



## NEW INTERNATIONAL LAW SCHOLARSHIP FROM BERKELEY LAW

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### ROXANNA ALTHOLZ

**“Chronicle of a Death Foretold: The Future of US Human Rights Litigation Post-Kiobel,”** *California Law Review*  
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For thirty years, the Alien Tort Statute (ATS) has provided US courts with civil jurisdiction over human rights abuses committed abroad and a small group of victims a modest measure of justice. The Supreme Court’s April 2013 decision to limit the extraterritorial reach of the ATS in *Kiobel v. Royal Dutch Petroleum* prompted declarations from experts that human rights litigation in the United States is dead. This view overstates the value of ATS litigation to human rights victims and ignores the availability of other legal strategies.

This article explores the implications of *Kiobel* for the interests of those most affected by human rights violations – its victims – and identifies strategies for how advocates can best use existing legal remedies in the United States to vindicate victims’ rights. First, the article defines a metric to evaluate the significance of US legal strategies from a victim-centered perspective. The metric is based on international standards related to victims’ rights: the rights to truth, justice, and reparations.

Second, the article catalogues the multiple legal strategies available in the United States to hold perpetrators accountable for human rights abuses committed abroad. Even after the Supreme Court’s holding in *Kiobel*, the United States remains the only country in the world where a nonnational victim can bring a civil action against a nonnational perpetrator for human rights abuses committed on foreign soil. US courts also have extraterritorial jurisdiction over international crimes, such as genocide, war crimes, torture, and the recruitment of child soldiers. Under crime victims’ rights legislation, the foreign victims of these crimes have participatory rights in criminal proceedings. US immigration authorities have also denaturalized and deported hundreds of perpetrators of human rights abuses who were discovered residing in the United States in violation of immigration laws.

Third, the article looks beyond the mere existence of these formal opportunities to explore how available legal mechanisms can advance the rights of victims. The article uses a victim-centered metric to dissect the myriad vague and unproven claims about the objectives of human rights litigation and identify concrete opportunities to advance victims’ rights to truth, justice, and reparations through legal advocacy in the United States.

## LAUREL FLETCHER

**“Refracted Justice: The Imagined Victim and the International Criminal Court,”** in CM De Vos and others eds., *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015, forthcoming)

Catastrophic violence seizes our imaginations. Victims of mass atrocity crimes are invoked by the protagonists of international criminal justice as one of the primary moral justifications for this unique enterprise. As figured by the field of international criminal justice, these “imagined” victims demand accountability as the highest value pursued by justice institutions. However, employing the international criminal justice discourse on victims, international courts and tribunals almost unfailingly satisfy imagined victims while just as consistently frustrating the real ones. Drawing on insights from critical theory and critical discourse analysis, this chapter contributes to critical reflection on transitional justice mechanisms, including the International Criminal Court, and aims to consider the political and social dimensions of international criminal justice. In so doing, it advances two arguments. First, it argues that the theory of the victim generated by international criminal justice produces a particular understanding of victims. This imagined victim works to mask the legal subordination of victims by the judicial institutions that derive their legitimacy, in part, through their service to this same constituency. Second, using the ICC case against Thomas Lubanga as an illustration, it argues that the imagined victim supports the logics of international criminal justice. These logics limit the particular meanings and desires of real victims for justice. The chapter thus contributes to international discussions of the values of international criminal justice and the ability of the ICC to live up to its moral commitments.

**“Transitional Justice and the ‘Plight’ of Victimhood”** (with Harvey M. Weinstein) in Dov Jacobs, ed., *Research Handbook on Transitional Justice* (Edward Elgar Publishing, forthcoming)

As transitional justice has evolved over the last two decades, the field has coalesced around the goals of truth, justice, and reconciliation, with victims at its center. Even as a sense of a moral and increasingly a legal obligation to victims has driven the international transitional justice agenda scholars have questioned the assumptions about victims driving policy and practice, thereby opening up new areas of inquiry. A burgeoning transitional justice literature has raised questions of national and international responsibility to victims, the role of cultures in processes of social reconstruction, the value of transitional justice to victim empowerment, the social construction of victim identity, and the differential contribution of retributive and distributive justice to victims and societal change. This chapter examines these assumptions, from where they arose, and how they have been expressed in discourse and praxis. This paper also takes into account the work of academics as well as the contributions of victims and their advocates to examine the evolution of the field. By identifying some of the tensions generated by the diverse goals and understandings of victimhood, this paper sheds new light on the challenges to and concerns raised by a victim-centered transitional justice.

