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**HUMAN RIGHTS, CIVIL WRONGS AND FOREIGN
RELATIONS: A “SINICAL” LOOK AT THE USE OF U.S.
LITIGATION TO ADDRESS HUMAN RIGHTS
ABUSES ABROAD**

*Jacques deLisle**

HUMAN RIGHTS LITIGATION IN UNITED STATES COURTS: CHINESE
CASES IN COMPARATIVE PERSPECTIVE

On August 28, 2000, five nationals of the People’s Republic of China (PRC or China) filed suit in federal court in New York.¹ The defendant was China’s former premier Li Peng.² The plaintiffs claimed Li was liable under the Alien Tort Claims Act (ATCA)³ and the Torture Victims Protection Act (TVPA)⁴ for human rights abuses committed in connection with the suppression of the student-led popular democracy movement that had produced massive demonstrations and occupied Beijing’s Tiananmen Square in May and June of 1989. The movement had come to an abrupt end when the regime, the government component of which was officially headed by Li Peng and had earlier issued a formal declaration of martial law over Li’s signature, ordered troops of the People’s Liberation Army (PLA) to fight their way to the Square on June 4.⁵ Widely known as the Tiananmen Massacre, this marked the violent beginning of a protracted campaign against many who had participated in or led what the PRC regime

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1. Concerning the suit against Li Peng, see, e.g., *China Slams US Lawsuit Against Li Peng as “Political Farce,”* AGENCE FR. PRESSE, Sept. 26, 2000, available at LEXIS NEXIS; *U.S. Judge Accepts Lawsuit Against Li Peng*, TIMES OF INDIA, Sept. 23, 2000, available at LEXIS NEXIS; Edward Wong, *Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown*, N.Y. TIMES, Sept. 1, 2000, at A6; *Human Rights in China. Global Justice: The Li Peng Lawsuit and Universal Jurisdiction over Violations of Rights*, available at http://iso.hrichina.org/iso/article.adp?article_id=408&category_id=79 (last visited Oct. 2, 2002); BBC News, *Li Peng Faces Human Rights Claim*, Sept. 1, 2000, available at <http://news.bbc.co.uk/1/hi/world/asia-pacific/905498.stm> (last visited Oct. 2, 2002).

2. In 2000, Li had moved from the premiership to the presidency of the National People’s Congress, the PRC’s national legislature. It was on the basis of his occupation of that office that he attended the U.N. Conference.

3. 28 U.S.C. §1350 (1998).

4. *Id.*

5. See *supra* note 1 and accompanying text.

officially dubbed the “counter-revolutionary turmoil.”⁶ The plaintiffs—four of whom had been student leaders during the protests on the Square and prisoners of the regime thereafter, and the fifth of whom claimed that the PLA killed his sister during the crackdown—alleged that Li was responsible for crimes against humanity, including summary execution, arbitrary detention, torture, and other torts.⁷ Seizing the opportunity presented by Li Peng’s presence in New York to attend a United Nations conference of parliament leaders, the plaintiffs dispatched a process server. At the Waldorf Astoria Hotel on August 31, the server delivered the papers to a State Department employee assigned to the Chinese leader’s security detail.⁸

On July 17, 2001, a process server entered the Manhattan Plaza Hotel and handed a summons to Zhao Zhifei, the head of the Hubei Provincial Public Security Bureau, who was in New York, apparently on official business. In Zhao’s case too, the plaintiff, who was reported to be in hiding in China, relied upon the ATCA and TVPA. The plaintiff’s complaint claimed that Zhao, in his capacity as provincial public security chief and as deputy head of the provincial-level secretive “6-10 Office,” was liable for the killing of the plaintiff’s mother and brother while they were in police custody in China. The two had been arrested for their participation in Falun Gong, an eclectic movement that blends elements of Buddhism, Chinese folk religion, and *qigong* martial arts exercises. Falun Gong had attracted millions of Chinese followers to the teachings of its expatriate spiritual leader Li Hongzhi before PRC authorities declared Falun Gong to be the greatest threat to the regime since the 1989 democracy movement, proscribed it as an “illegal cult,” and organized “6-10 Offices” to spearhead the suppression of the banned group. The plaintiff’s allegations paralleled those from the Li Peng case: “police officers under Zhao’s direction and control . . . employ[ed] murder, torture, cruel, inhuman or degrading treatment and arbitrary arrest and detention to

6. Concerning the Tiananmen Democracy Movement, its suppression and its aftermath, see, e.g., GEORGE BLACK & ROBIN MUNRO, *BLACK HANDS OF BEIJING: LIVES OF DEFIANCE IN CHINA’S DEMOCRACY MOVEMENT* (1993); CRAIG CALHOUN, *NEITHER GODS NOR EMPERORS: STUDENTS AND THE STRUGGLE FOR DEMOCRACY IN CHINA* (1997); ZHONGGUO “LIU-SI” ZHEN XIANG (*The True Story of China’s June Fourth*) (Zhang Liang ed., 2001); CHE MUQI, *BEIJING TURMOIL: MORE THAN MEETS THE EYE* (1990).

7. See Wong, *supra* note 1; see also *supra* note 1 and accompanying text.

8. See *supra* note 1 and accompanying text. See also Eric Gruzen, *The United States as a Forum for Human Rights Litigation: Is This the Best Solution?*, 2001 *TRANSNAT’L LAW* 207; Alvin H. Chu, *Vindicating the Tiananmen Square Massacre: “The Case Against Li Peng,”* 20 *WIS. INT’L L.J.* 199 (2001).

eliminate and intimidate practitioners of Falun Gong;" some of those acts constituted "crimes against humanity."⁹

Over the next several months, similar scenes played out several times around the United States, with plaintiffs invoking the ATCA and TVPA in civil suits arising from the Chinese regime's treatment of Falun Gong practitioners and activists. As he stepped from his limousine in Chicago on August 27, 2001, Zhou Youkang, the Chinese Communist Party Secretary for Sichuan Province, was served by a Falun Gong practitioner and Chinese national who lived in Boston. In this suit, the plaintiff claimed authorities in Sichuan had detained and tortured—and probably executed—his sister for Falun Gong beliefs and practices. Again, the complaint charged torture, crimes against humanity, false imprisonment, inhuman and degrading treatment, and similar human rights violations.¹⁰ On February 7, 2002, another pair of suits alleging local PRC authorities' abuse of Falun Gong adherents and supporters was filed, one against Beijing Mayor Liu Qi and another against Xia Daren, Deputy Governor of Liaoning Province. In the United States to attend the 2002 Winter Olympics in his capacity as mayor of the host city for the 2008 Summer Games, Liu had the papers thrust upon him as he prepared to board a flight from San Francisco to Salt Lake City.¹¹ The plaintiffs, who included two Chinese Falun Gong followers who had moved to the United States, charged that Liu was responsible for "torture, cruel, inhumane or degrading treatment, crimes against humanity and interference with freedom of religion and belief."¹² They added that Liu had breached his "duty to prevent the police from" abusing citizens and "to investigate and punish [such] violations," and had "endorsed the campaign of terror and violence in Beijing against Falun Gong."¹³

9. *Falun Gong Adherent Sues Chinese Official in U.S.*, REUTERS, July 18, 2001, available at http://www.censur.org/2001/falun_july05.htm (last visited Oct. 2, 2002); *Another Top Chinese Official Hit by Falungong Torture Suit*, AGENCE FR. PRESSE, Aug. 28, 2001. See also Stephen Collinson, *Falungong Adherents Denounce China in U.S.*, AGENCE FR. PRESSE, July 19, 2001. Concerning Falun Gong and the PRC's response to it, see generally DANNY SCHECHTER, *FALUN GONG'S CHALLENGE TO CHINA: SPIRITUAL PRACTICE OR EVIL CULT?* (2000); Jacques deLisle, *Who's Afraid of Falun Gong?*, FOREIGN POL'Y RES. INST. E-NOTE, available at <http://www.atimes.com/china/AH10Acl02.html> (last visited Oct. 2, 2002).

10. See *Another Top Chinese Official Hit by Falungong Torture Suit*, *supra* note 9; Al Swanson, *Chinese Official Accused of Torture*, UPI, Aug. 28, 2001, available at <http://clearwisdom.net/emh/articles/2001/8/29/13343.html> (last visited Nov. 25, 2002).

11. See, e.g., John Pomfret, *Fight Over Banned Chinese Sect Moves to U.S.*, WASH. POST, Mar. 12, 2002, at A15; Ben Rowse, *Lawsuit Against Beijing Mayor Shows Falungong Not Forgotten*, AGENCE FR. PRESSE, Feb. 10, 2002.

12. Rowse, *supra* note 11.

13. *Id.*

On May 16, 2002, Chinese Communist Party Politburo member, Party Propaganda Department chief and national "6-10 Office" deputy chief Ding Guangen found himself in much the same predicament when he was served at his hotel in Hawaii while in transit home from a visit to Canada. The plaintiffs, including three PRC nationals, brought a class action suit on behalf of themselves and other Falun Gong adherents. They asserted that Ding was "directly responsible," as a member of the PRC's top leadership and as the official in charge of the media campaign against Falun Gong, "for the deadly propaganda, fabrication and lies to grossly distort Falun Gong's teachings and slander its founder and students with the purpose of bending public opinion to support the government's persecution of Falun Gong."¹⁴ In that capacity and as a top "6-10 Office" leader, Ding was also responsible for the arbitrary detention, torture, and abuse suffered by adherents in China, as well as for violations of Falun Gong followers' rights to life, liberty, security of person and freedoms of thought, conscience, and religious belief.¹⁵

Another variation on the same general theme had begun Li Peng's American legal troubles a few years earlier. Two veterans of China's "reeducation through labor" prison camps who had moved to the United States and others who remained incarcerated in the PRC filed a class action suit in U.S. federal court on behalf of themselves and thousands of their fellow Chinese nationals imprisoned in similar facilities.¹⁶ They sought recovery for human rights abuses in the PRC that included punishment without due process, forced labor (in the form of sewing soccer balls with a multinational corporate logo), torture, and other extremely inhumane conditions of confinement. The defendants included Li Peng, the Politburo of the Chinese Communist Party, the Bank of China, which is owned by the state and performs foreign exchange functions, and "various corporate branches of Adidas."¹⁷ In this case too, the plaintiffs invoked the ATCA and TVPA. They claimed, *inter alia*, that Adidas was liable under the two statutes and the PRC official defendants owed damages as well, given their entan-

14. *Falungong Slaps Another Top Chinese Official with Lawsuit*, AGENCE FR. PRESSE, May 21, 2002 [hereinafter *Falungong Slaps Another Top Chinese Official with Lawsuit*]; see also Falun Data Information Center, *China's Propaganda Minister, Politburo Member, Deputy Chief of "6-10" Office Served with U.S. Class-Action Lawsuit for Persecution of Falun Gong*, May 17, 2002, available at <http://faluninfo.net/DisplayAnArticle.asp?ID=5654> (last visited Nov. 25, 2002) (hereinafter Falun Data).

15. *Falungong Slaps Another Top Chinese Official with Lawsuit*, *supra* note 14; Falun Data, *supra* note 14.

16. *Bao Ge v. Li Peng*, No. 98-1986, 1999 U.S. Dist. LEXIS 10834 (D.D.C. July 9, 1999); *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14 (D.D.C. 2000).

17. *Bao Ge*, 201 F. Supp. 2d at 17.

glement with Adidas in the commercial venture to produce and export the sporting equipment that the plaintiffs had been forced to make.¹⁸

These actions made real and tangible the Chinese specter that had long lurked at the fringes of the heated debate over using civil litigation in U.S. courts to address human rights abuses abroad. Well before the Li Peng and Falun Gong cases, U.S. courts had many occasions to interpret the ATCA, TVPA, and other laws and doctrines that are relevant to litigation implicating foreign governments' behavior. Such cases produced opinions that the two sides in the debate regarded, variously and in keeping with their conflicting preferences, as a clear cast of villains and heroes.¹⁹

What was striking about the divided body of case law was the degree to which the cases, and particularly the ones in which plaintiffs' claims survived motions to dismiss, almost exclusively involved abuses committed under regimes that were defunct and repudiated by their successors, nearly universally shunned by other governments, pos-

18. See generally *Bao Ge v. Li Peng*, No. 98-1986, 1999 U.S. Dist. LEXIS 10834 (D.D.C. July 9, 1999); *Bao Ge*, 201 F. Supp. 2d at 14.

19. For views favoring "expansive" views of the ATCA or TVPA, see, e.g., Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1 (1993); Beth Stephens, *Corporate Liability: Enforcing Human Rights Litigation through Domestic Litigation*, 24 HASTINGS INT'L & COMP. L. REV. 401 (2001) [hereinafter *Corporate Liability*]; Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002) [hereinafter *Translating*]; Beth Van Schaak, *The Civil Enforcement of Human Rights Norms in Domestic Courts*, 6 ILSA J. INT'L & COMP. L. 295 (2000); Steven M. Schneebaum, *Human Rights in the United States Courts: The Role of Lawyers*, 55 WASH. & LEE L. REV. 737 (1998); Hon. John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute*, 41 ST. LOUIS U. L.J. 539 (1997); Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from In Re Marcos Human Rights Litigation*, 67 ST. JOHN'S L. REV. 491 (1993); Edward D. Re, *Human Rights, International Law and Domestic Courts*, 70 ST. JOHN'S L. REV. 51 (1996); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277 (1991). For critiques of the expansive interpretation and arguments for a narrower reading, see Jack Goldsmith & Curtis A. Bradley, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 356-68 (1997) [hereinafter *Illegitimacy*]; Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2167-72 (1999) [hereinafter *International Human Rights Litigation*]; Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001) [hereinafter *Human Rights*]; Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001) [hereinafter *Universal Jurisdiction*]; Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) [hereinafter *The Alien Tort Statute*]; Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421 (2000) [hereinafter *Customary International Law*]; Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the "Law of Nations" in the Alien Tort Claims Act*, 31 CORNELL INT'L L.J. 153 (1998); Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT'L & COMP. L. REV. 361 (2001); Mark Gibney, *Human Rights Litigation in U.S. Courts: A Hypocritical Approach*, 3 BUFF. J. INT'L L. 261 (1996-97); Fitzpatrick, *supra*, at 494 (summarizing arguments against expansive ATCA jurisdiction as imprudent and unconstitutional).

sessed of, at best, uncertain claims to statehood or legitimate state power, lacking in geopolitical significance, politically unimportant to Washington, or clearly condemned by the United States. The foreign state and official actions under scrutiny in such cases²⁰ included: those

20. Omitted from the following list of factual allegations and fact patterns are those drawn from several types of ATCA or TVPA cases that are not the usual focus of the “derangement of foreign policy” arguments against foreign human rights litigation—the arguments primarily addressed in this article. The types of cases that are excluded are as follows:

Suits in which the United States is a defendant are not included. It is certainly plausible to argue that a U.S. sovereign choice to subject itself to liability for torture or for torts in violation of the law of nations that agents of the United States commit is not likely to pose the dangers that are ordinarily imagined in “derangement” arguments. If such cases do pose a risk of derangement, it is generally of a quite different sort from that stressed in critical arguments and rarely is likely to produce the problem of U.S. courts judging foreign regimes’ human rights records that are the paradigmatic case for critics. In any event, the courts have generally construed the ATCA’s non-waiver of sovereign immunity broadly and the ATCA’s substantive provisions narrowly in suits against the United States and its officials. *See generally* Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Alvarez-Machain v. United States, 266 F.3d 1045 (9th Cir. 2001); Papa v. United States, 281 F.3d 1004 (2d Cir. 2001); Jama v. INS, 22 F. Supp. 2d 353 (D.N.J. 1998).

Suits in which the plaintiffs are U.S. nationals are also excluded. (This category includes, of course, some TVPA suits but no ATCA suits.) Here, the risks of complicating or confounding U.S. foreign policy—and specifically doing so by inviting judicial consideration of foreign regimes’ human rights abuses—may be quite serious. But, all other things being equal, such cases lack the extra increment of offense involved in the United States (through its courts) “interfering” in a situation that many would see as none of its concern. Because passive personality-based jurisdiction (that is, a state enacting and enforcing laws to address harms or activities that directly affect a state’s nationals) has won fairly widespread acceptance in international law, such cases lack the “exceptional” quality that critics often discern and denounce in the ATCA and foreign plaintiff TVPA cases. *See generally* Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002); Alejandre v. The Republic of Cuba, 996 F. Supp. 1239 (S.D. Fla. 1997).

Notably, many of the ATCA or foreign plaintiff TVPA cases that have called for examining the actions of relatively important states and/or still-in-power regimes have a diluted form of a similar quality. That is, they involve U.S. corporate defendants, the overseas behavior of which is uncontroversially regulable under standard international legal principles of personality-based jurisdiction. The conventional character of such jurisdiction at least would seem to off-set in part the problematic character, as critics see it, of courts in such cases examining the domestic human rights behavior of foreign governments and their officials and agents. The problem fades still further—and exits the realm of U.S. judicial review of foreign human rights abuses that is the focus of this study and of most ATCA and TVPA critics—where there is no claim of “host country” human rights violations in an ATCA claim against a U.S. national. *See, e.g.,* Bano v. Union Carbide Corp., 273 F.3d 120 (2d Cir. 2001) (concerning the Bhopal chemical plant disaster, in which Indian government supported damages for Indian victims); *cf.* Jota v. Texaco, Inc. 157 F.3d 153 (2d Cir. 1998) (involving suit against Texaco for environmental harms, in which the Ecuadorian government switched to support the litigation going forward).

Foreign plaintiff suits that do not allege what are generally regarded as serious human rights abuses also are not included in the following list of scenarios (although several are addressed later in this article). Where the allegations are limited to expropriation of property or relatively modest and non-violent rights violations, the risk of deranging U.S. foreign policy is generally much reduced. Such cases lack the provocative quality that the archetypal ATCA or foreign-plaintiff TVPA complaint manifests and that critics fix upon. Moreover, U.S. courts generally dispose of such cases relatively early, ruling that the ATCA (like the TVPA) does not extend to

taken by a deposed Filipino dictator and his close relative;²¹ the Nazi regime and its corporate collaborators, in cases brought long after the war;²² the Japanese wartime regime, also in cases brought long after the war;²³ the Soviet government of the Stalin era and the decades immediately following, in a case brought during the Glasnost era, although for harms that plaintiffs alleged might be ongoing;²⁴ an Argentine junta—since replaced by a civilian government—for acts committed in a war against a close American ally;²⁵ an Argentine general who had served in the since-deposed junta’s “dirty war” against dissident civilians;²⁶ a Chilean military officer under the since-ousted military dictatorship, the leader of which had become the target of extensive litigation and condemnation for human rights violations;²⁷ an ousted Haitian military ruler and an exiled elected Haitian president;²⁸ a long-reigning head of an increasingly radical and authoritarian government in Zimbabwe;²⁹ the Islamic revolutionary rulers in Iran;³⁰ a Libyan regime that the United States has long regarded as a state sponsor of international terrorism;³¹ an ethnic cleanser strongman whose fragment of the former Yugoslavia had not won recognition as a state;³² police officials engaged in the ethnic cleansing in Bos-

the type of harms alleged. While this too does not eliminate the problem (given that foreign governments or officials having to defend such cases in all but the most preliminary and cursory way can raise complications for U.S. foreign policy), the risk has seemed to be clearly of a lesser magnitude in cases of this type.

21. *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

22. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (declaring corporate defendant to be a *de facto* state actor in employing Nazi-forced slave labor); *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976); *Abrams v. Societe Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423, 440-41 (E.D.N.Y. 2001) (involving a corporate defendant as state instrumentality of France during period of Nazi domination, for role in deportation of French Jews); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (involving an allegation that corporate defendant aided and abetted Vichy and Nazi regimes in ways that facilitated genocide).

23. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153, 1153-60 (N.D. Cal. 2001).

24. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985), *vacated*, 736 F. Supp. 1 (D.D.C. 1990).

25. *Argentine Republic v. Amerasia Hess*, 488 U.S. 428 (1989).

26. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

27. *Cabello Barrueto v. Fernandez Larios*, 205 F. Supp. 2d 1325 (S.D. Fla. 2002); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001).

28. *Paul v. Avril*, 901 F. Supp. 330 (S.D. Fla. 1994) (deposed military ruler); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (exiled democratically elected president).

29. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

30. *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982).

31. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

32. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

nia that U.S.-led NATO intervention sought to end;³³ a radical Islamic group in Algeria that claimed, but did not wield, national government power;³⁴ a former officer of a brutal Paraguayan military government;³⁵ local functionaries of a toppled Ethiopian military dictatorship;³⁶ a former senior military leader of army death-squads with an anti-U.S. bent in Guatemala;³⁷ the leader of a closely government-affiliated political organization that had helped implement the Rwandan government's genocidal policies;³⁸ the deputy head of national security in Ghana's repressive government;³⁹ the Palestinian Liberation Organization, long before the establishment of the Gaza Strip and West Bank as territories governed by the Palestinian Authority;⁴⁰ the democracy-movement-suppressing and unfortunately acronymed SLORC (State Law and Order Restoration Committee) in long-hermetic and widely ostracized Burma;⁴¹ an authoritarian army-backed regime in Indonesia that had been replaced by an elected government;⁴² and the former military authorities in Nigeria who had faced widespread condemnation for corruption and cruelty and been succeeded by an elected civilian administration.⁴³ Even when targeting this rogue's gallery of governments and officials, plaintiffs in such cases often have not succeeded or even gotten very far, and the list of failed efforts tellingly includes all those that involved activities or liability of still-ruling governments in relatively important, non-pariah countries.⁴⁴

33. *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002).

34. *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (D.D.C. 1998).

35. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

36. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

37. *Xuncax v. Gramajo*, 886 F. Supp. 163 (D. Mass. 1995).

38. *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996).

39. *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

40. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

41. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000).

42. *Beanal v. Freeport-McMoran*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999).

43. *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

44. *See Beanal*, 969 F. Supp. at 362 (holding that allegations of human rights abuse in Indonesia apparently extended to ongoing activities, but the suit was against a private company, not government or official actors, and focused primarily on actions undertaken by prior authoritarian regime); *Wiwa*, 2002 WL 319887 (ongoing suit against private company, not government of Nigeria or its official actors); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988) (involving a claim against corporate defendant for complicity in Saudi Arabian authorities' imprisonment and torture of plaintiff in connection with business dispute, dismissed, *inter alia*, for improper service of process and inadequate assertion of state action); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1090-92 (S.D. Fla. 1997) (concerning allegations of Bolivian judicial officials' arbitrary and prolonged detention of foreign national and noting on-going corruption of the Bolivian judicial system, but alien's claim entangled with claim by corporate plaintiff which was a U.S. national). *See also Von Dardel v. Union of Soviet Socialist Republics*, 623 F.

China, of course, has none of the foregoing characteristics that typify targets of ATCA and TVPA suits, especially targets of successful suits. For all the growing problems of popular disillusionment, social unrest, institutional fragmentation, and rampant corruption that beset the Chinese regime, any reports of its impending demise are grossly exaggerated. Although the object of occasional and pointed criticism from the United States and other governments, the PRC is hardly an international pariah, as China's accession to the World Trade Organization underscored in the midst of the flurry of filings of ATCA and TVPA suits against its officials. Nearly a quarter-century after the United States recognized the PRC as the government of China, no one seriously disputes that China is a sovereign state, the state actions of which are the responsibility of the government of the PRC.⁴⁵ In addition, while the PRC's economic importance, strategic clout, and penchant for challenging the international status quo are often and easily overstated, China is a rising power with expanding military capacity and a large, rapidly growing, and increasingly internationalized economy. Thus, the PRC is likely to remain for the foreseeable future the partner in arguably the most important and volatile of the United States' bilateral relationships.

China's vast population and the PRC's repressive politics—most garishly on display in the Tiananmen Incident of 1989 and the campaign against Falun Gong that began in 1999—have made it the locus of a huge number of human rights violations. Increased opportunities for emigration—both legal and illegal—from the PRC to the United States promised to turn a considerable number of Chinese human rights victims into prospective plaintiffs in ATCA and TVPA actions. American and Chinese expatriate activists and lawyers stood ready to help them try to make ample use of U.S. substantive laws that promised redress for human rights violations abroad and U.S. rules permitting jurisdiction based on a defendant's thin or transient connections to the forum. A growing number of defendants could be expected to come within plaintiffs' reach, as China's expanding participation in the United Nations and other international organizations and China's increasingly dense and important economic and security relationships

Supp. 246 (D.D.C. 1985); *Von Dardel v. Union of Soviet Socialist Republics*, 736 F. Supp. 1 (D.D.C. 1990) (if plaintiff had prevailed, current Soviet government would have been liable); cf. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976) (involving issues at stake including postwar German government's handling of claims for reparations for Nazi regime's actions).

45. Indeed, the uncertain claim to statehood in the region—Taiwan's—is largely the product of the PRC's insistence that the island republic is a part of China. See generally Jacques deLisle, *The Chinese Puzzle of Taiwan's Status*, 44 *ORBIS* 35 (2000).

with the United States predictably bring more Chinese officials to the United States and entangle more U.S. individuals and entities with problematic human rights behavior in China.

Given these features, China cases should have loomed large—even before the Li Peng and Falun Gong suits—as an important focus for advocates and critics of human rights litigation in American courts.⁴⁶ For proponents of such litigation, China cases hold out possible opportunities to address a particularly numerous and notorious set of abuses abroad, to show that U.S. legal remedies are available against defendants that are not only dead, ousted, insignificant, or deeply despised regimes and officials, and to counter suspicions that litigation about human rights abuses abroad has an unsavory partisan tone, almost always targeting right-wing defendants.⁴⁷ On all these fronts, a series of successful China cases could mark a major breakthrough for those who favor wide access to U.S. courts to redress foreign rights abuses. To opponents, China cases represent a singular case study in one of the principal dangers they often cite: inexperienced or overreaching courts could take free rein to issue decisions that would damage the political branches' ability (and primarily the executive branch's ability) to conduct sensitive, complicated, and vitally important foreign policy on behalf of the United States and in service of its national interests. In the China cases, the danger of courts deranging the conduct of U.S. foreign policy seems especially grave. Compared to U.S. relations with the countries that are home to typical ATCA and TVPA defendants, U.S. relations with the PRC have serious national security consequences and are conducted in shades of gray, with especially complex connections among issues and with a well-established tendency to volatility.

The late arrival and limited progress of China cases suggests that it would be at least premature to celebrate or despair over an imminent Chinese addition to the pantheon of *Filartiga v. Pena-Irala*,⁴⁸ the

46. For rare references to the prospective problem of China cases from the period before the filing of the Li Peng/Tiananmen case, see Ramsey, *supra* note 19, at 365; Walker, *supra* note 19, at 560. Since the filing of the Li Peng/Tiananmen case, the case has received some passing mention—although not much analysis—from critics as an example of the dangers of expansive ATCA or TVPA litigation. See, e.g., *Human Rights*, *supra* note 19, at 458, 461; *Universal Jurisdiction*, *supra* note 19 at 347-48. For the rare analyses focusing primarily on the Li Peng/Tiananmen case, see Chu, *supra* note 8; Gruzen, *supra* note 8.

47. Some of the most strident critics of human rights litigation assert that the skewing toward addressing the acts only of weak regimes extends to the political branches' activities as well. See, e.g., Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 2D 365, 370 (1998).

48. 630 F.2d 876 (2d Cir. 1980).

Marcos human rights litigation,⁴⁹ *Kadic v. Karadzic*,⁵⁰ *Xuncax v. Gramajo*,⁵¹ and kindred cases. Less certain and more interesting is whether China cases present, in a particularly grave form, some of the problems that critics identify, whether the resulting perils that critics assert are indeed serious, and whether a significant amelioration of those evils would result from following a prescription of construing narrowly—or enacting legislation to narrow—the ATCA or TVPA routes to the courthouse.

