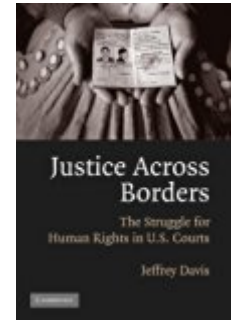


Jeffrey Davis. *Justice across Borders: The Struggle for Human Rights in U.S. Courts.* Cambridge: Cambridge University Press, 2008. xi + 303 pp. \$29.99, paper, ISBN 978-0-521-70240-9.



Reviewed by Paul Parker

Published on H-Human-Rights (February, 2009)

Commissioned by Rebecca K. Root (Ramapo College of New Jersey)

In the past thirty years, attorneys with human rights groups have sought to overcome the de facto immunity that most human rights abusers have experienced. Historically, perpetrators have faced little threat from their own country's justice system, while sovereignty and territorial jurisdiction have constrained courts of other countries from meddling. However, two cases have opened U.S. courts to human rights litigation. Jeffrey Davis, a lawyer and political scientist, has written an important book that traces the development of human rights law under the Alien Tort Statute (ATS), the crucial role of nongovernmental organizations (NGOs) in creating and litigating these cases, and the implications such cases have for relations among government branches and with other nations.

Chapter 1 traces the history of legal recognition of human rights, including Nuremburg and the seminal U.S. case *Filartiga v. Pena-Irala* (1980), which allowed suit under the ATS of 1789 against a Paraguayan national for acts committed in Paraguay. Chapter 2 discusses the history of the

ATS, and the obstacles to holding human rights abusers accountable. Significantly, the United States Supreme Court determined in *Sosa v. Alvarez-Machain* (2004) that the ATS recognized federal court jurisdiction. While courts may hear ATS cases, the underlying claim in the cases must come from "international law violations existing in federal common law" (p. 25). The burden for contemporary human rights lawyers is to demonstrate that alleged injustices violate standards that are "specific, obligatory, and universal" (p. 25).

Lawyers have taken up the challenge. Since 1980, 156 U.S. district court cases and 77 U.S. court of appeals cases have been brought under the ATS or the 1994 Torture Victim Protection Act. In chapters 3 through 6, Davis discusses several case characteristics that have affected the likelihood of plaintiffs prevailing. Chapter 3 examines the important role of human rights NGOs in creating and shaping this field of law in the past thirty years. Through interviews with lawyers, Davis demonstrates the effort in assembling and pressing a case. He also draws on political science liter-

ature on the role of interest groups in litigation to explain why plaintiffs represented by NGOs are more likely to win than plaintiffs with private representation. Reasons include the resources to develop a case, expertise, and selectivity in bringing cases to trial.

Human rights cases often implicate foreign relations, an enterprise traditionally handled by the executive; chapter 4 considers issues of separation of powers. Except for the Carter administration, most administrations have been hostile to such litigation. Such hostility can take the form of a "Statement of Interest" asking courts to dismiss a case, or filing an *amicus curiae* brief supporting the defendant. Beyond the argument that courts should not meddle in foreign affairs, an argument based on reciprocity looms large. As policy, American officials do not want U.S. citizens subject to the extraterritorial jurisdiction of other nations.

The fifth chapter considers the obstacles to bringing abusers to court in the United States, and the legal defenses once they are there. In conjunction with overcoming the traditional limitation of territorial jurisdiction, defendants may argue that a federal district court is not the proper forum to decide the case, or that the plaintiff has not exhausted their remedies in their home country. Individual defendants may also claim official immunity or claim the alleged crimes were done as acts of the state. Corporations are also subject to suit under the ATS; chapter 6 considers the challenges plaintiffs face in bringing these claims. With few exceptions, NGOs have been unsuccessful both in suing corporations for aiding and abetting repressive regimes, and in expanding human rights claims to include environmental destruction or economic coercion.

