

# ASHCROFT V. IQBAL AND BINDING INTERNATIONAL LAW: COMMAND RESPONSIBILITY IN THE CONTEXT OF WAR CRIMES AND HUMAN RIGHTS ABUSES

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In the aftermath of September 11, 2001, the federal government instituted a wide range of programs ostensibly aimed at ensuring short- and long-term homeland security.<sup>1</sup> As part of the government's response, the Federal Bureau of Investigation (FBI) interrogated over one thousand individuals believed to have terrorist ties, holding 762 of these individuals on immigration charges.<sup>2</sup> This group was further narrowed to 184 "high interest" detainees who were held in isolation from outside contact.<sup>3</sup>

Javaid Iqbal, a Muslim citizen of Pakistan, was among these detainees. After being detained in the Administrative Maximum Special Housing Unit of Brooklyn's Metropolitan Detention Center (MDC), Iqbal brought *Bivens*<sup>4</sup> claims against a variety of government officials. His claims alleged mistreatment connected to his detention at MDC and an unconstitutional policy of discrimination against Muslim-Americans, particularly those of Middle Eastern background.<sup>5</sup> The lawsuit ultimately provided the Supreme Court with a vehicle to radically alter pleading standards, extending the more limited decision in *Bell Atlantic Corp. v. Twombly*<sup>6</sup> to require a new "plausibility" standard for lawsuits under the Federal Rules of Civil Procedure.<sup>7</sup>

This new pleading standard has been criticized as a departure from long-standing precedent<sup>8</sup> and from the Supreme Court's proper role in promulgating and interpreting the Federal Rules of Civil Procedure.<sup>9</sup> However, the Supreme Court's decision in *Iqbal* also represents a radical step in another area, as the

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<sup>1</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (holding that the Constitution implicitly created a cause of action against federal officials for violations of the Fourth Amendment).

<sup>5</sup> See *Iqbal*, 556 U.S. at 666-68.

<sup>6</sup> *Twombly* created a new standard for lawsuits against telecommunications providers alleging monopolistic parallel actions under the Sherman Act. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007).

<sup>7</sup> See Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. 399, 404 (2011). See also FED. R. CIV. P. 8(a)(2) (establishing the pleading standard necessary to file a claim in federal court).

<sup>8</sup> See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (holding that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

<sup>9</sup> See, e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009) (arguing that as a result of the higher "plausibility" pleading standard from *Twombly*, "lower federal courts so inclined are essentially free to use that standard to rid their dockets of cases deemed to place unwarranted demands on the judiciary or that are for some other reason disfavored").

Court also seemingly swept away supervisory liability in *Bivens* actions against government officials.<sup>10</sup> While the majority treated this as a clear extension of precedent, Justice Souter's dissent noted that the government had actually conceded supervisory liability under *Bivens*, and that the Court had, *sua sponte*, articulated a new rule doing away with *respondeat superior* under *Bivens* and 42 U.S. § 1983.<sup>11</sup>

The purpose of this article is to analyze how this new rule—apparently abolishing the previously existing supervisory liability rule in suits against government officials—affects litigation against United States government actors under human rights treaties, statutes, and conventions. In numerous historical prosecutions for egregious human rights violations, supervisors have been held criminally liable for the actions of inferiors. The United States was directly involved in several of these proceedings, including the Nuremberg Tribunals and the International Criminal Tribunals for Yugoslavia, Japan, and Rwanda.

Part I will trace the development of government actors' liability in the United States, particularly via the Ku Klux Klan Act<sup>12</sup> and the above-mentioned *Bivens* doctrine. This section will also address government officials' supervisory liability under these doctrines. Part II will analyze prosecutions of war crimes, crimes against humanity, and other human rights violations, particularly those involving the development of command liability. Part III will discuss command liability's growth as a doctrine now firmly rooted in customary international law. Part IV will then assess whether *Iqbal*'s holding regarding supervisory liability can be reconciled with customary international law and binding international law obligations contained in statutes, treaties, conventions, and other agreements delineating clearly required or prohibited conduct.

## I. GOVERNMENT OFFICIAL SUPERVISORY LIABILITY IN AMERICAN LAW

### A. *Introducing Bivens and § 1983*

For more than a century after the ratification of the Constitution, American law did not provide a cause of action creating damages liability for the actions of government officials. It was not until the passage of the Civil Rights Act of 1871 (known more popularly as the Ku Klux Klan Act) during the post-Civil War Reconstruction Era,<sup>13</sup> that government actors could be held civilly liable for actions violating federal constitutional or statutory law. The Act, codified as 42 U.S.C. § 1983, was originally intended to address the perceived malfesance of southern officials, who were alleged to have worked hand-in-hand with the Klan to continue pre-War brutalization and oppression of freed African-Americans.<sup>14</sup>

Section 1983 created a cause of action against *state* officials for violations of federal law, but federal officials would not be subject to such a cause of action until 1971, following the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.<sup>15</sup> The Court, in promulgating the *Bivens* doctrine, explained that federal courts have the authority to fashion remedies—including monetary damages—for violations of Fourth Amendment rights even absent explicit authorization in the text

<sup>10</sup> See *Iqbal*, 556 U.S. 662, 675-78.

<sup>11</sup> See *id.* at 686-87 (Souter, J., dissenting).

<sup>12</sup> Civil Rights Act of 1871, 42 U.S.C. § 1983 (1871). The Act is commonly known as the Ku Klux Klan Act because of its original purpose of combating Southern officials' complicity with Klan violence against African Americans during the Reconstruction period. See, e.g., Ken Gormley, *Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1983(3)*, 64 TEX. L. REV. 527, 534-37 (1985) (detailing the early history of the "Ku Klux Klan Act").

<sup>13</sup> See Gormley, *supra* note 12.

<sup>14</sup> See *Monroe v. Pape*, 365 U.S. 167, 172-74 (1961) (describing the concerns and debates leading to the passage of the Ku Klux Klan Act).

<sup>15</sup> See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that federal officials would be liable under the Civil Rights Act of 1871).

of the Constitution or federal statute.<sup>16</sup> The Court later expanded the breadth of the *Bivens* doctrine to include other constitutional violations by government officials.<sup>17</sup>

### B. Defenses to *Bivens* and § 1983 Claims: “Special Factors” and Immunities

These two mechanisms for remedying unconstitutional conduct—*Bivens* and § 1983—are generally identical for the purposes of determining issues of defenses, immunities, and damages.<sup>18</sup> However, there are key differences. In particular, *Bivens* defendants have a wider array of protections available.<sup>19</sup> *Bivens* and § 1983 are distinct in *substance*; § 1983 has been held to encompass claims involving any constitutional violation, while *Bivens* has been circumscribed to a relatively small sphere of constitutional claims.<sup>20</sup> Additionally, the *Bivens* doctrine includes a vague caveat that exempts claims where there are “special factors counseling hesitation.”<sup>21</sup> Still, both *Bivens* and § 1983 claims must overcome qualified, and sometimes absolute, immunity defenses.

#### 1. “Special Factors Counseling Hesitation”

Generally, the substance of the claims brought against government officials in the human rights context fits within the nexus of *Bivens* claims already recognized by the Supreme Court. Torture, unreasonable seizure, indefinite detention, and denial of due process have each been included in the ambit of *Bivens* claims.<sup>22</sup> However, some human rights claims may fall outside the strict boundaries of preexisting *Bivens* claims, and certain courts are reticent to extend the doctrine beyond the borders already established. For example, in the recently decided *Arar v. Ashcroft*, the Second Circuit dismissed a *Bivens* claim against Secretary Ashcroft for direction of a program whereby detainees were rendered to countries where they would clearly be tortured.<sup>23</sup>

*Arar* illustrates the use—and, some might say, the danger—of “special factors” to limit the amenability of government officials to sensitive *Bivens* claims. The Second Circuit explained, “in the context of extraordinary rendition, [a *Bivens*] action would have the natural tendency to affect diplomacy, foreign poli-

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<sup>16</sup> *Id.* at 396.

<sup>17</sup> See, e.g., *Carlson v. Green*, 446 U.S. 14 (1980) (pleading for Eighth Amendment *Bivens* action); *Davis v. Passman*, 442 U.S. 228 (1979) (pleading for Fifth Amendment *Bivens* action).

<sup>18</sup> See William N. Evans, *Supervisory Liability After Iqbal: Decoupling Bivens from Section 1983*, 77 U. CHI. L. REV. 1401, 1404 (2010).

<sup>19</sup> As this paper is mainly focused on claims implicating *Bivens*, I will only note here that § 1983 defendants acting as state officials may have an Eleventh Amendment state sovereign immunity defense available, which *Bivens* defendants do not. Otherwise, § 1983 claims are more plaintiff-friendly than *Bivens* claims. See, e.g., *Edelman v. Jordan*, 415 U.S. 651 (1974).

<sup>20</sup> See Evans, *supra* note 18, at 1405 (explaining that claims under *Bivens* are limited to those where there is no adequate and alternative remedy available).

<sup>21</sup> *Bivens*, 403 U.S. at 396.

