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Taking Pride in International Human Rights Litigation
Beth Stephens*

Over the past 20 years, several dozen international human rights cases have been filed in US courts. Many have been dismissed; many are still pending. A small number have resulted in judgments against defendants accused of violations ranging from genocide and war crimes to torture and disappearances. While few money judgments have yet been collected, successful plaintiffs have expressed great satisfaction in the sense of justice and vindication they have obtained from participation in these lawsuits.

What does Curtis Bradley find objectionable about this litigation? He asserts that this is a dangerous line of cases, expanding rapidly, without proper authorization from Congress. He views human rights claims litigation as a perversion of the proper role of our legal system and a threat to US foreign policy. Bradley lays blame for this serious misstep on almost all of the various actors involved in human rights litigation, challenging their motives and alleging improper manipulation of the system. I will argue that the litigation is neither dangerous, nor expanding rapidly—and that it has, in fact, been tacitly endorsed by a modern Congress. Indeed, most of these complaints have been raised for the past twenty years. Practice has shown them to be overblown, if not groundless.

I. ROLE PLAYERS ON THE HUMAN RIGHTS STAGE

A review of the actors involved in human rights litigation shows that all are playing their accustomed role in the US legal system, neither abusing their access to that system, nor neglecting their responsibilities to the overall pursuit of justice.

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The Plaintiffs: Human rights litigation, of course, begins with human rights abuses, or, more accurately, with the victims and survivors of such abuses. A woman escapes torture in Ethiopia only to find herself working at the same hotel in Atlanta as the man who tortured her. Burmese refugees are thrown out of their villages, tortured and enslaved by military officers working in tandem with a US oil corporation. Survivors of genocide in the mountains of Guatemala discover the general who directed the military campaign against them studying in the United States.

In a more perfect world, none of these human rights victims would have chosen to file civil lawsuits in the United States. But the combined efforts of international and domestic legal systems offer very little in the way of enforcement or compensation to them or others like them around the world. More importantly, civil litigation in their home countries and criminal prosecution of those responsible are both clearly impossible. Faced with no other options, each has chosen to file a civil claim in US federal court. Moreover, each has had an additional reason to choose a US forum: the defendant was present here. While this is not true of all such litigation, the majority of lawsuits have involved US-based defendants.

Of all of the players involved in human rights litigation, Bradley only refrains from criticizing the plaintiffs. He recognizes their limited options, and sympathizes with the choice they have made in the face of those limitations. This is an important concession: once the victims have chosen to become plaintiffs, the rest of the actors fall into their accustomed roles in our legal system.

Plaintiffs’ Attorneys: Victims of human rights abuses, human rights organizations, and community activists regularly approach human rights litigators and tell horrendous stories of abuse at the hands of repressive governments and abusive individuals and corporations. More often than not, litigation is not an option, for one or more reasons. However, in a small number of cases, the abuse constitutes a violation of international law; the person, government, or corporation responsible for the abuse is subject to the personal jurisdiction of the US courts and is not entitled to immunity; the plaintiff wishes to proceed after a full understanding of the risks and realistic potential of the litigation; and attorneys are available to handle the case.

Professor Bradley expresses concern about the impact of these cases on the foreign policy of the United States. Indeed, his main objection to such litigation is that it leaves decisions that may affect foreign policy in the hands of private individuals who are neither bound nor equipped to make such determinations. But this problem is hardly unique to litigation, much less to human rights litigation. The federal government is often forced to disavow the actions of private citizens and to clean up
the foreign affairs consequences of their international adventures. US citizens who commit common crimes abroad, business people who default on their obligations, writers who offend religious sensibilities—all have the potential to create foreign policy crises that must be addressed by the federal government. Such actions cannot be curtailed without limiting freedoms that are basic to our democracy. Indeed, these are the side effects of our individual freedoms. Messy as it may be at times, our system has long since judged such problems to be well worth the price.

