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Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United States Courts

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INTRODUCTION: SEEING THE FOREST FOR THE TREES

I. Filartiga v. Pena-Irala: Judge Kaufman’s “Benevolent” Odyssey

On 30 June 1980, Judge Irving R. Kaufman authored his decision in Filartiga v. Pena-Irala. Writing for a unanimous Second Circuit Court of Appeals in New York, he held that non-United States (“U.S.”) citizens (“aliens”) may file civil suits in U.S. courts for human rights violations committed abroad by other aliens. He concluded that U.S. federal district courts have jurisdiction to hear such cases based upon 28 U.S.C. § 1350, an arcane federal law known as the Alien Tort Statute (“ATS”). Entitled “Alien’s action for tort”, it states:

The district courts 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.

During the 191-year span between the ATS’s enactment in 1789 and the Filartiga decision in 1980, alien plaintiffs only sought jurisdiction under the statute in twenty-one cases, succeeding just twice. Before Filartiga, no plaintiff had ever attempted to use the statute to obtain jurisdiction in a human rights case.

Although short on verbiage, the ATS has proven itself long on interpretation, particularly over the past twenty years. This is illustrated by the profound inconsistency of the U.S. courts’ adjudications of transnational human rights (“THR”) suits filed under the ATS, and now the Torture Victim Protection Act (“TVPA”), which was added to the ATS’s text in 1992. The TVPA language codifies Filartiga in instances where an “individual who, under actual or apparent
authority, or color of law, of any foreign nation” commits torture or an extra-judicial killing.\textsuperscript{12}

At the conclusion of the \textit{Filartiga} opinion, Judge Kaufman describes his holding as “a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”\textsuperscript{13} With these final words of lofty idealism, Judge Kaufman’s benevolent odyssey began; an odyssey to vindicate international human rights through transnational litigation, one case at a time. As established \textit{infra}, this mission, albeit well-intentioned, was ill-considered.

II. Ending the Myopic Paper Chase

Since the \textit{Filartiga} decision, academics, law students and human rights advocates have written slews of articles examining the propriety of using the ATS and TVPA as means for initiating THR lawsuits in U.S. federal district courts.\textsuperscript{14} In exhaustive fashion, they have analyzed the historical and legal contexts of these statutes, arguing both for and against their legal legitimacy as tools for vindicating human rights.\textsuperscript{15} Moreover, they have devoted painstaking research to the issue of whether the adjudication of such cases offends separation of powers notions grounded in the act of state doctrine,\textsuperscript{16} the political question doctrine,\textsuperscript{17} and the Foreign Sovereign Immunities Act.\textsuperscript{18} They have also debated the application of \textit{forum non conveniens}.\textsuperscript{19}

Regrettably, from a policy standpoint, the analyses provided in these works are typically short-sighted, focusing on the means rather than the end. They steadfastly justify or deny the legal legitimacy of THR litigation (the means), rather than evaluating its fairness and effectiveness in promoting and enforcing human rights (the end).\textsuperscript{20} Thus, as the common expression goes, they fail to “see the forest for the trees.” These studies devote only superfluous attention (if any at all) to what should
be, in my mind's eye, the pivotal concern-- whether the unique structure and methodology of civil litigation in the U.S. are conducive to fairly and effectively promoting and enforcing international human rights. This work devotes long-deserved attention to this subject.

III. A New Perspective

This work is not only unique in topic, but also in perspective. A myriad of articles have been researched and authored from the perspectives of academics, law students and human rights advocates. However, I have written this article from my own perspective, not merely as a scholar of international law, but also as an American tort litigation attorney, having experienced firsthand the practical realities of tort litigation in the U.S.

This work is divided into two Parts. Part One analyzes why the structure and methodology of the American civil litigation system preclude the fair adjudication of THR cases. Part Two examines why litigating THR cases in U.S. courts is ineffective in promoting and enforcing human rights abroad. Cumulatively, these two Parts support the conclusion that it is inappropriate to litigate THR cases in U.S. courts, because such litigation fails to fairly or effectively further international human rights interests.

IV. “Fairness” and “Effectiveness”

Before addressing the reasons why THR litigation in U.S. courts is unfair and ineffective, it is incumbent upon me to explain how I define the terms “fairness” and “effectiveness” for purposes of this work. I submit that “fairness” can simply be defined as objectivity, balance and sagacity in the proceedings and adjudication of the case at hand. Moreover, “effectiveness” can be defined as a meaningful and lasting solution to the case at hand, as well as to the general human rights dilemma from
which the case emerged. As established *infra*, the litigation examined in this work sorely lacks all of these characteristics.

**PART ONE: FAIR PLAY OR FARCE?**

I. American Provincialism in THR Cases: A Recipe for Injustice

From a global perspective, the American system of civil litigation is anomalous. Its adversarial rules of procedure and precedent-based rules of substance are exotic concepts, beyond the ken of most lawyers and judges in other parts of the world. However, these are the rules that U.S. courts generally employ to determine the liability of alien defendants in THR cases. They are not the product of any international consensus, and were not created for the specific task of adjudicating THR claims.\(^{23}\) They are generally the same, identical rules that govern domestic cases. The framework of adjudication seldom changes, regardless of whether the court is addressing alleged acts of genocide in Bosnia or a fender-bender at a stoplight in downtown Manhattan.

In an article entitled *Provincialism in United States Courts*, Professor Patrick McFadden labels the tendency of U.S. courts “to handle international cases as if they were domestic cases” as “methodological provincialism.”\(^{24}\) He observes that:

> U.S. courts tend to use domestic patterns of analysis in identifying the relevant issues in a case and in addressing and defending the resolution of those issues. This type of provincialism . . . flows from an approach to rules and their analysis – an approach demonstrably different from that of international courts and tribunals.\(^{25}\)

Building upon this argument, I submit that that the structure and methodology of the U.S. civil litigation system preclude the fair resolution of THR cases. Unlike Professor McFadden however, whose analysis focuses on U.S. courts’ application of substantive law, the following analysis devotes further attention to procedural aspects
of American jurisprudence, for it is here that the inequities of the system, vis à vis THR cases, are most keenly manifested.

II. The Issue of Fairness

A. Who Should Decide What is Fair?

The issue of whether an American court deems its judgment in a THR case as fair is largely immaterial. Every judgment that a U.S. court renders in a THR case purports to interpret international human rights norms and apply them extraterritorially. Therefore, the more significant issue is whether the international community views the decision as fair. If it does, then the judgment is more likely to influence the community’s promotion and enforcement of human rights norms. If it does not, then the community will view the judgment with skepticism, refusing to consider it seriously when developing new human rights policies. Consequently, the issue of fairness is directly related to the issue of effectiveness, which is examined in Part Two.

B. Procedural Integrity as a Determinant of Fairness

Procedural integrity is a vital factor in determining whether a judgment is fair. Common sense dictates that well-balanced proceedings, involving the presentation of reliable evidence and the court’s thoughtful evaluation of it, are needed to produce a result that others will regard as fair. When these qualities of procedural integrity are lacking, it is only natural that the international community will be less-inclined to respect the court’s judgment.

As demonstrated infra, the manner in which human rights advocates obtain exorbitant money judgments against alleged human rights violators embodies self-contradiction. These advocates, who are usually so headstrong in safeguarding the civil liberties of American criminal defendants accused of reprehensible conduct, are
equally zealous in their efforts to punish foreign civil defendants accused of similarly abominable behavior. In the former instance, they critically monitor every step of the proceedings, ensuring that the defendant is afforded every protection available under the law. Procedural integrity is revered as gospel. In the latter instance however, it is the very absence of these procedural protections that they exploit in order to obtain favorable judgments. These inequities, manifested at every stage of the proceedings, ultimately lead to plaintiff-oriented judgments, arbitrarily fashioned by the judge, jury and plaintiffs’ attorneys. Indeed, inequities exist even before the proceedings begin.

1. Forum Shopping

Unlike suits filed against U.S. citizens, suits against aliens may be initiated in any federal district court in the U.S. This enables the plaintiff’s attorney to search for and file suit in the court that is most likely to yield a favorable result, a practice commonly referred to as “forum shopping.” For example, New York has been the venue of preference in many THR cases, given the binding precedent of the Filartiga case in that jurisdiction.

Plaintiffs’ attorneys suing aliens also enjoy a safety net when forum shopping. If a lawsuit against an alien defendant is dismissed in one federal district court, they can simply re-file the suit in a different venue. An example of this notorious practice is the recent case of Torres v. Southern Peru Copper Corp. In Torres, a group of Peruvian citizens sued a Peruvian company in Texas, alleging harm from pollution. The case was dismissed on grounds of forum non conveniens and international comity. However, one of the plaintiffs had re-filed the suit in New York, hoping for a better outcome. Thus, even before a THR suit commences, the American civil litigation framework clearly favors the plaintiff.
2. The Complaint

When plaintiffs’ attorneys draft THR complaints, they normally do so assuming that the defendant will fail to appear in court, and that a default judgment will be entered, which indeed is usually the case. When a judge renders a default judgment, she does so with the presumption that all “well-pleaded” claims in the plaintiff’s complaint are true. This provides a powerful incentive for plaintiffs’ attorneys to raise many allegations that they would never be able to successfully prove in a full-scale trial.

Furthermore, plaintiffs’ attorneys in the U.S. are rarely subjected to penalties for filing frivolous lawsuits. Although Rule 11 of the Federal Rules of Civil Procedure (“FRCP”) empowers courts to levy sanctions against attorneys who file frivolous claims, this rule is seldom implemented in practice. Normally, if a judge views a complaint as frivolous, she will warn the plaintiff’s attorney first, admonishing him to either withdraw the frivolous claims or else receive sanctions. Consequently, plaintiffs’ attorneys have nothing to lose by including spurious allegations in their complaints that will, in all likelihood, remain unopposed and unaltered until a default judgment is rendered. Once this occurs, the defendant is of course deemed liable in absentia.

