Piercing the Shield of Sovereignty:

Utilizing Universal Jurisdiction in U.S. Courts
to Provide Justice for Tamils in Sri Lanka

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Introduction

Sri Lanka's recent civil war, which claimed the lives of up to 40,000 Tamil civilians, is only one phase of the country's violent past.[1] The Tamil community in Sri Lanka has experienced structural discrimination and economic and military attacks since Sri Lanka's independence in 1948.[2] Recent discussion of Sri Lanka's human rights crisis typically focuses only on the pinnacle of this – Sri Lanka's intense military campaign in early 2009 – while ignoring the context of successive Sinhala regimes' oppression of the Tamil community.[3]

Wikileaks documents demonstrate that the culpability of the Sri Lankan government in war crimes is well known. U.S. Ambassador to Sri Lanka Patricia Butenis stated that accountability in Sri Lanka "is further complicated by the fact that responsibility for many of the alleged crimes rests with the country's senior civilian and military leadership, including President Rajapaksa and his brothers and opposition candidate General Fonseka."[4] A 2007 cable from then-U.S. Ambassador to Sri Lanka Robert Blake described Sri Lankan government responsibility for utilizing paramilitary troops to perpetuate extrajudicial killings, abductions, child trafficking, extortion and prostitution.[5] Despite this widespread knowledge, past and present impunity for state-sponsored human rights violations continues in Sri Lanka.

From Nuremberg until today, there is a sense that the justicability of human rights violations confers justice for past abuses, while simultaneously helping to stem present and future abuses. International human rights law now recognizes that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[6] These words have been endorsed and acted upon by states, through the United Nations General Assembly and the Geneva Conventions of 1949.[7] Universal jurisdiction allows courts to move beyond territorial constraints to hold individuals accountable for crimes committed elsewhere, when such crimes are especially egregious. The nature of the atrocities committed in Sri Lanka satisfy the requirements for invoking universal jurisdiction, and this paper explores why and how the United States can exercise jurisdiction over certain Sri Lankan officials in U.S. courts.

In this paper, I explore the nature of the crimes in Sri Lanka, including war crimes, torture and genocide, and the liability of certain Sri Lankan officials who can be held accountable for these atrocities. Namely, Sri Lanka's Minister of Defense Gothabaya Rajapaksa and Sri Lanka's former Army General Sarath Fonseka. Rajapaksa is a U.S. citizen and is thus subject to U.S. laws even when outside the country,[8] and Fonseka is a U.S. green card holder. Next I explore Sri Lanka's impunity for state-sanctioned crimes against Tamils, and conclude

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[1] Andrew Buncombe, Up to 40,000 Civilians Died in Sri Lanka Offensive, *The Independent*, 12 February 2010, http://www.independent.co.uk/news/world/asia/up-to-40000-civilians-died-in-sri-lanka-offensive-1897865.html.

[2] VIRGINIA LEARY, ETHNIC CONFLICT AND VIOLENCE IN SRI LANKA 14-18 (1983).

[3] *See generally* PAUL SIEGHART, SRI LANKA: A MOUNTING TRAGEDY OF ERRORS (1984).

[4] US Embassy Cables: Rajapaksa Shares Responsibility for 2009 Sri Lankan Massacre, *The Guardian*, 1 December 2010, http://www.guardian.co.uk/world/us-embassy-cables-documents/243811.

[5] US Embassy Cables: Sri Lankan Government Accused of Complicity in Human Rights Abuses, *The Guardian*, 16 December 2010, http://www.guardian.co.uk/world/us-embassy-cables-documents/108763.

[6] Judgment of the International Military Tribunal, 22 *Trial of the Major War Criminals Before the International Military Tribunal, Proceedings* 411, 465-66 (1948), *reprinted in* 22 HARV. INT'L. L.J. 53, 68 (1981).

[7] *Id*.

[8] A United States citizen outside the U.S. is nonetheless "personally bound to take notice of the laws [of the United States] that are applicable to him and to obey them." *Blackmer v. United States,* 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932). Since Rajapaksa is a U.S. citizen, he is always subject to U.S. law, even when physically outside the United States.

that Sri Lankan mechanisms to provide justice to Tamils will continue to fail. This section demonstrates that Sri Lanka lacks the political will and structural capacity necessary to provide justice to its Tamil victims. I then turn to international mechanisms for justice, and argue that their past failures to deal adequately with Sri Lanka's crisis reasonably indicate an inability to provide an adequate venue for redress to Tamils in the future. I then utilize principles of universal jurisdiction to articulate a global justice paradigm, in which human rights offenders are accountable for their crimes in whatever country they are found. I argue that universal jurisdiction statutes should be used in countries all around the world, where former Sri Lankan officials can be found, to bring them to justice in a court of law. The final two sections of the paper explore the application of universal jurisdiction in the United States, through an analysis of the relevant U.S. statutes – the Alien Tort Statute, Torture Victims Protection Act, and the Genocide Accountability Act – and precedent holding foreign officials accountable for war crimes, torture and genocide. I conclude by arguing that U.S. courts offer the best available forum for ending decades of impunity in Sri Lanka.

I. Crimes in Sri Lanka

This section describes a subset of the specific crimes the Sri Lankan government has committed against Tamils on the island, chosen for their inclusion based on the statutory limitations on universal jurisdiction in U.S. courts. Due to space concerns, a full description of the crimes perpetrated by the Sri Lankan government is not permissible.[9] This section starts by exploring the war crimes that were committed during Sri Lanka's final offensive in Spring 2009, then provides an overview of Sri Lanka's perennial use of torture throughout its decades-long conflict, and ends by arguing that Sri Lanka's past and present actions constitute genocide against the Tamil community.

Specific Sri Lankan officials who should be held liable for these crimes include but are not limited to Defense Minister Gothabaya Rajapaksa and former Army Commander Sarath Fonseka. Gothabaya Rajapaksa is a U.S. citizen and owns property in California – assets that could be gained from a successful judgment. Fonseka is a U.S. Green cardholder. However, after he made public statements that he would be willing to testify about the perpetuation of war crimes in Sri Lanka's final conflict, Fonseka was jailed and he has been sentenced to three years imprisonment by a Court Martial for being involved in politics while serving in the Army and of malpractice in issuing Army Tenders.[10] Lawsuits could also be initiated against other high-ranking Sri Lankan officials who travel through the United States or now live in the U.S., over whom personal jurisdiction would exist.[11]

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[9] One specific crime that this paper does not address is state-sponsored abductions, or "disappearances". Sri Lanka is likely most infamous for the prevalence of disappearances throughout the conflict. In 1992, the United Nations found that Sri Lanka had the highest number of involuntary disappearances in the world. *Report of the United Nations Working Group on Enforced or Involuntary Disappearances,* U.N. Commission on Human Rights at 38, U.N. Doc. E/CN.4/1992/18/Add.1 (1992). *See generally* AMNESTY INTERNATIONAL, SRI LANKA: 'DISAPPEARANCES' (1986).

[10] Faraz Shauketaly, Fonseka Verdict, *The Sunday Leader*, 15 August 2010, http://www.thesundayleader.lk/2010/08/15/fonseka-verdict/.

[11] "In *Cabello v. Fernandez-Larios*, for example, the Eleventh Circuit held that the ATS encompasses accomplice liability and other forms of indirect liability." BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS, 23 (2008). "As in any lawsuit, the court must have personal jurisdiction over the defendant.

A. War Crimes

In September 2008, the Sri Lankan government ordered all international aid agencies to leave the northern region controlled by the Liberation Tigers of Tamil Eelam, known as Vanni.[12] This action paved the way for an intense military onslaught against Tamil civilians and combatants alike. United Nations sources initially estimated that 7,000 civilians were killed between January and March 2009.[13] However, the former UN spokesman in Colombo, Gordon Weiss, stated that he received reports from reliable sources that up to 40,000 Tamil civilians were killed during the final stages of war.[14]

In the months during Sri Lanka's most intense conflict, from January to May 2009, conditions were desperate. There was no neatly delineated "battle front," and the fighting trapped 300,000 Tamil civilians in Mulaivaikkal. The Sri Lankan government told Tamil civilians to stay in the "No Fire Zone", but then bombed and shelled this area.[15] Hospitals were deliberately targeted to inflict greater assault against the Tamil community, and over 462 Tamil civilians were killed in or around Puthukkudiyiruppu Hospital, Vanni's main hospital.[16] Gothabaya Rajapaksa's individual culpability can be asserted on the basis of public statements he made arguing that attacks on hospitals were legitimate. In an interview with SKY News, Gothabaya Rajapaksa was asked point blank if a hospital operating outside the declared "Safe Zone" was a legitimate military target, and he replied, "Yes. No hospital should operate in the area."[17] As head of the military structure in Sri Lanka, his public statement that the Puthukkudiyiruppu Hospital was a legitimate military target should satisfy the *mens rea* requirement for criminal liability.

Conditions throughout the region were extremely dire, as Sri Lanka launched its assault without the internationally mandated care for the safety of civilians. Doctors had to operate with

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Although international human rights claims often arise in unusual factual settings, ordinary rules governing personal jurisdiction apply. An assertion of personal jurisdiction must be both authorized by statute and meet the constitutional requirements of due process." *Id.* at 249. INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS is written by five co-authors who have been involved in all major ATS cases in the United States, and have worked in various capacities at the Center for Constitutional Rights, Center for Justice and Accountability, American Civil Liberties Union, Amnesty International, and as law professors at schools across the country. Their book is an invaluable guide to human rights litigation in U.S. courts, covering both theoretical and concrete aspects of the work involved, and this paper draws extensively from its analysis.

[12] Samanthi Dissanayake, Aid Agency Dilemma in Sri Lanka, *BBC News*, 9 September 2008.

[13] Thomas Fuller, U.N. Says Thousands Killed in Sri Lanka, *New York Times*, 24 April 2009.

[14] Andrew Buncombe, Up to 40,000 Civilians Died in Sri Lanka Offensive, *The Independent*, 12 February 2010, http://www.independent.co.uk/news/world/asia/up-to-40000-civilians-died-in-sri-lanka-offensive-1897865.html.

[15] Mark Tran, Sri Lanka Army Shelled No-Fire Zone, Says UN Agency, *The Guardian,* 1 May 2009, http://www.guardian.co.uk/world/2009/may/01/srilanka-nofire-satellite-pictures-un.

[16] *Tamils Against Genocide,* Satellite Imagery Evidence Showing Sri Lanka Military 'Purposely or Intentionally' Targeted PTK Hospital, Submitted to The People's Tribunal on Sri Lanka, Dublin, Ireland, 10 January 2010. TAG procured six satellite images of the PTK Hospital from two non-defense U.S. organizations, which were taken between October 2008 and May 2009. The satellite imagery, video clips and photographs from PTK Hospital "clearly and unambiguously establish beyond reasonable doubt that areas in or nearby PTK Hospital came under direct or indirect SLA attack while the PTK Hospital compound was functioning as a hospital." *Id.* at 12.

[17] Alex Crawford, Sri Lanka: 12 Killed At Hospital, *SKY News*, 2 February 2009, http://news.sky.com/skynews/Home/video/Sri-Lanka-12-Killed-In-Artillery-Fire-Report-From-Tamil-Tiger-Stronghold-Jaffna-And-CapitaL-lombo/Video/200902115215509?lpos=World%2BNews_2&lid=VIDEO_1785202_Fighting%2BIn%2BSri%2BLanka&videoCategory=World%2BNews.

butcher's knives and watered-down anesthesia.[18] Video has also surfaced of extrajudicial killings.[19] Further, starvation and malnourishment were widespread, according to UNHCR assessments,[20] due to the government's total and indiscriminate embargo against the region.[21] These actions constitute war crimes and violate the 18 U.S.C.A. § 2441 prohibition against cruel or inhuman treatment, murder, and intentionally causing serious bodily injury.[22]

B. Torture

Evidence has surfaced regarding sexual assault that was perpetrated in the conflict zone and in internment camps the government set up after active conflict ended. Journalists from the United Kingdom's Channel 4 News managed to enter an internment camp and were shocked by what they found. According to journalist Nick Paton Walsh, he was appalled at witnessing "[b]odies left for days; children crushed in the rush for food; the sexual abuse of women; disappearances."[23] He also reported that after three dead female bodies were found in the bathing area of the camp, refugees requested that they be guarded by female police guards instead of soldiers in the future.[24] After the report aired, Walsh and his team were arrested and deported, reflecting the government's harsh tactics to suppress media coverage.

The Irish Forum for Peace in Sri Lanka requested the Milan-based Permanent People's Tribunal create a People's Tribunal to investigate human rights violations committed by Sri Lanka during the final conflict. The People's Tribunal launched an investigation and heard testimony from eyewitnesses and watchdog groups, and concluded that war crimes and crimes

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[18] Gethin Chamberlain, As the Shells Fell, We Tried to Save Lives With No Blood or Medicine, *The Guardian,* 15 September 2009, http://www.guardian.co.uk/world/2009/sep/15/sri-lanka-war-on-tamil-tigers. Chamberlain interviewed Damilvany Gnanakumar, a British medic who was providing medical assistance during Sri Lanka's military assault. Gnanakumar gives a tragic account of what she witnessed during the final months of conflict, including steady starvation and the deliberate shelling of dense civilian areas.

[19] The United Nations confirmed the authenticity of video footage showing extrajudicial killings by Sri Lankan troops. Sri Lanka Rejects UN Execution Video Claims, *BBC News*, 8 January 2010, http://news.bbc.co.uk/2/hi/south_asia/8448073.stm. UN human rights investigator Philip Alston said three independent experts confirmed the authenticity of the footage, and he called for an independent inquiry into the practice in Sri Lanka. *Id.* At the Senate confirmation hearing for U.S. ambassador to Sri Lanka Patricia Butenis, she "vowed to press for justice in the cases of extrajudicial killings in Sri Lanka, which have shadowed the 26-year conflict." Simon Montlake, Sri Lanka's Postwar Resettlement Stalls, *Christian Science Monitor*, 19 June 2009, http://www.csmonitor.com/World/Asia-South-Central/2009/0619/p06s05-wosc.html.

[20] Serious Violations of International Law Committed in Sri Lanka Conflict: UN Human Rights Chief, U.N. High Commissioner for Human Rights, 13 March 2009, http://www.unhchr.ch/huricane/huricane.nsf/0/FFDE961C9D0236C5C1257578004B8E4B?opendocument.

[21] In *Sarie v. Rio Tinto, PLC*, 221 F. Spp. 2d 1116 (C.D. Cal. 2002), the court held that "a medical blockade constituted genocide because it foreseeably resulted in the killing of natives, caused serious bodily harm, [and] was deliberately calculated to destroy plaintiffs and their way of life." *Id.* at 1149, as quoted in STEPHENS, *supra* note 11, at 159.

[22] Reporters Without Borders also called the death of Tamil journalist Punniyamurthy Sathyamurthy due to Army bombardment a war crime. Tamil Journalist Killed in Bombardment Amounting to 'War Crime', Reporters Without Borders, http://en.rsf.org/sri-lanka-tamil-journalist-killed-in-16-02-2009,30312.html. Attacks against Tamil and Sinhalese journalists have also been a constant feature of Sri Lanka's conflict. *See generally*, Reporters Without Borders on Sri Lanka.

