Human Rights Litigation in U.S. Courts: A Hypocritical Approach

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HUMAN RIGHTS LITIGATION IN U.S. COURTS: A HYPOCRITICAL APPROACH

Mark Gibney

I. INTRODUCTION

Since the 1980 landmark decision in *Filartiga v. Pena-Irala*, U.S. courts have been asked to hear claims alleging the commission of human rights violations occurring in other countries. In one group of cases -- suits by foreign plaintiffs against foreign state actors -- U.S. domestic courts have provided a vital forum for individuals seeking some measure of justice against those responsible for committing heinous crimes. Yet, these same courts have given a much different reception to foreign plaintiffs who allege that the U.S. government is itself responsible for the commission of human rights abuses. In one suit after another, foreigners who have been harmed by the pursuit of U.S. foreign policy goals have had their claims dismissed by a panoply of revolving defenses. If there is to be any relief and/or compensation for the human consequences of U.S. foreign policy it is to come from the political branches -- although there is only scant evidence of this occurring. Finally, U.S. courts have shown some willingness to hear human rights cases brought by American citizens, so long as these suits do not implicate the U.S. government.

II. THE WILLINGNESS TO HEAR CLAIMS ALLEGING HUMAN RIGHTS VIOLATIONS COMMITTED BY OTHERS

At the time that it was decided, *Filartiga* was an audacious and unprecedented lawsuit. Two Paraguayan nationals, Dr. Joel Filartiga and his daughter Dolly, brought suit in a U.S. district court for the alleged death by torture in Paraguay of Joelito Filartiga, son and brother of the plaintiffs. According to the complaint, in 1976 the defendant Pena-Irala, chief of police in Asuncion, Paraguay,
kidnapped Joelito and tortured him to death in retaliation for the father's opposition to President Alfredo Stroessner's regime. The family instituted criminal action against Pena-Irala in Paraguay but these actions proved futile, resulting in the arrest and eventual disbarment of the family's attorney.

By 1979 Dolly Filartiga was living permanently in New York City. It was at that time that she learned that Pena-Irala was visiting the U.S. Filartiga filed a civil suit in federal district court against Pena-Irala on behalf of herself and her father, alleging subject matter jurisdiction under, inter alia, the Alien Tort Claims Act (ATCA), a statute passed by the very first Congress, but essentially moribund since that time. The District Court dismissed the complaint, but the Court of Appeals reversed. In his opinion for the Second Circuit, Judge Irving Kaufman held that the "law of nations" language in the statute included evolving notions of international human rights law, not simply what this term might have meant in 1789 when the statute was passed. After reviewing the United Nations Charter, various U.N. resolutions, and a host of international treaties and national constitutions (including that of both Paraguay and the United States), the Court held that under the law of nations, there was a "clear and unambiguous" prohibition against official torture. On the basis of this finding, the Court held that the ATCA provided federal jurisdiction when "an alleged torturer is found and served with process by an alien within our borders." On remand, the District Court implemented the Court of Appeals holding, awarding the Filartigas a default judgment against Pena-Irala (who, by then, had returned to Paraguay) of more than $10 million.

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2 28 U.S.C. § 1350 (1982). In its current codification the statute reads: "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."
3 630 F.2d at 878.
4 This judgment has never been satisfied. In fact, to date, this has been true of all ATCA judgments. See generally Howard Tolley, Jr., Interest Group Litigation to Enforce Human Rights: Confronting Judicial Restraint, in WORLD JUSTICE? U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS (Mark Gibney ed., 1991).
Filartiga has spawned a number of ATCA cases, nearly all of which have been successful. In Forti v. Suarez-Mason, Argentine citizens residing in the U.S. brought suit against a former Argentine general for human rights violations that occurred under his command during the "dirty war" in that country. While the Court found that it had jurisdiction with respect to torture, prolonged arbitrary detention, and summary execution, it initially dismissed the claims relating to disappearances and cruel, inhuman, and degrading treatment. Unfortunately, while this litigation was ongoing, the District Court certified the extradition of General Suarez-Mason on charges of murder, kidnapping, and forgery. Suarez-Mason was then returned to Argentina, although he never had to stand trial for his crimes and was eventually pardoned.

Other successful ATCA cases include Abebe-Jiri v. Negewo, a case in which three Ethiopian women were awarded a judgment against their former torturer, and Paul v. Avril, where a federal magistrate awarded a $41 million damage judgment to the victims of Prosper Avril, a former Haitian dictator, for violating their human

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6 Id. The court subsequently granted a motion to reconsider with respect to causing disappearances, but not with respect to cruel, inhuman and degrading treatment. Forti v. Suarez-Mason, 694 F. Supp. 707 (N.D. Cal 1988). The court held that “causing disappearances” is wrong under customary international law, because of the general recognition among states that this specific practice was prohibited. However, the court held that “cruel, inhuman or degrading treatment” was not a violation of customary international law because it was not definable. The court held that it could not tell if the norm encompassed purely psychological harm, for example, or purely verbal conduct.
8 For a critique of the manner in which the case against General Suarez-Mason was handled see Mark Gibney, International Human Rights as an International Concern: The Case of Argentine General Suarez-Mason and Lessons for the World Community, 24 CASE W. RES. L. REV. 165 (1992).
rights. In *Todd v. Panjaitan*, a federal judge in Massachusetts awarded $14 million to Helen Todd, whose young son had been murdered by Indonesian troops during a massacre in East Timor.