3. Discovery

The procedural rules comprising the American civil litigation framework are adversarial in nature, espousing the principle of “each for each and the state for neither.” The just adjudication of a case is equated with the ability of each attorney to gather and present every item of evidence that is necessary to vindicate his client’s interests. This contrasts starkly with the systems of civil law nations, where the
judges play a far more active role in the discovery process, garnering evidence and even questioning witnesses.\textsuperscript{39}

The American rules of civil procedure allow for “broader discovery than almost any other nation.”\textsuperscript{40} Under these rules, attorneys are even permitted to obtain evidence that is inadmissible at trial, as long as it appears “reasonably” calculated to lead to the discovery of admissible evidence.\textsuperscript{41} As examined in detail \textit{infra} however, plaintiffs’ attorneys often exploit this rule in THR cases. Because the defendants rarely hire counsel or appear in court, the plaintiffs’ attorneys regularly submit evidence at the default judgment hearings and trials \textit{in absentia} that would never be admitted over the objections of defense counsel.

Furthermore, where exculpatory or mitigating evidence is concerned, the American civil litigation system varies dramatically, not only from the American criminal system, but also from those of international tribunals. In the American and international criminal systems, the prosecuting attorney is obligated to provide defense counsel with any evidence establishing the defendant’s innocence.\textsuperscript{42} In the American civil system however, a plaintiff’s attorney is ethically obligated \textit{not} to provide exculpatory evidence to defense counsel unless the evidence fits the description of one of the defendant’s discovery requests, or his client consents.\textsuperscript{43} If he provides opposing counsel with the exculpatory evidence anyway, he could face sanctions from the local bar association and perhaps even a malpractice lawsuit from his clients. Therefore, even if a plaintiff’s attorney stumbles upon a piece of evidence clearly establishing that the defendant is not liable for a THR violation, he has no inherent duty to divulge it to the outside world. Thus, a plaintiff’s attorney could knowingly have a defendant wrongfully declared liable for torture, extrajudicial killing, or some other form of gross human rights violation.
4. The Judges

U.S. federal district judges are seldom trained in the field of international law. Indeed, of these approximately 655 judges, very few have any familiarity with THR cases. Often, their legal educational experiences predate the dramatic evolution of this field over the past few decades. Moreover, because their case dockets are so heavily congested with other matters, these judges do not have ample time to thoroughly research these germane, yet arcane issues on their own. In spite of these shortcomings however, the ATS vests them with two key responsibilities demanding at least a modicum of expertise in this highly specialized field. These responsibilities consist of: (1) determining the content of the “law of nations”, and (2) interpreting and applying the law of the state where the alleged conduct occurred (the *lex locus dilecti*).

a. Interpreting and applying international law

U.S. federal district judges are irretrievably enmeshed in American legal traditions and culture. They normally spend their days interpreting and applying laws that are based strictly upon American societal values, with little opportunity to widen their perspectives beyond these confines. Therefore, the grave danger of provincialism becomes a sudden reality when these same individuals are asked to interpret and apply international law.

(1) Provincialism at the international level

How does such a judge interpret a treaty (to which the U.S. may or may not be a member) when she has never done so before, and is totally unacquainted with the contents of the Vienna Convention on the Law of Treaties, or perhaps even its very existence? How does she accurately determine the existence of *opinio juris*, when she has little or no background knowledge of the historical, political and cultural
contexts underlying the prior behavior of other states towards each other? How does such a judge find the time to thoroughly research the general practices of other states, or to make an educated determination of whether a particular state has properly manifested dissent from being bound by a custom?

Given the fact that some scholars have questioned how the International Court of Justice itself can reach a proper decision on these matters,52 the endeavor seems even more hopeless where judges who are totally unpolished in this esoteric area are concerned. Whereas the ICJ, a court of international composition, can at least impose a “guise of objectivity” upon its rulings vis à vis the existence of customary international law,53 federal district judges generally do not have this ability and have little alternative but to retreat back to provincial, American notions of what is customary in the field of human rights.54 This further undermines the integrity of the proceedings in the eyes of the international community.

(2) Provincialism at the national level

The peril of provincialism exists not only at the international level, but also at the American level itself. The existence of 651 different federal district jurisdictions creates the possibility for widely varying interpretations from district to district regarding the same issues of international law. This potential inconsistency threatens to undermine the integrity of the proceedings because it encourages forum shopping and fails to articulate any uniform standard to which other states may look in determining their own views, especially where custom is concerned.

b. Interpreting and applying the lex locus delecti

THR cases often require American judges to interpret and apply the laws of other nations.55 How can this be successfully accomplished when these judges: (1) are only trained in the common law tradition; (2) are generally unaware of the
historical, political, socio-cultural and legal contexts from which these laws emerged; and (3) have little or no background knowledge regarding the practical application of these laws? The prospect of the American judge failing to “get it right” is yet another reason for skepticism regarding the integrity of the proceedings. Moreover, as demonstrated infra, when the application of foreign laws will not satisfy American policy interests regarding such matters as punitive damages, the judges will simply ignore them and apply U.S. law instead, retreating once again into egoist provincialism and thus undermining procedural integrity.

c. Judicial impunity

Federal district judges are appointed for life.\textsuperscript{56} Therefore, they are not accountable to anyone, inside or outside the U.S., for any decision rendered. They have \textit{carte blanche} authority to impose their own, individual notions of justice upon foreign defendants in transnational cases. A prime example is the case of \textit{Flatlow v. Iran}, in which the district court judge “expressed his American patriotism by awarding—in a default judgment—$100 million more than was sought by the plaintiffs.”\textsuperscript{57} Furthermore, some allege that the appointments of these judges are the products of politics rather than of sheer merit, which creates yet another question of how other states might regard the integrity of the decisions rendered.\textsuperscript{58}

5. Evidentiary Flaws

Almost every THR case filed in a U.S. federal district court has ended with a default judgment.\textsuperscript{59} In filing a motion for default judgment, plaintiffs’ attorneys are required to submit evidence to the court establishing that their clients are entitled to damages.\textsuperscript{60} Normally, they only need to submit evidence in the form of written declarations supporting their claims.\textsuperscript{61} Sometimes however, the court will go further, requiring a hearing with the presentation of testimony, or even a jury trial addressing
the issue of damages. Either way, where a default has occurred, the evidence that the plaintiffs’ attorneys will present in support of their case is likely to have severe flaws. If such evidence was presented at a trial on the merits, in the presence of the defendant and his counsel, it would either be inadmissible or impeached as lacking credibility. For example, in the Suarez-Mason cases, the plaintiffs’ counsel readily acknowledged that had they proceeded to trial, “they would have lost on the merits for lack of evidence linking Suarez-Mason to the human rights violations.”

   a. Hearsay

   Under the Federal Rules of Evidence, hearsay evidence is defined as an out of court statement offered to prove the truth of the matter asserted. Both oral testimony and documentary evidence may constitute hearsay. With a few exceptions, items constituting hearsay evidence are inadmissible at trial because they lack sufficient credibility to prove the existence of a fact. This lack of credibility is premised upon flaws in the declarant’s sincerity, narration, perception and memory.

   Nevertheless, in THR cases, such unreliable evidence often forms a pivotal part of the plaintiff’s case. Two excellent examples are the Gramajo cases, command responsibility cases in which the plaintiffs, in their efforts to establish a link between the former Guatemalan defense minister and alleged acts of “summary execution, torture, disappearance, and cruel, inhuman or degrading treatment” and arbitrary detention, “were forced to rely on newspaper articles and third-hand evidence, which posed problems of hearsay, double hearsay, and even triple hearsay.”

   Another controversial case, which actually ended in a trial on the merits, is In re Estate of Marcos. Here, the judge allowed the admission into evidence of “all statements attributed to any member of the Philippine armed forces or security
units.” He did so by contending that these statements constituted the admissions of party-opponents and declarations against interest, which constitute exceptions to the hearsay rule.

Several of the THR suits filed in federal district courts, including Filartiga, have been filed by attorneys affiliated with the Center for Constitutional Rights (“CCR”) in New York City. In 1996, Beth Stephens, a former CCR attorney, and Mark Ratner, a current CCR attorney, published International Human Rights Litigation in U.S. Courts. This book provides aspiring plaintiffs’ attorneys with step-by-step instructions on how to litigate THR cases in federal district courts.

In their book, Stephens and Ratner encourage plaintiffs’ attorneys in THR cases to present hearsay evidence to the court when seeking a default judgment. They do this by encouraging these attorneys to submit “any documents or declarations which support the claim. These could include medical bills and doctors’ reports; therapists’ evaluations; declarations from lay people concerning the harm suffered by the plaintiff; and economist’s evaluations of lost lifetime earnings.” Absent a stipulation by defense counsel as to the authenticity and admissibility of the aforementioned items, or testimony from the authors of these documents as to their authenticity and veracity, these items would be inadmissible at a trial where defense counsel is present to raise objections. It is true that the plaintiffs might be able to present all of the witnesses necessary to authenticate these documents. However, as Stephens and Ratner themselves have established, they generally will not have to, as decisions are usually based solely upon the written evidence presented.

b. Witness credibility

(1) Bias

The defendant and defense counsel are almost never present at the evidentiary
proceedings. Therefore, they rarely have occasion, through cross-examination and the presentation of their own evidence, to expose any bias tainting the plaintiffs’ testimonial evidence. This gives plaintiffs’ attorneys the opportunity to present, without reproach, heavily biased evidence devoid of credibility.

(a) *Quid pro quo*

Within the American system of civil litigation, attorneys regularly have continuous working relationships with expert witnesses in different fields. In the THR context, this is illustrated by referring once again to the work of Stephens and Ratner. Appendix L of their book contains a list of five different providers of “Medical and Psychological Services for Victims of Torture.” Bearing in mind that their book targets a reading audience of attorneys rather than of torture victims, this Appendix is tantamount to a list of suggested expert witnesses.