<sup>22</sup> See *Hartman v. Moore*, 547 U.S. 250 (2006) (recognizing a *Bivens* action for retaliatory and malicious prosecution); *Carlson*, 446 U.S. 14 (1980) (allowing Eighth Amendment *Bivens* remedy for cruel treatment of prison inmates); *Bivens*, 403 U.S. 388 (1971) (permitting a remedy for Fourth Amendment violations). Professor Judith Resnik has drawn parallels between domestic *Bivens* and § 1983 claims and the types of claims brought by alleged human rights abuse victims post-9/11. She argues that the recent jurisprudence should not be taken in isolation, but woven within prior decisions protecting constitutional rights. See generally Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579 (2010).

<sup>23</sup> 585 F.3d 559, 574 (2d Cir. 2009).

cy, and the security of the nation, and that fact counsels hesitation.”<sup>24</sup> A starker application of this “special factors” framework was apparent in the Supreme Court’s decision in *United States v. Stanley* to bar servicemen from bringing *Bivens* claims after the United States Army had administered LSD to soldiers in order to “study the effects of the drug on human subjects.”<sup>25</sup> The “special factor” found to be compelling in *Stanley* was the Court’s view that “uninvited intrusion into military affairs by the judiciary is inappropriate.”<sup>26</sup>

It is not entirely clear what amounts to a sufficiently pressing “special factor,” but it is apparent that the modern Supreme Court, as well as several circuits, is especially concerned with claims that ostensibly implicate national security. The D.C. Circuit seized on this rationale in *Ali v. Rumsfeld*,<sup>27</sup> decided in June 2011. Judge Henderson explained for a divided panel that *Bivens* claims brought by foreign nationals could not proceed because the Supreme Court had not recognized extraterritorial constitutional rights of foreign nationals prior to *Boumediene v. Bush*<sup>28</sup> in 2008, and even after the *Boumediene* decision it was not established that non-citizens could claim extraterritorial protection from torture under the Fifth and Eighth Amendments.<sup>29</sup> Furthermore, “even if . . . the plaintiffs could claim the protections of the Fifth and Eighth Amendments, [the court] would decline to sanction a *Bivens* cause of action because special factors counsel[ed] against doing so.”<sup>30</sup> The majority, quoting from its own decision in *Sanchez-Espinoza v. Reagan*, explained that the “special factor” in *Ali* was a concern that “the special needs of foreign affairs must stay [the court’s] hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad,” and “the danger of foreign citizens’ using the courts . . . to obstruct the foreign policy of [the U.S.] Government is sufficiently acute that [the court] must leave to Congress the judgment whether a damage remedy should exist.”<sup>31</sup>

It is difficult to distinguish the D.C. Circuit’s asserted special factor in human rights claims from blanket immunity from liability for illegal acts taken abroad.<sup>32</sup> The Supreme Court has not advanced such a rationale to bar suits against government officials by foreign citizens, and other circuits have not adopted the D.C. Circuit’s reasoning.

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<sup>24</sup> *Id.*

<sup>25</sup> *United States v. Stanley*, 483 U.S. 669, 671 (1987). James Stanley suffered greatly for his involvement in what he was told was a “program ostensibly designed to test the effectiveness of protective clothing and equipment as defenses against chemical warfare.” *Id.* Stanley “suffered from hallucinations and periods of incoherence and memory loss, was impaired in his military performance, and would on occasion ‘awake from sleep at night and, without reason, violently beat his wife and children, later being unable to recall the entire incident.’” *Id.* Furthermore, “[h]e was discharged from the Army in 1969. *Id.* One year later, his marriage dissolved because of the personality changes wrought by the LSD.” *Id.*

<sup>26</sup> *Id.* at 683.

<sup>27</sup> *Ali v. Rumsfeld*, 649 F.3d 762, 771 (D.C. Cir. 2011) (citing *Boumediene v. Bush*, 553 U.S. 723, 770 (2008)).

<sup>28</sup> *Boumediene* recognized the right of non-citizen detainees to seek writs of habeas corpus in American federal courts, absent sufficient justification for invoking the Suspension Clause. *See Boumediene*, 553 U.S. at 771.

<sup>29</sup> *Ali*, 649 F.3d at 771-72. In finding qualified immunity for the government defendants, the D.C. Circuit, somewhat cruelly, continued to refrain from recognizing the existence of a right to be free of torture at all, considering such a decision “an essentially academic exercise.” *Id.* at 772-73. *Ali* also involved claims under the Alien Tort Statute, which is discussed in more detail *infra* note 56.

<sup>30</sup> *Id.* at 774.

<sup>31</sup> *Id.* (quoting *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985)).

<sup>32</sup> *Cf. Elizabeth A. Wilson, Is Torture All in a Day’s Work? Scope of Employment, the Absolute Immunity Doctrine, and Human Rights Litigation Against U.S. Federal Officials*, 6 RUTGERS J. L. & PUB. POL’Y 175, 233 (2008) (noting that the Foreign Sovereign Immunities Act now includes an exception waiving foreign state sovereign immunity in damages actions, but only where the state is specifically designated as a foreign terrorist organization).

## 2. Immunity to Suit

A second layer of defense available to government officials takes the form of a variety of immunities to suit and liability for impermissible actions. Generally, these immunities are non-statutory and are the product of jurisprudence designed to ensure that government officials can perform their duties without excessive fear of legal liability. Government official immunity takes two broad forms: absolute immunity, which provides a total shield to liability for certain government officials and actions, and qualified immunity, which offers a two-step rubric for deciding whether an official can be held liable for an illegal act.

In human rights claims, qualified immunity is the applicable framework for deciding government officials' liability. As the Supreme Court explained in *Harlow v. Fitzgerald*, “[f]or executive officials in general . . . our cases make plain that qualified immunity represents the norm.”<sup>33</sup> The doctrine of qualified immunity, as articulated in *Harlow*, states that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>34</sup> The two-part test for qualified immunity therefore asks (1) whether there was a statutory or constitutional right allegedly violated, and (2) whether that right was clearly established at the time of the alleged violation.

The modern Supreme Court has altered the process of determining whether qualified immunity should be granted. Traditionally, a court's initial obligation was to decide whether a federally-protected right (statutory or constitutional) had been alleged.<sup>35</sup> Because the court would still have the opportunity to decide whether the right was clearly established, this approach balanced the competing goals of protecting federal rights while preventing over-deterrence of government officials through fears of excessive liability. Once the right had been clearly recognized, future misbehaving government officials could not claim the shield of qualified immunity.

The Supreme Court upended this process for deciding the question of qualified immunity in *Pearson v. Callahan*, which abolished the requirement for deciding the existence of a federally protected right in assessing qualified immunity.<sup>36</sup> Under the prior *Saucier* regime, qualified immunity had meaning; it gave public officials “one bite at the apple,” but provided notice going forward, both of the rights of individuals and the limitations on government actors.<sup>37</sup> However, under *Pearson*, courts need *never* decide whether such a right or limitation exists, regardless of how often an alleged violation is challenged in court. *Pearson* thus closes the distance between traditional qualified immunity and absolute immunity.

### C. Supervisory Liability Under *Bivens* and § 1983

*Bivens* and § 1983 are also substantially identical in determining supervisory liability. Section 1983, with its longer history, wider range of substantive causes of action, and higher volume of litigation,

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<sup>33</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). Exceptions, where absolute rather than qualified immunity is granted, exist for “prosecutors and similar officials, executive officials engaged in adjudicative functions, and the President of the United States.” *Id.* See also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (applying qualified immunity where plaintiff claimed that Ashcroft used material witness warrants as a pretext for detaining suspected terrorists).

<sup>34</sup> *Harlow*, 457 U.S. at 818.

<sup>35</sup> See *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (“A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right?”)

<sup>36</sup> See *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

<sup>37</sup> *Saucier*, 533 U.S. at 206 (“Qualified immunity operates . . . to protect officers from the sometimes ‘hazy border between excessive and acceptable force,’ and to ensure that before they are subject to suit, officers are on notice their conduct is unlawful.”) (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926-27 (11th Cir. 2000)).

provides the bulk of pre-*Iqbal* guidance on the boundaries of government official supervisory liability. However, even the question of supervisory liability under § 1983 did not reach the Supreme Court for over a century after the Act's passage. *Rizzo v. Goode*, decided in 1976, was the Court's first direct statement on supervisory liability under § 1983.<sup>38</sup> In *Rizzo*, the Supreme Court announced an "affirmative link" approach to supervisory liability; in other words, plaintiffs must establish some direct agency between the allegedly illegal actions of a supervisor and his or her inferiors.<sup>39</sup>

After *Rizzo*, lower federal courts fashioned their approaches to supervisory liability by following Supreme Court holdings on municipality liability under § 1983.<sup>40</sup> *Monell v. Department of Social Services of the City of New York* was the first Supreme Court case to establish that the actions of municipal officials could render a municipality liable under § 1983, provided that the municipality—through its supervisory agents—held some legal responsibility for the allegedly improper conduct.<sup>41</sup> A showing of culpability on behalf of supervisory policymakers satisfied the "affirmative link" component of *Rizzo*. The link could arise from direct decisions by an identifiable supervisor or from a "policy or custom" of prohibited conduct on behalf of the municipality.<sup>42</sup> In order to qualify as a policymaker, a supervisor's "edicts or acts [must] fairly be said to represent official policy."<sup>43</sup> After *Rizzo* and *Monell*, almost all federal circuits applied the Supreme Court's municipal liability approach to cases involving claims against supervising officials under § 1983.<sup>44</sup>

While governmental supervisory liability was a relatively recent development in American jurisprudence, the doctrine quickly and thoroughly took hold in federal courts in the period between *Rizzo* and *Iqbal*. Government officials could be held liable for the unconstitutional actions of their inferiors if the supervisors (1) had actual or constructive knowledge of the alleged conduct, (2) responded with "deliberate indifference to or tacit authorization" of those practices, and (3) there was a link between the supervisor's inaction and the harm suffered by the plaintiff.<sup>45</sup>

Placed in the context of this decades-long line of cases, in which even the conservative Rehnquist Court acknowledged supervisory liability under § 1983, the *Iqbal* holding is radical. As the *Iqbal* majority explained:

In a § 1983 suit or a *Bivens* action . . . the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional

<sup>38</sup> See *Rizzo v. Goode*, 423 U.S. 362 (1976).

