that the foreign nature of the dispute makes it inappropriate for litigation in the courts of the forum state is wrong also as a matter of policy, at least in nations that subscribe to the principle that the law of nations protects fundamental human rights throughout the world. That was the lesson of Nuremberg. A large number of law respecting nations have repeatedly reaffirmed their commitment to this principle in underwriting the creation of international courts for criminal prosecution at the Hague of human rights violations committed throughout the world. For the common circumstance where victims will have no remedy unless a civil remedy is offered in the local courts of some stranger nation, the policy that underlies any nation’s subscription to the creation of the international courts to punish abusive despots is the policy that justifies such a nation’s authorization to its own courts to hear the civil suit. The “not-our-courts’-business” proposition is more accurately seen as rhetoric to justify avoidance of unwelcome burdens than as an accurate account of the forum nation’s policies. If a nation requires some kind of national interest to justify authorizing its courts to hear a category of case, the nation’s commitment to endorse and give substance to the international law of
human rights is that national interest. While governments, and especially their foreign offices fearing diplomatic problems, will predictably oppose initiatives to give courts such authorization, it seems altogether conceivable that legislatures can be convinced of the nation’s interest in supporting the effectiveness of the law of nations by authorizing such litigation in the nation’s courts.

What does all this suggest for organizations committed to advancing the cause of human rights? First, that they should not be too resigned to acceptance of the unsatisfactory status quo. They might seek out foreign advocacy partners to institute publicity and lobbying campaigns drawing attention to the plight of remediless victims and draft model legislation designed to give jurisdiction to the nation’s courts. A proposed bill should not be too ambitious. It should be of modest scope, designed to satisfy the concerns of the local government’s foreign office.

To this end, the bill might require as a precondition of the court’s allowing the suit to proceed to adjudication that the plaintiff give notice to the foreign office and that the foreign office either expressly state that it has no objection to the suit, or at least, after reasonable time to consider, not assert opposition to the court’s entertainment of the suit. Unless the government can be assured that it will have a veto power over cases that risk to interfere with its foreign policy, it will predictably assert opposition that may prove insurmountable.

The bill can apply, as is true with the ICC, only to cases in which the plaintiff makes a showing that, as a practical matter, no just relief can be expected in the nation where the offense was committed. It might also require the plaintiff to make some kind of initial showing of probable cause to protect the courts from frivolous, politically motivated suits. The bill might require dismissal under forum non conveniens whenever the defendant can show that the plaintiff has meaningful access to justice in the courts of another nation better suited to hear the case and the defendant commits that it will not oppose the hearing of the case in those courts. The bill might also require that the court respect a bona fide reconciliation and amnesty agreement, under which the defendant’s regime relinquished power.

I am not so naive as to believe that such lobbying efforts will rapidly or widely succeed. But I believe the arguments in favor of such authorizing legislation are so much stronger than the arguments against that the cause is not necessarily hopeless. If we value the law that protects fundamental human rights, the endeavor is certainly worth an unflagging effort.

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7. This requirement is better conceived as a precondition to the suit’s proceeding to adjudication than as a precondition to the institution of the suit. If institution of the suit requires the presence of the defendant in the forum state or service of process on the defendant, the prerequisites to institution of the suit should not involve steps that will forewarn the defendant and allow him to take evasive action.
We come now to the very different situation in the United States. Since the birth of the Nation, we have had a statute authorizing federal courts to hear suits brought by aliens for torts in violation of the law of nations. The Alien Tort Statute (ATS) was passed by the First Congress in 1789. It was recognized in a 1795 opinion of the Attorney General as authorizing a federal court to hear an alien’s suit for a violation of the Law of Nations committed in a foreign land. The Law of Nations at the time had a different focus from today, then concerning itself with such matters as hostilities among nations, safe passage for ambassadors, and piracy. In 1980, the federal courts heard Filartiga v. Pena-Irala, an alien’s suit pleaded under the ATS involving the new, post-Nuremberg expansion of the Law of Nations into matters of fundamental human rights. Since Filartiga, our federal courts have heard a number of cases brought by aliens alleging torts in violation of the Law of Nations committed in foreign lands, and more than once the Supreme Court has, either tacitly or expressly, given its approval to this line of cases.