*In re Marcos Human Rights Litigation* was the first class action suit brought under the ATCA, the first jury verdict, and finally, the first case to be decided on the merits. The case consolidated five separate civil suits filed in three different judicial districts, all alleging various forms of human rights abuses under Ferdinand Marcos' reign. All five cases were originally dismissed by the district courts in which they were filed on the basis of the Act of State doctrine, but the Ninth Circuit reversed in a brief and unpublished opinion, and at the same time consolidated the cases for trial.

More recently, in 1995 a federal district court in Massachusetts issued a $47.4 million judgment against the former Defense Minister of Guatemala, Hector Gramajo, in a suit brought by nine Guatemalans and a U.S. nun. The Guatemalan plaintiffs, all Kanjobal Indians, had been brutalized by government soldiers under Gramajo's command. Sister Diane Ortiz, an American nun who taught school in Guatemala, had been abducted, raped, and otherwise tortured by Guatemalan security and military forces. Because of her U.S. citizenship, Ortiz could not sue under the ATCA. Instead, she successfully brought suit against Gramajo under the Torture Victim Protection Act, which the Court applied retroactively. Finally, in

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   An individual who, under actual or apparent authority, or under color of state law, of any foreign nation,
   1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
   2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative or to
Mushikiwabo v. Barayagwiza, a default judgment was entered in favor of a group of Rwandan plaintiffs who had brought suit against a leader of a Hutu political party which was behind the massacre of Tutsi civilians in that country.

At the time of this writing, there are pending ATCA suits in Belance v. FRAPH and two companion cases, Doe v. Karadzic and Kadac v. Karadzic. Belance is a suit brought by Alerte Belance, a Haitian mother of three, against the Front for Advancement and Progress in Haiti (FRAPH). In October 1993, four henchmen of this para-military organization came to the Belance household in search of the plaintiff's husband, a supporter of President Aristide. Not finding him at home, they abducted his wife and took her to a "killing field" where she was nearly decapitated and left for dead. Suit was filed in the U.S. in 1994, seeking relief for attempted summary execution, cruel, inhuman and degrading treatment, arbitrary detention, assault and battery, and kidnapping. One of the more unique aspects of the suit is that it is an attempt to hold an organization, rather than an individual officer, responsible for human rights violations.

Karadzic involves a suit brought by two Muslim Serb women who filed an ATCA claim in February 1993 against Radovan Karadzic, the self-proclaimed leader of the Bosnian Serbs. The central focus of the case is the use of organized mass rape by Serb forces in Bosnia as a means of carrying out the Serb goal of "ethnic cleansing." The District Court dismissed the suit on the ground that international law cannot be applied against an "unrecognized" government such as the Bosnian Serbs. On appeal, the Second Circuit reversed this decision holding that the plaintiffs had sufficiently alleged violations of customary international law and law of war for purposes of the

any pursuant who may be a claimant in an action for wrongful death.

Id. Unlike the ATCA, the TVPA is not limited to claims by foreign plaintiffs, so that actions can be brought by U.S. citizens as well.

17 No. 94-2619 (E.D.N.Y. filed June 1, 1994).
ATCA, and that the judicial action was not precluded by the political question doctrine.

Not all ATCA claims have been successful, the most notable being *Tel-Oren v. Libyan Arab Republic.*¹⁹ *Tel-Oren* involved a 1978 terrorist incident on the coast in Israel. Thirteen members of the Palestinian Liberation Organization (PLO) landed a boat in Israel and hijacked a bus. In a confrontation with Israeli police, the members of the PLO shot at their hostages and blew up the bus, killing thirty-four adults and children and wounding seventy-five others. Survivors of the attack filed suit in the district court of the District of Columbia, basing jurisdiction on the ATCA. The plaintiffs included Israeli, Dutch and American citizens.

Affirming the District Court's dismissal of the case, the panel for the Second Circuit deciding the case issued a one page *per curiam* opinion, accompanied by lengthy concurring opinions from each of the three judges. Judge Edwards' opinion came the closest to the reasoning in *Filartiga.* Edwards was of the opinion that the ATCA did provide a cause of action for aliens asserting violations of the law of nations. However, Edwards based dismissal on the fact that, while the law of nations prohibits torture by state actors and persons acting under color of state law, the PLO (as a non-state actor) was not subject to the same rules of international law. Judge Bork's opinion for dismissal was based on several factors. One was that such a suit would violate separation of powers principles. Bork also took the position that while the ATCA granted jurisdiction, it did not also create a cause of action for an individual alien. Finally, Bork would restrict violations of the "law of nations" in the statutory language to those that were recognized as international crimes in 1789: violation of safe-conduct, infringement on ambassadorial rights, and piracy. Judge Robb voted to affirm dismissal on the basis that the case presented a nonjusticiable political question. In his view, federal courts were not able to determine the legal status of international

terrorism, nor trace individual responsibility for any particular act of terrorism. Robb also feared that there was no logical stopping place for such lawsuits.

We are here confronted with the easiest case and thus the most difficult to resist. It was a similar magnet that drew the Second Circuit into its unfortunate position in *Filartiga*. But not all cases of this type will be so easy. Indeed, most would be far less attractive. The victims of international violence perpetrated by terrorism are spread across the globe. It is not implausible that every alleged victim of violence of the counter-revolutionaries in such places as Nicaragua and Afghanistan could argue just as compellingly as the plaintiffs here do, they are entitled to their day in the courts of the United States. The victims of the recent massacres in Lebanon could also mount such claims. Indeed, there is no obvious or subtle limiting principle in sight.  

