International Law Advocacy and Its Discontents

David J. Bederman
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Walter Russell Mead has recently observed that there are four fundamental strands of thought in US foreign policy.¹ He has given these the provocative labels of the Jeffersonian, Hamiltonian, Jacksonian, and Wilsonian schools. At the risk of simplifying Mead's superbly nuanced characterizations, these thrusts in US foreign policy reduce to four discrete paradigms: (1) moral and absolutist, emphasizing the revolutionary values of popular democracy and individual liberty (Jeffersonian); (2) commercial and pragmatic, accentuating the Republic's business values and need to release creative energies (Hamiltonian); (3) honor-bound and populist, displaying the deep-seated and violent cultural values of the American frontier (Jacksonian); and (4) legalistic and elitist, featuring the cosmopolitan values of foreign engagement and functional cooperation (Wilsonian).

Obviously, the strength of US foreign policy lies in its ability to draw upon each of these disparate sources of authority and legitimacy, while also reconciling their sometimes contradictory policy prescriptions. It would be facile and counter-intuitive to suggest that one of these ideological strands should have prominence over the others. We should be, to paraphrase Thomas Jefferson's First Inaugural Address, Jeffersonians, Hamiltonians, Jacksonians, Wilsonians all.

Despite this, our raging domestic culture wars have now come down to the shoreline. US foreign policy is again a legitimate target of popular discourse about the place of values in our governing laws and institutions. Even if we have accepted that party politics can intrude on foreign affairs (despite protestations to the contrary, this has often been the case), we have often been less comfortable with the intrusion of social ideology as a motive force for the development of foreign policy objectives. This phenomenon can be observed in many facets of US foreign policy-making today. Indeed, I suggest that it is the central theme of the United States's confrontation with the complex of phenomena we call globalization.

* Professor of Law, Emory University.
But the subject of this essay is much, much narrower: the ideological responses to the growing use of US courts and judicial processes in the vindication of international human rights. Professor Curtis Bradley’s contribution joins a small, but growing, body of literature which considers the broader procedural, structural, constitutional, and foreign policy implications of international human rights litigation in the United States. What I will refer to here as the standard critique of international human rights advocacy is a welcome development, if for no other reason than earlier writings on this general subject, and particularly on the role of the 1789 Alien Tort Statute (“ATS”), have tended to be unfocused and uncritical in their commentary and undeniably optimistic in their conclusions. I emphasize that my concern here is to examine the current discontents of international human rights litigation in the US, particularly civil litigation brought at private instance under the ATS. Significant also are the wider legal doctrines surrounding suits against entities that qualify for immunity as foreign sovereigns, and the prudential grounds that might counsel US courts from declining to rule on the merits of these cases (including the political question and act of state doctrines).

Using Professor Bradley’s contribution as a point of departure, my essay unfolds in three steps. The first is to consider some false issues and dichotomies that are often raised as criticism of private human rights litigation. The rhetorical purpose of these attacks on ATS litigation is to stereotype human rights advocates and their supporters as marginal, cosmopolite elitists—at once conniving (in a Wilsonian manner) and naive (in a Jeffersonian way). The second step in my analysis rebuts a further discontent of human rights advocacy: that US courts have somehow been hoodwinked into being the pawns of a shadowy, academic conspiracy to subvert fundamental US constitutional values of limited government, separation of powers, and judicial rectitude. My last move in this meditation is to question openly the Hamiltonian and Jacksonian critique of human rights advocacy and to suggest that, far from being an elitist, moralist, and legalist phenomenon, ATS litigation may actually reflect the very best in American foreign policy values.

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4. 28 USC § 1350 (1994) (codifying the Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73, 77 (1789)).
I. FALSE CONCERNS

One consistent strain of criticism of international human rights litigation is that it divests foreign policy discretion from the elected, political branches of the government and places it in the hands of an unbridled judiciary which is easily manipulated by a cosmopolite, avaricious, and vaguely disloyal international law elite. In support of the first part of this conspiracy narrative (the divestiture of foreign policy power), critics adopt a primarily Hamiltonian idiom. As Professor Bradley observes, "the most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives." Whether this is a good or bad development is something that I will consider below, but the issue here is whether this characterization can really withstand close scrutiny.