[23] Nick Paton Walsh, Sri Lanka's Rajapakse Tells Channel 4 to Leave, *Channel 4,* http://blogs.channel4.com/snowblog/2009/05/10/sri-lankas-rajapaksa-tells-channel-4-news-to-leave.

[24] *Id.*

against humanity were committed by the Sri Lankan government.[25] The People's Tribunal concluded that systematic sexual assault occurred during the final months of Sri Lanka's conflict and in the internment camps Sri Lanka set up afterwards for Tamil refugees fleeing the conflict area.[26] Sexual assault and rape are war crimes and also constitute a form of torture, and violate the U.S. prohibition on torture, codified in the Torture Victims Protection Act.[27]

C. Genocide

When viewed in a historical context, Sri Lanka's actions against the Tamil community constitute genocide. Sri Lanka's recent civil war, which claimed the lives of up to 40,000 civilians, is only one phase of the country's violent past.[28] Immediately following national independence in 1948, the Sinhalese majority began to marginalize Tamils. The Sri Lankan Parliament passed laws in 1949 to strip citizenship from nearly one million Tamil laborers of Indian descent. Seven years later, the government declared Sinhalese the national language, which privileged native Sinhalese speakers for advancement in education and employment. Sri Lanka further institutionalized discrimination against Tamils when the Parliament passed the "standardization" acts, which established quotas restricting the number of Tamils able to pursue higher education.[29]

This structural inequality led to peaceful protests by the Tamil community, which the government police forces swiftly crushed.[30] These events arguably served as the catalyst for subsequent decades of conflict, as they prompted Tamils to view armed struggle as the only path to freedom. The Liberation Tigers of Tamil Eelam (LTTE) and other armed Tamil militant groups formed in the 1970s, with the first phase of the civil war breaking out in 1983 after Black July.[31] The 1983 anti-Tamil pogrom was termed an "Act of Genocide" by the International Commission of Jurists.[32] Then-President J.R. Jeyawardene publicly stated, "I am not worried about the opinion of the Tamil people... now we cannot think of them, not about their lives or their opinion... the more you put pressure in the north, the happier the Sinhala people will be here... Really if I starve the Tamils out, the Sinhala people will be happy."[33] These attacks by

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[25] Verdict of the People's Tribunal on Sri Lanka, Permanent People's Tribunal on Sri Lanka, Peace for Life, http://www.peaceforlife.org/resources/peoplestruggle/srilanka/2010/10-0122-pptverdict.html.

[26] *Id.*

[27] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 held that rape constitutes torture when "plaintiffs can show that these acts were committed for any reason based on discrimination and with the consent or acquiescence of a public official or other person acting in an official capacity." *Presbyterian Church* at 326, as quoted in STEPHENS, *supra* note 11, at 200.

[28] Andrew Buncombe, Up to 40,000 Civilians Died in Sri Lanka Offensive, *The Independent*, 12 February 2010, http://www.independent.co.uk/news/world/asia/up-to-40000-civilians-died-in-sri-lanka-offensive-1897865.html. Catherine Philip, The Hidden Massacre: Sri Lanka's Final Offensive against Tamil Tigers, *Times Online*, 29 May 2009, http://www.timesonline.co.uk/tol/news/world/asia/article6383449.ece.

[29] Bruce Fein, Tamil Statehood?, *The Washington Times*, 29 January 2008.

[30] Deepika Udagama, *Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*, 11 HARV. HUM. RTS. J. 269, 273 (1998).

[31] MURUGAR GUNASINGAM, TAMILS IN SRI LANKA: A COMPREHENSIVE HISTORY 529 (2008).

[32] The Review, International Commission of Jurists, December 1983, stating, "The evidence points clearly to the conclusion that the violence of the Sinhala rioters on the Tamils amounted to Acts of Genocide." *See also* Paul Sieghart, Sri Lanka: A Mounting Tragedy of Errors, International Commission of Jurists Report, March 1984 ("Clearly this was not a spontaneous upsurge of communal hatred among the Sinhala people. It was a series of deliberate acts, executed in accordance with a concerted plan, conceived and organised well in advance.").

[33] Daily Telegraph, 11 July 1983.

successive Sinhala regimes are against the foundations of Tamil identity, and reveal the genocidal intent of not letting Tamils live as Tamils in Sri Lanka.[34]

II. Sri Lankan and International Justice Mechanisms and their Limitations

This section explores domestic institutions in Sri Lanka, and their incapacities at redressing state-sponsored violence against Tamils. This part looks at the institutional design of Sri Lanka's judiciary and its intentional lack of independence from political pressure. This section then turns to international mechanisms and explores the international community's recent involvement with Sri Lanka. With powerful allies such as China and Russia, international justice mechanisms have been stymied in a variety of fora.

A. Sri Lankan Mechanisms: Legislative and Judicial Tolerance for State Violence

In an ideal scenario, Sri Lanka would utilize its domestic courts to hold individuals accountable for war crimes. "[I]t is the domestic courts of each nation that offer the primary, daily line of defense in the judicial application of international human rights standards."[35] Unfortunately, domestic justice mechanisms in Sri Lanka have historically failed to hold individuals accountable when the state is complicit in the crimes, and this remains true today.[36] The institutional design of Sri Lanka's justice system is crippled when it comes to addressing state-sponsored crime.[37] Since 1971, Sri Lanka has been under emergency rule for longer than it

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[34] Further exposition of the argument that genocide was committed in Sri Lanka is curtailed in this paper due to space constraints. However, there is a rich literature surrounding this, and an introductory launching point is a compilation of articles written primarily for the Tamil Guardian, available online at http://sangam.org/taraki/archives/categorical/?category=J+T+Janani.

[35] RALPH G. STEINHARDT, PAUL L. HOFFMAN AND CHRISTOPHER N. CAMPONOVO, INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS 50 (2009).

[36] "The most recent instance is the work of the 2006-2009 Commission of Inquiry into 16 cases of serious human rights violations by both the government security forces and the LTTE. Even with broad international support and technical assistance from the IIGEP [International Independent Group of Eminent Persons], the Commission investigated only a handful of cases, failed to protect witnesses from harassment by security personnel, and produced no evidence that led to more effective police investigations. The final report of this Commission is said to have been given to President Rajapaksa and remains unpublished." Sri Lanka: Crisis Group Refuses to Appear Before Flawed Commission, *Crisis Group*, 14 October 2010, http://www.crisisgroup.org/en/publication-type/media-releases/2010/asia/sri-lanka-crisis-group-refuses-to-appear-before-flawed-commission.aspx. *See generally,* Twenty Years of Make-Believe: Sri Lanka's Commissions of Inquiry, *Amnesty International*, June 2009 (documenting the failure of successive Sri Lankan governments to provide accountability for human rights violations, including enforced disappearances, unlawful killings, and torture: "Impunity has long been the rule in this country where violations of international human rights law and international humanitarian law are concerned, because successive governments wanted it that way."). The IIGEP was a group invited by President Mahinda Rajapaksa to observe the Presidential Commission of Inquiry, and found five key flaws in the CoI: 1) Serious conflicts of interest [which] persist that compromised the independence of the Commission; 2) Lack of effective victim and witness protection; 3) Lack of transparency and timeliness in the proceedings; 4) Lack of full co-operation by state bodies; and 5) Lack of financial independence. *Id.* The IIGEP eventually resigned in protest, citing the lack of "political will" to secure justice. *Id.*

[37] *See generally,* Udugama, *supra* note 31. "The government of President J.R. Jayawardane, in particular, seriously threatened the independence of the judiciary in the 1980s. During that period, judges of the superior courts were once locked out of their chambers, homes of several Supreme Court judges were attacked after a fundamental rights judgment found against the government, and the Chief Justice was almost impeached for referring to matters of

has been under democratic rule, which gives the state sweeping security and surveillance powers, including to arrest and detain individuals – even preventively – without judicial recourse.[38] Sri Lanka's Prevention of Terrorism Act, passed in 1979 and still operating today, enables security forces to arrest and detain a person for up to 18 months, and prohibits courts or tribunals from questioning this.[39] "By eliminating early judicial supervision of detention, both provisions [of the PTA] enable the security forces to torture and otherwise violate detainees' rights."[40] This demonstrates Sri Lanka's legislative sanction for state violence.

In May 2010, Sri Lanka created a Lessons Learnt and Reconciliation Commission (LLRC) to respond to international criticism of its military offensive, but its mandate is solely to investigate the causes for the failure of the 2002 ceasefire – not to investigate allegations of war crimes and crimes against humanity.[41] Even despite its narrow scope, human rights groups have little hope for this commission because in the past, Sri Lanka created at least 9 such commissions after encountering international criticism of its human rights abuses, with no significant results.[42] Human Rights Watch, Amnesty International and International Crisis Group all declined to testify before the LLRC because it is "fundamentally flawed" and because of "Sri Lanka's long history of failed and politicised commissions of inquiry".[43] ICG remarked on Sri Lanka's increasing centralization of power and entrenchment of impunity, saying, "The growing authoritarianism of the government since the end of the war - exhibited most recently by the removal of presidential term limits and any remaining independence of commissions on human rights, police and elections - would make it difficult for even the best-intentioned commission of inquiry to make a meaningful contribution to political reconciliation or accountability now."[44] This demonstrates the pervasive and well-reasoned distrust of Sri Lanka's domestic institutions to adequately provide redress to Tamil victims.

The benefit of a truth and reconciliation-type approach is that it helps prevent the whitewashing of history. However, litigation such as that which this paper proposes achieves this objective. "[Alien Tort Statute cases in U.S. courts] are a way of setting the historical record straight – not just about *what* happened but also about *who* was responsible. As such, the cases

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public interest in a public speech." *Id.* at 282-83. The Sri Lankan judiciary previously relied upon the *prima facie* presumption of *omnia presumuntur rite esse acta*: the presumption that acts of public officers are lawful until proven otherwise, but higher courts in Sri Lanka have taken favorable steps to move away from this standard. *Id.* at 270.

[38] *Id.* at 277. Emergency Regulations "paved the way for torture and involuntary disappearances and even extra-judicial executions due to the absence of provisions requiring accountability and judicial protection of the detainees." *Id.* at 278.

[39] *Id.* at 276.

[40] *Id.*

[41] Rights Groups Snub Sri Lanka's 'Flawed' War Probe, *AFP,* 14 October 2010, http://www.google.com/hostednews/afp/article/ALeqM5iad6UGwRvdxtvkQ0xu7l0NQWofww?docId=CNG.54816e33debe3117debb062e3859e7f7.8c1.

[42] Letter to Secretary Clinton on Sri Lanka's Lessons Learnt and Reconciliation Commission, *Human Rights Watch*, 27 May 2010, http://www.hrw.org/en/news/2010/05/27/letter-secretary-clinton-sri-lankas-lessons-learnt-and-reconciliation-commission-llr.

[43] *Id.*

[44] Sri Lanka: Crisis Group Refuses to Appear Before Flawed Commission, *Crisis Group*, 14 October 2010, http://www.crisisgroup.org/en/publication-type/media-releases/2010/asia/sri-lanka-crisis-group-refuses-to-appear-before-flawed-commission.aspx.

can serve as a kind of mini-truth commission."[45]

Pursuing a suit in U.S. courts could also provide a new impetus for Sri Lanka to allow accountability for human rights violations. Initiating a human rights claim in the U.S. could diminish the impunity that currently blankets the island, and fear of additional lawsuits could motivate Sri Lankan officials to hold soldiers accountable for specific crimes. "By demonstrating that impunity can be challenged, ATCA cases can stimulate discussion about the crimes of the past and build support for bringing perpetrators to justice in their own domestic courts."[46] Thus, litigation in the U.S. can serve as a catalyst for greater accountability in Sri Lanka. This was the case in Ethiopia: after plaintiffs brought a suit alleging torture and extrajudicial killings by the Dergue, the Ethiopian military dictatorship that ruled in the 1970s, the Ethiopian government recognized the importance of accountability for past crimes, and launched trials of former Dergue officials.[47] Similarly, after the Center for Justice and Accountability brought a suit in the U.S. against Colonel Juan Lopez Grijalba, former head of the Honduran intelligence agency Direccion Nacional de Investigaciones, CJA was subsequently invited to Honduras to provide advice to local prosecutors on this strand of jurisprudence and how to utilize theories of command responsibility to hold others accountable in domestic courts.[48] This epitomizes the potential for success from initiating a human rights claim in U.S. courts: civil lawsuits can spark criminal prosecutions – domestic and international – which further enhance global accountability efforts.[49] Thus, litigation in the U.S. can influence foreign officials around the globe, encouraging them to abide by the rule of law.

B. International Mechanisms: Power Politics Obscures Victims' Rights

In June 2010, United Nations Secretary General Ban Ki-moon created a three-member panel to advise him on whether war crimes were committed during Sri Lanka's final military offensive.[50] The panel is chaired by Indonesia's former Attorney General Marzuki Darusman, who was also recently named UN special rapporteur for human rights in North Korea. The other two members are Yasmin Sooka, a human rights expert who participated in the truth and reconciliation commission in South Africa, and Steven Ratner, an American lawyer who advised the UN on bringing the Khmer Rouge to justice in Cambodia.[51] The panel's mandate is to advise Ban on "the issue of accountability with regard to any alleged violations of international human

[45] Sandra Coliver, Jennifer Green and Paul Hoffman, *Holding Human Rights Violations Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 180 (2005).
[46] Sandra Coliver, *Bringing Human Rights Abusers to Justice in U.S. Courts: Carrying Forward the Legacy of the Nuremberg Trials*, 27 CARDOZO L. REV. 1689, 1700 (2006).
[47] "[T]he *Abebe-Jira* case had an effect on public opinion in Ethiopia and on the commitment of the Ethiopian government to move forward with trials of former officials of the Dergue." *Id.*
[48] JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN U.S. COURTS 70 (2008).
[49] "Private civil lawsuits also serve as a catalyst for government action. The attention they focus on human rights abuses and the information they uncover about such abuses and about hidden assets can help prepare the way for criminal prosecutions or other legal action. In this way, civil litigation complements other strategies, strengthening the drive for accountability." *Id.*
[50] U.N.'s Ban Names Advisory Panel on Sri Lanka War, *Reuters,* 22 June 2010, http://www.reuters.com/article/idUSTRE65L4SW20100622.
[51] *Id*.

rights and humanitarian law during the final stages of the conflict in Sri Lanka."[52] Sri Lanka immediately responded to the creation of the panel by asserting that it was a threat to its sovereignty. "Sri Lanka regards the appointment of the Sri Lanka Panel of Experts as an unwarranted and unnecessary interference with a sovereign nation," Sri Lanka's Ministry of External Affairs said in a statement.[53] The three panel members, characterized in Sri Lankan media as "snoopers", were initially denied visas to enter the country.[54] Subsequently, Sri Lanka agreed to grant visas to the UN Panel to let them testify before its Lessons Learnt and Reconciliation Commission, but not to allow them to conduct any independent investigations.[55]

Hundreds of protesters led by Housing Minister Wimal Weerawansa, laid siege to the UN compound in Colombo last July, trapping staff inside for hours in an effort to force the UN to cancel its investigation.[56] Protesters initially attempted to break into the compound, but failed to breach the high walls. Approximately 125-200 UN staff members were trapped inside. Weerawansa said, "Our armed forces have beaten terrorism in an exemplary manner. We will not allow our soldiers and political leaders to be taken before an international war tribunal. We ask Ban Ki-moon to withdraw this panel if he wants to get the workers and those inside the building out."[57] After two days of protests outside the UN compound, Weerawansa began a fast unto death, saying, "Only when the accusations of war crimes are withdrawn and the [UN] panel abolished, I will stop this [fast]."[58] The Sri Lankan government had an ambivalent response to the protest and Weerawansa's actions, somewhat disassociating itself but rejecting his offer of resignation and refusing to quell the demonstration.[59] However, Weerawansa ended his fast after about two days, after President Mahinda Rajapaksa visited him and offered him a glass of water.[60] These protests followed violent demonstrations outside the Red Cross compound and British High Commission in Colombo, also in response to war crimes accusations.[61]

This virulent reaction – which proceeded with subtle official sanction – demonstrates Sri Lanka's dominating preoccupation with Westphalian sovereignty. Sri Lanka's obsession with its sovereignty comes at the expense of accountability and justice for extrajudicial violence against Tamils. Indeed, Sri Lanka justified its military offensive as necessary to defend the territorial

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[52] *Id*. The panel of experts accepted submissions of evidence through email until December 15; however were criticized by watchdogs for inadequately publicizing their call for submissions: "If a Panel meets in secret, and even downplays its own solicitation of submissions, what is the sound of one hand clapping?" Matthew Lee, On Sri Lanka, Stealth Solicitation of Submissions by UN Ban Panel Unexplained, *Inner City Press*, 23 October 2010, http://innercitypress.blogspot.com/2010/10/on-sri-lanka-stealth-solicitation-of.html.Though it appears that larger human rights groups are wary to criticize the UN panel, its utility seems endangered as long as official UN statements hesitatingly explore the possibility of war crimes having been committed, instead of unequivocally calling for a full and fair investigation.