Suits directly against foreign sovereigns have also been unsuccessful, although there was some initial promise. In *Von Dardel v. U.S.S.R.*, suit was brought in the district court for the District of Columbia by the half-brother and legal guardian of the Swedish diplomat Raoul Wallenberg against the Soviet Union, concerning the unlawful seizure of Wallenberg in 1945 and his subsequent imprisonment and possible death while under Soviet custody. The Court initially held that the ATCA provided jurisdiction and granted a default judgment when the U.S.S.R. refused to defend the case. However, when the Soviets made a limited appearance to contest jurisdiction, the District Court granted a motion to vacate the judgment for lack of jurisdiction under the Foreign Sovereign

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20 726 F.2d at 826 (citations omitted).
Immunity Act (FSIA).22

The most noteworthy development in this area occurred in *Siderman v. Republic of Argentina.*23 Siderman was a torture victim who also had property confiscated in Argentina. Even after fleeing his home country Siderman's nightmare did not end, as Argentine authorities sought to have him arrested for fraud while he was residing in Italy and the U.S. In 1982, Jose Siderman and his family brought suit in federal district court. The Court first entered a default judgment for the plaintiff, but subsequently reversed and dismissed on the ground that there was no explicit exception in the FSIA for allegations of human rights violations. The Court of Appeals reversed and remanded the case. With respect to the expropriation claim, the Court held that the Siderman's had alleged sufficient evidence to bring the claim within both the commercial activity and international takings exceptions to the FSIA's grant of foreign sovereign immunity.24 With regard to the torture claim, the Court held that the FSIA does not specifically provide for an exception to sovereign immunity based on *jus cogens.*25 However, the Court held that by pursuing Siderman in this country, the Republic of Argentina might have waived its sovereign immunity for purposes of the FSIA. It then remanded the case to allow Argentina to rebut this evidence; however, in September 1996, Siderman reached an out of court settlement with the Argentine government.26

22 28 U.S.C. §§ 1330, 1602-1611 (1993). This statute immunizes any "political subdivision of a foreign state or an agency or instrumentality of a foreign state," unless certain exceptions apply. These are: 1) an express or implied waiver, 2) involvement in commercial activities, 3) taking of property that is currently present in the U.S., 4) acquisition of a gift by succession of property that is currently present in the U.S., 5) commission of noncommercial torts inside the U.S., and 6) involvement in certain maritime activities.


24 965 F.2d at 712.

25 *Id.* at 718.

In sum, despite some limitations, U.S. courts have played a very unique role in the world in terms of providing a forum for those who have been victims of human rights abuses. It is remarkable to think that it was only slightly more than a decade and a half ago that the prospects of bringing to trial torturers and murderers from Paraguay or Ethiopia or Indonesia or Guatemala or Haiti or anywhere else seemed completely out of the realm of the possibility. Much has changed in a relatively short period of time. The U.S. has now opened its courts to those who have suffered human rights abuses at the hands of foreign state actors, so long as personal jurisdiction can be obtained over the defendant. As we will see in the next section, however, these same courts have not been nearly so willing to hear allegations of human rights abuses that implicate the U.S.

### III. Allegations of Human Rights Violations by the United States

Perhaps emboldened by the success of foreign plaintiffs in *Filartiga* type cases, U.S. courts have also been asked to hear cases where the alleged perpetrator of human rights violations is the U.S. government itself. In *Sanchez-Espinoza v. Reagan*, 27 three groups of plaintiffs challenged the human consequences of U.S. policy in Nicaragua. 28 For present purposes, the most noteworthy group

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28 The complaint and supporting briefs filed by the plaintiffs provided very graphic detail of their alleged suffering. The plaintiff-appellant brief reads in part:

Twelve of the plaintiffs or their close family members have been subjected to murder, torture, mutilation, kidnapping and rape as a result of U.S.-sponsored paramilitary activities designed to ravage the civilian population in Nicaragua. . . .

The facts of the injuries to each of the plaintiffs or their family members reflect brutal, inhumane activities violative of fundamental laws of civilized nations. For example, plaintiff Maria
consisted of twelve Nicaraguan civilians who were suing nine then present or former officials of the Executive branch including President Reagan, three non-federal defendants, and a group of unidentified officers or agents of the U.S. The basis of the suit was the allegation that the U.S. government was providing support to the contra rebel forces who were committing terrorist raids in Nicaragua, in violation of fundamental human rights established under international law and the fourth and fifth amendments of the United States Constitution. These non-resident alien plaintiffs sought monetary damages, as well

Bustillo de Blandon, a resident of Nicaragua, saw her husband and five sons murdered and tortured by members of the Nicaraguan Democratic Front (FDN) -- the main counterrevolutionary group funded by the federal defendants. On October 28, 1982, the contras entered her home, seized her husband, a lay pastor, and removed their five children from their beds. In front of the parents, the children were tied together, castrated, their ears cut off and their throats slit. The father was then killed.


29 The other two groups of plaintiffs were twelve members of the U.S. House of Representatives who claimed that the Executive branch violated Congress' ability to declare war, as well as provisions of the War Powers Resolution. In addition, the congressional plaintiffs claimed that the activities of the Executive branch violated the so-called Boland Amendment, which had prohibited further funding for the contra rebel forces. The other group of plaintiffs were Florida residents who charged that the U.S. sponsored paramilitary training camps in that state constituted a public nuisance. Id. at 3-4.