<sup>39</sup> *Id.* at 371. The plaintiffs in *Rizzo* sought an injunction against various Philadelphia officials to correct ongoing abuses by the Philadelphia police. Frank Rizzo, the Philadelphia Police Commissioner and later Mayor, was notorious for highly controversial law enforcement practices during his tenure in both offices. See, e.g., Jonathan Storm, *Ch. 12 Looks at the Life of Rizzo*, PHILADELPHIA INQUIRER, Oct. 6, 1999, at D1.

<sup>40</sup> See Evans, *supra* note 18, at 1412.

<sup>41</sup> See *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

<sup>42</sup> *Id.* at 694-95. See also *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (explaining that "deliberate indifference" on behalf of municipal policymakers can form the basis for §1983 supervisory liability).

<sup>43</sup> *Monell*, 436 U.S. at 694.

<sup>44</sup> Prior to *Iqbal*, "[m]ost, perhaps all, of the circuits agreed that actual knowledge of unconstitutional conduct by subordinates and deliberate indifference to it were sufficient for supervisory liability." Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279, 293 (2010). See also Evans, *supra* note 18, at 1412-13 (providing a survey of cases from various circuits reflecting this consensus).

<sup>45</sup> See *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.<sup>46</sup>

Furthermore, “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.”<sup>47</sup>

Even commentators approving of the recent *Iqbal* abolition of supervisory liability in *Bivens* actions have expressed reservations about the Supreme Court’s decision to issue such a sweeping holding on a question that was conceded by the government and, ostensibly, not actually before the Court.<sup>48</sup> Strikingly, the majority did not discuss at any length its own precedents recognizing supervisory liability under § 1983, including *Monell* and *City of Canton v. Harris*, even though these cases clearly established theories of liability based on supervisory inaction rather than active constitutional violations. However, it is not entirely clear that *Iqbal* abolished § 1983 and *Bivens* supervisory liability.

More recently, in *Connick v. Thompson*, the Court recognized the continuing viability of supervisory liability, despite striking down a § 1983 “failure-to-train” claim alleged against a defendant district attorney.<sup>49</sup> The *Iqbal* majority explained that vicarious liability and *respondeat superior* are not applicable in § 1983 and *Bivens* claims; the majority also explicitly tied the two causes of action together for the purposes of liability rules.<sup>50</sup> Taking into account that the *Iqbal* majority deemed supervisory liability a “misnomer” in these contexts, the standard for deliberate indifference appears to be such that a supervisor’s inaction actually amounts to a constitutional deprivation itself, similar to a “failure to warn” claim in products liability law.<sup>51</sup>

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<sup>46</sup> *Iqbal*, 556 U.S. at 667. It is arguable that the majority mischaracterized *Iqbal*’s actual allegations regarding Ashcroft’s (and his fellow officials’) culpability. The Court wrote, “[Respondent] argues that, under a theory of ‘supervisory liability,’ petitioners can be liable for ‘knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.” *Id.* (citing *Iqbal* Brief 45-46). The Court equated this with an argument that “a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.” *Id.* However, the language from *Iqbal*’s brief closely tracks Supreme Court precedent regarding supervisory liability under § 1983—that is, knowledge and deliberate indifference and/or tacit approval—and seems to allege more than “mere knowledge of [a] subordinate’s” wrongdoing. *Id.*

<sup>47</sup> *Id.* at 677.

<sup>48</sup> Professor Nahmod is one such commentator, who, while generally agreeing with the Court’s supervisory liability holding in *Iqbal*, nevertheless asserted that whatever one thinks should be the proper standard for supervisory liability, it is surprising from a process perspective that the Court announced that it was adopting the constitutional approach to supervisory liability under circumstances of no briefing and no argument . . . . At the very least, the Court should have explained itself much more than it did. Nahmod, *supra* note 44, at 292-93.

<sup>49</sup> See *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011). John Thompson spent fourteen years on death row before being exonerated by DNA evidence illegally withheld by Harry Connick, Sr.’s New Orleans District Attorney’s Office. He subsequently sued, and was awarded \$14 million in damages—\$1 million for each year spent on death row. The Supreme Court, in overturning this award, held that the prosecutor’s office could not be held liable under a failure to train theory based on what they characterized as a single *Brady* violation. *Id.* at 1366. As the dissenting opinion and subsequent cases make clear, it is highly dubious whether the factual background of *Connick* can legitimately be treated as a single, isolated constitutional violation. *Id.* at 1370 (Ginsburg, J., dissenting). See also *Smith v. Cain*, 132 S. Ct. 627 (2012) (overturning Juan Smith’s murder conviction due to the illegal failure of the New Orleans D.A.’s office—still under Harry Connick, Sr.—to disclose that the prosecution’s sole eyewitness could not identify alleged attacker for months after the night of the quintuple murder, where there was no other evidence linking defendant to the crime).

<sup>50</sup> *Iqbal*, 555 U.S. at 676.

<sup>51</sup> See generally RESTATEMENT (SECOND) OF TORTS: SUPPLIERS OF CHATTELS § 492A (2007) (defining scope of manufacturer’s duty to warn when “he has knowledge, or by application of reasonable, developed human skill and foresight should have knowledge” of possible harm through use of product).

*Connick* affirms the continued post-*Iqbal* existence of supervisory liability under § 1983, with the caveat that a single violation of individual rights cannot satisfy a deliberate indifference standard.

In two cases decided in the months after *Ali v. Rumsfeld*, federal courts declined to extend the D.C. Circuit's logic. Each case involved the *Bivens* actions of American citizens, rather than foreign nationals, who alleged extraterritorial torture and other substantive due process violations. One of these cases, *Vance v. Rumsfeld*,<sup>52</sup> is informative for several reasons. Although the Seventh Circuit panel's decision has been vacated pending en banc review, the opinion may illustrate how circuits will treat both extraterritorial *Bivens* claims against federal officials and supervisory liability in light of *Iqbal*. Judge Hamilton, writing for the court, began by distinguishing the type of *Bivens* claim brought by Javaid Iqbal from that brought by the plaintiffs in *Vance*. Unlike Iqbal, who brought a Fourteenth Amendment equal protection claim for discriminatory treatment, the *Vance* plaintiffs, claiming torture and physical mistreatment, needed to meet the lower standard of "deliberate indifference, as in analogous cases involving prison and school officials in domestic settings."<sup>53</sup> Finding that "the plaintiffs . . . sufficiently alleged Secretary Rumsfeld's personal responsibility," the Seventh Circuit concluded that the case involved "an unusual situation where issues concerning harsh interrogation techniques and detention policies were decided . . . at the highest levels of the federal government," and

the plaintiffs' pleadings, if true, . . . sufficiently alleged not only Secretary Rumsfeld's personal responsibility in creating the policies that led to the plaintiffs' treatment but also deliberate indifference by Secretary Rumsfeld in failing to act to stop the torture of the[] detainees despite actual knowledge of reports of detainee abuse.<sup>54</sup>

*Vance*, if upheld en banc by the Seventh Circuit or by the Supreme Court, signals a brighter future for human rights claims against malfeasant government officials in the post-*Iqbal* era than one might initially anticipate. It addresses the *Iqbal* description of supervisory liability as a "misnomer" by defining deliberate indifference as a discrete constitutional violation that is tied to knowledge and foreseeability of the underlying harm. The Seventh Circuit panel found the plaintiffs' allegations that Secretary Rumsfeld knew about and failed to prevent torture and other constitutional violations—even if he had not actually personally directed these policies—sufficient to establish a *Bivens* claim.<sup>55</sup>

## II. HUMAN RIGHTS LITIGATION AND THE UNITED STATES

The United States has a long history of participation in human rights litigation involving high-ranking foreign officials. Such litigation has occurred through American federal courts and through involvement in international tribunals overseeing prosecutions of alleged war criminals. The Alien Tort Statute (ATS) allows non-citizens to bring claims in federal courts for alleged "violation[s] of the law of nations or atreaty of the United States," which provides an avenue for human rights litigation in domestic courts.<sup>56</sup>

<sup>52</sup> See *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011), *reh'g en banc and op. vacated*, Oct. 28, 2011.