**“Writing Transitional Justice: An Empirical Evaluation of Transitional Justice Scholarship in Academic Journals”** (with Harvey M. Weinstein), *Journal of Human Rights Practice* (forthcoming, 2015)

This article examines transitional justice scholarship published in academic periodicals over a six-year period, between 2003-2008, to identify the disciplines that contributed to the literature and the nature of scholarly questions they pose during a period of burgeoning scholarship. This paper is the first to identify empirically which disciplines contributed to the scholarship and which were most influential among the social sciences and humanities. Law, political science, and sociology are the disciplines that dominated the field as reflected in academic journals. The most influential transitional justice articles in the social sciences and law suggested that readers were drawn to scholarly treatments that theorized the field or were analytical in nature. Scholars were wrestling with basic questions with regard to what transitional justice is and how it works. This historical perspective establishes a baseline from which to examine on-going and future research and writing in transitional justice.

## STAVROS GADINIS

**“Three Pathways to Global Standards: Private, Regulator, and Ministry Networks,”** *American Journal of International Law* (2015, forthcoming)

Private market professionals, national regulators, and ministry officials have formed numerous informal international bodies commonly called transnational regulatory networks. Their goal: to produce standards and convince governments to adopt them voluntarily as domestic laws. How do they succeed? This paper starts from the distinct institutional capabilities and constraints of these three actor types. It argues that private, regulator, and ministry networks structure their operation to accommodate their participants’ different missions, standard-drafting sensibilities, and relationships with foreign peers. Ultimately, these networks formulate standards that appeal to different countries for different reasons. Private networks tout their market validation and a-national, a-political character, thus appealing to countries eager not to fall behind their competitors. Regulator networks rely on reciprocity among peer authorities, and thus spread more readily among countries with similar institutional capabilities. Ministry networks have their governments’ backing, and thus their adoption patterns reflect the influence of powerful states with a strong international bargaining position.

To support this theory, the paper focuses on three networks in three important areas of securities regulation: accounting, cross-border fraud, and money laundering. Three case studies illustrate how networks tailor their operation and governance to the domestic lawmaking capacities of their participants. Empirical evidence from 191 countries over 20 years shows that each network’s standards have a distinct pattern of spread. More specifically, the study examines in detail the International Accounting Standards Board (IASB), a private network, and the adoption of its International Financial Reporting Standards (IFRS); the International Organization of Securities Commission (IOSCO), a network of regulators, and its Multilateral Memorandum of Understanding (MMOU); and the Financial Action Task Force, a network of ministry executives, and the adoption of its 40 Recommendations against money laundering and terrorist financing.

## MARCI HOFFMAN

**“United States,”** in Ralph Gaebler and Alison Shea, eds., *Sources of State Practice in International Law*, 2nd revised edition (Brill, 2014)

This book is a descriptive bibliography of both electronic and printed sources of information relating to the practice of States in international law. The focus is the sources which provide the text of treaties and the records of diplomatic activity of important jurisdictions around the world. As such, it includes an up-to-date description of national treaty collections and other valuable resources. It also includes descriptions of printed sources providing access to treaties and official diplomatic documentation difficult to locate in standard compilations as well as historical information and sources. In addition, this work includes a narrative section for each jurisdiction summarizing issues related to treaty succession and treaty implementation in municipal law.

## KATE JASTRAM

**“Left Out of Exclusion: International Criminal Law and the ‘Persecutor Bar’ in US Refugee Law,”** *12 Journal of International Criminal Justice* 1183 (December 2014)

The United States follows neither the letter nor the spirit of the exclusion clauses of the Refugee Convention and Protocol. The Refugee Act of 1980, which implements US obligations under the Refugee Protocol, does not use the language of article 1F(a) of the Refugee Convention referring to ‘a crime against peace, a war crime, or a crime against humanity’ and omits its reference to international criminal law. As a result, US law excludes those who have ordered, incited, assisted, or otherwise participated in the persecution of any person on account of any of the five protected Convention grounds. This formulation, known as the ‘persecutor bar’, raises a number of concerns regarding coherence and fragmentation in international law, consistency between the domestic law of an important country of asylum and its international obligations, and accountability in a regime that does not have a tribunal, expert treaty body, or other independent authority able to articulate a binding interpretation of the law. By analyzing 101 US exclusion cases based on

the persecutor bar, this article points to a gap in the US approach based on the virtual absence of references to international law sources and suggests the limitations of US jurisprudence in comparison to the approach taken in other common law legal systems.