For critics of human rights advocacy in US courts, there is one very uncomfortable reality: such litigation has been sanctioned by Congress and has met with the general approval of every administration since that of Ronald Reagan. While the original intent of the Alien Tort Statute may be shrouded in the mists of time, it is neither fair nor accurate to characterize that provision of the First Judiciary Act of 1789 (which is so often regarded as a canonical document, like the Constitution itself, the Bill of Rights and the Federalist Papers) as not "meaningful," a mere historic curiosity to be ignored at a whim. While it may indeed be impossible to conclusively establish the contours of litigation originally contemplated under the ATS, it seems beyond cavil that it was intended to provide some sort of judicial mechanism for the adjudication, under expressly international law standards, of claims by foreigners.

Even more embarrassing for the coherence of the Hamiltonian opposition to human rights advocacy was Congress's legislation of the Torture Victim Protection Act ("TVPA") in 1991–92. Professor Bradley may well be correct in suggesting that the TVPA was a narrowly-drawn statute, largely intended to extend to US citizens the same relief offered by the ATS. Nothing on the face of the TVPA unsettles

7. Id at 462.
background rules of foreign sovereign immunity, or other principles of judicial restraint. The TVPA certainly authorizes claims against private entities and thus bears a Congressional imprimatur of this characteristic feature of private instance litigation to vindicate human rights values. The TVPA is clearly a grant of a private right of action to enforce international human rights law, even if that grant is limited by exhaustion and state action requirements.

In this respect, the Hamiltonian critique of human rights advocacy is readily apparent because the complaint is not that human rights litigation arrogates the authority of the political branches and usurps Congress's authority as our nation's law-maker. Rather, the underlying argument is really that private instance litigation unsettles and embarrasses the freedom of the Executive Branch to conduct a pragmatic, situational foreign policy free from the inconveniences of morality and legality. Within this optic, the primary evil of human rights advocacy is that it eschews pragmatism and realism, and constrains a utilitarian US foreign policy that will often (although not invariably) prefer to subordinate human rights values to power politics or economic demands.

I confess that aspects of this Hamiltonian pragmatism deeply resonate in my own personal construct of an ideal of US foreign policy ideology. And it cannot be doubted that some aspects of recent human rights litigation pose a direct challenge to flexible and supple foreign policy approaches. The recent spate of Congressional amendments to the FSIA, allowing for lawsuits to be brought against certain rogue states and for the enforcement of judgments against such defendants, is particularly mischievous and has drawn criticism from a wide variety of commentators. But, again, the irony is that the political branches of the government have sanctioned such judicial mechanisms, and such initiatives have enjoyed wide bipartisan support. Why shouldn't we be hard on state sponsors of terrorism, torture, murder, and religious oppression? And here we see a dramatic tension between the Hamiltonian pragmatists who distrust judicial standards for evaluating the conduct of foreign nations (such idealism gets in the way of business, after all), and the Jeffersonian and

10. Section 2 of the TVPA provides:
   ESTABLISHMENT OF CIVIL ACTION.
   (a) Liability. — An individual who, under actual or apparent authority, or color of law, of any foreign nation—
       (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
       (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.
   28 USC § 1350 note.
12. See, for example, Bradley, 2 Chi J Intl L at 463, n 25 (cited in note 2); Slaughter and Bosco, 79 Foreign Aff at 112–15 (cited in note 3).
Jacksonian moralists and populists who are prepared to make a stand in defense of principle.

But for other forms of Executive Branch prerogatives in foreign affairs there may be less consensus to insulate them from judicial scrutiny. The recent ATS suits against Li Peng and Robert Mugabe do appear to be cases-in-point for the foreign policy pragmatists. But the confusion that exists with the nature and extent of head-of-State immunity (as distinct from foreign sovereign immunity) may in large measure be attributable to Congressional unwillingness alternatively to assimilate or differentiate the two doctrines. The Executive Branch may nonetheless be justified in its insistence that it should be allowed to situationally determine when some sorts of human rights cases against present or former heads-of-state should be allowed to proceed.