<sup>53</sup> *Id.* at 599.

<sup>54</sup> *Id.* at 600.

<sup>55</sup> See *id.* at 604-05.

<sup>56</sup> The Alien Tort Statute, codified as 28 U.S.C. § 1350, has existed in some form since the original Judiciary Act of 1789. However, the ATS went largely unused until the past half-century, a shift that coincided with the growth of the international human rights movement following World War II and the Universal Declaration of Human Rights. See generally Jordan D. Shepherd, Note, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318, 2321-24 (2011) (briefly tracing the pre-*Filártiga* history of the Alien Tort Statute).

Throughout the past half-century, the United States has both actively engaged in human rights prosecutions of officials in international venues and opened its courts to domestic claims of human rights abuses.

A. *Domestic Litigation Involving Human Rights Violations: The Alien Tort Statute*

In 1976, Joelito Filártiga was kidnapped, tortured, and ultimately killed by Américo Peña-Irala.<sup>57</sup> Filártiga's family brought suit against Peña-Irala in the United States District Court for the Eastern District of New York. The suit was unique in two critical aspects: both parties were non-citizens and the plaintiffs brought suit in American federal court for harms that occurred entirely in another country. Filártiga's terrible ordeal took place in Paraguay, where Peña-Irala was a local Inspector General of Police. After Joelito's death, the Filártigas fled to America, where they subsequently discovered that Peña-Irala was visiting on a tourist visa. While Peña-Irala remained in immigration detention, the victim's family filed a claim seeking ten million dollars for a variety of human rights offenses under the Alien Tort Statute. After the suit was dismissed in lower court for lack of jurisdiction,<sup>58</sup> the Second Circuit Court of Appeals heard the Filártigas' appeal. Judge Kaufman's opinion recognized universal subject matter jurisdiction for violations of "established norms of the international law of human rights."<sup>59</sup> Personal jurisdiction over Peña-Irala and the Filártigas, the only remaining obstacle, was satisfied by the actual physical presence of both parties within the United States.<sup>60</sup> The *Filártiga* decision gave life to the ATS as a means of vindicating human rights in a competent and fair forum—the federal courts of the United States of America.<sup>61</sup>

Subsequent decisions have narrowed—or clarified—the scope of the ATS as a vehicle for pursuing human rights claims. The Supreme Court held in *Sosa v. Alvarez-Machain* that the Statute is jurisdictional and does not on its own give rise to causes of action not recognized in treaties or customary international law.<sup>62</sup> Thus, the range of available causes of action is limited to those created by a treaty to which the United States is a party and those arising from widely recognized international norms.<sup>63</sup> This restricted scope of

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<sup>57</sup> See *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

<sup>58</sup> *Id.* at 880.

<sup>59</sup> *Id.*; see also *The Paquete Habana*, 175 U.S. 677, 694-95 (1900) (recognizing "settled rule[s] of international law" by "the general assent of civilized nations" as part of domestic law to be applied in American jurisprudence).

<sup>60</sup> *Filártiga*, 630 F.2d at 885. The Court quickly disposed of Peña-Irala's opposition to personal jurisdiction, explaining that "[c]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred." *Id.*

<sup>61</sup> Another statutory framework for obtaining relief for human rights violations exists, but in a much more limited fashion than for that under the Alien Tort Statute. The Federal Tort Claims Act (FTCA) functions as a partial waiver of sovereign immunity by the Federal Government, but it contains a number of exceptions that severely undermine its usefulness as a tool in human rights litigation. In particular, the FTCA exempts any injury suffered on foreign soil from permissible suits. Additionally, the FTCA does not hold officials individually accountable for violations of human rights. See 28 U.S.C. §§ 1346, 2671; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700-01 (2004) (noting that "the FTCA 'was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances'" and that the waiver of immunity is significantly limited by the Act's exception for any claim arising in a foreign country) (citing *Richards v. United States*, 369 U.S. 1, 6 (1962)).

<sup>62</sup> See *Sosa*, 542 U.S. at 712-13. *Sosa* arose after the Drug Enforcement Agency (DEA) used Jose Francisco Sosa, a Mexican national, to abduct Humberto Alvarez-Machain, also a Mexican national, on suspicion of torturing and murdering Enrique Camarena-Salazar, a DEA agent. Both the abduction and the alleged torture-murder occurred entirely in Mexico. Alvarez-Machain was transported to the United States for a trial in which he was acquitted of all charges. He then brought suit against Sosa under the ATS and against the United States under the Federal Tort Claims Act. See *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>63</sup> See *Sosa*, 542 U.S. at 725.

the ATS limits its applicability to the clearest and universally acknowledged of human rights violations, such as the torture-killing suffered by Joelito Filártiga in Paraguay.<sup>64</sup>

While a unanimous Court held that Humberto Alvarez-Machain's claim was not cognizable under the ATS, the majority rejected Justice Scalia's argument for limiting claims under the statute only to those specific substantive claims recognized at the time of the Act's passage.<sup>65</sup> The majority's holding instead allowed federal courts to recognize "claim[s] based on the present-day law of nations . . . rest[ing] 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."<sup>66</sup> The range of substantive claims available to ATS plaintiffs is therefore not strictly limited to those identifiable in the international law corpus of 1789, but expands, and theoretically also contracts, with the development of present-day international law.

Federal courts have been hesitant to hold American officials and entities amenable to suit in analogous human rights cases. The Supreme Court has granted immunity from suit to military contractors for defective product manufacturing claims brought under the Federal Tort Claims Act (FTCA),<sup>67</sup> while lower courts have shielded contractors from liability for torture<sup>68</sup> and corporations from liability for participation in illegal rendition of detainees.<sup>69</sup> In fact, prior to *Vance*, whose status is in flux, there does not appear to have been a case in which an American official or entity has been held liable under the ATS for violations arising out of American activities abroad.

The D.C. Circuit's holdings in *Saleh v. Titan* and *Ali v. Rumsfeld* reflect both a double standard and a trap for plaintiffs: a double standard by which an American statute can be used to hold foreign, but not American, officials liable for violations occurring entirely in foreign jurisdictions, and a trap by which plaintiffs can neither recover from the officials who directed or supervised impermissible acts nor the private actors who carried them out.<sup>70</sup> Beyond *Ali*'s limitation of the permissible range of substantive causes of action

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<sup>64</sup> One early example of the difficulty of recognizing "universal" norms of international law is evident in *Tel-Oren v. Libyan Arab Republic*, in which the plaintiffs alleged that the Libyan state had sponsored and otherwise aided terrorist attacks against civilian targets in Israel. 726 F.2d 774 (D.C. Cir. 1984). The opinion, unanimously finding a lack of subject matter jurisdiction, nevertheless produced a separate opinion from each of the three presiding judges, each disagreeing about the merits of the *Filártiga* decision in the period before *Sosa* provided definitive clarity on the reach of the ATS. In particular, Judge Edwards' concurring opinion, in assessing claims against the Libyan Republic, wrestled with the question of whether terrorism was a universally accepted violation of international law giving rise to ATS subject-matter jurisdiction, ultimately concluding that it was not. *Id.* at 795-96 (Edwards, J., concurring).

<sup>65</sup> Justice Scalia argued that "creating a federal command (federal common law) out of 'international norms[]' and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS[] is nonsense upon stilts." *Sosa*, 542 U.S. at 743 (Scalia, J., concurring).

<sup>66</sup> *Id.* at 725.

<sup>67</sup> See *Boyle v. United Tech. Corp.*, 487 U.S. 500, 512 (1988) (holding that government contractors cannot be held liable for design defects in military equipment that satisfied United States approved specifications when the contractor had made the United States aware of the dangers of the use of that equipment).

<sup>68</sup> See *Saleh v. Titan Corp.*, 580 F.3d 1, 15 (D.C. Cir. 2009). The D.C. Circuit held in *Ali v. Rumsfeld* that the Westfall Act precludes ATS liability for government officials for actions that clearly violate international laws and norms, while also holding in *Saleh* that private contractors that participate in torture, under the direction of the same government officials, are not subject to international norms and customs banning these practices. *Ali*, 649 F.3d at 762, *Saleh*, 580 F.3d at 15.

<sup>69</sup> See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied* 131 S. Ct. 2442 (May 16, 2011) (dismissing litigation against private corporations that provided flight planning and logistical support services to U.S. Government in rendition of detainees).

<sup>70</sup> See generally Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718 (2008) (arguing that the Westfall Act was never intended to preempt liability for violations of international norms, laws, and customs under the ATS and proposing a legislative revi-

under the Alien Tort Statute and *Bivens*, discussed above, the D.C. Circuit also held that the Westfall Act,<sup>71</sup> which generally functions as a bar to FTCA claims, *also* provides an absolute defense to any ATS claims arising out of a government official's employment.<sup>72</sup> This is a sweeping view of the Westfall Act, which was only written to protect federal employees from tort suits arising out of actions taken "within the scope of . . . employment."<sup>73</sup> However, the D.C. Circuit's reading of the Westfall Act defines intentional, unconstitutional, and illegal—rather than merely discretionary, negligent, and tortuous—conduct as "within the scope" of government officials' employment.