International Law Scholars: Professor Bradley notes correctly that scholars play an unusual role in the development of international law. Lacking a global legislature or court system, international law develops through a complex interaction of governments, multinational organizations and scholars. The views of international law “publicists” are acknowledged by both international bodies and by the US Supreme Court as a “source” of international law. He may be correct as well in observing that human rights scholars tend to be supportive of the legitimacy of international human rights law and international law in general. It is hardly surprising that the people who choose careers in international human rights generally believe in the validity of the enterprise. But federal court judges are surely as capable of evaluating the scholarly opinions of human rights experts as they are of evaluating the competing experts who come before them in any litigation.

Indeed, experience shows that the system works quite well. US human rights cases are based on the Alien Tort Claims Act (“ATCA”), which states that the federal courts shall have jurisdiction over “a tort only, committed in violation of the law of nations.” The modern line of human rights litigation began in 1980 with the Second Circuit Filartiga decision, which interpreted the ATCA as permitting an alien to sue in US federal court for torture committed in a foreign country. Filartiga involved the torture in Paraguay of a young Paraguayan man; his family discovered the Paraguayan police officer responsible for the abuse living in New York City, and successfully brought suit under the ATCA.

Since Filartiga, federal courts have accepted as violations of international law under the ATCA only the most egregious human rights abuses, as to which there is

5. See Statute of the International Court of Justice, art 38(1)(d), 59 Stat 1031, 1050 (1945) (listing “the teachings of the most highly qualified publicists of the various nations” as a source of the content of international law); United States v Smith, 18 US (5 Wheat) 153, 160 (1820) (“What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public laws.”); The Paquete Habana, 175 US 677, 700 (1900) (noting courts applying international law may refer to the work of jurists and commentators... for trustworthy evidence of what the law really is”).

6. Indeed, there are few people within or without the scholarly community who do not support victims of human rights who seek to obtain remedies for their injuries and to deter such abuses in the future.


widespread consensus around the world, such as torture, genocide, summary execution, war crimes, and forced labor. Others have been rejected, including claims based on expropriation of property and fraud. Professor Bradley points to the fact that plaintiffs have attempted to plead such claims as evidence that this line of litigation is out of control. Of more relevance is the fact that the courts have dismissed claims as to which there is no consensus. As a result, in practice, the reliance on human rights scholars as experts has led to the development in the United States of a coherent, measured body of international law norms. This is a record of which the community of human rights scholars, and the nation as a whole, can be proud.

The Federal Judiciary: US human rights cases based on the ATCA require the federal courts to interpret a sparse, 210-year-old statute. Since Filartiga, dozens of law review articles have attempted to flesh out the likely intent, current meaning, and constitutional status of the statute. According to one interpretation, the statute affords both jurisdiction and a federal right to sue; constitutionality under this interpretation turns upon Congress’s power under Article I to establish a federal remedy for violations of international law. Despite its age, the courts have significant evidence to support this reading of the statute. As legislative history, the courts can turn to resolutions of the Continental Congress, which called upon the states to provide remedies for those harmed by violations of international law. For contemporary interpretation, they have an opinion by an early attorney general stating that the statute provides “a remedy” for aliens in Africa harmed by a violation of neutrality committed by US citizens. Thus, this reading of the statute as providing a cause of action, as well as jurisdiction, is certainly plausible, and hardly an egregious judicial creation. A second interpretation of the statute, as providing jurisdiction over claims of international law violations and justified by Article III of the Constitution, has also been hotly debated, but finds support in a long line of judicial decisions and scholarly analysis.

9. Although Bradley labels “forced labor” as an extension of the doctrine, it has been recognized and condemned as a form of slavery for many decades. For a general discussion, see Sarah H. Cleveland, Global Labor Rights and the Alien Tort Claims Act, 76 Tex L Rev 1533, 1569–73 (1998).