For reasons I am at a loss to understand, those cases have provoked hostility of astonishing intensity among the right wing of United States legal thought. A recent piece of scholarship describes it as “[t]he most contested issue in the U.S. foreign relations law during the last decade.”

A. Sosa v. Alvarez-Machain

That right-wing hostility was placed on prominent display by a minority of the Supreme Court in 2004 in the case of Sosa v. Alvarez-Machain. By a majority of six Justices, the Court generally upheld the validity of a federal court’s adjudication of an alien’s claim of a tort committed by aliens in another nation in violation of the law of nations. While upholding the propriety of such a suit, the Court dismissed the suit before it because it found that the particular tort alleged, arbitrary arrest unauthorized by local law, was not among the few, extreme, heinous categories of behavior that are prohibited by the law of nations because they violate fundamental, virtually universal norms of civilization.

The part of the majority opinion that expressed general approval of suits under the ATS was fiercely attacked in a minority opinion, written by Justice Scalia, and joined by Chief Justice Rehnquist and Justice Thomas. The minority opinion would have done away with all suits under the ATS. Of the
majority opinion's general approval of ATS litigation, the minority scoffed, "This Court seems incapable of admitting that some matters—any matters—are none of its business." Nonetheless, the minority's arguments were, in my view, contrived and weak.

First, the minority opinion posited that the Act passed by the First Congress had no function or effect whatsoever. According to the minority opinion, the statute constituted nothing more than a grant of jurisdiction to the federal courts to receive claims without authority to decide them. Construing the Act as granting the federal courts authority to have the cases put before them, but withholding authority to decide them is, to say the least, a strange piece of statutory interpretation.

The minority opinion relied also on a second argument—that the federal courts were powerless to recognize a claim under the law of nations because Justice Brandeis's famous ruling in *Erie Railroad Co. v. Tompkins* had stripped the federal courts of general common law powers. This was an overreading and misinterpretation of the Brandeis opinion, which addressed a very different question.

The question in *Erie* was whether a federal court, in interpreting the law of one of the States of the United States, was at liberty to reject the interpretive decisions of that State's courts, substituting its own common law—thus reaching a different decision in the case than the State's courts would have reached. The Supreme Court said no. If the law to be applied was the law of a State, it was that State's courts, and not the federal courts, whose common law should govern. The federal court was obliged to defer to the State's courts' common law rather than substitute its own.

*Erie* did not in any way involve the question of whether the federal courts possess common law powers to use in other areas of law whose interpretation was entrusted primarily to them. (Much less did it involve whether federal courts may apply the law of another nation or the law of nations in cases to which they apply.) Only by a distorted, out-of-context reading of the *Erie* opinion could the minority Justices extract from it the conclusion that federal courts were stripped of all power to employ the historic Anglo-American common law method of adjudication, no matter what sort of legal question is in dispute, and stripped of authority to apply the law of nations.

Federal courts have always employed the common law method in judging questions that are not either governed by state law or conclusively answered by a federal statute, and they continue to do so. Those areas have included matters of maritime law and international law—such as sovereign immunity and the

14. Id. at 750 (Scalia, J., concurring in the judgment).
15. 304 U.S. 64 (1938).
16. Id. at 78.
17. See Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1832 (1998) ("Justice Brandeis acknowledged—on the very same day that *Erie* was decided—that federal judges may continue to make specialized federal common law regarding issues of uniquely federal concern." (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938))).
law of nations. The Brandeis opinion in *Erie* did not say or mean they must cease to do so. The minority's *Erie* argument is inapposite for another reason. A federal court has no need to employ federal common law to rely on a well-established rule of the law of nations that genocide, for example, or slavery violates that body of law.