The Westfall Act—officially titled the Federal Employees Liability Reform and Tort Compensation Act—owes its name to the Supreme Court decision *Westfall v. Erwin*, which exposed federal employees to liability for non-statutory state tort actions.<sup>74</sup> Congress quickly responded to the Westfall holding by "grant[ing] . . . federal employee[s] suit immunity . . . when 'acting within the scope of [their] office or employment at the time of the incident out of which the claim arose.'"<sup>75</sup> Additionally, the Act was designed "to shield covered employees not only from liability but from suit."<sup>76</sup> In *Ali*, the D.C. Circuit sought to place its holding in line with *Sosa*, emphasizing the jurisdictional nature of the ATS and arguing that a "claim brought under the ATS . . . does not allege 'a violation of a statute of the United States' satisfying the Westfall Act exception [allowing employees to be held liable]."<sup>77</sup> However, the ATS embraces more than violations of the law of nations; § 1350 also allows suits under American treaties and other non-common law.<sup>78</sup> In numerous cases considering the ATS after the passage of the Westfall Act, no Supreme Court decision has ever held—implicitly, explicitly, or otherwise—that the Westfall Act abrogated the ATS.

It is difficult to reconcile the obligatory nature of international law and customs, as expressed in the age-old *The Paquete Habana* case,<sup>79</sup> with a holding that commission of acts in violation of those laws and customs are within the scope of an official's employment. In fact, the Supreme Court fashioned the *Ex parte Young* doctrine for § 1983 cases to recognize that state officials cannot claim Eleventh Amendment sovereign immunity for actions in violation of the Constitution and certain federal laws, because those actions are inherently outside the scope of an official's employment as a public servant.<sup>80</sup> Furthermore, many of the ATS claims pressed against federal officials are rooted in long-standing, even famous, human rights laws and practices. At least some of these laws include obligatory enforcement provisions. For example, the

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sion to clarify this Congressional intent).

<sup>71</sup> Federal Employees Liability Reform and Tort Compensation (Westfall) Act, Pub. L. No. 100-694, 102 Stat. 4563 (1988).

<sup>72</sup> *Ali*, 649 F.3d at 774-75.

<sup>73</sup> See Lin, *supra* note 70, at 1728-29 (providing an overview of legislative history and context leading to the passage of the Westfall Act following *Westfall v. Erwin*, 484 U.S. 292 (1988)). The argument for the Westfall Act's applicability to ATS claims generally springs from the proposition that the Act provides a defense to FTCA claims against the government, and the ATS, as a jurisdictional statute, on its own, does not create a cause of action where one is otherwise barred. See, e.g., *Ali*, 649 F.3d at 775 ("the ATS 'is strictly a jurisdictional statute' that 'does not confer rights nor does it impose obligations or duties that, if violated, would trigger the Westfall Act' . . .") (citing *Rasul v. Myers*, 512 F.3d 644, 661 n.1 (D.C. Cir. 2008)).

<sup>74</sup> *Westfall*, 484 U.S. at 293.

<sup>75</sup> *Osborn v. Haley*, 549 U.S. 225, 247 (2007).

<sup>76</sup> *Id.* at 248.

<sup>77</sup> *Ali*, 649 F.3d at 778 (citing 28 U.S.C. § 2679 (b)(2)(B)).

<sup>78</sup> This being the case, one might expect—and judicially demand—Congress to speak more explicitly if it sought to abrogate § 1350 so selectively. The D.C. Circuit, in the process of seeking to cast itself as merely following *Sosa*, performed a good deal of linguistic maneuvering to avoid the Court's plain statement that "the domestic law of the United States recognizes the law of nations." *Sosa*, 542 U.S. at 729-30.

<sup>79</sup> 175 U.S. 677 (1900).

<sup>80</sup> *Ex parte Young*, 209 U.S. 123, 159-60 (1908).

Geneva Conventions and Convention Against Torture require parties to actively seek out, prosecute, and remedy human rights violations.<sup>81</sup>

Despite this narrowing of the ATS, the law has been effective in providing relief against notorious human rights abusers who have ventured into the boundaries of American courts' personal jurisdiction. Judge Newman, writing for the Second Circuit in *Kadic v. Karadžić*, captured the unique place of the statute in our legal culture: "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."<sup>82</sup> The ATS has also provided liability for the torture of Falun Gong practitioners in China and unionists in Guatemala,<sup>83</sup> the assassination of Archbishop Oscar Romero in El Salvador,<sup>84</sup> and non-consenting pharmaceutical experimentation on individuals in Nigeria.<sup>85</sup>

### B. *International Tribunals and Prosecutions of Human Rights Abuses Applying Command Responsibility*

The Nuremberg Trials are often considered the true beginning of human rights law. Almost immediately following the Allied victory in World War II, many of the most notorious perpetrators of the Holocaust, and related offenses, were brought to trial. These early *ad hoc* tribunals were created by multilateral treaty and were unprecedented in scope and purpose. Never before had courts been established to systematically prosecute human rights crimes. The practice was so unheard of that the Allies were accused of "victors' justice," imposing punishment and extracting a pound of flesh from the defeated Axis powers for acts which were not explicitly prohibited under preexisting international law.<sup>86</sup>

The United States, having emerged from the War as a superpower, played a key role in the Nuremberg proceedings. The U.S., along with its allies, formed the International Military Tribunal in order to "punish the German leaders responsible for crimes committed during the war."<sup>87</sup> Justice Robert Jackson served as the Allies' Chief Prosecutor, and the United States was a treaty party to the trials.<sup>88</sup> In the cases against the most senior Nazi officials, "it was usually clear that offenses had been committed and that orders had been given at the highest level."<sup>89</sup>

The United States also pursued separate prosecutions of Nazi officials in military tribunals held in Germany. Somewhat contrary to the recent Second Circuit holding in *Kiobel v. Royal Dutch Petroleum*

<sup>81</sup> See The Geneva Conventions of 1949 and Additional Protocol I of 1977; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85.

<sup>82</sup> *Kadic v. Karadžić*, 70 F.3d 232, 236 (2d Cir. 1995).

<sup>83</sup> See *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242 (11th Cir. 2005) (discussing Guatemalan labor union workers); *Doe v. Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004) (discussing Falun Gong practitioners).

<sup>84</sup> See *Doe v. Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).

<sup>85</sup> *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

<sup>86</sup> See, e.g., Michael P. Scharf, *Have We Really Learned the Lessons of Nuremberg?*, 149 MIL. L. REV. 65, 66 (1995) (describing criticism of Nuremberg as a "victor's tribunal before which only the vanquished were called to account").

<sup>87</sup> Allison Marston Danner, *The Nuremberg Industrialist Prosecutions and Aggressive War*, 46 VA. J. INT'L L. 651, 654 (2006). See also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, Aug. 8, 1945, 82 U.N.T.C. 280 (establishing the International Military Tribunal to prosecute the major war criminals of the European Axis for crimes against humanity such as persecution, deportation, and extermination).

<sup>88</sup> Scharf, *supra* note 86, at 65-66.

<sup>89</sup> See W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 113 (1995).

*Company*<sup>90</sup> (discussed below), the Allies secured convictions of individuals from various spheres of Nazi society, from government officials to private capitalists. The “Industrialist Cases,” for example, prosecuted German corporate executives under the theory that “these individuals encouraged Germany to make war on its neighbors for economic gain.”<sup>91</sup> Private actor “responsibility [for human rights abuses] was ultimately codified during the Second World War in Control Council Law No. 10, which [also] recognized private individual and corporate liability, as well-entrenched elements of international law.”<sup>92</sup> More recently, the Second Circuit weighed in on the breadth of the Alien Tort Statute as it related to corporate liability, holding in *Kiobel* that corporations could not be subject to liability under the ATS because they were not historically held liable for violations of human rights under customary international law.<sup>93</sup>

While it is conceptually plausible, as Judge Cabranes argued in *Kiobel*, to differentiate between corporate entities and individual actors within corporations for the purposes of customary international law standards of liability, no case appears on the record in which corporate agents have been held liable under the ATS. Relevant to this dearth of individual liability, the *Kiobel* decision, and others coming to the same conclusion, did not find that no human rights violation occurred, but instead found that corporations were not amenable to liability for human rights violations under customary international law. In other words, the *Kiobel* holding, and similar decisions in other lower federal court cases, may create a plaintiffs’ catch-22 in which it is formally possible, but practically impossible, to ever hold corporations or their high-ranking officials liable under a command responsibility theory. The contention that corporations and private actors were not held liable for such violations in customary international law is in tension with the Industrialist Cases.<sup>94</sup>

Another significant series of post-World War II trials forced sixteen judges to defend their roles in reshaping the German legal regime to allow the atrocities that took place under Nazi rule.<sup>95</sup> Ten of the sixteen judges prosecuted in *United States of America v. Josef Altstötter, et al.*<sup>96</sup> were convicted and sentenced to punishments, including prison time.<sup>97</sup> The judges and lawyers held to account in these “Justice Trials” were not alleged to have participated in the human rights crimes perpetrated by their countrymen, but were found liable based on “the principle that lawyers and judges in a governmental regime bear a particular responsibility in certain circumstances” to prevent these abuses.<sup>98</sup> Without even an allegation that the judges directed or oversaw the underlying crimes, the criminal convictions in the Justice Trials, carrying incarceration rather than merely civil penalties, rested on a level of intent and responsibility that falls below even the

<sup>90</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

<sup>91</sup> Danner, *supra* note 87, at 653 (drawing a parallel between attempts to hold corporate entities, particularly Halliburton, liable for abuses in American wars following 9/11 and the prosecutions following Nuremberg).