10. See, for example, Bigio v Coca Cola, 239 F3d 440 (2d Cir 2000) (rejecting ATCA jurisdiction over claim that defendant acquired property that had previously been expropriated by Egyptian government on basis of the owners’ religion); Hamid v Price Waterhouse, 51 F3d 1411, 1417–18 (9th Cir 1994) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds are not breaches of the “law of nations” for purposes of jurisdiction under the Alien Tort Statute); Doe v Unocal, 963 F Supp 880 (CD Cal 1997) (dismissing ATCA claim for loss of property).


12. 1 Op Atty Gen 57, 59 (1795).

13. Professor Bradley and I, along with many colleagues, have debated the validity of the Article III constitutional theory. Compare Curtis A. Bradley and Jack L. Goldsmith, Customary International
Every court that has reached a decision on the ATCA has found the statute constitutional. This is a remarkable degree of uniformity in the application of a statute which lay dormant for almost 200 years. This consensus presumably explains why the Supreme Court has repeatedly denied petitions for certiorari in ATCA cases—there is no split in the circuits. This body of precedent is also an unlikely platform upon which to mount a challenge to activist judges. While these constitutional theories have been debated by scholars, they have been viewed by the judiciary as well grounded in noncontroversial doctrine.

Moreover, the judiciary has been ever mindful of the foreign policy and separation of powers implications of human rights litigation. Judges have requested the views of the Executive Branch even where the executive has not chosen to intervene. The Karadžić litigation is illustrative. The Second Circuit noted that the administration had been put on notice of the case shortly after it was filed, but declined to intervene. Nevertheless, "[a]fter oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised." The courts have departed from the guidance of the executive branch only in the rarest of cases. As Professor Koh suggested early in the development of this line of cases, the standard tools of checks and balances serve well to weed out cases that the executive branch finds objectionable.

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14. Kadic v Karadžić, 70 F3d 232, 250 (2d Cir 1995), cert denied, 518 US 1005 (1996). See also National Coalition Government of the Union of Burma v Unocal, Inc, 176 FRD 329, 361 (CD Cal 1997) (court wrote to Department of State inviting views of "the ramifications this litigation may have on the foreign policy of the United States as established by Congress and the Executive").

15. Karadžić, 70 F3d at 250. The decision on the appeal was issued only after the Solicitor General and the State Department's Legal Adviser filed a Statement of Interest supporting judicial resolution of the claims.

16. In one of several cases filed against deposed Philippine dictator Ferdinand Marcos, the Justice Department, in response to a request for its views from the Ninth Circuit, argued for a narrow interpretation of the ATCA. Memorandum for the United States as Amicus Curiae, Trajano v Marcos, 878 F2d 1439 (9th Cir 1989) (unpublished opinion). The Court sidestepped the issue in that decision, but in a later appeal of the same case, addressed and rejected the arguments raised by the administration's brief. Trajano v Marcos, 978 F2d 493, 495 n 1, 499-503 (9th Cir 1992), cert denied, 508 US 972 (1993).

Professor Bradley asserts that it is contradictory for advocates of human rights litigation to argue that the courts will prevent excesses in this line of cases. He points out that such advocates—myself included—continue to push new claims, some of which go beyond what the courts have accepted to date. He misses my point. I don’t agree that such cases threaten legitimate US foreign policy goals. I favor strengthening human rights accountability both in domestic courts and through international organizations. I believe that a human rights oriented foreign policy would greatly benefit the United States, as well as the rest of the world. As a result, I choose to litigate cases that might “expand the boundaries” of existing law. Sometimes, unpredictably, the Executive Branch agrees with me, as in the Karadžić litigation. When the Executive Branch opposes litigation, the federal system has standard procedures in place to prevent the perceived harm. Bradley would block the filing of all such cases, regardless of the views of the Executive Branch—a disproportionate response to a tool that offers one of the few options available to promote accountability for human rights abuses.

There may be hypothetical risks and dangers in this type of litigation, but after over twenty years of practice, Professor Bradley is unable to point to even one example of a case that has caused a foreign policy crisis. I have intentionally set the barrier high at this point, looking for a foreign policy “crisis” rather than a mere concern or the need to explain our legal system to skeptical foreign diplomats. Such minor discomforts are the price of our democracy, and a small price to pay for a democratic contribution to human rights accountability.