30 Ronald Wilson Reagan, individually and in his official capacity as President of the United States; William Casey, individually and in his official capacity as Director of Central Intelligence; Alexander M. Haig, Jr.; George P. Schultz, individually and in his official capacity as United States Secretary of State; Thomas O. Enders, individually; Vernon Walters, individually and in his official capacity as United States Ambassador-at-Large; Caspar Weinberger, individually and in his official capacity as United States Secretary of Defense; Nestor Sanchez, individually and in his official capacity as United States Assistant Secretary of Defense; John D. Negroponte, individually and in his official capacity as United States Ambassador to Honduras. First Amended Complaint for Damages, Declaratory and Injunctive Relief at 8-9, Sanchez-Espinoza v. Reagan, 770 F.2d 202.
as declaratory and injunctive relief prohibiting further U.S. military involvement in Nicaragua.

Despite recognizing the "gravity and legal complexity of the plaintiffs' claims," the District Court dismissed the suit on the basis of the political question doctrine, holding that: "In order to adjudicate the tort claims of the Nicaraguan plaintiffs, we would have to determine the precise nature of the United States Government's involvement in the affairs of several Central American nations, namely, Honduras, Costa Rica, El Salvador, and Nicaragua."

The Court of Appeals affirmed this decision, but on the basis of sovereign immunity rather than the political question doctrine. Responding to the civilians' claim for monetary damages, then Judge Scalia writes:

> It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are concededly and as a jurisdictional necessity, official actions of the United States. Such judgments would necessarily interfere with the public administration, or restrain the government from acting, or . . . compel it to act . . . .

In terms of the claim for injunctive relief, the Court held:

> The support for military operations that we are asked to terminate has, if the allegations in the complaint are accepted as true, received the attention and approval of the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four sovereign states -- Nicaragua, Costa Rica, 

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\[31\] 568 F. Supp. at 601.
\[32\] Id.
\[33\] 770 F. 2d at 207 (citations and emphasis omitted).
Honduras, and Argentina. Whether or not this is, as the District Court thought, a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief.\(^{34}\)

Ironically enough, Scalia's opinion in *Sanchez-Espinoza* took special pains to distinguish itself from *Filartiga v. Pena-Irala*.\(^{35}\) Also noteworthy is the fact that the Court failed to make reference to a case from the same circuit that had been decided only a year before, *Ramirez de Arellano v. Weinberger*.\(^{36}\) In this case, an American citizen living in Honduras brought suit claiming that the U.S. government had unlawfully seized and destroyed his property in Honduras, turning his meat packing plant into a military training post. The District Court dismissed the case on the basis of the political question doctrine,\(^{37}\) but the Court of Appeals reversed in an *en banc* decision. In sharp contrast to the decision a year later in *Sanchez-Espinoza*, the Court held that the plaintiff was not attempting to have

\(^{34}\) *Id.* at 208.

\(^{35}\) Scalia writes:

> Since the doctrine of foreign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply here, being based upon considerations of international comity, rather than separation of powers, it does not necessarily follow that an Alien Tort Statute suit filed against the officer of a foreign sovereign would have to be dismissed. Thus, nothing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*.

*Id.* at 207 n.5 (citations omitted).


the judicial branch monitor the conduct of U.S. foreign policy in Central America, nor did the legal claim challenge the U.S.'s relations with any foreign country. Instead, the Court in *Ramirez* held: "The Executive's power to conduct foreign relations free from unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."

The suggestion [by the defendant] that a United States citizen who is the sole beneficial owner of viable business operations does not have constitutional rights against United States government officials' threatened complete destruction of corporate assets is preposterous. If adopted by this court, the proposition would obliterate the constitutional property rights of many United States citizens abroad and would make a mockery of decades of United States policy on transnational investments.

Would a Honduran national in the same situation as Ramirez have the same kind of claim against the U.S. government? That appears very unlikely, although it is not exactly clear why this would be. The same issue arises as to what it is, exactly, that differentiates *Filartiga* from *Sanchez-Espinoza*. Scalia attempted to distinguish the two cases on the basis of domestic versus foreign sovereign immunity, but that is a distinction without a difference. David Cole has argued that the only way to explain *Sanchez-Espinoza* is to understand the enormous reluctance of U.S. courts to address accusations of wrongdoing by the U.S. government.

*Sanchez-Espinoza* asks the federal courts to apply the same international human rights norm -- the

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38 745 F.2d at 1515.
39 Id. at 1515-16.
40 Sanchez-Espinoza 770 F2d. 202, 207 n.1; see supra accompanying note 35.
proscription against official torture -- to officials of the United States government. Like Filartiga, Sanchez-Espinoza raises fundamental questions about the role of domestic courts in enforcing customary norms of international law. On the one hand, Sanchez-Espinoza is an easier case than Filartiga; plaintiffs do not ask United States courts to reach out to the domestic affairs of a foreign state.\footnote{Cole continues:}

On the other hand, Sanchez-Espinoza is a more difficult case than Filartiga; it asks the United States judiciary to interpose the norms of international law between itself and a coequal branch of the government, and to impose limits on the executive that derive only indirectly from the constitutional mandate. As a purely pragmatic matter, it seems it is much easier to award $10.4 million in damages to Filartiga against a judgment-proof ex-police chief from Paraguay than to enjoin the military activities of the President of the United States. As a matter of law, however, it is less easily defensible for federal courts to take jurisdiction in Filartiga and refuse it in Sanchez-Espinoza.\footnote{Notwithstanding the decision in Sanchez-Espinoza, other suits alleging human rights abuses by the U.S. government have been brought, in each instance with the same result. Saltany v. Reagan involved a suit brought by a group of 55 plaintiffs, all residents of Libya, whose decedents (all civilians) were either killed, suffered

\begin{itemize}
  \item Id.
\end{itemize}
personal injury, or whose property was damaged or destroyed during the course of U.S. military air strikes on that country in April 1986, in retaliation for the bombing of a disco in West Berlin on April 5, 1986 that resulted in the deaths of two U.S. servicemen. The defendants were the President of the U.S., various civilian and military officials of the U.S. government, Prime Minister Margaret Thatcher of the United Kingdom, and the U.S. and United Kingdom governments.