[53] Sri Lanka Rejects UN's War Crime Advisory Panel, *Reuters AlertNet*, 23 June 2010, http://www.alertnet.org/thenews/newsdesk/N23216259.htm.

[54] UN Snoopers Will Not be Given Visa to Enter SL – Govt, *The Island*, 25 June 2010, http://www.defence.lk/new.asp?fname=20100625_01.

[55] Sri Lanka Says U.N. Panel Can Not Conduct Own War Crimes Probe, *Reuters*, 30 December 2010, http://ca.reuters.com/article/topNews/idCATRE6BT13B20101230.

[56] Sri Lanka Protesters Lay Siege to U.N. Compound, *USA Today*, 7 July 2010, http://www.usatoday.com/news/world/2010-07-06-Sri-Lanka_N.htm.

[57] *Id*.

[58] Sri Lanka Minister Begins 'Fast' Outside UN Office, *BBC News,* 8 July 2010, http://www.bbc.co.uk/news/10549819.

[59] Sri Lanka and the UN: Fast Foes, *The Economist*, 15 July 2010, http://www.economist.com/node/16595312.

[60] *Id.*

[61] Sri Lanka Protesters, *USA Today, supra* note 57.

integrity of the island from the LTTE, which had threatened its sovereignty by maintaining a de facto state in the North.[62] Further, Sri Lanka responds to international attempts to bring accountability to Sri Lanka as existential threats to its sovereignty. It redirects the discussion from one that focuses on the victims of its conflict, deserving of long-elusive justice, to one that asserts international inquiries are hypocritical infringements upon Sri Lanka's integrity. Through arguing that the concern of the international community for Sri Lanka's human rights crisis is motivated by neo-imperial, paternalistic desire for domination, Sri Lanka has been able to rally sympathetic countries such as China and Russia to effectively block action by the United Nations Security Council and United Nations Human Rights Council to initiate a meaningful investigation or transitional justice mechanism.[63] This dialectical opposition of the "West Against the Rest" allows Sri Lanka to shield its human rights abuses behind claims of sovereignty that resound with its Chinese and Russian allies. While there is credence to the claim that the language of human rights can be used to reinforce the dominant power structure in the international community, the solution is not to renounce international human rights principles altogether.[64] Succumbing to this binary fails to provide any meaningful recourse for Tamil victims in Sri Lanka, or other victims of state-sponsored violence around the world. This demonstrates the deeply flawed nature of the international system, in which regional and power politics often obfuscates the rule of law. Instead, universal jurisdiction should be employed without regard for the power of the state responsible for human rights violations.

III. Deriving a Global Justice Paradigm: Surveying the Use of Universal Jurisdiction Around the World

High-ranking Sri Lankan officials should be held accountable for war crimes, torture and genocide in any court that successfully gains personal jurisdiction over them. Justice should be pursued regardless of country borders—when certain egregious crimes have been committed, including genocide, torture and war crimes, universal jurisdiction is triggered to enable prosecutions wherever those responsible are found. Courts can "reach beyond territorial constraints to touch abusers of rights with the hand of legal accountability."[65] International,

[62] "As the democratically elected President of my country, I had no option but to take resolute action to defend the people of my country by taking measures to eradicate terrorism from our soil." Inform the World of Our Progress to Democracy - President to Sri Lanka Consuls, Policy Research & Information Unit of the Presidential Secretariat, Ministry of Defense, 19 January 2009, http://www.defence.lk/new.asp?fname=20090120_03.

[63] During the peak of Sri Lanka's military onslaught, China and Russia were blocking a formal discussion of the crisis in the UN Security Council. UN Council to Discuss Civilians in Sri Lanka War, *Reuters*, 26 March 2009, http://www.reuters.com/article/idUSN26488900._CH_.2400. Subsequently, the UN Human Rights Council was debating a resolution criticizing Sri Lanka's human rights violations during its military offensive, but passed a resolution largely commending Sri Lanka for its military feat. Sri Lanka: UN Rights Council Fails Victims, *Human Rights Watch*, 27 May 2009, http://www.hrw.org/en/news/2009/05/27/sri-lanka-un-rights-council-fails-victims.

[64] "[There is] a growing sentiment – fueled by the dismissal of cases in France and Germany against U.S. officials accused of crimes against detainees, and the International Criminal Court's focus thus far on Africa - that international justice targets only the leaders of weak states while officials of powerful countries have the muscle to prevent accountability." Reed Brody, The World Needs Spain's Universal Jurisdiction Law, *Human Rights Watch,* 27 May 2009, http://www.hrw.org/en/news/2009/05/27/world-needs-spain-s-universal-jurisdiction-law.

[65] DAVIS, *supra* note 49, at 50.

historical precedent exists for this: "Courts have always taken jurisdiction, in appropriate circumstances, over torts committed in other countries."[66]

This paper articulates a strategy for holding Sri Lankan officials accountable in U.S. courts, but does not suggest this is the exclusive arena for accountability. Activists in the United Kingdom have already filed initial claims to bring Sri Lankan officials to court there.[67] These efforts should be continued and extended throughout all countries that have universal jurisdiction statutes for these crimes, such as France, Belgium, Canada, Spain and Switzerland.[68] Cumulatively, these efforts work to ensure that those responsible for mass killings and torture cannot traverse the globe with impunity for their actions.[69]

Without universal jurisdiction, impunity will continue to prevail over governments who violate the basic human dignity of their citizens:

> Despite 50 years of rapid progress in the recognition of international human rights norms, enforcement of these norms and punishment of transgressors remains ineffective. The world community has proved incapable of preventing or stopping widespread violence on almost every continent. The vast majority of perpetrators have not been brought to justice, and their victims have not been compensated for their suffering. Although not a substitute for other means of enforcing human rights norms, human rights litigation is an important tool in the struggle to protect human rights.[70]

This is a natural corollary to the fact that this subset of human rights violations occurs with state sanction: "By their nature, crimes against humanity are unlikely to be punished in the state where they occurred."[71] Universal jurisdiction is an attempt to restore the rule of law – international law in this case – where impunity previously resided. "By holding those human rights violators accountable in court, a community elevates the rule of law above the basic human tendency toward vengeance. It restores the rule of law in place of the systemic impunity from which the atrocities were born."[72]

Carlos Mauricio, a plaintiff in a lawsuit against two Salvadoran generals, described the importance of litigation to him: "[T]he struggle against torture begins with the struggle against impunity….One of the facts from torture is that they make you not want to talk about it. It took me 15 years to be able to tell my story….[T]elling my story to others is important … because in that way you are really out of prison."[73] Universal jurisdiction helps break prisons that can disempower individuals around the globe, and enables litigation against human rights violators wherever they are found. U.S. civil and criminal suits against human rights violations are merely

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[66] JOHN TERRY, TAKING *FILARTIGA* ON THE ROAD: WHY COURTS OUTSIDE THE UNITED STATES SHOULD ACCEPT JURISDICTION OVER ACTIONS INVOLVING TORTURE COMMITTED ABROAD, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed.) 110 (2001).
[67] War Crimes Lawyers Seek Arrest of Sri Lankan President in Oxford, *The Guardian*, 30 November 2010, http://www.guardian.co.uk/world/2010/nov/30/sri-lanka-president-arrest-war-crimes.
[68] DIANE F. ORENTLICHER, THE FUTURE OF UNIVERSAL JURISDICTION IN THE NEW ARCHITECTURE OF TRANSNATIONAL JUSTICE, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed.) 214 (2004).
[69] *Id.* at 238.
[70] STEPHENS, *supra* note 11, at xxiii.
[71] DIANE F. ORENTLICHER, THE FUTURE OF UNIVERSAL JURISDICTION IN THE NEW ARCHITECTURE OF TRANSNATIONAL JUSTICE, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed.) 214, 232 (2004).
[72] DAVIS, *supra* note 49, at 14. "Traditionally, sovereign immunity has been an insurmountable barrier to the prosecution of human rights cases against states or state leaders in national courts." *Id.* at 41.
[73] STEPHENS, *supra* note 11, at xxiv.

one piece of a global push for accountability: "The *Filártiga* decision and the cases following it reflect an important principle of international law: Some crimes are so heinous that the perpetrators can be brought to justice wherever they are found."[74]

Traditional principles of international law allow states to criminalize conduct in five circumstances: territorial jurisdiction, active personality jurisdiction, passive personality jurisdiction, protective jurisdiction, and universal jurisdiction.[75] The last principle is most relevant to this paper's discussion. Universal jurisdiction is described through the following: "A state may criminalize conduct that has none of the four preceding connections to the state if it is so universally condemned that every state is authorized to vindicate the community interest in repressing it. Crucially, the crimes within a state's universal jurisdiction now overlap considerably with human rights standards and allow prosecution wherever the perpetrator is found."[76] In certain situations, states have a treaty-based obligation to exercise universal jurisdiction; for example, each of the four Geneva Conventions of 1949 requires states to extradite or prosecute those accursed of committing "grave breaches" of the Geneva regime.[77] However, in general, states have permissive authority to exercise universal jurisdiction. Grounds for universal jurisdiction also exist without accompanying treaties: "there is no doubt that states have authority under the principle of universal jurisdiction to prosecute individuals based on customary international law."[78] For example, though the Genocide Convention does not explicitly provide for universal jurisdiction, customary international law enables states to exercise universal jurisdiction over those accused of genocide.[79] Another example is universal jurisdiction for crimes against humanity.[80]

The distinction between whether states are permitted or required to prosecute based on universal jurisdiction is sometimes framed as an obligation *erga omnes*: an obligation that every state bears to the community of states.[81] "In the human rights setting, an obligation *erga omnes* might stem from the interest that all states have in ensuring protection against certain conduct, like torture, genocide, and crimes against humanity. Cooperating in the arrest, detention, and punishment of individuals who are involved in such crimes should satisfy the obligation."[82]

Universal jurisdiction was most famously used to prosecute Chilean General Augusto Pinochet. He led a coup d'etat against the democratically elected regime of President Salvador Allende and ruled Chile for 17 years, during which thousands of individuals were abducted, tortured, and executed in a systematic attempt to eliminate any political opposition.[83] In the mid-

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[74] STEPHENS, *supra* note 11, at xxv. *Filártiga* was the first case holding a foreign official accountable in U.S. courts for torture. A thorough discussion of *Filártiga* is in the following section of this paper.
[75] STEINHARDT, *supra* note 36, at 213.
[76] *Id. See also* ANNE-MARIE SLAUGHTER, DEFINING THE LIMITS: UNIVERSAL JURISDICTION AND NATIONAL COURTS, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed.) 168 (2004).
[77] STEINHARDT, *supra* note 36, at 213-14.
[78] *Id.* at 214.
[79] *Id.* at 214, quoting *In Matter of Demjanuk,* 603 F.Supp. 1468 (N.D. Ohio 1985), *aff'd*, 776 F.2d 571 (6th Cir. 1985).
[80] *Id.* at 214, quoting *Federation Nationale des Deportes et Internes Resistants et Patriots and Others v. Barbie, Cour de Cassation (Chambre Criminel),* Judgment, 78 Int'l L. Rep. 125 (Oct. 6, 1983).
[81] STEINHARDT, *supra* note 36, at 215.
[82] *Id.* at 214.
[83] *Id.* at 215. In 1978, the Chilean government gave itself amnesty for crimes committed between 1973 and 1978. In 1988, Pinochet lost a plebiscite election but remained in power until 1990, and then still retained the title Senator for Life, which afforded him legal immunity from prosecution for crimes committed during the junta's rule. *Id.*

1990s, Spanish prosecutors began to use Spanish law to prosecute human rights violators under principles of universal jurisdiction. Initially, complaints were filed against the military leadership in Argentina and Chile for their role in the disappearances of Spanish citizens in those countries. However, in May 1996 during the course of investigations, a complaint was filed against General Pinochet, and Spanish Judge Baltasar Garzon issued an arrest warrant and a request for the extradition of General Pinochet.[84] In October 1998, the United Kingdom agreed to enforce the international arrest warrant and detained Pinochet while he was in the U.K. for medical treatment. Pinochet initiated proceedings for *habeas corpus* and leave for judicial review of the provisional warrants in British courts. On October 28, 1998, the Divisional Court rejected both warrants and found that Pinochet "as a former head of state [was] clearly entitled to immunity [in U.K. courts] in relation to criminal acts performed in the course of exercising public functions."[85] On behalf of the Spanish government, the U.K. government appealed to the House of Lords, which eventually held that Pinochet was not entitled to immunity from prosecution for charges of torture, conspiracy to torture, and conspiracy to murder. The House of Lords ruled that the Convention Against Torture, as ratified by the U.K. and Chile, eliminated immunity for torture.[86]

In 2005, Spain's Constitutional Court held that Spanish courts could hear cases alleging crimes against humanity and genocide on the basis of universal jurisdiction.[87] Nobel Laureate Rigoberta Menchu had filed a complaint asking a Spanish court to investigate the genocide, torture, murder, and illegal imprisonment committed by Guatemalan security forces between 1978 and 1986, during which over 200,000 people were killed.[88] CJA is assisting in these proceedings.[89] In May 2003, Spain's Supreme Court declined to hear the Guatemalan case because it was not tied to Spain's national interests. However, Spain's Constitutional Court rejected this and instead held that "the principle of universal jurisdiction takes precedent over whether or not national interests are at stake."[90] This holding captures the correct approach to universal jurisdiction: it should not be employed as a tool to further national interests or to gain or demonstrate power, but should rather be used as a mechanism to provide justice to individuals who would otherwise have no recourse available. A state should utilize its universal jurisdiction statutes without regard for what it will gain from doing so; universal jurisdiction should be used to promote blind, global justice.