A *quid pro quo* relationship frequently exists between attorneys and their expert witnesses. In exchange for the expert’s favorable report or testimony, the attorney retains her services for other cases and recommends her to other attorneys. In the end, both sides benefit, and the expert has an economic incentive to testify favorably in future proceedings. At a normal trial, where both parties are present with counsel, the biases of each side’s experts generally cancel each other out during the respective cross-examinations. However, this is not the situation in a garden-variety THR case. The experts are not subject to cross-examination, and can therefore embellish or exaggerate their testimony without fear of impeachment.

(2) Eyewitness credibility

There is a genuine risk that an eyewitness giving testimony at a THR proceeding will wrongfully identify the defendant as the perpetrator of the purported violation or violations. This is particularly so when the defendant is a low-level
official whom the plaintiffs did not know by name when the alleged acts were
committed, as opposed to the likes of the highly-publicized Ferdinand Marcos or
Radovan Karadzic. Moreover, it has been scientifically established that the
possibility for an incorrect identification increases when the defendant is not
physically present before the witness, as is usually the case in these types of
proceedings.83

There is also the time element. If decades have passed since the plaintiff last
saw the defendant, there may be more uncertainty as to whether the plaintiff indeed
recognizes him, based upon his appearance so many years later.84 The time factor is
particularly significant for cases brought under the ATS, which has no statute of
limitations.85

c. A game of half-truths

Professor Jose E. Alvarez contends that “civil suits may be more effective than
criminal prosecutions in establishing the full factual context in which the perpetrators
committed their crimes.”86 It is my assertion that in practice, the very opposite holds
true. An assumption exists within the American system of civil litigation that the
adversarial method of producing evidence during the proceedings is conducive to
eliciting the “whole truth.” Using this method, each attorney presents his best case,
submitting all of the relevant evidence that is favorable to his side and unfavorable to
the opposing side. Ideally, this results in the court’s cognizance of the “whole truth”-
the respective strengths and weaknesses of both cases.

The problem with this system however, is that it only requires an attorney to
divulge half of the truth. A hypothetical example best illustrates my point. Let’s
suppose that A sues B, claiming that B assaulted her, permanently injuring her back.
A’s attorney knows that certain medical records exist establishing that his client had
chronic back problems even before the assault occurred. However, for one reason or another, B’s attorney fails to take the necessary steps to obtain this information. At trial, A’s attorney is not required to disclose the existence of these records. Moreover, he is not required to ask his client any questions regarding her ailments prior to the alleged assault. As long as no one overtly lies about anything, his case remains entirely legitimate under the adversarial system. His only obligation is to present his “best case” and let the court decide whether it is believable. In other words, he only needs to present half of the truth. It is B’s attorney’s job to competently present the other half.

This “game of half-truths” poses severe problems in the arena of THR litigation, particularly when the plaintiff’s attorney is unopposed. He is free to tell just “one side of the story”, and has no obligation to divulge any evidence that is unfavorable to his case. As long as no one overtly lies about anything, this practice is wholly permissible under the American system.

Viewed aggregately, the default-nature of most THR cases vests the plaintiffs with enormous evidentiary advantages that they would not enjoy in a conventional trial setting where both sides are present. However, the evidentiary advantages do not end here. Their potential impact on the ultimate judgment is further amplified by an unusually light burden of proof, as discussed infra.

6. The Trial

As established supra, most THR cases never make it to trial. Moreover, even if a case does reach this stage, it is normally a trial in absentia. Nevertheless, a thorough analysis of the procedural integrity issue requires an examination of scenarios where the defendant does appear at trial. As demonstrated, even if the defendant does appear, he will still face a plethora of disadvantages.
a. Finding a lawyer

Plaintiffs initiating THR lawsuits in U.S. courts typically do not pay any attorneys’ fees.\textsuperscript{87} Indeed, as established \textit{infra}, human rights advocacy groups such as the CCR have non-pecuniary incentives for representing plaintiffs in THR suits. Highly skilled and experienced in the litigation of these claims, these attorneys provide their clients with outstanding representation.\textsuperscript{88}

The defendants in THR cases are not so fortunate. Few attorneys will volunteer to defend an individual accused of gross THR violations. Moreover, because the defendants in these cases are typically low-level civil servants, most will not be able to afford a high-caliber defense attorney whose skill matches that of the plaintiff’s attorneys. Furthermore, even if the defendant does have such resources, the impact of his attorney’s skill will likely be marginalized by the highly specialized and esoteric nature of the claims raised. No American attorney defends THR cases for a living.

If a defendant cannot afford counsel, there is a distinct possibility that he will have to represent himself \textit{pro se} at trial. Unlike in criminal cases, where impecunious defendants are constitutionally entitled to defense counsel,\textsuperscript{89} no such guarantee is afforded to civil defendants. For example, in \textit{Abebe-Jira v. Negewo}, a THR case alleging human rights violations in Ethiopia,\textsuperscript{90} the “court rejected the defendant’s request for court-appointed counsel, and the defendant represented himself at trial.”\textsuperscript{91} Naturally, such a situation provides the plaintiff with a profound advantage at trial.

b. The costs

Defending against a THR lawsuit is costly. Normally, civil defense attorneys bill their clients an hourly fee for their services. They also require reimbursement from their clients for all expenses incurred during the course of the litigation. This
means that the defendant in a THR case has the burden of “matching resources” with the plaintiff’s attorneys, likely incurring enormous expenses.

The attorney alone will be very expensive, based upon the law of supply and demand. Very few lawyers have any expertise in THR litigation. Therefore, those who have such skills are in a position to charge more when defending such cases. Of course, the defendant can always opt for an attorney with lesser skills, but then he runs the risk of being out-maneuvered by the highly-polished attorneys representing the plaintiffs.

Attorney’s fees are only the beginning. Depending on how well the defendant and his attorney are able to communicate, they may have to hire a translator, who will spend many hours with them as they prepare their case. Translators may also be needed to translate documents obtained during the course of discovery.92

Discovery expenses are also likely to be exorbitant. The defendant will need to obtain evidence and interview witnesses supporting the defense,93 which might also require the hiring of a private investigator and possibly local counsel. Should he need for these witnesses to testify at trial, he will have to pay for their transportation.94 It is also likely that the defendant will need to hire his own expert witnesses to refute the expert testimonies presented by the plaintiff.

It will easily cost a defendant tens of thousands of dollars to defend against a garden-variety THR case. Therefore, it is no surprise that very few non-corporate defendants can afford to properly defend such a case all the way through a trial on the merits. Most simply do not have the resources of the Ferdinand Marcos estate.95 Their inability to match resources with the plaintiffs places them at a distinct disadvantage throughout the course of the litigation.
c. Juries

The concept of the jury is a unique and cherished notion of American jurisprudence. Juries are pools of randomly-selected citizens,\textsuperscript{96} presumed to represent a cross-section of the venue’s community- the “peers” of the defendant. The jury system is founded upon the presumption that a jury can fairly and impartially determine: (1) the weight and credibility of the evidence presented; (2) a criminal defendant’s guilt or innocence (and sometimes his punishment as well); (3) a civil defendant’s liability or lack thereof; and (4) the damages that a civil defendant should pay.

As a civil trial attorney, practicing primarily in the realm of personal injury defense, it was my experience that jurors generally do an excellent job in fulfilling their “civil duties,” as we call them in the U.S. My post-trial conversations with jurors revealed them to be insightful, attentive, and even intuitive at times. As a personal matter, I think that the civil jury system is generally fair and effective- for adjudicating local disputes. Where THR matters are concerned however, my conclusion is very different.

(1) Nobody’s peers

When a THR case is tried before a jury, the parties will have little in common with the jurors. They will come from different nations, cultures, societies and economic backgrounds. They will likely speak different languages. The commonality of backgrounds that jurors typically share with the parties, which is the very cornerstone of the American jury system, is notably absent in THR cases. Nevertheless, even in these cases plaintiffs attorneys such as Stephens and Ratner favor jury trials over bench trials.\textsuperscript{97}
A particularly eloquent critique against the practice of using American juries to try THR cases is that of Professor Maxwell Chibundu. In his article, entitled *Making Customary International Law Through Municipal Adjudication: A Structural Inquiry*, Professor Chibundu criticizes the provincialism of this practice. He observes that although the jury system is founded upon the notion of representative democracy:

> [It] is precisely these ‘strengths’ of the American jury that renders it an unsuitable instrument for promoting international human rights claims; for it can do so only at some cost to the intellectual coherence of its idealized justification. . . . [A] jury with no foreigners on it lacks the legitimacy to preside over claims arising outside the state and which involves parties none of whom are members of the political community. Even if, as some argue, international human rights represent values that are ‘universal’, the interpretation of those values in the particular case by complete strangers to the environment in which the alleged events took place, and who lack any practical interest in the future structure of that environment surely denude their decision of the indicia of democratic legitimation . . .

In discussing the jury’s deliberation process, Chibundu states that:

> [T]he jurors who will be deliberating about facts that at best they can only dimly perceive, and which, for the most part, neither their daily existence nor their readings provide them with meaningful reference points.

In summary, American juries are not suitable for fairly adjudicating THR cases. Their remoteness from the parties and events in controversy detracts from the integrity of the proceedings and the results generated from them. Therefore, the rest of the world is not likely to respect the American jury as an educated and objective arbiter of international human rights standards.