The District Court dismissed the case in a summary fashion. The claim against the United Kingdom was dismissed on the basis of the Act of State doctrine and those relating to the U.S. defendants on the basis of sovereign immunity, although the Court readily conceded that the alleged conduct would be "tortious" were it to be judged by any civil law standards.\textsuperscript{44} For reasons left mostly unexplained, however, the bombing and killing of innocent civilians were never judged by such standards. Indeed, they were not judged by any standards at all. Rather, the Court made reference to the fact that the defendants had exercised "discretion in a myriad of contexts of utmost complexity and gravity, not to mention danger. And each acted, as duty required, in accordance with the orders of the commander-in-chief or a superior order."\textsuperscript{45} Somehow from the fact that orders were being followed, the Court proceeded to hold that the defendants enjoyed immunity from suit.

Notwithstanding the death and harm to innocent civilians from this aerial attack, and despite the absence of hostilities between Libya and the U.S., what was galling to the Court was that suit was ever brought in the first place.

The plaintiffs, purportedly citizens or residents of Libya, cannot be presumed to be familiar with the rules of law of the United States. It is otherwise, however, with their counsel [former U.S. Attorney General Ramsey Clark]. The case offered no hope whatsoever

\textsuperscript{44} Id. at 322.
\textsuperscript{45} Id.
of success, and plaintiffs’ attorneys surely knew it.\(^{46}\)

The Court continues:

The injuries for which suit is brought are not insubstantial. It cannot, therefore, be said that the case is frivolous so much as it is audacious. The Court surmises it was brought as a public statement of protest of Presidential action with which counsel (and, to be sure, their clients) were in profound disagreement\(^{47}\)

Despite the perceived "audaciousness" of the suit, the Court refused to apply sanctions against the plaintiffs' attorneys. On appeal, the Court upheld the dismissal of the plaintiffs' claim, but reversed the denial of Rule 11 sanctions\(^{48}\) with regard to the United Kingdom.\(^{49}\) In the Court's view, federal courts are not to serve as a forum for protests to the detriment of parties with serious disputes waiting to be heard. In its haste to pass judgment against those bringing the lawsuit, however, the Court ignored a number of factors. One is that there was (and continues to be) serious dispute whether the military action against Libya was warranted in the sense that both the West Berlin police and the Federal Republic of Germany publicly disputed whether Libyan agents were involved in the incident, with evidence implicating Syria instead. Second, even if Libyan agents were somehow involved in the disco bombing, the air raids conducted in retaliation violated the laws of war. Article 25 of the Hague Regulations of 1907 states: "The attack or bombardment, by whatever means, of towns, villages,

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) FED. R. CIV. P. 11.

dwellings, or buildings which are undefended, is prohibited.\textsuperscript{50}

Unfortunately neither of these two arguments was given much weight by the Court. Nor were the courts apparently moved to action either by the loss of innocent civilian life, or the complete lack of any compensation for the plaintiffs. Instead, not only were these harms viewed as mere abstractions, but they somehow became justified in the name of U.S. national security.\textsuperscript{51}

The pursuit of U.S. foreign policy objectives in the Persian Gulf gave rise to a slightly different kind of claim in \textit{Nejad v. United States}.\textsuperscript{52} The action arose out of the downing of Iran Air Flight 655 over the Persian Gulf by missile fire from the USS Vincennes, killing all of the passengers and crew aboard. The commercial airliner had been mistaken for a military aircraft, and was mistakenly fired upon for that reason. Plaintiffs in the case were the families and economic dependents of four of the passengers. The defendants were the U.S. and twelve defense contractors who supplied the ship with various military equipment. The District Court dismissed the plaintiffs' case, evincing the usual deference to the political branches.

"[I]t is indubitably clear that plaintiffs' claim calls into question the Navy's decisions and actions in execution of those decisions. The conduct of such affairs are constitutionally committed to the President

\textsuperscript{50} Annex to the Convention, Regulations respecting the Laws and Customs of War on Land, Art. 25, Convention (No. IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277.

\textsuperscript{51} Consider a different situation: the U.S. bombing of Baghdad in June 1993 in retaliation for an alleged assassination plot against former President Bush while he was visiting Kuwait earlier that year. Although Iraqi suspects were under the control of Kuwaiti officials, the U.S. launched 23 Tomahawk cruise missiles fired from warships in the Persian Gulf, with 16 of these hitting their intended targets. It is estimated that more than 20 civilians were killed from the missile attack, for which the U.S. expressed "regret," but offered no form of compensation. Eric Schmitt, \textit{U.S. Says Strike Crippled Iraq's Capacity for Terror: 16 of 23 Missiles Are Said to Hit the Targets}, N.Y. Times, June 28, 1993, at A1; \textit{Six Arabs Deny Role in Any Plot to Kill Bush}, N.Y. Times, July 4, 1993, at 11; Tim Weiner, \textit{Plot by Baghdad to Assassinate Bush Is Questioned}, N.Y. Times, Oct. 25, 1993, at A5.