In 1961, Israel utilized principles of universal jurisdiction to prosecute Adolf Eichmann, one of the architects of the Holocaust. Israeli agents abducted Eichmann from Argentina, where he had fled after the war, and brought him to trial in Israel, where he was convicted and executed.[91] The District Court of Jerusalem stated: "The State of Israel's 'right to punish' the

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[84] *Id.*
[85] *Id.* at 216-17, quoting from *In re Pinochet Ugarte*, 38 I.L.M. 68, 83.
[86] STEINHARDT, *supra* note 36, at 217. However, during the fall of 1998, Pincohet suffered two strokes and a team of doctors chosen by the U.K. determined that he was unfit to stand trial. *Id.* at 227-28. In 2000, the U.K. decided not to proceed with the extradition based on Pinochet's medical condition, and he returned to Chile. There he was granted immunity based on allegedly having vascular dementia, but this was revoked after a televised appearance in which he appeared quite lucid. He was then deemed fit to stand trial in 2005 by the Supreme Court for charges relating to the disappearance of six dissidents in 1974, but while awaiting trial he died from a heart attack. *Id.* at 228. The United States has also ratified the Convention Against Torture.
[87] *Id.* at 227.
[88] *Id.*
[89] DAVIS, *supra* note 49, at 65.
[90] *Id.* at 229, quoting from *Guatemala Genocide Case,* STC 237/2005, (26 September 2005).
[91] STEINHARDT, *supra* note 36, at 227.

accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source."[92] The State of Israel was held to be entitled to try Eichmann, "pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement."[93]

In 2000, Belgium issued an international arrest warrant for Abdulaye Yerodia Ndombasi, then the foreign minister of the Democratic Republic of Congo. The warrant was issued under Belgium's 1993 universal jurisdiction statute, and alleged that prior to becoming foreign minister, Yerodia had incited racial hatred by publicly calling for the killing of Tutsis, causing hundreds of deaths, and according to Belgium, constituting crimes against humanity and war crimes.[94] The DRC instituted proceedings before the International Court of Justice, in *Case Concerning the Arrest Warrant of 11 April 2000*, claiming that the warrant violated Yerodia's immunity under international law as foreign minister. The ICJ held that Belgium's act of issuing the warrant against Congo's incumbent Minister for Foreign Affairs violated his immunity from criminal jurisdiction and said Belgium must cancel the warrant.[95] However, the result would likely have been different if Yerodia was not a sitting government official.

Human Rights Watch identified Haiti's Raul Cedras in Panama and Haiti death squad leader Emmanuel Constant in the United States as individuals who should be indicted in the countries in which they reside.[96] CCR is pursuing a criminal case against former Secretary of Defense Donald Rumsfeld in Germany under Germany's universal jurisdiction law.[97]

Further, exercising universal jurisdiction can enable war-torn nations to move forward from episodes of ethnic violence. Litigation helps distinguish individual liability from group responsibility, which is crucial for fractured societies to begin the process of reconciliation.[98]

> Lawyers for CCR, CJA, and ERI all described their work as part of a larger movement toward increased accountability for human rights violations. As CJA's director of Development and Outreach, Christopher McKenna explained, 'when you present a case…there's this message for other people about upholding a human rights framework.' To that end, these groups have worked to encourage the adoption and implementation of universal jurisdiction in the United States and abroad. They have also struggled to weave international human rights law into the fabric of U.S. common law. Furthermore, they have tried to use their ATS work to encourage accountability movements in the countries that spawned the ATS cases.[99]

Universal jurisdiction is an essential tool in furthering global accountability. "Legal proceedings focus blame where it belongs, calling individuals to account for their crimes and absolving communal blame."[100] This is especially important in countries such as Sri Lanka, where the war

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[92] *Id.* at 229, quoting from *Attorney Gen. of Isr. V. Eichmann,* 36 Int'l L. Rep. 18, 50 (Isr. D.C. Jer. 1961), *aff'd*, 36 Int'l L. Rep. 277 (Isr. S. Ct. 1962).
[93] STEINHARDT, *supra* note 36, at 299.
[94] *Id.* at 239.
[95] *Id.* at 243.
[96] JOHN TERRY, TAKING *FILARTIGA* ON THE ROAD: WHY COURTS OUTSIDE THE UNITED STATES SHOULD ACCEPT JURISDICTION OVER ACTIONS INVOLVING TORTURE COMMITTED ABROAD, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION, ed. Craig Scott, 114 (2001).
[97] DAVIS, *supra* note 49, at 65.
[98] WILLIAM ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILARTIGA V. PENA IRALA 178 (2007).
[99] DAVIS, *supra* note 49, at 64.
[100] *Id.*

has been characterized as being between the Tamil and Sinhalese people, as opposed to between the Sri Lankan government.

IV. Statutory Doctrine of Universal Jurisdiction in the United States

The United States can exercise jurisdiction over human rights violations committed extraterritorially through the Alien Tort Statute, the Torture Victims Protection Act, and the Genocide Accountability Act.[101] Each statute's history and application will be explored in turn, demonstrating its potential to hold Sri Lankan officials accountable in U.S. courts.

A. Alien Tort Statute

The Alien Tort Statute was adopted in 1789 as part of the Judiciary Act, which was the first law passed in the United States, and created the federal court system.[102] ATS, also known as the Alien Tort Claims Act, and codified in 28 U.S.C.A. § 1350, provides that the "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Judge Henry Friendly referred to ATS as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know whence it came."[103] However, subsequent legal scholarship has clarified its origins and purpose: "The Founders, in enacting the law as members of the First Congress, were concerned about the enforcement of the 'law of nations' by the federal courts for reasons important to the preservation of the nascent republic: avoiding the risk of wars caused by offending more powerful nations and adhering to a principled belief that the enforcement of the 'law of nations' was an essential duty of international citizenship and the federal government."[104]

At the time, English common law included the concept of transitory torts: the principle that a tortfeasor could be sued not only where the tort was committed, but also wherever the tortfeasor was found.[105] "The ATS was enacted against the backdrop of international scandals ignited by torts committed in the United States against foreign diplomats. The disputes were litigated in state courts because the federal courts had no jurisdiction over the claims….Response to Congress' pleas [for the states to enact legislation granting aliens remedies for violations of

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[101] War crimes are defined in 18 U.S.C.A. § 2441, and include but are not limited to torture, cruel or inhuman treatment, murder, willfully killing or causing serious injury to civilians.

[102] STEINHARDT, *supra* note 36, at 52.

[103] *Id.*

[104] *Id.* at 53 (2009). "[T]he framers repeatedly expressed concern about their inability to comply with international law. Jurists of that era viewed international law as part of the common law, binding on all nations. The ATS was a key component of an effort to comply with the new nation's fundamental obligation to adhere to the law of nations." STEPHENS, *supra* note 11, at 3-4.

[105] "In *Mostyn v. Fabrigas,* (1774) 98 Eng. Rep. 1021 (K.B.), Lord Mansfield applied the transitory tort doctrine to an assault and false imprisonment claim brought in London by a resident of the island of Minorca against the island's governor based on a tort committed there. Similarly, Oliver Ellsworth, the author of the ATS and a Senator from Connecticut, presided over a trial in Connecticut in 1786 in which he applied the transitory tort doctrine." STEINHARDT, *supra* note 36, at 53. "The statute does not require that the tort occur in the United States, that the defendant be a U.S. citizen, or that Congress specifically create a cause of action. If the defendant is subject to the personal jurisdiction of a U.S. court, if the suit is for a tort, and if that tort constitutes a violation of international law such as the prohibition of torture, the federal court has jurisdiction over the claim." STEPHENS, *supra* note 11, at 1.

international law] were so inadequate that Edmund Randolph complained in 1787 that the failure to punish violations of the law of nations threatened to plunge the nation into war."[106] His hyperbole was based on the real fear that the United States would not be respected as a new nation if it did not demonstrate it could uphold international norms.[107]

ATS stood essentially unused until 1980,[108] when it was used in Filártiga v. Peña-Irala.[109] In *Filártiga,* Dolly Filártiga filed a successful civil suit against Américo Norberto Peña-Irala, who was the former Inspector General of Police in Asunción, Paraguay. Peña kidnapped and tortured Dolly's brother, Joelito Filártiga.[110] In Paraguay, Joelito's father brought murder charges against Peña and the police but the case went nowhere. The Second Circuit ruled that U.S. courts had jurisdiction to hear the case under the ATS for a tort "committed in violation of the law of nations or a treaty of the United States."[111] "[T]he facts of the *Filartiga* case, a single act of brutality committed by a culprit who was living illegally in the United States, presented the human rights issues in a clear, dramatic posture."[112] The Court held, "In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations."[113]

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[106] "For example, an attack by a French nobleman on a French diplomat, General Marbois (the "Marbois Affair"), led to a flurry of exchanges between members of the federal government and French representatives. Despite France's demands for redress, the federal government was only able to urge the state court to take action." STEPHENS, *supra* note 11, at 5. "The ATS simply provides jurisdiction for federal courts to hear such claims when they involve torts in violation of the law of nations. If federal courts did not have this ability, the claims would be actionable only in state courts, even if important questions of international law were concerned." *Id.* at 43.

[107] Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor,* 83 AM. J. INT'L L. 461, 475-88 (1989).

[108] "Between 1789 and 1980, while the ATS lay mostly dormant, the scope of customary international law expanded. After the trials of Nazi war criminals at Nuremberg, the idea that individuals bear direct responsibility for violations of international law became firmly established. Moreover, in the aftermath of World War II, the substantive scope and universal acceptance of international human rights norms increased at a rapid pace, giving individuals protections and not just imposing criminal obligations on them." STEINHARDT, *supra* note 36, at 54. "Between 1795 and 1976, fewer than two dozen reported cases invoked jurisdiction under the ATS. Jurisdiction was sustained in only one, *Adra v. Clift,* a 1961 international custody dispute. *Adra* upheld ATS jurisdiction over a claim by a Lebanese national that his ex-wife had illegally seized custody of his children, using a false passport to bring the children to the United States. The court cobbled together the tort (wrongful interference with custody) with an international law violation (passport falsification) to find a violation of the ATS. The fact that the plain language of the statute ("a tort in violation of the law of nations") requires that the tort itself constitute a violation of the law of nations was not discussed in the opinion." STEPHENS, *supra* note 11, at 7.

[109] 630 F.2d 876 (2d Cir, 1980).

[110] Dolly Filartiga describes being taken to see Joelito's broken corpse and being told by Peña Irala to carry his body back to their house and "never talk about what happened." Dolly recalls telling him, "Tonight you have power over me, but tomorrow I will tell the world." STEPHENS, *supra* note 11, at xvii. Dolly described struggling for years with sadness and guilt over her brother's death; one year after his murder, she tried to commit suicide by overdosing on medicine. ACEVES, *supra* note 99, at 21. In an affidavit that accompanied the stay of deportation the Filártigas filed to keep Peña in the U.S., Dolly described how her family had been threatened and harassed due to their efforts to pursue this case in Paraguay, and said, "Because the defendant Peña will never be brought to justice in Paraguay, this lawsuit presents a crucial and the only means by which I can seek justice for my brother's death and my injuries." *Id.* at 33.

[111] *Filártiga* at 878.

[112] STEPHENS, *supra* note 11, at 8.

[113] *Filártiga* at 880.

The Court then said the Supreme Court had enumerated the appropriate sources of international law, holding that the law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[114] The end of the Court's opinion holds that the torturer is like the pirate and slave trader in history as *hostis humani generis*: an enemy of all mankind.[115] This phrase recurs throughout an exploration of which other extraterritorial criminal acts can provide grounds for liability in U.S. courts. "The common denominator of hostis humani generis seems to have been the magnitude of the threat posed by the acts, coupled with the universality of condemnation of the acts. The effect of the doctrine was to hold individuals liable, both civilly and criminally, for violations. When wrongdoers violated the law of nations their liability followed them everywhere."[116] The Court awarded the Filártigas $10.4 million, and this began an upsurge in ATS litigation.[117] Thus, holding Sri Lankan officials accountable for acts of torture is fully in accordance with the historical first case holding foreign human rights violators accountable in U.S. courts. "Following *Filártiga*'s lead, most of the ATS cases immediately post-*Filártiga* were filed against former foreign officials found in the United States who were implicated in human rights violations in their home countries. As time went on, however, ATS cases began to target not only individual torturers, those who aided and abetted or conspired with them, and their commanders, but also corporations and even U.S. officials alleged to have violated international human rights norms."[118]

The significance of *Filártiga* cannot be overstated: "in construing a somewhat obscure jurisdictional statute [the ATS], the Second Circuit appears to have articulated a new role for domestic courts of the United States in discerning and applying international law."[119] Prior to

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[114] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820); Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 295 (E.D.Pa.1963).

[115] *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir, 1980).

[116] Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L. L.J. 53, 61 (1981).

[117] "Despite concerns that *Filartiga* would unleash a flood of federal court litigation, fewer than two dozen cases have sustained ATS claims in the years since the *Filartiga* decision. Approximately 150 lawsuits had been filed under the statute as of late 2006; the majority had been dismissed, most often for failure to allege a cognizable violation of international law." STEPHENS, *supra* note 11, at 12. "[I]n our view the ATS litigation of the past twenty years has accomplished a number of important objectives and has laid the foundation for further development of this civil anti-impunity tool for human rights victims in the United States and possibly in other countries." Coliver, *supra* note 46, at 174.

[118] STEINHARDT, *supra* note 36, at 54. This wave of ATS cases, in which suits were brought against former foreign officials who resided in or visited the U.S., is considered the first generation of ATS cases. The second generation of cases is composed of suits against multinational corporations for their alleged complicity in human rights violations. The first and most prominent of these cases was *Doe v. Unocal Corp.*, 27 F. Supp. 2d. 1174 (C.D. Cal. 1998), in which a suit was brought against California-based oil company Unocal for complicity in forced labor, torture, rape and other human rights violations in Burma. The third generation of ATS cases involves an attempt to hold U.S. officials accountable under international human rights law, typically with relation to actions taken in the "war on terror". *Id.* at 69-70, describing attempts to hold U.S. officials accountable for torture committed at Guantanamo Bay. "The courts have uniformly held that corporations can be sued for direct involvement in abuses such as genocide and slavery, although the extent of corporate liability for assisting in abuses committed by others is still unclear. Litigants have also sought, with less success, to use the *Filartiga* precedent to hold the U.S. government and its officials accountable for human rights abuses." STEPHENS, *supra* note 11, at xxiii. Since the first wave of cases is the one relevant to the strategy this paper advocates, this paper will not explore the second or third waves of ATS cases.

[119] Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L. L.J. 53, 112 (1981). "Since *Filartiga* was decided, it has been cited in

Filártiga, it would be almost inconceivable to bring a lawsuit against Sri Lankan officials in the United States. *Filártiga* lay the necessary groundwork for U.S. courts to utilize an old, obscure statute to bring accountability to human rights violations in other countries. *Filártiga* "amply supports the proposition that customary international law is incorporated in United States law, and that United States courts possess jurisdiction to decide cases in which it is invoked."[120] The Alien Tort Statute is essentially a statute conferring universal jurisdiction in U.S. courts over a limited number of offenses. Universal jurisdiction "dispenses completely with a requirement of a particular connection between a state and the activities under review, relying instead on the collective interest that establishes a tie not to any one country, but to all states."[121] This enables U.S. courts to provide justice to Tamil victims without a clear U.S. interest being served.

