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Framing International Rights with a Janusism Edge—Foreign Policy and Class Actions—Legal Institutions as Soft Power

Harvey Rishikof

Mark Twain is reported to have quipped, "It is admirable to do good. It is also admirable to tell others to do good—and a lot less trouble."

INTRODUCTION

It is hard to review the intersection of Federal Rule of Civil Procedure 23 ("Rule 23"), the Alien Tort Claims Act ("ATCA")\(^2\), and the Torture Victim Protection Act ("TVPA")\(^3\) and not call to mind Twain's aphorism. The principles animating these multiple judicial doctrines are not only noble but also admirable. Yet the overall effect, given the current state of international law and the recent international positions taken by the United States, is to create a form of International Judicial Janusism, a two-faced vision of international rights and responsibilities.\(^4\)

The argument of this Article is that the issues raised by the 23/ATCA/TVPA model are of such weight that they have to be understood in the context of international relations and international law. The 23/ATCA/TVPA model poses a serious challenge to the traditional paradigm of the international system. In a way though, the traditional paradigm of the international system, based on state actors, has been under attack from at least two

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\(^1\) Visiting Distinguished Professor, National War College, Washington, DC, 2002–2003; Professor of Law, Roger Williams University School of Law, Bristol, RI. I would like to give special thanks to Trudi Rishikof for her assistance; Peter Hall for his extensive and thoughtful comments; Peter Gourvevitch for his support; and the editors of The University of Chicago Legal Forum for their editorial and research assistance. The views expressed in this Article are those of the author and do not reflect the official policy or position of the National Defense University, the Department of Defense, or the U.S. Government.


\(^3\) Torture Victim Protection Act, 28 USC § 1350 (2000).

\(^4\) Janus was the ancient Roman god of polarities, whose head had two opposing faces—one smiling and one frowning.
fronts for some time: non-governmental organizations ("NGOs") and a new, potentially muscular set of international institutions, such as the International Criminal Court ("ICC"). Each is worth at least a brief look.

NGOs have become a force to be reckoned with within the international system and have brought issues to the conventional international agenda with a vengeance. The well-known story of the recent international agreement on the use of land mines is a prime example of how a private organization, with little governmental support, can martial a winning world coalition in the international arena. Terrorist groups, as NGOs, have called into question both domestic and international structures since they involve non-state actors with multiple nationalities (including US citizens and aliens), loose affiliations or networks involving criminal law, armed conflict conventions, and national security violations.

The story of the creation of the ICC is viewed by the United Nations as a triumphant struggle for a new international legal institution that places one more building block in the foundation of a world court of justice and liberty. America's refusal to join either international regime has challenged the legitimacy of these agreements and the role of international law.

What makes the 23/ATCA/TVPA model so fascinating is that it cuts across traditional paradigms of civil procedure, rights law, plaintiff classes, plaintiff lawyer entrepreneurs, international law, international institutions, judicial authority, state power, and American foreign policy. The broad span of issues results in unanticipated outcomes and political alliances based on the pursuit of international human rights causes of action in federal court.

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5 NGOs can be domestic or international. Their decision making processes are not controlled by any particular government, although they may receive funds from state governments.


7 See Harvey Rishikof, A New Court for Terrorism, NY Times A15 (June 8, 2002) (arguing for a federal court dedicated to resolving these issues).

8 I am restricting the discussion to the federal courts although, as is pointed out by Professor Beth Van Schaack, similar class actions are more than possible under state class action law. Beth Van Schaack, Unfulfilled Promise: The Human Rights Class Action, 2003 U Chi Legal F 279. This to my mind only further complicates an already complicated situation.
This argument is divided into four sections. Part I is a brief description of international law and the strands of thought that inform the "Realist versus Idealist" debate. Introduced are the four basic ideologies or strands that have competed to define the appropriate approach to international law: the exceptionalists, the legalists, the human rightists, and the pragmatists. As part of the discussion, each strand is placed in the context of the 23/ATCA/TVPA model. Part II analyzes a number of the key concepts that inform the class action debate and their relevance to the concept of the 23/ATCA/TVPA model. Part III is an analysis of the 23/ATCA/TVPA model as articulated by some proponents of its efficacy. Finally, the Conclusion explores why the 23/ATCA/TVPA model has proven to be so controversial in the rights area and advocates a new approach to the issues.

I. INTERNATIONAL LAW IS MORE THAN REALISTS VERSUS IDEALISTS

International law is a body of customs, principles, rules, conventions, and treaties promulgated to create binding legal obligations for sovereign states and international actors.\(^9\) State sovereignty forms the basis of our international system. State foreign policy is based on, and constrained by, the intertwining of domestic and international law. Traditionally, our foreign policy has been conducted by the executive branch in consultation with the legislative branch. But the modern world system is not an open playing field. In fact the modern world system is characterized by a set of dominant structural constraints: decentralization, self-help, and asymmetry. Decentralization has led to a highly competitive international system with each state jockeying to enhance its interests. The system, despite the emergence of a number of international institutions, has retained a "self-help" component that relies on military force.\(^{10}\) And finally, the international system has been, and remains, hierarchical, in the sense

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\(^{10}\) This is most clearly demonstrated in recent times by the stated willingness of the United States to undertake an invasion of Iraq by itself if necessary. See National Security Strategy of the United States, Chapter V, Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction, Sept 2002, available online at <http://www.whitehouse.gov/nsc/nss.html> (visited Oct 9, 2003) (discussing the need for "preemption").
that some states are more equal than others and exercise greater power—economically, politically, and militarily.

As the twenty-first century begins, the United States stands astride the international system as a colossus. American values stand for free markets, human rights, and democracy. America is viewed by its friends and foes as a hyper-power, a hegemon, and a modern empire.\(^1\) A long-time strain of American culture, the strain of isolationism, has clearly retreated in the face of the nation's responsibilities and capacities. From its inception, America has stood alone. The first president, George Washington, in his Farewell Address in 1796 advised against foreign entanglements and "interweaving our destiny with that of any part of Europe."\(^2\) This approach was the luxury of a new, small, emerging country.

Today's America cannot ignore the affairs of other countries, and it cannot avoid international law as if it does not play a role in the affairs of the world. The post-World War II international system—the United Nations, the North Atlantic Treaty Organization ("NATO"), the World Bank, and the International Monetary Fund ("IMF")—involves organizations in which the United States has been a chief architect. Although in recent history these institutions have come under severe strain, with the fall of the Berlin Wall, the demise of the Soviet Union, and the creation of the World Trade Organization, international law continues to be a force for the legitimization of state action.

Often when discussing American foreign policy, the debate is framed as "Realists versus Idealists." As first understood by Max Weber, what makes the international state system different from individual state power is that there is no legitimate monopolization of the use of coercive force.\(^3\) Realists and Idealists both grapple with the Weberian problem of the lack of international authority. Realists focus on power as the dominant feature of international relations. For Realists, the defining feature of international politics is that, unlike domestic politics where state power is constrained, there are few restraints in the international sys-

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\(^1\) This is growing into an extensive literature. See, for example, Michael Ignatieff, American Empire (Get Used to It), NY Times Magazine 22 (Jan 5, 2003); Michael Mandelbaum, The Inadequacy of American Power, 81 Foreign Affairs 5 (2002).