**“Prevention in practice: Teaching IHL in US legal academia”** (with Anne Quintin), *International Review of the Red Cross* (forthcoming, 2015)

This paper assesses the evolution of teaching international humanitarian law (IHL) in law schools in the United States since 2007, analyzes progress made in overcoming challenges to more effective integration of IHL content in law school curricula, and provides a measure of the contribution of promotional initiatives and strategies undertaken by the International Committee of the Red Cross (ICRC) to this effort. The findings and recommendations should serve to support law faculty and law schools in the United States and elsewhere, as well as the ICRC, in expanding opportunities for teaching and scholarship, and in encouraging law students and professors to pursue their interest in this field.

### **SAIRA MOHAMED**

**“Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law,”** 124 *Yale Law Journal* 1628 (2015)

The historian Raul Hilberg once observed that we would all be happier if we believed the perpetrators of the Holocaust were crazy. But mass atrocity is never so simple. We may search in Germany, Bosnia, the Congo, or Rwanda for the madman or the deviant, but often we will find instead an ordinary person, one who commits a crime at the barrel of a gun or who succumbs to the awful indirect coercion that pervades entire communities in the throes of transformative violence. In the ashes of atrocity, criminal courts have been created, but many scholars have come to think that the basic structures of criminal law—built to address willful deviance from society’s norms—are inappropriate for dealing with the complex context of mass atrocity crimes.

This Article challenges this critique by making three contributions. First, it presents a novel descriptive account of how courts addressing mass atrocity crimes wrestle with the concept of deviance in criminal responsibility. Second, applying principles of domestic criminal law, the Article proposes a theory of “aspirational expressivism,” which envisions international criminal law as legitimately and positively setting forth aspirations for human behavior, rather than simply drawing a line between normalcy and deviance. Finally, the Article builds on the theory of aspirational expressivism to make the normative claim that courts can be more than forums for condemning the world’s horrors, as their role has been predominantly conceived. Instead, they can be—and should be—sites of storytelling, providing an opportunity for understanding how individuals choose to perpetrate unspeakable crimes, articulating how we hope people will behave in the most demanding of circumstances, and shaping our beliefs about the way we ought to behave under the unflattering light of the way we actually do.

**“Of Monsters and Men: Perpetrator Trauma and Mass Atrocity,”** 115 *Columbia Law Review* (forthcoming June 2015)

### **STEPHEN ROSENBAUM**

**“Clinical Legal Education in Afghanistan: Next Steps,”** Social Science Resource Network (Sept. 1, 2014)

Law and Shari’a faculties in Afghanistan now have a critical mass of professors trained in the principles of interactive teaching and experiential education. Many deans and other administrators are keen on the idea of hosting a legal clinic or an innovative educational model. Piloting a clinical program requires a team of junior and senior faculty members who remain in continuous and long-term contact with their peers and practitioners across the nation, and with clinicians in the Global South and North. This should include a partnership with a reputable law school abroad for study, clinical practice and clinic tutorials; assistance from in-country administrative staff; and periodic visits by consultants who offer hands-on technical assistance and critique.

In addition, the legal faculty and university administrators need to nurture clinical education by facilitating changes in policy and practice that spur the development of new curricula, service learning and interdisciplinary and inter-university collaboration and exchange. Many policies and procedures can be plucked from clinics operating elsewhere in Afghanistan, or adapted from those in Central or South(east) Asia or across the globe. As for the actual clients and socio-legal issues to be addressed, data are already available from governmental, non-profit and academic sources. This should allow the start-up clinic to focus on service areas (without reinventing the wheel on documenting the problem) and on modes of advocacy and service delivery.

The temptation to purchase durable goods will be great, whether donor-driven or grantee-generated. Rather than routine acquisition of equipment, furniture and books, the clinic should be much more strategic about ways for students, staff and clients to access information and to access a space for consultation, training and work. An essential but arguably elusive goal for successful clinicians is to maintain a relationship with donors marked by candor and coordination of activities with other funders. Finally, clinical legal education cannot be divorced from the rest of the curriculum. The groundwork should be accomplished through skills-based, interactive education, in moot exercises and competitions, and in clinics, both inside and outside the classroom.