II. CHINESE HUMAN RIGHTS CASES AND DANGERS TO THE CONDUCT OF U.S. FOREIGN POLICY

Opponents of expansive readings of the ATCA and other avenues of broad access to U.S. courts for victims of foreign human rights abuses deploy two lines of argument. One invokes general separation of powers concerns, including questions of constitutional restrictions or constitutionally-grounded norms governing judicial construction of arguably ambiguous jurisdictional statutes, the appropriate roles of the political branches and the courts in bringing international law into U.S. law, and the basic allocation of authority over foreign affairs among the branches of the national government. The other strand in critical analyses emphasizes policy reasons that are thought to support the commitment of matters relating to foreign human rights abuses specifically—and foreign affairs more generally—almost exclusively to the political branches, at least absent clear legislative authorization (and perhaps executive support or acquiescence as well) for judicial involvement.

It is, of course, true that either sort of argument independently could be enough for proponents of a restrictive view to carry the day. While the two approaches may be separable in theory, few analysts confine themselves solely to the first type of argument.⁵² The two

49. *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Marcos, Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

50. 70 F.3d 232 (2d Cir. 1995).

51. 886 F. Supp. 162 (D. Mass. 1995).

52. For examples of prudential arguments and blending of constitutional-structural and prudential foreign policy arguments, see, e.g., *Human Rights*, *supra* note 19, at 460-63, 470-73; *Universal Jurisdiction*, *supra* note 19, at 344-48; Ramsey, *supra* note 19; *International Human Rights Litigation*, *supra* note 19, at 2181-84; cf. Jack Goldsmith, *Should International Human Rights Law Trump Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000) (making prudential argument with respect to incorporation of treaty-based international human rights law). The same critics have also tried to develop arguments that confine themselves more narrowly to constitutional-structural or original intent arguments. See, e.g., *The Alien Tort Statute*, *supra* note 19; *Illegitimacy*, *supra* note 19, at 356-67; Curtis A. Bradley & Jack A. Goldsmith, *Customary International Law*

strands' tendency to intertwine may reflect a sense that the concerns that are the foci of the second, prudential and consequentialist, line of analysis ordinarily are thought to animate some of the constitutional and near-constitutional principles invoked in the first type of argument. Or, the proclivity for conjoining the two types of arguments may suggest that their adherents doubt whether their positions can persuade without relying on empirical claims about the significant adverse impact on U.S. foreign relations when U.S. courts hear civil claims arising from human rights abuses committed by foreign defendants in foreign lands.

An analysis of human rights suits that have or might come from China has little to add to the voluminous debates that have elaborated or rejected the first line of arguments. Not so for the second. Reflection on the implications of litigation relating to human rights abuses in China—including cases that range well beyond ATCA and foreign-plaintiff TVPA suits—suggests that there are legitimate causes for concern about adverse effects on the conduct of American foreign policy. But such an examination also reveals good reasons to discount the parade of horrors that the usual critiques imply would flow from U.S. suits by Chinese nationals for human rights abuses in China.

Critics often point to the judicial branch's lack of expertise in foreign policy matters that foreign human rights cases require courts to address. They suggest that inept or ignorant courts will simply make a mess of things.⁵³ The criticism has considerable resonance in a num-

as *Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 869-73 (1997). But even these typically include an admixture of consequentialist arguments which explain why the issue is important, and point out the adverse impact that their opponents' views portend for U.S. foreign policy or American democracy or federalism.

53. This aspect of the argument surfaces in a number of forms. It is a central concern of the political question doctrine as applied in foreign affairs cases, the animating concerns of which are strongly shared by critics of foreign human rights litigation in U.S. courts. The political question doctrine and its application to ATCA, TVPA, and other foreign human rights cases is discussed *infra* at notes 87-95 and accompanying text. For an example of an argument that the political question doctrine should be applied to stop a China-focused ATCA case (specifically the Li Peng/Tiananmen suit), see Gruzen, *supra* note 8, at 226-27, 239-40.

The argument of dangerous judicial inexpertise also arises from critics' attack on the lack of executive control over civil litigation concerning foreign human rights abuses (as opposed to criminal prosecution). See, e.g., *Human Rights*, *supra* note 19, at 360; *Universal Jurisdiction*, *supra* note 19, at 346-47. This point is discussed more fully *infra* at note 124 and accompanying text. See also *infra* notes 210-215 and accompanying text. While the immediate focus of this critique usually is the risk that plaintiffs will have an agenda that departs from that of the executive and thus might lead to foreign policy embarrassment, courts are part of the imagined problem as well, for they are the institutions that fail to rein in and, instead, validate, amplify and make "governmental" or "official" statements or criticisms of foreign human rights practices that otherwise would be merely the assertions of private individuals who are particularly critical of the targeted government and its agents.

ber of decided cases that have involved China. Judges called upon to address China-related issues have penned statements that have made many U.S. diplomats and China-hands wince (and the anticipation of such judicial moves has sometimes prompted the State Department to intervene in litigation). Federal court decisions have characterized the PRC as a brutal communist dictatorship, a regime that can be expected to quash civil liberties and the rule of law in post-reversion Hong Kong, and a systematic violator of its citizens' rights to freedom of religion, political speech, and procreation.⁵⁴ They have opined that Taiwan is a part of the PRC and that Taiwan is an independent state legally distinct from the PRC—contradictory statements that are politically highly charged, not the least because of the volatile international relations that have increasingly focused on the contrasting human rights regimes on opposite sides of the Taiwan Strait.⁵⁵ Courts have made similarly contradictory statements, again sometimes more than a little tinged with human rights issues, concerning Hong Kong's status during the diplomatically tense period surrounding the territory's formal reversion to China.⁵⁶ One court has held that were it not

Finally, the argument of court ineptness or inexpertise resonates with another favorite argument of critics of foreign human rights litigation in U.S. courts: the largely customary international law that courts are asked to apply in such cases is uncertain. One of the implications is that, unlike conventional domestic law, there is no way anyone—and therefore no way that any court—could get it right. This line of argument is explored more fully at *infra* notes 58-60, 206-208 and accompanying text.

54. *See, e.g.*, *Li Wu Lin v. INS*, 238 F.3d 239, 245 (3d Cir. 2001) (describing the “Chinese government” as having “frequently used force and coercion to repress political dissent” and crediting reports that “the Chinese government used tanks and machine guns to kill at least 700 and possibly more nonviolent protesters”); *Lui Kin-Hong v. United States*, 957 F. Supp. 1280, 1288-89 (D. Mass. 1997), *rev'd*, 110 F.3d 103 (1st Cir. 1997) (concerning Hong Kong); *Doe v. INS*, 867 F.2d 285 (6th Cir. 1989) (concerning likely treatment of Christian convert and aspiring proselytizer if returned to China); *Zheng Quan Li v. INS*, No. 97-71175, 1999 U.S. App. LEXIS 21542 (9th Cir. Feb. 10, 1999) (finding that “China continues to persecute low-level dissidents” even ten years after the Tiananmen Incident); *Fengchu Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997) (concerning persecution on account of political opinion); *Ke Zhen Zhao v. United States Dep't of Justice*, 265 F.3d 83, 91-92 (2d Cir. 2001) (concerning pattern of coercive family planning and forced sterilization in China).

55. *See, e.g.*, *Millen Indus. v. Coordinating Council for N. Am. Affairs*, 1987 WL 8707, at *1 (D.D.C. Mar. 17, 1987) (finding jurisdiction over a suit against “an association comprised of subjects of the Republic of China” under 28 U.S.C. § 1332(a)(2), which provides for jurisdiction over actions between “citizens of a State [of the United States] and citizens or subjects of a foreign state”), *aff'd*, 855 F.2d 879 (D.C. Cir. 1988) (affirming trial court decision but relying on provision in U.S. law requiring courts to treat Taiwan as if it were a state); *Atl. Mut. Ins. v. Northwest Airlines*, 24 F.3d 958, 959 (7th Cir. 1994) (characterizing lower court's decision as holding that “Taiwan [is] a province of the [PRC]”). *See also* deLisle, *supra* note 45, at 55-60 (concerning the issues of Taiwan's democracy and human rights in PRC and Taiwan diplomacy).

56. *Lui Kin-Hong*, 957 F. Supp. at 1280 (finding post-reversion Hong Kong so assimilated to PRC that prior extradition treaty with Hong Kong cannot be construed to extend where trial would occur after reversion); *Tai-Chiu Wong v. Ilichert*, 998 F.2d 661 (9th Cir. 1993) (holding

for Congress's decision not to make the Foreign Sovereign Immunities Act (FSIA) retroactive, the PRC would be obliged to honor Qing dynasty bond obligations, which the PRC regards as void, odious debts incurred by a traitorous regime and imposed by rapacious foreigners who impermissibly disregarded China's sovereignty.⁵⁷

China human rights cases, however, also suggest how the critical view both begs the question and proves too much. The critics' argument proves too much in that courts are no less inexpert and likely to reach potentially destructive judgments when facing other arcane matters that find their way into litigation. Courts' clunking statements about conditions in China sound no more silly or distressing to Sinologists and State Department regional desk officers than judicial handling of many other matters sounds to economists, other social scientists, and specialists in the relevant industries or sectors. Despite ample opportunities to use special masters and expert witnesses, courts routinely "get it wrong" in potentially disastrous ways on complex economic and technical questions and other matters. To be sure, a cottage industry among academics has used this aspect of judicial inexpertise and ineptitude to argue for much greater judicial humility and restraint in a wide range of cases. But that program is clearly a good deal more radical than what the opponents of expansive litigation over foreign human rights abuses take themselves to be arguing.

The usual criticisms also tend to beg the question by asserting that what courts are asked to do in ATCA and similar cases is to decide subtle and ambiguous questions arising from the unjudicial and murky realms of foreign policy and customary international law, which are depicted as profoundly uncertain and thus vulnerable to considerable manipulation.⁵⁸ China cases seem especially to reinforce the critics' point. Indeed, it is hard to find an aspect of recent American foreign policy that has been as fraught with ambivalence, complexity, contentiousness, and instability as U.S.-PRC relations in general and human rights issues in Sino-American relations in particular. Some of the tense and testy exchanges between the two governments have focused

post-Tiananmen executive order granting immigration relief to PRC nationals did not extend to applicant who entered from Hong Kong and subsequently acquired PRC passport; U.S. law does not accept PRC position that pre-reversion Hong Kong residents are Chinese nationals).

57. *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

58. *See, e.g., International Human Rights Litigation*, *supra* note 19, at 2140-46, 2165-66, 2175-79 (describing the uncertain content of international law, the judicial reception of international law governing immunities as "politicized and unpredictable," and the vagueness of international law's content); *cf. Goldsmith*, *supra* note 52, at 332-34 (concerning U.N. Covenant treaty-based international human rights law provisions which are generally acknowledged—although not by the author—to reflect much of customary international human rights law); *Kochan*, *supra* note 19, at 185.

specifically on the question of whether international human rights as the U.S. government defines them are applicable or appropriate to China and binding on the PRC as a matter of international law.⁵⁹ But the matters alleged in the Li Peng, Falun Gong, and other China human rights cases are profoundly unsubtle.⁶⁰ They typically concern behavior that has caused extensive physical and emotional harms that are widely documented by scholars, journalists, non-governmental organizations, the U.S. State Department and, occasionally, official PRC sources. Additionally, the law to be applied—the most core of international human rights standards—is not obviously less accessible to U.S. courts or less amenable to their judicial interpretation and application than is much international, foreign, state, and common law that federal judges are asked to apply every day. Indeed, some of the relevant human rights standards are recorded in U.S. treaties or statutes and parallel familiar U.S. constitutional rights, all of which are conventional sources of the law of the United States.

Clearly, this does not completely take care of the problem of a court decision's potential for upsetting delicate foreign policy arrangements.⁶¹ But, with such cases thus recharacterized as presenting difficulties that are genuine, but hardly *sui generis*, in the work of U.S. courts, it becomes more plausible to argue that the concerns they raise are better handled through the episodic intervention of the executive branch rather than wholesale, categorical exclusion of foreign human rights cases or a large subset of them. If what otherwise appears to be the relatively ordinary functioning of the judiciary in applying not-especially-inaccessible law to not-especially-elusive facts would risk, in a particular case, an unacceptable impact on U.S. relations with China or other nations, then the executive branch can be expected to perform its customary role of intervening as it sees necessary in specific cases, as it is presumed to be capable of doing in non-ATCA or non-

59. See, e.g., *Human Rights in China "Superior" to Those in West*, RENMIN RIBAO (People's Daily), Nov. 8, 1991; *Chinese President at Cambridge Stresses "Chinese Values"*, XINHUA, Oct. 22, 1999; *No More of "Human Rights Above State Sovereignty"*, XINHUA, May 26, 1999; *FM Spokesman Refutes U.S. Human Rights Accusation*, XINHUA, Feb. 26, 2000, available at LEXIS NEXIS.

60. The China human rights cases other than the Li Peng and Falun Gong litigation are discussed in greater detail *infra* at Section III.

61. Indeed, a critic could argue plausibly that misplaced analogies to U.S. Bill of Rights jurisprudence are a particular danger in courts' adjudication of foreign human rights claims; cf. *Wiwa*, 2002 WL 319887, at *11-12 (including violations of rights to peaceful assembly and expression among possible grounds for ATCA recovery); see also *Guo Chun Di v. Carroll*, 842 F. Supp. 852 (E.D. Va. 1994).

TVPA cases that raise political questions, act of state issues, head of state or diplomatic immunity requests, and the like.⁶²

Critical arguments often portray such an approach as putting inappropriate or imprudent pressure on a political branch—primarily the executive branch—to set forth its views in individual cases or classes of cases. On this view, such pressure is significant and is constitutionally disfavored or proscribed because it unduly or impermissibly constrains or burdens the conduct of U.S. foreign policy by requiring the executive branch to choose between, on the one hand, staking out positions that it might wish to leave ambiguous or unarticulated or, on the other hand, accepting excessive risk that the court will disregard the need for the nation to speak with one voice in international affairs.⁶³ Again, China-related cases add some credibility to such concerns. The Tiananmen and Falun Gong cases have been obviously awkward for the administration and stressful for the U.S.-PRC relationship, with the United States having to argue in court that a suit alleging severe human rights abuses in China should be thrown out for inadequate service of process,⁶⁴ having to explain to Chinese officials that another suit making broadly similar claims would likely proceed because there was nothing that executive branch officials could do to stop it,⁶⁵ and having to endure and respond to howls of protest from Beijing about the threat that such suits pose to Sino-American relations.⁶⁶

62. For a discussion of the executive's role in intervening in individual cases implicating foreign affairs, see *infra* note 222.

63. The "unitary voice" argument is a central element of the political question doctrine and thus of the argument that the political question doctrine should be used to dispose of some or most foreign human rights litigation. The "forced to speak" issue is a concern of the act of state doctrine and thus an underpinning of arguments that the act of state doctrine should be used to restrict foreign human rights litigation in U.S. courts. See also *Human Rights*, *supra* note 19, at 461 (arguing that human rights litigation, specifically the Li Peng/Tiananmen suits threatens to upset the "carefully calibrated strategy" of the president and Congress toward China); cf. *International Human Rights Litigation*, *supra* note 19, at 2182-83 (arguing that issues of bringing human rights law into U.S. law by judicial means places in the courts' hands matters that are best resolved by the political branches); Ramsey, *supra* note 19, at 376 (making the "unitary voice" argument).

64. See, e.g., *Court Decision on Li Peng Applauded*, TIMES OF INDIA, Sept. 23, 2000, available at LEXIS NEXIS; *Li Peng Tiananmen Law Suit Could be in Danger*, available at LEXIS NEXIS; Wong, *supra* note 1; *The Li Peng Lawsuit and Universal Jurisdiction over Violations of Rights*, *supra* note 1 (concerning U.S. argument that service on a State Department employee in Li's security detail was not appropriate or adequate, and noting court's rejection of that argument in light of the difficulty of serving Li).

65. See, e.g., Pomfret, *supra* note 11 (describing PRC requests, U.S. response, and Chinese legal experts' rejection of U.S. response).

66. See, e.g., *China Slams US Lawsuit Against Li Peng as "Political Farce"*, *supra* note 1; *China Says Falungong Lawsuit on Beijing's Mayor is a "Nasty Trick"*, AGENCE FR. PRESSE, Feb. 10, 2002; *Global Justice: The Li Peng Lawsuit and Universal Jurisdiction Over Violations of Rights*,

Here too, however, China cases illustrate how such critical arguments, especially when cast in general and abstract terms, can overreach. The Li Peng and Falun Gong cases and much other litigation touching upon human rights conditions in China have not forced the political branches to articulate a previously shadowy position on whether the Tiananmen Incident and its aftermath or much of the crackdown on Falun Gong or forced prison labor conditions and the like were condemnable and condemned. United States official statements have long made this abundantly clear in many far more visible, extrajudicial contexts. The annual report issued by the State Department on human rights conditions in China is one of the more routine and recurring forms of such statements.⁶⁷ The post-Tiananmen Incident executive order suspending immigration restrictions on PRC nationals in the United States, the early Clinton administration executive order linking recommendations on renewal of China's most-favored nation trading status to amelioration of specific human rights abuses (including imprisonment for political expression, forced prison labor, and inhumane treatment of prisoners), Congress's adoption of amendments to the immigration laws to authorize grants of asylum to victims of coercive family planning in China (and the findings behind the legislation), and congressional statements and hearings condemning the persecution of Falun Gong are some of the more high-profile instances.⁶⁸ There are countless others. What the Chinese human

supra note 1 (quoting PRC Foreign Ministry Spokesman statement that the lawsuit is "a political farce fabricated by a handful of anti-China elements in the U.S. out of despicable political motives"); Pomfret, *supra* note 11 (describing Chinese government calls on Bush administration to stop the ATCA suits against PRC officials).

67. See U.S. Dep't of State, *Human Rights Report (China)*, available at <http://www.state.gov> (last visited Nov. 25, 2002) [hereinafter *China Report*] (issued annually in March).

68. Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990) (directing deferral of enforced departures of all PRC nationals in the United States on or after the day following the Tiananmen Incident of June 4, 1989, and directing "enhanced consideration" of asylum requests from individuals claiming to flee coerced abortion or sterilization); Exec. Order No. 12,850, 58 Fed. Reg. 31,327 (May 28, 1993) (conditioning Secretary of State's recommendation for renewal of MFN on PRC progress in freedom of immigration, and compliance with prison labor agreements; and directing Secretary to consider if there has been progress on adherence to the Universal Declaration of human rights, release of Chinese nationals detained for non-violent expression of political or religious beliefs, humane treatment of prisoners, treatment of Tibet, and access of Chinese nationals to information broadcast from abroad); 8 U.S.C. § 1101(a)(42) (1998) (as amended to include in the definition of a refugee eligible for asylum those who have been subjected to, or have been persecuted for refusing, involuntary sterilization or abortion, or have been persecuted for resistance to such policies). Executive Order 12,711 was adopted in the shadow of congressional legislation, vetoed by the President, that would have extended similar relief to Chinese nationals. The China-specific findings behind the amendment of 8 U.S.C. § 1101(a)(42) are discussed in *Zhao*, 265 F.3d at 92-93. For examples of congressional statements and investigations concerning Falun Gong, see, e.g., Statement by Congresswoman Ileana Ros-Lehtinen at Falun Gong Press Conference in Washington DC, available at <http://www.free>

rights-related court cases have pushed any political branch to do has been (at most), first, merely to address the limited and narrowly litigation-related question of whether procedural or jurisdictional requirements had been satisfied (and whether the courts thus should hear cases involving behavior that the United States had criticized officially), or second, perhaps to sit uncomfortably on the sidelines as the courts heard such cases despite misgivings that diplomatic troubles might ensue, but with such limited expected consequences that it did not seem worth bearing the modest cost of criticism for hypocrisy that would greet more aggressive executive branch intervention on behalf of the defendants.

Moreover, the context of China-related cases reminds us that adjudication of an occasional foreign human rights case or executive comments in response to the filing of an occasional ATCA or TVPA suit are but an insignificant part of a dense and complex set of international interactions. In a bilateral relationship as economically and strategically important as the U.S.-PRC relationship, the channels are constantly open and well-tended despite numerous frictions, many of which far surpass the difficulties portended by human rights litigation in U.S. courts. The protracted wrangling over U.S. preconditions for support for China's entry into the World Trade Organization (WTO) and the resulting entitlement to permanent normal trade relations, U.S. bombing of the PRC embassy in Belgrade, the incident surrounding the United States EP-3 reconnaissance plane's collision with a shadowing Chinese fighter jet and subsequent forced landing, arms sales or discussions of defense links to Taiwan, and the PRC's detention of U.S. citizens or residents as spies are but a few of the most recent, far greater irritants in U.S.-PRC relations. Indeed, they are irritants in which issues of international law (including human rights law), U.S. foreign relations law, and the like have been central. United States support for PRC accession to the WTO had hinged in significant part on human rights issues, given that China's entry would demand an end to U.S. laws imposing human rights conditions on China's Most Favored Nation (MFN) trading status. The PRC regarded the embassy bombing as part of a broader human rights-violating U.S.-led NATO intervention in the former Yugoslavia. Beijing denounced the Belgrade and EP-3 incidents and U.S. involvement in Taiwan as violations of the United States' obligations to respect

lists.org/archives/minghui-eng/07-2001/msg00013.html (last visited Nov. 25, 2002); *Congressional Human Rights Caucus Members' Briefing and Exhibit on Human Rights in China: The PRC's Anti-Human Rights Tactics in the United States*, available at http://www.house.gov/lantos/caucus/brief_FalinGong061102.html (last visited Nov. 25, 2002). See also *infra* note 99.

China's sovereignty and, in turn, the human rights of the Chinese people to enjoy the full attributes of sovereignty. And the detention, conviction, and expulsion of several U.S.-national or U.S.-based researchers for alleged espionage pitted China's explicit claims about its right to national security and implicit suggestions that China-born individuals remained to a degree subject to the PRC's authority against the United States' familiar assertion of its rights to protect its nationals and, to a more limited degree, its non-citizen residents from mistreatment by foreign sovereigns, particularly in the form of questionable charges targeting activities that resonated with First Amendment values.⁶⁹ On the U.S. side, all of these instances of diplomatic friction have stemmed from actions or decisions taken or statements made by the executive branch, sometimes with support from Congress. They have not come from the courts.⁷⁰

Chinese officials and legal scholars have made predictable complaints (although less strident ones than in other legal contexts) that the President or his subordinates can and should do more to stop the Tiananmen and Falun Gong suits. While some of those critiques are surely sincere and may be valid, a degree of skepticism is in order. Official China is not so uncomprehending of the United States system

69. See, e.g., PRC Ministry of Foreign Affairs, *Strong Protest by the Chinese Government Against the Bombing by the US-led NATO of the Chinese Embassy in the Federal Yugoslavia*, available at <http://www.fmprc.gov.cn/eng/5733.html> (last visited Nov. 25, 2002); Erik Eckholm, *Crisis in the Balkans: China Assails "Gross Violation of Sovereignty"*, N.Y. TIMES, May 8, 1999, at A6; PRC Ministry of Foreign Affairs, *Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes*, available at <http://www.fmprc.gov.cn/eng/9576.html> (last visited Nov. 25, 2002); Philip P. Pan & John Pomfret, *American Crew Heads Home; China Accepts Letter of Regret*, WASH. POST, Apr. 12, 2001; PRC Ministry of Foreign Affairs, *Spokesperson on President Bush's Remarks on U.S. Arms Sale to Taiwan*, available at <http://www.fmprc.gov.cn/eng/10024.html> (last visited Nov. 25, 2002); Peter Lim, *U.S. China Relations Improving, But Still Sticky: U.S. Ambassador*, AGENCE FR. PRESSE, Jan. 21, 2002, available at LEXIS NEXIS; Alan S. Alexandroff, *Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 UCLA J. INT'L L. & FOREIGN AFF. 23 (1998); *Xinhua Officials, Congress Deputy on Linking Human Rights with Trade Issues*, TA KUNG PAO, Mar. 7, 1994, available at LEXIS NEXIS; *Only Politics Keeping Us Out of WTO, Says China*, AGENCE FR. PRESSE, Dec. 10, 1996; *Ministry Comments on Passage of Trade Bill in U.S. Senate*, XINHUA, Sept. 21, 2000, available at LEXIS NEXIS; Craig R. Smith, *Beijing Convicts Professor; Orders Expulsion*, N.Y. TIMES, July 15, 2001, § 1, at 10 (discussing the cases of Li Shaomin and U.S. resident and PRC citizen Gao Zhan); *China: Academic Li Shaomin charged with Espionage, to be Deported*, XINHUA, July 14, 2001, available at LEXIS NEXIS; Philip Shenon, *Scholar Back in U.S. After Detention*, N.Y. TIMES, Jan. 30, 2001, § 1, at 8 (discussing the case of PRC national, U.S. resident law librarian, Song Yongyi); Jim Hoagland, *The Harry Wu Defense*, WASH. POST, Aug. 31, 1995, at A23; *China Brought Harry Wu Hongda to Trial According to Law*, WEN WEI PO, Aug. 29, 1995, available at LEXIS NEXIS.

70. Ironically, the courts were involved in one of these sets of issues on the Chinese side—the espionage prosecutions of U.S. nationals and residents.

of separation of powers as it claims to be.⁷¹ And the PRC's complaints over the cases have produced more of a quest for debating points than an occasion of measurable damage to the bilateral relationship.⁷²

None of this is to say that the foreign policy costs of U.S. litigation over Chinese human rights abuses are nonexistent or should be borne without good reason, but even a brief consideration of the realities of the relationship between Beijing and Washington cautions against assuming too readily that China-related human rights suits in American courts will substantially disrupt relations with a nation that is of vital concern to U.S. foreign policy.

In addition, critics fear that the problem of deranging foreign policy through human rights litigation is likely to get worse in the wake of U.S. courts opening their doors to ATCA suits against non-state actors, including U.S. companies operating abroad.⁷³ Here, conventional critics of the ATCA may even under-appreciate the possibility of creeping expansion of judicial reach. Developments in international law may be advancing the human rights lobby's cause and making more difficult critics' arguments that foreign plaintiff suits against private defendants are hard to fit within the ATCA framework. An emerging view in international law holds that multinational corporations, and not just governments or individual international criminals, have human rights duties. If this view takes hold, suits against a U.S. company sufficiently implicated in severe human rights abuses in China, or elsewhere, become rather easily recharacterized as actions claiming torts under the "law of nations" that is the touchstone of ATCA jurisdiction and that courts have characterized as "evolving."⁷⁴

71. See the discussion of PRC understandings of U.S. separation of powers law, *infra* note 211.

72. See *infra* note 211; see also *supra* note 66.

73. See, e.g., *Human Rights*, *supra* note 19, at 470-71; Ramsey, *supra* note 19. See also *Corporate Liability*, *supra* note 19 (discussing approvingly the expanding reach, and foreseeing trends that the critics fear); Murray Hiebert, *The Era of Responsibility*, FAR E. ECON. REV., July 11, 2002, 14-16 (discussing human rights-related risks of multinational corporations dealing with rights-abusing regimes); see also *infra* note 83. The cases have been something of a mixed bag. One line—including *Kadic v. Karadzic*, *Doe v. Islamic Salvation Front*, *Tachiona v. Mugabe*, and *Mushikiwabo v. Barayagazima*—has held state-like and state-affiliated entities to be within the scope of ATCA and/or TVPA liability. Another line—involving nationally private corporations and including *Doe v. Unocal*, *Beanal v. Freeport McMoran*, *Bigio v. Coca Cola*, *Carmichael v. United Technologies Corp.*, and *Iwanowa v. Ford*—has found the courts only rarely willing to find corporate actors within the reach of plaintiffs' ATCA claims. See also *infra* notes 146-158 and accompanying text.