7. **Damages**

If the court (by which I mean the judge or jury) concludes that the defendant is liable to the plaintiff, then damages must be determined. In the THR context, the plaintiffs typically seek two different categories of damages, compensatory and
punitive. The theory behind compensatory damages is basic and inconspicuous.\textsuperscript{101} The concept of punitive damages however, is a largely American phenomenon.\textsuperscript{102}

As discussed \textit{supra}, the default setting, so common in THR cases, confers plaintiffs’ attorneys with a profound advantage when presenting evidence of damages. They can present hearsay evidence that is normally inadmissible, and biased evidence that is normally impeachable. Moreover, by playing the “game of half-truths,” they can avoid submitting any evidence serving to mitigate the plaintiffs’ damages. However, there are other reasons why it is inequitable for American courts to determine damages in THR cases.

a. Punitive damages: Justice “American-style”

There is a lack of international precedent for imposing punitive damages as a response to violations of international norms.\textsuperscript{103} However, this has not dissuaded U.S. courts from awarding punitive damages in THR cases.\textsuperscript{104} In the American system, punitive damages are designed to accomplish two objectives - punishment and deterrence.\textsuperscript{105} They punish egregious conduct,\textsuperscript{106} and deter similar future behavior by making an example of the defendant.\textsuperscript{107}

Therefore, in the THR context, American courts are delegated the responsibility for issuing verdicts designed to punish non-citizens for extraterritorial conduct committed against other non-citizens, and to make examples of them for others who might consider perpetrating similar acts abroad in the future. However, these decision-makers are profoundly secluded from the daily realities of the societies, cultures and economic situations of those whom they seek to influence and assist through their verdicts. Moreover, as established \textit{supra}, their decisions are normally founded solely upon the plaintiff’s uncontested case. Thus, the integrity of decisions
to award punitive damages, implementing a concept of justice virtually unknown to the rest of the world, is suspect.

b. Inconsistency in the choice of law

No set formula exists to guide American judges’ decisions as to which nation’s law should govern the determination of damages. This matter is relegated to the whims of the individual judges. The Filartiga decision provides a handy example. Here, the trial court held that Paraguayan law should govern the determination of compensatory damages, as Paraguay had the closest connection to the violation. However, when considering the issue of punitive damages, the court deliberately ignored Paraguayan law because it did not allow for such. The court concluded that: “the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages,” applying U.S. law instead. This chauvinistic philosophy of only applying the *lex locus dilecti* where it complements American notions of justice begs the oft-repeated question of whether such judgments will inspire other states when making policy decisions regarding human rights issues. This concern is magnified by the general unenforceability of punitive damage award, which is addressed in Part Two.

C. The Determination of Accountability

In addressing the issue of whether U.S. courts can fairly adjudicate THR cases, we must also question the process used in determining the defendant’s accountability for human rights violations. This process varies distinctly from others serving this function, particularly those of the international criminal tribunals. Compared with those systems, the American civil framework sets a far lower threshold for labeling someone as a *hostis humani generis*, or enemy of all mankind.
1. The Burden of Proof

In a THR case tried before a U.S. court, the plaintiff only needs to establish the defendant’s liability by a “preponderance of the evidence.” This means that the plaintiff only needs to prove that it is more than fifty percent likely that the defendant committed the alleged human rights violation. This is a far cry from the “beyond a reasonable doubt” standard that other tribunals use to determine accountability for such violations.

Bearing all of this in mind, we return again to the issue of fairness. It is unfair for a defendant to be branded as an “enemy of all mankind” when the court concludes that this is “more likely than not” based upon evidence involving hearsay, bias, questionable identifications of the missing defendant, or half-truths. Furthermore, it is highly unlikely that other states and their citizens will hold such conclusions in high regard, and improbable that such results will influence them when addressing contemporary human rights issues within their borders.

2. The Time Factor

Unlike criminal defendants, civil defendants in U.S. courts do not have the luxury of a speedy trial. Once a complaint is filed, it normally takes years for a case to go to trial in a U.S. federal district court. The Marcos case was the “first full-scale civil trial of human rights claims” in the U.S. After the filing of the initial complaint, the case did not go to trial for another six years.

Such long delays are more likely in THR cases because of discovery complications. Because most of the evidence is located outside the U.S., attorneys for both parties face a host of complications in garnering all of the materials necessary for presenting their cases. Some of these complications may relate to other states’ laws.
governing the discovery of evidence.\textsuperscript{118} Other complications may involve contacting witnesses, locating physical evidence, or translating documents.\textsuperscript{119}

Again, the issue of fairness re-emerges. Is it fair that the civil process for adjudicating someone as an “enemy of all mankind” should take so long when defendants in U.S. criminal courts and international criminal tribunals are guaranteed speedy trials as a matter of right?\textsuperscript{120} Furthermore, what if the defendant is an active world leader, such as Robert Mugabe, who was served with a summons and complaint while visiting the U.S.?\textsuperscript{121} It is true that suits against world leaders are likely to be dismissed on such bases as the Foreign Sovereign Immunities Act.\textsuperscript{122} However, months or even years of procedural maneuvering may be required to obtain this result.

There is also the question of whether such a process is fair to the leader’s constituents. In order to present a respectable defense, the defendant and his lawyer must spend many hours together in preparation. Is it fair that a world leader should be forced to squander valuable time preparing his defense against a civil suit rather than pursuing what he views as the interests of his constituents?\textsuperscript{123} Where the leader is an elected official, it can be argued that his removal from the performance of official duties in order to defend against a civil lawsuit, detracts from his constituents’ right of self-determination. By filing such a lawsuit, the plaintiffs’ attorneys seek to vindicate one category of human rights at the expense of others- namely political rights, which are arguably the most fundamental of all.\textsuperscript{124}

Moreover, the U.S. State Department has voiced serious concern about the prospect of “nuisance suits.” “Nuisance suits” are lawsuits initiated for the purpose of targeting and harassing political adversaries. David P. Stewart, an Assistant Legal Adviser at the U.S. State Department has commented that:
From a foreign policy perspective, we are particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes, where allegations may be made against foreign governments or officials who are not torturers but who will be required to defend against expensive and drawn-out legal proceedings. 125

In order to fully appreciate the reasons why plaintiffs’ attorneys might be inclined to file nuisance suits in THR cases, we must examine the political motives behind THR litigation in the U.S., the next issue addressing fairness.

D. Political Witchhunts

In the “Acknowledgments” section of the book that he co-authored with Beth Stephens, Mark Ratner states that the CCR has been his “political home for 25 years.”126 The question instantly emerging from this comment is whether the CCR, which has initiated so many THR suits in U.S. courts over the past 22 years, seeks to vindicate human rights in general, or only those fitting their political agenda. Strong evidence supports the latter contention. Jean-Marie Simon observes:

Since the [ATS] was first used in human rights causes in 1980, attorneys have selectively invoked it to punish either individual right-wing officials or their governments. It is not exactly news, of course, that right-wing governments commit well-documented human rights violations. They are not, however, alone; during the [time] since Filártiga was decided, those plaintiffs’ attorneys most given to filing claims under the [ATS]-- principally the New York-based [CCR]-- have never used the [ATS] to press claims against leftist governments or “progressive” targets. The choice of defendants emanates as much from a desire to punish ideological opponents as from a desire to obtain legal redress. 127

Although Simon’s article was written approximately ten years ago, these observations are just as true today. In my research, I was unable to locate a single THR case that the CCR has instituted against a leftist regime since that time.128

It thus becomes clear that at least some plaintiffs’ attorneys initiating THR cases in U.S. courts do so desiring to fulfill a political agenda, rather than to
objectively vindicate international human rights. Here, we see unfairness on all sides. Defendants are arbitrarily selected based upon their political ideologies. Perhaps even more unjust, however, are these attorneys’ uses of their clients’ testimonies as means to political ends. It begs the question of whether their ultimate goal is justice for their clients or the fulfillment of a political objective. It is also unfair to the victims of human rights abuses by leftist regimes, who may be left without a voice if their stories do not suit the attorneys’ agendas.

1. Who’s Minding the Lawsuit?

Plaintiffs’ attorneys supporting THR litigation in U.S. courts argue that “[c]ivil suits provide a mechanism by which individual victims can initiate and control the legal process.” This argument is largely illusory. Remember that the plaintiffs represented in these cases are aliens. In all likelihood, they have little knowledge or understanding of how the American system of civil litigation functions. Moreover, it is the attorney who decides whether to represent the plaintiff and file the lawsuit. Once the lawsuit is filed, the attorney recommends the courses of action that are taken throughout the duration of the litigation. Although the rules of ethics require the attorney to follow his client’s wishes, these wishes are almost always based upon the attorney’s advice. Therefore, although the client may be in control in theory, the attorney remains in control in practice.

E. Corporate Defendants

Plaintiffs’ attorneys have also filed THR lawsuits in U.S. courts against foreign corporations. Although such defendants might have sufficient assets to afford capable defense counsel throughout the course of litigation, they still remain at a severe disadvantage due to certain factors already examined, such as forum shopping, uninformed judges and juries, and a low burden of proof.
Additionally, corporate defendants face other disadvantages that are not as likely to affect THR defendants who are natural persons, such as civil servants or world leaders. Because plaintiffs’ attorneys are more likely to represent their clients on a contingency fee basis in corporate cases, they are thus more likely to have a personal stake in the outcome. This provides them with a greater incentive to sue corporations, forcing them to choose between agreeing to quick settlements (from which they would receive a hefty percentage) and facing critical media attention that is likely to deter investors. Indeed, because civil suits are a matter of public record in the U.S., there is a distinct possibility that the public will learn about such cases anyway. It is also worth noting that many foreign corporate defendants are horrified by the concept of punitive damages, which can serve as another source of pressure to settle quickly.

The phenomenon of suing foreign corporations in THR cases is relatively new. Where it will lead remains to be seen. What is certain however, is that the structure and methodology of the American system of civil litigation places all defendants at a disadvantage in THR cases, regardless of whether they are natural persons or corporations.