\textsuperscript{52} 724 F. Supp. 753 (C.D. Cal. 1989).
as Commander in Chief and to his military and naval subordinates."

Quite recently, the U.S. government has made ex gratia payments to the families of those killed in the Vincennes incident, agreeing to pay $300,000 to each of the wage-earning victims and $150,000 to each non wage-earning victims.

The U.S. invasion of Panama, and the resulting harm caused thereby, has also given rise to litigation in this country. In *McFarland v. Cheney*, suit was brought on behalf of a group of Panamanian civilians who suffered personal injury, property loss, and death of loved ones during the American invasion that began on December 20, 1989. Estimates of the number of civilians killed range from 200 to ten times that number. Many of the petitioners in the case filed administrative service claims with the U.S. Army Claims Service seeking compensation for their losses and injuries. Although civilians injured during the course of the U.S. invasion of Grenada in 1983 had been compensated in this fashion, the Army Claims Service

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53 *Id.* at 755.


55 In another air accident case in the Middle East, the U.S. has decided to pay $100,000 to each of the families of eleven foreign citizens killed in the accidental downing of two Army helicopters by two American fighter jets over northern Iraq in April 1994. This action, however, prompted some public outcry and congressional attention because the families of at least four of the American victims of this accident are demanding the same lump sum payment as that provided the families of the British, French, Turkish and Kurdish citizens who died. Eric Schmitt, *Payment in Copter Downing in Iraq Brings Bitter Dispute*, N.Y. TIMES, Sept. 27, 1995, at A10.

56 Several lawsuits have been brought by Panamanian corporations. See, e.g., *Industria Panificadora, S.A. v. U.S.*, 763 F. Supp. 1154 (D.D.C. 1991) involved a suit alleging that as a result of the U.S. invasion, the plaintiff's property was looted, burned, and destroyed while the Panamanian Defense Force was engaged militarily with the U.S. Armed Forces. The Court granted the defendant's motion to dismiss, holding that the decision to invade Panama was an exercise of governmental discretion.


rejected all of the Panamanian compensation claims on the grounds that injury occurred during U.S. combat operations. The District Court upheld this administrative finding, and this judgment was affirmed on appeal. While Panama has received emergency assistance from the U.S. since the invasion, no funds have been set aside for the relief of the innocent victims of the combat.

In sum, while U.S. courts have provided a welcome forum for aliens suing foreign state actors for the commission of human rights abuses in other countries, these same courts have not been willing to hear similar claims brought by foreign plaintiffs who are alleging that the U.S. government is responsible for committing human rights abuses. Instead, such suits are viewed as invitations to violate separation of power principles. The problem is that courts grossly exaggerate the role they say they are being asked to play -- in one case after another the judge would have you believe that compensating innocent victims would be akin to the courts directing U.S. foreign policy -- that what gets completely lost is the nature of the individual claim that is being presented. In a very cavalier manner, then Judge Scalia in Sanchez-Espinoza suggests that if foreign plaintiffs are to

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59 One of the ironies is that in a case brought before the Inter-American Commission of Human Rights against the U. S. for exactly the same kind of harms as alleged in McFarland, Salas v. United States, 1993 INTER-AM. Y.B. ON H.R. (Inter-Am. C.H.R.) 476, among the defenses erected by the U.S. government was that the petitioners had not filed a claim with the Army Claims Service. The OAS Commission rejected these defenses, and held that it would hear the merits of the claim. Evidentiary hearings were held in 1995 and a final decision of the OAS commission is pending.

60 971 F. 2d 766 (D.C. Cir. 1992).


62 A different claim, but with the same predictable result, was presented in Antolok v. United States, 873 F.2d 369 (D.C. Cir. 1989). Plaintiffs in this case were a group of former and current residents of the Marshall Islands suing for harm to them from American nuclear testing in the Pacific. The district court had dismissed the case on the basis of the political question doctrine, and this decision was upheld by the appeals court, but mainly on the basis that Congress had removed jurisdiction from federal courts to hear such cases when it signed a Compact with the government of the Marshall Islands.
receive any relief for the harm done to them from the conduct of U.S. foreign policy, this must come from the political branches, not from the courts. But this answer is anathema to our entire system of government. What is so radical -- and completely unacceptable -- about such a position is that it is essentially saying that when the U.S. government is pursuing activities in other countries (and apparently this would include "domestic" operations such as the drug war), it is not only not bound by our own laws or by the Constitution, but that our entire structure of checks and balances is somehow irrelevant. As Thomas Franck has warned; “Judicial deference ignores the evident truth that in our system a law that is not enforceable by adjudicatory processes is no law at all. A foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bonds of law.”

IV. HUMAN RIGHTS SUITS BROUGHT BY UNITED STATES CITIZENS

The plaintiffs in Committee of U.S. Citizens in Nicaragua v. Reagan were individual U.S. citizens and organizations representing the same who lived and worked in Nicaragua during the civil war there. In their complaint, the plaintiffs alleged that the U.S.

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63 Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' (sic) using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist. 770 F. 2d at 209.

64 In a very perceptive piece Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain, John Quigley argues that our courts have been completely incapable of recognizing human rights abuses (such as kidnapping and abductions) committed by agents of the federal government in waging the war on drugs. John Quigley, Our Men in Guadalajara and the Abduction of Suspects Abroad: A Comment on United States v. Alvarez-Machain, 68 NOTRE DAME L. REV. 723 (1993).


government's support for the contra rebel forces was in violation of international law and the U.S. Constitution. In terms of the former, the plaintiffs relied on the judgment of the International Court of Justice in *Nicaragua v. United States* which determined that the U.S. had violated international law and thereby "[i]s under a duty to immediately cease and refrain from all acts as may constitute breaches of the foregoing obligations." Among the acts in violation of international law were the "[t]raining, arming, equipping, financing and supplying [of] the [C]ontra forces."