\(^3\) Max Weber, Economy and Society: An Outline of Interpretive Sociology 58, 82 (Berkeley 1978) (Guenther Roth and Claus Wittich, eds).
When the state loses the legitimate monopolization of force, civil war or revolution ensues. A state in such a situation is in a state of anarchy until order is restored. Due to the anarchic nature of the international system, states need power to prevail. In the end, some form of a balance of power is the only guarantor of stability. But stability for Realists is an elusive goal because each state actor is constantly striving for advantage. The modern Realists of today stand for unilateral action in the international system. As Mark R. Amstutz noted, Realism “is distinguished not by amorality or immorality but by a morality of a different sort, one that differentiates political ethics from personal ethics and judges actions in terms of consequences.” One is held accountable for acts of commission and omission. For this strand of thought, the Munich Compromise by the allies in the early 1930’s allowed fascist Germany to garner power.

Idealists, on the other hand, emphasize the ideal of constraints on the exercise of power and the importance of world cooperation. The Idealist solution for the Weberian problem of no legitimate monopolization of force is the establishment of international institutions to promote civilizing, internationally agreed upon norms. This is not to say that Idealists are opposed to the use of force. Force is contemplated by Idealists, as long as the force is employed in a cooperative manner sanctioned by international norms and institutions. Idealists believe in the power of big ideas to shape the world and make it a better place. Recently, Michael Mandelbaum has argued that reliance on the ideals of peace, democracy, liberty, and free markets are key reasons for the current dominance of American power. Modern-Idealists, the heirs of the Wilsonian League of Nations, are multilateralists who believe in the power of many, not one, or at least a small coalition of the willing who are not part of a larger, institutionally-sanctioned action.

16 Id at 53.
17 Id at 58–63.
18 Id.
21 See National Security Strategy (cited in note 10).
But the "Realist versus Idealist" debate does not fully capture the strands of thought that compose the foundations of the American approach to international law. Given the international competing structure that the Weberian problem identified, four basic ideologies or strands have competed to define the appropriate approach that should dominate our foreign policy with relation to international law: the exceptionalists, the legalists, the human rightists, and the pragmatists. By teasing out these strands, one can establish the impulses that have animated the debates over human rights class actions and the 23/ATCA/TVPA model.22

A. Exceptionalist Foreign Policy

Exceptionalist foreign policy is based on the assumption that the United States is different from, and superior to, all other states in the international system; thus our foreign policy should advance our national interests. International law, when it is a fetter to our view or interest, should be ignored. We have a unilateral right to act since we have a unilateral imperative based on our values. An early manifestation of this approach is reflected in the Monroe Doctrine whereby we announced to the world that our sphere of influence was clear and paramount.23 Our motives are based on "Americanism," a combination of noble and honorable aspirations and motives that are unique unto themselves. The exceptionalist basis is the justification for our action and stands above the concept of international law. Needless to say, this view is reinforced by the capacity to act and project our will with force. Therefore our laws, our approach to rights, our views of remedies can be, and may have to be, projected on the world. Because the world cannot be counted on to bring evildoers to justice, but we can, we therefore should. To carry out this mandate is to teach the world the American—the correct—way to enforce the law. Under this conception, the 23/ATCA/TVPA model as energized by the theory of class action makes perfect sense and should be understood as an appropriate projection of American exceptionalism of American law to the international system.

22 These strands are identified and analyzed in Joyner, Encyclopedia 259–81 (cited in note 9). The discussion is also informed by a memo drafted by Hanni Cordes [On file with U Chi Legal F].

23 The Monroe Doctrine of 1825 declared that the Western Hemisphere was closed to colonization and aggressive actions by European states. See Ernest R. May, The Making of the Monroe Doctrine (Harvard 1975).
B. International Legalist Foreign Policy

The legalist foreign policy bases its legitimacy in international law. A number of existing, nascent, and proposed international judicial bodies (for example, the International Court of Justice and the European Court of Human Rights); quasi-judicial bodies (for example, the United Nations Commission on Human Rights); dispute settlement tribunals (for example, the International Labor Organization Administrative Tribunal); permanent arbitral tribunals (for example, the Permanent Court of Arbitration); claims and compensation bodies (for example, the Eritrea-Ethiopia Claims Commission); inspection panels (for example, the Asian Development Bank Inspection Policy); and regional integration agreements (for example, the Court of Justice of the Common Market for Eastern and Southern Africa) constitute a patchwork of conventions and treaties that comprise international law. The United Nations and its component units constitute only part of the world forum for international law. A guiding principle of these forums is that the respective governments voluntarily commit to, and follow, the agreements. This legal tradition is particularly important for the use of military force in the international arena.

Various international agreements and bodies govern the use of force in the international arena. Although the right of "self-defense" is a recognized international principle under Article 51 of the United Nations Charter, the concepts of casus belli (an act regarded as a reason for war) or jus ad bellum (the law for war) or jus in bello (the law in war) enforce restraint. Moreover, under Article 51, although the Charter does not impair the inherent right of self-defense in an armed attack, that right exists "until the Security Council has taken measures necessary to maintain international peace and security." The Geneva Conventions make naked self-interest an unacceptable form of behavior and constitute the basis of international humanitarian law. Since America has been a fundamental pillar of the U.N. and other bodies, its support and recognition of the system's logic are essential for its maintenance. The 23/ATCA/TVPA model asks when it is

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24 For a full chart of the myriad of bodies, see The Project on International Courts and Tribunals, available online at <http:www.pict-pcti.org> (visited Nov 8, 2003).


26 Id.
appropriate to use international fora, and when domestic fora are to be preferred. When does the use of domestic courts undermine or negate the efficacy of international tribunals? When America chooses not to ratify a treaty, protocol, or convention, but its traditional allies and friends do, what is the effect on international legalism?

C. Rights-Based Foreign Policy

The third major strand of America’s approach to international law derives from its particular brand of liberalism. The Constitution and the Bill of Rights privilege individual rights over government control (although this is not the only way the individual is protected, since the checks and balances of the separation of powers and federalism also constrain the central power). Rights politics play a special role in American consciousness and, in recent decades, have played an increasingly prominent role in the nation's approach to international politics. Some trace this tenet to Article III of the Constitution, which specifically described federal jurisdiction as “arising under the Constitution... and... the Laws of the United States,” which included international law claims based on treaty and custom. Needless to say, other theorists argue that customary international law does not have the status of federal law until authorized by the appropriate political authority.

International agreements are always scrutinized by powerful interests, whether governmental or private, to ensure that individual rights are protected. But American liberalism also has a deep commitment to self-determination. The tension of liberalism to define how far the duties of human rights stretch beyond U.S. borders has been a constant source of debate and strain within the foreign policy community.

During the Cold War, the rights of the citizens of our allies were often sacrificed if our allies’ governments were significantly anti-Communist. This Realist approach to rights often stood at

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27 Ugo Mattei and Jeffery S. Lena, United States Jurisdiction Over Conflicts Arising Outside of the US: Some Hegemonic Implications, 1 Global Jurist Topics 3 (2001), quoting US Const Art III.
29 See Stanley Hoffmann, Duties Beyond Borders (Syracuse 1981) (discussing the pros and cons of human rights policies).
30 Id.
odds with the liberal promotion of universal rights. The advantage of the 23/ATCA/TVPA model is that it places human rights front and center, as a key component of American foreign policy and international law. As stipulated by the ATCA and codified at 28 USC § 1350, “The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” When combined with class action doctrine, this produces a powerful tool that has generated claims of “legal imperialism” by some critics.