The Supreme Court slightly narrowed the application of ATS in *Sosa v. Álvarez-Machaín*.[122] However, *Sosa* affirmed the basic constitutionality of ATS, grounding its authority in the federal question jurisdiction of Article III of the Constitution.[123] All U.S. courts must adhere closely to the *Sosa* ruling: "To date, *Sosa* remains the only Supreme Court decision interpreting the meaning and scope of the ATS."[124] In *Sosa,* Humberto Álvarez-Machaín, a Mexican national, filed a suit against Jose Sosa, a Mexican agent who collaborated with the U.S Drug Enforcement Agency to kidnap Álvarez-Machaín and deliver him to U.S. custody. Mexico formally protested Álvarez's abduction immediately, and issued requests for the extradition of the DEA officials responsible for abducting him.[125] However, the Supreme Court held that Álvarez-Machaín did not have a valid claim under ATS. The *Sosa* Court clarified that ATS did not create a cause of action, but instead merely "furnish[ed] jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[126] The Court held prospectively, "we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[127] The Court

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approximately 1,100 law review articles and 180 published decisions in the United States. It has also been cited and used in many foreign jurisdictions….Because of its prominence, the *Filartiga* case is used in every major international law and human rights law textbook as an example of the domestic application of international law." ACEVES, *supra* note 99, at 77.

[120] Steven Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOKLYN J. INT'L. L. 289, 303 (1982).

[121] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 41 (2002). "In addition, customary international law, at a minimum, permits all states to exercise universal jurisdiction over genocide, crimes against humanity, war crimes, and torture." *Id.* at 43. Universal jurisdiction will be explored more fully in Part IV of this paper.

[122] *Sosa v. Álvarez-Machaín*, 542 U.S. 692.

[123] "The question as to whether Congress had the constitutional power to grant the federal courts authority over claims between aliens for violations of international law has been put to rest by the Supreme Court decision in *Sosa*, which did not even find it necessary to address the issue….The constitutional authority for the ATS comes … from the federal question jurisdiction of Article III of the Constitution, which authorizes Congress to grant the federal courts jurisdiction over suits 'arising under the Constitution, laws, or treaties of the United States.'" STEPHENS, *supra* note 11, at 41.

[124] STEINHARDT, *supra* note 36, at 54. "From 1980 to 2004, the Supreme Court declined to review nearly a dozen ATS cases decided by the courts of appeal. Although there was considerable uniformity of opinion among the appellate courts, it was only a matter of time before the Supreme Court would accept an ATS case and interpret the statute for the first time." *Id.* at 74-75.

[125] STEINHARDT, *supra* note 36, at 75.

[126] *Sosa* at 720.

[127] *Id.* at 725.

here held that this requirement was "fatal" to Álvarez-Machaín's claim.[128] However, the Court's decision was not fatal to future ATS litigation:

> Significantly, the Court cited with approval cases, including *Filártiga*, which permitted ATS claims for violations of international norms that are 'specific, universal and obligatory.' Although the Court denied the particular arbitrary arrest claim advanced by Dr. Álvarez, it did so in a manner that does not appear to undermine the prior case law in which claims of genocide, war crimes, crimes against humanity, slavery-like practices, torture, disappearance, summary execution, and prolonged arbitrary detention were found actionable under the ATS.[129]

Thus, though *Sosa* itself was resolved by denying ATS jurisdiction over Álvarez-Machaín's claim, the ruling did not preclude future suits from using the Alien Tort Statute to gain jurisdiction over a narrow subset of human rights violations – including war crimes, torture and genocide, which I argue Sri Lankan officials committed and for which they should be held liable. In fact, "[h]uman rights activists hailed the long-awaited decision in *Sosa* as a major victory, a cause for celebration."[130] *Sosa* offers official sanction from the highest court in the land for bringing human rights cases in U.S. courts, even when there is no direct link to U.S. interests.

Thus, a valid claim can be made with respect to the human rights violations committed by Sri Lankan soldiers, as the case law further demonstrates in the subsequent section. The Second Circuit Court of Appeals has recognized genocide, war crimes and crimes against humanity as crimes under international norms consistent with the application of *Sosa.* In *Presbyterian, 582 F.3d 244, 256 (2d Cir. 2009)*, the Second Circuit reaffirmed that pursuant to ATS, a court may exercise subject matter jurisdiction over a claim concerning genocide, war crimes and crimes against humanity as customary international law or norms of international law.[131] Further, "Crimes against humanity violate the law of nations [constituting a] norm[ ] of sufficient specificity and definiteness to be recognized under the ATS."[132] Other federal courts, including the Second, Ninth and Eleventh Circuits, have extended the list of human rights torts actionable under ATS to include extrajudicial execution, disappearance, genocide, crimes against humanity, cruel, inhuman and degrading treatment, and forced labor.[133] Thus, the statutory doctrine available for holding Sri Lankan officials accountable for war crimes, torture and genocide is robust and fortified by Supreme Court sanction.

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[128] *Id.*

[129] Coliver, *supra* note 46, at 171, citing *Sosa* at 2766 and *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994). See also STEPHENS, *supra* note 11, at 57 ("The stern admonitions of the *Sosa* opinion were not directed at wayward lower courts that had strayed from the appropriately narrow understanding of their common law powers. To the contrary, the lower courts had applied the ATS narrowly and with great caution. As a result, *Sosa* did not disapprove of any of the pre-*Sosa* ATS decisions.")

[130] "For over two decades, supporters of the ATS line of litigation had waited warily for Supreme Court review of *Filartiga* and its progeny…[In *Sosa*, the] Court endorsed the approach followed by the lower courts and validated the careful application of statute." STEPHENS, *supra* note 11, at 20. *But see* ACEVES, *supra* note 99, at 156 ("The *Sosa* decision is viewed as a success by both advocates and critics of ATS litigation. Advocates of ATS litigation view the decision as an affirmation of the *Filartiga* precedent. They argue that the Supreme Court's decision rejected the assertion that policy considerations should compel dismissal of all ATS litigation. In contrast, critics of ATS litigation assert that the decision would make it harder to bring ATS lawsuits. They argue that the Supreme Court's decision instructed courts to carefully consider the foreign policy implications of these cases and that such rigorous review would result in the dismissal of most cases. In practice, the long-term implications of the *Sosa* decision are difficult to measure.").

[131] *Kadic v. Karadzic,* 70 F.3d 232, 236 (2d Cir. 1995).

[132] *Almog v. Arab Bank,* PLC, 471 F. Supp. 2d 257, 274 (E.D.N.Y. 2007).

[133] Coliver, *supra* note 47, at 1691.

B. Torture Victims Protection Act

The Torture Victims Protection Act was enacted in 1992. Unlike ATS, the TVPA enables U.S. citizens and non-citizens to assert a civil claim, and also differs by "contain[ing] explicit provisions governing exhaustion of local remedies, tolling, and the statute of limitations (10 years)."[134] Torture is defined as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control".[135] The Torture Act, 18 U.S.C. § 2340A, provides a cause of action against anyone who commits or attempts to commit torture. This includes utilizing command responsibility to hold superior officials accountable: "The TVPA made it clear that commanders could be liable for the acts of perpetrators subordinate to them."[136] Command responsibility is an integral component of holding high-ranking Sri Lankan officials accountable, such as Defense Minister Gothabaya Rajapaksa. The TVPA enables "an individual who has been subjected to torture to sue for damages and authorizes a suit for extrajudicial execution by either the legal representative of the person killed or by 'any person who may be a claimant in an action for wrongful death.'"[137] As of late 2006, approximately 45 reported decisions included TVPA claims, of which about a dozen resulted in final judgments awarding damages, with another dozen pending in trial or appellate courts.[138]

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[134] STEINHARDT, *supra* note 36, at 67. However, "local remedies which are 'unobtainable, ineffective, inadequate, or obviously futile' need not be exhausted." *Id,* citing *Xuncax v. Gramajo*, 886 F.Supp. 162, 178 (D. Mass. 1995). Several courts have ruled that there is no parallel requirement to exhaust local remedies when filing an ATS case. DAVIS, *supra* note 49, at 182.

[135] 18 U.S.C.A. § 2340.

[136] STEINHARDT, *supra* note 36, at 68. The jury instruction in *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. Oct. 26, 2005), in which plaintiffs brought a suit for extrajudicial killing and torture against Nicolas Carranza, the former Vice-Minister of Defense of El Salvador from 1979-1981, provides a concise definition of the theory of command responsibility: "To hold a military commander liable under the law of command responsibility, the plaintiffs must prove the following elements by a preponderance of the evidence: (1) A superior-subordinate relationship existed between the defendant and the person or persons who committed torture, extrajudicial killing and/or crimes against humanity. (2) The defendant knew or should have known, in light of the circumstances, at the time that his subordinates had committed, were committing or were about to commit torture, extrajudicial killing and/or crimes against humanity. (3) The third element, the defendant failed to take all necessary and reasonable measures to prevent these abuses or failed to punish the subordinates after the commission of torture, extrajudicial killing and/or crimes against humanity." *Id.* at 69. *See also* STEPHENS, *supra* note 11, at 257 (2008) ("Domestic courts in ATS and TVPA cases have held defendants liable for the actions of their subordinates, whether the violations occurred in wartime or in peacetime. U.S. decisions look to case law of international tribunals to define the scope of command responsibility."). *See also* VALERIE OOSTERVELD AND ALEJANDRA FLAH, HOLDING LEADERS LIABLE FOR TORTURE BY OTHERS: COMMAND RESPONSIBILITY AND *RESPONDEAT SUPERIOR* AS FRAMEWORKS FOR DERIVATIVE CIVIL LIABILITY, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed.) 441 (2001) ("[L]iability falls on those who had control over the actor and who failed to exercise that control to stop the harm. Command responsibility and *respondeat superior* are structurally analogous: they provide ways through which a person in authority can be held liable for deeds done by another.").

[137] STEPHENS, *supra* note 11, at 85.

[138] "Claims have been dismissed for varied reasons, including immunity from suit; failure to show that the defendant was acting under color of law of a foreign nation; the statute of limitations; or failure to state a claim that meets the TVPA definitions." STEPHENS, *supra* note 11, at 76.

The TVPA requires the exhaustion of local remedies that are "adequate and available"; however the TVPA's Senate Report noted that this requirement should be applied liberally and that exhaustion is not required when the "local remedies were ineffective, unobtainable, unduly prolonged, inadequate, or obviously futile."[139] This futility exception for exhausting local remedies should be invoked for Sri Lanka; Sri Lanka's Lessons Learnt and Reconciliation Commission is widely considered to be an instrument for official whitewashing over the atrocities committed in the final stages of war.[140] Thus Sri Lanka's domestic remedy is feckless and attempting to "exhaust" it would be futile, inadequate and ineffective.

The TVPA was not intended to replace the Alien Tort Statute or repeal it by implication: "The TVPA's legislative history demonstrates that it does not supersede the ATS, which continued to have 'other important uses.'"[141] The TVPA is a carefully constructed statute authorizing universal jurisdiction for U.S. courts. "The TVPA constitutes a modern expression of congressional support for the exercise of extraterritorial jurisdiction over certain egregious human rights violations."[142] It was first used successfully in the criminal prosecution of Chuckie Taylor, for acts of torture and extrajudicial killings committed in Liberia.[143] Aspects of this case will be explored further in the following section of this paper. However, it is relevant for this section to explore how Taylor's prosecution withstood challenges to the constitutionality and extraterritoriality of the Torture Act.

Taylor moved to dismiss his indictment for torture and extrajudicial killings on the grounds that the Torture Act is unconstitutional. The district court and the Court of Appeals of the Eleventh Circuit held it was "well within Congress's power under the Necessary and Proper Clause to criminalize both torture, as defined by the Torture Act, and conspiracy to commit torture".[144] Regarding the Act's extraterritorial application, the Appellate Court held that the Torture Act "evinces an unmistakable congressional intent to apply the statute extraterritorially".[145] The Appellate Court explored the case law surrounding the extraterritorial application of U.S. law. The Court quoted *Church v. Hubbart,* 6 U.S. (2 Cranch) 187, 234, 2 L.Ed. 249 (1804): "[s]ince an early date, it has been recognized that Congress may attach extraterritorial effect to its penal enactments," and that a nation's "power to secure itself from injury may certainly be exercised beyond the limits of its territory." The Court then stated, citing *Nieman v. Dryclean U.S.A. Franchise Co*., "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the

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[139] STEPHENS, *supra* note 11, at 404. The ATS has no explicit requirement that plaintiffs first exhaust all remedies in the country in which the abuse occurred. *Id.* at 407.

[140] See Part II of this paper for an analysis of the problems with the LLRC.

[141] Coliver, *supra* note 46, at 172, citing S. REP. No. 102-249, at 4 (1991) and H.R. REP. No. 102-367, at 86 (1991). "ATS should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law." H.R. REP. No. 102-367, at 2 (1991), as quoted in STEINHARDT, *supra* note 36, at 67.

[142] STEPHENS, *supra* note 11, at 79.

[143] *United States v. Roy M. Belfast, Jr. (a.k.a. Chuckie Taylor)*, 611 F.3d 783 (2010).

[144] *Id.* at 793.

[145] *Id*. *See also* STEPHENS, *supra* note 11, at 80 ("At the time the [TVPA] was enacted, two dissenting senators expressed doubts about its constitutional basis. No court has endorsed their concerns. Congress has the authority to create a cause of action for violations of international law under any one of several constitutional powers: the congressional power to control foreign affairs, to implement international law, or to 'define and punish … offenses against the law of nations.' The federal courts have jurisdiction over TVPA claims under the general federal question statute. Since TVPA claims also constitute violations of the law of nations, the ATS provides an alternative source of jurisdiction over TVPA claims filed by aliens.").

territorial jurisdiction of the United States…. The presumption against extraterritoriality can be overcome only by clear expression of Congress' intention to extend the reach of the relevant Act beyond those places where the United States has sovereignty or has some measure of legislative control."[146] Since the Torture Act explicitly prohibits acts and attempts of torture "outside the United States"[147], the Court held the Torture Act's extraterritorial application to be legitimate. Thus, it furnishes sturdy grounds for holding Sri Lankan officials accountable for torture.