74. See e.g., *Filartiga*, 630 F.2d at 881; *Jama*, 22 F. Supp. 2d at 362; *IIT v. Venacap*, 519 F.2d 1001 (2d Cir. 1975); *Kadic*, 70 F.3d at 238-40; Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

On these private defendant issues as well, China-related litigation points to a scenario under which U.S. adjudication indeed could pose significant foreign policy difficulties. In *Bao Ge v. Li Peng*,⁷⁵ the court initially allowed the plaintiffs limited discovery in their suit over forced prison labor, under inhumane conditions, to manufacture soccer balls with the Adidas logo. By construing the ATCA potentially to allow plaintiffs to go after a private corporate actor allegedly entangled with the host government, the court threatened to throw a spotlight on human rights-related matters that the PRC did not want to see scrutinized in a U.S. court and that the PRC regarded as matters within its domestic discretion. The judicial inquiry into PRC human rights violations could have proceeded even if the official PRC defendants were dismissed, so long as Adidas remained as a defendant. Moreover, the prospect that Adidas's corporate assets, unlike the Chinese defendants' assets, would likely be available to satisfy a judgment gave the plaintiffs and their lawyers tangible incentives to press forward.

The number of *Bao Ge*-like or other private defendant ATCA cases that might arise from the PRC is seemingly huge. By most accounting measures, the PRC is the world's second largest recipient of foreign direct investment, and by far the largest among states with seriously problematic human rights records. An unusually large share of that investment takes the form of project investment, rather than passive or portfolio investment (such as the purchase of shares in a listed company—an act which is unlikely to leave the investor open to ATCA liability for the company's entanglement in human rights violations even on the most expansive reading of the statute). Such project investment is heavily concentrated in export-oriented joint ventures or long-term contracted production with PRC state-owned enterprises, some of which are quite directly controlled by government entities and many of which operate with support and intervention from the state.⁷⁶ At the same time, reforms to the PRC's penal regime in recent years have subjected corrections officials to vastly greater pressure to generate revenue to pay more of the costs of operating prisons. This reportedly has led to increased emphasis on developing prison

75. 201 F. Supp. 2d 14 (D.D.C. 2000).

76. On the structures and patterns of foreign direct investment in the PRC, see, e.g., Nicholas R. Lardy, *The Roles of Foreign Trade and Investment in China's Economic Transformation*, 144 CHINA Q. 1065 (Dec. 1995); Margaret M. Pearson, *China's Integration into the International Trade and Investment Regime*, in CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS 161-205 (Elizabeth Economy & Michel Oksenberg eds., 1999); Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Foreign Investors*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 345 (1997).

production of saleable goods, including those produced by the use of the forced labor of mistreated inmates. Some of this production has targeted the lucrative and foreign exchange-generating export market and fueled the now long-running controversy over prison exports in U.S.-China relations.⁷⁷

Still, the “threat” implied by the *Bao Ge* case is easily exaggerated. Despite the apparent potential for such cases presented by China’s foreign investment and trade circumstances, there has been no rash of PRC-related prison labor or private defendant cases in U.S. courts, and the plaintiffs in *Bao Ge* were strikingly unsuccessful. The PRC official defendants were quickly dismissed. So too was Adidas, upon the court’s finding that the plaintiffs could not show that Adidas was more than the name on the soccer balls (and presumptively the marketer thereof), which was not sufficient for an ATCA claim against the company. As this suggests, even in the Chinese context, the type of factual circumstances the court found with respect to Adidas, and other relatively arms-length or remote relationships between multinational companies and host-country rights abuse, are likely to be more common than patterns of deep entanglement and cooperation between multinational corporations and regimes in human rights-violating ventures, such as were at issue in the suits over Unocal’s operations in Burma or Freeport-McMoran’s venture in Indonesia—suits in which the plaintiffs notably did not prevail and in which there seemed in the end to be little effective judicial inclination to treat corporations as primary bearers of international human rights law obligations.⁷⁸

Finally, critics also have argued that broad permission to bring U.S. suits over human rights abuses abroad risks encouraging retaliation in the form of other states throwing open their less neutral and fair courts to politically motivated, ostensibly human rights-based suits against U.S. officials and other U.S. nationals.⁷⁹ Once again, the Chinese example makes such fears vivid. Many of the necessary elements

77. See generally HONGDA HARRY WU, LAOGAI: THE CHINESE GULAG 119-45 (1992); U.S. Department of State, *Country Reports on Human Rights Practices* (2001): China Report, *supra* note 67, § 6.c., available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8289.htm> (last visited Nov. 25, 2002) (concerning forced prison labor and export industries); see also Exec. Order No. 12,850 (incorporating prison labor issues in conditions for MFN renewal).

78. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000); *Beanal v. Freeport-McMoran Inc.*, 969 F. Supp. 362 (E.D. La. 1997).

79. *Human Rights*, *supra* note 19, at 460-61; see also William Glaberson, *Courts in the U.S. Become Arbiters of Rights and Wrongs Around the World*, N.Y. TIMES, June 21, 2001, at A8 (describing the potential perils of foreign states opening their courts to suits against U.S. defendants for human rights violations); cf. Ramsey, *supra* note 19, at 373-74 (describing the “explosion” of foreign criticism that greeted the Helms-Burton law’s extension of “extraterritorial”

seem to be present in official China's shrill language about U.S. culpability and responsibility for atrocities in Kosovo and bombing deaths in Iraq, in the universally noted and widely criticized dominance of the Chinese Communist Party and Party-dominated government institutions over the PRC's courts, in Beijing's well-established taste for splashy political show trials of the politically disfavored (including Mao Zedong's widow, Jiang Qing, and other radicals who lost in the post-Mao succession struggle, pro-democracy dissidents, and religious dissenters) and in the prosecution of U.S. nationals and U.S. residents detained in China on dubious espionage charges and other similar grounds.⁸⁰

Official China also has shown some taste for transnational litigation to address apparent violations of *Chinese nationals'* human rights when committed by foreign hands or in alien lands. Thus, a PRC court accepted and Chinese state media reported favorably a suit by "victims" of Falun Gong against the group's U.S.-resident leader Li Hongzhi.⁸¹ And PRC official commentaries and Party-affiliated Non-Governmental Organizations (NGOs) have been supportive of reparations suits brought (primarily in Japan) against Japan by Chinese nationals who were subjected to sex slavery and other human rights violations by Japanese forces during World War II.⁸² Also, the PRC did not launch any of its trademark tirades against a highly similar sex slavery suit brought in U.S. courts under the ATCA, or against another ATCA suit brought on behalf of Chinese (and other) laborers

reach for U.S. courts); *Universal Jurisdiction*, *supra* note 19, at 344 (involving Helms-Burton law and also extraterritorial application of U.S. antitrust law).

80. See generally, U.S. Department of State, Country Reports on Human Rights Practices For 2001; China Report, *supra* note 67, § 1 (describing politicization of criminal justice in China); Margaret Woo, *Law and Discretion in Contemporary Chinese Courts*, in *THE LIMITS IN THE RULE OF LAW IN CHINA* 163-96 (Karen G. Turner et al. eds., 2000) (describing the role of Party officials in courts and criminal justice); DAVID BONAVIA, *VERDICT IN PEKING: THE TRIAL OF THE GANG OF FOUR* (1984) (describing the trial of Jiang Qing and others); CARLOS WING-HUNG LO, *CHINA'S LEGAL AWAKENING* 271-323 (1995) (describing trials of political dissidents); see also *supra* note 69 (describing PRC reaction to bombing incidents and PRC's detention of U.S. citizens or residents on spy charges).

81. See, e.g., *Falungong Leader Ready to Go Home*, AGENCE FR. PRESSE, July 27, 1999, available at LEXIS NEXIS.

82. *WWII Sex Slaves File Class Action Suit Against Japan*, XINHUA, Sept. 19, 2000, available at LEXIS NEXIS, (reporting favorably, in official PRC media, on ATCA suit by Chinese nationals in United States); *Chinese "Comfort Women" File Lawsuit Against Japanese Government*, XINHUA, Dec. 2, 2001, available at LEXIS NEXIS (reporting favorably, in official PRC media, on suit by Chinese nationals in Japanese court, and reporting support for and participation in the suit by PRC government/Chinese Communist Party-affiliated NGOs); *China-Sex Slaves Demand Apology from Japan*, CHINA DAILY, Nov. 16, 1998, available at LEXIS NEXIS (reporting, in official PRC newspaper, that Japan is "being urged not to evade its legal and moral obligations").

for abuses committed by sweatshop owners of various nationalities operating in the U.S. territory of Saipan.⁸³

Here too, however, a closer look at Chinese contexts and behavior indicates that worries that an unnarrowed ATCA (or TVPA) will lead China to establish mirror-image jurisdiction may be easily overstated. Despite the features of China's politics and judicial system that might make human rights litigation against U.S. nationals attractive and available to the regime, and despite the provocation to retaliation that the Tiananmen and Falun Gong suits might seem to provide, the PRC has not moved in this direction. The Li Hongzhi, sex slavery and Saipan litigations do little to portend the kind of retaliation that the ATCA's critics predict. Most of these suits do not share one or more of the characteristics that critics have in mind when they raise fears of retaliation. Although a U.S. resident, Li Hongzhi remained a PRC national and the harms of which plaintiffs complained were suffered primarily and arguably exclusively in China. The same is true for many of the Chinese plaintiffs suing over Japanese wartime atrocities. The sex slavery suits that have received strong official PRC endorsement were brought in the home courts of the abusers, not China (or a third country). The Saipan labor rights suit focused on abuses occurring in the territory of the forum state. Even the official tolerance of or acquiescence in the sex slavery and sweatshop ATCA suits brought by Chinese plaintiffs in U.S. courts do not clearly suggest a likelihood of retaliation. Rather, they have shown Beijing's inclination to forego seemingly promising opportunities—indeed, ones in which its abandonment of its own citizens' apparent interests would stifle charges of opportunism and hypocrisy—to denounce the United States' ATCA or assert a right to respond in kind to American legal overreaching.

The possible reasons for the PRC's failure to resort to retaliation are numerous and instructive. Perhaps Beijing is deterred by the harm such moves would produce in U.S.-PRC relations. Perhaps the more thoughtful and savvy policy-makers in the PRC understand that the world would react to such litigation with skepticism and criticism far stronger than it has directed at U.S. human rights litigation; and that reaction would make such a PRC undertaking predictably futile as a diplomatic gambit.

Perhaps PRC leaders simply recognize the severe tension between endorsing expansive Chinese litigation (even litigation they could control) over human rights abuses abroad and positions that have long

83. See generally Seth Faison, *Stretching Federal Labor Law Far Into South Pacific*, N.Y. TIMES, Feb. 20, 1999, at A3; Nancy Cleeland, *Firms Settle Saipan Factory Workers Suit*, L.A. TIMES, Sept. 27, 2002, § 3, at 1.

been at the core of Beijing's approach to international law and international relations more broadly. A Chinese ATCA, or its criminal law equivalent, would be difficult indeed to square with the PRC's venerable insistence on strong notions of sovereignty, the impermissibility of the courts or government of one country judging or otherwise interfering in the internal affairs of another state, and other related positions. Such PRC positions may not be lightly cast aside because they have been, among other things, the foundation of official Chinese critiques of U.S. human rights litigation, other aspects of American approaches to international law, Washington's human rights diplomacy, and United States policy on Taiwan, global security and a host of other issues.⁸⁴ Even in foreign policy and even for the PRC, hypocrisy may have its limits, albeit perhaps only prudential ones. To the extent that embracing transparently incoherent positions on purportedly fundamental principles has its costs, the gains from retaliatory litigation may not be worth Beijing's trying to reap.

Chinese domestic politics too may impose practical constraints on hypocrisy that reduce the urge to allow or encourage retaliatory litigation. The PRC regime may recognize that the modest imagined advantages of subjecting U.S. defendants to human rights suits or prosecution in China's courts could be easily outweighed by the risks of increased pressure or protests pushing for opening those same courts to Chinese nationals seeking justice and compensation for human rights abuses committed by their own government, much as American law subjects the U.S. government and its officials to liability for the kind of activity covered by the ATCA and TVPA.⁸⁵ Certainly, the temerity of Chinese Falun Gong adherents and relatives of Tiananmen victims who sought to sue China's President and Communist Party Chief Jiang Zemin in Chinese courts—despite the predictable result of their cases being rejected and themselves risking jail—

84. See generally Wang Tiewa, *International Law in China: Historical and Contemporary Perspectives*, in ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS (collected courses of the Hague Academy) 203-357 (1990); Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267 (2000).

85. Examples of the suits that can be brought against the United States or U.S. officials include Bivens actions (constitutional claims on the model of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), civil rights claims under 42 U.S.C. § 1983, suits under the Federal Tort Claims Act, 28 U.S.C. §§ 2674-2680, and ATCA suits against U.S. defendants. *But cf.* Gibney, *supra* note 19 (criticizing the "hypocrisy" of U.S. courts being open to suits for human rights abuses by foreign defendants but not by U.S. government defendants); Goldsmith, *supra* note 47.

provides good reason for China's rulers not to discount this possibility.⁸⁶

The foregoing factors that may explain restraint in China are likely to be operative elsewhere, although to different degrees and in different proportions depending on, for example, the independence of such nations' judiciaries, the friendliness of their relations with the United States, and the like. Small rogue states might not be thus restrained and one can imagine that China too might conceivably succumb to temptation under some circumstances. But it seems fair to question whether the relatively marginal adjustments entailed in restricting or even gutting the ATCA or TVPA would affect such regimes' decisions about whether to subject U.S. defendants to human rights litigation in their courts.

In sum, a consideration of Chinese cases and circumstances indicates that the general types of concerns raised by critics of expansive permission for foreign human rights litigation in the United States have a real foundation, including (and in some cases especially) in the context of particularly important and contentious bilateral relationships. On the other hand, an examination of the Chinese examples also argues strongly against accepting dire claims made in the abstract and in categorical form about what is ultimately an empirical question of how much of a threat ATCA and TVPA litigation poses to the conduct of U.S. foreign policy.

III. CLOSING THE DOOR BUT NOT THE WINDOWS

If one credits the plausible dangers to U.S. foreign relations described above, or even if one accepts that the most Cassandra-like critics are right about the harms threatened by broad readings of allegedly eccentric U.S. statutes permitting civil suits by foreign nationals for human rights abuses committed abroad, it is far from clear that narrow restrictions, or indeed the repeal, of the ATCA (or the foreign plaintiff portion of the TVPA) will do much to protect against the harms to foreign policy that critics identify as compelling reasons for limiting or eliminating such suits. Following such a prescription could well be a matter of trying to keep out flies by closing the door while leaving the windows open. Even without the ATCA or a TVPA that

86. See, e.g., *2 Falun Gong Members Held After Lawsuit Against Jiang Zemin*, ASIAN POL. NEWS, Oct. 16, 2000, available at LEXIS NEXIS; *Victim's Families and Dissidents Applaud Court Decision on Li Peng*, AGENCE FR. PRESSE, Sept. 22, 2000; see also *Li Peng Lawsuit Background Page*, available at http://iso.hrichina.org:8151/old_site/Lawsuit.htm (last visited Nov. 25, 2002) (describing Tiananmen victims' repeated petitions to PRC prosecutors and other government authorities to prosecute or investigate the wrongs committed at Tiananmen).

allows alien plaintiffs to bring suit, U.S. courts would still have ample occasion to address many of the same substantive questions and pass judgment on many of the same or similar foreign government actions committed abroad. The core dangers that critics identify would still exist: judicial derangement of foreign policy through civil litigation in U.S. courts concerning foreign human rights abuses. Cases involving China help, in several ways, to show why this is so.

United States federal courts regularly decide cases that seek review of some of the thousands of proceedings in which the Immigration and Naturalization Service (INS) grants or denies asylum to PRC nationals who claim to have suffered persecution for their religious or political beliefs or opposition or subjection to PRC policies and practices that raise serious human rights issues. In many of these cases, U.S. courts have had to decide whether the Chinese government and its agents engaged in a variety of practices that violated international human rights law. The United Nations Protocol Relating to the Status of Refugees, which U.S. asylum law closely tracks, sets forth grounds for asylum that cover and in many respects extend well beyond the severe human rights violations typically alleged in ATCA and TVPA claims brought by Chinese nationals.⁸⁷ The substance of typical PRC asylum-seekers' claims—torture, beating, imprisonment, systematic harassment, and the like for political dissent, opposition or resistance to coercive family planning, or practicing banned or unauthorized religion—are surely matters with respect to which U.S. court decisions can be every bit as offensive to the PRC regime and troubling to U.S.-PRC relations as would be a pro-plaintiff determination of the facts alleged in the Tiananmen, prison labor and Falun Gong suits, and other imaginable ATCA and TVPA cases.

Indeed, the facts alleged in the two types of cases are often quite similar. A considerable number of Chinese asylum-seekers whose cases have made it beyond the administrative adjudication of the immigration and asylum process and into Article III courts have won judicial acceptance of their claims about human rights abuses occurring in China in connection with the post-Tiananmen crackdown or the suppression of Falun Gong. In *Li Wu Lin v. INS*,⁸⁸ for example, the court ordered asylum for an applicant whom PRC authorities had prosecuted ostensibly for destruction of property, but in reality for his peaceful political expression through active participation in the stu-

87. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424 (1987) (stating that relevant portions of U.S. Immigration and Naturalization Act were designed to follow United Nations Protocol Relating to the Status of Refugees).

88. 238 F.3d 239 (3d Cir. 2001).

dent pro-democracy movement in 1989. In reaching this conclusion, the court explicitly relied upon media reports that “the Chinese government used tanks and machine guns to kill at least 700 and possibly more nonviolent protesters” in Beijing. The court added that “the Chinese government has frequently used force and coercion to suppress political dissent” and quoted liberally from an opinion in a Chinese political asylum case that invoked “[t]he memory of Hitler’s atrocities” as an analogy for the PRC’s repressive practices.⁸⁹

Similarly, in *Zheng Quan Li v. INS*,⁹⁰ the court directed withholding of deportation and consideration of asylum for a Tiananmen Square demonstrator after finding that “China continues to persecute low-level political dissidents” and thus give them objectively reasonable reasons to fear persecution on account of their political opinions. Facing similar claims from another asylum seeker, another court followed much the same path in *Guo Wei Xu v. INS*.⁹¹ In *Gao v. Ashcroft*,⁹² the court fully credited the immigration judge’s determination that “an association with the Falun Gong could subject one to a well-founded fear of persecution” in China, and described State Department and Amnesty International reports of “beatings and deaths of practitioners in detention who refused to recant” and “torture []” of adherents (including the administration of “electric shocks”) as the “back-drop” of the case. (The remand directed more careful consideration of whether the asylum-seeker’s account of her own experiences was credible.)

Court judgments and the language of judicial opinions have been no less likely to roil Sino-American relations in asylum cases involving other forms of claimed human rights abuses. For example, in *Fengchu Chang v. INS*,⁹³ the court directed withholding of deportation and consideration of asylum for a Chinese national who failed to report the plans of members of his delegation to “defect” to the United States and who thereby violated China’s State Security Law and came to face the likely prospect of persecution on account of his political opinion opposing that law and its requirements if he were returned to China. The *Chang* court credited State Department and NGO reports that the State Security Law’s aim “appears to be to frighten dissidents into halting their activities,” that China “has not yet ‘significantly mitigated continuing repression of political dissent’” and that Chinese

89. *Id.* at 244-45 (quoting *Chang v. INS*, 119 F.3d 1055, 1060-61 (3d Cir. 1997)).

90. No. 97-71175, 1999 U.S. App. LEXIS 21542, at *6 (9th Cir. Sept. 3, 1999).

91. No. 99-71288, 2001 U.S. App. LEXIS 19845 (9th Cir. Aug. 30, 2001).

92. 299 F.3d 266, 268-70 (3d Cir. 2002).

93. 119 F.3d 1055, 1064-66 (3d Cir. 1997).

authorities continued to manifest “intolerance of dissent” and to provide “inadequa[te] legal safeguards for freedom of speech”—a pattern of government behavior that was in violation of international human rights norms.

Population control cases provide some particularly arresting judicial statements. Although noting that an applicant could not establish eligibility for asylum “merely by pointing to some right guaranteed in the United States Constitution that is not guaranteed in his or her respective country,” the court in *Guo Chun Di v. Carroll*⁹⁴ reasoned that, “[b]ecause the right to make procreational decisions is a basic liberty protected under the Bill of Rights, it is, in that respect, analogous to other fundamental rights that are well-recognized as legitimate grounds for asylum.” As the court saw it, the political persecution the applicant faced for his opposition to PRC population control policies and practices placed him among the “huddled masses yearning to be free.” Similarly, in *Ke Zhen Zhao v. U.S. Department of Justice*,⁹⁵ the court reversed an unfavorable ruling from the Board of Immigration Appeals (BIA) after quoting extensively from—and at least implicitly adopting—accounts in congressional hearings and media sources supporting a conclusion that “China has repeatedly cracked down on those who resist forced sterilization [which is among the ‘most gruesome human rights violations’,] . . . treat[ing] them as political and ideological criminals” and “inflict[ing] harsh punishment on refugees who are returned, such as beatings and being sent to forced labor camps and being sentenced to prison.”

As such judicial statements suggest, courts in China-related asylum cases often have shown an inclination to follow State Department analyses and a reluctance to intrude on the conduct of foreign policy. Many asylum and refugee decisions explicitly defer to or seek State Department findings.⁹⁶ In the same vein, the court in *Gao* emphasized the special deference generally due the executive branch in immigration matters, while the court in *Guo Chun Di* was careful to stress that it would not “transform the asylum process . . . into a vehicle for foreign policy debates in the courts” or base its decision on the

94. *Di v. Carroll*, 842 F. Supp. 858, 872-74 (E.D. Va. 1994).

95. *Zhao v. United States Dep’t of Justice*, 265 F.3d 83, 92 (2d Cir. 2001).

96. See, e.g., *Chen v. INS*, 195 F.3d 198, 201-02 (4th Cir. 1999) (deferring to State Department report concerning prevalent, non-coercive means for enforcing PRC population control policy); *Doe v. INS*, 867 F.2d 285 (6th Cir. 1989) (remanding for request to State Department to offer opinion on asylum applicant’s claims); cf. *Chang*, 119 F.3d at 1064 (stating that “[w]e do not suggest that relief should be granted solely on [the basis of watchdog organization] reports, particularly where they conflict with findings of the Department of State”).

court's "implicit approval or disapproval of U.S. foreign policy and the actions of other nations."⁹⁷

If the courts uniformly so restrained themselves, these cases might be of relatively little concern for those worried about the adverse impact on U.S. foreign policy of adjudication of foreign human rights claims. The courts, after all, would add little to what the political branches had already put in place. Still, for the harshest critics of a substantial judicial role, there is something disquieting even in a merely untimely or unauthorized repetition of established political branch positions—especially in litigation that may occur years after the quoted and endorsed executive statements were made and have, perhaps, grown stale. And there is something potentially disruptive also in the additional U.S. sovereign act and potential insult to a foreign sovereign that inheres in a court decision that tracks clearly still-operative executive statements.

Moreover, as the cases described above also illustrate, courts in asylum cases have not always limited themselves to following executive branch—or, for that matter, congressional—determinations concerning human rights conditions in China that implicate issues in U.S. policy toward the PRC. Some courts handling Chinese immigration cases have looked to and embraced sources that have gone well beyond State Department reports in critical tone and substance, and sometimes have rejected State Department views. Thus, the court in *Kezhen Zhao* reached its conclusions partly on the basis of reports in the *New York Times* and the *Congressional Record*. And the court in *Li Wu Lin* relied upon reports in "every major American newspaper" and admonished the immigration adjudicators not to treat the State Department's reports as "Holy Writ."⁹⁸

Acts in the United States can provide another ground for U.S. judicial examination of foreign human rights practices and policies in suits that could go forward in the absence of the ATCA or TVPA. Another type of Falun Gong case is illustrative. On April 4, 2002, fifty-one plaintiffs filed suit against the PRC's State Security Ministry and Public Security Ministry and the state-owned China Central Television. Alleging a pattern of physical assault, intimidation, harassment, death threats, and vandalism against Falun Gong followers in the United States, the plaintiffs brought their claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and civil rights stat-

97. *Di*, 842 F. Supp. at 873; see also *Gao*, 299 F.3d at 93.

98. *Li Wu Lin*, 238 F.3d at 242, 245, 248; see also *Chang*, 119 F.3d at 1064 (relying on a Human Rights Watch report that, though found consistent with the Department of State position, was more critical and detailed).

utes,⁹⁹ following a path that other cases had suggested could be promising.¹⁰⁰ In comments to the media, the plaintiffs' spokesmen left little doubt that they expected—not implausibly—that the resolution of their claims would involve an inquiry into PRC officials' actions and practices in China that, on the plaintiffs' view of the case, were an integral part of the defendants' overarching efforts to suppress Falun Gong at home and abroad. As supporters and spokesmen put it, PRC President Jiang Zemin “is directly responsible for the entire thing that has happened to Falun Gong” and the actions over which plaintiffs sued were “the extension of that persecution to U.S. soil.”¹⁰¹ Though hung on the hook of activities in the United States, the explicit goal of the suit was to “make clear to Jiang Zemin that his persecution policies have no place in the modern world,” to “expose the brutality, intolerance and short sightedness of the PRC,” and to make clear that the United States “will not tolerate this blatant persecution, wherever it occurs.”¹⁰²

Ordinary tort law—sometimes in conjunction with the Foreign Sovereign Immunities Act—can offer still another avenue to U.S. judicial judgment concerning human rights abuses that occur at least in part abroad. While no such litigation appears to have gone forward with respect to PRC actions, a well-known case provided an occasion for addressing human rights-related actions attributable to another Chinese dictatorship—pre-reform era Taiwan—and committed in part by one of its senior officials. In *Liu v. Republic of China*,¹⁰³ the plaintiff's decedent was a naturalized U.S. citizen who was assassinated in California by Taiwanese gangsters whom a high-ranking officer in the Republic of China's Military Intelligence Bureau had dispatched to punish and put an end to the decedent's articles critical of the Repub-

99. See, e.g., *Falungong Followers Sue China for Systematic Criminal Harassment in U.S.*, AGENCE FR. PRESSE, Apr. 4, 2002; *Chinese Communist Regime Sued in Landmark Lawsuit Over Illegal Activities in the United States*, Apr. 3, 2002, available at <http://www.faluninfo.net> (last visited Nov. 25, 2002); *Groundbreaking Civil Lawsuit Accuses PRC Ministries of Criminal Conduct Across United States*, Apr. 5, 2002, at <http://flgjustice.org/presskit/PlaintiffStatement.htm> (last visited Nov. 25, 2002).

100. *Wiwa*, 2002 WL 319887, at *20-27 (allowing RICO claims to proceed against corporate and individual defendants whose actions in conjunction with Nigerian state actors satisfied ATCA and TVPA state action requirements); *Republic of the Philippines v. Marcos*, 862 F.2d 1355 (9th Cir. 1988); *Does I v. GAP, Inc.*, 2002 WL 1000068 (D.N.Mar.I. May 10, 2002). *But cf. Doe v. Unocal Corp.*, 110 F. Supp. 2d at 1310-11 (finding insufficient allegation of acts in United States to satisfy RICO requirements).