Even if the minority Justices' arguments in *Sosa* were far-fetched, those arguments were engendered by a concern that is undoubtedly troublesome. The concern was that democratically adopted laws in the United States might be invalidated by the disapproval of other nations. The minority opinion decried the "appall[ing] . . . proposition that . . . the American peoples' democratic adoption of the death penalty could be judicially nullified because of the disapproving views of foreigners." 19

The law of nations in fact does not reject the death penalty. But there are those in the world who think it should. And, as illustrated at Nuremberg, the law of nations is subject to change. The day might conceivably come when the law of nations would prohibit imposition of the death sentence. While all who contemplate the issue might not equally treasure the death penalty, it should not be too difficult to identify aspects of United States law that others would find distressing to lose because of the conflicting views of foreign nations.

Consider for example a possible conflict involving the right of free speech. Suppose that a multitude of other nations, in a universal fit of brotherly love, with near unanimity espoused the principle that hate speech is incompatible with civilization and violates the law of nations. Such a rule would of course conflict with our right of free speech, assured by the First Amendment. What then? Would customary international law's prohibition of hate speech trump the right of free speech entrenched in the United States Constitution? How would a federal court rule in a suit brought under the ATS against a state or federal official of the United States, alleging a tort of hate speech in violation of the law of nations?

It is hard to imagine a United States court ruling that such an official acted illegally in exercising the constitutional right of free speech. But how would a court reconcile its ruling preferring the United States Constitution over the law of nations with the Nuremberg principle that the law of nations trumps inconsistent local law?

Furthermore, conflict between the law of nations and the law of the United States can occur otherwise than through change in the law of nations. It could occur also through change of the law in the United States. Suppose that U.S. law came to tolerate and authorize atrocities that have long been accepted as violations of the law of nations. Suppose, for example, that Congress or the President were to delegate to an inferior officer the free discretion to inflict torture on enemy prisoners, and that a tortured prisoner brought suit in a United

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18. While it is true that the Court in *Erie* stated that "[t]here is no federal general common law," what that statement meant was that there is no federal common law that supersedes a state's common law on issues of that state's law. 304 U.S. at 78 (emphasis added). It did not mean that federal courts cannot utilize the common law method in adjudicating areas not governed by state law.

19. *Sosa*, 542 U.S. at 750 (Scalia, J., concurring in the judgment) (citation omitted).
States court against the torturer, alleging that the torture, although expressly authorized by U.S. law, was a violation of the law of nations. How should a United States court rule? The answers, and how to reconcile them with precedent, are by no means obvious.

While the concern that motivated the Sosa minority is undeniably troublesome, their solution to the problem—the nullification of the ATS—fails to solve the problem. If an alien brought suit in the United States courts against a United States citizen, alleging that the defendant abused the plaintiff in violation of the law of nations, the ATS would in most cases play no necessary role in the dispute. Nullifying the ATS would not solve the minority’s problems with the application of the law of nations to the acts of United States officials that are authorized by United States law.

Why? As both the majority and the minority of the Supreme Court made clear in Sosa, the function of the ATS is to give the federal courts jurisdiction over cases they would otherwise not be authorized to hear.20 A suit by an alien against a United States official that may be brought in the United States courts by virtue of the ATS’s grant of jurisdiction would in most cases also be within the jurisdiction of the same court because it is a suit between a citizen of a foreign nation and a United States citizen. The federal courts of the United States, in contrast to the courts of any State of the United States, are courts of limited jurisdiction. A dispute may be brought before the federal courts only if it falls within a category of cases that Congress authorized the federal courts to hear. The main categories of cases Congress has authorized the federal courts to hear are cases within the federal question jurisdiction—that is cases arising under the federal law of the United States (as distinct from cases arising under state law or under the law of another nation),21 and cases in the diversity jurisdiction—being suits “between citizens of different States” or between “citizens of a State and citizens or subjects of a foreign [nation].”22 The type of suit feared by Sosa’s minority—one in which a U.S. court would be asked by an alien, invoking the ATS, to invalidate a democratically adopted law of the United States, or of one of its states, by reason of the disapproval of foreigners—would in most circumstances be within the diversity jurisdiction of the federal courts. The plaintiff would necessarily be a citizen of a different nation, as suits under the ATS may be brought only by aliens, and, if the defendant whose actions are protested was an official of the United States or of a state of the United States, that defendant would likely be a “citizen of a State.” Accordingly, such a case could be brought before a federal court under its diversity jurisdiction without need of the grant of jurisdiction provided by the ATS.