III. Conclusions

A. Mission Impossible

Rigid, provincialist adherence to the traditional structure and methodology of civil litigation in the U.S. makes the fair adjudication of THR cases impossible. Even before such a lawsuit is filed, inequities exist—namely the ability of the plaintiffs’ attorneys to file suit in the most favorable district, or on repeated occasions. It is often politics, rather than a desire to objectively vindicate human rights, that motivates the suit’s filing. After the lawsuit is filed, the defendant is subjected to a
virtual avalanche of disadvantages, which are greatly amplified by the likelihood of a default judgment. Adding to the proceedings’ lack of integrity is the courts’ remoteness from the contexts in which the alleged THR violations occurred.

Accountability is normally determined based solely upon the plaintiff’s “side of the story.” Consequently, the defendant is labeled, in absentia, as an “enemy of all mankind.” This conclusion is reached in a manner abjectly lacking the procedural safeguards of American and international criminal courts.

Moreover, it is in this setting that punitive damages, a concept generally unknown to international tribunals, are imposed against the defendant. The prospect of receiving a percentage of such punitive damages, particularly in lawsuits now being instituted against corporate THR defendants, can serve as a powerful incentive for plaintiffs’ attorneys to sue and exert pressure for quick and lucrative settlements. Moreover, the unique circumstances of THR cases make it easier for plaintiffs’ attorneys to influence their clients’ decisions on how to proceed.

I submit that all of these factors, in combination, make it impossible for a U.S. court to fairly adjudicate a civil THR case. The objectivity, balance and sagacity required for fairness are all conspicuously absent. Of course, those supporting such litigation are likely to retort that the defendants “bring the inequities upon themselves” by failing to appear in court. However, this argument ignores the fact that most defendants will lack the ability to retain counsel. Moreover, even with representation they will still face the stark disadvantages of forum shopping, uninformed judges and juries, and a low burden of proof. Given the inevitability of unfairness in these cases, those who so staunchly support this litigation should take pause for a moment and honestly ask themselves whether they would go to the trouble of appearing in a U.S. court if they were the defendants in these cases.
B. For the Advancement of Human Rights

It would be nice if, as some have suggested, American courts could fairly adjudicate THR cases just as they would contract disputes. Unfortunately, such is a matter of fancy rather than of fact. The arguments that I have presented supra, illustrating the impossibility of this endeavor, are made for the sake of advancing the promotion and enforcement of international human rights, not as a defense for the conduct of monsters. Regardless of how deplorably these defendants may have behaved, they must be brought to justice fairly, not just for their sakes, but more importantly, for the sake of international human rights.

The sovereign states forming the international community will not take the decisions of another nation’s “kangaroo courts” seriously when formulating and implementing domestic policies addressing human rights issues. Consequently, the inherent lack of fairness in the U.S. system of litigating THR cases results in a failure to effectively further the interests of human rights abroad. However, this lack of fairness is not the only reason why such litigation is ineffective. Many other reasons exist, which are examined in the next Part.

PART TWO: TRIVIAL PURSUITS

I. What’s in a Number?

In 1984, Judge Eugene Nickerson of the Federal District Court for the Eastern District of New York awarded Dr. Joel and Dolly Filartiga a total of $10,385,364 in damages for the brutal torturing and killing of seventeen year-old Joelito. Nothing happened. No Paraguayan court enforced the judgment, no measures were taken to ameliorate the human rights situation in Paraguay, and most Paraguayans never even learned about the case. These are the observations of the Filartigas themselves,
who remarked that any satisfaction they received from the verdict has been
“overshadowed by the complete lack of response in Paraguay.”

Such a result is the rule, not the exception. Since Filartiga, dozens of THR
suits have been filed in U.S. courts, some leading to judgments for millions of
dollars. However, during the two decades that U.S. courts have been rendering
such judgments, no judgment has ever been paid, with the exception of $400 collected
from Argentine General Suarez-Mason. More significantly, these judgments have
had virtually no impact on human rights interests abroad.

This Part explains why THR litigation in U.S. courts, in addition to being
hopelessly unfair, is also hopelessly ineffective. As established infra, other than
providing the plaintiffs in these cases with the instant gratification of favorable
judgments, nothing lasting has ever been accomplished through such litigation. Its
legacy has been and will continue to be an ever-growing list of failures, underscoring
its total inability to effectively promote and enforce human rights abroad. It is to this
list that we now turn our attention.

II. A Legacy of Failures

A. Failure to Compensate the Victims

1. Easy Flight for Defendants

As just discussed, with the exception of the paltry $400 collected from
General Suarez-Mason, no plaintiff has ever collected a judgment against a defendant
in a THR case tried in a U.S. civil court. Unlike criminal cases, in which the
defendant is often held in custody, civil defendants are free to flee at their own
volition. Therefore, in THR cases, the defendants typically flee the U.S. with their
assets before the court’s decision is announced. Moreover, in situations where
these defendants are ex-dictators or their associates, they will likely enjoy the ability to hide their assets in various forms and places.  

2. An Expensive Collection Process

The matter is further complicated by the fact that the plaintiffs’ attorneys generally lack expertise in the field of enforcing and collecting the judgments of U.S. courts abroad. It is expensive for the plaintiffs to pursue collection abroad because it “involves protracted technical and jurisdictional issues.” Moreover, “substantial advance cash outlays” are often needed. Because the plaintiffs’ attorneys in THR cases are normally “public interest” groups, such as the CCR, they must rely upon financial, intellectual and labor donations for the funding of their lawsuits. Although these resources are plentiful during the earlier stages of the proceedings, they generally are not once the litigation reaches the collection phase.

3. A Paucity of Enforcement Conventions

The U.S. is not a party to any bilateral or multilateral treaty providing for the enforcement of its courts’ money judgments in other countries. It is true that the U.S. is likely to join the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters. However, it remains uncertain whether the Convention will permit courts to enforce foreign judgments providing relief to THR plaintiffs in situations where the defendant also stands trial in criminal court for the same offenses. Moreover, even if the Convention ultimately does allow this, it remains questionable whether states harboring the assets of THR violators will ever join the Convention anyway.
4. Foreign Judicial Concerns Regarding Enforcement
   a. Public policy
      For public policy reasons, foreign courts sometimes refuse to enforce
      American judgments. This scenario is particularly common in situations where the
      U.S. court awards punitive damages. For example, Germany considers punitive
      and exemplary damages as fundamentally contrary to its public policy. As a result,
      its courts have refused to enforce the punitive damages portions of U.S. judgments.
      Because punitive damages are so prevalent in THR cases, there is reason for
      skepticism regarding the likelihood that such judgments will be enforced in foreign
      courts.
   b. Jurisdiction
      Foreign courts may scrutinize the manner in which U.S. courts obtain
      jurisdiction over defendants in THR cases. U.S. courts have frequently asserted
      personal jurisdiction over THR defendants based upon the plaintiffs’ use of “tag
      service of process,” which involves physically handing the summons and complaint to
      the defendant while in the location where jurisdiction is sought. However, some
      key European states, such as Germany, do not recognize tag service as a legitimate
      means of obtaining jurisdiction. As a result, jurisdictional issues may preclude the
      plaintiffs from enforcing their judgments in foreign courts.
   c. Choice of law
      A foreign court may also refuse to enforce a U.S. judgment if it concludes that
      the American judge failed to properly decide choice of law issues. For example,
      the courts of the Philippines, France and Poland all reserve the right to review such
      decisions. Reflecting back upon the U.S. courts’ inconsistent applications of the
      *lex locus delecti* when determining damages in cases such as *Filartiga*, it becomes
clear that choice of law issues may return to haunt plaintiffs’ attorneys in THR cases when they seek to enforce their judgments abroad.

d. Default judgments

Foreign courts may also be skeptical of the default judgments so commonly rendered in THR cases before U.S. courts. Regarding this matter, Part One explains it thoroughly. The proceedings are so inherently unfair to the defendants that a foreign court would have good reason for expressing reluctance to enforce such a judgment.

5. Impecunious Defendants

Even if plaintiffs are able to clear all of the aforementioned hurdles to collection, their efforts are still likely to be much ado about nothing. Because heads of state and high-level officials are typically shielded from liability in U.S. courts by the Foreign Sovereign Immunities Act of 1976, the Act of State Doctrine or the Political Question Doctrine, it is normally the case against the low-level official that reaches a final judgment. Such defendants are seldom capable of paying even a tiny fraction of the exorbitant judgments awarded in THR cases. An example is the case of Abebe-Jira v. Negewo. Here, the defendant was accused of torturing the plaintiffs while working as a jailer in Ethiopia during the Dergue dictatorship of the mid-1970s. When one of the plaintiffs located him in Atlanta, Georgia, he was working at a hotel. The plaintiffs have yet to recover any of the $1.5 million judgment rendered against him.

In summary, no plaintiff has ever collected any substantial damages stemming from a U.S. court’s judgment in a THR case. Moreover, no one is ever likely to do so. Essentially, this means that THR litigation in U.S. courts fails to achieve its own basic objective, which is to remunerate individual plaintiffs for damages they
sustained when their human rights were violated. However, it also fails to achieve the policy objectives of those who advocate its use most zealously. These failures are the next subjects of discussion.

B. Failure to Deny a Safe Haven

During the course of oral arguments before the Second Circuit Court of Appeals in Filartiga, one of the judges asked: “Because the defendant apparently does not have much money, what was the point of this high-profile case, other than getting your name in the newspapers?” Peter Weiss, an attorney with the CCR, responded:

The point was to send a message that the United States is not a haven for people like Pena-Irala. People who torture are not welcome here, and if they come here, they will be pursued by their victims, who will use the full arsenal of the U.S. judicial process to defend and vindicate their rights.

Since Filartiga, Weiss’ argument has remained popular among those supporting THR litigation in U.S. courts. Indeed, the policy of denying a safe haven to torturers was part of what motivated Congress to enact the TVPA.