D. Pragmatic Foreign Policy

Pragmatism is the final strand of thought addressed in this Article. Rather than a grand design or integrated philosophical approach, pragmatism deals with issues or questions on an ad hoc basis. Pragmatism focuses on meeting short-term goals that deal with each issue on its own merits. Pragmatists tend to focus more on integrating national and international interests without overly emphasizing consistency over time, adopting a “that was then, this is now” reasoning. Sometimes this is a reflection of a change in political administrations or a recalibration of the costs and benefits in each case. Decisions regarding military intervention are often subject to this form of scrutiny. Each time a situation arises the case has to be made for why the nation is putting its soldiers in harm’s way. This is analogous to the classic “case-by-case” approach of the common law legal process. The common law method provides a perfect example of how a pragmatic approach, loosely guided by general principles, can produce a variety of results until the Supreme Court speaks. This is a form of instrumentalism—the science of muddling through—that can be guided by a philosophy of minimalism. The concept of taking one case at a time with a general overarching principle emerging from the individual cases is an approach that creates reform as minimalism in the legal realm. In the international world, however, the types and forms of reaction to the pragmatic case-by-case approach are more multi-faceted and more potentially deadly, (such as the counter reaction to the idea of “preemption” as the promotion of proliferation).

32 Mattei and Lena, United States Jurisdiction 2 (cited in note 27).
33 Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard 2001).
In the context of the 23/ATCA/TVPA model, judicial techniques that allow for pragmatism over jurisdiction are embodied in the concepts of "minimum contacts," "political question," or "forum non conveniens." These techniques are used to clear dockets and remove cases. In some instances pragmatism results in the case being filed in another forum or the cause of action not going forward. Of course, the other form of pragmatic judicial restraint is the denial of the certification of a class under Rule 23. Each of these strands of internationalist thought has implications for judicial involvement in human rights litigation. To fully integrate the power that the judiciary has in the 23/ATCA/TVPA model, however, we must tie it to the general theory of class actions.

II. CLASS ACTION THEORY AND INTERNATIONAL RELATIONS

A. What Does Class Action Theory Have To Do With It?

Many of the questions raised by the 23/ATCA/TVPA model stem from the underlying issues recognized by the contemporary debates over class actions in the domestic context. The very nature of the private action, or a "class action," that creates a group seeking a general remedy cuts to the core of our individual tort compensation system of persons pursuing individual remedies in order to make them whole.

Richard Epstein, in his article analyzing the efficacy of the class action as a mode of procedure, raises a fundamental question for all class actions: who holds the cause of action for damages to the person, for losses of property, or for breaches of contracts? The tension that the class action procedure raises for Epstein results from the balancing of two imperatives: the desire for personal control of one's own claim and the need for coordination of separate claims. In essence the question forces us to decide when it makes sense to relinquish the traditional logic of the purpose of a lawsuit in order to maximize the desired good of the individual plaintiff.

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34 Mattei and Lena, United States Jurisdiction (cited in note 27).
36 Id at 1.
37 Id.
In answering this question, Epstein is led to the insight that, where the fungible interests of all the group members are the closest, class actions make a great deal of sense. This situation arises when three conditions are met: (1) the number of individuals similarly situated with respect to a common defendant becomes very large; (2) the loss sustained by each party is relatively small; and (3) the administrative costs of an individual suit turn out to be quite high. Given this approach to class actions, he concludes that the procedural approach that would best allow for the joint and separate pursuit of interests is permissive joinder under Federal Rule of Civil Procedure 20 ("Rule 20"). Rule 20 allows for permissive joinder of cases when the cause of action arises "out of the same transaction, occurrence, or series of transactions or occurrences."

Why then, given the fact we have permissive joinder, do we need class actions as a procedure? The problem is that there is "permissive joinder failure." There are situations where there should be joinder but there is not, due to holdouts, coordination problems between all of the parties, indivisible remedies that generate "free rider" problems, and a logic of collective action that precludes a plaintiff from stepping forward because the administrative costs are too high in comparison to the reward. The solution: the class action—because class action procedure can overcome these barriers. Interestingly, in framing this analysis, Epstein's example is a shareholder suit, since the members all hold the same shares in the same company. Therefore, the interests are not only fungible, or typical, as required under Rule 23, but also identical and parallel. Moreover, the remedy is equally shared, based on the shareholders' investment. Under these shared shareholder conditions, there is no "opt-out" problem because the relief ultimately serves the efficiency of the corporation and its shareholders. Finally, mandatory inclusion is logical since the alternative is to receive nothing.

Given the Epstein argument for class actions, all that is left are questions that promote fairness on the issue of representa-
tion. How does one police or choose the class representatives? A race to the courthouse rule, "first in time–first in right" rule, or auctions that limit the contingent fee of the attorneys for a fixed amount, or a shareholder vote based on an election for representation are suggested. Yet, there is still a nagging question—what happens to the representations of those who lose and do not have the legal representative of their choice? The "grin and bear it" approach of those who lose their choice undermines the fundamental right to control one's case, or class action, but this may be a fair price to pay for the ultimate benefit. Moreover, there is a continuing legal problem of res judicata on subsequent litigation, appropriate attorney fees, and the use of class action procedure to shape substantive law. But these concerns are manageable with some appropriate tinkering. For Epstein it is the "modern class action" where things begin to become unhinged.

For Epstein, the "modern class action" begins to lose its attraction as one weakens the binding elements of fungibility of shares, which then undermines the indivisible nature of the relief and parallel nature of the individual claims. Modern class actions have extended the procedure to new harms, and the new harms are not analogous to the shareholder situation. The res, or the thing, is different due to the nature of the harm and the different state laws with different substantive law. This problem can arise whether the harm is a "single event," such as an airplane crash (incident concentrated in time, location, and injury), or a "dispersed event," such as harm from asbestos or pharmaceutical products (different time horizons with future plaintiffs, events in different places, different grades of harm).

These characteristics raise issues over which much ink has been spilt, including in the pages of the 2003 edition of The University of Chicago Legal Forum. Should a plaintiff have a right to "opt-out," as recognized under Rule 23(b)(3), or should a plaintiff

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46 Mattei and Lena, United States Jurisdiction at 12 (cited in note 27).
47 Some examples of potential class action harms or mass torts under Rule 23(b)(1), (b)(2), or (b)(3) where the number of estimated plaintiffs is high and the harm is an ongoing event are: tobacco (50,000,000 plaintiffs); breast implants (440,000 plaintiffs); asbestos (300,000–700,000 plaintiffs); Dalkon Shield (300,000 plaintiffs); Norplant (30,000–50,000 plaintiffs); Radiation-HRE (23,000 plaintiffs); Radiation fallout (21,192 plaintiffs); Agent Orange (15,000 plaintiffs); Heart valves (12,000 plaintiffs). See Report of the Advisory Committee on Civil Rules and the Working Group on Mass Tort Litigation, Appendix D: Individual Characteristics of Mass Torts Case Congregations, 7 (Feb 15, 1999). This report also provides cases where class certification was used or denied.
48 See id at 4–5.
be “conscripted” and be forced under a mandatory scheme to be a part of the class as stipulated by the Rule 23(b)(1) and 23(b)(2) limited fund class actions? For the opt-out class there is no res judicata, but there is control. For the defendant, once an opt-out class manifests, the calculations of cost-benefit analysis change, and, for obvious reasons, there will not be a one-time universal settlement.