101. *Falungong Followers Sue China for Systematic Criminal Harassment in U.S.*, *supra* note 99.

102. *Chinese Communist Regime Sued in Landmark Lawsuit Over Illegal Activities in the United States*, *supra* note 99.

103. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

lic of China's president. Finding that the claim could go forward under the tortious activity exception in the Foreign Sovereign Immunities Act, the court necessarily inquired into and reached judgments about the political motives behind the slaying and the state's and state agents' responsibility for it. The allegations in the Falun Gong RICO case in many respects parallel the pattern of the *Liu* case, suggesting that the possibly PRC-attributable actions at issue in that case, or similar activities, could ground a viable tort suit and, with it, an extensive U.S. judicial probing of human rights violations by PRC officials in China.

The *Bao Ge* prison labor case suggests another route to a similar end through the FSIA's other principal exception to the immunity of foreign sovereigns (and their instrumentalities and some of their officials) from jurisdiction: the commercial activity exception. Not surprisingly in the wake of the Supreme Court decision in *Nelson v. Saudi Arabia*,¹⁰⁴ the plaintiffs in *Bao Ge* failed in their suit against the Chinese state defendants because the court concluded that the operations of the Chinese judicial and prison systems which formed the foci of the complaint were not commercial activities, and that any related commercial activities either lacked the requisite direct effect in the United States or the necessary nexus to the injuries plaintiffs claimed to have suffered in the labor camps.¹⁰⁵ But the broader type of activity at issue in *Bao Ge*—forced prison labor producing goods for export—could come within the commercial activity exception to permit suit against a closely state-linked PRC defendant. It need take nothing more than someone bringing the easily imaginable case against a PRC state-owned enterprise with ties to export-producing prison factories that were more active and entangling than the minimal and attenuated connections the *Bao Ge* court found to exist for Adidas.

Acts against U.S. citizens also could provide the basis for suits that could address the same behavior as some TVPA and ATCA claims and could go forward even if the TVPA and ATCA do not open the door to similar claims by foreign nationals. Many of the plaintiffs in the Falun Gong RICO litigation are U.S. nationals. Four of the plaintiffs in the Falun Gong-related ATCA and TVPA suit against Beijing's mayor are among the many Western sympathizers who have gone to China, mostly to Beijing, to protest or resist the PRC government's crackdown and have sometimes suffered detention or physical mistreatment, perhaps amounting to torture, at the hands of police au-

104. 507 U.S. 349 (1993).

105. *Bao Ge*, 201 F. Supp. 2d at 23-25; see also *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

thorities.¹⁰⁶ A foreign national was also among the plaintiffs in the Falun Gong class action suit against Ding Guangen.¹⁰⁷ Given that U.S. citizens have been among the foreigners traveling to China to support Falun Gong, it likely has been only a matter of luck that an American national has not brought a TVPA claim based on similar factual allegations.

The prospect of such suits is not limited to the context of Falun Gong or other mass movements. People's Republic of China authorities in recent years have detained individual U.S. citizens—notably ones who once were PRC nationals—for actions that the PRC claimed were crimes against state security but that the detainees asserted were innocent acts that became the object of politically motivated arbitrary detention and threats to prosecute and imprison. While Li Shaomin (a Hong Kong-based political scientist who was held for allegedly passing PRC secrets to Taiwan), Harry Hongda Wu (an alumnus of the PRC's prison labor camps who returned to China to gather information for his exposés of Chinese prison conditions), and their peers have not sued, it does not require a great stretch of the imagination to envision that a more badly treated or a more litigious victim might turn, with some hope of success, to the TVPA or other possible routes to redress in U.S. courts.¹⁰⁸

Judicial review of actions by the U.S. executive branch can also yield court judgments or assessments concerning human rights conditions and government behavior in China. This category includes the asylum and refugee cases that have produced so many critical findings and conclusions about patterns of human rights abuse in China, for such cases involve judicial review of the INS/Board of Immigration Appeals administrative adjudication of petitioners' claims. The category also includes some more exotic cases.

In *Wang Zong Xiao v. Reno*,¹⁰⁹ the court enjoined the United States from deporting a PRC national who had been a witness for the United States in a drug prosecution. The court did so in part because of the prosecutors' entanglement, to an extent that constituted a violation of constitutional substantive due process rights, with actions by PRC officials that had harmed or would harm the witness. In reaching that conclusion, the court found that the witness had been beaten and tortured by PRC police who interrogated him to elicit the information

106. See *supra* note 99.

107. See *supra* note 15.

108. See *supra* note 69 (concerning the Li Shaomin and Harry Wu incidents).

109. *Wang Zong Xiao v. Reno*, 837 F. Supp. 1506 (N.D. Cal. 1993), *aff'd*, 81 F.3d 808 (9th Cir. 1996).

with respect to which American prosecutors sought his testimony, and the witness likely would face execution due to his testimony if he were to be returned to China. On the former issue, the court determined (partly on the basis of State Department Human Rights Reports) that

Wang's treatment in the PRC police system—his detention without trial, his forced confessions, and the physical and mental torture exerted upon his person—is consistent with the treatment of many other prisoners in the PRC. That the PRC police interrogated Wang many times, and forced him to give multiple confessions, is consistent with the purposes of the PRC's criminal justice system to force the individual suspected of wrongdoing to cooperate with the state.¹¹⁰

On the fate that would await Wang in China, the court wrote (largely on the basis of expert witnesses' reports),

Today, Wang faces the harshest possible treatment in the event he is returned to the PRC. Wang's present predicament stems from the vastly different natures of the two systems in which he was asked to provide testimony. The PRC's criminal justice system exists to vindicate the State's interests, not to guarantee the individual's rights. That criminal justice system is not concerned with questions of "guilt" or "innocence" Once he entered the United States and took the witness stand, Wang was faced with an irreconcilable choice of serving the PRC police officials and providing false testimony, or honoring his oath as a witness and testifying truthfully The most likely scenario is that the Chinese government will execute Wang.¹¹¹

In *Lui Kin-Hong v. United States*,¹¹² the district court granted a writ of habeas corpus to prevent the United States from extraditing the petitioner to Hong Kong to face bribery charges that would not be prosecuted until after Hong Kong's reversion to China on July 1, 1997. The court held that the United States misinterpreted the U.S.-Hong Kong extradition treaty by construing it to permit handing over defendants for a post-retrocession trial. Although the court's judgment was later reversed and although the court purported "not [to be] making a judgment about the judicial or penal systems of China or [post-reversion Hong Kong],"¹¹³ its opinion lastingly set forth the kind of assessment of a foreign government's human rights record that worries those who fear judicial derangement of American foreign policy. The court wrote that "it strains credulity to suggest that the Senate would approve" an extradition treaty with so narrow a definition of

110. *Id.* at 1514.

111. *Id.* at 1541-42.

112. 957 F. Supp. 1280 (D. Mass. 1997), *rev'd*, 110 F.3d 103 (1st Cir. 1997).

113. *Id.* at 1289.

political offenses for which the relator cannot be tried if the relator could “only be tried by the Chinese judiciary,” which is part of a “totalitarian” regime, which routinely hands out harsh sentences with no due process, and which, “signs” indicate, the Hong Kong judicial system “will appear very much like” in the near future.¹¹⁴ Even en route to reversal of the district court’s judgment and dismissal of the claim (in an opinion stressing the need for deference to the executive branch, and the courts’ limited role in cases presenting this type of foreign affairs question), the appellate court too restated at some length the assertions that had been the focus of the lower court opinion and the basis of its holding: that the PRC was the sort of human-rights-violating regime with which the Senate could not be presumed to have been willing to enter into an extradition treaty when it voted for the treaty between the United States and British-ruled colonial Hong Kong.¹¹⁵

In addition to the constitutional rights and treaty provisions at issue in *Wang Zong Xiao* and *Lui Kin-Hong*, statutes also provide potential triggers for judicial review (of executive actions) that can lead to court pronouncements on human rights conditions and abuses in China. Although China’s accession to the WTO and the United States’ related granting of permanent normal trading relations has removed from the U.S. Code the most celebrated instance of human rights conditionality for China, the federal statute books remain littered with provisions that direct the President or his subordinates to withhold support or benefits from countries—and sometimes categories or lists of countries clearly or explicitly including the PRC—that have especially poor human rights records. Such statutes often authorize the President or other executive branch officials to waive the restrictions upon making certain findings, typically that a waiver is in the U.S. national interest. Others direct the President or his subordinates not to expend or not to support multilateral institutions’ expenditure of funds where the beneficiary country does not meet human rights conditions.¹¹⁶

In principle, such executive determinations that statutory conditions have or have not been met, or executive interpretations of the statutory standards, can be subject to judicial review.

Such provisions have become the focus of litigation in which Chinese human rights practices have come under criticism and scrutiny.

114. *Id.* at 1289 n.17.

115. *United States v. Lui Kin-Hong*, 110 F.3d 103 (1st Cir. 1997).

116. *See infra* note 144.

For example, in *Smith v. Atwood*,¹¹⁷ the plaintiffs challenged an administrative interpretation of a law banning the use of U.S. international family planning assistance funds for coerced abortions or sterilizations. The plaintiffs, who included PRC nationals who claimed to be opposed to and subject to Chinese coercive family planning policies, claimed that the interpretation could unlawfully permit funding for U.N. Fund for Population Activities programs that operate in China and were therefore ineligible for U.S. funding because China has “a coercive family planning policy that mandates abortion for pregnant women and/or sterilization for parents who have exceeded the maximum allowable number of children.”¹¹⁸

In practice, of course, such suits rarely get very far. The political question doctrine, administrative law doctrines requiring deference to agency interpretations or to decisions statutorily committed to the discretion of an agency, and other broad separation-of-powers-related principles generally can be expected to dispose of these cases at an early stage and at the district court level. But, as the grounds for dismissing the congressman-plaintiff’s claim in *Smith v. Atwood* suggest, and as the asylum and refugee cases that involve successful challenges to INS/BIA interpretations and applications of the immigration statutes also illustrate, it is not certain that such doctrines will always assure a quick end to the litigation and the opportunity it presents for courts to weigh in on China’s human rights conditions and practices.

Moreover, the repertoire of statutes that open the door to judicial consideration of Chinese human rights practices could expand significantly, principally through the mechanism of human rights-based regulation of non-state actors’ foreign business activities. While the *Bao Ge* case focused on Adidas, the principal corporate targets of those concerned about the PRC’s human rights policies and practices have included U.S. multinationals as well. Given the magnitude of human rights problems in China and the PRC’s status as one of the principal destinations for outward-bound U.S. foreign direct investment (a considerable portion of the products of which are exported to the United States), operations in China inevitably loom large in any strategy of addressing human rights issues by targeting U.S. corporations’ overseas activities.

117. *Smith v. Atwood*, 845 F. Supp. 911 (D.D.C. 1994) (challenging Agency for International Development interpretation of statute requiring U.S. not to fund U.N. family planning program where such funds might be used for coerced abortion or sterilization; dismissed for lack of standing by Chinese plaintiffs, and for mootness with respect to Congressman’s claim in light of administrator’s assurance that challenged interpretation would not be applied).

118. *Id.* at 912.

Government procurement statutes are one option. Although there are formidable political obstacles to adopting a federal law targeting or including companies that do business with the Chinese state and its instrumentalities or enterprises, and although such a law might well be incompatible with the WTO regime for government procurement, there is no doubt that a federal law barring government purchases from companies with specified connections to China would survive constitutional scrutiny, even after the Massachusetts Burma Law case.¹¹⁹ Corporate code of conduct legislation offers another route. Activists focused primarily or partly on China have, at times, seemed to have reasonable prospects for success in pushing Congress to enact legislation that would proscribe or punish investment in operations that violate labor rights standards or investment in countries with unacceptable human rights records.¹²⁰

In many respects, such laws addressing U.S. government commercial behavior or directly or indirectly regulating U.S. companies' behavior would be less controversial than the TVPA or ATCA, particularly with the recently emerging extension of the ATCA to corporate or other private defendants. In addressing private actors, these laws would draw upon mundane international legal principles of nationality-based jurisdiction, rather than the more controversial international legal principles of universality-based jurisdiction that critics attack as the problematic underpinnings of the ATCA and the foreign plaintiff provisions in the TVPA. United States laws, including, for example, antitrust statutes and the Foreign Corrupt Practices Act, rather unexceptionally extend to American natural and legal persons acting abroad. Notably, China would have an especially hard time objecting to such nationality-based legislation given the PRC Criminal Code's expansive assertion of nationality-based jurisdiction over of-

119. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (striking down state statute on supremacy clause grounds).

120. See, e.g., Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 *Nw. J. INT'L L. & BUS.* 66 (1993); cf. Murray Hiebert & John McBeth, *U.S. Foreign Policy: Calculating Human Rights*, *FAR E. ECON. REV.*, Aug. 15, 2002, at 18-19 (discussing Department of State's possible opposition to suit under existing laws against Exxon Mobil arising from human rights violations in Indonesia); Hiebert, *supra* note 73 (concerning legal exposure of multinational corporations in connection with foreign human rights abuses). Notably, one of the reasons that efforts to pass code of human rights-related overseas corporate conduct legislation have fallen short is that some of the major corporate actors have adopted company policies that mimic what a statute might contain, although corporate and broader political opposition to such legislation probably has been a more important factor in defeating legislative proposals.

fenses committed abroad by PRC citizens—and even by foreigners as well.¹²¹

Depending on their particular structure, such laws might avoid the impediments to judicial review that have characterized the human rights provisions in aid statutes, trade statutes, and the like. Because they deal less purely and unambiguously with foreign affairs, they might be less likely to employ the very broad language and wide grants of presidential waiver authority that are typical in existing human rights legislation, and courts might be less likely to interpret the language such statutes would contain with the high level of deference often accorded to political branch interpretations of foreign affairs-related statutes. Moreover, such statutes might provide for enforcement through administrative adjudication, or through prosecution in court, or they might even countenance private rights of action. Each such additional enforcement mechanism (and especially those that permit complainant-initiated proceedings), of course, opens the door wider to litigation and expands the occasions when courts could examine and pass judgment on human rights conditions and policies abroad.

Finally, court decisions under any constitutional or statutory rubric are only a part of the problem if the principal relevant evil is the derangement of the conduct of U.S. foreign policy. Even if the ATCA, the TVPA, and other existing or imaginable statutes did not give courts the authority to decide cases involving foreign human rights violations, that would not eliminate some of the greatest threats to a constitutional value that critics frequently invoke and seem to see as especially important or persuasive: the need for the nation to speak with one voice in foreign policy and principally through the voice of the executive branch.¹²² Congressional-executive dissonance, far more than the intervention of the courts (or the states, for that matter), has been the source of actions and statements that have produced multiple inconsistent positions in U.S. policy toward the PRC. Near-

121. See ZHONGHUA RENMIN GONGHEGUO XINGFA (Criminal Law of the People's Republic of China), arts. 6-8 (1997) (asserting jurisdiction over crimes committed by PRC nationals abroad, and over crimes committed by foreigners abroad, provided that such crimes committed by foreigners are punishable under the law of the place where they are committed); see also ZHONGHUA RENMIN GONGHEGUO XINGFA (Criminal Law of the People's Republic of China), arts. 4-7 (1979).

122. See *supra* note 63; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (asserting the need for a single voice of the nation in foreign affairs and concluding that the executive's role in foreign affairs is dominant); Curtis A. Bradley, *Breard, Our Dualist Constitution and the Internationalist Conception*, 51 STAN. L. REV. 529, 555 (1999) (discussing arguments for a unitary voice in foreign affairs and for excepting foreign affairs from ordinary separation of powers strictures).

overrides of President George Bush's waivers of MFN-denial to China after the Tiananmen Incident, congressional findings and commentary focusing on Taiwan's superior record of human rights and democracy as a basis for mandating continued or enhanced U.S. engagement in what Beijing considers an internal affair, protracted tussles between the political branches over funding for international family planning programs, House or Senate hearings and discussions of resolutions censuring China for repressing Falun Gong or other dissident groups and for other human rights abuses, and legislative directives to the State Department to prepare annual human rights reports on the PRC (including special sections on Hong Kong and Tibet) have been far more productive of discordant and disruptive voices in the United States' handling of Sino-American relations than anything that has happened in American courts.

Of course, critics of expansive judicial involvement in matters of foreign affairs generally (although not always) argue that Congress properly has a far larger role to play in foreign policy than do the courts. If such a congressional role is seen as fully legitimate, however, then the "one voice" argument against judicial involvement rings a bit hollow or disingenuous, given Congress's large role (amply illustrated in the case of U.S.-PRC relations) in generating a "second voice." If, on the other hand, critics of the judicial role adopt a far more executive-dominant understanding of the allocation of foreign affairs power, then their argument concerning the deranging effects of foreign human rights litigation has more force, but is far more radical and less widely accepted in its conception of how the constitution assigns authority over foreign affairs.

With all these many non-ATCA and non-TVPA routes to the dangers that critics associate with expansive litigation in U.S. courts concerning foreign human rights abuses, the critics' general "derangement" argument loses much of its force unless there is something especially pernicious about the particular mechanism of civil suits by foreign plaintiffs against official defendants. Several offered or imaginable arguments assert that there might be, but they are slender or untested reeds on which to lean the rather weighty argument that ATCA and TVPA suits pose a special and significant threat to the exercise of foreign affairs powers and the conduct of U.S. foreign policy.

Why might there be an especially serious impact on U.S. foreign relations when a U.S. court reaches a judgment that awards a foreign national damages from his own government or its relatively high-ranking officials for harms committed at home? It is almost certainly not

about the award of money *per se*.¹²³ For the highest-profile state defendants, even large damage awards, if paid, would not have a ruinous financial impact. More to the point, ATCA and TVPA plaintiffs almost never collect awards. It is widely acknowledged that their primary motivation has been moral vindication, not the pursuit of unrealistic hopes of material redress.¹²⁴ That, certainly, has been the articulated position of the plaintiffs in the major China ATCA and TVPA suits. The Tiananmen plaintiffs stressed their desire to promote democracy and human rights in China as well as justice for the victims of the massacre, while the plaintiffs in the Falun Gong cases and their supporters emphasized that their aim was not to recover damages but rather to draw attention to Falun Gong's plight and to bring international pressure to bear against the Chinese regime's repressive behavior.¹²⁵

Further, as the Falun Gong RICO suit and the FSIA suit in *Liu v. Republic of China* illustrate, non-ATCA and non-TVPA channels can offer access to U.S. courts to secure substantial damage awards against foreign governments and official actors for human rights abuses that occur in part outside the United States or that have roots outside the United States. Also, as the issues at stake in the U.N. Fund for Population Activities case remind us, U.S. courts could play a role in imposing far greater financial consequences on China (and

123. The suggestion that it is about the money seems to resonate with the law governing relief in civil suits against the U.S. government, with respect to which injunctive relief generally has been seen as less troubling than money damages. The reasons offered for this, however, have failed to convince many commentators in a vast federal courts literature on the subject, and some of the reasons offered do not translate well to the context of suits against foreign sovereigns.

124. For this argument, see Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.-Oct. 2000, at 102; see also Ellen L. Lutz, *The Marcos Human Rights Litigation: Can Justice Be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 B.C. THIRD WORLD L.J. 43, 45-46 (1994) (discussing *In re Marcos* human rights litigation as a possible opportunity for restoring justice to a damaged society and achieving public acknowledgement of unsavory truths). *But cf.* Fitzpatrick, *supra* note 19, at 501-03 (arguing that it is unclear whether the class of plaintiffs in the *In re Marcos* litigation were primarily "ideologically motivated" or were more like ordinary tort victims seeking compensation for harms suffered).

125. See, e.g., *Why We Are Suing Li Peng*, at http://iso.hrichina.org/iso/article.adp?article_id=411&category_id=79 (last visited Dec. 12, 2001); *Human Rights in China. Global Justice: The Li Peng Suit and Universal Jurisdiction Over Violations of Rights*, *supra* note 1; Pomfret, *supra* note 11; Rowse, *supra* note 11; cf. *Chinese Communist Regime Sued in Landmark Lawsuit*, *supra* note 99 (concerning RICO suit); *Groundbreaking Civil Lawsuit Accuses PRC Ministries of Criminal Conduct Across United States*, Apr. 5, 2002, at <http://flgjustice.org/presskit/PlaintiffStatement.htm> (last visited Nov. 25, 2002). Even critics backhandedly acknowledge the limited importance to plaintiffs of damage awards: they argue that the prospect of the ATCA's or TVPA's extension to corporate defendants threatens only to increase suits above a baseline that is already problematic in the absence of the prospects for recovery that the new class of private and possibly forum-country national defendants would provide.

other states) for human rights misbehavior through denials of aid (or trade) privileges than through the typical ATCA or TVPA suit.

It might be the case that ATCA or foreign plaintiff TVPA suits pose special threats to U.S. foreign relations because foreign sovereigns take qualitatively greater offense when U.S. courts entertain litigation by the foreign state's own nationals. This is perhaps plausible, but this argument notably has received little endorsement in PRC attacks on China-related human rights litigation in U.S. courts. The thrust of Beijing's complaints has focused less on the identity of the plaintiffs and more on the site of the alleged harms and, especially, the identity of the defendants. And if the problematic feature is U.S. courts riding to the rescue of the offended state's own nationals, then here too Chinese human rights cases remind us that non-ATCA and non-TVPA pathways are available, including immigration and asylum review and, on some fact patterns, FSIA suits, RICO suits, and even constitutional or administrative law review of U.S. government actions that have been deployed, with mixed success, to address problematic PRC human rights practices.

As the official PRC comments on the Li Peng/Tiananmen and Falun Gong suits suggest, ATCA or TVPA suits might be especially likely to roil U.S. international relations because they formally name foreign governments or officials—and especially high-ranking officials—as defendants in U.S. litigation. It might be that foreign governments and leaders find suits of this type more unacceptable than similar judicial judgments and statements about their behavior issued in cases in which they are not formally defendants. But it is not clear that is so, or why it should be so.

It is far from obvious that judicial statements about human rights abuses abroad made in ATCA or TVPA judgments would be more offensive to foreign officials and regimes than would similar statements in other litigation contexts, including perhaps even in dicta. Indeed, compared to the focus on the experiences of individual plaintiffs that characterizes many ATCA and TVPA cases, some non-ATCA, non-TVPA suits provide occasions for more sweeping judgments about policies and practices and overall human rights conditions in foreign states, as in the inquiries plaintiffs' complaints have sought, for example, in the Falun Gong RICO case, the administrative law challenge to U.S. funding for the United Nations Population Fund's China operations, and even some of the Chinese asylum cases. Certainly, official PRC outrage over U.S. courts assessing Chinese human rights conditions has not seemed deeply sensitive to the specifics of the jurisdictional statute that brought the case to court or the specific nature

of the relief that the court might grant. Also, whether ATCA and foreign plaintiff TVPA suits are especially likely to name top officials or major organs of government is, of course, an empirical claim of uncertain validity. The handful of such cases involving China have targeted high officials or major Party and government institutions. But generally, ATCA and TVPA cases have been brought against lower-ranking functionaries as well as top leaders, individuals who had fallen from power and office, and private actors. Human rights-focused suits, including China-related ones, brought under other laws, including RICO and the FSIA, have also included high-ranking officials, major government organs, and the state itself as defendants.

It might be true that ATCA and TVPA cases are especially dangerous to the conduct of U.S. foreign policy because they are beyond the control of the executive branch—and thus are more likely to go in directions that diverge from U.S. foreign policy preferences than are other possible routes to the courthouse to obtain an examination of foreign human rights practices.¹²⁶ The large number of potential Chinese plaintiffs and the pattern of cases in which Chinese plaintiffs have pursued political agendas of exposing and condemning on-going regime behavior (rather than only seeking redress of past wrongs or securing individual justice, which characterizes at least some ATCA and TVPA claims and garden-variety tort claims) suggest that this concern is plausible. Still, this argument, too, is less convincing than it first appears. One problem is that the executive branch does not in fact control many non-ATCA and non-TVPA suits, such as those that victims of abuses in China have brought under the FSIA, RICO, the asylum and refugee acts, or as challenges to extradition or deportation. As we will see, it is far from clear that the executive branch lacks means to cut off many problematic ATCA and TVPA cases, or that the executive branch being “in control” of litigation does more good than harm if the goal is to prevent the claimed evils of complicating U.S. foreign relations or, more specifically, “forcing” the executive branch to “speak” when it might prefer to remain silent.

Finally, it is surely true that broad ATCA and foreign-plaintiff TVPA jurisdiction do produce additional cases in which courts can address human rights abuses abroad and thus cause foreign policy problems for the political branches. Some suits that can be pursued successfully under those statutes will prove impossible to bring, easier to dismiss, harder to win, or insufficiently attractive to file under other

126. *Human Rights*, *supra* note 19, at 460; *International Human Rights Litigation*, *supra* note 19, at 2181-82; *Universal Jurisdiction*, *supra* note 19, at 346-47.

laws. Whether the impact is marginal or substantial is, again, an empirical question. But even small quantitative reductions of acknowledged evils are, of course, good unless outweighed by countervailing concerns.

IV. KEEPING FLIES FROM COMING IN: ORDINARY SCREENS WILL DO

If one finds convincing the plausible claims that ATCA and alien-plaintiff TVPA suits pose particular dangers to the conduct of U.S. foreign policy, or if one is more generally concerned about the implications of U.S. courts weighing in on potentially sensitive and important foreign relations issues in cases that include human rights questions, it does not necessarily follow that there are significant problems requiring urgent measures. Shutting the door or closing the windows is not necessary to keep out flies if the screens already in place are adequate for the job. Several such existing legal “screens” very well may be sufficient to keep out many of the cases that might significantly endanger the conduct of foreign policy.¹²⁷ Here too, actual and easily imaginable Chinese cases make clear the more general point.

A. *Rights Violation “Thresholds”*

Even on the most generous plausible readings of the ATCA and TVPA, these statutes permit recovery only for especially serious international human rights violations. Critics’ comments can conjure up a vision of U.S. courts issuing awards for violations of any right on the long, possibly growing and often controversial list of “international human rights”—a list that, by some lights at least, includes rights to education, social security and perhaps economic development, electoral democracy and a clean environment. But very few of the rights on the maximalist list or even in the major U.N. Covenants fall within the core handful of rights the violation of which is a necessary element in an ATCA or TVPA claim. While U.S. courts have indicated that the scope of behavior covered by the ATCA can expand with evolving international human rights law,¹²⁸ U.S. courts generally have recog-

127. For an overview of some of these screens, see Walker, *supra* note 19 at 551-59; Fitzpatrick, *supra* note 19; BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996); see also Ralph G. Steinhardt, Book Review, 91 AM. J. INT’L L. 755, 755 (1997) (noting that there had been only thirty ATCA cases filed and decided from 1980 to 1997); 28 U.S.C.A. § 1350 (1948) (providing notes concerning the few dozen cases decided under the ATCA and TVPA).

128. See *supra* note 74.

nized only a handful of severe abuses as the “torts in violation of the law of nations” that the ATCA requires.¹²⁹ Thus, courts have held that genocidal campaigns of murder and rape,¹³⁰ war crimes and crimes against humanity,¹³¹ torture,¹³² extrajudicial or summary execution,¹³³ slave labor and slave-trading,¹³⁴ “disappearing,”¹³⁵ and protracted and arbitrary detention¹³⁶ suffice, but state or state-sanctioned expropriation of property,¹³⁷ repression of free speech,¹³⁸ “cultural” genocide,¹³⁹ environmental destruction,¹⁴⁰ and civil rights violations¹⁴¹ do not pass muster under the ATCA. Courts have been divided on

129. 28 U.S.C. § 1350 (1948).