C. Genocide Accountability Act

The third statutory basis for holding individuals accountable in U.S. courts for international human rights violations is the Genocide Accountability Act. The GAA was passed in 2007 and has not yet been used in a successful criminal prosecution.[148] However, the GAA expands the jurisdictional basis of United States law criminalizing genocide and allows prosecution of any perpetrator of genocide found in the U.S. The GAA essentially creates universal jurisdiction for genocide, and builds upon previous statutes and treaties. "The Genocide Convention requires states to refrain from practicing or encouraging genocide and to punish persons guilty of genocide or conspiracy to commit genocide….[N]othing can excuse or justify genocide. The absolute prohibition against genocide has been reaffirmed in U.N. agreements and resolutions and incorporated into U.S. domestic law through the Genocide Convention Implementation Act."[149] The Restatement of the Law on Foreign Relations states that the practice of states has been to apply universal jurisdiction to "certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, … [and] genocide…"[150] In a hypothetical situation where the GAA was passed while Pol Pot was alive, the GAA "could easily apply … Especially the language 'brought into' indicates that the President could bring a suspect into the country specifically for trial."[151] Genocide is defined in 18 U.S.C.A. § 2441 as acts committed "in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group". Further, the law states, "Any person who attempts or conspires to commit an offense under this section shall be punished in the same manner as a person who completes the offense."[152] This inclusion is significant for prosecutions of Sri Lankan officials, since a majority of Tamils on the island survived the genocidal military assault. However, this statute explicitly treats a genocidal

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[146] *Nieman v. Dryclean U.S.A. Franchise Co.,* 178 F.3d 1126, 1129 (11th Cir.1999).
[147] 18 U.S.C.A. § 2340A.
[148] The GAA, or Pub. L. No. 110-151; 121 Stat 1821. Section 5 provides that individuals can be prosecuted if "the alleged offender is brought into, or found in, the United States, even if that conduct occurred outside the United States."
[149] STEPHENS, *supra* note 11, at 157.
[150] Restatement (Third) of Foreign Relations Law of the United States § 404. Genocide may be the most codified international crime: it was prohibited in international law even before the Universal Declaration of Human Rights passed the General Assembly, and has been subsequently affirmed through The Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and the Principles of international cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity. Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L. L.J. 53, 92 (1981).
[151] Zachary Pall, *The Genocide Accountability Act and U.S. Law: The Evolution and Lessons of Universal Jurisdiction for Genocide,* 3 INTERDISCIPLINARY J. OF H.R. L. 1 at 29.
[152] 18 U.S.C.A. § 2441.

attempt as equivalent to a completed genocide. The law provides jurisdiction regardless of whether the crimes were committed outside the U.S., as long as the perpetrator is a U.S. national, an alien lawfully admitted for permanent residence in the U.S., a stateless person whose habitual residence is in the U.S, or is present in the U.S.[153]

V. Precedent Holding Foreign Officials Accountable in U.S. Courts

From 1980 to 2006, a total of 18 perpetrators (including Filártiga) have successfully been sued in U.S. courts.[154] This section will explore U.S. precedent for holding foreign officials accountable for international human rights violations. Through using a combination of the Alien Tort Statute and Torture Victims Protection Act,[155] individual victims have brought successful suits against foreign state actors where they would otherwise likely have no recourse.

A. Chuckie Taylor

The first successful criminal case holding foreign officials accountable in U.S. courts was *United States v. Roy M. Belfast, Jr. (a.k.a. Chuckie Taylor)*, 611 F.3d 783 (2010), in which the commander of the Anti-Terrorist Unit (known widely as the "Demon Forces") in Liberia, responsible for torture and extrajudicial killings, was prosecuted under the Torture Act and the Alien Tort Statute. Taylor was arrested in 2006 at Miami International Airport, after flying from Trinidad to Miami, for falsifying information on his passport.[156] During his arrest, Emmanuel knowingly waived his rights and voluntarily made the following statements: first, that his father was Charles Taylor, even though he had listed "Daniel Smith" as his father on a recent U.S. passport application; second, that the Anti-Terrorist Unit was his "pet project" prior to 2000 and

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[153] *Id.*

[154] Coliver, *supra* note 47, at 1689. Coliver cites: "Pena-Irala (Paraguayan police chief), see *Filartiga v. Pena-Irala*, 124 S.Ct. 2739 (2004); Suarez-Mason (Argentinian general), see *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); Karadzic (Bosnian Serb leader), see *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); Gramajo (Guatemalan former defense minister), see *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); Kavlin (Bolivian), see *Eastman Kodak v. Kavlin*, 978 F. Supp. 1078 (S.D. Fla. 1997); Assasie-Gyimah (Ghanaian), see *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996); Ferdinand Marcos (former President of the Philippines), see *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994) (*Marcos II*); Imee Marcos- Manotoc (daughter of former Philippine President), see In *re Estate of Ferdinand Marcos, Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992) (*Marcos I*); Barayagwiza (Rwandan radio owner and political party leader), see *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 WL 164496, at (S.D.N.Y. 1996); Panjaitan (Indonesian general), see *Todd v. Panjaitan*, Civ. A. No. 92-1225-PBS, 1994 WL 827111, at *1 (D. Mass. 1994); Avril (Haitian former military ruler and self-declared president), see *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994); Vuckovic (Bosnian Serb paramilitary), see *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002); Negewo (Ethiopian former municipal official), see *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); Fernandez Larios (Chilean former military death squad member), see *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001), *aff'd*, 2005 WL 580533 (11th Cir. 2005), and 205 F.Supp. 2d 1325 (S.D. Fla. 2002), aff'd 402 F.3d. 1148 (11th Cir. 2005); Saravia (Salvadoran key organizer of Archbishop Romero assassination), see *Doe v. Saravia*, 348 F.Supp.2d 1112 (E.D. Cal. 2004); Liu Qi (Beijing Mayuor), see *Doe v. Liu Qi*, 349 F. Supp.23d 1258 (N.D. Cal. 2004); Garcia (Salvadoran general and former defense minister) and Vides Casanova (Salvadoran general and former defense minister), see *Romagoza-Arce v. Garcia*, No. 02-14427, 2006 U.S. App. LEXIS 65 (11th Cir. 2006), vacating 400 F.3d 1340 (11th Cir. 2005), and upholding jury verdicts." *Id.* at 1692.

[155] The Genocide Accountability Act has not yet been used in a criminal prosecution.

[156] United States Attorney's Office, Southern District of Florida, Press Release 9 January 2009, http://www.justice.gov/usao/fls/PressReleases/090109-02.html.

that he was considered its commander; and third, that he was present when a "press guy" was arrested by "the general" and was beaten and burned with an iron.[157] In November 2007, a grand jury sitting in the United States District Court for the Southern District of Florida returned an eight-count superseding indictment against Taylor. Taylor's torture victims testified at his trial and presented evidence of the torture they experienced at Taylor's hand or under his supervision. After a six-week trial, Taylor was convicted on October 30, 2008, and sentenced to 97 years in prison. The case was jointly investigated by the Federal Bureau of Investigations and Immigration and Customs Enforcement.[158] In a press release about Taylor's conviction, Executive Assistant Director Arthur M. Cummings, II, of the FBI National Security Division said, "This sentence sends a resounding message that torture will not be tolerated here at home or by U.S. nationals abroad ….The FBI and our law enforcement partners will continue to investigate such acts wherever they occur."[159] Taylor is the first individual to be prosecuted under the Torture Act.[160]

When Taylor raised concerns regarding the extraterritorial application of U.S. law, the Appellate Court held that he was a U.S. citizen and was thus bound by applicable U.S. law. The Appellate Court stated, "The Supreme Court made clear long ago that an absent United States citizen is nonetheless 'personally bound to take notice of the laws [of the United States] that are applicable to him and to obey them.' *Blackmer v. United States,* 284 U.S. 421, 438, 52 S.Ct. 252, 76 L.Ed. 375 (1932). Emmanuel was a United States citizen at all relevant times – when the Torture Act was passed and when he committed all of the acts for which he was convicted. As such, he is bound by United States law 'made applicable to him in a foreign country.' *Id.* at 436, 52 S.Ct. 252. 'For disobedience to its laws through conduct abroad, he was subject to punishment in the courts of the United States.' *Id.*"[161] This is especially significant for efforts to bring a suit against Sri Lankan Defense Secretary Gothabaya Rajapaksa, since he too is a U.S. citizen.

B. Mohamed Ali Samantar

This past June, the Supreme Court held in *Samantar v. Yousuf*, 560 U.S. --- (2010), that the Foreign Sovereign Immunities Act does not govern Somali officials' claims to immunity. Victims of Somali military abuses brought a suit against Mohamed Ali Samantar, who was Somalia's former First Vice President, Minister of Defense and Prime Minister. They claimed that Samantar exercised command and control over members of Somali military forces who committed human rights violations, and that Samantar aided and abetted these abuses.

Members of the Isaaq clan of Somalia filed a civil action under ATS and the TVPA against Samantar. Plaintiffs alleged that Samantar, as the official in charge of the Somalia Armed Forces in the 1980s and 1990s, was liable for acts of torture; extrajudicial killing; attempted extrajudicial killing; crimes against humanity; war crimes; cruel, inhuman, and degrading treatment or punishment; and the arbitrary detention of the plaintiffs.[162] The plaintiffs alleged that at all relevant times between 1980 and 1987, Samantar, as Minister of Defense, possessed

[157] *United States v. Roy M. Belfast, Jr. (a.k.a. Chuckie Taylor)*, 611 F.3d 783 (2010) at 799.
[158] *Id*.
[159] *Id*.
[160] *Id*.
[161] *Id*. at 809-10.
[162] *Yousuf v. Samantar*, 1:04CV1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007) rev'd, 552 F.3d 371 (4th Cir. 2009) aff'd and remanded, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (U.S. 2010).

and exercised command and effective control over the Somali military. They alleged that Samantar "knew, or should have known, that his subordinates had committed, were committing, or were about to commit extrajudicial killings, attempted extrajudicial killings, torture, crimes against humanity, war crimes, cruel, inhuman, or degrading treatment, or arbitrary detentions."[163] The plaintiffs were individuals who had been personally victimized by the Somali military. At the time the claim was brought, Samantar was residing in Fairfax, Virginia.

The District Court found for Samantar and held that the Foreign Sovereign Immunities Act of 1976 applied and thus Samantar was immune from suit.[164] The District Court opinion quoted from letters from the Somali Transitional Federal Government to the State Department, asserting that, "the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacities and [we wish] to reaffirm Mr. Samantar's entitlement to sovereign immunity from prosecution for those actions."[165] The Sri Lankan government would likely submit similar letters to the State Department in an effort to protect its officials from liability. The Supreme Court previously held that the ATS is not an exception to the FSIA's exclusive regulation of suits against foreign sovereigns.[166] However, the Court of Appeals reversed and remanded the case, holding that FSIA does not apply to individuals and thus Samantar was not entitled to immunity. The Appellate Court explored the FSIA, saying that it provides, subject to certain exceptions not relevant here, "a *foreign state* shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604 (emphasis added). Here, the court said plaintiffs were bringing this suit not against a foreign state, but against Samantar as an individual. The court concluded that based on the overall structure and purpose of the FSIA, individuals were not covered by FSIA. Indeed, the Restatement (Third) has eliminated individuals from the list of parties entitled to sovereign immunity.[167] "Most courts … have held that the FSIA does not immunize individuals accused of human rights abuses, because such abuses are not within the scope of their employment."[168] Thus, letters to this effect from the Sri Lankan government would be accorded no merit. Further, the court concluded that even if the FSIA applies to individual defendants, "Congress did not intend to shield *former government agents* from suit under the FSIA."[169] Thus, "even if an individual foreign official could be an 'agency or instrumentality under the FSIA,' sovereign immunity would be available only if the individual were still an 'agency or instrumentality' at

[163] *Id*. at 6. The plaintiffs also alleged that as Prime Minister from 1987 to 1990, Samantar possessed and exercised command and effective control over the Somali military, and that he was in Hargeisa in May and June of 1988 and had command of the military forces that were engaged in indiscriminate attacks upon the civilian population. Lastly, plaintiffs alleged that, "he knew, or should have known, of the pattern and practice of gross human rights abuses perpetrated against the civilian population by subordinates under his command." *Id.*
[164] *Yousuf v. Samantar*, 1:04CV1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007).
[165] *Id*.
[166] *Argentine Republic v. Amanda Hess Shipping Corp.*, 488 U.S. 428 (1989).
[167] STEPHENS, *supra* note 11, at 367.
[168] STEPHENS, *supra* note 11, at 98. *See also* MICHAEL SWAN, INTERNATIONAL HUMAN RIGHTS TORT CLAIMS AND THE EXPERIENCE OF UNITED STATES COURTS: AN INTRODUCTION TO THE US CASE LAW, KEY STATUTES AND DOCTRINES, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION (Craig Scott ed.) 70 (2001) ("[I]t has been impossible for former state officials to successfully maintain that acts of torture or extrajudicial killing, for example, were carried out within the proper scope of their authority, so that a grant of immunity could be said to be 'appropriate'. The FSIA, therefore, has presented no impediment to US courts taking jurisdiction in suits against such former state officials, *per se.*").
[169] *Id*.

the time of suit."[170] Therefore, the court held that the FSIA does not provide Samantar with immunity. The court concluded by considering Samantar's alternative arguments that he was shielded from suit by a common law immunity doctrine such as head-of-state immunity,[171] that the plaintiffs' claims under the ATS and TVPA are time-barred, and that they are also barred because plaintiffs failed to exhaust their legal remedies in Somalia. The court concluded that these questions should be addressed in the first instance by the district court and thus declined to reach their merits.

Samantar appealed this decision to the Supreme Court. On June 1, 2010, the Supreme Court held that an individual foreign official sued for conduct undertaken in his official capacity is not a "foreign state" entitled to immunity from suit within the meaning of the Foreign Sovereign Immunities Act (FSIA).[172] The Supreme Court held that Samantar's interpretation that FSIA's "foreign state," § 1603(a), or "agency or instrumentality," § 1603(b), could literally be read to include a foreign official, but the Court concluded that interpretation contravenes the meaning that Congress enacted.[173] Thus, Sri Lankan officials could be held liable for human rights violations, without the protection of immunity from FSIA.

The Court explains, "the statute specifies that 'agency or instrumentality ...' means any *entity* matching three specified characteristics, § 1603(b) (emphasis added), and 'entity' typically refers to an organization, rather than an individual. See, *e.g.,* Black's Law Dictionary 612 (9th ed.2009). Furthermore, several of the required characteristics apply awkwardly, if at all, to individuals…. Thus, the terms Congress chose simply do not evidence the intent to include individual officials within the meaning of 'agency or instrumentality.'"[174] Since the Supreme Court agreed with the Appellate Court that individual officials are not covered by FSIA, it held Samantar's status as a former official "irrelevant".[175] Thus, the Court concluded that the Court of

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[170] *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) at 383.

[171] *See In re Grand Jury Proceedings,* 817 F.2d 1108, 1110 ("Head-of-state immunity is a doctrine of customary international law ... maintain[ing] that a head of state is immune from the jurisdiction of a foreign state's courts, at least as to authorized official acts taken while the ruler is in power.") (4th Cir.1987); *see also Ye v. Zemin,* 383 F.3d 620, 625 (7th Cir.2004) ("Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976-with the Executive Branch."). *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009) at 383.

[172] This decision abrogated *Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, *Keller v. Central Bank of Nigeria*, 277 F.3d 811, *Byrd v. Corporacion Forestal y Industrial De Olancho S.A.*, 182 F.3d 380, and *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668. *Samantar v. Yousuf*, 130 S. Ct. 2278, 176 L. Ed. 2d 1047 (2010).

[173] *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) at 2286.

[174] *Id.* at 2286-87.