Without question, this policy is a sound one, and I submit that the U.S. government should continually seek its effective fulfillment. However, Weiss’ argument is incorrect in implying that THR litigation is an effective way to achieve this end. This is because the volume of lawsuits filed is too small to communicate an effective message to torturers hiding in the U.S. Indeed, the long odds against THR plaintiffs recovering judgments have an undeniable chilling effect on the number of lawsuits filed. Moreover, as established supra, even Weiss’ own organization, the CCR, is only willing to file suit against select groups of torturers, excluding other potential defendants. This is only natural given the political agendas of the non-profit advocacy groups normally representing the plaintiffs in THR litigation.
The policy of denying a safe haven to torturers in the U.S. is not a valid justification for THR litigation in U.S. courts. If the U.S. truly seeks to competently fulfill this policy objective, then it should resort to other, more effective means. Otherwise, it will remain all too easy for torturers to hide in the U.S., a nation of 285 million people spanning over 9 eleven million square kilometers.

C. Failure to Deter Future THR Violations

Supporters of THR litigation in U.S. courts argue that such litigation serves to deter future THR violations. However, other human rights advocates readily acknowledge that “[i]t is unlikely that civil litigation in U.S. courts will, in the long run, represent an effective means of deterring or punishing massive human rights abuses.” The question of deterrence can be phrased in the following way: Does the prospect of being sued in a U.S. court have any influence on the decisions of high-level or low-level officials when they consider implementing or executing policies that violate human rights? The answer to this question is clearly “no” for a number of reasons. Some of the most compelling reasons, such as the plaintiff’s inability to collect a judgment and the infrequency of lawsuits, have already been addressed supra, and require no further examination. There are two other compelling reasons however, that do warrant analysis.

1. The Momentum of Hatred

Few would disagree that human rights violations are typically products of hatred and violence. Such conduct is generally motivated by powerful ideological influences, whether political, religious or otherwise, that advocate a “spiral of violence”. When such a climate descends upon a society, “[t]he threat of punishment – let alone an empty threat – has a limited impact on human behavior.” It logically follows that when a culture has become “intoxicated with hatred and
violence,” the “empty threat” of a THR lawsuit in the U.S. will have a negligible impact on the decisions of officials contemplating the perpetration of human rights violations.

2. The World Will Not be Watching

Unlike the judgments rendered by international criminal tribunals, such as the ICTY and ICTR, no U.S.-based litigation addressing a contemporary THR violation has ever been the object of worldwide attention among the general public. Consequently, the U.S. courts deciding these cases have failed to garner an international consensus as to the legitimacy of their judgments. Without such a consensus, the U.S. courts lack the international endorsement that is needed to effectively and authoritatively deter future violations. Mere disapproval in the U.S. of the defendant’s conduct is simply not enough. The concurrence of the international community is needed to effectively deter human rights violations.

D. Failure to Create a Respectable “Record”

Beth Stephens has argued that one of the benefits of litigating THR cases in U.S. courts is that it creates “an official record of the human rights abuses inflicted on [the plaintiffs] or their families.” Although the establishment of such a record may be gratifying to the plaintiffs involved, it is not likely to have any practical significance where the furtherance of global human rights interests is concerned. As discussed in Part One, such “records” tend to depict only one side of the story, and are often founded upon unreliable evidence. Their utility is limited because they fail to provide the international community with a full picture of what happened.

Moreover, there seems to be an implicit assumption among advocates of such litigation that a courtroom trial is the only way for the victim’s story to be meaningfully imparted to the outside world. Such an assumption is difficult to
fathom, given the easy access to abundant media sources existing in American society. The victims of THR abuses can publicize their stories in any number of ways without ever setting foot inside a courtroom.

Furthermore, when victims rely on non-legal means of publicizing their stories, they make it easier to obtain a more thorough, balanced account of what happened. If an accused THR violator is inclined to explain his actions, it is only natural that he would prefer to do so in a non-legal setting, away from all of the scrutiny, pressure and tension of the courtroom. It is generally more pleasant to be interviewed by a journalist than to be cross-examined by opposing counsel. Additionally, the media is likely to have investigative resources that are just as good, if not better, than the public interest groups typically representing the plaintiffs in these cases.

It should also be noted that the initiation of THR litigation in a U.S. court could be counter-productive where the objective is to obtain information. As noted by Professors Malcolm Evans and Rod Morgan,

\[ T \]he problem posed by having ever greater recourse to domestic courts, criminal or civil, for claims in relation to torture or other forms of ill-treatment is that it could encourage [the] negative effect [of] governments battening down the informational hatches.\textsuperscript{181}

In such a scenario, it is clear that THR litigation is not conducive to the furtherance of international human rights interests because it restricts the world’s access to information rather than expanding it.

The creation of an official record, via litigation, only serves to vindicate the interests of the individual plaintiffs involved. It does little to benefit global human rights interests. As demonstrated in the next section, there are other ways in which this lack of congruity between the ephemeral, individualized satisfaction of THR plaintiffs and the advancement of international human rights is manifested.
E. Failure to Advance International Human Rights Interests by Individual Satisfaction

This section begins with the premise that “human rights typically deal with individuals as part of larger communities.”182 This being the case, tort litigation, which focuses squarely “on the purely bilateral relation between victim and tortfeasor,”183 is a particularly ineffective tool for advancing THR interests. Rather than pursuing a solution that seeks to remedy and deter transgressions perpetrated against an entire community, THR litigation merely provides an avenue towards piecemeal “justice” for a few select inhabitants of these communities. Where the effective, lasting promotion and enforcement of international human rights is concerned, such a solution is almost entirely inconsequential. This is best demonstrated by the failure of THR litigation in the U.S. to leave any form of legacy within the international community during twenty-plus years since Filartiga.184

Moreover, the individualized nature of the remedy is not limited to the victim’s context. It also extends to the violators. Reflecting upon the Filartiga decision, Stephen Schneebaum writes: “[t]he point was not that Paraguay violated a treaty in the torture of Joelito Filartiga; it was that his torture and murder by Amerigo Pena-Irala were nevertheless violations of the law of nations.”185 Although he assuredly does it unintentionally, Schneebaum articulates why the focus of THR litigation in U.S. courts is so misdirected. Rather than attempting to effectively influence the brutal Stroessner regime in Paraguay to stop oppressing its citizens, the Filartiga litigation merely addressed the plight of one family and the conduct of one low-level official.

THR advocates would likely respond to this criticism by claiming that they seek to vindicate the human rights interests of these various communities “one case at a time.” However, this argument falters because few cases are ever brought. Even
viewed in the aggregate, they have certainly failed to have any meaningful impact upon the targeted communities.

Moreover, although it is true that the class-action suit in *In re Marcos Human Rights Litigation* led to a judgment awarding $1.2 billion in punitive damages to approximately 10,000 class members, this result still constitutes “individualized justice” because the nature of the remedy is a separate award for each individual class member, rather than a general course of action extending beyond all class members to the remainder of the Philippine community. Community-based problems require community-based solutions.

THR litigation in U.S. courts is doomed to remain devoid of any lasting legacy in the promotion and enforcement of international human rights because it proposes individualized solutions for community-oriented problems. This is yet another reason why other members of the international community have not seriously contemplated the results of such litigation when formulating or implementing human rights policies. As shown in the next section however, there are still more reasons for this shortcoming.

F. Failure to Issue Decisions that Other States Will Take Seriously

1. Undermining the Gravity of the Offense

Initiating a private tort claim against someone varies drastically from prosecuting that person for the commission of an international crime. Although it is true that the same specific conduct may be the focal point of each type of action, the respective contexts in which the facts surrounding this conduct are brought to light differ dramatically. The context in which private tort claims are raised in the U.S. lacks the solemnity of a criminal prosecution, regardless of whether such a prosecution is before an American or international tribunal. When a torture case is
addressed in the same context as a dog-bite case, the opprobrium of the international crime is severely undermined. As Lyal Sunga remarks:

\[T\]he use of a statute designed for tort claims, but applied to torture, appears to belittle the status of torture as an international crime; in national law, mere ‘wrongs’ actionable though they are, are generally considered less grave than ‘crimes.’\(^\text{187}\)

Consequently, foreign decision-makers will not contemplate a U.S. court’s decision in a private tort case with the same degree of seriousness that they would a criminal court’s decision.

2. Parochialism and Patriotism

Regrettably, as Professor Chibundu has observed: “[t]he tendency of judicial opinions to read more like press releases by the plaintiff (rather than an impartial evaluation of the facts) is an all-too-familiar feature of the [THR] decisions.”\(^\text{188}\) As an example, Chibundu cites an excerpt from the court’s opinion in Alejandre v. Cuba, in which it states: “[t]he government of Cuba, on February 24, 1996, in outrageous contempt for international law and basic human rights, murdered four human beings in international airspace over the Florida Straits.”\(^\text{189}\) This begs the question of whether the authors of such opinions are able to cast aside parochial biases when evaluating the legal issues raised in such cases.\(^\text{190}\) As another example, Chibundu refers us to the case of Flatlow v. Iran, examined in Part One, where the overzealous judge awarded $100 million more in damages against the Iranian government than the plaintiffs had even requested.\(^\text{191}\) When U.S. courts strive for the polemic rather than the pragmatic, the international community is less inclined to hold their decisions in serious regard when addressing human rights issues.