The opt-out approach satisfies the prime directive of allowing the plaintiff to own the lawsuit. The problem arises when a class is certified and the opt-out is in force, the defendant has a two-front war, and the fairness and efficiency arguments begin to weaken for Epstein. One therefore has two possible approaches to the dilemma—make all class actions mandatory or make it very difficult to certify classes. Epstein leans to the latter option because of the risk that, in the end, all differences in plaintiffs’ cases will be “bled out of the equation” and choice of forum power will, over time, tilt the substantive law in favor of plaintiffs. But others, such as David Rosenberg, lean to the former. Rosenberg would criticize the current “second” opt-out opportunity under Rule 23(b)(3) precisely because it weakens the ability of those who depend on class actions for protection and general deterrence, and he would advocate for limited opt-out options under most circumstances.

As part of his parade of horribles, Rosenberg refers to Basic v Levinson and the acceptance by the Court of the general “fraud-on-the-market” theory. Such a general theory allows a weakening of the requirement for individual plaintiffs to show specific reliance on the specific information for their actions and allows for a class to be certified on defendant action alone, in this case injecting false information into the market place, in essence shifting the burden from individual plaintiff to defendant once an act takes place.

This shifting of the burden and unnatural policing of the defendant and the market is perfectly exhibited in the tobacco com-

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52 Id at 225.
pany litigation. Once the “assumption-of-the-risk” defense by the tobacco companies became a winning strategy against individual plaintiffs, the critical moment came when the plaintiffs’ bar switched strategies from individual smoker cases and brought individual actions on behalf of Medicaid programs. For Epstein these are “disguised” or “concealed” class actions that work a class action alchemy by expanding the scope of liability by the process of amalgamation. The approach was successful because the courts became confused over the doctrines of subrogation and assignment. Medicaid program plaintiffs should have been properly understood as standing in the shoes of individual smokers and not as independent entities. Under this view, the rights of individual smokers were assigned under subrogation and subject to the same affirmative defense of “assumption-of-the-risk” as the individual smokers were subject to. The assumption of the risk defense for each individual fell by the wayside through amalgamation since individual warning was not sufficient for the tort harming the Medicaid programs. Epstein’s view that all of the plaintiffs were subject to the assumption of the risk defense raises the key question as to what the ultimate end of the class action is—the individual right or something else?

If it is something else, then what is it? Rosenberg has articulated what it is in his approach to mandatory class participation—a regulatory deterrence insurance regime. For Epstein, the class action is attractive only under certain circumstances, when it conforms to derivative suits for corporations and voluntary association. The procedure is valuable since it is corrective of “permissive joinder failure,” and the other potential defects of the procedure are tolerable due to the benefit. For other mass torts, however—Agent Orange, tobacco, international chemical acts, international human rights (criminal and civil)—Epstein begins to waver.

Yet these mass torts, for Rosenberg, cry out for class actions. Rosenberg also recognizes the “permissive joinder failure” and sees the class action procedure as the way to arm those denied access to the courts with a powerful weapon. Not only has the

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53 Epstein, Class Actions 15–16 (cited in note 35).
54 Id.
55 Id.
56 Id.
58 Id at 67-68.
market failed in these cases, but so has the government. The procedure allows for mass private causes of action where there has been public legislative failure. Since the legislators have allowed the defendants to commit harm without regulation or compensation by insurers, and the political context, short of class actions, would allow for a liability-free behavior, class actions are the answer. In fact, since the remedy is for the larger group—class, market, structure, and regime—he is led to the conclusion that the certification should be mandatory and opt-outs restricted. His normative theory is that individuals should be allowed to utilize the mode of adjudication that the individual seeks in order to maximize his welfare. For the system and the individual defendant, this will be the optimal deterrence, and to sacrifice this general good for individual welfare is, in fact, inefficient. In a thoughtful twist of logic, Rosenberg turns the Law and Economics approach on itself to defend the procedure that has been attacked on equity grounds by the Law and Economics school. Law is full of irony.

This is a private regulatory system for the common good. The mandatory class approach more rationally allocates judicial resources, is more cost effective for plaintiffs, and levels the playing field when powerful defendants are involved. The challenges for Rosenberg are to police the class representation and the counsel fee structure, and to promote rational, fair rules for distribution issues. In fact, the very characteristics that lead Epstein to be ambivalent to class actions—cases that involve daunting questions of science, causality, technology, business and government finance, and organization—are recognized as problematic by Rosenberg. But for Rosenberg, since both the government and market have failed, lawmaking by courts is the best we can do.

It is this concept of private lawmaking for the public good that makes Martin H. Redish uncomfortable. To his mind, class actions have done nothing less than undermine “the foundational precepts of American democracy.” For Redish, class actions have transformed the essence of governing substantive law and are no longer a mere procedural device to facilitate the enforcement of

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59 Id.
60 Id at 25-26.
62 Id.
64 Id at 73.
existing substantive law. In fact, they have metamorphosized from a private victim’s compensatory damage suit into a vehicle for private attorneys, with large financial incentives to discover violations of corporate behavior. Rather than compensating violations of private substantial rights, in reality a few attorneys, like “bounty hunters” in the guise of serving the public interest, file “faux” suits based on policies embodied in the statutes. Given the opt-out option of Rule 23(b)(3), most class members are not informed and are given coupon rather than cash settlements. The only true beneficiary of the suit is the class attorney. Thus, these suits fundamentally are not compensatory damage suits, and these “disguised bounty hunter actions” are not authorized by the underlying substantive law that is being enforced.

Ultimately, these are not legitimate suits of “private attorneys general” since the state has chosen not to prosecute, and the rewards are kept by the public attorneys. Whether ideological and based on injunctive relief under Rule 23(b)(2) or motivated by self-interest, the suit would not be possible if the harm were de minimis. The logic of the private compensatory model would dictate it should not go forward—there is no permissive joinder failure; the system is working. To believe otherwise is to introduce the idea of parens patrie on behalf of individual plaintiffs in law suits. It means the plaintiffs who are not going forward are suffering from a variant of false consciousness. As for class actions being an enforcement regime on behalf of the collective community, we already have a private compensatory remedial regime. This procedure is on behalf of a “nonexistent” class with the only beneficiary being the third-party entrepreneur lawyer/bounty-hunter. This procedure is particularly pernicious because it undermines the tenets of democracy covertly: traditional theories of representation and accountability are secretly subverted. This is a counter-majoritarian example of judicial lawmaking—a reme-

65 Id at 74.
66 Id at 75-77.
68 Id at 90-91.
69 Id at 100-01.
70 Id at 101-02.
71 Here he is part of the school of John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum L Rev 370 (2000). Moreover, Redish acknowledges that the passage of the Private Securities Litigation Reform Act, 15 USC § 78u-4 (2000), might suggest that Congress has given tacit approval of this class action regime but reasons that it identified part of the problem but failed to solve it. Redish, 2003 U Chi Legal F at 74 n 9 (cited in note 63).
dial regime neither fully understood by the public nor consented to.