## **HARRY SCHEIBER**

**“Fisheries Policies and the Problem of Instituting Sustainable Management: The Case of Occupied Japan”** (with Benjamin Jones, Boalt ‘10), in Helen Young and Lisa Goldman, eds. , *Livelihoods, Natural Resources, and Post-Conflict Peacebuilding* (Environmental Law Institute, 2015)

A study of US and Allied policies in the Japan Occupation period 1945-1952, partially based on research in Scheiber’s earlier book analyzing the problems of restoring the leading ocean fishing power of the prewar era to its former status in volume of harvest, accomplished by 1951. Topics addressed include: the revival of Japanese factory-ship whaling in the Arctic, sponsored as a key part of General MacArthur’s program for revival of Japan’s economy, and opposed strongly but unsuccessfully by the other Allied powers; fishery conflicts with China; and the effort of William Herrington, head of fisheries policy administration for the Occupation, to have Japan’s fishing industry adopt the best current practices (such as they were) for sustainability as they were being developed in the United States and northern Europe. The tripartite North Pacific International Fisheries convention and the US pressure in the case of its “abstention” policy, which kept Japan’s fleets out of the West Coast and Alaskan salmon and halibut areas, was a keystone for US and Canadian policy, and proved to be a boon favoring Japanese fishing industry expansion in other areas of the global oceans.

**“A Jurisprudence of ‘Pragmatic Altruism’: Jon Van Dyke’s Legacy to Legal Scholarship,”** 35 *University of Hawaii Law Review* 386 (Spring 2013)

This article is an analysis of the legacies of the research and litigation activity of the late Jon Van Dyke, who was professor of law in the Richardson School of Law, University of Hawaii. In a career cut short tragically in 2011, Van Dyke contributed scholarship of enduring importance to several fields, including general international law, human rights law, ocean law, jurisprudence of the Pacific small islands nations, and Hawaii water and environmental law. This study explores, among other topics, Van Dyke’s role in the early development of the “precautionary principle” and his pioneering studies of issues of nuclear power in relation to ocean law; his devotion to the elevation of altruistic, aspirational “soft law” principles to the status of recognized customary law; and the great range of topics in Pacific area regional and local legal history on which he wrote. Two areas of study, pursued in the early phase of his career, not as well remembered today as his work in international law, were a path-breaking analysis of jury selection, with an argument for permitting jury discretion in trial decisions; and a book of authoritative standing on the failure to defeat a stubborn enemy of the unprecedented bombing of Vietnam by the US forces during the war years, many of the raids on targets forbidden by international law standards. An argument is made here that Van Dyke’s approaches to international relations and to the jurisprudence of international law were marked by a blending of pragmatism and altruistic ideals.

***The Oceans in the Nuclear Age: Legacies and Risks*** (with David D. Caron, ed.), revised and expanded edition (Brill, 2014)

Expanded edition of a book (first edition published in 2010) that fills a surprising gap in research on the impact of nuclear technologies on the oceans and on ocean law and policy. The Fukushima disaster and the problem of siting nuclear power facilities in fragile coastal areas and in earthquake zones receives attention in a chapter by USN Lt. Todd Hutchins (Boalt '11). Other material on international ocean law is updated by the editors Caron and Scheiber.

**“Reflections on the ‘Abstention Doctrine’ in the Diplomatic History of Modern Ocean Law,”** in Lillian Castillo, ed., *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos* (Brill, 2015)

A retrospective view of the “abstention doctrine” as centerpiece of policy pursued by the United States during the conferences that led to adoption of UNCLOS, proposing a radical reordering of ocean fishery rights and zoning of ocean space: its origins, evolving content, and impact in the ocean diplomacy of 1945 to the 1970s. Analysis centers on the role of William Herrington as principal architect of the policy, and the reasons for failure to gain the support necessary to incorporate the doctrine into either the 1958 Geneva Convention on Law of the Sea or the UNCLOS of 1982. Judge Caminos, whose career in international law was profoundly influenced by his postdoctoral studies at UC Berkeley in 1945, retired from the ITLOS recently and is honored by 41 scholars and jurists from 20 countries.

#### **KIM THUY SEELINGER**

**“Domestic accountability for sexual violence: The potential of specialized units in Kenya, Liberia, Sierra Leone and Uganda,”** *International Review of the Red Cross* (2015)

From 2011 to 2014, the Human Rights Center at the UC Berkeley School of Law conducted qualitative research in Kenya, Liberia, Sierra Leone and Uganda to identify accountability mechanisms and challenges related to sexual violence committed during periods of conflict or political unrest. This article shares two aspects of that research: First, it presents key challenges related to the investigation, prosecution and adjudication of sexual violence committed during and after the periods of recent conflict. Second, it flags the emergence of specialized units tasked with investigating and prosecuting either sexual and gender-based violence or international crimes, noting the operational gap between these institutions. It notes that if not bridged, this gap may impede responses for the intersecting issue of sexual violence committed as an international crime. The article closes with recommendations for a more coordinated response and more accountability at the domestic level.