3. The United States’ Human Rights Record

As established in this section, the United States hardly qualifies as a champion
of human rights. Because its human rights record is far from exemplary, the international community will not be inclined to regard the opinions of American courts on human rights issues with much reverence. This demonstrates yet another failure of THR litigation in U.S. courts to have an effective and lasting impact on global human rights matters.

a. Non-membership in human rights treaties

The U.S. “lags far behind the rest of the developed world (and a sizable portion of the under-developed world) in signing, ratifying and implementing major human rights initiatives.”\textsuperscript{192} The U.S. still has not ratified treaties addressing economic, social and cultural rights, women’s rights, children’s rights, and even the laws of war.\textsuperscript{193} Moreover, even when the U.S. does ratify a human rights treaty, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it always declares it “non-self-executing.”\textsuperscript{194} This is a dualist approach, requiring ancillary legislation before a private right of action can exist in accordance with the treaty.\textsuperscript{195} Furthermore, whenever the Senate consents to the ratification of a human rights treaty, it always conditions its consent upon the attachment of reservations to the treaties’ provisions.\textsuperscript{196} These reservations serve to nullify the domestic force of these treaties within the U.S.\textsuperscript{197} The result is that “the U.S. government uses the international human rights system to measure the legitimacy of foreign governmental acts, but it systematically declines to hold domestic acts to the same legal scrutiny.”\textsuperscript{198}

Under these conditions, it is absurd for U.S. courts to act as standard-setters for the rest of the world in the arena of human rights. The U.S.’s failure to meaningfully participate in so many of the world’s major human rights conventions is
abject. It severely undermines its courts’ credibility as arbiters of the very rights promoted in these agreements.

b. Hypocrisy regarding the treatment of defendants

As we have just seen, although THR litigation in the U.S. allows American courts to scrutinize other nations’ compliance with international human rights standards, the U.S. government has been unwilling to apply such standards against its own citizens.\(^{199}\) A key example is the U.S.’s refusal to ratify the Rome Statute for the International Criminal Court. A primary reason for this refusal is concern that U.S. troops and other government officials might be subject to the court’s jurisdiction.\(^{200}\) For similar reasons, the U.S. has refused to sign the Land Mine Treaty.\(^{201}\)

A stark conflict of interest exists between the U.S.’s internal and external human rights policies. As Stephen Schneebaum writes: “[t]he United States is the great champion of international law in the world, so long as it is winning, but the moment it stands to have its conduct condemned, it changes the rules.”\(^{202}\) Under these circumstances, it is difficult to imagine the rest of the world seriously contemplating any human rights-related decision emanating from a U.S. court.

c. Vindication or violation?

In deciding THR cases, U.S. courts stand poised to violate the defendants’ human rights, and possibly those of their fellow citizens. This is an interesting paradox, as the purported vindication of one set of human rights might require the violation of others. As demonstrated, at least four fundamental human rights are subject to violation during the course of a THR case’s proceedings in a U.S. court.

(1) Right to self-determination

In Part One, I argue that when THR litigation in the U.S. presumes to remove
an elected official from the performance of his duties, even temporarily, it violates his constituents’ right of self-determination. Such officials are elected by their constituents to assist them in the free pursuit of economic, social and cultural development. These are all components of the right of self-determination embodied in Article 1 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 1 of the International Covenant on Economic and Social Rights ("ICESR"), and Article 21(1) of the Universal Declaration of Human Rights ("UDHR"), which recognizes everyone’s “right to take part in the government of his country, . . . through freely chosen representatives.”

Let us assume that a freely chosen representative, facing the threat of an exorbitant money judgment against him, is forced to defend his actions (or inactions) through a protracted litigation process in the U.S. In such a situation, his ability to participate in the government of his country will be stifled, along with that of his constituents, albeit vicariously. In such a situation, litigation purporting to vindicate a human rights violation, results in a violation of the right to self-determination.

(2) Right to a fair civil hearing

Article 14(1) of the ICCPR states that “[a]ll persons shall be equal before the courts and Tribunals” and that “[i]n the determination . . . of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” When the U.S. ratified the ICCPR, it did not include any reservation to the portion of Article 14 addressing civil trials. Part One demonstrates that the proceedings of THR cases in U.S. courts, from start to finish, are not fair. Furthermore, both Parts show that the competence, independence and impartiality of these courts are also suspect. Because almost all THR litigation in U.S. courts involves default judgments that are rife with inequities,
such proceedings will likely involve infractions of the defendants’ right to a fair hearing.

(3) Right to equal protection and freedom from discrimination based upon national origin

As briefly noted in Part One, 28 U.S.C. § 1391, the statute governing the venue of civil cases in federal courts, discriminates between American and alien defendants. Although American defendants can only be sued in districts that are connected with the case (such as the district where the defendant resides, or where the subject events occurred), the statute allows plaintiffs to sue aliens in any district. Consequently, plaintiffs filing THR lawsuits can sue in the most favorable fora possible solely because the defendants are not U.S. citizens.

Article 26 of the ICCPR and Article 7 of the UDHR both state that all are “equal before the law and are entitled without any discrimination to the equal protection of the law.” Moreover the ICCPR’s language contains an express prohibition against discrimination based upon national origin. Thus, the defendant’s right to equal protection and freedom from nationality-based discrimination stands to be violated every time a THR plaintiff forum shops.

(4) Right to not be arbitrarily deprived of property

Article 17(2) of the UDHR states that “No one shall be arbitrarily deprived of his property.” If the plaintiff in a THR lawsuit ever succeeds in collecting damages from the defendant, the collection will probably constitute a violation of this provision. As discussed in Part One, the default judgments awarding damages in these cases are very arbitrary, as they are rendered in the defendant’s absence, and based solely upon the plaintiffs’ evidence. It would be equally arbitrary to permit a plaintiff to seize a defendant’s property under such circumstances.
4. Nothing Has Happened

For over twenty years, U.S. courts have been issuing judgments in THR cases, with little or no consequence in the field of international human rights. Therefore, it should not be surprising that the rest of the world ignores these decisions. This is particularly so as international criminal tribunals such as the ICTY, ICTR and ICC continue to play more significant roles in the promotion and enforcement of international human rights.

5. Brief Summary

In summary, one reason why THR litigation in U.S. courts fails to effectively promote and enforce human rights is because the international community does not take the courts’ decisions seriously. Several factors contribute to this failure. The proceedings are abysmally unfair to the defendants. Civil in nature, they fail to cast a proper air of gravity upon the violations at issue. The decisions emanating from these proceedings are sometimes products of parochial zeal, rather than an objective evaluation of the facts and application of the law. They are a product of the judicial system of a nation with a human rights record that is mediocre at best. Finally, these decisions have never generated any meaningful results in the arena of international human rights.

F. Failure to Appreciate the Parochial Nature of Human Rights

Human rights are parochial phenomena. A given human right does not consist of one uniform and ubiquitous concept, but rather a variety of notions that are “likely to be influenced by local considerations.”206 The dimensions of a human right within a particular community “are inevitably the product of that particular community’s historically-situated understandings.”207 As demonstrated in this section, one of the reasons why THR litigation in U.S. courts has failed to effectively promote and
enforce international human rights is because the American way of adjudicating human rights claims fails to devote any consideration to the differing notions of human rights pervading other communities. Such litigation is founded upon the erroneous premise that the communities “targeted” by the decisions of U.S. courts will willingly embrace wholly American notions of human rights. Three key reasons explain why litigation based upon this premise cannot lead to meaningful results.

1. Definitional Problems

No definitional consensus exists regarding the precise contents of most human rights.\textsuperscript{208} Moreover, even if we assume that such a consensus does exist regarding a right’s definition, such a definition will inevitably be the subject of varying interpretations, based upon the differing perspectives that exist from one community to the next. Therefore, when a U.S. court purports to delineate the dimensions of a human right in a given case, its definition is likely to conflict with those of other communities.

Advocates of THR litigation in U.S. courts are likely to argue that in a case such as \textit{Filartiga}, the defendant clearly perpetrated acts constituting torture by any community’s definition of the word. I do not disagree with this assertion. The ninety-minute, tape-recorded interrogation and electrocution of young Joelito Filartiga at the hands of the Asuncion police in reprisal for his father’s opposition to the Stroessner regime\textsuperscript{209} was unquestionably an insidious act of torture by any community’s definition. The problem is that in less severe cases, the varying definitions of torture from one community to the next make it impossible for a universal line to be drawn between acts that constitute torture and acts that do not.

The supporters of THR litigation will likely retort that U.S. courts should at least adjudicate the “most severe cases.” But how does a court determine whether a
case is severe enough? The problem with U.S. courts deciding severe torture cases such as *Filartiga* is that it paves the way for the 600-plus federal judges to claim that “they know severe torture when they see it.” Such a practice inevitably creates a “slippery slope” leading to internationally controversial definitions of human rights norms.

a. But somebody has to draw the line

Advocates of THR litigation will also argue that somebody has to address these cases if human rights law is ever to have any real significance. I agree wholeheartedly. However, it is my assertion that the proper “somebody” is certainly not a U.S. federal district judge. I submit that the proper “somebody” must either (1) have a keen understanding of the “target locality’s” concept of a given human right (for example Paraguay’s concepts of torture and extrajudicial killing in the *Filartiga* case) or (2) have been appointed through the sovereign mandate of the target locality to determine the concept’s meaning (for example Germany’s accession to the jurisdiction of the European Court of Human Rights). Without such an arbiter, judgments purporting to define the scopes of human rights are doomed to be dismissed as ignorant of local concepts and interventionist. The result is inefficacy in the target locality. For this reason, when effective and lasting change is the goal, U.S. judges and juries will seldom ever qualify as the proper authorities for determining the scopes of human rights in other localities.

2. The Specter of Naturalism

When we juxtapose the parochial nature of human rights with its naturalist and value-oriented foundations, the arguments against THR litigation in U.S. courts are bolstered even further. Professor Alfred P. Rubin states that:
As a result, when U.S. courts decide THR cases, they articulate human rights standards based upon American moral ideals and values that do not complement those of the target localities. Such naturalistic decisions are likely to be rejected in these other communities, failing to foster any meaningful human rights reforms. Moreover, as Professor Rubin indicates, the naturalism inherent in these judgments serves to set the world asunder rather than uniting it:

The natural law argument used to pierce national boundaries turns out to cut the other way and reinforce the legal boundaries that determine municipal legal orders, each reflecting the value system the state has chosen through its history and political processes as the best reflection of the natural law as it ought to apply to matters essentially within its own borders.  