The plaintiffs' constitutional claim alleged that the U.S. government trained and supported the Contras who, in turn, detained, threatened and deprived plaintiffs of their liberty. Part of the claim of physical harm and the threat of harm rested on a generalized fear of the recurring violence in Nicaragua; but in addition, the plaintiffs also alleged that the Contra leaders had specifically targeted U.S. citizens living in that country as "internationalists" and as "enemy targets."

The District Court dismissed the complaint on the basis of the political question doctrine. The D.C. Circuit Court of Appeals affirmed, but took special measures to base its holding on other grounds: "We believe the trial court's reliance on the political question doctrine was misplaced, particularly to the extent that appellants seek to vindicate personal rights rather than conform America's foreign policy to international norms." Despite the Court's recognition of the seriousness of the plaintiffs' claims and the fact that they were presenting personal (rather than political) rights, the Court affirmed dismissal on the basis that the plaintiffs failed to state a claim upon which relief could be granted. With regard to the international law claim, the Court held that the ICJ ruling was without domestic effect. With regard to violations of international law more generally, the Court held that only if the President and the Congress had violated a peremptory norm of international law, might there be some domestic

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68 859 F. 2d at 932, quoting 1986 I.C.J. 14, 149.
69 Id.
70 Id.
challenge to that policy.\textsuperscript{71}

The plaintiffs' constitutional claim was based on a fifth amendment argument that the U.S. government was providing assistance to the Contras, who were in turn depriving the plaintiffs of their life, liberty, and property without due process of law. Although the Court seemed concerned by the seriousness of this claim, it ultimately held that the link between the U.S. and the Contras was not strong enough to impute the actions of the latter to the former.

Appellants must demonstrate . . . that the United States' involvement in this targeting of Americans in Nicaragua is sufficient to constitute a due process violation by our government. Appellants' fifth amendment claim founders on this requirement; their complaint does not allege that the United States has participated in any way in the targeting or injuries against Americans or their property in Nicaragua. Nor do they allege that such injuries are intended consequences of our government's support for the Contras.\textsuperscript{72}

The claim of another American citizen also arising out of events in Nicaragua has received a somewhat different reception. \textit{Linder v. Calero Portocarrero}\textsuperscript{73} involves a suit brought in federal court for the death of Benjamin Linder, an American mechanical

\textsuperscript{71} Describing the domestic effects of \textit{jus cogens} norms, the Court holds:

Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or other individuals, that policy might well be subject to challenge in domestic court under international law. \textit{Id.} at 941.

\textsuperscript{72} \textit{Id.} at 945 (emphasis in original).

engineer who moved to Nicaragua in August 1983. In the complaint it is alleged that while building a hydroelectric plant in the El Cua region, the group that Linder was with was ambushed by a Nicaraguan Democratic Force (FDN) patrol. Linder was immobilized by wounds to his legs and arm. These wounds would not have caused Linder's death, but members of the FDN then proceeded to torture him by inflicting thirty to forty wounds to his face with a sharp pointed object. Subsequently, Linder was killed by one of the Contras, who shot him in the temple from a distance of less than two feet. The defendants were three Contra organizations and four individuals. The basis of the plaintiff's claim was that the Contra rebels targeted Linder as a U.S. citizen, and that some of the activities in furtherance of this terrorist plan took place in the Southern District of Florida, in violation of state law.

The District Court dismissed the case on the basis of the political question doctrine.

In our view, the court is without discoverable and manageable standards to adjudicate the nature and methods by which the contras chose to wage war in Nicaragua. The realm of issues determinable by a court or jury with reference to Florida tort law simply does not include issues such as these arising out of conflict between belligerents in the midst of a foreign civil war. 74

The Court continues:

Among other things, we would be required to discern between military, quasi-military, industrial, economic and other strategic targets, and rule upon the legitimacy of targeting such sites as hydroelectric plants on Nicaraguan soil in the course of a civil war.

74 747 F. Supp. at 1460.
We would be called upon to inquire into whether and under what circumstances Defendants were justified in targeting such sites with knowledge that civilians, or paramilitary or military personnel would be present at the sites. Indeed we would be called upon to discern between military or paramilitary personnel guarding a strategic dam and engineers building or maintaining such a site during time of war. In short, we would necessarily be required to measure and carefully assess the use of the tools of violence and warfare in the midst of a foreign civil war. Nothing in Florida's law of torts adequately prepares us for so daunting an undertaking.\textsuperscript{75}

The Court buttressed the grounds for dismissal by pointing to information gathering problems inherent in such a suit.\textsuperscript{76} Finally, although the plaintiff's claim was solely against several Nicaraguan defendants, the Court was of the opinion that such a suit would ultimately serve to interfere with the conduct of U.S. foreign policy. In sharp contrast to \textit{Committee of U.S. Citizens in Nicaragua} where it was held that the actions of the Contras could not be imputed to the U. S. government,\textsuperscript{77} the District Court in \textit{Linder} perceived an almost inextricable link.

The adjudication of the merits of these claims manifestly would require inquiry into the full scope of Defendants' modus operandi for carrying out warfare in Nicaragua. The Court would be required to make determinations regarding: the identity of those

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} For example, at one point in its opinion the Court held that: "The defendants are unlikely to readily testify concerning the confidential information channels of their organization." \textit{Id.} at 1466. This, however, would be true of nearly any and all defendants appearing in court.