[175] *Id.* at 2284. However, the Supreme Court held that a suit may still be barred by foreign sovereign immunity under the common law, especially since not every suit can be successfully pleaded against an individual alone: "Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has "an interest relating to the subject of the action" and "disposing of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect the interest." Fed. Rule Civ. Proc. 19(a)(1)(B). If this is the case, and the entity is immune from suit under the FSIA, the district court may have to dismiss the suit, regardless of whether the official is immune or not under the common law. See *Republic of Philippines v. Pimentel,* 553 U.S. 851, 867, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008) ("[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign"). Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest. Cf. *Kentucky v. Graham,* 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) ("[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity" (citation

Appeals correctly held that FSIA does not govern Samantar's claim of immunity, and the FSIA does not deprive the District Court of subject-matter jurisdiction.[176] The Sri Lankan government would likely use all diplomatic and legal methods possible to assert that its actions in Sri Lanka were well within its sovereign rights, and thus they should be protected by sovereign immunity. However, *Samantar* demonstrates the invalidity of this claim.

C. Officials from the Philippines, Argentina, Bosnia and Guatemala

In *Samantar*, the District Court explored precedent in which former sovereigns were held accountable in U.S. courts for actions deemed to be outside the scope of their official authority.[177] It is instructive for holding Sri Lankan officials liable in U.S. courts to explore the issues that arose in these cases. One such case was brought against the former Philippine President Ferdinand Marcos and his daughter, Imee Marcos-Manotoc, alleging that during Ferdinand Marcos' tenure as president of the Philippines, up to 10,000 people were tortured, summarily executed, or disappeared at the hands of the military intelligence personnel, which operated under the authority of Marcos and his daughter Imee Marcos-Manotoc.[178] Protests in the Philippines against the Marcos regime culminated in his resignation and forced exile in 1986, upon which he established residence in Hawaii.[179] In the suit against Ferdinand Marcos, jurors were given the following jury instruction:

> You may find the defendant Estate liable to plaintiffs if you find, by a preponderance of the evidence, that Ferdinand Marcos acting under color of law either (1) directed, ordered, conspired with or aided Philippine military, paramilitary, and/or intelligence forces to

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omitted))." *Id.* at 2292. The Court here found, "respondents have sued petitioner in his personal capacity and seek damages from his own pockets, [and thus this case] is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term. Although Congress clearly intended to supersede the common-law regime for claims against foreign states, we find nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Id.* This argument could be available to the Sri Lankan government; however the Supreme Court's strong dismissal of it in *Samantar* demonstrates it would not persuade another court.

[176] The act of state doctrine is explored in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 11 L. Ed. 2d 804, 84 S. Ct. 923 (1964). There the Court articulated a three-pronged test for determining whether application of the act of state doctrine is called for, thereby conferring immunity onto the acts. Under the *Sabbatino* rule, the court must balance the degree of codification or consensus regarding the international legal principle in question, the impact of the matter on United States foreign relations, and the status of the foreign government whose act is allegedly implicated. *Id.* at 428. "It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." *Id. See also* STEINHARDT, *supra* note 36, at 72 ("For the most part, the courts reasoned that acts of torture and other egregious human rights violations were not sovereign or public acts that were entitled to deference by the federal courts. The *Marcos* cases were initially dismissed based upon the act of state doctrine in 1986, but the Ninth Circuit reversed in a 1989 unpublished decision.") The international crimes relevant to a prosecution of Sri Lankan officials are war crimes, torture and genocide; all three crimes are deeply codified in international law and thus bypass the act of state doctrine. Dicta from a subsequent ATS case stated, "we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state." *Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1995).

[177] *Yousuf v. Samantar*, 1:04CV1360, 2007 WL 2220579 (E.D. Va. Aug. 1, 2007) at 13.

[178] *Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation),* 978 F.2d 493 (9th Cir.1992). *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation),* 25 F.3d 1467 (9th Cir.1994).

[179] ACEVES, *supra* note 99, at 120.

> torture, summarily execute or cause the disappearance of plaintiffs and the class or (2) had knowledge that Philippine military, paramilitary and/or intelligence forces tortured, summarily executed, cause[d] the disappearance or arbitrary detention of plaintiffs and the class, and having the power failed to take effective measures to prevent the practices."[180]

This jury instruction could be given in a case against Sri Lankan Defense Minister Gothabaya Rajapaksa and Army General Sarath Fonseka, and I argue a jury would find them both liable.

There are interesting choice of law questions that arise in ATS cases, and the practice seems to be to adopt the law most favorable to plaintiffs. This is demonstrated in *Marcos*: after Ferdinand Marcos's death, the court applied Philippine law to allow the award of exemplary damages against an estate instead of following the prevailing U.S. practice that would have prohibited such damages; this led to a $1.2 billion award to plaintiffs.[181] This demonstrates that courts strive for the broader goal of achieving justice for the victims, instead of narrowly, rotely applying laws that could inhibit a just resolution. Since the Sri Lankan government could argue its actions against Tamils were legally authorized by Sri Lanka's Prevention of Terrorism Act and other national security laws, the Ferdinand Marcos case demonstrates that this defense should not be available.

The Sri Lankan government would also likely argue that foreign relations with the U.S. would be strongly adversely impacted by U.S. courts allowing a case by Tamil victims. This is what the Somali Transitional Federal Government asserted in *Samantar,* that "foreign relations would be adversely affected by this litigation, and that if the litigation progressed, it could inflame already high tensions in the region."[182] The Sri Lankan government would likely assert that Rajapaksa and Fonseka were acting within the scope of their authority and thus litigation would impair future relations with the United States. U.S. courts should stand fast against such intimidation tactics, and should pursue justice for Tamils without regard for the alleged impact on narrow U.S. interests in the region. Upholding and invoking universal jurisdiction promotes the global interest in transnational justice, and should trump parochial U.S. interests in maintaining friendly relations with Sri Lanka regardless of the cost.

In *Forti v. Suarez-Mason*, an Argentine general was held liable for the acts of his subordinates and was ordered to pay damages of $21 million.[183] General Carlos Guillermo Suarez-Mason was summoned to appear before the Argentine Supreme Council in March 1984, and fled to the United States to evade justice.[184] He was arrested in California pursuant to an international arrest warrant issued by the Argentine government.[185]

Here also the defendant was not personally responsible for inflicting torture or engaging in international crimes, but was liable due to the authority vested in his government position. "Although the individual acts are alleged to have been committed by military and police officials, plaintiffs allege that these actors were all agents, employees, or representatives of defendant acting pursuant to a 'policy, pattern and practice' of the First Army Corps under defendant's command. Plaintiffs assert that defendant 'held the highest position of authority' in Buenos Aires Province; that defendant was responsible for maintaining the prisons and detention centers there, as well as the conduct of Army officers and agents; and that he 'authorized,

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[180] Quoted in STEINHARDT, *supra* note 36, at 68.
[181] Quoted in STEINHARDT, *supra* note 36, at 71.
[182] *Id*.
[183] *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).
[184] ACEVES, *supra* note 99, at 93.
[185] *Id.*

approved, directed and ratified' the acts complained of."[186] Lawyers from the Center for Constitutional Rights brought this case, and invoked the Nuremberg principle of command responsibility to hold Suarez-Mason liable. CCR attorney Peter Weiss commented, "We always wanted to get to the top."[187] Pamela Merchant, the executive director of Center for Justice and Accountability stated, "Our model is that we want to go after the people at the top, the people who have command authority, because that's where you have your highest impact."[188] Judge Jensen enunciated the standard that ATS jurisdiction is triggered by violations of "universal, obligatory, and definable" international law norms.[189] This case provides the strongest precedent for holding former Army General Sarath Fonseka and Sri Lankan Defense Minister Gothabaya Rajapaksa accountable in U.S. courts. Both Fonseka and Rajapaksa's individual accountability can be predicated on their roles as having the highest positions of authority within the military structure.

Further support for holding certain Sri Lankan officials accountable in U.S. courts comes from *Kadic v. Karadzic.* [190] This was a suit filed by Croat and Muslim citizens of Bosnia-Herzegovina against Radovan Karadzic, former President of the self-proclaimed Bosnian-Serb republic of "Srpska" in Bosnia-Herzegovina. The plaintiffs "allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war."[191] The Court held that Karadzic possessed "ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by the military forces under his command."[192] Though Karadzic was not acting under the authority of a state recognized by the international community, the court held that international law prohibits certain action, regardless of whether it is committed under color of official authority or as a private actor.[193] The appellate court said ATS confers federal subject-matter jurisdiction "when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law)."[194] The court held that the first two requirements were clearly satisfied, and then explored whether the plaintiffs pleaded violations of international law, which it concluded they had.[195] "The court also recognized that Karadzic could be held liable for genocide and war crimes even without state action, because neither violation requires that violations be committed under color of law."[196] This suggests that even if the Sri Lankan government argues that the war crimes, torture and genocide committed by Sri Lankan soldiers

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[186] *Forti* at 1537-38.
[187] DAVIS, *supra* note 49, at 58.
[188] *Id.*
[189] Judge Jensen stated that torts actionable under the ATS are "characterized by universal consensus in the international community as to their binding status and their content. *That is, they are universal, definable, and obligatory international norms."* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987) (emphasis added). For definitions of "universal", "definable", and "obligatory", see STEPHENS, *supra* note 11, at 49.
[190] *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).
[191] *Id.* at 236-37.
[192] *Id.* at 237.
[193] DAVIS, *supra* note 49, at 56-57. "Through the *Karadzic* case, CCR opened the door to other claims against private defendants." *Id* at 57.
[194] STEINHARDT, *supra* note 36, at 62.
[195] STEINHARDT, *supra* note 36, at 66.
[196] STEPHENS, *supra* note 11, at 14.

were committed outside official authority, Sri Lankan officials can still be held liable for these crimes. On remand of Karadzic's case, the district court held a lengthy default hearing and entered a judgment of $15 billion for the class members, but plaintiffs were unable to collect this judgment.[197] Karadzic was found liable for genocide, war crimes, and crimes against humanity, despite being in the United States at the invitation of the United Nations. Judge Peter Leisure told jurors: "[i]t's of historical significance what you participated in. It's very important that the United States of America rise to the challenge and that we just don't wait for the United Nations war-crimes trial."[198] With Sri Lanka's case, due to paralysis induced by regional politics at the international level, it is unlikely there will ever be a United Nations war crimes trial. This makes action in U.S. courts even more urgent.

In *Xuncax v. Gramajo*, Ortiz Gramajo was held accountable for Guatemalan military abuses under his command.[199] Gramajo was a former military commander and Minister of Defense. The Court held he was "liable for the acts of members of the military forces under his command."[200] The complaints were served to Gramajo while he was attending Harvard University's Kennedy School of Government. Gramajo failed to participate in the court proceedings and thus a default judgment was entered against him.[201] In its judgment, the Court drew from Application of Yamashita, 327 U.S. 1, 90 L. Ed. 499, 66 S. Ct. 340 (1946), in which the commander of Japanese forces in the Philippines during World War II was held responsible for human rights violations committed by subordinates: "The allegations contained in the prosecution's Bill of Particulars against Yamashita are eerily parallel to those made here: 'a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.' 372 U.S. at 14."[202] These facts are eerily similar to Sri Lanka's attacks on Vanni from September 2008 to May 2009, and furnish further precedent for holding Sri Lankan officials liable in U.S. courts.

VI. Utilizing U.S. Courts to Litigate Crimes in Sri Lanka

This section explores the repercussions of using U.S. courts to hold Sri Lankan officials accountable. The first part explores the ability for victims to be empowered by bringing a suit, while also describing the difficulties of gaining money damages from a successful suit. The second part explores criticism of using U.S. courts to hold foreign officials accountable, including concerns of sovereignty and hypocrisy. This part concludes that the benefits of bringing a suit far outweigh the possible costs.

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[197] However in July 2008, after avoiding arrest for 13 years, Karadzic was brought before the International Criminal Tribunal for the Former Yugoslavia. STEINHARDT, *supra* note 36, at 69. The following section includes a discussion of enforcing ATS judgments.
[198] ACEVES, *supra* note 99, at 135.
[199] Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995).
[200] *Id.* at 172.
[201] *Id.* at 169.
[202] *Id.* at 172.

A. Impact for Victims of Filing a Suit in U.S. Courts

Ideally, the Department of Justice's Human Rights and Special Prosecutions Section would launch a criminal prosecution against top Sri Lankan officials to hold them accountable for war crimes, torture and genocide. However, this requires mobilizing political will behind the expenditure of scarce resources in this manner, and over the protests of the Sri Lankan government. If this is unsuccessful, a civil suit should be filed by Tamil victims using the Alien Tort Statute, Torture Victims Protection Act and the Genocide Accountability Act.[203] "Although not a substitute for criminal prosecutions as a means of punishment, civil remedies complement such prosecutions where they are possible, and serve an important role where criminal prosecution is not an option."[204]

Bringing an Alien Tort case for Tamils powerfully vocalizes the injustice Tamils have suffered in Sri Lanka, and asserts the need for extraterritorial accountability.[205] The act of filing a

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[203] Though a criminal prosecution is certainly the strongest form of recourse available in the sense that it sends the unequivocal message that criminal liability is necessary to account for egregious human rights violations in Sri Lanka, there are immeasurable psychological advantages to individuals victimized by Sri Lanka pursuing a civil suit. "ATS plaintiffs consistently remark that the main benefit of their involvement in an ATS case was the sense of satisfaction they gained from exposing, through *their* efforts, their determination and courage to speak out, the role and responsibility of a human rights abuser. Their active engagement—not possible in government-led actions—goes a long way towards redressing their feelings, and the feelings of their communities, of powerlessness, injustice, and survivor's guilt." Coliver, *supra* note 47, at 1690. Coliver further cites plaintiffs and community leaders who described the impact of pursuing lawsuits on their personal healing process and on repairing their community's sense of loss: "Juan Romagoza, a Salvadoran torture survivor, stated: When I testified, a strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind. I felt that if I looked back, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn, bleeding. So, I didn't look back, but I felt their support, their strength, their energy. Being involved in this case, confronting the generals with these terrible facts—that's the best possible therapy a torture survivor could have." *Id.* at 1697. Coliver also cites therapists who confirm the remedial effect of pursuing a lawsuit: "Dr. Mary Fabri, Director of the Center for Victims of Torture in Minneapolis [stated]: This legal recourse presents the opportunity for torture survivors living in the United States to seek justice and confront impunity. The few who are able to take their cases to court create a collective voice for all torture victims, bringing the issue of human rights atrocities into the public eye. This opportunity also presents a means for psychological healing of torture's wounds by breaking the silence, confronting perpetrators and refuting impunity." *Id.* at 1698.

[204] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 14 (2002). "An exclusive focus on criminal prosecution is the result of a translation gap, a failure to recognize that civil liability for human rights abuses represents the translation of international accountability principles into a strategy appropriate to a particular domestic legal system." *Id.* at 5. "Although not a substitute for other means of holding perpetrators accountable, human rights litigation contributes to an important long-term objective: working toward a world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide." STEPHENS, *supra* note 11, at xxii. *See also* JOHN TERRY, TAKING *FILARTIGA* ON THE ROAD: WHY COURTS OUTSIDE THE UNITED STATES SHOULD ACCEPT JURISDICTION OVER ACTIONS INVOLVING TORTURE COMMITTED ABROAD, in TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION, (Craig Scott ed.) 112 (2001): "[I]t is perhaps more accurate to describe the civil remedy not so much as a mechanism to fill a gap in 'enforcement' under international law but as a means for providing a measure of self-respect, vindication and recognition for the victims of serious violations of international human rights."