Similar to his 2006 journal article, in chapter 7, Davis reports a series of empirical tests of the factors identified in the prior four chapters.[1] In trials in U.S. district courts, the likelihood of a plaintiff victory is statistically reduced when either the U.S. government is a defendant or when

the administration offers a statement of interest. Meanwhile, representation by an NGO and assertion of international law violation enhance the likelihood of plaintiffs prevailing at both the trial and appellate levels. Plaintiffs have lower success on appeal when the defendant either is a corporation or invokes the political question doctrine. Surprisingly, the ideology of the judge, a variable that dominates political science literature on judicial outcomes, is irrelevant. Interviews with human rights attorneys suggest that Republican-appointed judges bring a conservative law-and-order bent to international law, and adherence to the rule of law dominates. However, another factor suggested by Davis is forum shopping, whereby attorneys file cases in jurisdictions with jurists they expect will be more favorably disposed. This unresolved puzzle is significant: Denying ideology matters counters judicial decision-making scholarship, while forum shopping is a predictable adaptation to ideological differences. One explanation affirms the universal power of human rights, while the other suggests the importance of careful strategy.

In the final chapter, Davis claims, "my findings demonstrate that the federal courts are slowly shedding traditional norms of sovereignty, territorial jurisdiction, and judicial restraint in international issues. In limited cases, some federal judges appear to be embracing emerging doctrines of universality and internationalism" (p. 264). An obvious result is the possibility of holding accountable human rights perpetrators. But even unsuccessful cases can be important for individual plaintiffs who are given a voice. Additionally, since these are civil suits, lawyers have the power of discovery; being able to acquire documents and depose corporate officials can produce evidence that criminal prosecution could never reveal. Historical records of atrocities deny perpetrators the ability to "move on" without notice.

This text is excellent in inviting discussion of law and litigation generally, and in the field of human rights more specifically. What is a lawsuit for? Should courts defer to the executive branch, largely entrusted with the conduct of foreign policy, or is it important that courts should hold the executive accountable for its decisions? Could lawsuits against U.S. corporations lead to a worsening of standards, as they withdraw from some areas for fear of suit, to be replaced by more callous foreign corporations?

A strength of the book is the numerous interviews Davis conducted with attorneys from NGOs and the departments of state and justice. It is interesting to see government lawyers dismiss the importance of NGO efforts by claiming that they do not win cases, and claim that NGOs litigate only for the ability to raise funds from donors on the merits of their good works. Meanwhile, plaintiffs' attorneys discuss the important effects for the victims of having brought suit: holding an accused accountable, giving name to the horrors visited upon them, and feeling a sense of empowerment.

Despite the heavy use of cases, this is not a casebook. The analytic presentation of factors affecting the likelihood of prevailing in litigation contributes to repetition of cases and interviews. Some pages use extensive quotes, which are often divided in a distracting manner. Undoubtedly, it is a challenge to keep straight the numerous interviews, sources, and case excerpts; there are over 1,400 footnotes. At times, this reviewer searched several pages to find the antecedent citation, occasionally finding the complete citation later in the text. A few grammatical errors distract as well.

Davis has made a valuable contribution that brings together scholarship from political science and human rights law. The first three chapters present a sound historical and legal analysis of the development of legal accountability in human rights cases, with insider perspective from human rights NGOs. The remainder of the book more an-

alytically considers factors that affect plaintiffs' chances of success. Students of human rights may read either part, or the whole, profitably.

Note

[1]. Jeffrey Davis, "Justice without Borders: Human Rights Cases in U.S. Courts," *Law and Policy* 28 (2006): 60-82.

D

C

C

A

discusses

H

R

Non-Governmental Organizations (

)

(pp. 71-87)

:

D

C

,

(pp. 254-256)

(p. 259)

(p. 210)

D

S

J

(p. 283)

(chapter 8, *passim*)

: T

If there is additional discussion of this review, you may access it through the network, at
<https://networks.h-net.org/h-human-rights>

Citation: Paul Parker. Review of Davis, Jeffrey. *Justice across Borders: The Struggle for Human Rights in U.S. Courts*. H-Human-Rights, H-Net Reviews. February, 2009.

URL: <https://www.h-net.org/reviews/showrev.php?id=23542>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.