130. *Kadic v. Karadzic*, 70 F.3d 241, 241-42 (2d Cir. 1995) (including campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy religious and ethnic groups as violation of international norm proscribing genocide); *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1332, 1354 (N.D. Ga. 2002) (genocide).

131. *Kadic*, 70 F.3d at 242-43; *Mehinovic*, 198 F. Supp. 2d at 1350-54 (involving war crimes and crimes against humanity).

132. *Kadic*, 70 F.3d at 242-43; *Filartiga v. Pena-Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980); *In re Estate of Marcos, Human Rights Litig.*, 25 F.3d 1467, 1472-74 (9th Cir. 1994); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 890 (C.D. Cal. 1997); *Nat'l Coalition Gov't of the Union of Burma v. Unocal Inc.*, 176 F.R.D. 329, 345 (C.D. Cal. 1997); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); *Mehinovic*, 198 F. Supp. 2d at 1345-46; *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-89 (D. Mass. 1995); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887, at *6-7 (S.D.N.Y. Feb. 28, 2002); *Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002).

133. *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987); *Xuncax*, 886 F. Supp. at 184-89; *Wiwa*, 2002 WL 319887, at *6-7; *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1357-60 (S.D. Fla. 2001).

134. *Kadic*, 70 F.3d at 240; *Doe v. Unocal*, 110 F. Supp. 2d 1294, 1302-08 (C.D. Cal. 2000); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439-41 (D.N.J. 1999).

135. *In re Estate of Marcos*, 25 F.3d at 1470-71; *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988); *Xuncax*, 886 F. Supp. at 184-89; *cf. Alvarez-Machain*, 266 F.3d 1045, 1049-52 (9th Cir. 2001) (holding state-sponsored kidnapping in territory of another state violates law of nations).

136. *In re Estate of Marcos*, 25 F.3d at 1474-75; *Xuncax*, 886 F. Supp. at 184-89; *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Forti*, 694 F. Supp. at 709; *Mehinovic*, 198 F. Supp. 2d at 1348-50; *Wiwa*, 2002 WL 319887, at *6-7; *cf. Alvarez-Machain*, 266 F.3d at 1052 (finding detention that is arbitrary is sufficient for ATCA even if not protracted).

137. *Jafari v. Islamic Republic of Iran*, 539 F. Supp. 209 (N.D. Ill. 1982); *cf. Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *Nat'l Coalition Gov't of the Union of Burma*, 176 F.R.D. at 345; *Bigio v. Coca Cola Co.*, 239 F.3d 440, 447-48 (2d Cir. 2001).

138. *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986). *But see Wiwa*, 2002 WL 319887, at *11-12.

139. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 372-73 (E.D. La. 1997), *aff'd*, 197 F.3d 161, 166-68 (5th Cir. 1999).

140. *Id.* at 382-83; *Flores v. S. Peru Copper Corp.*, 2002 WL 1587224, at *6 (S.D.N.Y. July 16, 2002). *But cf. Aguinda v. Texaco, Inc.*, 1994 WL 142006, at *6-7 (S.D.N.Y. Apr. 11, 1994) (suggesting that serious environmental harms might be within ATCA's scope).

141. *Mendonca v. Tidewater, Inc.*, 159 F. Supp. 2d 299 (E.D. La. 2001); *cf. Bigio*, 239 F.3d at 447-48 (concerning religious discrimination). *But see supra* note 61.

whether “cruel, degrading and inhuman treatment” is enough, though most increasingly have found such claims adequate.¹⁴²

The torture and extrajudicial killing cognizable under the TVPA are not casual or slight violations of human rights. In terms of the seriousness and core human rights-violating character of the underlying behavior, the TVPA has not opened the door to a wider range of suits than the ATCA has. Official “torture” is behavior the prohibition of which, on most contemporary accounts, ranks among the very small handful of international legal norms classed as *jus cogens*, or nonderogable, peremptory norms.¹⁴³

These relatively narrow readings of the range of human rights violations that will sustain ATCA or TVPA claims are fully in keeping with other U.S. statutory grounds for suit that explicitly and specifically look to international human rights standards. Indeed, the latter are seemingly more expansive in their general references to “human rights,” although they too hardly open the floodgates to a wide range of civil suits or other legal consequences from foreign state or state-linked activity that arguably violates international human rights standards. Where the term “human rights” is used in aid and trade statutes and elsewhere in the U.S. Code, it typically includes only a narrow range of “internationally recognized human rights,” generally construed to mean only civil and political rights, and the statutes typically address only gross or consistent violations of them. The clearly human rights-rooted provisions of the asylum and refugee laws similarly encompass only persecution—that is, significant mistreatment—

142. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Forti*, 694 F. Supp. at 712; *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1543 (N.D. Cal. 1987); *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 2001); *Mehinovic*, 198 F. Supp. 2d at 1347-49; *Xuncax*, 886 F. Supp. at 187-89; *Wiwa* 2002 WL 319887 at *7-9.

Seemingly less severe harms that have been found to be torts under the law of nations adequate for ATCA jurisdiction, are of a special type. Paradigmatically, they involve matters within the scope of what international law defines as protective jurisdiction. The interests covered by this category are peculiar and distinctive interests of the international system in maintaining the mechanisms for conducting relations among states. The classic example is diplomatic immunity. See *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 256-58 (D.D.C. 1985). While trampling upon the interests protected by such elements of the law of nations may not cause the grisly injuries that core human rights violations do, those interests have long received special protection under international law (and thus can be rather unexceptionally included as “international torts” under the ATCA as an exercise of the permission international law grants states to enact laws to protect those interests).

143. The definition of “torture” in the TVPA is “severe pain or suffering . . . whether physical or mental” that is intentionally inflicted to extract information or confessions, intimidate or coerce, effectuate discrimination, or impose punishment other than that incident to lawful sanctions. 28 U.S.C. § 1350 note (1993 & Supp. 2000). While such language perhaps could be construed expansively to reach a wider range of human rights violations, it has not been and critics of the ATCA have not claimed that courts have done so.

that violates a short list of civil and political rights, including those related to political opinion, religious belief, or membership in a distinct social group.¹⁴⁴

Simply, not every bit of foreign government or government-linked nastiness will do, and the Chinese cases filed so far suggest that even this relatively new group of plaintiffs (or their counsel) amply understands that one cannot expect to get very far absent claims of crimes against humanity, torture, extrajudicial and politically motivated killing or protracted detention in inhumane conditions, systematic and brutal infringements of basic freedoms, near-slave labor, and the like. As we have seen, the claims in the major China-related human rights litigation—including the Tiananmen, Falun Gong, Chinese prison factories, and Chinese political asylum cases—consistently have included core allegations of this character concerning the behavior of the regime and its agents in China. The same can be said about the ATCA or TVPA claims that one can imagine being brought by the non-U.S. nationals subjected to detention and interrogation in the PRC for espionage or other political crimes.¹⁴⁵ So, too, with potential ATCA claims, modeled on *Unocal* or *Beanal*, that might be brought against multinational corporations in connection with their China operations. Tellingly, a suit that ostensibly focuses on allegations of less serious harms—primarily harassment and intimidation—suffered by Falun Gong followers in the United States has relied not on the ATCA but

144. For examples conditioning U.S. trade and aid on a beneficiary state's not engaging in a consistent pattern of gross violations of internationally recognized human rights, see, e.g., 7 U.S.C. § 1733(j)(1) (1993 & Supp. 2002) (subsidized agricultural exports); 12 U.S.C. § 635(b)(6) (D) (1993 & Supp. 2002) (export-import bank loans); 22 U.S.C. § 262(d) (1993 & Supp. 2002) (United States voting in international financial institutions, including those of the World Bank Group); see also 22 U.S.C. § 2432 (1993 & Supp. 2002) (conditioning most favored nation/normal trading relations status for non-market economy countries on non-violation of right to emigration; also provides key statutory underpinning for broader human rights conditionality for MFN/PNTR status of China); see discussion of President Bill Clinton's 1993 Executive Order, *supra* note 68, at 1217; 8 U.S.C. §§ 1101 et seq. (asylum and refugee statutes); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 701-702 (1987) (discussing international human rights law in U.S. law).

145. While Wu and Li were both U.S. citizens and thus could not have brought ATCA or foreign-plaintiff TVPA claims, other similar cases have involved people who had not shed their PRC citizenship in favor of U.S. citizenship. Examples include Gao Zhan, a U.S. green cardholder whom PRC authorities claimed had collaborated with Li Shaomin and Song Yongyi, a U.S. university-based librarian in the final stages of the U.S. naturalization process whom Chinese authorities held for allegedly possessing and seeking to take back to the U.S. documents that contained "state secrets"—a broad category that includes many "internal" documents routinely collected by U.S. research libraries and documents in wide circulation inside China. Typically, those who have retained PRC nationality are indeed subjected to harsher treatment by public security authorities than are those with U.S. (or other foreign, especially Western) citizenship. See *supra* note 69.

upon RICO and civil rights statutes and the legal avenues they provide for linking such transgressions to the claimed more severe and brutal violations of human rights in the campaign against Falun Gong in the PRC.¹⁴⁶

B. State Action

The inability to establish a sufficiently close connection between either the actor committing the shocking and egregious behavior and the state or state actors, or between the state's severely human rights-violating behavior and non-state defendants scuttles a good many ATCA or TVPA claims. A state action or, at least, a close and extensive state-entanglement test stems from the ATCA's requirement that the tort be "in violation of the law of nations," which courts have construed as referring primarily to rules and norms with a state behavior-regulating character and which some courts have held explicitly to entail a "color of law" requirement for all but a very few exceptional and exceptionally serious types of human rights violations,¹⁴⁷ and the TVPA's requirement that the defendant have acted "under actual or apparent authority, or color of law, of a [] foreign nation."¹⁴⁸

In terms of the nexus between the party that commits the bad acts and the state or state actors, abuses committed by government officials and functionaries present relatively easy cases, even if the acts violated local laws.¹⁴⁹ In addition, actions undertaken by a dominant political party acting "in tandem" with and at the "direction" of the President and top military officials satisfy the ATCA and TVPA requirements¹⁵⁰ for suits against top officials. So, too, do atrocities directed by the leader of an entity that had uncertain and disputed status as a state and acted in concert with another undisputed state,¹⁵¹

146. The reliance on RICO rather than the ATCA cannot be attributed to the inability to find non-U.S. national plaintiffs. The pattern of harassment of Falun Gong followers and activists in the United States that the plaintiffs allege likely has not been so discriminating as to reach only U.S. citizens.

147. 28 U.S.C. § 1350 (1993 & Supp. 2002). See, e.g., *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976) (stating that the ATCA provision refers primarily to laws regulating state behavior); *In re Estate of Marcos*, 978 F.2d at 501-02 (suggesting a "color of state authority" requirement); *Kadic*, 70 F.3d at 239-43 (state action/color of law requirement for violations other than genocide, and some war crimes/crimes against humanity); cf. *Tel-Oren*, 726 F.2d at 791-96 (Edwards, J., concurring) (suggesting that non-state actors' liability is doubtful under the ATCA, except perhaps for a handful of serious violations such as piracy and perhaps torture).

148. 28 U.S.C. § 1350 (2)(a) (1993 & Supp. 2002).

149. See, e.g., *In re Estate of Marcos*, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994); *Filar-tiga*, 630 F.2d 876; cf. *Mehinovic*, 198 F. Supp. 2d at 1346-47 (finding police officials' actions in official capacity and under official authority sufficient for ATCA and TVPA liability).

150. *Tachiona*, 169 F. Supp. 2d at 309-16.

151. *Kadic v. Karadzic*, 70 F.3d 232, 244-46 (2d Cir. 1995).

a campaign of killings, torture, and terror directed by the leader of a group that was waging a civil war and that perhaps constituted a *de facto* state or *de facto* government,¹⁵² and torture and massacres committed by a group that operated in conjunction with a government that had a policy of genocide.¹⁵³ The connection, however, is not close enough where a private entity accused of badly mistreating plaintiffs only received government investment funds and other payments, government authorization to operate, extensive government-like control over activities in the area around its site, and access to military personnel for security purposes.¹⁵⁴

In terms of the nexus between non-state defendants and rights-violating state behavior, a corporation's close cooperation with state authorities who implemented a policy of slave labor and encouraged companies to make use of such labor in their activities establishes the requisite connection,¹⁵⁵ as does a joint venture between state authorities and a company that cooperate to use slave labor for which the company pays the government.¹⁵⁶ So, too, do a corporation's (and its officer's) paying, arming, and conspiring with military and police authorities to conduct terror campaigns, engage in systematic violence and secure false convictions of critics of the corporation's activities,¹⁵⁷ and a local company's enlisting police and judicial authorities to secure the prolonged detention of an alien in order to extort commercial concessions from his employer.¹⁵⁸ On the other hand, a corporation merely benefiting knowingly from the government's use of slave laborers or commission of other human rights abuses with the effect of facilitating the company's activities does not establish a sufficient nexus.¹⁵⁹

Here too, China-related cases suggest the contours and potential efficacy of this doctrinal impediment to "foreign" human rights suits.

152. *Doe v. Islamic Salvation Front*, 993 F. Supp. 6, 6-9 (D.D.C. 1998).

153. *Mushikiwabo*, 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996).

154. *Beanal v. Freeport-McMoran*, 969 F. Supp. 372, 372-82 (E.D. La. 1997).

155. *Iwanowa*, 67 F. Supp. 2d at 445-46 (corporation as *de facto* state actor); cf. *Doe v. Unocal Corp.*, 110 F. Supp. 2d at 1309 (discussing Nazi cases).

156. *Unocal*, 963 F. Supp. at 890, 895.

157. *Wiwa*, 2002 WL 319887 at *13-15.

158. *Carballo*, 978 F. Supp. 1078, 1090-94 (S.D. Fla. 1997).

159. *Unocal*, 110 F. Supp. 2d at 1304-10; see also *Bigio*, 239 F.3d at 448-49 (holding that corporation's economic benefit from buying property it knows to have been seized is not enough). *But cf. Nat'l Coalition Gov't of Burma*, 176 F.R.D. at 346 (finding that failure to allege corporate defendant's conspiracy with government to commit violations of international human rights law does not make complaint insufficient where allegations of conspiracy to injure plaintiffs and to conceal repression may indicate corporation was a "willful participant in joint actions with the State").

Establishing the connection between the human rights-violating actions in question and state actors would appear to be rarely a problem in China, given the PRC's authoritarian, one-party regime that extensively penetrates Chinese society and the Chinese economy. Indeed, most of the actions that form the foci of complaints in China-related human rights litigation—the treatment of Falun Gong activists, political dissidents, or prison laborers—have not raised “state action” problems under the ATCA or TVPA. The plaintiffs clearly have claimed that the harms at issue have been perpetrated or directed by agents or officials of the government or the all-pervasive and politically dominant Chinese Communist Party. Much the same can be said about most of the ATCA or TVPA claims that one can imagine being brought by plaintiffs who have suffered punishment for opposing China's family planning policies, or who have been subjected to prosecution and detention for spying, and so on.

On the other hand, even in the seemingly auspicious Chinese context, state action problems could and sometimes do arise to limit plaintiffs' access to American courts, and this suggests that such barriers might be daunting in cases involving states that lack China's exceptional characteristics of a pervasive party and state. For example, much of the pattern of behavior—the beatings, harassment, coercion to submit to abortions or sterilization, and the like—at issue in cases that focus on China's family planning regime is perpetrated by “family planning activists” who are not unquestionably state (or ruling party) actors and whose actions exceed what Chinese law and policy formally permit. As the *Bao Ge* prison labor case illustrates, linking abuses to a particular Chinese state defendant (and especially one that is not shielded from suit by some other means such as sovereign immunity) can be a formidable task. The Bank of China's role in the foreign exchange transactions that were part of the prison labor product export business was simply not enough to keep the Bank in the case as the sole remaining PRC defendant.

While the *Bao Ge* case focused on the issue of prison labor in which the deep involvement of some state actors is beyond dispute, many of the human rights cases related to labor conditions that one could imagine arising in China do not. By all accounts, many severe abuses of Chinese workers—including conditions that amount to coerced and arguably even slave labor (in the sense of employees not being free to leave)—occur in private or joint-venture factories. In those contexts, the state's role can be extensive, with enterprises owned or controlled by local authorities being the Chinese party to a joint venture, with state or party officials being the real owners in nominally private ven-

tures, or with government officials facilitating or corruptly profiting from the rights-abusing enterprises' activities. Even on such facts, however, the state's role in inflicting the relevant harm is somewhat limited, indirect, and informal and thus leaves plaintiffs far from certain of being able to satisfy the ATCA or TVPA state action requirement despite China's unusually state-dominated and state-penetrated economic structure.

As the *Bao Ge* case and these other conceivable Chinese labor cases also illustrate, even in China-related suits, plaintiffs also may face insurmountable obstacles in establishing the required nexus between human rights-violating state behavior and the activities of the private defendants who sometimes provide the only viable route to the courthouse and, especially, to enforceable judgments. Not surprisingly, given the relatively passive and marginal role that the *Bao Ge* plaintiffs attributed to Adidas, their claims against the sporting goods company were dismissed. Given the courts' interpretation of the degree of entanglement necessary to pursue a corporate defendant under the ATCA or TVPA, plaintiffs in less exotic imaginable China-based cases can expect to fare no better. Foreign companies that surpass Adidas in their active involvement with China's prison industries still might reasonably expect to escape—and so far have escaped—U.S. litigation. The same is true for foreign companies in China that benefit from and may comply with PRC government demands to facilitate (primarily by providing information) suppression of independent labor movements or dissident Internet speech—activities that can and do lead to their participants' subjection to human rights-violating treatment by public security authorities in China. More broadly, the Chinese government's policies and incentives, regulatory approvals, grants of special privileges and position as co-owner, or even joint-participant, in foreign-invested ventures in China are not likely to be enough to establish the necessary degree of foreign corporate collaboration with the PRC regime's commission of any serious human rights abuses that are not directly and intimately related to the enterprises' activities. With human rights cases arising from foreign participation in China's still heavily state-entangled and state-pervaded economy thus likely falling short on this version of the state action requirement too, this doctrinal barrier looks rather impressive as a potential check to a general category of foreign human rights litigation.

C. *Sovereign Immunity*

Ordinary application of the Foreign Sovereign Immunities Act can bar many human rights claims against foreign states and state enti-

ties—a class of suits that on some accounts are especially likely to offend foreign governments and complicate U.S. foreign policy.¹⁶⁰ At least since the Supreme Court decided *Argentine Republic v. Amerada Hess*,¹⁶¹ the ATCA has not offered a route around the restrictions that the FSIA imposes on jurisdiction over states and their instrumentalities. It has become equally clear that there is no general human rights or even *jus cogens* exception in the ATCA or elsewhere to the immunity conferred under the FSIA.¹⁶² Relatively few alien plaintiffs will be able to link the human rights abuses they suffered to state defendants' tortious acts in the United States or to commercial activities that are carried on in the United States or that have sufficient "direct effect" in the United States—the two most relevant and common categories of exceptions to foreign sovereign immunity.¹⁶³

A smattering of Chinese cases suggests the potential efficacy of this barrier. In most cases, the tortious activity exception will not apply because, as the court noted in *Bao Ge*, "all of the legally significant acts giving rise to plaintiffs' claims occurred in China, not the United States."¹⁶⁴ This is, of course, the case with respect to most of the human rights issues that Chinese plaintiffs have sought to raise in ATCA and TVPA cases (and that have arisen in U.S. litigation involving human rights in China more generally). Cases like *Liu v. Republic of China* have yet to arise against PRC defendants, and the fact pattern of torts allegedly committed by PRC agents in the United States have been and are likely to remain rare, especially for alien plaintiffs.

The Falun Gong suit that was filed in 2002 focusing on tortious actions by PRC agents in the United States indicates that this may be changing. But a successful suit of that sort under the FSIA's exception for torts in the United States might not achieve the plaintiffs' stated goal of throwing open to court scrutiny and condemnation severe abuses committed by the PRC at home. Only the relatively modest harms inflicted in the United States would be immediately at issue,

160. The key provisions of the FSIA are 28 U.S.C. §§ 1330, 1602-1611. The TVPA by its terms does not provide for suits against foreign states or their instrumentalities, but only against "individuals."

161. 488 U.S. 428, 433-39 (1989); see also *Siderman de Blake v. Argentina*, 965 F.2d 699, 714-19 (9th Cir. 1992) (finding that violation of *jus cogens* is a tort in violation of the law of nations, but does not confer jurisdiction for suit against foreign sovereign, given FSIA).

162. See generally Edward D. Re, *The Universal Declaration of Human Rights and Domestic Courts*, 31 SUFFOLK U. L. REV. 585, 600 (1998); Walker, *supra* note 19, at 553; *International Human Rights Litigation*, *supra* note 19, at 2146-58. The possible exception to immunity in such circumstances is often cast as an implied waiver of FSIA immunity.

163. 28 U.S.C. §§ 1605(a)(2), (a)(5) (1993 & Supp. 2002).

164. *Bao Ge*, 201 F. Supp. 2d at 25. See generally *Amerada Hess*, 488 U.S. at 433-39 (holding tortious acts did not occur in United States and therefore there was no jurisdiction under FSIA).

with the plaintiffs having to fight further battles to drag PRC domestic behavior into the mix, or for their case to survive at all. The limited abuses that plaintiffs claim PRC agents committed in the United States might be found to come within the discretionary function exception, which lifts the exception to sovereign immunity where the tortious activity was merely a problematic exercise of discretion or a bad policy call (rather than an extreme abuse of human rights that clearly lay beyond the scope of political choice or a mere mis-performance of a ministerial function).¹⁶⁵ Moreover, few cases from the PRC will come in the handily packaged form of the *Liu* case, wherein the courts of the targeted “sovereign” (the Republic of China) made findings that smoothed the path to the judicial inquiry that plaintiff needed and wanted the court to undertake into the foreign state’s and officials’ actions at home. The plaintiffs in the U.S.-activity-based Falun Gong case appear to have recognized these difficulties. Notably, the suit over PRC agents’ harassment of Falun Gong followers in the United States relied upon RICO, which might allow an inquiry into the broader nature and activities of the alleged “enterprise,” including the PRC state entities that suppress Falun Gong both abroad and, far more violently, at home.

Chinese cases also illustrate and underscore the weakness of the commercial activity exception to foreign sovereign immunity. Most of the abuses at issue in China cases unambiguously involve activities that lack a sufficiently “commercial” nature to establish jurisdiction under FSIA standards. Courts have construed the “commercial activity” exception as excluding situations in which abuse by foreign police officials arose from a commercial relationship or furthered a commercial venture,¹⁶⁶ and situations in which the foreign government’s human rights-violating behavior may have produced substitutes for commercial activities.¹⁶⁷ Even if the activity can be shown to be adequately commercial in nature, the requisite “direct effect” in the United States very often will be lacking, given that mere economic impact in the United States is not enough.¹⁶⁸

165. On the discretionary function exception in the context of foreign human rights litigation, see *International Human Rights Litigation*, *supra* note 19, at 2154-55.

166. See *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993); *Unocal*, 963 F. Supp. at 887-88 (in ATCA and TVPA case).

167. This is one plausible, if not uncontroversial, interpretation of the activity at issue in the Japanese wartime sex slavery/forced labor cases. See, e.g., *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001); see also *supra* note 82.

168. Cf. *Unocal*, 963 F. Supp. at 887-88 (discussing cases ruling that mere economic impact is not enough to establish “direct effect” under FSIA, in ATCA/TVPA case).

One of the most commercially tinged China-related cases, *Bao Ge*, addressed these matters squarely. The “allegedly unlawful incarceration and mistreatment of plaintiffs in prison by the Chinese government” arose out of “an alleged abuse of China’s police power,” which is a sovereign and not a commercial function.¹⁶⁹ That the soccer balls produced by prison labor were exported to the United States was simply not enough to make the “operation of the Chinese judicial and penal systems” into a “commercial activity.”¹⁷⁰ Moreover, any impact of the prison labor abuses in the United States was too attenuated to count as “direct.” The one Chinese state defendant that might have engaged in commercial activities—the Bank of China—was not sufficiently connected (through its involvement in foreign exchange transactions relating to the soccer ball exports) to any rights abuses in prison labor camps.¹⁷¹

D. Individual Immunity

Doctrines conferring immunity on heads of state and other extremely high-ranking foreign officials may dispose of some foreign human rights suits, including some that are particularly likely to produce friction in U.S. foreign relations. While the construction of the FSIA to include state officials within the scope of immune “instrumentalities” of a foreign state might offer very broad immunity here, it has not done so in practice. Courts generally have limited such immunity to official capacity suits (which plaintiffs have generally been clever enough to avoid when necessary) or to acts taken within the scope of official authority (which courts have been reluctant to interpret as including the severe human rights abuses that are the focus of mainstream ATCA and TVPA cases).¹⁷²

Of more relevance and promise has been the doctrine of head of state immunity, which courts have held to be applicable in ATCA and TVPA cases.¹⁷³ The contours of this doctrine are contested. It is gen-

169. *Bao Ge*, 201 F. Supp. 2d at 24.

170. *Id.*

171. *Id.* at 25.

172. *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) (giving FSIA immunity for officer acts within official capacity); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985); *Chuidian*, 912 F.2d at 1106 (giving no FSIA immunity for acts beyond scope of authority); *In re Estate of Marcos*, 978 F.2d at 498 (involving acts of torture by head of state); *Xuncax*, 886 F. Supp. at 175-76. See also *International Human Rights Litigation*, supra note 19, at 2155-56 (describing courts as divided on the application of FSIA immunity in individual capacity suits against foreign officials).

173. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (holding head of state immunity is outside of FSIA and unchanged by TVPA and finding immunity for president and foreign minister of Zimbabwe in ATCA and TVPA case); *Lafontant v. Aristide*, 844 F. Supp. 128

erally seen as rooted in notions of the inappropriateness of equal states exercising judicial authority over one another (and, by extension, one another's heads of state), and in related notions of international comity. While some see it as incorporated without specific reference in the FSIA and others see it as a principle of customary international law, courts in ATCA and TVPA cases generally have deferred to executive branch views on whether the doctrine should apply in a particular case, taking as conclusive (or nearly conclusive) formal executive determinations that an individual is the head of state of a foreign state and showing considerable willingness to follow executive suggestions of immunity even where they extend to individuals who are not clearly recognized heads of state.¹⁷⁴

Once again, these China cases suggest how the doctrine (and its possible extensions) might be effective in warding off suits that are claimed to pose some of the potentially most serious problems for U.S. foreign policy. People's Republic of China plaintiffs in U.S. human rights litigation relatively often have named Li Peng, Jiang Zemin, and other top-ranking leaders as defendants. Presumably, this reflects some combination of the PRC regime's durability, its political structure of relatively centralized control, the presence of political and policy mandates for many of the abuses giving rise to litigation, and Chinese plaintiffs' beliefs that it is legally appropriate or politically desirable to hold top level officials formally accountable. Whatever the mix of defendant responsibility or plaintiff agendas behind it, this pattern suggests that individual immunity doctrine—particularly if the U.S. executive branch weighs in to support it or to extend it beyond

(E.D.N.Y. 1994) (analyzing common law basis of head of state immunity, holding that it survives unchanged by the FSIA and TVPA and finding immunity for U.S.-recognized president of Haiti in TVPA case). *But see Chuidian*, 912 F.2d at 1103 (concluding in non-ATCA/non-TVPA case that FSIA governs individual immunity, displacing prior common law doctrines). On head of state immunity and broader FSIA individual immunity, see *International Human Rights Litigation*, *supra* note 19, at 2165-71 (arguing that courts are divided on whether head of state immunity is included in the FSIA or is a discretionary prerogative of the executive branch and that U.S. courts do not accept customary international law of head of state immunity); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1829 (1998) (asserting applicability of customary international law); see also David J. Bederman, *Dead Man's Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT'L & COMP. L. 255, 258-70, 280-82 (1995-1996); Walker, *supra* note 19, at 554-58.