Given that a complete overhaul of class action is not practical, Redish recommends the following fixes: for Rule 23(b)(1) mandatory actions the Congress should make the determination where it is appropriate; for Rule 23(b)(2) injunctive relief actions where the right may be held by the class and not by the individual, such as civil rights class actions, the Advisory Committee on the Rules should review the issue; and finally, for Rule 23(b)(3) actions, given the problems at the start and at the end, Redish suggests replacing the opt-out with a more specific opt-in.\textsuperscript{72}

On the remedy side, he contends that although a judge has the power to police the settlement under Rule 23(e)'s fairness prong, he is not required to.\textsuperscript{73} Given this laxity, Redish suggests that the judge should be mandated to scrutinize the dispute to ensure that individual plaintiffs will receive "meaningful compensation."\textsuperscript{74} In this vein, he further recommends the restriction of coupon settlements so that plaintiffs' lawyers cannot inflate the value of the settlement for fee purposes and transform the case into a faux \textit{qui tam} action.\textsuperscript{75}

Based on this discussion, then, who is right? As one can see from the issues raised by the theory of the class action, debate rages over whether (1) the procedure undermines democratic control of public goods, such as the regulation of corporate behavior, or (2) whether this is a proper private mechanism for compensation of harmed individuals who, but for the mechanism, would go uncompensated. For Rosenberg, the true value of the class action is its ability to have private parties—given the problems of collective action—enforce public rules on the system of bad actors.\textsuperscript{76} The underlying compensation is less of an issue. Redish, on the other hand, condemns the process as a usurpation and distortion of public power by private attorneys for unanticipated selfish private gain. Epstein stands somewhere in the middle—ambivalent. The attraction of the procedure for Epstein is how, under specific conditions (pure shareholder suits), it overcomes a procedural failure of permissive joinder and allows for increased market effi-

\textsuperscript{72} Redish, 2003 U Chi Legal F at 130-32 (cited in note 63).
\textsuperscript{73} Id at 132.
\textsuperscript{74} Id at 133.
\textsuperscript{75} Id at 134-35.
\textsuperscript{76} Rosenberg, 2003 U Chi Legal F 19 (cited in note 50).
ciency by supporting causes of action that should, but would not, go forward, but do benefit the corporation.

B. What Is The Relation Of The Domestic Class Action Debate To The International Context?

How does the primarily domestic debate on class actions relate to the international context? Richard Epstein has introduced some criteria for appropriate class actions: individuals must hold the same/similar causes for action, there must be large numbers of plaintiffs, the loss of each plaintiff must be small, and the administrative costs of each individual suit must be high. "Opt-out" is unavailable in these cases, since allowing opt-out options will weaken the efficacy of the suit. Under these clear criteria a strong case can be made for international class actions, assuming the cases meet the multi-part test.

In fact, these foreign plaintiffs have even less capacity to seek redress than average Americans would have. From the victims' perspective, lack of other fora for redress underscores the need for the cause of action. Analytically, the foreign corporate shareholder cases raise this issue in particular.

For Martin Redish the essential problem is that class actions can become a substitute for substantive law (for example, legislated law) and a treasure trove for bounty hunters. The threat of class actions displacing legislation and the undermining of the democratic process is the Redish domestic nightmare. In the international realm, however, there are few international legislators and arguably, despite the efforts of the U.N., few effective enforcement regimes. So, there is nothing to be displaced—but there are national legislatures. On the one hand, one can argue that the 23/ATCA/TVPA model is a statement by the Congress to create this new American-based regime of international jurisdiction. But, on the other hand, Redish's distaste and critique of the domestic "bounty hunters" may now be transformed into a critique of the "international lawyer bounty hunters." The model therefore may be an improper use of a private legal mechanism to rewrite international norms and mores of self-determination and undermine respective state accountability.

For some, international bounty hunters may be a small price to pay for the redress of human rights abuses, and until an effec-

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77 The following section is based on comments and ideas stemming from Peter Hall and Ryan Sandrock.
tive international regime is created, the 23/ATCA/TVPA model may be the most legitimate and democratic regime around. Conversely, for other internationalists it is the U.N. or regional alliances such as the European Community that should set the jurisdiction for international class actions and, until they do, the well-intentioned international bounty hunters should be curbed.

If one takes the David Rosenberg position for the proposition that the essential goal of the class action is not to redress individuals for individualized harm but to punish or deter wrongdoers, then the 23/ATCA/TVPA model may be the most appropriate approach for the international system.

This is the grand public policy perspective arguing that the point of class action suits is to deter wrongdoing writ large. The suits act as “fire alarms” for the international system and put the international system on notice that these types of activities will not be tolerated and will be “put out.” Since international “police patrols,” or invasions, are difficult, costly, and dangerous, these suits or “fire alarms” are more modest, less dangerous, and can be more effective.\(^8\) It is a way to enforce international norms without having the American state place its treasure and blood at risk. This approach allows students of international relations and law to work with federal judges to be the gatekeepers.

As reflected in the discussion, the underlying cause of action and the substantive issues of law are critical for the debate on class actions. To this bubbling cauldron of issues, we now add the situation where the cause of action involves an international class concerning human rights.

III. PRIVATE RIGHTS PROTECTED OR ASPIRATION OVER REALITY?

International human rights class actions bring together the two unique worlds of the U.S. approach to international law and the U.S. procedure of class actions. As one sympathetic commentator has observed, since human rights abuses are often committed on a widespread and systematic basis, and international law norms prohibit collective remedies, one would think “at first glance” that class actions would “provide a good fit for human rights litigation.”\(^7\) But, as one might expect given the analysis so


\(^8\) Van Schaack, 2003 U Chi Legal F at 279-80 (cited in note 8).
far, the tensions of the two worlds have produced similar tensions in the 23/ATCA/TVPA model. In fact, there are the same pro, anti, and ambivalent positions, based on analogous analytical grounds supplemented by additional international concerns. Elsewhere in this Volume, Beth Van Schaack takes the ambivalent position on the 23/ATCA/TVPA model and argues, in a manner similar to Epstein, that the model may be especially suited for particular conditions: where the issues raised in the litigation concern the doctrine of command responsibility by subordinates, where a corporate course of conduct is in dispute, and in historic cases of injustice from World War II (“WWII”).

In a fundamental sense, the issue of the intersection of international law and domestic courts was broached once the U.S. courts upheld the ATCA to provide federal jurisdiction over international violations in 1980. In Van Schaack’s view, the ATCA and the TVPA were clear statements by Congress rejecting the view that international law violations do not enjoy U.S. domestic jurisdiction. Once the underlying substantive law established the cause of action, given the ingenuity of American litigation, it was only a matter of time before a human rights class action would be filed and upheld, as it was in 1996 in *Hilao v Estate of Ferdinand Marcos*.

When one looks closely at the cases that make the best argument for the model, however, a rather bleak picture emerges. In the command responsibility and corporate course of conduct cases, as analyzed by Van Schaack, what is gained pragmatically is unclear. In Van Schaack’s thorough description of *Hilao*, during the enforcement of the judgment phase, after the U.S. court had awarded damages for $1.2 billion, a struggle over the Swiss bank accounts ensued among the Philippine government, the Marcos heirs, and the class action plaintiffs. Since each party claimed a right to the funds, the Swiss court, when it eventually transferred the bank funds to the Philippine authorities, did so with instructions that the rights of the class action plaintiffs be respected. To date the Philippine courts have refused to comply.