\textsuperscript{77} 859 F.2d at 945.
responsible for the creation and execution of contra military strategy; the precise nature and scope of the strategy employed by the contras; the physical location where the contras' decision-making procedures occurred; and the time during which strategy was formulated. Because of the intimate link between the contras' activities and the political branches' policy toward Nicaragua, an inquiry into the parameters of contra policy would surely involve efforts to uncover the nature of the relationship between United States policy and the actions of the contras.  

The Eleventh Circuit Court of Appeals reversed the District Court's dismissal. While agreeing with the lower court that the plaintiff's claim essentially raised a host of non-justiciable political questions, the Appellate Court also was of the view that there was no civil war exception to the right to sue for tortious conduct that violates the fundamental norms of the customary laws of war. As a consequence, the Court reversed and remanded on the issue of whether Linder's murder had been planned in southern Florida. The case is pending at the present time.

V. FUTURE DIRECTIONS

Will U.S. courts continue to hear cases involving violations of human rights? In all likelihood many of the trends described in this article will continue. The law governing ATCA cases is now fairly well established, at least with regard to individual state actors. Whether plaintiffs will begin to collect on the judgments they have been awarded -- which has not happened to date -- is still problematic, although there may be cases (such as the Marcos litigation) where other governments will cooperate. Efforts to bring human rights

78 747 F. Supp. at 1469.
80 Id. at 336.
violators to justice will undoubtedly be buttressed by the Torture Victim Protection Act, as the litigation involving Sister Ortiz would indicate.\(^{81}\)

As this article has shown, however, U.S. courts have attempted to make a sharp distinction between human rights abuses committed by others (which, in most instances, will be litigated) and allegations of human rights abuses by the U.S. government (which will not be). There are at least two problems with this. The first has been alluded to before: the hypocrisy of addressing human rights violations committed by others, but not those committed by the U.S. The second problem is that it is not always clear which transgressions are ours, and which are those of others. Consider the Ortiz case.\(^{82}\) Sister Ortiz's TVPA suit, which accompanied an ATCA suit, was brought against Guatemalan General Hector Gramajo. However, there is now fairly clear evidence that Gramajo was on the payroll of the CIA,\(^{83}\) and that American officials knew of (and quite possibly directed) Ortiz's torture. Is Gramajo a foreign state actor, a U.S. state actor -- or both? The same phenomena has occurred in another ATCA case, Belance v. FRAPH,\(^{84}\) now that it has been revealed that Emmanuel "Toto" Constant, the leader of FRAPH, was himself a CIA agent. Again, how does one separate the actions of the United States from those on its payroll? Certainly in the domestic sphere no such distinction could be maintained.

There are, of course, other examples where the actions of foreign actors blend together with those of the U.S. Guatemala presents several such situations. For example, there is evidence implicating Col. Julio Roberto Alpirez, a Guatemalan intelligence officer, in the killing of Michael DeVine, a U.S. citizen living in Guatemala. Alpirez, like Gramajo (and much of the Guatemalan

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81 Xuncax v. Gramajo and Ortiz v. Gramajo; see supra accompanying note 14 and text.
82 Id.
84 Belance v. FRAPH; see supra accompanying note 17.
If the decedents of DeVine were to bring a wrongful death suit, against whom would the cause of action lie? Against the Guatemalan government? Certainly. Against the U.S. government, or particular agents of the U.S. government? It seems difficult to imagine why not — shouldn't the actions of Alpirez be imputed to both of his employers?

Or consider the torture and murder of Efrain Bamaca Velasquez, a guerilla leader who was married to Jennifer Harbury, a U.S. citizen. Not only was the murder carried out under the orders of Col. Alpirez, but the U.S. government actively assisted the Guatemalan government in attempting to cover up the murder. Again, the question is asked: where does Guatemalan complicity end and that of the U.S. begin?

To conclude, as remarkable and as praiseworthy as the ATCA litigation has been, American courts have purposely excluded themselves from another important class of human rights cases: those alleging death, destruction, and suffering at the hands of the U.S. government or its agents. Apparently to ease their doubts (or their consciences) about what they are doing, our courts invariably claim that they would otherwise be interfering with the conduct of U.S. foreign policy. What this means in practice, however, is that the U.S. government can do virtually anything it wants to in other countries —
notwithstanding the human consequences that ensue from these actions -- and not be held responsible (at least not in the U.S.) for these actions. This smacks of hypocrisy and what it represents, quite bluntly, is a perversion of our democratic principles.

1974). However, this was an individual who had been repeatedly tortured for seventeen days before being brought to the United States. In a subsequent challenge, United States v. ex rel Lujan v. Gengler, 510 F. 2d 62 (2d Cir. 1975), the court held that in order to divest itself of jurisdiction, the conduct of U.S agents must be "of the most outrageous and reprehensible kind" which results in the denial of due process.
The editors regret certain circumstances surrounding the publication of Mr. Ohnesorge’s article. Due to staffing changes at the *Journal*, the editors were unable to provide Mr. Ohnesorge with the edited version of his article and as a consequence he was not able to revisit the article or engage in the editorial process. While this published version remains substantially the same as that which was submitted by Mr. Ohnesorge, it is unfortunate that Mr. Ohnesorge did not see or approve the final version of his article. The author wishes to thank William Alford, Robert Hudec, Richard Samuels and James West for intellectual inspiration. In this instance, more than usual, the article is purely the author’s own.