<sup>92</sup> Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 91-92 (2011). See also International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR., 49th Sess., U.N. Doc. S/RES/955, at 1 (Nov. 8, 1994).

<sup>93</sup> *Kiobel*, 621 F.3d at 145. Somewhat paradoxically, Judge Cabranes explained that “the fact that a legal norm is found in most or even all ‘civilized nations’ does not make that norm a part of customary international law.” *Id.* at 118. Cf. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (dismissing claims brought against Exxon for human rights abuses perpetrated in Indonesia by its private security forces on the same basis as the decision in *Kiobel*).

<sup>94</sup> See Gwynne Skinner, *Nuremberg’s Legacy Continues: The Nuremberg Trials’ Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 322-23 (2008). The degree to which corporate liability has been recognized as a universal international norm or custom is up for debate. Whether Judge Cabranes’ approach is a tenable and realistic approach to liability for corporate malfeasance and responsibility particularly in the modern era of multinational corporations is up for debate, but this paper will leave that argument for another day.

<sup>95</sup> See Philippe Sands, *Torture Team: Abuse, Lawyers, and Criminal Responsibility*, 48 WASHBURN L.J. 353, 369 (2009).

<sup>96</sup> *United States of America v. Josef Altstötter, et al.*, 3 T.W.C. 1 (1948).

<sup>97</sup> See Sands, *supra* note 95, at 369.

<sup>98</sup> *Id.*

deliberate indifference standard articulated in more recent American jurisprudence.

Coincident with the trials of Nazi officers, officials, and civilians were the Tokyo Tribunals, which extended command responsibility for the first time to political officials without direct involvement in alleged abuses.<sup>99</sup> The Tokyo Tribunals not only considered direction of and involvement in abuses, but also “considered the responsibility of political and bureaucratic leaders for failure to act.”<sup>100</sup> Under General Tomoyuki Yamashita’s leadership, “[Japanese] soldiers abused civilians, internees, and prisoners of war on an indescribably large scale,” but he claimed, “as a result of the success of American forces in disrupting his command and control, he had no knowledge of the crimes committed by his soldiers.”<sup>101</sup> General Yamashita was ultimately sentenced to death even though

[t]he prosecution could not prove that the General had actual knowledge of the crimes that his subordinates committed . . . [because] the Tribunal reasoned that the crimes were so widespread and conspicuous that General Yamashita must have either secretly ordered them or must have been aware of their commission.<sup>102</sup>

Following the Nuremberg Trials, the United States was instrumental in founding the United Nations and crafting many of its most crucial human rights standards. The United States submitted the first draft of the Universal Declaration of Human Rights, much of which is now integrated in the fabric of customary international law,<sup>103</sup> and helped craft many of the core human rights treaties and conventions following the Holocaust. The U.S. is a signatory to the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture, the Additional Protocol to the Geneva Conventions, and the Convention Against Genocide. Each of these agreements is binding on treaty parties, and each codifies universal protections claimed by human rights litigants in the ATS suits discussed above. For example, the ICCPR prohibits the ethnic and religious discrimination alleged by Javaid Iqbal, while the Convention Against Torture addresses the treatment of detainees alleged in *Vance*.

The U.S. was also at the forefront of establishing both modern international criminal tribunals in Yugoslavia and Rwanda and ensuring that human rights abusers were held to account in each forum.<sup>104</sup> In fact,

much of the cooperation from relevant governments received by the [International Criminal Tribunal for Yugoslavia] was the direct or indirect consequence of pressure from Washington, D.C. . . . [and various] surrenders and transfers were the direct consequence of the United States threatening to withhold or block substantial financial assistance.<sup>105</sup>

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<sup>99</sup> See Fenrick, *supra* note 89, at 117-18 (1995).

<sup>100</sup> *Id.* at 116.

<sup>101</sup> Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 178-79 (2000).

<sup>102</sup> Jordan Engelhardt, *The Preeminent State: National Dominance in the Effort to Try Saddam Hussein*, 41 CORNELL INT’L L.J. 775, 788 (2008).

<sup>103</sup> See Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is it Still Right for the United States?*, 41 CORNELL INT’L L.J. 251, 257 (2008).

<sup>104</sup> See Richard Goldstone, *A View from the Prosecution*, 2 J. INT’L CRIM. JUST. 380, 383 (2004). The United States exercised its vote in support of both U.N. Security Council Resolutions establishing the ICTs for Rwanda and Yugoslavia. See S.C. Res. 955, ¶¶11, 12, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955, at 2 (Oct. 8, 1994); S.C. Res. 827, ¶¶12-24, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827, at 2 (May 25, 1993).

<sup>105</sup> Goldstone, *supra* note 104, at 383.

American support was likewise critical in ensuring the existence of the International Criminal Tribunal for Rwanda.<sup>106</sup>

Both of these international criminal tribunals applied the doctrine of command responsibility. As the ICTR held in *Prosecutor v. Blaskic*,<sup>107</sup> command responsibility attaches when “the superior has effective control over the persons committing the violations of international humanitarian law in question, that is, has the material ability to prevent the crimes and to punish the perpetrators thereof.”<sup>108</sup> The ICTR and ICTY cases “emphasize . . . that the command responsibility theory of liability is premised on the actual ability of a superior to control his troops.”<sup>109</sup> In the ultimate prosecution of Slobodan Milosevic in the ICTY, the prosecution “utilized the theory of command liability,” since “the ICTY prosecution found little to no direct evidence of Milosevic’s involvement in the vicious crimes perpetrated during his rule.”<sup>110</sup>

Following the 2003 ouster of Saddam Hussein by a coalition led by the United States, the U.S.-led Coalition Provisional Authority issued a statute authorizing the Iraqi Special Tribunal to hold members of Hussein’s former regime liable for human rights abuses.<sup>111</sup> In the prosecution of Hussein, the Iraqi High Tribunal, applying the command responsibility doctrine, informed the former dictator, “in view of your high responsibility [as Iraqi leader], you are directly responsible for crimes committed against those victims and their families.”<sup>112</sup>

The post-*Filartiga* development of the Alien Tort Statute has also recognized command responsibility in civil litigation against foreign government officials.<sup>113</sup> As the Senate explained in passing the Torture Victim Protection Act (TVPA), “[u]nder international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—*anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them.*”<sup>114</sup> In *Ford ex rel. Estate of Ford v. Garcia*, for example, the Eleventh Circuit held that

[t]he TVPA allows victims of violations of international law, or those victims’ representatives, to bring a civil cause of action in federal district court against commanders under the international law doctrine of command responsibility, [which] makes a commander liable for acts of his subordinates, even where the commander did not order those acts.<sup>115</sup>

The court continued to explain,

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<sup>106</sup> See S.C. Res. 827, ¶¶12-24, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827, at 2 (May 25, 1993).

<sup>107</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia March 3, 2000).

<sup>108</sup> *Id.* at ¶¶ 295, 302. See also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT’L L. 706, 719, 721 (2002) (discussing the role of command responsibility in the decisions of the International Criminal Tribunals for Rwanda and the Former Yugoslavia, taking note of the holding of *Prosecutor v. Blaskic*).

<sup>109</sup> Murphy, *supra* note 108, at 721.

<sup>110</sup> Engelhardt, *supra* note 102, at 791. Milosevic perished in Tribunal custody before a final conviction or acquittal could be delivered by the ICTY.

<sup>111</sup> See Danner, *supra* note 87, at 675-76 (referencing the use of the command responsibility doctrine, and the “abuse of position” by the Iraq Special Tribunal).

<sup>112</sup> Engelhardt, *supra* note 102, at 797.

<sup>113</sup> See Wilson, *supra* note 32, at 233. The TVPA creates a substantive cause of action under the ATS for victims of torture.

<sup>114</sup> *Id.* at 233-34 (quoting S. Rep. No. 102-49, at 9 (1991)) (emphasis added).

<sup>115</sup> *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1286 (11th Cir. 2002). The litigation in *Ford* was not brought under the ATS, since the plaintiffs were American citizens.

The essential elements of liability under the command responsibility doctrine are: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes.<sup>116</sup>

*Ford* remains good law in American courts, and the doctrine of command responsibility, at least so far as applied to *foreign* government officials, has not been questioned in federal jurisprudence. Federal courts in these contexts have recognized command responsibility as integral to customary international law and treaty obligations, and have routinely applied this understanding in litigation against foreign officials alleged to have had committed human rights abuses.