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80 Id at 281.
81 *Filartiga v Peña-Irala*, 630 F2d 876, 887 (2d Cir 1980).
82 The passage of the TVPA specifically rejected Judge Bork’s opinion in *Tel Oren v Libyan Arab Republic*, 726 F2d 774 (DC Cir 1984); See Van Schaack, 2003 U Chi Legal F at 281 (cited in note 8).
83 103 F3d 767 (9th Cir 1996).
84 Id at 771.
In the *Doe v Karadzic* cases, ultimately a limited fund Rule 23(b)(1) class, massive judgments have yet to be collected, although Karadzic was found liable for genocide, war crimes, and crimes against humanity in both his private capacity and in his capacity as a state actor. The default judgment was predetermined once Karadzic stipulated that he did not have the financial resources to bring witnesses for his defense.

These command responsibility cases highlight the fundamental international problem of human rights class action. The host countries, and the people of the host countries, believe that if there are financial resources for compensation, the settlement plan should be controlled by the sovereign state and sovereign people where the original violations took place. To do otherwise is to export American procedure and American interpretation of the substantive law to the third-party countries. Either the host country's courts or legislatures are the place where the remedy should be pursued, or the remedy should be determined in an agreed upon international forum.

On the other hand, there are examples of potential success. The corporate cases, such as *Aguinda v Texaco* and *Ashanga v Texaco*, are based on large-scale environmental abuses (for example, toxic spills and harmful hazardous waste disposal) stemming from petroleum operations involving tens of thousands of individuals and acres of property spoilage. These cases, in a sense, have been more successful, since the eventual dismissals of the cases required Texaco to consent to the jurisdiction of the host countries. But for the filing, however, Texaco would never have been in a situation to consent to jurisdiction. A traditional summary judgment would not have involved any consent issues. In the end, the appellate court's approach of granting a dismissal on *forum non conveniens* grounds only if consent to jurisdiction were granted was a form of international judicial hardball.

The corporate case that is of a different nature is *Doe v Unocal*, since it sought injunctive and declaratory relief as a Rule 23(b)(2) class action. The plaintiffs requested that Unocal stop its joint venture on an oil and gas pipeline with the government of Burma because of a violent and intimidating Burmese relocation
program, which included the enslaving of plaintiffs and the unlawful confiscation of property. What makes the case intriguing is that it is an ongoing abuse and the goal of the litigation is to enjoin the behavior. There will be no financial boon to the lawyers of the plaintiffs.

In the corporate cases, by requiring the corporate defendants to submit to the jurisdiction of the host countries when the cases are dismissed, the plaintiffs use the leverage of the U.S. courts to force the defendants to deal with issues that they otherwise would not have to deal with. The natural question that arises is, given the fact the corporations are doing business in the host countries, why are the plaintiffs, who are from the host countries, not bringing the cases in the host countries to begin with? What will make the host legal system perform?

Another category of cases that has generated interest stems from conflicts regarding war. The WWII historic justice cases involving dormant survivor Swiss bank accounts, German industrial slave labor abuses, and Korean “comfort women” exploited by the Japanese are cases of financial remedies to seek a moral reckoning for horrible acts of torture, slave labor, and human degradation. In these cases the lawyers can waive any attorneys’ fees for a fixed cap, as in the dormant survivor Swiss bank accounts class, so that claims of attorney-defendant collusion can be eliminated. These cases are of a special historic nature and involve defined groups who seek an institutional apology by either collaborative industrial and financial actors or subsequent state actors.

The strands of American exceptionalists, human rightists, and legalists come together in command responsibility, corporate, and historic justice cases to push America’s version of international law into the international system. Ironically, the pragmatist strand is left hanging in many of the command responsibility and corporate cases, since the power of enforcement increasingly becomes flaccid unless there is host country support. For a pragmatist there is traction in a Rule 23(b)(2) injunction against a corporate defendant over which the court has clear jurisdiction, such as in Unocal. Here plaintiffs are like shareholders asking for an indivisible good—stop the bad acts—to which, based on U.S. jurisdiction, defendants will have to comply. This is a twist on the view provided by Epstein and his plaintiff/shareholder compari-

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90 Daniel Goldhagan, A Moral Reckoning (Knopf 2002).
sons, whereby the plaintiffs, or a “rump” of shareholders, are able to police the actions of the corporation for a public good that the directors and other shareholders have ignored.

In the historic justice cases, for the pragmatist, there is a fear that other countries may find the 23/ATCA/TVPA model so attractive that they might enact a similar model. Imagine a Canadian law, based on the Canadian Bill of Rights, similar to the 23/ATCA/TVPA model. Then imagine the filing of a class action for slave reparations by the “African-American Descendants of Slavery” based on the historic case of U.S. slavery and abuse. Finally imagine a remedy by which U.S. bank accounts of U.S. corporations held in Canada are frozen for recovery. If effective, why shouldn’t the popularity of the 23/ATCA/TVPA model spawn a race to court by other countries? As reflected in the Japanese forced labor cases, such actions raise treaty and foreign policy considerations that courts find deeply disturbing. For pragmatists, such a rush to domestic court houses for international class actions would be a legal nightmare.

As Van Schaack’s discussion recognizes, the international remedy has not been particularly effective. Since enforcement is hard (as in the command cases) none of the corporate cases has proceeded past class certification, and the historic justice cases have succeeded only with diplomatic involvement. Nevertheless, the human rights class action has advantages that combine the international strands of foreign policy with the power of class actions to produce a right to “truth” or a “moral equilibrium.” This “truth” remedy goes beyond compensation and is part of the declaratory relief that supports the creation and supplementation of international norms. The cases where the relief sought is injunct-

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81 A committee of lawyers has formed the Reparations Assessment Group to pursue the case in the United States. The committee includes a number of experienced plaintiffs' attorneys such as Charles J. Ogletree, Professor of Law at Harvard Law School; Johnnie Cochran and Alexander J. Pires Jr., who won a one billion dollar settlement for black farmers who claimed discrimination by the U.S. Department of Agriculture; Richard Scruggs, who won the $368.5 billion settlement for states against tobacco companies; Dennis C. Sweet III, who won a four hundred million dollar settlement in the “phen-fen!” diet drug case; and Willie E. Gary, who won a five hundred million dollars judgment against the Loewen Group Inc, the world’s largest funeral home operators. The model for the U.S. suits comes from the WWII Japanese-American internment and the Nazi-era slave cases. See Group To Seek Slavery Reparations, Wash Post A11 (Nov 5, 2000) (describing suit).


84 Id at 313-14.
tive obviously have more effect on immediate harms. The compensation component often can be more symbolic than real, except in cases where funds have been absconded or government legislation is triggered by the case, and then significant funds are involved.

The strongest arguments for international human rights class actions emphasize the "international institutional failure" logic. Similar to the market failure logic of supporters of domestic class actions, the cases not only empower plaintiffs, who, but for the class mechanism, would be barred from achieving redress, but also benefit the functioning of the international system and help enforce responsible corporate behavior. The advantages are most similar to the Rosenberg position on class action theory: universal relief and a basis for negotiations. As Van Schaack elegantly describes, these cases can be the foundation for a new level of international rights recognition through the use of U.S. courts. Local laws of the host countries over jurisdiction, local politics, and resource limitations combine to make the 23/ATCA/TVPA model the only viable alternative. Significantly, minority groups who otherwise could not benefit from the international Genocide Conventions, through the use of the class action procedure, can generate a shared identity based on ethnic and cultural characteristics.95

Needless to say, Van Schaack's argument has a powerful appeal given the failure of the international system. The 23/ATCA/TVPA model gives voice to the voiceless. The forgotten weak and injured of the world finally have a mechanism to pursue justice. International bad actors are brought to light, some are forced to stop, some are forced to pay, and some are forced to confront their own evil. Clearly the three strands of American international law have come together—exceptionalists, legalists, human rightists—and crafted an effective tool of international justice. Why, then, is the world not applauding? Yes, there have been some problems in enforcing human rights class actions, as predicted by the pragmatists, but is not the principle sound? Part of the answer is contained in Van Schaack's discussion on the disadvantages of using the class action procedure in the human rights international context.