One point is evident, however, and Professor Bradley makes it well: as the US allows suits in its courts against foreign sovereigns for human rights abuses, we can expect retaliation by other nations. This has been a central dictate of US policy in respect to foreign sovereign immunities and diplomatic privileges. While we may morally desire to lash out at international malefactors, we cannot afford to give them a pretext to manipulate existing international laws to their benefit. Our government may deeply wish to prosecute drunken ambassadors who cause mayhem in our capital, but we fret that our adversaries would delight in pretextual harassments of US diplomats abroad. Indeed, this is a central dilemma of US compliance with international law. When the US extends its jurisdiction to sanction a foreign government’s behavior, we like to think we are acting on principle; when a competitor does so, we assume it is craven intimidation. This “shoe on the other foot” paradox bespeaks the substantial surprise that is expressed when the US is haled before some judicial process (international or domestic) as a defendant. But that cannot be held as a reason to forego all stands on principle. In this respect, the Hamiltonian and Jeffersonian critiques of human rights in US foreign policy will never be reconciled.

II. JUDICIAL RECTITUDE

A consistent theme of attack on international human rights advocacy has been that artful litigators, bolstered by the siren-songs of international law academics, have tricked otherwise sensible federal judges into unduly broadening the scope of the ATS and to throw their usual judicial caution to the winds. It is an intriguing narrative, true conspiratorial fare for American audiences weaned on legal obfuscation in THE

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15. See, for example, Lafontant v Aristide, 844 F Supp 128 (EDNY 1994).
X-FILES™ or judicial misdeeds in THE STAR CHAMBER™. There are only two problems with this potential Hollywood script: the villains are miscast and the plot rings false.

Environmental advocates may have Julia Roberts in ERIN BROCKOVICH™ as their poster-child, but I am unaware of a comparable claim to fame by international human rights lawyers. Nor can it be seriously suggested that international human rights cases are going to overwhelm the dockets of the federal courts. International human rights litigation is trivial when compared to employment cases, habeas petitions, prisoner suits, and section 1983 actions. If there is a concern about overworking our judicial public servants, or the propriety of offering state-subsidized adjudication for certain matters, one might start with reform of these categories, or the abolition of diversity jurisdiction. Complaining that federal judges are being swamped by international human rights litigation is like suggesting that we need to abolish admiralty cases from federal jurisdiction.

As Professor Bradley seems to recognize, however, federal judges have not willy-nilly expanded the scope of the ATS and have used other procedural and prudential doctrines to restrain such a tendency. This should come as no surprise. While the language of the ATS is short and crisp—granting 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”—there is enough content to give federal judges a textual basis for limiting the kinds of proceedings that can be brought within its terms. For starters, and most importantly, courts have consistently construed the ATS as not creating any new causes of action, but merely allowing the commencement of suits based on existing common law grounds supported by customary international law or treaty.

The “tort only” phraseology has, as a consequence, excluded a number of causes of action that sound in contract and has eliminated garden-variety commercial litigation from the scope of the Act.

17. In an admittedly imperfect empirical exercise, I calculate that since 1980 there have been approximately ninety-five reported decisions involving a substantial issue implicating the ATS. (My figure is drawn from Annotation, Construction and Application of Alien Tort Statute, (28 USCS § 1350), Providing for Federal Jurisdiction Over Alien’s Action for Tort Committed in Violation of Law of Nations or Treaty of the United States, 116 ALR Fed 387 (1993) (updated through Oct 2000)). That makes for slightly less than five cases a year. I recognize that this figure does not take into account unreported decisions or orders, but nevertheless the magnitude of ATS cases is quite small.

18. See Goldstar (Panama) SA v United States, 967 F2d 965 (4th Cir 1992); In Re Estate of Marcos Human Rights Litigation, 978 F2d 493 (9th Cir 1992). But see Xuncax v Gramajo, 886 F Supp 162, 179 (D Mass 1995) (“§ 1350 yields both a jurisdictional grant and a private right to sue for tortious violations of international law (or a treaty of the United States), without recourse to other law as a source of the cause of action.”).

19. See, for example, IIT v Vencap, Ltd, 519 F2d 1001, 1015 (2d Cir 1975); Abiodun v Martin Oil Service, Inc 475 F2d 142 (7th Cir 1973); Tamari v Bache & Co SAL, 730 F2d 1103, 1104 n 1 (7th Cir 1984); Hamid v Price Waterhouse, 51 F3d 1411, 1417–18 (9th Cir 1995); De Wit v KLM Royal Dutch Airlines, NV, 570 F Supp 613, 618 (SDNY 1983).
The key limitation of the applicability of the ATS is whether certain conduct will be deemed to constitute a violation of the law of nations or treaty of the United States. The "treaty of the United States" language of the ATS is rarely mentioned by the critics because it is undoubted that federal courts have the power under the Constitution's Supremacy Clause to enforce rights under treaties. Federal courts have been careful, however, to limit the applicability of the ATS in such cases to rights under treaties that are not only self-executing under the conventional doctrine, but which also unambiguously create private rights of action (which are not always the same thing).