Although the TVPA only allows litigation against foreign officials, recognition of command responsibility in ATS claims preceded the 1991 passage of the Act. The TVPA was actually passed to close a loophole that allowed foreign nationals, but not American citizens, to sue foreign officials for torture in American courts.<sup>117</sup> For instance, applying the TVPA to a torture claim against a Guatemalan military leader, the District Court for the District of Massachusetts in *Xuncax v. Gramajo* “found that the foreign official defendant, as former Vice Chief of Staff and director of the Army General Staff, was responsible under the command responsibility doctrine for the atrocities committed by the military under his command.”<sup>118</sup>

### C. *Kiobel* and the Future of Human Rights Accountability

On February 28, 2012, the Supreme Court heard oral arguments on *Kiobel*. The question presented was the same as considered previously by the Second Circuit: are corporate actors liable for violations of substantive law made actionable by the Alien Tort Statute?<sup>119</sup> This question remains unanswered; the Court has instead broadened the scope of *Kiobel* dramatically, asking whether the ATS gives federal courts jurisdiction over *any* case in which both parties are foreign and the alleged harm occurred outside of the territorial bounds of the United States. The Supreme Court is set to decide whether *Filartiga* remains good law.<sup>120</sup>

Although the issue of extraterritorial applicability of the ATS does not directly bear on the question of command liability, *Kiobel* has the potential to severely roll back the American commitment to enforcement of explicitly universal human rights law. A basic underlying fact of the *Kiobel* case echoes *Filartiga*: the defendant was a private party *acting in concert* with the government when the harm occurred.<sup>121</sup> Under these circumstances, a victim of human rights abuses could not reasonably expect justice in the courts of that country.

International law and human rights experts have strongly pushed back against the apparent effort to limit the reach of the ATS. Professor Sarah Cleveland has noted that “international law [does not] impose any categorical bar to adjudicating international law violations arising in another country,” and “modern in-

<sup>116</sup> *Id.* at 1288.

<sup>117</sup> See Wilson, *supra* note 32, at 226-27.

<sup>118</sup> *Id.* at 234. See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

<sup>119</sup> *Kiobel*, 621 F.3d at 145.

<sup>120</sup> See Oral Argument, *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (No. 10-1491), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf).

<sup>121</sup> *Kiobel*, 621 F.3d at 117 (describing the plaintiffs as private corporations who were “aided and abetted [by] the Nigerian government in committing violations of the law of nations”).

ternational law authorizes, and in some cases requires, the United States and other nations to exercise jurisdiction over those who commit core international law violations abroad.<sup>122</sup> Furthermore, Professor Oona Hathaway notes that there are at least twenty-one other countries that allow extraterritorial enforcement of international law in domestic courts.<sup>123</sup> Dozens of briefs on behalf of human rights groups and experts have been filed in *Kiobel* in support of preserving the reach of the ATS.

The Roberts Court can do a great deal of damage to human rights accountability by deciding *both* the corporate liability and extraterritoriality under the ATS. While the typical Supreme Court approach is to decide a case on the narrowest basis necessary, there have been notable examples of the Court majority going further in recent terms.<sup>124</sup> A holding barring corporate liability under the ATS would do critical harm to human rights enforcement as multinational corporations have an increasingly far-reaching role in labor, environmental, health, and other issues across the globe which bear directly on human rights law propagated over the last half-century.

As discussed above, corporate liability has deep roots in international law. While it is possible that corporations at the time of the original ATS—which has been recodified in the modern era as its own standalone statute—were merely chartered extensions of sovereign states, *Sosa* explained that the international law embodied in the ATS is not fixed as the law of 1789. Holding corporate entities liable under a theory of command responsibility is crucial to ensuring that those with the most power to prevent human rights abuses by their employees and agents have a real incentive to do so. This is true whether the alleged human rights abuses occur within the territorial bounds of the United States and whether either of the parties is non-foreign. The human rights revolution of the twentieth century was predicated on universality. Malfeasant defendants should not escape responsibility because they are sheathed in corporate immunity or because the human rights abuses happened in a country whose government was complicit in the alleged harm.

### III. COMMAND RESPONSIBILITY AS CUSTOMARY INTERNATIONAL LAW AND BINDING TREATY OBLIGATION

Command responsibility precedes the post-World War II human rights revolution by at least half a century. The doctrine appears in the Hague Convention of 1907, in which “one begins to see the early development of the military command doctrine.”<sup>125</sup> This Convention has been cited in numerous United States Supreme Court opinions, and has “invoked Hague and Geneva law in interpreting the Eighth Amendment bar on ‘cruel and unusual’ punishment, as guidelines in fashioning process requirements for military tribunals and in adjudicating writs of habeas corpus.”<sup>126</sup> The command responsibility doctrine “emerged as a

<sup>122</sup> Sarah Cleveland, *Online Kiobel Symposium: The Alien Tort Statute and the Foreign Relations Fallacy*, SCOTUSBLOG (July 13, 2012, 1:04 PM), <http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-alien-tort-statute-and-the-foreign-relations-fallacy>.

<sup>123</sup> See Oona Hathaway, *Online Symposium: The ATS is in Good Company*, SCOTUSBLOG (July 17, 2012, 11:37 AM), <http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-ats-is-in-good-company>. See also Oona Hathaway, *What's Really at Stake in Kiobel v. Royal Dutch Shell*, ALLIANCE FOR JUSTICE (Sept. 28, 2012, 4:07 PM), <http://afjjusticewatch.blogspot.com/2012/09/whats-really-at-stake-in-kiobel-v-royal.html>.

<sup>124</sup> See e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012) (holding that the Affordable Care Act is constitutional under federal taxing power, with Justice Roberts writing separately to narrow Congressional Commerce Clause authority); *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011) (deciding unanimously that Betty Dukes' class action could not go forward under Rule 23, while 5-4 majority went further to substantially limit class actions more broadly).

<sup>125</sup> See Fenrick, *supra* note 89, at 112. See also Hague Convention (IV) Respecting the Laws and Customs of War on Land, Annex, Ch. 1, Sec. 1, Arts 1, 26, Oct. 18, 1907, 1 U.S.T. 631.

<sup>126</sup> See David Weissbrodt and Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1342 (2011).

principle of customary international law during the [post-World War I] 1919 deliberations of the Commission on Responsibility and Sanctions.”<sup>127</sup>

The Convention Against Torture, adopted by the U.N. General Assembly in 1984 and ratified by the United States in 1994, explicitly obligates command officials to ensure their subordinates’ compliance with its terms.<sup>128</sup> Rendition is explicitly prohibited,<sup>129</sup> and government officials are required to

ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.<sup>130</sup>

Notably, the Convention contains an Article that functions as an anti-”special factors” provision: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>131</sup>

The Torture Convention also creates a right to a “prompt and impartial investigation, whenever there is a reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.” As a party, the United States must “ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible.”<sup>132</sup> In other words, not only are victims of torture entitled to a fair hearing and due process, state parties are *required* to compensate individuals who have been subject to torture, and government officials have an obligation to prevent torture by subordinate officials. The Convention is also explicit in its assurance that its provisions are a floor rather than a ceiling; while criminal punishment of violators and civil remedies for victims are required by the treaty, it does not “affect the right of the victim or other person to compensation which may exist under national law,” or “prejudice . . . any international instrument or national legislation which does or may contain provisions of *wider* application.”<sup>133</sup>

As discussed above, the U.S. has a long history of applying command responsibility to litigation—including prosecution—involving foreign officials and leaders. American courts have recognized the doctrine as integral to international law to be applied in federal litigation.

#### IV. CONCLUSION: RECONCILING *IQBAL*’S SUPERVISORY LIABILITY HOLDING WITH BINDING INTERNATIONAL LAW

The Supreme Court in *Iqbal* explained that supervisory liability is a “misnomer,” and that *respondeat superior* does not apply to claims against government officials for the actions of subordinates. As discussed above, some commentators and lower court judges have taken this to mean that officials *cannot* be held liable for the actions of their subordinates. If this were truly *Iqbal*’s holding, the Court would have not only radically departed from its own domestic law precedent, it would also have put American law in per-

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<sup>127</sup> Mamolea, *supra* note 92, at 90-91.

<sup>128</sup> See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art.10, Dec. 10, 1984, 1465 U.N.T.S. 113.

<sup>129</sup> *Id.* at art. 3.

<sup>130</sup> *Id.* at art. 10.

<sup>131</sup> *Id.* at art. 2.

<sup>132</sup> *Id.* at art. 14.

<sup>133</sup> *Id.* at arts. 1, 14, 17 (emphasis added).

haps irreconcilable tension with binding international law doctrine. However, on closer analysis, the decision appears much less sweeping than an abolition of long-standing domestic and international law. A more plausible reading of *Iqbal*, in light of subsequent Court decisions<sup>134</sup> reaffirming the “deliberate indifference” standard and a presumption in favor of fealty to long-standing domestic and international law, views the failure to prevent, train, or act in mitigation of human rights abuses as a distinct legal violation.