174. See generally *Lafontant*, 844 F. Supp. 128 (treating as determinative Department of State position that defendant was head-of-state and that defendant president should enjoy immunity; refusing to inquire into exiled president's lack of possession of actual power of state); *Tachiona*, 169 F. Supp. 2d 259 (treating as determinative the Department of State's suggestion of immunity for defendant president and defendant foreign minister as part of president's travelling entourage); cf. *Kadic*, 70 F.3d at 248 (suggesting that executive branch support for immunity for defendant head of entity of uncertain state status would be dispositive).

the formal head of state—can bar many Chinese nationals' human rights suits in U.S. courts or leave the plaintiffs unable to go after the most important (and sometimes perhaps the only available) defendants.

In some cases, the broadly related, but less esoteric, doctrine of diplomatic immunity can provide an adequate shield for high-ranking officers and other individual official defendants in ATCA and TVPA cases. Here too, China-related cases illustrate and illuminate a broader pattern. The PRC objected loudly that some doctrine should have protected Li Peng from amenability to the Tiananmen-related suit in which he was served when he was in New York as an official attendee of a U.N. function. The Chinese complaint was not wholly and obviously misplaced, given that U.S. courts have ruled that diplomatic immunity does—and does not—apply to foreign leaders visiting New York for U.N. activities. Notably, and presumably much to the PRC's anger, the disparate outcomes in such cases seem to have correlated with the executive branch's support or lack of support for such immunity.¹⁷⁵

China cases also suggest how diplomatic immunity might insulate individual defendants of lower rank as well. True, the "official" character of the visits by various Chinese provincial, ministerial, or municipal officials is very unlikely to sustain claims of diplomatic immunity; it would stretch the doctrine well beyond its ordinary and rather formalistic contours. (Moreover, according to plaintiffs, not all of the PRC official defendants served in Falun Gong ATCA or TVPA suits were in the United States on official business.) But diplomatic immunity may be available where the targets of human rights litigation independently enjoy diplomatic status. The possibility is not as far-fetched as it may seem. The Falun Gong RICO claim, for example, alleges that agents based at the PRC embassy and consulates committed much of the harassment of Falun Gong followers in the U.S. that is the basis of the suit.¹⁷⁶

E. Avoiding the Process Server

The "tag" jurisdiction that plaintiffs have relied upon in ATCA and TVPA cases against foreign officials may falter or fade. Particularly as

175. Mugabe was in New York under conditions very similar to Li Peng. In the *Mugabe* case, the United States supported immunity. See *Tachiona*, 169 F. Supp. 2d at 297-303 (finding diplomatic immunity, deferring to State Department interpretation of relevant treaties and laws); *Kadic*, 70 F.3d at 247-48 (noting Department of State view that defendant's status on visit to the United States was such that he enjoyed no immunity).

176. See *supra* notes 139, 145.

visiting foreign officials become more aware of what befell Li Peng and Zhao Zhifei in New York, Liu Qi in San Francisco, Zhou Youkang in Chicago, and Ding Guangen in Hawaii, they may become far more savvy about avoiding effective service of process. Prime defendants may not come at all (or they may devise ways to come as accredited diplomats or with promises of protection from the executive branch). Some of the most high-ranking defendants might be adequately insulated on this score already, as the Tiananmen-related suit against Li Peng suggests. The defense asserted, with the initial support of the U.S. government, that service of process on a U.S. State Department employee accompanying Li Peng was insufficient. While the court in that case rejected the argument, citing the near-impossibility of serving Li through any other means, it is far from clear that such a result can be counted upon, given the conceded irregularity of such service or, perhaps, if the executive branch were to weigh in more forcefully in favor of the defendant.¹⁷⁷

F. Acts of State

The act of state doctrine also has the potential to close off foreign human rights suits in U.S. courts. After all, alien plaintiff TVPA, ATCA, and other foreign human rights litigation often entails asking U.S. courts to pass judgment on actions a foreign sovereign has undertaken in its own territory—precisely the situation that the act of state doctrine addresses. When courts enter into the types of inquiry that such cases demand, there often will appear to be substantial risks of the evils against which the act of state doctrine is supposed to guard: embarrassing or hindering the executive branch's conduct on foreign affairs or otherwise producing an adverse impact in the field of foreign relations in which the political branches are constitutionally assigned preeminent roles.¹⁷⁸

True, defendants' efforts to invoke this judicially crafted justiciability doctrine have not met with much success in ATCA and for-

177. See *Court Decision on Li Peng Applauded*, *supra* note 64; *Li Peng Tiananmen Law Suit Could be in Danger*, *supra* note 64; Wong, *supra* note 1; *The Li Peng Lawsuit and Universal Jurisdiction over Violations of Rights*, *supra* note 1; Pomfret, *supra* note 11; see also *Tachiona*, 169 F. Supp. 2d at 302-09 (holding that personal inviolability of head of state and possessor of diplomatic immunity did not preclude service of process for suit against political party headed by individual enjoying immunity).

178. See generally *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

eign plaintiff TVPA cases.¹⁷⁹ But efforts to invoke the act of state doctrine and the concerns it addresses have not uniformly failed in foreign human rights cases.¹⁸⁰ Moreover, the many cases in which courts have not applied the doctrine have included several not-necessarily-ubiquitous factors that seem to underlie the judicial chilliness toward dismissing foreign human rights suits on act of state grounds. These cases include: state actors' having engaged in conduct of a type that has faced near-universal condemnation (including torture), especially where the acts violate *jus cogens* prohibitions against genocide, slavery, and the like;¹⁸¹ state actors' having acted contrary to fundamental laws of their own countries and not plausibly in the public interest;¹⁸² violations having been committed under a now-defunct regime, especially where successors have repudiated their predecessors' actions;¹⁸³ and the U.S. executive branch having explicitly supported the litigation or, at least, the political branches having clearly condemned the targeted regime and its actions.¹⁸⁴ Simply, and as the

179. See, e.g., *Filartiga*, 630 F.2d at 889-90 (expressing doubt about whether state official's action violating state's laws and constitution and unratified by the state would constitute act of state); *Wiwa*, 2002 WL 319887, at *28 (refusing to apply act of state doctrine where challenged actions were those of government no longer in power). Notably, some of the legislative history of the TVPA addresses and rejects the idea that the act of state doctrine should apply in TVPA cases. See S. REP. NO. 249 (1991).

180. See *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (holding that an inquiry into Marcos's acts as president engaging allegedly in a systematic policy of human rights violations requires the type of inquiry that the act of state doctrine precludes); see also *Tel-Oren*, 726 F.2d at 798-808 (Bork, J., concurring) (invoking concerns that animate the act of state doctrine in construing the ATCA not to create a cause of action); *Tel-Oren*, 726 F.2d at 789-90 (Edwards, J., concurring) (criticizing Bork concurrence for using act of state doctrine concerns to reject construction of ATCA that would allow plaintiff to have a cause of action).

181. *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Liu*, 892 F.2d at 1432-33; *Kadic*, 70 F.3d at 250; *Nat'l Coalition Gov't of Burma*, 176 F.R.D. at 349-57; *Unocal*, 963 F. Supp. at 892-95.

182. *Unocal*, 963 F. Supp at 892-95 (holding that act of state doctrine generally applies only where acts are in the public interest); *Nat'l Coalition Gov't of Burma*, 176 F.R.D. at 349-57 (noting that disregard of state's own laws cuts against application of act of state doctrine); *Filartiga*, 630 F.2d at 889-90 (expressing doubt about whether state official's action violating state's laws and constitution and unratified by the state would constitute act of state); *Kadic*, 70 F.3d at 250 (finding that acts taken in violation of nation's fundamental law unlikely to come within act of state doctrine).

183. *Wiwa*, 2002 WL 319887, at *28 (refusing to apply act of state doctrine where challenged actions were those of government no longer in power); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 130-31 (E.D.N.Y. 2000) (holding that subsequent French regime's repudiation of Vichy government and its actions meant act of state doctrine would not be applied); cf. *Kadic*, 70 F.3d at 250 (finding that acts wholly unratified by government unlikely to qualify as acts of state); *Bigio*, 239 F.3d at 452-53 (current regime had repudiated acts by prior regime that are focus of complaint); *Jota v. Texaco*, 157 F.3d 153, 156-58 (2d Cir. 1998).

184. *Unocal*, 963 F. Supp. at 892-95 (finding that act of state doctrine does not apply where coordinate branches have condemned the actions in question); *Nat'l Coalition Gov't of Burma*, 176 F.R.D. at 349-57 (holding that act of state doctrine not applied where Department of State

classic early act of state cases suggested, high levels of international consensus on relevant legal principles, and support or lack of opposition from the U.S. executive branch and the target state's government will do a great deal to remove concerns that allowing a foreign human rights case to go forward will lead to a problematic lack of judicial deference to any foreign sovereign acts to which deference is due according to the concerns animating the act of state doctrine.

China cases suggest that the factors weighing against the act of state doctrine's application may not be as pervasive in ATCA, TVPA, and similar cases as might be supposed. The concerns that typically have supported non-application of the doctrine are not strongly present in many China-related cases. Obviously, the PRC regime that has been the target of human rights litigation in U.S. courts is still in power. Moreover, the regime is strikingly unrepentant with respect to the actions that have been the foci of human rights suits in the United States. Chinese authorities assert that the suppression of Falun Gong and the Tiananmen democracy movement were proper measures taken by the state to maintain order, security, and stability. As this suggests (and with the exception of some of the means for implementing population control policies that have been at issue in asylum-related proceedings), most of the Chinese state actions at issue in U.S. human rights litigation have been defended by PRC authorities as actions in the public interest and consistent with state laws. The PRC has claimed that the self-described victims of human rights abuses in the regime's repression of political dissent and Falun Gong have been prosecuted and punished consistent with China's criminal laws. Also, the PRC regards mandatory prison labor as a part of lawful punishment for crimes and other offenses. Thus, the defunct regime, repudiated actions and violation-of-local-law arguments against applying the act of state doctrine ill fit cases from China (and many other states).¹⁸⁵

letter to court and other statements to court condemn the targeted regime and its actions); *cf. Kadic*, 70 F.3d at 250 (suggesting that if executive had favored application of act of state doctrine, which it clearly did not, court might defer but would not be bound to do so). Some of these judicial discussions concern the so-called Bernstein letter or Bernstein exception (named after the case in which the mechanism was famously at issue), under which—in the robust form upon which ATCA and TVPA courts have cast doubt—courts defer to executive branch statements that it prefers that the act of state doctrine be applied or not be applied in a particular case.

185. A non-ATCA/non-TVPA case that did raise human rights issues with respect to Taiwan is potentially suggestive here. The plaintiff in *Liu v. Republic of China* only narrowly escaped the act of state doctrine, by virtue of the court's determination that it was in fact crediting rather than questioning the foreign state's action at home when it accepted local tribunals' factual determinations and avoided rejecting its legal determinations by applying U.S. law to the facts as found by the foreign sovereign's domestic court. *See Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

Although some of the PRC actions that have triggered human rights litigation in the United States ground claims of torture or near-slavery, many do not. Some of these asserted abuses—including beating, arbitrary detention, deprivation of First Amendment-like freedoms and some coercive family planning practices—are not accepted in many quarters as infringements of rights that are the object of a strong international consensus. While these considerations are hardly likely to be enough to sweep away judicial reluctance to apply the act of state doctrine, they can weaken one key element—the preference for not applying the act of state doctrine where the actions violated core, universally accepted international legal principles—in the multivariate calculus that courts apply.

Potentially of more significance, in China-related cases, the executive branch generally has not taken the steps that have encouraged courts to refuse to apply the act of state doctrine to human rights cases, even though deference might well be forthcoming if the executive branch were to take such steps. Thus, in some of the Falun Gong litigation, the U.S. government steered clear of the case and pointedly told the PRC that there was nothing it could do to stop the suit despite arguments from PRC legal scholars that the U.S. government had the ability to do so on grounds that sounded very much like the act of state doctrine.¹⁸⁶ Also, the United States limited its formal intervention in the Li Peng case to addressing the narrow issue of service of process. In contrast, in one of the first cases (one not related to human rights issues and not invoking the act of state doctrine) to arise after the normalization of U.S.-China relations, the United States intervened actively, citing American foreign policy interests, to encourage the court to lift a default judgment so that the PRC could seek (with U.S. support and instruction) the formerly discretionary grant of absolute sovereign immunity to shield itself from liability for railway bonds on which China had defaulted.¹⁸⁷

By accepting the position urged by the executive branch, the court in the railway bonds case also in effect insulated from judicial review a sovereign act undertaken by the Chinese sovereign in its own territory and possibly in violation of a widely asserted but controversial international legal rule proscribing expropriation of foreign property (in this case by repudiating a predecessor government's bonds). Some of the actions giving rise to contemporary China-related human rights litigation in U.S. courts (and much other foreign human rights litiga-

186. See *supra* notes 65-66.

187. *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986).

tion in U.S. courts as well) might be plausibly characterized in ways that fit this act-of-state-friendly template.

G. Political Questions

The political question doctrine can bar suits that invite U.S. judicial review of foreign states' abuses of their own nationals' human rights. ATCA and foreign plaintiff TVPA cases (as well as foreign human rights litigation generally) can raise several of the overlapping concerns that are the focus of the political question doctrine, including the risks that in deciding such cases the courts: will usurp discretion that the Constitution textually and demonstrably commits to the political branches; will have to apply standards that are not susceptible to judicial discovery and interpretation; will have to make policy determinations of a kind not suited to the exercise of judicial discretion; or will otherwise embarrass or frustrate foreign policy by failing to express the respect due to decisions of a coordinate branch, or by upsetting a policy decision that has already been made and is important to support, or by creating multiple, discordant voices in U.S. foreign policy.¹⁸⁸

Attempts to invoke the political question doctrine have met with mixed success in ATCA and foreign plaintiff TVPA cases, suggesting that the doctrine can provide an effective screen in some cases (or some courts). Some courts have found ATCA and TVPA suits to present low risks of foreign policy embarrassment, of trampling on political branch prerogatives, and of requiring courts to grapple with judicially unmanageable standards, given the ATCA's and TVPA's embodiment of the political branches' commitment of authority to the courts and given the well-settled and uncontroversial nature of the international legal prohibitions the violation of which are typically at issue in such cases.¹⁸⁹

On the other hand, other judicial opinions have been a good deal more sympathetic to arguments that ATCA claims and foreign human rights litigation more generally (and foreign relations cases still more generally) raise in especially severe forms the dangers against which the political question doctrine guards.¹⁹⁰ Such assessments stress the

188. See generally *Baker v. Carr*, 369 U.S. 186, 211-12, 217-18 (1962); *Kadic*, 70 F.3d at 249-250.

189. See *Kadic*, 70 F.3d at 249-50 (addressing all these points); *Tel-Oren*, 726 F.2d at 797-98 (Edwards, J., concurring); see also *Von Dardel*, 623 F. Supp. at 258-59 (finding diplomatic immunity so well-settled that there was little risk of embarrassment where ATCA claim was based on violation of that law). See generally *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (finding the political question doctrine did not bar ATCA suit for official torture).

190. See, e.g., *Tel-Oren*, 726 F.2d at 803, 823-26 (Bork & Robb, JJ., concurring).

difficulties posed by vague or disputed standards for violations of the law of nations, and the potential for displacing political branch judgments—both of which have been major elements in critics' general critiques of expansive ATCA and TVPA jurisdiction well beyond the specific context of the political question doctrine. Not surprisingly, given the concerns that animate the doctrine and, particularly, its application to foreign affairs cases, courts in ATCA and foreign-plaintiff TVPA cases have been more inclined to discern political questions in cases where the U.S. government has taken diplomatic steps to address the problematic acts with the targeted state and less inclined to find the doctrine applicable where the U.S. government's political branches have condemned the activity or the regime in question.¹⁹¹

China-related cases help to indicate the doctrine's real, if limited, potential efficacy in stopping some foreign human rights litigation. As we have seen in the act of state doctrine context and elsewhere, some China-related foreign plaintiff human rights suits involve allegations of clear and egregious violations of core and fundamental principles of international human rights law such as the proscription of torture or extrajudicial killing. But other instances of China-related human rights litigation involve standards that are—in general or in their application to the facts alleged by Chinese plaintiffs—less settled and certain and thus more vulnerable to arguments that adjudication of the plaintiffs' claim would raise several of the dangers that the political question doctrine addresses. Particularly in light of PRC defenses of allegedly abusive measures as proper implementations of Chinese criminal law and state regulations, there may be room for arguments that the political question doctrine should be applied to preclude adjudication of claims based on coerced prison labor or arbitrary detention or jailing for dissent or other politically disapproved activities.

Most of the China-related foreign plaintiff human rights suits do involve PRC actions condemned by U.S. political branches—such as the suppression of the democracy movement or political dissidents or Falun Gong, the use of forced prison labor to produce exports, brutal

191. *Iwanowa*, 67 F. Supp. 2d at 484-88 (finding the political question banned suit against company that was *de facto* part of the state/state actor where plaintiff's claim was for reparations, a matter that executive had negotiated with other states at conclusion of the war and which court could not appropriately resolve, given the general commitment of reparations settlement authority to the executive, the lack of respect for the executive that would be shown by adjudicating claims that the executive had determined should be handled at a government-to-government level, the risk of embarrassment inherent in the courts' disregard for that executive determination, and the courts' limited capacity for dealing with the diverse, complex and varied materials that are at issue in the case); see also *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 272-81 (D.N.J. 1999); *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 64-67 (D.C.C. 2001) (similar in FSIA/non-ATCA case). See also *supra* note 189.

population control policies, or a criminal justice system fundamentally lacking in due process. These cases do not raise in stark form the danger that adjudication will embarrass or undermine or show a lack of respect for a coordinate branch or introduce a radically different U.S. voice in foreign policy if the plaintiffs were to prevail. On the other hand, as we also have seen, deciding for the plaintiffs in such cases often entails the courts going well beyond what the political branches have said in tone and substance, and beyond what they have undertaken or clearly authorized in the way of sanctions or other remedies. Such concerns can be—and have been—used to support arguments that the political question doctrine should apply to stop some Chinese human rights suits in U.S. courts.¹⁹²

More broadly, some China-related cases arising outside the ATCA and TVPA settings suggest that courts may be especially attuned to the arguments for applying the political question doctrine to human rights-related cases in the context of the particularly important, charged and actively managed type of bilateral relations that the U.S.-PRC relationship exemplifies. To some degree, this appears to reflect an assessment of the potentially disruptive impact of courts' deciding such cases. In *Wang Zong Xiao v. Reno*,¹⁹³ for example, the court refused to apply the political question doctrine, which the United States had urged the court to apply, on the grounds that U.S. relations with aliens were committed to the discretion of the political branches. But, in rejecting the United States' argument, the court stressed the relatively low of risk of upsetting U.S.-China relations given that the claim focused on how U.S. government employees treated the plaintiff "albeit during a cooperative investigation with PRC officials." In *Lui Kin-Hong*, the appellate court permitted the executive branch to extradite a defendant to Hong Kong for a trial that would occur after the territory's reversion to PRC rule. In so doing, the court discerned that the interpretation of the extradition treaty signed between the United States and the United Kingdom for British-ruled Hong Kong had many of the characteristics of a political question in a foreign affairs case and thus accorded no occasion for the inquiry into the PRC's lack of due process and low regard for the human rights of defendants that had led the district court to conclude that the treaty could not be interpreted to oblige (or allow) the United States to render up the defendant.¹⁹⁴

192. See, e.g., Gruzen, *supra* note 8, at 239-40.

193. 837 F. Supp. 1506, 1546 (N.D. Cal. 1993).

194. *Lui Kin-Hong v. United States*, 110 F.3d 103 (1st Cir. 1997).

As the *Lui Kin-Hong* case also suggests (although somewhat in tension with *Wang Zong Xiao v. Reno*), deference to political branch (and especially executive branch) preferences with respect to whether the political question doctrine, or related barriers, should apply may be at work here as well. This possibility perhaps emerges more clearly in a China-related case that did not involve any of the human rights generally thought to be covered by the ATCA (although it did implicate the international right against expropriation unsuccessfully invoked in some ATCA litigation). In *Shanghai Power v. United States*,¹⁹⁵ principles of deference to the will of the political branches and a strong sense of the constitutional commitment of some foreign affairs-related powers to the executive branch disposed of claims that the United States had “taken” plaintiffs’ property when the United States, as part of the deal for normalizing relations with the PRC, effectively settled plaintiffs’ claims concerning property expropriated when the communist regime came to power.

Shanghai Power and the discussion in *Dames & Moore v. Regan*¹⁹⁶ of the same settlement of claims agreement that accompanied the normalization of U.S.-PRC relations, are also China-related reminders of another, related feature of courts’ approaches to applying the political question doctrine in ATCA litigation: where the executive branch has undertaken a diplomatic solution of the issues that gave rise to human rights claims, the political question doctrine’s concerns about deranging the political branches’ conduct of foreign policy apply with special force.¹⁹⁷ While this has not become a factor in PRC human rights litigation pursued in the United States so far, it is not hard to imagine that it might. The harassment of U.S. nationals and activities in U.S. territory that are in controversy in the Falun Gong RICO case could become the object of serious diplomatic discussions. Any ATCA or TVPA case that might be brought by the U.S. nationals and residents detained in the PRC as spies could very well have to face an argument that the diplomatic settlement that led to their release provided rea-

195. *Shanghai Power Co. v. United States*, 4 Cl. Ct. 237 (1983) (finding Presidential power to recognize foreign governments a sufficient and unreviewable ground for President’s settlement, incident to normalization of U.S.-PRC relations, of plaintiff’s claims concerning property expropriated by PRC, and rejecting plaintiff’s claim that such settlement constituted a taking under the Fifth Amendment); see also *Dames & Moore v. Regan*, 453 U.S. 654, 679-81 (1981) (discussing the claims settlement agreement incident to U.S.-PRC normalization as part of a long historical pattern of support for or acquiescence in such measures by Congress, in case that found congressional authorization for similar settlement agreement with respect to plaintiff’s assets in Iran).

196. 453 U.S. 654 (1981).

197. See *supra* note 191.

sons to employ the political question doctrine or other related mechanisms to bar the plaintiffs' claims.

As this suggests, with the PRC's growing willingness to engage in international human rights discourse and with deepening U.S.-PRC bilateral discussions over a range of human rights issues, plaintiffs in China-related human rights cases may be worse off. More China-based human rights cases could come to resemble more closely the previously rare types of ATCA cases in which the executive branch's pursuit of a diplomatic solution argued for finding the case nonjusticiable, or the court faced executive branch preferences that lay more clearly and firmly on the side of applying the political question doctrine.

H. Problematic Plaintiffs

Even though ATCA and TVPA courts have been relatively capacious in such matters,¹⁹⁸ standing doctrine and the more general problem of appropriate plaintiffs may stand in the way of some suits that seek U.S. judicial examination and judgment of foreign human rights practices.

Again, China cases illustrate the more general point and particularly the difficulties of finding a plaintiff with standing to bring a claim that has the scope necessary to produce a broad judicial examination of serious human rights abuses. Strikingly, the coercive enforcement of China's restrictive population policies has not generated a wave of ATCA or TVPA cases. Allegations of such behavior have reached U.S. courts almost exclusively through the mechanism of judicial review of asylum and refugee proceedings, which are not well-designed to achieve the political impact (and the potential if unlikely financial impact) that a successful ATCA or TVPA claim promises. The most notable attempt to bring systematic judicial scrutiny of human rights

198. *Beanal*, 969 F. Supp. at 367-69 (finding that an individual could have standing to raise claims of "cultural genocide" against an indigenous people of which he was a member and of environmental harms to the region of his residence, given that he claimed to have been personally harmed, though plaintiff's claims lacked sufficient specificity to survive motion to dismiss; plaintiff also failed to allege facts necessary to satisfy third-party standing requirements); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 9 (D.D.C. 1998) (accepting possibility of standing of organized group to bring suit under ATCA and TVPA where human rights abuses allegedly committed against group's members prevented group from carrying out its human rights-promoting activities); *Xuncax*, 886 F. Supp. 162, 189-93 (C.D. Mass. 1995) (granting standing for any person who may be a claimant in a wrongful death action to bring TVPA and ATCA claims for disappearance and summary execution of others); *Wiwa*, 2002 WL 319887, at *16 (holding that decedent's survivors may bring TVPA claim); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (ATCA suit by brother and father of deceased torture victim); *Cabello Barrueto*, 205 F. Supp. 2d at 1333-35 (holding that legal representative of decedent may bring ATCA or TVPA claim).

abuses in PRC family planning policy (also outside the ATCA and TVPA) foundered on issues of standing. In *Smith v. Atwood*, a pair of Chinese plaintiffs sought to stop possible U.S. funding of the U.N. Fund for Population Activities on the grounds that such support at least indirectly would help to make possible forced abortions and sterilization in China. The court judged the connection between possible funding and the “barbaric actions that might befall [the plaintiffs] if they returned to their homeland” to be “too remote to provide them with the requisite standing.”¹⁹⁹

Falun Gong cases have been few, and not all have taken the standard TVPA and ATCA form of Chinese plaintiffs suing for harms suffered in China. Some Falun Gong litigation—specifically that involving actions in the United States or actions in China against non-PRC nationals—illustrates the difficult trade-offs facing plaintiffs who depart from the usual paradigm. Simply, the links are weak or remote between the relatively modest harms suffered by the plaintiffs who bring such claims and the severe abuses inflicted on Chinese Falun Gong activists in China. Plaintiffs in such cases face potential standing problems to the extent that they must rely on the more grave harms suffered by others in order to clear the threshold of severity that typically applies in ATCA and TVPA-style human rights litigation. To the extent that they can avoid such barriers (including by relying on RICO or civil rights statutes as an alternative to the ATCA or TVPA), they may still face the difficulty that they cannot then secure the judicial scrutiny they seek of severely abusive behavior against Chinese adherents in the PRC. Such practices may well be deemed to raise claims of harms to others with respect to which the plaintiffs lack standing. Or such aspects of PRC behavior—the exposure and judicial condemnation of which motivated the suit—may be deemed irrelevant to the claims the plaintiffs can bring on their own behalf (although the RICO and civil rights approach employed in one Falun Gong case may help to ameliorate this problem as well).