95 Id at 284-305 (analyzing international law claims and forms of responsibility).
IV. IF THE UNITED STATES TALKS THE TALK, CAN IT THEN CHOOSE WHEN TO WALK THE WALK?

In the international context of class actions, what must be added to Epstein's fundamental question of "who holds the cause of action for damages" is "where should the question be decided?" When Van Schaack turns to the disadvantages of using the class action procedure in the international human rights context, the analysis focuses on the procedural aspects of class actions. As one would expect from the previous discussion on the theory of class action, the basic quandary of collective action versus individual autonomy predominates. The obvious "harm problems" for certification, plaintiff counsel collusion, coerced settlements, and fair compensations plans are all raised, and viable fixes are proffered. The Rule 23(a) and (b)(3) requirements of numerosity, commonality, typicality, adequate representation, and predominance of common law and fact are all discussed as hurdles to overcome.

But the critical issue for international human rights class actions is the question under Rule 23(b)(3) as to whether this proceeding is superior to other forms of adjudication. Given the international context, where else could the case go forward? Under the four-factor test of Rule 23(b)(3)—the individual interest test, the other litigation test, the choice of a single forum test, and the difficulty of management test—what is clear is that, but for the U.S. forum, there probably would be no litigation. U.S. courts are the courts that certify "international classes" with elaborate transitional notice schemes, possess broad equitable powers, and have the power to be creative. Ironically, the success of class certification may allow some states to avoid accountability by denying "non-judicial redress and reparations to human rights victims." The state or corporate entity, in fighting the case, has few choices. The defendant can either be forced to assent to jurisdiction in its own state, propose a political compromise through a legislative remedy such as a "truth and reconciliation commission," view the class as a competitor to redress, fight the class certification, or default.

But the critical point, and the one that should give us pause, is that the international defendant is hauled into a U.S. court by a U.S. procedure enforcing either U.S. law or U.S. interpretation of international law, though the international defendant often has little direct connection to the United States. This is not to say that the defendants are not bad actors, but when did the United
States become the center of a global legal order with worldwide jurisdiction, at the expense of the other international institutions of justice? For instance, this approach begins to establish a notion of “universal jurisdiction” as applied by the U.S. courts and not by an international body. Though there are processes to serve foreign powers, once a class is certified, American procedures of broad and liberal discovery ensue. As mentioned, courts can, and have, used judicial techniques that allow for denial of jurisdiction under the concepts of “minimum contacts,” “political question,” or “forum non conveniens,” but one must not forget, the U.S. interpretation of these legal concepts will prevail. Moreover, even “forum non conveniens” can be a sword if, as part of the order of dismissal, there is an agreement to submit to jurisdiction in another forum. In the pure class action context, even Epstein approved of such a use in some situations, particularly when sound substantive claims would be denied access without amalgamation. Yet he worried about its mischievous, corrosive effect on substantive law. The action was merely an “amplifier for the ordinary principles of civil litigation” or “a giant megaphone that amplifies both the strengths and weaknesses of the underlying system of substantive and procedure.”

The “giant megaphone” resonates not just through the domestic legal system; it also has international and transnational affects and ramifications. The 23/ATCA/TVPA model is a potential “world megaphone.” It takes the Rosenberg model of private adjudication for public good to a world extension. Just as Redish understood class actions as undermining democratic principles, we can similarly understand the 23/ATCA/TVPA model as creating “world bounty hunters,” forcing U.S. private liability compen-

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96 Two critics cynically suggest that part of the support for the movement is as an employment opportunity plan for U.S. LLM foreign graduates, since American training will be needed to combat the cases. See Mattei and Lena, United States Jurisdiction 13 (cited in note 27).

97 See Jack Goldstone and Stephen D. Krasner, The Limits of Idealism 47, 48–53 (Daedalus 2003) (arguing against the Princeton Principles that stand for allowing national jurisdiction—even if national legislatures are opposed to it—and stripping all potential defendants of sovereign immunity).


99 Mattei and Lena, United States Jurisdiction (cited in note 27).

100 Epstein, Class Actions 15–16 (cited in note 35).
sation schemes on the world in the name of human rights and international legitimacy.

What makes this Janus-like is that on the international stage, at the same time U.S. courts are asserting a world jurisdiction amplified by class actions for justice and humanitarian rights, the U.S. government is rejecting the creation of the ICC. In a Realist exercise of pragmatic power, the U.S. has rejected a regime that would hold strong and weak states equally accountable. Powerful states have been reluctant to delegate authority to an independent body. In 1999, when the United States signed the Rome Statute that created the ICC, the United States expressed general reservations on a number of points that can be summarized as follows: (1) opposition to universal jurisdiction of any state whether a signatory to the statute or not; (2) opposition to the term “crime of aggression” without a clear definition, since use of nuclear weapons may be included under the current definition; (3) opposition to the power of the prosecutor to investigate actions without a specific complaint and to the request for single member Security Council veto power, and 4) opposition to U.S. military personnel being subject to ICC jurisdiction for any official military action.

When one contrasts U.S. reservations to the ICC with U.S. projection of the 23/ATCA/TVPA model for human rights, many of the world criticisms of the 23/ATCA/TVPA model mirror the U.S. reservations. Who has the legitimacy to define terms? How can jurisdiction be asserted without consent? And, how can an action go forward without any restriction on the general parameters of the cause of action? These are international treaty power questions, yet under the 23/ATCA/TVPA model, judges and private parties will be establishing public international rules without international public power supervision. How does the United States simultaneously project such international engagement and rejection? The answer is based on the prominence of the rights and legalism strands as embodied in the 23/ATCA/TVPA model.

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101 Christopher Rudolph, Constructing an Atrocities Regime: The Politics of War Tribunals, 55 International Organization 3, 655–91 (Summer 2001). The following discussion draws from Rudolph’s analysis.


103 Id at Art 13(c), 15(1). The United States is a permanent member of the Security Council along with four other permanent members: France, the Russia Federation, the United Kingdom, and China. There are fifteen members in the Security Council and the other ten countries are elected by the General Assembly for two-year terms.
and contrasted with the dominance of the exceptionalist and pragmatist strands in the ICC case. As is often the case in U.S. politics, different branches of government act at cross purposes based on different jurisdictions. How can this paradigm of "international jurisdiction Janusism" be resolved?

For Realists in the international realm, power is asymmetric, and the debate over the 23/ATCA/TVPA model turns on how well the model advances the interests of the United States. Interests usually are defined narrowly as the projection of American power, the protection of American territory at home, and the protection of American interests abroad. Exceptionalists and pragmatists are Realists who sometimes differ on courses of action but agree that the goal of American policy is to pursue America's interests. Realists value the projection of American power, and they usually only recognize forms of power in the military and economic spheres and reject outside limitations on the uses of such instruments. In other words, law is employed only when useful. Like the Athenian frame of mind, as expressed in The Melian Dialogue in Thucydides's *The Peloponnesian War*, power is the only criteria to evaluate action—the strong do what they will, the weak suffer what they must. Exceptionalists contend the 23/ATCA/TVPA model is appropriate since it is an American model and pragmatists fear the possible backlash of other countries pursuing a similar model and suing Americans.