But the part of the ATS that draws the most criticism is the "law of nations" phraseology that is correctly understood to refer to customary international law—the general practices of nations as manifested by their conduct pursued out of a sense of legal obligation. It is this element that such critics as Professors Bradley and Goldsmith assume that federal courts will misjudge in their haste to pander to the demands of human rights plaintiffs. But it just has not been so. Rather, courts have vigorously applied a number of filters to preclude certain types of aggrieved conduct from constituting a "violation of the law of nations" under the statute. A particular manner of review—although one I do not necessarily agree with—is formulated as whether the conduct complained of is one presenting "extraordinary circumstances" that not only violate international law or a treaty of the United States, but also are "egregious violations of universally recognized principles of international law" as to shock the conscience of the court. Courts have required that for conduct to violate the norms of international law and thus be cognizable under the ATS it is required that: (1) no state condones the act in question and there be a recognizable "universal" consensus of prohibition against it; (2) there are sufficient criteria to determine whether a given action amounts to a prohibited act and violates the norm; and (3) the prohibition against it is nonderogable and therefore binding at all times on all actors. Or, as one court has put it, the violation must be of an international norm that is "specific, universal and obligatory."

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22. See Zapata v Quinn, 707 F2d 691 (2d Cir 1983); Beanal, 197 F3d at 167.

23. See Xuncax, 886 F Supp at 187 ([T]he requirement of universality goes not only to recognition of the norm in the abstract sense, but to agreement upon its content as well.); see also Jones v Petty Ray Geophysical Geosource, Inc, 722 F Supp 343, 348 (SD Tex 1989), aff'd on other grounds, 954 F2d 1061 (5th Cir 1989).

24. In re Estate of Ferdinand Marcos Human Rights Lit, 25 F3d 1467, 1475 (9th Cir 1994); see also Eastman Kodak Co v Kavlin, 978 F Supp 1078, 1091 (SD Fla 1997).
Notwithstanding these essential limiting factors on ATS litigation, it has been suggested that recent developments in the case law have vastly expanded human rights litigation in US courts. Chief among these have been the Second Circuit's ruling in *Kadic v Karadžić*, which held that the "law of nations," as understood in the modern era for purposes of actions brought under the ATS, was not confined in its reach to state action, and that certain forms of conduct, such as piracy, slave trade, and war crimes, violate the law of nations whether undertaken by those acting under auspices of the State or only as private individuals. But by its own terms, this is an exceedingly narrow ruling, subjecting private actors only to a handful of offenses that can truly be characterized as implicating either universal jurisdiction or *jus cogens* norms. In a similar vein, the recent rulings in *Doe v Unocal Corp* and *Wiwa v Royal Dutch Petroleum Co* may subject private business actors to liability under the ATS, but only where they collude as a matter of state action with sovereign authorities that are engaged in particularly heinous conduct, such as genocide or murder. The level of proof that would be required to demonstrate such complicity—where a transnational corporation was literally the surrogate for state action—will be high, indeed. To date, no such suit has prevailed on the merits. Lastly, some cases have suggested that the US government can be a proper defendant in a case brought under the ATS, provided that some other statutory waiver of sovereign immunity can be satisfied.

Professor Bradley makes the point that as human rights litigation expands, there will be an equal and opposite tendency for courts to use procedural and prudential doctrines to restrain it. He further observes that such a backlash may distort and confuse the application of such doctrines as foreign sovereign immunity, *forum non conveniens*, personal jurisdiction, acts of state and political questions. I share this concern and predicted it nearly six years ago. And while I have been critical of the use of doctrines that allow courts to avoid the merits of cases because of perceived political sensitivities, I can certainly credit the concern that if US courts are to issue judgments that will be regarded as legitimate in these controversies, elemental notions of jurisdiction and appropriateness of venue should be satisfied. But rather than vindicating criticism of human rights litigation, the fact that virtually no ATS cases have been dismissed on *forum non conveniens* or personal jurisdictional grounds is indicative that advocacy in this area has not exceeded the accepted bounds of judicial propriety.