Where one or more paradigmatic plaintiffs can be found, class actions potentially offer a powerful mechanism to advance the goals of broad exposure of abuses that foreign human rights litigation typically seeks, as is suggested by the initial success in defining a class of present and former Chinese prison camp laborers in *Bao Ge* and the

199. *Smith v. Atwood*, 845 F. Supp. 911, 914 (D.D.C. 1994).

plaintiffs' decision to file a class action suit against Ding Guangen on behalf of many who have suffered in the crackdown on Falun Gong.²⁰⁰

But U.S. class actions, as well as conventional ATCA and TVPA cases involving individual Chinese plaintiffs complaining of harms in China, have remained arrestingly few. This may reflect an under-appreciated general feature of foreign human rights litigation that Chinese cases (or the lack of them) manifest: Unlike the failed chaotic states or the states in which the abusers have fallen from power that are the most common sources of ATCA and TVPA claims and much other foreign human rights litigation, effective and on-going regimes like the PRC's may do a reasonably effective job of preventing victims of human rights abuses, or (where the victims die or are incapacitated) their relatives, from reaching the United States. Such regimes also may be more adept at insulating many potential defendants from U.S. courts' jurisdiction (at the very least by not sending them into exile in the United States), so that potential plaintiffs who do reach the United States may have a hard time tagging the right defendant. Thus, the burden of the problematic plaintiff may be especially effective as a barrier in cases that—given the number of victims, the severity of the abuse and the continuing power and foreign policy salience of the abusing regime—might pose an especially serious threat of deranging U.S. foreign policy.

I. Running Out the Clock and Hiding the Ball

Statutes of limitations may bar some claims. The TVPA has an explicit ten-year statute of limitations provision.²⁰¹ Cases under the ATCA generally face the same limit, although some courts may apply the usually more restrictive limits that the U.S. forum state imposes on tort actions.²⁰² The ATCA and TVPA defendants cannot run out the clock as easily as the nominal limitations periods may suggest. Courts have found a wide variety of factors adequate to toll the statutes, especially acts by the defendants or other officials of the target state that have made it difficult or impossible for the plaintiff to bring his claim

200. The class action approach has fared reasonably well in a handful of other ATCA cases too. *See, e.g.,* *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996); *cf. Iwanowa*, 67 F. Supp. 2d 424 (dismissed on other grounds).

201. 28 U.S.C. § 1350 (1998).

202. *See generally* *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1194-97 (S.D.N.Y. 1996) (discussing statute of limitations provision in case raising TVPA and ATCA claims); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1548 (N.D. 1987) (holding that state law tort statute of limitations applies to ATCA claim); *Iwanowa*, 67 F. Supp. 2d at 461-63 (TVPA statute of limitations applies to ATCA claims); *Xuncax*, 886 F. Supp. at 191-93; *Wiwa*, 2002 WL 319887, at *18-19; *Papa v. United States*, 281 F.3d 1004 (9th Cir. 2002); *Unocal*, 963 F. Supp. at 896-97.

sooner. Most typically, equitable tolling has followed from the plaintiff's home country denying the plaintiff any hope of an adequate remedy in home-country fora, which were the only ones potentially available to him prior to his often-belated journey to the United States.²⁰³

Here too, some China-related cases suggest that time limits may have a little bite despite the cases suggesting that they are largely toothless. By the time a jailed political dissident or an inmate from China's gulag overcomes the many barriers to emigration (possibly through illegal immigration to the United States), it may be many years after the end of his incarceration. Because potential Chinese plaintiffs often come to the United States illegally, they may spend additional years in hiding or in the asylum and refugee process, greatly delaying filings of ATCA or TVPA claims.

While equitable tolling likely would still apply to the benefit of Chinese human rights litigation plaintiffs facing such statute of limitations challenges, that still would not be enough to overcome all of the time-related problems that plaintiffs face. Still further delay can follow from the difficulty of assembling the evidence that may be necessary to craft a viable TVPA or ATCA suit. Unlike many of the leading ATCA and TVPA cases in which the abuses have been undisputed and even acknowledged by the target state's government (albeit often in the form of a successor regime), plaintiffs and potential plaintiffs in China-related cases face the problem of official denials, poor documentation, and a good deal of controversy over PRC practices. A couple of anecdotes suggest the nature of the problem. Chinese asylum-seekers (whose claimed sufferings might support an ATCA or TVPA claim) have had to fight against official U.S. reports (most notably the INS's asylum guidelines and some portions of the State Department's human rights reports) that often present a less harsh picture of China's family planning enforcement practices than plaintiffs allege. Harry Wu faced charges of "spying" and risked rein-

203. See, e.g., *Iwanowa*, 67 F. Supp. 2d at 463-67 (tolling of statute by edicts and treaties that deferred individual war-related claims until final settlement of reparations issues); *Xuncax*, 886 F. Supp. at 192-94 (tolling statute where plaintiffs had remained in territory of regime under which harms committed); *Forti*, 672 F. Supp. at 1549-51 (equitable tolling of statute of limitations where defendant had been in hiding and where home-country courts were effectively if not formally unavailable to plaintiff given domination of courts by military regime the officials of which allegedly perpetrated harms that were the focus of plaintiff's complaint); *Unocal*, 963 F. Supp. at 897 (equitable tolling of statute where home country lacked functioning judiciary); *Hilao*, 103 F.3d at 773 (equitable tolling while president remained in office and benefited from statute conferring immunity, and in light of plaintiffs' reasons to fear reprisal or intimidation if they had reported human rights abuses); *Cabello Barrueto*, 205 F. Supp. 2d at 1330-31 (equitable tolling where defendants concealed fact of decedent's body and cause of death).

carceration in China's gulag in order to try to document the sort of abuses alleged in the *Bao Ge* case and the torture elements alleged in the Tiananmen and Falun Gong cases, but denied by PRC authorities. As the *Bao Ge* case also suggests, uncovering the state role in human rights-abusing economic activities is an exceptionally difficult business in China's byzantine and secretive world of relationships between government and enterprise.

Moreover, reforms—particularly formal ones—in administrative law and other mechanisms for government accountability that China has been undertaking in recent years might even begin to cast doubt on a factor that has moved courts to be generous in applying the statute of limitations in ATCA and TVPA cases, and which has defeated other possible grounds for dismissing Chinese and other foreign human rights litigation in U.S. courts: the unavailability of adequate home-country fora.

J. Alternative Fora

Alternative forum-related issues—including *forum non conveniens*, international comity (specifically where foreign court actions are at issue), and exhaustion of remedies requirements—point to still other possible means to thwart ATCA and alien-plaintiff TVPA litigation in U.S. courts.²⁰⁴ As courts repeatedly have recognized, these doctrines rarely will provide convincing grounds for dismissal of otherwise viable foreign human rights cases.²⁰⁵ Often, it will be clear that there is no other adequate forum available, that requiring the plaintiffs to pursue local remedies at home would be futile or perilous, or that deference to the target country's inadequate court's determinations would be unwarranted. Even if all of that were not entirely clear, courts have discerned that there is something more than a little awkward

204. The TVPA, but not the ATCA, includes an explicit exhaustion requirement. See 28 U.S.C. § 1350 (1993 & Supp. 2002); 28 U.S.C. § 1350 note (1993 & Supp. 2002). On these doctrines in ATCA and TVPA cases, see generally Bederman, *supra* note 173, at 277-80; Douglas S. Morrin, *People Before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad through the Alien Tort Claims Act*, 20 B.C. THIRD WORLD L.J. 427, 435-37 (2000).

205. See, e.g., *Cabiri*, 921 F. Supp. at 1197-99 (rejecting application of *forum non conveniens* on the basis of U.S. courts' interest in having issues of U.S. ATCA and TVPA law adjudicated by a U.S. court, and the inadequacy of plaintiff's home country forum—and danger to plaintiff of pursuing a remedy in that forum—if the allegations of mistreatment which form the basis of plaintiff's complaint are true); *Wiwa*, 2002 WL 319887, at *17-18 (holding that TVPA exhaustion requirement did not apply where defendant had not shown that new civilian regime's human rights investigation commission would provide adequate remedies); *Flores v. S. Peru Copper Corp.*, 2002 WL 1587224 (S.D.N.Y. July 16, 2002) (holding that *forum non conveniens* and comity are discretionary doctrines, unlikely to be applied where relevant foreign government does not oppose proceedings in U.S. court); *Bigio*, 239 F.3d at 453-55 (addressing comity issues in ATCA context); *Jota*, 157 F.3d at 158-61.

about using discretionary doctrines or a doctrine with a futility exception to send an otherwise eligible plaintiff back to the courts of his torturer in a quest for relief.

Here too, China cases often reinforce and underscore the general pattern. Unlike in cases where the torturing government has fallen, where the official defendant has lost power, or where the home-country courts are strongly independent, China cases—like potential cases from many parts of the world—are especially poor candidates for *forum non conveniens*, exhaustion of (non-futile) local remedies, or comity, even compared to the baseline of the unpromising universe of ATCA and TVPA cases in general. Plaintiffs in the Tiananmen and Falun Gong cases have been quite articulate and explicit in explaining that attempts to secure redress through the judicial and political processes in the PRC have been pursued and proven futile.²⁰⁶ Some of those who have pursued judicial remedies in China for such human rights abuses have found themselves not at the plaintiff's table but in jail.²⁰⁷

Moreover, ATCA or TVPA cases brought by former political prisoners, targets of prosecution or detention for Falun Gong or dissident activities, and alumni of China's correctional institutions present claims that have made the political bias and inadequacies of Chinese courts and the PRC's justice system central issues in their cases. So, too, have China human rights cases that range beyond the ATCA and TVPA, including, for example, many asylum and refugee cases and the pair of suits challenging U.S. efforts to deport a PRC national who cooperated in a U.S. narcotics prosecution and a Hong Kong resident who faced prosecution on bribery charges in the territory after reversion.

On the other hand, ongoing legal reforms in the PRC suggest how *forum non conveniens*, exhaustion of remedies, and kindred doctrines might someday become a more effective barrier to some ATCA, TVPA, and similar claims. Expanding administrative law remedies for citizens accusing the PRC government of unlawful acts, highly publicized prosecutions of abusers of official power and position in China,

206. See *A Declaration on the U.S. Federal Court's Acceptance of the Lawsuit Brought by June Fourth Victims Against Li Peng for Crimes Against Humanity*, at http://iso.hrichina.org/iso/article.adp?article_id=2277&category_id=79 (last visited Nov. 25, 2002) (concerning demand for prosecutorial inquiry into Tiananmen); *Victims Families and Dissident Applaud Court Decision on Li Peng*, *supra* note 86 (describing lawsuit filed in China by relatives of victims of Tiananmen Massacre, to which the regime did not respond); *Li Peng Lawsuit Background Page*, *supra* note 86 (describing futile quest for political redress); Rowse, *supra* note 11 (quoting statement by plaintiffs' counsel in Falun Gong ATCA case that no remedies are available in China).

207. See *2 Falun Gong Members Held After Lawsuit Against Jiang Zemin*, *supra* note 86.

and other such reforms, may someday begin to erode the easy conclusion that PRC fora are obviously inadequate. But, for now, the clear lack of access to such remedies for victims of the types of rights abuses at issue in China-related human rights litigation in U.S. courts indicate that any such change is still a long way off.

Still, even if *forum non conveniens*, non-exhaustion of remedies, and comity remain unavailable in practice, some of the problems those doctrines are designed to address are not so easily escaped, specifically the problems of litigating a case in a forum physically and institutionally far removed from the site of the underlying events. Again, Chinese cases elucidate the issue. As the fate of the plaintiffs' case in *Bao Ge v. Li Peng* illustrates, even granting the plaintiffs' request to go forward with discovery did not allow them to turn up facts necessary to the survival of their case. Not many human rights-related cases come in the conveniently pre-packaged form of *Liu v. Republic of China*, in which the plaintiff could rely on factual findings made by the defendant's own court concerning the relevant behavior of government officials.

The foregoing inventory of existing mechanisms that can screen out ATCA and foreign plaintiff TVPA suits (and kindred foreign human rights cases) is long, if uneven in terms of the efficacy of the barriers listed. The list may be longer still, limited for now only by the cases that have been presented and the legal imaginations of the parties, their counsel, and academic commentators. So far, these screens have shown the capacity for being effective in keeping out many of the cases that critics have identified as posing the greatest dangers to U.S. foreign policy, at least where the executive branch has made clear its wishes to keep cases out.

V. THIS OLD HOUSE?: OF RENOVATIONS AND STRUCTURAL SOUNDNESS

While existing legal screens can keep out many of the pests that critics of expansive human rights litigation in U.S. courts decry, the screens do have holes and do not fit their frames perfectly. Some ATCA and TVPA cases will still get through and may increase, certainly quantitatively and perhaps qualitatively, the opportunity for courts to complicate or frustrate the conduct of U.S. foreign policy. And foreign human rights cases that can be brought by other means will get through the screens as well. However, this still may not be the significant problem for the conduct of U.S. foreign policy that the critics fear or suggest. To evaluate the magnitude of these dangers, one needs a sense of the larger structure, which, on inspection, proves not

to be as obviously rickety, vulnerable to vermin, or in need of repair as it initially might seem or as critics of foreign human rights litigation in U.S. courts maintain.

That this larger structure might be reasonably sound becomes a good deal more plausible when one inspects it with an eye to the politics and law of U.S. foreign relations in contemporary and comparative perspective. As we saw earlier, the China-related ATCA and TVPA cases (and China-related human rights cases more generally) suggest that human rights litigation is likely to be only a relatively peripheral factor among the many forces and strains besetting the complex framework of one of the United States' most important international relationships. But this is only a part of a much larger and more complex setting that provides reasons to discount claims that ATCA and TVPA cases threaten seriously to derange American foreign policy.

A. *Warped Panes: The Distorting Lens of American Exceptionalism*

A standard challenge to expansive readings of the ATCA and other routes to foreign human rights litigation in U.S. courts claims that such jurisdiction is radically exceptional in two related respects.

One argument holds that there is something unjudicial, abnormal, and therefore worrisome in U.S. courts wading into the adoption and application of customary international human rights law in the fashion and to the extent undertaken in ATCA cases and other foreign human rights litigation. It is, in other words, radically exceptional from what courts are supposed to do. The claim is hardly uncontroversial and has produced an extended and contentious debate in academic writing on U.S. separation of powers and foreign relations law.²⁰⁸ Much of that debate is beyond the scope of this discussion. The more relevant point here is a different one: The critics' assertion that such actions by U.S. courts are strange and unusual sounds a good deal odder, and the claim that such actions are likely to produce foreign policy problems sounds a good deal less plausible, once one leaves behind a narrow focus on distinctively American preoccupations.

In much of the world, customary international law—including the customary international law of human rights—is unproblematically in-

208. For examples of this debate, including some that focus on human rights litigation, see *Human Rights*, *supra* note 19, at 461-64; *International Human Rights Litigation*, *supra* note 19, at 2181; *Illegitimacy*, *supra* note 19; Bradley, *supra* note 19, at 538-57 (opposing incorporation as unconstitutional and/or undemocratic); Koh, *supra* note 173; Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); *Translating*, *supra* note 19.

incorporated in domestic law, sometimes without specific legislative authorization and sometimes with a status superior to ordinary domestic law. Much of the world (like the good number of U.S. courts that have drawn the critics' censure) regards international human rights law as an expanding and progressively developing body of legal principles. Such legal principles almost inevitably demand a kind of on-going incorporation if they are to enter domestic law.²⁰⁹ In practice, such incorporation is, inescapably, at least partly judicial. (The myth that courts do not "make law" in civil law systems is tired and untenable.) Viewed in comparative perspective, it is the radically "dualist" U.S. system—particularly as portrayed or prescribed by critics of the ATCA and, more broadly, critics of the reception of international law into U.S. law by means other than legislation or treaties—that is the international outlier in keeping international law out of domestic law. Even the PRC is somewhat expansive on this score, despite China's generally being among the few states that have approached U.S. levels of wariness about permitting domestic law to be affected by international law.²¹⁰

Moreover, the focus on the (by American standards) exotic source of international human rights law should not lead one to lose sight of the fact that the substantive legal principles usually at issue in ATCA and TVPA cases (prohibitions of torture and gross, systematic violations of fundamental rights and freedoms, including arbitrary detention without process and on the basis of political beliefs) are not strangers to U.S. law. They hardly represent the types of displacements of U.S. sovereignty by heretofore unknown alien rules that are

209. For a survey of many European states' laws—often embodied in constitutional provisions—providing for the incorporation and on-going reception of international law, including customary international law, see generally *INTERNATIONAL LAW: CASES AND MATERIALS* 238-48 (Lori F. Damrosch et al. eds., 4th ed. 2001); *Translating*, *supra* note 19. On U.S. law concerning the reception of international law, see generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (accepting the international consensus against torture as being a part of international law and thus part of the law to be applied under the relevant U.S. law, that is, the ATCA); *The Paquete Habana*, 175 U.S. 677 (1900) (stating that international law is part of U.S. law). See also *supra* note 74.

210. See, e.g., Samuel S. Kim, *The Development of International Law in Post-Mao China: Change and Continuity*, 1 *J. CHINESE L.* 117, 158-59 (1987) (describing China's abandonment of the criticism of the theory of the superiority of international law over domestic law and embrace of an attack on the assumption of the superiority of domestic law over international law); Wang Tieya, *International Law in China: Contemporary and Historical Perspectives*, in *ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS* (Collected Courses of The Hague Academy of International Law) 326-33 (1990) (discussing provisions of Chinese law that permit international law, in the form of treaties, to enter domestic law and alter domestic legislation without further sovereign acts).

the usual target of those who resist internationalization of U.S. law or the supercession of U.S. domestic law by international law.

These considerations, of course, do not resolve the dispute over the U.S. constitutional and quasi-constitutional law governing the courts' role in foreign affairs or foreign human rights cases. By some lights, they may seem to strengthen some of the ATCA critics' policy arguments about the courts' potential for inexpertly mucking up the nation's international relations through expansive foreign human rights litigation by pointing to real-world examples of courts doing what critics condemn in U.S. courts' behavior. But they also cast a skeptical light on part of the critics' parade of horrors concerning the impact of human rights litigation on the conduct of U.S. foreign affairs. Simply, even the most shallow of comparative inquiries helps to remind us that many countries manage to conduct their foreign affairs with courts playing a not-so-narrowly cabined role in shaping the positions of "the state" (which international law generally regards as a unitary actor) on international legal and related issues.

It still might be supposed that courts roving about enforcing an expanding body of international legal norms might be especially dangerous in the American context because of the unusually high levels of independence and power that U.S. courts enjoy as a coequal and (on some accounts) unaccountable branch. The potential for courts to derange the nation's foreign policy might seem to be commensurately greater. But it is far from clear that this is so. True, the structure of governmental power and the extensive autonomy of courts in the United States may still seem exotic and hard to imagine in much of the world, especially in China and many of the other authoritarian regimes that have been the foci of human rights litigation. But that does not mean that foreign governments and their leaders fail to comprehend the U.S. structure. It does not mean that they view court decisions as of a piece with U.S. foreign policy as articulated by the executive branch or Congress because they see courts as agents of the political branches (as they arguably are in China and many ATCA target countries). Nor does it mean that they view judicial opinions as on par with legislative or presidential pronouncements because they view courts as the equal of the political branches in foreign policy (as a highly simplistic version of American constitutional law and politics might suggest). Indeed, these two imaginable foreign views of U.S. courts are contradictory. Moreover, there is considerable evidence that the PRC has a reasonably accurate and sophisticated understanding of U.S. separation of powers principles. In these circumstances, it is unwarranted and unwise—and would unnecessarily constrain and

undermine the political branches' conduct of foreign policy—to accept at face value statements from foreign governments (including notably China) that exaggerate opportunistically their incomprehension of U.S. separation of powers law, and that express shock and offense at judicial decisions (or, for that matter, congressional expressions of opinion that do not become law) and that purport to construe them as expressions of the foreign policy positions of the American government.²¹¹

A second argument claims that the ATCA (along with the TVPA and some of the other routes to foreign human rights litigation) is exceptional in reaching foreigners' human rights-abusing conduct abroad, and even “unique” in doing so through civil litigation by alien private parties, rather than criminal prosecution by the state.²¹² Here again, even a cursory review of other countries' practices is instructive. It erodes the claim of a malign instance of American exceptionalism. Many countries and some multilateral organs have been far more aggressive than the United States in adopting legislation basing jurisdiction (principally for criminal prosecution) on international

211. For indications that official China does understand the role of the courts in the U.S. system and U.S. separation of powers principles, see, e.g., *Making Political Civilization One of the Objects of Development is an Invention – Scholar Says We May Draw on Western Political Civilization, but Must Proceed from our National Conditions and Must Not Copy Indiscriminately*, TA KUNG PAO, Sept. 5, 2002, available at LEXIS NEXIS (presenting an analysis of “separation of powers” principles by a political scientist at the Chinese Communist Party's Central Party School, and finding such principles in need of adaptation to Chinese conditions); Peter Seidlitz, *Li Peng Clearly Rejects Western Democracy*, HANDELSBLATT, Dec. 1, 1998, available at LEXIS NEXIS (presenting PRC Premier's critique of the unruliness and unsuitability to Chinese circumstances of Western-style “separation of powers”); see also Mary Thornton, *U.S. Backs China's Move to Reopen 1911 Railroad Bond Case*, WASH. POST, Aug. 19, 1983, at A2 (describing negotiations between PRC top leader Deng Xiaoping and U.S. Secretary of State to enlist executive branch support for PRC motion to lift default judgment in initial *Jackson v. PRC* litigation); *Court Decision on Li Peng Applauded*, supra note 64; *Li Peng Tiananmen Lawsuit Could Be in Danger*, supra note 64; *Global Justice: The Li Peng Tiananmen Lawsuit and Universal Jurisdiction over Violations of Rights* supra note 1; Wong, supra note 1; Pomfret, supra note 11 (describing PRC calls on U.S. executive to intervene in Tiananmen/Li Peng and Falun Gong litigation).

212. For the argument that the “extraterritorial reach” of the ATCA is unusual and therefore offensive to other states and thus dangerous to U.S. foreign policy, see, e.g., *Universal Jurisdiction*, supra note 19, at 341-49; *International Human Rights Litigation*, supra note 19, at 2181; cf. *Universal Jurisdiction*, supra note 19 (noting the hypocrisy, and consequent offense to foreign states and problems for U.S. foreign policy, of the ATCA providing broader remedies for acts abroad by foreign governments than the liability other statutes impose for acts at home by the U.S. government); see also Ramsey, supra note 19. For contrary arguments asserting that the ATCA is not really an instance of conventional extraterritoriality but merely a matter of applying international law in U.S. courts and exercising relatively uncontroversial principles of universal jurisdiction to adjudicate or increasingly accepted principles of universal jurisdiction to prescribe, see *Translating*, supra note 19, at 22-24; Harold G. Maier et al., *The Role of International Law in Human Rights Litigation in the United States*, 82 AM. SOC'Y INT'L L. PROC. 456, 469-74 (1988).

law's universality principles to address severe human rights violations committed abroad by foreigners against foreigners.²¹³

While universality jurisdiction is thus more clearly established as an international legal principle on the criminal law side, the significance of the civil/criminal distinction is easily overstated, particularly from the perspective of a functional analysis that is most germane to assessing "derangement of foreign policy" arguments. The civil/criminal distinction that is so powerful in U.S. law fades in comparative context. Several major legal systems give victims far more control over whether to prosecute than is the case in the United States. In a good many legal systems, including China's, prudent plaintiffs do not pursue suits—and plaintiffs have poor prospects for success—if their civil claims are at odds with the government's agenda as expressed in the criminal law and elsewhere. More generally, and despite what some critics of the ATCA assert, extraterritorial exercises of criminal jurisdiction are, not surprisingly, regarded in many quarters as more problematic than extraterritorial exercises of civil jurisdiction.²¹⁴ Moreover, foreign states' views, including notably China's, have hardly been uniformly critical of civil litigation over foreign human rights abuses. The same PRC regime that has been predictably critical of human rights litigation in the United States concerning the PRC's behavior has supported litigation by Chinese "comfort women" and other Chinese national victims of Japanese war atrocities who have pursued suits in several venues against Japan. At the same time, Beijing has refrained from criticizing such sex slavery suits and a suit concerning the rights of PRC expatriate laborers, even though those suits were brought in the United States under the ATCA.²¹⁵

If one looks outside the narrow context of human rights cases, a claim that the ATCA's or TVPA's extraterritorial reach is an eccentric departure from the norm loses more of its persuasive force when one moves beyond a narrowly American perspective (and, specifically, a

213. See generally *Translating*, *supra* note 19, at 39-53; Van Schaak, *supra* note 19, at 295-97; *International Human Rights Litigation*, *supra* note 19; *Universal Jurisdiction*, *supra* note 19, at 327-41.

214. For the view that extraterritorial extension is more problematic for civil than for criminal jurisdiction, see *Universal Jurisdiction*, *supra* note 19, at 347-48; *International Human Rights Litigation*, *supra* note 19. For contrary views, see generally *Translating*, *supra* note 19, and *Corporate Liability*, *supra* note 19, at 408-11.

215. See *WWII Sex Slaves File Class Action Suit Against Japan*, *supra* note 82; *Chinese "Comfort Women" File Law Suit Against Japanese Government*, *supra* note 82; Faison, *supra* note 83; Cleeland, *supra* note 83 (concerning suits over "comfort women" and labor in Saipan). See also Morrin, *supra* note 204, at 441-45 (concerning the Saipan case); Nathalie I. Johnson, *Justice for "Comfort Women": Will the Alien Tort Claims Act Bring Them the Remedies They Seek?*, 20 PENN. ST. INT'L L. REV. 253 (2001).

narrowly American perspective that adopts a disputable characterization of U.S. practices as rarely enacting or construing laws to reach abroad). Nationality-based jurisdiction (whether based on the nationality of the plaintiff/victim or the defendant) and thin forms of territoriality-based jurisdiction provide unexceptional and often-used bases for legislation that permits civil suits or prosecution for actions (which can include human rights violations) committed by foreigners abroad. While most countries have not gone as far as some European states in opening their courts to criminal or civil proceedings by or against their nationals for activities abroad, or to suits based on the most transient of connections to the jurisdiction, many go some distance down that path.²¹⁶ Even the PRC—usually so wary of anything that might undermine the principles of strong territorial sovereignty—embraces and often exercises an expansive notion of its authority to legislate and enforce with respect to the behavior of its nationals abroad, whether as defendants or victims, both in the criminal and civil contexts.²¹⁷

Thus, many of the nations of the world manage to conduct their foreign affairs despite laws, legal processes, and views about the proper roles, functions, and scope of litigation that are in some ways functionally parallel to the ATCA or TVPA. Because of such parallels and because American legal idiosyncrasies are not so incomprehensible abroad as is sometimes assumed or asserted, there are ample reasons to be suspicious of arguments against expansive foreign human rights litigation in the United States that discern threats to the conduct of U.S. foreign policy from visions seen through the distorting lens of American legal exceptionalism.

216. Of course, it remains the case that foreign plaintiff suits against foreign defendants for torts committed abroad and with no particular connection (aside perhaps from the defendant's transient presence) are a step beyond nationality-based jurisdiction and even beyond some of the thinner conventional extensions of territorial-based jurisdiction, but this is a smaller step than it appears to be if one accepts and focuses only on the questionable depiction of U.S. law's aversion to extraterritorial extensions of jurisdiction. On European practices, see generally *Translating*, *supra* note 19; *Corporate Liability*, *supra* note 19, at 407-10.

217. On PRC views and practices, see ZHONGHUA RENMIN GONGHEGUO XINGFA, *supra* note 121 (concerning extraterritorial reach of PRC criminal law); Bing Ling, *Applicability of the PRC Criminal Law in Hong Kong and the Prospect of a Rendition Agreement between Hong Kong and the Mainland*, 29 H.K.L.J. 393 (1999); see also 2 *Falun Gong Members Held After Lawsuit Against Jiang Zemin*, *supra* note 86 (concerning suit in PRC against U.S.-based Falun Gong spiritual leader Li Hongzhi). On Chinese sensitivity on the subject of territorial sovereignty, see generally Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 AM. SOC'Y INT'L L. PROC. 267 (2000).