Furthermore, the federal court has no need to rely on the ATS to apply the law of nations in an appropriate case. As noted above, when a court hears a

20. Id. at 713-14 (majority opinion); id. at 739 (Scalia, J., concurring in part and in the judgment).
22. Id. § 1332.
case, it applies whatever law governs the dispute. If, for example, the federal court hears a diversity suit involving an allegation of a tort committed in a foreign nation, the court will ordinarily apply the tort law of the nation where the facts occurred. The court does not need special statutory authorization to apply whatever law governs the dispute. It is the function of a court to decide a case under the appropriate law. If the law that governs the dispute is the law of nations, the court will apply that law. In short, in the category of suits brought under the ATS that the minority Justices seemed to find most distressing, the minority’s proposed nullification of the ATS would have no effect whatsoever.\(^\text{23}\) The cases for which the ATS is essential to give jurisdiction to the federal courts are primarily the disputes that are between foreigners—disputes in which one alien protests torts in violation of the law of nations committed by another foreigner on foreign soil. These are the suits the minority Justices no doubt had in mind when they railed that the majority “seems incapable of admitting that some matters—any matters—are none of its

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23. For the problematic type of ATS case the minority Justices seemed to consider most unacceptable—one in which a law of the United States might be invalidated because of the contrary views of foreigners—Professors Curtis Bradley, Jack Goldsmith, and David Moore have proposed an elegant, measured, and, in my view, quite persuasive solution. See Bradley, Goldsmith & Moore, \textit{supra} note 12; see also Curtis A. Bradley & Jack L. Goldsmith, \textit{Customary International Law as Federal Common Law: A Critique of the Modern Position}, 110 \textit{Harv. L. Rev.} 815, 861 (1997). They conclude, for constitutional reasons, that the ATS \textit{cannot} confer jurisdiction on the federal courts in that circumstance, notwithstanding that it purports to do so. Bradley, Goldsmith & Moore, \textit{supra} note 12, at 902.

Article III, Section 2 of the Constitution places limits on the types of cases U.S. courts may be authorized to hear. The only category of cases authorized by Article III, Section 2, that can accommodate a suit under the ATS is "[c]ases . . . arising under . . . the Laws of the United States," and then only if the Law of Nations is deemed the law of the United States. U.S. \textit{Const.} art. III, \textit{sect.} 2. The question therefore arises whether a rule of the Law of Nations can be properly considered to be part of the "Laws of the United States," as it must be if Congress had the power under the Constitution to grant ATS authority to the federal courts. Because the Law of Nations applies in the United States, as it does the world over, there is an acceptable basis to consider a suit under the Law of Nations as falling within the scope of Article III’s authorization to the federal courts to hear cases arising under "the Laws of the United States," at least so long as the provision of the Law of Nations is consistent with the laws of the United States.

But can the same be true if the explicit laws of the United States conflict with the asserted provision of the Law of Nations? "All legislative Powers . . . are vested [by the Constitution] in Congress," within the limits of its authority, U.S. \textit{Const.} art. I, \textit{sect.} 1, and the Constitution similarly gives the President sole authority within specified areas (such as conduct of war), U.S. \textit{Const.} art II. Because of the exclusive authority of the Congress and the President within their respective areas of power, Bradley, Goldsmith, and Moore’s article argues that a U.S. judge lacks the authority to find that the law of the United States is not as Congress or the President have established. See Bradley, Goldsmith & Moore, \textit{supra} note 12, at 886, 903-04, 929-31; see also Bradley & Goldsmith, \textit{supra}, at 861.