27. 226 F3d 88, 104 (2d Cir 2000).
28. See *Alvarez-Machain v United States*, 107 F3d 696, 702–03 (9th Cir 1996). Indeed, allowing for suits against the US government (or states and other political subdivisions) may have been within the original conception of the statute, especially in granting a remedy for unlawful captures at sea. See sources cited in note 8.
III. PUBLIC DIPLOMACY

So the conspiracy narrative of hapless federal judges succumbing to the importunings of human rights litigators is simply not credible. Nor is the villain portrayed by the critics—the cosmopolite international law professor—likely to be very believable. Although I can certainly agree with Professor Bradley that international law academics have played a role as human rights advocates out of a sense of professional aspiration, I am less certain how much impact this has had on actual court decisions. Despite the flurry of amicus briefs in human rights cases (some of which I have even authored or subscribed to), and the tome-like affidavits on international law, judges tend to rely on the traditional and recognized sources of international legal obligation: treaty texts and clearly documented evidence of state practice. In their criticism of our overweening influence, Professors Bradley and Goldsmith simply give international law academics too much credit.

But I worry that there might be something else afoot in the critique of academic international lawyers and human rights advocacy, and this brings me to the theme introduced in the opening of this essay. In this criticism there is a whiff of a suggestion that international law academics are an elite, manipulating US foreign policy for their own self-aggrandizing ends. Professor Bradley writes that we should question the ability of academics “to neatly separate their scholarly and advocacy roles.” Worse yet, the implication is that the participation of academics in this process of advocacy is undemocratic, and, perhaps, even a bit un-American.

Here we have an unalloyed Jacksonian vision of American foreign policy: populist, intensely skeptical of international law, and deeply distrustful of policy-making elites. Indeed, as Walter Russell Mead recently observed, “of all the major currents in American society, Jacksonians have the least regard for international law and international institutions.” That may well be true, and critics of human rights litigation may have some substantial justifications for concern. But lack of democracy and popular accountability is not one of them.

If anything, human rights advocacy and the direct use of courts to vindicate the honor and dignity of individuals may be more consistent with a Jacksonian ideal than one might at first suppose. For starters, the decentralization of initiative that is evident in human rights litigation marks a clear departure from the classic model of diplomatic protection by way of government espousal of claims. No longer should the pursuit of justice in such cases be the captive of political and diplomatic expediency.

30. See Bradley, 2 Chi J Intl L at 467-68 (cited in note 2). See also my observations in David J. Bederman, I Hate International Law Scholarship (Sort Of), 1 Chi J Intl L 75 (2000).
32. See id (“[T]hese academic experts have even less democratic accountability than the federal judges themselves.”).
33. See Mead, Natl Interest at 18 (cited in note 1).
In this respect, human rights advocacy is a partial antidote to the strong US foreign policy tradition of pragmatism and utilitarianism. Individual grievances have tended to be subordinated to the greater good of the nation in its pursuit of common foreign policy objectives. The Jacksonian emphasis on the vindication of honor, irrespective of the desires of the Hamiltonian foreign policy and commercial establishment, offers a slight change of emphasis by sanctioning a direct form of action based on principle, not expediency.

The ultimate proof that human rights litigation is consistent with a Jacksonian vision of foreign policy is the extent to which such advocacy enjoys substantial grassroots public support. The public actually has taken note of this development—and they approve. This is not only manifested, as I have suggested before, in the strong bipartisan support in Congress for the TVPA and anti-terrorism amendments to the FSIA, but also in public opinion polling.34

The populist, Jacksonian critique of international human rights advocacy is thus simply a convenient rhetorical cover. It is the brainchild of another, competing foreign policy elite, dismayed at the inroads of the Wilsonian and Jeffersonian legalists and idealists on commercialist pragmatism and Executive Branch prerogative. The standard critique of human rights advocacy cannot possibly reconcile its Hamiltonian and Jacksonian strands—not that it needs to. Contradiction and conflict has been a hallmark in US foreign policy-making, and attitudes about international human rights advocacy should be no exception.