*B. Shifting Foundations: Globalization's Erosion of the Foreign/
Domestic Distinction*

Arguments that rely upon elements of American legal exceptionalism to criticize the U.S. courts' openness to foreign human rights litigation suffer from a further problem: They are most tenable if the U.S. legal system can function as a relatively self-contained domestic system. The great jumble of developments often grouped under the unsatisfactory heading of "globalization," however, has done much to undermine such isolation and insulation. "Globalization" has been undermining a broad, fundamental assumption of ATCA and TVPA critics' arguments: There is a coherent, separable and relatively limited realm of foreign affairs-related cases (of which the ATCA and TVPA cases are an extreme subset) in which courts can—and should—stay out or be kept out, and this exclusion of courts can be accomplished without undermining the larger judicial role that is appropriate in civil litigation concerning domestic matters.

Here again, Chinese human rights cases provide particularly striking illustrations of a larger phenomenon. On one hand, PRC-related actions brought under the ATCA or TVPA (or kindred legal frameworks) have been relatively rare, dramatic, and controversial—and controversial in part because of their seeming remoteness from the ordinary business of U.S. civil litigation. The Chinese gulag, coerced abortion and sterilization, killing or jailing pro-democracy protesters and adherents to an obscure Eastern quasi-religion are not items on the ordinary American judicial docket. On the other hand, much of what has been at issue in such litigation has involved matters that are not obviously unconventional or non-routine concerns for U.S. courts. The Chinese cases illustrate that foreign human rights litigation often, and probably increasingly, departs from the prototypical *Filartiga*-style claim brought by a foreign national who happened to make it to the United States, who was lucky enough to find his persecutor transiently present or in political exile in the United States, and who thus could prosecute his suit over abuses suffered in his home country at the hands of his countrymen. While some of the Chinese suits take this form (including, for example, the Tiananmen-related political persecution litigation and much of the Falun Gong litigation), others already brought or easily imaginable do not.

As we have seen, such filed and fileable actions involve multinationals with strong presences in the United States, investment of American capital in China, the production of Chinese goods for sale in U.S. markets, and activities conducted on U.S. soil. The parties to such suits include a growing number of Chinese officials who travel regu-

larly and in official capacities to the United States to engage in widely varied activities with significant effects in the United States, members of the large groups of PRC nationals (including tens of thousands of students and asylum-seekers) who are or who seek to be in the United States as long-term or permanent residents, U.S. nationals who exercise their expressive and associational and religious freedoms in the United States, or U.S. nationals who travel to China to undertake a range of activities, including some that American law and policy regard as exercises of fundamental, internationally protected rights.

Such are some of the consequences of the increasingly dense and complex cross-national connections and international interactions that comprise “globalization.” They have helped to make U.S.-PRC relations more complicated and more important, and thus have made U.S. litigation over Chinese human rights practices seem both more feasible and more threatening to the conduct of U.S. foreign relations in recent years. But they also have made it far more difficult to keep cases addressing Chinese human rights abuses out of U.S. courts without also restricting those courts’ reach over matters that are ordinarily and appropriately within their ambit.

As the foregoing inventory of real and imaginable types of China-related human rights cases underscores, even when brought under the ATCA or by alien plaintiffs under the TVPA, and especially when based on other grounds, U.S. lawsuits concerning human rights abuses abroad are, or can be expected to become, on average, a good deal less “foreign” and less disconnected from the ordinary substance and process of “domestic” litigation. Rejecting or avoiding foreign human rights litigation less clearly and less often involves shunning something remote and alien, or waiting for home-country institutions—or collective international institutions—to address problems that might be described as predominantly intra-national foreign problems, not of specific concern or interest to the United States except perhaps as a foreign policy matter.²¹⁸ Instead, keeping out ATCA, foreign plaintiff TVPA, or other “foreign” human rights cases is significantly and increasingly likely to be possible only at considerable cost in the performance of more ordinary and more widely valued judicial functions, including addressing activities in the United States, with substantial impact on the United States, against U.S. residents and citizens, or by U.S. citizens or others notoriously or protractedly present in the United States. Keeping out the pests that critics have identified in

218. See *Human Rights*, *supra* note 19, at 468-69 (arguing that alien tort actions are costly to the international system because they risk preempting or disrupting local remedies or international institutional responses); see also Van Schaack, *supra* note 19 (arguing the opposite view).

Filartiga-like cases thus looks as if it may require bricking up the windows—a radical measure indeed for dealing with the real, or even the imagined, dangers to the conduct of U.S. foreign policy that the ATCA's critics have stressed.

It is of course possible that the flood of increasingly unexotic-seeming foreign human rights cases that globalization may be unleashing will produce a backlash against U.S. openness to foreign human rights litigation, not least because such cases conjure a specter of serious disruption to U.S. foreign policy and extensive judicial trampling in areas that had been seen as political branch prerogatives. That presumably is part of what critics foresee and perhaps hope to foster by depicting the dangers that they see lying down the path staked out by *Filartiga*, *Marcos*, *Karadzic*, and their progeny.²¹⁹

But it seems also quite possible that arguments for restriction of the judicial role face an increasingly tough uphill climb as the implications of globalization continue to unfold. Hard choices (in the form of eschewing litigation of claims that are not “foreign” in the full, traditional sense and that seek redress for harms involving people, places, activities and interests that U.S. courts ordinarily address) are presumably less likely to be made than seemingly easier ones (in the form of not opening the courthouse door to suits with no obvious or perceived connection to the United States and the ordinary business of U.S. courts).

Moreover, even where the cases remain more conventionally *Filartiga*-like, as the most visible PRC human rights cases have been, globalization may exert considerable pressure against retrenching U.S. litigation over foreign human rights abuses. Globalization has entailed a new moral interdependence or moral immediacy. The international growth of interest in universal jurisdiction and in the idea of international crimes reflects a more general emerging sense that severe human rights abuses anywhere are the legitimate concern—and perhaps therefore the legitimate objects of the law and courts—every-

219. See Goldsmith, *supra* note 47 (assessing the problem of the U.S. “double standard” of holding foreign governments to account in U.S. courts through the ATCA but not allowing parallel recovery against the U.S. government). One plausible version of playing out the logic of this argument is that the contradiction and the tensions and criticisms the “double standard” generates could and should best be resolved by cutting back the ATCA's reach. See also *Illegitimacy*, *supra* note 19, at 369 (arguing that the internationalist or expansionist version of incorporation of customary international human rights law by the courts through interpretation of the ATCA or similar means risks undermining the legitimacy of international law and the progress of human rights); cf. *Human Rights*, *supra* note 19, at 469 (arguing that resort to the ATCA risks cutting off the development of more effective and more legitimate international institutional or legal mechanisms for addressing human rights violations).

where. More concretely, at least where the specific abuse is severe and telegenic enough, the perpetrator is important enough, or watchdog groups are skilled and dogged enough, foreign human rights violations seem less remote. The CNN and NGO effects can be quite formidable, as the Tiananmen Incident of 1989 and, to a lesser degree, the PRC crackdown on Falun Gong and political dissidents more broadly have shown. It would take a rather thorough-going legal anti-realist to think that judges would be uniformly unaffected—and should be expected to be unmoved—by such developments when they decide how to handle at least the borderline ATCA suit or other foreign human rights case.

In addition, there are signs that the political branches regard as acceptable and even politically desirable relatively broad or expanding judicial authority to entertain suits involving at-least-partly-foreign human rights abuses. Faced with vivid evidence, effective lobbyists and concerned voters, elected officials (immediately or through their constituents) have seemed vulnerable to the influences of the CNN and NGO effects and the impact of globalization more generally. Again, Chinese cases provide illustrations. With the Bush executive order concerning political asylum for Chinese nationals after Tiananmen (and addressing coercive family planning as well as the repression of political dissent), the President showed himself willing to countenance a widening of the openings for judicial consideration of foreign human rights conditions (including through judicial review of asylum decisions). As we have seen (and however much executive guardians of presidential foreign affairs prerogatives may dislike such litigation), the executive branch has done little to exercise its considerable power to stop ATCA and Chinese plaintiff TVPA suits against PRC state and official defendants.

Congress too can be and has been moved to open new doors to the courthouse and to forego closing doors that judges have opened wider. Congress adopted one of the key provisions under which Chinese plaintiffs have sued (the TVPA), largely in response to a judicial decision denying recovery under the FSIA to an American national tortured abroad by a foreign government, and it also adopted a terrorism exception to the FSIA for U.S. plaintiffs. (Although the State Department initially opposed such legislation, the President signed it.) Congress passed several pieces of legislation that paralleled provisions in the post-Tiananmen executive orders, in one instance entrenching in the immigration laws a coercive family planning provision that PRC nationals have invoked in seeking asylum and judicial reviews of asylum that have put PRC human rights practices under the U.S. courts'

scrutiny. While Congress has considered and declined to enact laws that would have clearly and explicitly broadened the courts' jurisdiction to hear some classes of foreign human rights cases, it tellingly has not used such reexaminations of the existing statutory framework as an opportunity for reversing or reigning in the judicial constructions of the ATCA and TVPA that have been the target of voluminous attacks by academic—and some non-academic—critics.²²⁰

If this assessment of the impacts of globalization and the earlier discussion of “flies” that get in despite the “screens” are right, then the arguments against the ATCA or relatively expansive judicial interpretations of it, the foreign plaintiff part of the TVPA, and perhaps other routes to foreign human rights litigation begin to look less like a matter of reining in rogue and potentially foreign policy-deranging courts. They thus look more like a rather narrow originalism (that Congress did not intend such expansive litigation when it enacted the ATCA in 1789) or formalism (that Congress has not sufficiently specifically authorize courts to take jurisdiction over many of the ATCA or TVPA cases that the courts have decided).²²¹ That is, the air of “judicial roguishness” dissipates and the asserted dangers of judicial derangement of the political branches' conduct of foreign policy fade in a world, reshaped by globalization, in which: Courts face genuinely hard interpretive choices among seemingly legitimate and compelling notions of proper judicial roles; much of the same foreign behavior can be the subject of litigation under relatively uncontroversial statutes; Congress and the President seem relatively unconcerned with much that U.S. courts have done to condemn “foreign” human rights abuses; and the political branches have staked out critical positions on foreign human rights practices while acquiescing in or even extending the courts' exercises of jurisdiction over cases arising from those practices.

*C. How About if We Take Out That Non-Structural Wall?
So What if the Floor's a Little Tilted?: Plural Institutions
and Foreign Policy*

As we have seen, one major element in the “derangement of foreign policy” critique of foreign human rights litigation in U.S. courts is the claim that such litigation can subvert a unitary national voice in foreign policy or can force a political branch to “speak” on delicate

220. Concerning amendments and contemplated amendments to the ATCA and relevant portions of the FSIA and the enactment of the TVPA, see generally Bederman, *supra* note 173, at 281-85; Edward D. Re, *Human Rights, Domestic Courts and Effective Remedies*, 67 ST. JOHN'S U. L. REV. 581 (1993); *International Human Rights Litigation*, *supra* note 19, at 2156-57, 2181-82.

221. See generally, *Illegitimacy*, *supra* note 19, at 256-68; *The Alien Tort Statute*, *supra* note 19.

matters in foreign affairs (or face the undesirable consequences of failing to speak and thereby allowing the litigation to go forward unchecked and unguided). From this critical perspective, the political branches' near-monopoly—and the executive branch's dominance and relatively unfettered discretion—in the conduct of foreign relations must be preserved, for consequentialist reasons as well as constitutional ones, which may themselves be rooted in prudential calculations. The view that dangers to the national interest flow from multiple voices in foreign relations, or from pressures on the executive branch to articulate a potentially controversial position in foreign policy, enjoys a rather impressive pedigree.²²² But the “one voice” and “forced to speak” arguments do not give critics the sockdologer they seek in the debate over foreign human rights litigation in U.S. courts. This aspect of the critics' argument weakens once one considers the virtues and value of plural institutions in U.S. foreign relations.

As we have seen ATCA, TVPA, and other human rights cases can and do add a second (or third) voice to the chorus of U.S. foreign policy and put pressure on the executive branch to “speak” in situations that the executive branch and—perhaps, although less certainly—Congress might rather have avoided. China-related cases have provided vivid examples. The awkward U.S. intervention on the service of process issue in the Li Peng/Tiananmen case, the evident diplomatic embarrassment of a rash of process-serving on PRC officials in the United States, and the somewhat sheepish-sounding explanation of the executive branch's limited authority to stave off litigation that Beijing found offensive are all arguably instances of courts forcing a reluctant executive branch to intervene and make its views known or risk even greater damage to foreign policy. Similarly, judicial disquisitions on the horrors of Tiananmen, the injustice of the PRC's criminal process and similar issues constitute cases of the courts adding an additional and different (at least in tone or in timing) voice in foreign policy.

On the other hand, as we have also seen, the notion that courts have a proper and legitimate role to play in making decisions that shape—and complicate—foreign relations is far from heretical, internationally and even in the United States. As we have also seen, it becomes still less exotic amid globalization's erosion of the distinction between foreign affairs-related and more quotidian subjects of litigation in U.S. courts.

222. See *supra* note 178 (concerning act of state doctrine); *supra* note 188 and accompanying text (concerning political question doctrine).

More to the point, it is not always clearly or inevitably the case that a separate judicial voice or litigation-induced pressure on the political branches to speak in human rights cases impedes or undermines the conduct of the nation's international relations, even in cases where the government officials tasked with putting out the diplomatic fires would rather not see the courts tossing matches, and despite the reflexive opposition of the executive branch to legislation that would expand courts' authority to hear foreign human rights cases. Simply put, the conduct of U.S. foreign policy can sometimes be enhanced—and is not often unambiguously harmed—by these “problems” that arise in the context of human rights litigation in U.S. courts.

At least where the executive branch or the political branches endorse a critical view of a foreign regime's practices, the addition of a judicial voice through litigation may extend and reinforce the political branches' foreign policy. Opposition to and criticism of human rights abuses abroad are, after all, stated goals of U.S. foreign policy. These aims—and specific critiques of much of the behavior at issue in foreign human rights litigation—have been amply embodied in numerous statutes (including legislative directives to the President, the State Department, and other entities within the executive branch), executive orders and less formal statements of the United States' agenda in international relations. In this content, cases brought by ATCA claimants, or foreign TVPA plaintiffs and their ilk, can play a role loosely akin to suits relatively routinely undertaken by private attorneys general or *qui tam* relators or, more broadly, by plaintiffs asserting private rights of action provided or implied by regulatory statutes. The substantive principles being enforced may be different—core international law norms (which proponents regard as incorporated into U.S. law) rather than more conventional U.S. laws—but the function is much the same. Private individuals, aided by the court, provide additional enforcement resources to supplement limited public ones, and ferret out evidence of proscribed or condemned behavior that might otherwise have gone undetected and unaddressed by government and the courts.

It is plausible to portray several instances of China-related human rights litigation as fitting with this pattern, including the *Bao Ge* prison labor case, the suit concerning actions against U.S.-resident Falun Gong practitioners, much of the litigation concerning coercive family planning, and arguably other cases as well. These are all examples of litigation in which there was very little doubt about the political branches' condemnation of the targeted activity, in some instances expressed through legislative or executive action addressing the same

or similar behavior.²²³ Under these conditions, the lawsuits' functions include bringing to bear additional sanctions and additional resources to expose and address the activities or types of activities deplored by the political branches.

United States civil litigation over human rights abuses abroad can also further the executive branch's or the political branches' conduct of foreign policy by providing additional means that contribute to a subtler and more varied array of responses to foreign human rights abuses. Legislative or presidential sanctions may sometimes appear to exact too high a price, whether in terms of diplomatic relations or domestic political calculations, or they may seem to constitute wielding a sledgehammer where a scalpel would do (and where toothless rhetoric or doing nothing at all seems better than swinging the sledgehammer).

Under these conditions, the executive—or the political branches collectively or elements within the political branches that Congress or the President has directed to pursue a human rights agenda—may favor, or at least benefit from, the courts offering a plural, critical voice on the relevant foreign policy matters. Judicial chastisement or disquisition on the evils of the foreign sovereign's or its agents' behavior can help to advance the conduct of the political branches' foreign policy by adding a desirable degree of flexibility and an opportunity for “the U.S.” to make the critical point without making such criticism into *the* unitary “U.S.” position, and without the executive branch bearing full—or perhaps much of any—responsibility with the foreign government. U.S. civil litigation over the PRC's repression of political dissent and Falun Gong, the sometimes-brutal implementation of family planning policies, forced prison labor, and the like, can be credibly depicted in these terms given the political branches' combination of tolerance or support of such litigation and eschewal of substantial sanctions against China for the underlying behavior. And the sometimes-loud complaints, but lack of tangible response, by the PRC suggests that this judicial aspect of “U.S. foreign policy” sometimes finds its mark.

Viewed in this light, foreign human rights litigation also may present opportunities for calculated political branch speech or silence, or a summing of the sometimes-divergent views of “U.S.” or “executive” branch positions, rather than problematic pressure on the executive to speak or to bear the risks of remaining mute. Executive branch silence or a diluted executive branch support for the litigation (in the form of saying it would be inappropriate for the executive branch to interfere)

223. See *supra* notes 67-68.

permits a still-more calibrated degree of criticism with limited foreign relations accountability. So too, and further down a spectrum of responses, the executive branch can explain to the foreign government that, much as it would like to help, it cannot do anything to stop the litigation—much as occurred in the context of some of the Falun Gong suits. Still farther along the continuum, the executive branch could articulate a position that might allow it to play hero—or would-be hero—to the foreign government without losing some—or perhaps any—of the benefits of judicial exposure and examination of the underlying human rights situation. The United States' role in the service of process question in the Tiananmen-based suit against Li Peng illustrates what this course can look like: The U.S. government patiently explains to the PRC that it is doing its best to make the case go away, yet unless and until the court accepts that argument, the plaintiffs' case can go forward.

Such perspectives on judicial roles in human rights-related aspects of U.S. foreign relations rub uncomfortably against a few staples of analysis of U.S. constitutional law and the constitutional aspects of U.S. foreign relations law that are often key underpinnings of arguments critical of the ATCA and kindred routes to the U.S. courthouse. First, the structure of separated powers is supposed to guard against informal and too easy inter-branch collaboration, which critics might see as an evil that pervades the foregoing picture of human rights litigation. Even if this is good constitutional theory (albeit of a narrowly America-centric sort that ignores constitutions' function as power-creating instruments), it does not suggest that such inter-branch cooperation deranges, rather than advances, the conduct of U.S. foreign policy and the effective pursuit of the national interest abroad. Moreover, prudential arguments for a strong separation of powers—usually focusing on the preservation of liberties at home—have little resonance in a discussion of the role of courts in U.S. foreign policy concerning other states' human rights practices.

Second, the judicial branch's proper role is especially narrowly constrained in the field of foreign affairs, a proposition very much at odds with any expansive notion of courts' jurisdiction over foreign human rights cases. This form of "foreign affairs exceptionalism" too may be fine constitutional theory (although it is not uncontroversial in the U.S. context or of particular resonance abroad). But it too does little to answer the functional question that is at issue in "derangement" arguments. As the foregoing discussion of ways of comprehending the functions of human rights litigation in U.S. foreign policy suggests, it is not obvious why some of the usual asserted practical virtues of plural

institutions in the U.S. constitutional structure—that three heads may be better than one—cannot under the right circumstances extend to foreign affairs, particularly those aspects of U.S. foreign relations that focus on human rights claims that, in the domestic context, are often thought to be especially suited to judicial definition and enforcement.

Third, a unitary executive is a constitutional value, one that weighs heavily against those aspects of the foregoing account of foreign human rights litigation that countenance lawsuits as a means for extending conflicts within the executive or reaching a middle ground in intra-executive (or inter-branch) disagreements over the precise place of human rights in foreign policy. Again, as we have seen, it is not clear that the half-way house that human rights litigation might help to offer is not the muddy middle ground where the internally divided executive would stand if the ordinary non-judicial policy mechanisms could effectively produce such a position. Moreover, the “unitary executive” is hardly an uncontroversial principle. Beloved by advocates of strong presidential power, the unitary executive concept has had to contend with the venerable notion that agencies (including the State Department and its human rights bureau) are equally or predominantly the creatures of Congress (and thus not free to disregard its mandates to pursue a more aggressive human rights agenda than that preferred by the President, the Secretary for the department, other cabinet-level agencies, or other bureaus within the same department). And one of the supposed functional attractions of the unitary executive principle—accountability by attaching to the President singular political responsibility (as a correlate of unitary political control)—may be a plus for democratic governance in general. But it is, at best, an ambivalent virtue in the context of foreign affairs and, specifically, the risk of deranging the conduct of foreign affairs. There, a greater degree of opacity is generally accepted as necessary, wise, or at least tolerable. And there, the greater accountability that would stem from an insistence on a principle of unitariness would run, in effect, to foreign powers as well as to domestic electorates.

In any event, the prospect that a robust judicial role in adjudicating foreign human rights cases under the ATCA and other statutes will derange foreign policy remains greatly limited by the political branches’ ability to stop much such litigation. If the political branches share the critics’ perception of serious threats to derange foreign policy in the behavior of U.S. courts in foreign human rights litigation, they can act on that perception. Congress is free to enact—at the urging of the President or on its own—legislation to curtail the ATCA, other statutory routes to the courthouse, and the courts’ interpreta-

tions of those statutes. As we have seen, this has not happened despite the obvious occasions to address the supposed problem that the enactment of the TVPA, consideration of human rights-related amendments to the FSIA and other revisiting of the statutory frameworks for human rights-related litigation have provided.

As we also have seen, if the executive branch concludes that particular litigation does not serve the interests of U.S. foreign policy or the political interests of the President, the executive branch can intervene—with a high likelihood of success—to stop the case, often at a very early stage before much offense can have been caused or, at least, when executive branch intervention on the targeted regime's behalf can undo much of any damage already done. The act of state and head-of-state immunity doctrines invite such intervention. The political question doctrine at least tolerates it. Courts' openness to amicus briefs and more informal appearances by the United States in ATCA, TVPA, and other foreign relations-related cases provide an avenue even where such conventional doctrinal hooks are unavailable or unappealing.

Certainly, the executive branch has been willing and able to intervene in some foreign human rights cases. Sometimes it has done so aggressively to stop the litigation. Other times it has pointedly expressed a lack of opposition to the suit's going forward.²²⁴ As the China human rights cases—particularly the Tiananmen and Falun Gong cases—illustrate, the executive branch more often takes the intermediate course, either staying silent or intervening in a limited way to nudge the court or calm the offended foreign government. This varied repertoire of executive branch responses suggests that the executive branch's conduct of foreign relations may gain useful flexibility

224. See, e.g., Kochan, *supra* note 19, at 180-81 (describing the argument of the United States under the Bush administration, in one of the *Marcos* cases that it was for Congress, not the courts, to define an offense against the law of nations, and describing the very different U.S. indication to the court, during the Carter administration, that the U.S. had no objection to the suit's going forward); Edward D. Re, *The Universal Declaration of Human Rights and Domestic Courts*, 31 SUFFOLK U. L. REV. 585, 596-97 (1998) (describing Department of State intervention on behalf of defendant in *Nelson v. Saudi Arabia*); *International Human Rights Litigation*, *supra* note 19, at 2181, n.256 (describing U.S. amicus briefs in *Filartiga*, *Kadic*, and *Marcos* litigations); see also *Court Decision on Li Peng Applauded*, *supra* note 64; *Li Peng Tiananmen Lawsuit Could Be in Danger*, *supra* note 64; *The Li Peng Lawsuit and Universal Jurisdiction over Violations of Rights*, *supra* note 1; Wong, *supra* note 1; Pomfret, *supra* note 11; see also *supra* note 64-66 (concerning executive branch role in *Li Peng/Tiananmen* case and its more passive role in *Falun Gong* cases); *Tachiona v. Mugabe*, 169 F. Supp. 2d at 297-303 (concerning issue of diplomatic immunity/head of state immunity suggestion from executive for Mugabe and co-defendant); *Hiebert & McBeth*, *supra* note 120 (concerning Department of State opposition to suit against Exxon Mobil for activities in Indonesia); *Thornton*, *supra* note 211 (concerning State Department role in securing the lifting of default against PRC in *Jackson v. PRC* railway bonds case).

from the existing jurisprudence of foreign human rights litigation cases (even if the executive branch generally would prefer that the jurisprudence were less expansive concerning jurisdiction), or at least that the executive branch does not see the adjudication of many such cases as posing severe threats to the conduct of foreign policy. If this is right, prudential arguments for walling off the courts are misguided or, at least, overreaching. And even a more modest assertion that the floor should be “tilted” toward the executive branch (by, for example, presumptions that a case not go forward unless the executive branch approves) has little to recommend it.

VI. CONCLUSION

Suits in American courts over human rights abuses committed in China suggest that the ATCA, the foreign plaintiff provision in the TVPA, and U.S. litigation concerning human rights abroad more generally, do not create the threat to derange the conduct of the nation’s foreign policy that critics of foreign human rights litigation often portray. Because the U.S.-PRC relationship is among the most important, sensitive, and volatile bilateral relationships that the United States has, foreign human rights litigation’s failure to imperil those ties casts significant doubt on the claim that such suits are likely to cause significant harm to the conduct of the country’s international affairs.

Reflection upon the China-related human rights cases makes clear that, in evaluating consequentialist claims about the evils of the ATCA, TVPA and kindred routes to the U.S. courthouse, context matters, and an examination of relevant contexts generally provides reasons to discount fears of derangement. Diplomatic context matters. Human rights litigation is but a small part—and at most a minor source of strains—in the United States’ dense, sprawling and heavily tended relationship with the PRC. Much judicial scrutiny of China’s human rights practices would occur in the absence of the ATCA, TVPA, and similar statutes. Asylum and refugee cases, administrative law and habeas corpus actions, suits by U.S. plaintiffs, and suits for harms occurring in the U.S. could still be brought to achieve court review of PRC human rights practices. The same is surely true with respect to other states that matter for U.S. foreign policy.

Legal or doctrinal context matters. United States law affords many mechanisms for keeping out human rights litigation that seems relatively likely to portend harms to the nation’s conduct of foreign policy. And, especially where the executive branch chooses to intervene, several of those means seem available—and perhaps most fully availa-

ble—to deal with human rights cases that seem to pose the most serious dangers to U.S. foreign policy, specifically those that implicate major relationships with still-in-power regimes in strategically important countries, such as the PRC.

International and political context matters. Other countries, including China, practice themselves and tolerate in others (including the United States) legal structures and processes that embody traits that are or that closely resemble what critics identify as the dangerous features of the ATCA and other aspects of the U.S. law of foreign human rights litigation. “Globalization” includes a number of developments that have been eroding the foreign/domestic distinction and that have been changing the domestic politics of U.S. foreign human rights litigation in ways that increasingly tip the balance against those who see suits over “foreign” abuses as likely to impose foreign policy costs that outweigh the benefits such litigation provides or the costs that a significant retrenchment in such suits would bring. Finally, the assertion that foreign human rights litigation in U.S. courts adds a troubling second or third voice to the articulation of U.S. foreign policy, or forces the political branches to speak when they would rather remain silent, betrays an insufficiently subtle and rather controversial understanding (one partly rooted in archaic and overly inward-looking notions of relationships among the three governmental branches) of the complex political process of making and implementing U.S. foreign policy in the contemporary world.

As the China-related human rights cases suggest with particular vividness, once these contextual factors are taken into account, ATCA suits, or foreign plaintiff TVPA actions, or other claims requiring or seeking U.S. judicial scrutiny of “foreign” human rights conditions and practices, do not seem likely to bring down, or even much damage, the edifice of American foreign policy.