Thus, to the extent that the ATS purports to give jurisdiction to federal courts to hear suits charging a tort in violation of the Law of Nations when the allegedly tortious act was explicitly authorized by Congress or the President within the scope of their powers, the ATS exceeds Congress’s authority to grant jurisdiction to federal courts. Those courts are then without authority to hear the case.

The Bradley-Goldsmith-Moore analysis is an interesting and reasonable solution to a vexing problem that I hope will rarely or never arise. I note however that this answers only the case of conflict between the Law of Nations and \textit{federal law} in the United States. It has no bearing on a case in which an alien sues a state officer under the ATS claiming that the state law and practice were repugnant to the Law of Nations. It is not clear furthermore how their reasoning would bear on a case in which an alien plaintiff relies not on the ATS but on diversity jurisdiction to charge a U.S. official with a tort in violation of the Law of Nations, consisting of acts expressly authorized by U.S. law. Nor does their reasoning have any bearing on a case brought in a state court asserting a tort in violation of the law of nations.
business.” The minority Justices’ second proposition to the effect that a genocide is none of a national court’s business if it occurred outside the nation’s borders is an unwarranted rejection of the very existence of a law of nations. At Nuremberg, primarily under United States leadership, and thereafter in new instances of intolerable atrocities, the nations of the world espoused the proposition that a small nucleus of heinous atrocities that are incompatible with a civilized world violate the law of nations regardless of where they were committed and of whether they were authorized by the local law of that place. Because those acts are not merely disapproved but are prohibited by law, they are indeed the business of any court that has jurisdiction to hear a suit protesting them. If a court has jurisdiction to hear the suit, and the suit involves the question whether the challenged acts were or were not lawful, it is the court’s business to apply whatever law was applicable to them. The law of nations applies throughout the world, which is why it is called the law of nations. In a case under the ATS, it supplies the governing law, and it is the business of any nation’s court, assuming it has jurisdiction to hear the case, to apply that governing law.

B. Kiobel and the Application of the ATS to Extraterritorial Events

Until now, United States federal courts have been authorized under the ATS to award relief to alien victims of atrocities committed by aliens in other nations. Whether they will continue to have that authority is now in doubt. Last February, the Supreme Court heard argument in Kiobel v. Royal Dutch Petroleum Corp., an ATS case coming from my court—the United States Court of Appeals for the Second Circuit. The question upon which the Supreme Court had granted review was quite narrow—whether the prohibitions of the law of nations against genocide and other such atrocities apply to corporations (and other legal entities), or only to natural persons and nations. However, views expressed by Justices at the argument, and the action taken by the Court shortly thereafter, have cast doubt on whether the ATS will survive in any form for atrocities committed in other nations.

Justice Kennedy asked, “‘No other nation in the world permits its court[s] to exercise universal jurisdiction over . . . extraterritorial human rights abuses to which the nation has no connection.’ . . . [A]re you going to say that that proposition is irrelevant?’” Chief Justice Roberts asked, “If there’s no other country where this suit could have been brought, . . . isn’t it a legitimate

24. 542 U.S. at 750 (Scalia, J., concurring in part and in the judgment).
concern that allowing the suit itself contravenes international law?" Justice Alito asked, "[W]hat business does a case like that have in the courts of the United States?"

Shortly after hearing argument, the Court put the case over for reargument on a much broader question: "Whether . . . the Alien Tort Statute allows courts to recognize a cause of action for violations of the Law of Nations occurring within the territory of a sovereign other than the United States." In other words, are genocides committed in another nation any proper part of the business of our courts? Will the Supreme Court shut down the ATS as to atrocities in other nations?