Idealists, like human rightists and legalists, struggle to transcend Realist power politics and place international relations on a new foundation, emphasizing the rational approach to state-centered institutions supporting international regimes of cooperation. The League of Nations after World War I and the reconstituted Security Council of the United Nations and European Union all embody, as institutional goals, these objectives. Although human rightists applaud how the 23/ATCA/TVPA model advances human rights, the legalist strain decries the erosion and displacement of international legal institutions.

Ironically, Realism explains a great deal about international relations today but proponents undervalue the role that international regimes and organizations play in creating a perceived le-

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genuine world order for weaker states. Idealism, while at least acknowledging the existence of international regimes and organizations, tends to overvalue the power of international institutions to be effective and fair. In short, Realism recognizes no rules while Idealism assumes any rule will be enforceable.

The 23/ATCA/TVPA model falls between these schools and raises the notion of the creation of the neo-institutionalist concept. Neo-institutionalists, on the one hand, acknowledge that international institutions can play a key role in international affairs but, on the other, do not claim that international institutions are automatically powerful, and instead place great emphasis on ascertaining when they can, and will, be effective. One central point, from the neo-institutionalists’ perspective, is whether the judgments of the 23/ATCA/TVPA suits carry any real force. Thus far, of the three types of suits—corporate, historic, and human rights—it appears that only the corporate suits have had success in attempting to persuade local jurisdictions to accept the causes of action. On the question of effectiveness, therefore, neo-institutionalists argue that only some rules (for example, institutions) can have force, because only those properly designed can induce cooperation that make self-interested improvements to the positions of the state actors. So, once properly put in place, they are virtually self-enforcing.

Joseph Nye, an internationalist theorist, has described American Influence by dividing power into hard and soft categories. Hard power is exercised through economic sanctions and military force. Soft power involves the ability to influence action through the institutionalization of the values of liberty, human rights, and democracy. Soft power is exercised through U.S. universities, cultural exports, domestic life, and international organizations. Additionally, “soft power . . . works through international organizations like the International Monetary Fund, NATO or the Inter-American Human Rights Commission. To the

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108 Id.

109 Id.

110 Id.
extent that they shape the agenda of choices for other countries in ways that are compatible with our interests, they enhance our soft power.”

To institutionalize the idea of soft power within international institutions, it may be more effective to engage international tribunals that then apply pressure on states and corporations, rather than to use domestic judicial structures and class actions. If the great powers allow the “international community” and its institutions to stand on the sidelines as the “harms” continue, the morality of the system will be called into question. Having only one state actor, or having only one state’s courts be the sole forum for redress, will breed deep resentment no matter how well-intentioned.

Recent history has generated international tribunal experiences in Bosnia, Rwanda, Kosovo, Cambodia, and East Timor. The creation of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) under Chapter VII of the U.N. Charter has set a precedent for procedures and law in such tribunals. By having the chief prosecutor for Yugoslavia serve as the chief prosecutor for the International Criminal Tribunal for Rwanda and having both tribunals share appeals chambers, consistency will be encouraged. Moreover, jurisdictionally the ICTY court ruled that Article 3 of the Geneva Convention applies to war crimes whether or not individuals are from different countries, reasoning that “the distinction between interstate wars and civil wars (intrastate) is losing its value as far as human beings are concerned.” Article 15, Rule 61 of the ICTY Statute allows for a “super-indictment,” by which an indictment in open court can be submitted without the defendant present for cross-examination of witnesses. These rules are the nascent forms of the creation of an international norm for international tribunal adjudication.

U.S. support and expansion of this international norm would go far in beginning an international tribunal regime because this norm raises the national sovereignty issue and the Weberian question of force. How international tribunals interact with domestic courts of the country where the causes of action have arisen is the test for the fairness of the process. For example,

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holding the Rwanda tribunal in Tanzania does not integrate the legal process with the internal domestic politics of Rwanda. Creating “mixed tribunals” of Cambodians and international judges proved to be an effective innovation of including domestic forces.\(^\text{114}\) While in East Timor, the objections of the Indonesian government to the U.N. Commission for Human Rights neutralized the tribunal and emphasized the need of great power cooperation.\(^\text{115}\) If the United States begins to support the international tribunal regime over international human rights class actions, the power of the international system will be strengthened.

Therefore, the issue still remains whether the 23/ATCA/TVPA model is an approach that serves U.S. interests and is desirable. As the United States continues to prosecute the Global War on Terrorism, institutions, regimes, and accords that promote cooperation and international justice will be critical for success. Is the 23/ATCA/TVPA model mechanism an appropriate use of U.S. “soft power”? Or, from the neo-institutionalist perspective, is it effective if it is not enforceable, or, if enforced, will it be counterproductive? Under what conditions would the 23/ATCA/TVPA model be most effective? Thus far the model has not enjoyed critical success. Do we as a nation support the concept of having private American lawyers spearheading efforts for the public and international compensation of foreign torts as the mechanism to creating a more just world? Is it a wise foreign policy to let the private market of lawyers be the arbiter of which cases to prosecute?

Paradoxically, the argument for a more aggressive system of international adjudication and accountability also supports early multilateral military intervention. With military intervention there will be “civilian” casualties that may generate offenses under an international law of war crimes. Part of this paradox is why the United States is reluctant to join the ICC. Another part of this paradox is why the United States supports the 23/ATCA/TVPA model. One forum is a U.S. controlled forum; the other is not. But the recent experience with “tribunal regimes” has demonstrated that coordinating with these domestic national courts builds legitimacy. Ideally, American engagement in international institutions that pursue multilateral approaches to domestic violations and harms is the preferred method of promoting

\[^{114}\text{Note that it was the failure of having timely trials that undermined the effectiveness of the process.}\]
\[^{115}\text{Rudolph, 55 Int Org at 677 (cited in note 101).}\]
collective human rights. Exporting a private model such as the 23/ATCA/TVPA model, although well intentioned, is a crude method in the international community and may be viewed as too hypocritical a use of soft power.

To paraphrase Mark Twain, we should "tell others to do good" but we should also take the "trouble" to do good as members of international institutions, not solely as Americans. The price of failure is high. One commentator, noting how difficult reconciliation would be in Cambodia (since to pursue justice would be to indict the whole community) likened the pursuit of justice to trying to pick up a rusty chain that bloodies anyone who touches it. Not touching the chain permits the liable and guilty to remain free. Touching the chain alone will mean not sharing the bleeding.

The entire international community is required to ensure justice, since the responsibility lies with the entire international community. The final dilemma remains: what is the most effective path to the institution or regime of international justice? For some thinkers "modern politics," particularly for America, is the business of structuring power. The 23/ATCA/TVPA model must be supported only if it adds to the positive structuring of power in the international context. To create such a domestic forum for international adjudication, while at the same time refusing to recognize or support international fora that would hold American citizens similarly accountable, would be to hold up one face to the world and another to ourselves.

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116 Id at 676.
117 Jedediah Purdy, Being American 272 (Knopf 2003).