*Iqbal* did not decide supervisory liability under the Alien Tort Statute. The Court has decided one case involving ATS litigation against the United States, holding in *Rasul v. Bush* that federal courts are not barred from asserting jurisdiction over ATS suits by foreign nationals against federal officials.<sup>135</sup> While the decision referred to the Alien Tort Statute only in passing, the *Rasul* majority never mentioned the Westfall Act as a defense to an ATS suit. This silence calls into question lower court decisions interpreting the Westfall Act to foreclose ATS claims arising from the Constitution and human rights law. Thus, *Iqbal*, while possibly tightening the requirements for asserting a human rights claim (or any claim in general), does not seem to have undermined the possibility of holding high-level government officials liable for clear human rights abuses carried about by subordinates when the requisite level of command responsibility is established. This fits well with international court decisions in which command liability is treated as a “separate offence of omission.”<sup>136</sup> The Court further did not bar *Iqbal*’s *Bivens* claims on the basis of the “special factors” found in other cases by lower federal courts.

*Iqbal*’s holding, if read properly, can be reconciled with the United States’ obligations under human rights law. Because more recent cases, including *Connick*, recognize the continued viability of deliberate indifference as a basis for liability of government officials, the supervisory liability rooted in international law has not been abandoned.<sup>137</sup> Pure *respondeat superior* has never been the standard by which command liability has operated; to this extent, *Iqbal* is not inconsistent with prior human rights law. So long as federal courts do not misinterpret *Iqbal* as doing away with command responsibility entirely, the deliberate indifference standard is in line with human rights precedent.<sup>138</sup>

Looking forward, the bigger threat to human rights litigation is the lower court jurisprudence discovering new defenses to ATS and *Bivens* claims against government officials and private actors. As discussed above, private and corporate actor liability is firmly ingrained in customary international law. Furthermore, international statutes, treaties, and conventions to which the United States is a party require civil remedies for victims of human rights abuses, in addition to criminal prosecution of offenders. The extension of the Westfall Act, which never mentions the Alien Tort Statute, as a defense to human rights litigation brought by foreign nationals relying on clear statutory and treaty law stands in opposition to this requirement. Similarly, applying unwritten “special factors” to *Bivens* litigation involving human rights plaintiffs threatens the legal obligation to provide a remedy for these types of claims.

There are graver and more immediate threats to human rights accountability for government officials than the *Iqbal* language surrounding supervisory liability. In particular, the invocation of state secrets by the federal government, and the federal courts’ acceptance of this argument to preemptively quash *any*

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<sup>134</sup> See, e.g., *Connick*, 131 S. Ct. 1350.

<sup>135</sup> *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

<sup>136</sup> See generally Chantal Meloni, *Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior*, 5 J. INT’L CRIM. JUST. 619, 620-21 (2007).

<sup>137</sup> See, e.g., *Connick*, 131 S. Ct. at 1366.

<sup>138</sup> Others have assessed the interplay of *Iqbal*’s new pleading standards and human rights law. See, e.g., Shepherd, *supra* note 56, at 2320 (explaining that after *Iqbal*, “the movement to bring human rights violators to justice must clear a burdensome procedural hurdle”). This paper does not conclude that *Iqbal*’s other procedural holdings, or federal court decisions with an exceedingly crabbed approach to human rights violations, are consistent with human rights obligations; I only conclude that *Iqbal*’s language concerning supervisory liability *can* be reconciled with command liability precedent and legal obligations.

merits hearing and determination of liability, is an increasingly prevalent barrier to both transparency and human rights accountability for the United States. In a range of cases, from the mistaken rendition and torture of Maher Arar to the “due-process-free assassination” of Anwar al-Awlaki, federal courts have bowed to the Bush and Obama Administrations’ assertions of national security privilege, crafting procedural barriers to plausible claims of human rights abuse.<sup>139</sup> In both cases, the targets of alleged anti-terror enforcement were not provided any opportunity to contest their status or government determinations of terrorist affiliation in court. While President Obama referred to the al-Awlaki assassination as “extraordinary,” Defense Secretary Leon Panetta recently affirmed the Executive’s broad position that a U.S. citizen can be executed without trial if the government determines that the individual is associated with anti-American terrorism.<sup>140</sup>

American jurisprudence currently displays an asymmetry in which foreign nationals can bring foreign officials into federal court for alleged abuses occurring across the globe, while the courtroom doors are shut to claims against American officials accused of the same legal violations. There is a widely noted recalcitrance on behalf of United States courts and high-level officials to submit American officials to the same legal scrutiny as has been directed at foreign officials in Germany, Japan, Rwanda, Yugoslavia, Iraq, Libya, and elsewhere. The post-9/11 U.S. legal regime and polices have produced plaintiffs alleging human rights abuses by American officials on an unprecedented level. While there have been efforts to hold lower level officials accountable for certain incidents, such as the torture of Iraqi detainees at Abu Ghraib and killing of Iraqi civilians in Haditha,<sup>141</sup> courts have denied an adequate forum for seeking redress against high-level officials who allegedly authorized these policies.<sup>142</sup> The withdrawal of the United States from the International Criminal Court, after helping craft the Rome Statute authorizing the ICC and signing onto its charter,<sup>143</sup> is similarly disconcerting.

The lower federal courts’ expansion of immunity to high-level officials represents a possibly ille-

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<sup>139</sup> See *Arar v. Ashcroft*, 585 F.3d 574, 563-64 (2d Cir. 2009); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010). See also Glenn Greenwald, *The Due-Process-Free Assassination of U.S. Citizens is Now a Reality*, SALON (Sept. 30, 2011, 6:31 AM), [http://www.salon.com/2011/09/30/awlaki\\_6/](http://www.salon.com/2011/09/30/awlaki_6/) (discussing the assassination via drone strike of the U.S. born Anwar al-Awlaki, alleged to have collaborated with al-Qaeda to plan terrorist strikes against the United States).

<sup>140</sup> See Adam Serwer, *Panetta: Decision to Kill Americans Suspected of Terrorism is Obama’s*, MOTHER JONES (Jan. 30, 2012, 3:13 PM), <http://motherjones.com/mojo/2012/01/panetta-obama-signs-killings-americans-suspected-terrorism>; Glenn Greenwald, *Leon Panetta’s Explicitly Authoritarian Decree*, SALON (Jan. 30, 2012, 7:55 AM), [http://www.salon.com/2012/01/30/leon\\_panettas\\_explicitly\\_authoritarian\\_decree/](http://www.salon.com/2012/01/30/leon_panettas_explicitly_authoritarian_decree/).

<sup>141</sup> See Brad Knickerbocker, *‘Atrocity’ Cases Test US Military Justice*, CHRISTIAN SCIENCE MONITOR (Dec. 22, 2006), <http://www.csmonitor.com/2006/1222/p01s01-usmi.html>; David Johnston, *Inquiry Into Abuses Ends With no U.S. Civilian Indictments*, INT’L HERALD TRIBUNE (Dec. 20, 2006), <http://www.nytimes.com/2006/12/19/world/americas/19iht-detain.3954041.html> (discussing convictions secured against American soldiers accused of torture of detainees, along with failure to indict civilian contractors complicit in detainee torture). However, the Haditha prosecutions have largely failed and the results have been characterized as an “insult” to the Iraqi people. See *Iraqis Condemn US Haditha Sentence as Insult*, JERUSALEM POST (Jan. 24, 2012), <http://www.jpost.com/Headlines/Article.aspx?id=254991&R=R101>.

<sup>142</sup> Notably, both former President George W. Bush and Vice President Dick Cheney publicly acknowledged ordering waterboarding against detainees as part of “enhanced interrogation” techniques. See Steve Holland, *In Book, Bush Strongly Defends Use of Waterboarding*, REUTERS (Nov. 4, 2010), <http://www.reuters.com/article/2010/11/04/us-bush-book-waterboarding-idUSTR6A353020101104>; *Former US VP Cheney Defends Iraq War, Waterboarding*, VOICE OF AMERICA (Aug. 30, 2011), <http://www.voanews.com/english/news/usa/Former-US-VP-Cheney-Defends-Iraq-War-Waterboarding-128686908.html>. The federal government has historically prosecuted waterboarding as torture. See, e.g., *U.S. v. Lee*, 744 F.2d 1124 (5th Cir. 1984) (prosecuting Reagan Administration law enforcement officers for use of waterboarding).

<sup>143</sup> See Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, American Society of International Law, <http://www.asil.org/insigh87.cfm> (May, 2002) (discussing the U.S. involvement in crafting the Rome Statute and subsequent decision not to ratify the Treaty and participate in the ICC).

gal barrier to human rights litigation, but is not a necessary product of *Iqbal*. The Supreme Court's decision does not displace the deliberate indifference standard, which is roughly parallel to the international law command responsibility doctrine. The Court similarly did not extend the Westfall Act to shield federal employees from human rights claims, under the guise of "scope of employment." Neither did the Court create a new "special factor" under the *Bivens* doctrine, which would bar constitutional claims brought against high-ranking federal officials by foreign victims of alleged human rights abuses. The Supreme Court has decided, in very limited circumstances, to bar particular claims against federal officials for largely procedural reasons, such as the failure to adequately plead or a failure to overcome the qualified immunity requirement of a clearly established federal right. These barriers would not exist in the context of a clear human rights violation, such as obvious torture or impermissible detention. The regime of quasi-absolute human rights immunity for high-level government officials is the product of lower federal courts crafting new law beyond what the Supreme Court or statutory law had previously recognized.