Further, a review of the parade of horribles cited by Professor Bradley readily discloses that the cases most likely to create foreign policy concerns are those most recently authorized by Congress: cases filed directly against foreign governments permitted under a new exception to the Foreign Sovereign Immunities Act (“FSIA”) only if the defendant government is on our State Department’s list of terrorist states. Indeed, he makes a rather disingenuous leap at this point of his paper, first complaining about the alleged lack of congressional authorization, and then using litigation against the government of Iran as his prime example of a lawsuit that may have foreign policy implications. I agree that litigation against governments presents the greatest risk of foreign policy consequences, but these cases have been expressly

19. When our claims fall within standard US procedural and jurisdictional frameworks, however, I expect the courts to review them objectively, as they would any case with international links. Thus, Bradley unfairly characterizes the decision in Wiwa v Royal Dutch Petroleum, 226 F3d 88 (2d Cir 2000), cert denied, 121 S Ct 1402 (2001), when he states that the Second Circuit reinstated the case “despite substantial arguments” against personal jurisdiction and in favor of a forum non conveniens dismissal. Bradley, 2 Chi J Int'l L at 472 (cited in note 1). There were, obviously, substantial arguments on our side as well, arguments that led to a unanimous panel decision, denial of a request for a hearing en banc, and denial of a petition for certiorari.
authorized by a modern Congress. Perhaps it is to Congress that Bradley should
direct his concerns, not to plaintiffs, their attorneys, or the federal judiciary.

Congress: The Legislative Branch of our government undoubtedly has the power
to regulate foreign affairs, including the power to create federal remedies for violations
of international law. Bradley acknowledges this, urging that the creation of such
remedies be left to Congress. But the federal courts have uniformly concluded that
Congress has done just that, instructing them to hear claims for torts in violation of
international law. Although the underlying statute is over 200 years old, and the
subject of much debate, the interpretation adopted by the courts is certainly plausible.

In the face of the Filártiga decision, the modern Congress has legislated in this
area three times over the past decade, and each time it has expanded the reach of human
rights litigation. Professor Bradley responds that such actions are not an explicit
endorsement of Filártiga, although there is an explicit endorsement in the legislative
history accompanying one of the statutes. But even putting that legislative history
aside, Congress through both its action and its inaction has certainly indicated that
the ATCA, as interpreted by the federal courts, raises no troubling constitutional or
institutional concerns.

As noted, Congress has in fact been far less protective of foreign policy concerns
than Professor Bradley himself. The amendment to the FSIA recently enacted by the
legislature threatens to put the United States into diplomatic controversies, and to
trigger exactly the kind of retaliation Bradley fears. If he, or the Executive Branch,
seeks to prevent such harms, however, they will have to take their concerns to
Congress, rather than pointing the finger at the other players on the human rights
stage.

28 USC § 1350 note (1994), (creating claims for torture and summary execution by citizens as well
as aliens); Federal Courts Administration Act of 1992, Pub L No 102-572, 105 Stat 4505, 4522,
codified at 18 USC § 2333(a) (authorizing suit by a US national injured by "an act of international
terrorism"); and the "terrorist state" exception to the Foreign Sovereign Immunities Act, 28 USC §
sovereign states if those states are listed on the State Department's list of terrorist states).
21. The legislative history of the TVPA offers support for the Filártiga Court's interpretation of the
ATCA and stresses that the TVPA was not intended to supersede the ATCA. See HR Rep No
22. As to the volume of human rights cases—no more than several dozen over the course of over twenty
years—it is an insignificant percentage of the federal court caseload. I would venture to suggest that
the total judicial time absorbed by all of the human rights cases together is still less than that
required by certain individual corporate cases. See in this context the remarks of Chief Judge Walker
of the Second Circuit: "It is safe to say that, quantitatively, international human rights law is not a
major, or even a minor, component of the business of federal courts: it is a minuscule part of what
we do." Hon. John M. Walker, Jr., Domestic Adjudication of International Human Rights Violations Under
the Alien Tort Statute, 41 SLU L J 539, 539 (1997).
The Executive Branch: A final comment about the role of the Executive Branch, focuses on the striking absence of Executive Branch efforts to undo Filártiga. With the exception of one brief filed by the Justice Department before the Ninth Circuit in 1989, the Executive Branch under several different presidents has (a) endorsed Filártiga, (b) found no per se justiciability problems in ATCA litigation, (c) signed legislation expanding the reach of human rights litigation, and (d) made no efforts to undo Filártiga by suggesting repeal or amendment of the ATCA. It appears that the Executive Branch can live with the level of control over these cases that it exercises through the standard tools available to it. Concerns about separation of powers and interference in foreign affairs have been remarkably muted.