[205] "[ATS] lawsuits have contributed to the worldwide movement against impunity by (1) helping to ensure that the United States does not remain a safe haven for such perpetrators, (2) holding individual perpetrators accountable for human rights abuses, (3) providing the victims with some sense of official acknowledgement and reparation, (4) contributing to the development of international human rights law, and (5) building a constituency in the United States that supports the application of international law in such cases and an awareness about human rights violations in countries in all regions of the world. It also appears that these cases, when taken together with other

suit can be an empowering experience that helps end the impunity that currently surrounds human rights violations in Sri Lanka, giving back a voice for the specific Tamil victims in the case and for the broader Tamil community. This process should not be undertaken lightly – intensive discussions should be had with potential plaintiffs before filing a suit, to ensure they are aware litigation is a lengthy process and may not result in financial damages. At each stage of litigation, plaintiffs should be consulted and closely communicated with, so they are able to take ownership in the lawsuit.

All efforts always need to maintain a victim-centered and victim-driven approach: Katharine Redford from EarthRights International described, "in a lawsuit, for the clients the process is super-important and it can be disempowering if they're not treated with respect and as the drivers of their own case and shapers of their own destiny."[206] It is important to retain this focus on serving the victims' needs first and foremost, and not to let the larger goal of accountability obscure the goals of individual plaintiffs. CJA lawyers have emphasized the importance of gaining the support of local communities in pursuing an ATS case, as a source of plaintiffs and evidence. CJA Litigation Director Matthew Eisenbrandt said, "We simply can't do cases if the community doesn't want to do them."[207] However, human rights NGOs *should not* do cases if the community does not want them. Human rights organizations must avoid seeing themselves as "saviors", arrogantly able to lift up "victims" after being ravaged by "savages",[208] and should instead work closely with the community to ensure an inclusive strategy for justice is pursued. There are legitimate fears of retribution and backlash to pursuing something as public as a lawsuit, and filing a claim should not be undertaken lightly. If members of a community do not want to undergo the risks and hardship involved, NGOs should not attempt to convince them otherwise – doing so risks further disempowering the community they claim to serve.[209] The Tamil community in the United States has already taken steps towards U.S. litigation, through the creation of an organization called Tamils Against Genocide. TAG consolidated evidence of state-sponsored crimes in Sri Lanka into a 1000+ page model indictment that it submitted to the Justice Department to catalyze an investigation into holding Sri Lankan officials liable in the United States.[210] This reflects community support for the strategy this paper advocates. However, other ethnic communities may not support litigation as the Tamil community does, and I caution against undertaking litigation without conducting a thorough analysis of community needs and objectives.

Ideally, a coalition of human rights organizations and private actors could be created to represent Tamil plaintiffs in this suit: "multivariate analysis has demonstrated that plaintiffs represented by NGOs are 34 percent more likely to win an ATS decision in the district courts and 41 percent more likely to prevail in the court of appeals than those represented strictly by private counsel."[211] Plaintiffs in ATS suits have won multimillion-dollar judgments, but these

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anti-impunity efforts around the world, are also helping to (6) create a climate of deterrence and (7) catalyze efforts in several countries to prosecute their own human rights abusers." Coliver, *supra* note 46, at 174-75 (2005).

[206] DAVIS, *supra* note 49, at 77.

[207] DAVIS, *supra* note 49, at 80.

[208] Makau Mutua, *Savages, Victims and Saviours: The Metaphor of Human Rights*, HARV. INT'L L. J. 201 (2001). "The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other."

[209] *Id.* at 241.

[210] *See generally*, Tamils Against Genocide at www.tamilsagainstgenocide.org.

[211] DAVIS, *supra* note 49, at 75. "At the district court and circuit court levels, when plaintiffs are represented by human rights NGOs, they were significantly more likely to prevail. This demonstrates that the client contact,

judgments are notoriously difficult to enforce because defendants frequently flee the country and hide their assets.[212] "For many victims of human rights abuses, however, the act of bringing their abuser to justice is compensation enough."[213] Even an unenforceable judgment in favor of Tamil victims is a powerful statement to Tamils in Sri Lanka that impunity does not have to prevail, and that there are legal methods of recourse available. Further, the non-monetary value of filing a suit and affirmatively vocalizing the injustice they have experienced is immeasurable.[214]

> A victory that results in a statement about the human rights record of an individual, a corporation, or a government, or in the definition of a new or revised norm of international law may be just as important as monetary compensation. International human rights lawsuits are part of a tradition of U.S. public interest litigation: cases with objectives that include – but also go far beyond – the specific relief sought by plaintiffs.[215]

However, collection in ATS suits is not impossible: plaintiffs have seized over $1 million from a Haitian general, hundreds of thousands of dollars from two Salvadoran generals, and an undisclosed amount from Unocal Oil Corporation.[216]

Working to bring a suit against Sri Lankan officials helps ensure the lives lost are not forgotten and were not extinguished in silence. Even if the case is unsuccessful or dismissed, the repercussions of initiating a lawsuit can be beneficial: "The cases expose what the perpetrators have done and cause embarrassment to the perpetrators. In some cases, being sued under the ATCA or TVPA may limit the careers of foreign officials if their advancement depends on their ability to travel to the United States without controversy."[217] For these reasons, lawsuits on behalf of Tamil victims in Sri Lanka should be filed against Gothabaya Rajapaksa and Sarath Fonseka.

B. Criticism of Using U.S. Courts

The proposition of holding Sri Lankan officials accountable in U.S. courts is likely to encounter a multitude of criticisms, largely based on two arguments: that doing so is a violation of Sri Lanka's sovereignty, and that it is hypocritical for the United States to be prosecuting human rights violations while it simultaneously commits human rights violations in

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community outreach, expertise, selectivity, and innovation of the NGOs have a concrete impact on outcomes." *Id.* at 264.

[212] STEPHENS, *supra* note 11, at 455.

[213] *Id. See also* ACEVES, *supra* note 99, at 9 ("For Dolly Filártiga, who filed the ATS action against Peña-Irala, the purpose of the lawsuit was to seek justice on behalf of her brother and to honor his memory. 'The essential *leit-motif* for me was to disperse the cinders of memory in the name of my brother and his unjust martyrdom, articulating my innate faith for justice and my firm conviction of the one thing that does not exist – oblivion.'") and DAVIS, *supra* note 49, at 285 (quoting CJA lawyer Moira Feeney, who said "we're very clear that [collecting damages] is not number one on our priority list and our clients are adamant that it's not about money.").

[214] "[Plaintiffs] take tremendous personal satisfaction from filing a lawsuit, forcing the defendant to answer in court or to leave the United States, and creating an official record of the human rights abuses inflicted on them or their families." STEPHENS, *supra* note 11, at xxiv.

[215] STEPHENS, *supra* note 11, at xxvi.

[216] STEPHENS, *supra* note 11, at xxiii.

[217] Coliver, *supra* note 47, at 1696 (citing examples of Hector Gramajo, a Guatemalan ex-general who fled the U.S. after being served with an ATS complaint in 1991, and his party subsequently decided not to choose him as its presidential candidate; of Kelbessa Negewo, held responsible for acts of torture during the "Red Terror" in Ethiopia, who lost several jobs and was subsequently denaturalized and placed in deportation proceedings largely based on evidence from the civil trial; of Sergio Arrendondo Gonzalez, a Chilean torturer who avoided competing in the Pan-American games in Indiana after the filing of an ATS claim in 1987).

Guantanamo, Bagram and elsewhere. Another facet of the hypocrisy argument is that the United States has declared the Liberation Tigers of Tamil Eelam to be a Foreign Terrorist Organization, which conveys implicit support for the Sri Lankan government's counter-terrorism efforts.

The sovereignty argument is based on the fact that the foundation of international law is still the traditional principle of territorial sovereignty.[218] This principle privileges the inviolability of national borders, and holds that a government's actions within its country's borders are sacrosanct.[219] In one statement of the doctrine, the Supreme Court wrote: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."[220] Thus, this argument postures that holding foreign officials accountable in U.S. courts is inherently a political maneuver that illegitimately encroaches upon their countries' sovereignty.[221] However, the developments of the last half-century of international law have corroded the principle of territorial sovereignty, enabling foreign states to intervene in domestic affairs when certain enumerated, egregious international crimes have been committed.[222] In an analysis of *Filártiga*, "[i]t was unimportant whether [wrongdoers'] acts had any connection with the forum state, as all nations had a duty to enforce international law. There was no doubt that United States courts, for example, were competent to try foreign nations who committed acts of universal culpability outside the United States….Foreign government officials who behaved as international outlaws could be tried for violating the law of nations."[223] This principle still rings true today, and sovereignty can no longer be used to shield torture, slavery or genocide. Further, defendants bear the burden of demonstrating why a court should decline to hear a claim on the grounds of non-justiciability due to sovereignty, political question, act of state, comity, deference to the U.S. executive branch, and the foreign affairs doctrine.[224]

The hypocrisy of U.S. courts being used to hold international human rights violators accountable while being closed to American government officials or soldiers responsible for violations cannot be denied.[225] However, on a normative level, that should not that be the reason U.S. courts are closed to Tamil victims. Tamils have no better recourse for the injustice they have suffered in Sri Lanka – Sri Lanka's domestic commission has demonstrated itself to be a farce, and international justice mechanisms have been and will continue to be stymied by Sri

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[218] Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L. L.J. 53, 76 (1981).
[219] DAVIS, *supra* note 49, at 5.
[220] *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), as quoted in STEPHENS, *supra* note 11, at 349. "[I]f raised, the defendant has the burden of proof and must produce evidence of an official sovereign policy." *Id.*
[221] *See, e.g.* Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of International Human Rights Litigation,* 66 FORDHAM L. REV. 319 (1997).
[222] Vasuki Nesiah, *From Berlin to Bonn to Bagdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. L. J. 75 (2004). Nesiah explores the concept of the Responsibility to Protect, which is the "new guiding normative and legal framework for transnational cosmopolitan engagement." *Id.* at 84. R2P focuses on the idea of sovereignty as responsibility, in what states owe to its own people as well as what the international community owes to all peoples. Nesiah's article explores the problems of this nomenclature, which often belies self-interested motives more than genuine concern for the suffering of others. *Id.* at 95.
[223] Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Pena-Irala, 22 HARV. INT'L. L.J. 53, 61 (1981).
[224] STEPHENS, *supra* note 11, at 337, further elaborating that "[s]ome courts, however, consider the issues *sua sponte* or in response to an executive branch request or a statement of concern from a foreign government" and subsequent discussion p. 337-364.
[225] For additional analysis of the argument that transnational litigation constitutes judicial imperialism, see ACEVES, *supra* note 99, at 163-66.

Lanka's allies in the United Nations Security Council. It is exactly for cases such as Sri Lanka that universal jurisdiction exists – it is meant to be invoked due to "the heinousness of the offense and the difficulty of bringing perpetrators to justice."[226] Additionally, though the U.S. government declared the LTTE to be a terrorist organization, this does not provide authorization to ignore the international legal regime in adopting counter-terrorism tactics that include war crimes, torture and genocide.

While the prospect of holding Sri Lanka officials accountable in U.S. courts may be philosophically imperfect, to Tamils who have witnessed the loss of loved ones and know only impunity in Sri Lanka, it could be justice. Further, attempts to litigate human rights violations in U.S. courts do not need to proceed in exclusivity. "Although not a substitute for other means of holding perpetrators accountable, human rights litigation contributes to an important long-term objective: working toward a world in which those who commit gross violations of human rights are brought to justice swiftly, in whatever country they try to hide."[227] Litigation can be pursued in tandem with domestic and international pressure to convince the Sri Lankan state to end its decades of impunity; however, a realistic assessment of previous and present efforts in Sri Lanka and in the UN reveal the improbability of success.[228]

Conclusion: Toward a future where genocide is merely a 'relic of an uncivilized past'

Accountability for Sri Lanka's human rights violations against Tamils is a necessary first step towards re-building Tamil society and recovering from the decades of devastating conflict. Sri Lanka currently stands on the brink between two possible futures: one in which the rights of Tamils are respected and Tamils are welcomed as full citizens of Sri Lanka, and one in which Tamils continue to be trampled on, as the state apparatus perpetuates real and structural violence against the community. Without a meaningful measure of accountability, Tamils across the island will continue to mourn the loss of their loved ones and refuse to swallow these losses in silence. Armed conflict is bound to ensue. Holding Sri Lankan officials accountable for their crimes against Tamils wherever they can be found – in the United States or elsewhere – can demonstrate to Tamils and to Sri Lanka that justice can be sought through legal means for the deaths, torture, and genocidal assault Tamils have withstood. These in-roads of accountability can influence Sri Lankan officials to create a space for accountability within Sri Lanka itself – if only to avoid having its dirty laundry aired extraterritorially.

Army General Sarath Fonseka conceded that war crimes were committed as Sri Lanka prosecuted its final offensive, but there has still been no attempt to hold any soldiers or officials accountable for the thousands of deaths that occurred in a matter of weeks. Fonseka's subsequent arrest reveals the limited political space that exists even for dissidents of the ethnic majority in Sri Lanka. When even Sinhalese critics of the government face repression, Tamils feel too threatened to openly express their political aspirations. Until there is some accountability for Sri Lanka's last military rampage, Tamils in Sri Lanka will continue to live in fear of yet another

[226] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 41-2 (2002).
[227] STEPHENS, *supra* note 11, at xxii.
[228] Part II of this paper provides analysis of the current and historical institutional incapacities of Sri Lankan and international justice mechanisms for Tamil victims.

wave of violence. This suffocating political environment will only breed further violence and instability.

As Sri Lankan courts are loathe to hold officials and soldiers responsible for their crimes against Tamils, justice must be sought through a number of extraterritorial means. This paper demonstrates that universal jurisdiction exists for situations like Sri Lanka: there is a desperate need for justice, yet it remains elusive within the country's own borders. Universal jurisdiction statutes in the United States – the Alien Tort Statute, the Torture Victims Protection Act, and the Genocide Accountability Act – provide ample statutory language for holding Sri Lankan officials liable in the U.S. The doctrine and wealth of precedent of holding foreign officials accountable in U.S. courts provide a valid framework for bringing charges against key Sri Lankan officials. The deaths of up to 40,000 Tamils cannot fade into obscurity while their killers roam free and other Tamils are left to cower in silence.

Accountability is critical in providing justice for Sri Lanka's past wrongs against Tamils and in preventing further injustice. As Michael Ratner, a human rights litigator said, "Not only must we pursue these lawsuits in the United States, but every country must make a priority of bringing torturers to justice. May our work hasten the day in which human rights abuses rarely occur and are promptly punished when they do, so that future generations will look upon these evils as relics of an uncivilized past."[229] Human rights litigation around the world is an integral component of crafting a global justice paradigm that ensures torturers and genocidaires are brought to justice in whatever country in which they are found. This litigation helps actualize international justice and provides victims with a recourse when all other doors look shut. Litigation that holds Sri Lankan officials accountable for the atrocities they have perpetrated against Tamils can advance the day Tamils and Sinhalese alike can look back on the conflict as a relic of Sri Lanka's uncivilized past.

[229] STEPHENS, *supra* note 11, at, xi.