The significance of the question whether liability under the ATS will apply to corporations is dwarfed by the risk that the Supreme Court will restrict the ATS so that it no longer applies to atrocities on foreign soil. Such a ruling would shut what is, as a practical matter, the world's only open door to a compensatory remedy for victims of mankind's most heinous abuses.

27. Id. at 8.
28. Id. at 11.
29. Kiobel, No. 10-1491 (U.S. Mar. 5, 2012) (order restoring the case to the calendar for reargument) (citation omitted). The Court presumably adopted the formulation "occurring within the territory of a foreign sovereign" rather than "occurring outside the territory of the United States" because it has been clear since long before Nuremberg that the law of nations applies to piracy, which is often committed on the high seas.
30. When Kiobel was heard in the Court of Appeals, I set forth my view that the law of nations does not exempt corporations from its prohibition of atrocities leaving them free, for example, to retain profits of slave labor or of doing genocidal dirty work for despots, without liability to victims. Kiobel, 621 F.3d at 149 (Leval, J., concurring in the judgment).

Nonetheless, although I adhere to those views, one might wonder whether the law of nations, the ATS, and the protection of human rights, may be better off if the Supreme Court were to rule that corporations are not covered. Why? The ATS may have a better chance of survival as an effective tool to combat atrocities if huge, multi-national business corporations are exempted from its scope and consequently abandon their powerful and richly financed efforts to kill the ATS.

Big companies that operate throughout the world, including in nations with bad human rights records, have been magnets for ATS suits. They have been preferred targets in some part because the primary abusers—usually the officials of a local despotic government—are not present in the United States and cannot be sued here. Those suits most often ascribe to the corporate defendant a secondary role of aider and abetter in the local government's atrocities. Rarely is it contended that much major international business companies are prime movers or direct participants in the alleged atrocities.

Such suits have been expensive to defend and furthermore expose prominent corporate defenders to risks of huge liabilities, even arising out of circumstances where the corporation has done nothing worse than curry the favor of the despotic government. The risks of liability and of adverse publicity can put the defendant under great pressure to pay substantial amounts to settle cases in which it may have no well-founded liability.

It is therefore not surprising that these vast wealthy entities have launched big, effective campaigns to kill the ATS in any way it can be killed. Not surprisingly, these campaigns have been influential. The lobbies for the world's most powerful corporations are more effective than the virtually non-existent lobbies on behalf of the victims of atrocities in despotic nations. If a Supreme Court ruling that corporation are immune under the law of nations ended the campaign by the world's mightiest economic powers to cripple or kill the ATS, it may be that the cause of human rights would be the net winner, even at the loss of some deserving cases.

The defendants in Kiobel argue that the Supreme Court’s recent ruling in *Morrison v. National Australia Bank, Ltd.*, 31 commands such a result. *Morrison* should have no bearing, as it addressed a very different question. The issue in *Morrison* was the extent to which prescriptive statutes of the United States—statutes that establish norms of conduct—should apply beyond the borders of the United States. The Court ruled that, unless a contrary Congressional intent appears, such regulation is understood “to apply only within the territorial jurisdiction of the United States.” 32

It is difficult to find fault with that principle. When a sovereign prescribes norms of conduct, presumably it does so for its citizenry and for its territory—and not for the whole world.

This well-justified principle has no bearing on a court’s finding that conduct in another nation violated the law of nations. In reaching such a determination, a court is not undertaking to impose its own nation’s norms of conduct on the rest of the world. The prescriptive rules it applies, forbidding genocide, slavery, etc., are rules devised by the community of nations with the intent that they apply throughout the world. As the term “the law of nations” implies, it is the law of the world, not the law of a single country. A court’s duty is to apply the proper governing law to any set of facts. The prohibitions of the law of nations against the most heinous atrocities are applicable everywhere.