This restraint presumably reflects the fact that concerns about the impact of such litigation on foreign policy are exaggerated. As noted, Bradley points to no examples of cases that have triggered diplomatic crises. China, for example, may be displeased by the lawsuit against Li Peng, but there is no indication that the case has had any effect on relations between the two governments. Finally, it is important to note that even where the administration may make an effort to block litigation, executive branch views on the ultimate issues may be more nuanced. For example, the Li Peng lawsuit\textsuperscript{23} may have raised concerns in the State Department, but its underlying focus—demanding damages for the horrific abuses against individuals seeking democratic reform in Tiananmen Square—are consistent with US foreign policy.

Indeed, even though, as Bradley notes, the Bush administration opposed passage of the TVPA, President Bush endorsed the concerns underlying the legislation:

These potential dangers, however, do not concern the fundamental goals that this legislation seeks to advance. In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.\textsuperscript{24}

Litigation by individual plaintiffs may be at times a messy means by which to achieve accountability, but it serves a crucial purpose. Its limitations can be lived with in the pursuit of a world free of human rights abuses.

II. THE MODEST GOALS AND ACHIEVEMENTS OF US HUMAN RIGHTS LITIGATION

The US legal system is, in many ways, unique in the world. More than any other society, we use the courts as a forum for resolution of problems large and small, a

\textsuperscript{23} See Zhou v Li Peng, No 00 Civ 6446 (WHP) (filed SDNY Aug 28, 2000).

\textsuperscript{24} Statement of President George Bush upon Signing HR 2092, 28 Weekly Comp Pres Doc, 465, 466 (Mar 16, 1992).
means to address major policy issues as well as individual complaints. This reliance on the judiciary is in part the result of widely acknowledged strengths: our independent judiciary is capable of resolving private disputes and challenging official wrongdoing. Even the most controversial decisions are routinely obeyed. The availability of this neutral arbiter has been central to the development of our complex social and economic structures. Despite debates about the huge volume of litigation in our society, the benefits of living in a society with a reliable judiciary redound to us all. I lay out this well-known background in order to place international human rights litigation in US courts in this broader context. Human rights litigation is just one example of an area in which the United States can be proud to lead the way.

Victims of human rights abuses and their advocates fight an uphill battle, looking for the cracks through which they can slip their claims in an effort to find some means to seek justice, hold those responsible accountable, and help prevent such abuses in the future. Closing the US system would require a sharp break with our generally accepted rules and patterns. Distorting our legal principles to keep these people out of our courts would be a disservice not just to them, but to our legal traditions and to our democracy. It has been my privilege to help some of these individuals develop remedies under US law for what they have suffered.

25. Michael Bazyler has praised the US legal system for its ability to resolve claims arising out of the Holocaust:

The filing of such suits at the close of the twentieth century presents the last opportunity for the elderly survivors of the Holocaust to have their grievances heard in a court of law ... [A]s with almost all transnational litigation, the highly-developed and expansive system of justice in this country suggests that the United States remains the best forum for the disposition of such claims. It is a tribute to the U.S. system of justice that our courts can handle claims that originated over fifty years ago in another part of the world.