Without doubt there would be something self-aggrandizing and unseemly in one nation’s courts undertaking adjudication of the lawfulness of another nation’s conduct on foreign soil if a fair and just adjudication of the question is available in the courts of the nation where the conduct occurred, at least so long as the suit does not involve the interests of the forum nation. It would be reasonable and constructive for the Supreme Court to rule it ordinarily (absent special circumstances) beyond a federal court’s discretion to entertain an ATS action in those circumstances. Any nation should accept such a limitation on its adjudication of such claims.

But it would be a sad mistake for the Supreme Court to exclude such suits from the jurisdiction of the federal courts otherwise. First, it would be unwise: the ruling would not terminate such litigation in the United States, but would merely move suits from the federal courts to state courts of general jurisdiction, where the Supreme Court would exercise far less supervisory control over them. More important, to rule that the ATS cannot apply to torts committed on foreign soil would be an unwarranted blow to the law of nations. It would infuse new life into the detestable but widespread notion that it is simply “not our business” when genocides and comparable atrocities are committed in other parts of the world.

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32. *Id.* at 2877 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).
2. The Absence of Comparable Jurisdiction in Other Nations

The defendants’ second argument misdescribes instances in which courts of other nations have declined to exercise jurisdiction over foreign acts. Observing correctly that universal jurisdiction in civil cases does not have general acceptance, the defendants treat the rulings of various courts that have declined to entertain such suits as if they had ruled that the law of nations forbids such enforcement of its norms. They have done no such thing. Without doubt, courts declining to assert jurisdiction have observed in self-justification the inescapable fact that most nations’ courts do not hear foreigners’ claims of foreign atrocities. That observation can undoubtedly give comfort to any nation’s decision that it, like so many others, will not assume the unwelcome burden. It does not however carry the implication that the law of nations would be violated by a court’s enforcement of its norms. Global human rights law prescribes minimum norms of conduct for the world. It does not dictate how those norms are to be enforced, but leaves matters of enforcement to individual nations. What is more, the ATS was unquestionably originally intended to have extraterritorial application, as the law of nations was always understood to apply to acts of piracy on the high seas.

Universal jurisdiction is essential to a meaningful law of nations. Nations that commit atrocities will not provide remedies to those they have abused. International tribunals do not provide civil remedies to the abused. If those who have been victimized by atrocities are to have any effective legal rights against their abusers, it can only be through the courts of other nations providing remedies on the basis of some form of universal jurisdiction. Without such remedies, which to date only the courts of the United States provide, the law of nations amounts to little more than a pious fraud. The courts of the United States should continue to provide a remedy, rather than further undermine the already deplorably toothless law of nations.

IV. Conclusion

A few questions in conclusion:

Are atrocities committed in a foreign land the proper business of a nation’s courts? Very much so when the victims cannot obtain relief in the place of the offense.

Can such suits for foreign atrocities interfere with the forum nation’s foreign policy? Yes, but this threat can be avoided by the simple mechanism of the forum nation’s government advising a court that it should not entertain a particular case. The easily avoided potential for interference in a few cases is no reason to reject the cause of justice in all cases.

Should such suits be entertained if there is a more suitable forum in another nation? No. Courts should make liberal use of forum non conveniens dismissal when the suit would be more justly heard in another nation, and should absolutely abstain when the interests of the forum nation are not directly involved and justice is available in the place of the wrong.
Does the failure of other nations to exercise universal jurisdiction over suits for abuses of fundamental human rights justify cessation of United States courts doing so? No. What should rather happen is that other nations shed their timid reluctance and shoulder a part of the burden of enforcement of the law of nations. Nuremberg recognized, in the words of Justice Robert H. Jackson, then Chief Counsel for the United States, that we deal with wrongs "so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated."

It would be a sad retreat from those ambitious goals if our Supreme Court were to support the retrograde principle that distant genocides are not the proper business of our courts. Such a ruling would deal a harmful blow to hopes of expanding meaningful recognition of basic human rights throughout the world.

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