As demonstrated in the next section however, the divisiveness of naturalism is not the only reason why THR litigation in U.S. courts can do more harm than good in promoting and enforcing international human rights. The problem is further compounded by interventionism.

3. The Perils of Interventionism

In order to truly capture the brashness of the interventionist spirit that is so commonplace among advocates of THR litigation in U.S. courts, it is helpful to examine the words of these advocates themselves. Beth Stephens, perhaps the most outspoken advocate of this litigation among academics and practitioners, has written: “[T]he precedents in [the U.S.] must be used to facilitate the development of a civil remedy [for human rights violations] in other nations.” She also writes that
“[h]uman rights litigation is just one example of an area in which the United States can be proud to lead the way.”<sup>213</sup> Labeling the ATS a “human rights beacon,” Michael Small states that: “[b]y granting jurisdiction under the [ATS], federal courts can foster global legal order and enforce international human rights norms.”<sup>214</sup> He also claims, in rather naturalist fashion, that: “[b]y exercising jurisdiction over international human rights claims, federal courts put the United States on high moral ground.”<sup>215</sup> Professor Kathryn Boyd, in her article supporting the abandonment of <i>forum non conveniens</i> dismissals in THR cases, asserts that: “the United States has a strong interest in influencing the evolutionary process by which international norms emerge and are applied.”<sup>216</sup> Finally, Gregory Wallance, an international lawyer in New York, avers that: “[t]he cold war paradigm was the United States as global policeman. The post-cold-war paradigm is the United States as global attorney.”<sup>217</sup>

Criticizing such claims, Professor Chibundu observes:

Such pat statements, however, only barely mask the issues of power and chauvinism they entail. The obfuscation of these concerns by pulling on the heartstrings of universal humanity can at most be temporary, for at heart, it undercuts the normative justification of the “rule of law,” which is one of the frequently invoked pillars of the new order in international relations.<sup>218</sup>

Even a cursory reading of the myriad of law journal articles lauding the “merits” of THR litigation in U.S. courts will convince the reader that an understanding exists, among supporters of this litigation, that the U.S. can and should dictate the human rights policies of other nations through its courts’ decisions. Such a philosophy warrants severe criticism, as its practical implementation is ultimately baneful to the interests of the effective promotion and enforcement of international human rights.
a. A catalyst for resistance to human rights reform

Much of the world harbors a deep resentment towards the intervention of other nations, such as the U.S., in their internal affairs. Consequently, it should be no surprise that when a country such as the U.S. professes to dictate the human rights norms that other countries must observe, many nations will respond by either refusing to cooperate with transnational investigations and adjudications, or refusing to adopt the norms promoted through such judgments. They view such acts and omissions as defenses against encroachments upon their sovereign authority. Professor Curtis Bradley notes that:

[THR judgments rendered by U.S. courts] may simply be dismissed by the affected societies on the ground that they do not reflect a full understanding of the local history, culture, and conditions, and perhaps also on the ground that they are an example of US overreaching.

Moreover, developing nations are not the only ones that deplore such extensive exercises of jurisdiction. European countries have also asserted that “the United States has no right to assert jurisdiction over persons who are neither present nor acting within the U.S. territory.”

Judgments stemming from THR litigation in U.S. courts fail to establish human rights norms that other nations will incorporate into their own systems. The repugnance of the interventionism embedded within this approach repels states from internalizing suggested reforms. Whether such resistance occurs solely as a matter of sovereign pride is immaterial. The point is that the approach taken by the U.S. courts not only fails to work, but threatens to be counter-productive.

b. Precluding states from developing their own human rights norms

Without question, “the most effective deterrent to continued human rights abuses” is the development and application of “meaningful domestic remedies.”

50
Because concepts of human rights vary from one political community to the next, these respective communities are the most appropriate legislators of the remedies needed to promote and enforce these rights. However, when a U.S. court decides a case addressing human rights issues in another country, it “sit[s] in judgment, not just on [that country’s] everyday activities, but on the activities at the heart of [its] political community.” In so doing, the American court may effectively remove awareness of the THR violations from the societies most affected by them. This may lead to a deterioration of the local judiciaries, an ignorance of individual rights in the local community, and a preference for “the extrajudicial mauling of opponents” rather than the “judicial fashioning and enforcement” of human rights. Moreover, it may lead to a removal of pressure on the government of a target locality to hold itself accountable before its own domestic legal tribunal.228

(1) A “hands off” judicial policy

THR litigation in U.S. courts threatens to stymie the target locality’s internalization of human rights norms and responsibilities- a process that stems from local resolutions, whether they emerge in the form of “a local adjudication, truth commission, or even an agreed-upon amnesty.” Thus, it threatens to undermine the most effective method of deterring future human rights abuses. By compelling its civil courts to observe a “hands off” policy, requiring abstention from the adjudication of THR cases, the U.S. can make it easier for the target localities to develop their own procedural and substantive human rights laws. In the long run, this is a far more effective way for American courts to promote and enforce human rights abroad. Sometimes the best action is inaction.

Advocates of THR litigation in U.S. courts will be quick to argue that this approach would be ineffective, as the unavailability of a local remedy is the very
reason why THR abuse victims are suing in the U.S. However, I submit that the U.S.
can play a far more effective role in the effective promotion and enforcement of
international human rights by acting in concert with the international community to
persuade target localities to undertake internal judicial and legislative reforms. Of
course, the precise nature of this cooperation and the requisite efforts to persuade
remain subject to debate, and will surely vary from one target locality to the next.
However, the key point is that a target locality is more likely to respond to an
international stimulus than a provincial one. When such persuasion succeeds, the
target locality becomes better equipped to internalize and enforce its own human
rights norms. In the end, the benefits (the more effective deterrence of human rights
abuses) of a judicial “hands off” policy would dramatically outweigh the costs (the
elimination of unfair and inconsequential judicial decisions).

Naturally, the “international alternative” is not a panacea for the countless
human rights crises afflicting the world today. Indeed, the use of international
persuasion to promote human rights reforms may often be slow and unreliable, or
possibly dismissed as another brand of interventionism. However, even if this
approach only succeeds in nudging a few target localities towards the adoption of
human rights reforms, it already will have accomplished far more than ineffective and
counter-productive THR litigation in U.S. courts.

III. Conclusions

The litigation of THR cases in U.S. courts fails to effectively promote and
enforce human rights abroad. No meaningful, lasting solution to either the case at
hand or the general human rights dilemma from which it emerged has ever been
achieved. During the past two decades, American courts deciding these cases have
awarded millions of dollars to the plaintiffs, who have collected a grand total of $400.
The enforcement of such judgments is virtually impossible. Defendants can easily flee the U.S. with their assets. The process for collecting such assets is costly. Foreign courts must inevitably enforce such judgments on an *ad hoc* basis, as the U.S. is not party to a single enforcement convention. Sometimes these courts will refuse to enforce such judgments. In most cases, the entire endeavor is fruitless *ab initio*, as the defendants are generally low-level officials who could not afford to pay even a tiny fraction of the judgment anyway.

THR lawsuits filed in U.S. courts are trivial pursuits because they fail, in every conceivable way, to advance international human rights interests. They do not effectively discourage human rights violators from coming to the U.S. They do not deter future THR violations. They do not establish respectable records of the violations committed. Limiting their focus to individualized vindications, they fail to provide collectively beneficial solutions to THR problems. They fail to draw serious attention from the foreign decision-makers who formulate and implement human rights policies. With no apology for interventionism, U.S. courts presume to impose their own norms upon target localities with differing values, often depriving them of opportunities to develop and enforce their human rights laws domestically.

If the U.S. truly desires to make a lasting contribution to the promotion and enforcement of international human rights, it will adopt a “hands off” policy prohibiting its courts from interfering in THR matters. Its focus should be redirected towards international efforts to persuade target localities to undertake meaningful human rights reforms on their own accord. Rather than being a “maverick” promoting provincial notions of justice, the U.S. should become more of a “team player” in international efforts to further human rights interests.
CONCLUSION: AN ODYSSEY TO NOWHERE

I. THR Litigation: A Product of American Idealism

When Judge Kaufman issued his decision in Filartiga, almost twenty-two years ago, he did so with the most honorable intentions. Surely most of us have long desired to realize the “ageless dream” of a world in which all are free from “brutal violence” or other gross violations of human rights and fundamental freedoms. Moreover, to the extent that they seek to fulfill this dream indiscriminately, I do not question the intentions of today’s human rights advocates. The problem lies in the uniquely American method advocated for achieving this dream, a method that is excessively idealistic.

THR litigation in U.S. courts is hopelessly unfair and ineffective. In asserting that it is “hopelessly” so, I submit that no matter how U.S. lawmakers might endeavor to re-craft the language of the procedural and substantive laws directly affecting this unique type of litigation, severe flaws will remain, inevitably undermining the objective of effectively promoting and enforcing human rights abroad. This is because these flaws do not lie in the language of the laws, but in the premises behind them when applied in the THR context. Each premise reflects the idealistic notion that what works in the U.S. will also work internationally in the human rights arena. One such premise is that American-style litigation is conducive to the fair resolution of THR dilemmas. The errors of this premise are discussed exhaustively in Part One and require no further elaboration. However, four other provincialist premises exist, warranting at least cursory attention.

A. Civil Lawsuits Deter Wrongful Conduct

In contemporary American society, the prospect of being sued is an effective form of behavior control. I recall many past clients, aspiring to start new businesses,
discussing how they were eager to get started but could not do anything until incorporating or taking other measures to limit their liability—just in case they might get sued. Such concern is enhanced by the possibility of a lawsuit for punitive damages. Moreover, when a defendant is sued for conduct that is not covered by insurance, the risk of financial ruin is genuine. Therefore, in the U.S., the imminence of a person’s economic demise for wrongful conduct provides a strong motivation for good behavior.

This is not so in the THR context. A non-U.S. citizen committing torture abroad does not sense any threat of financial devastation. As demonstrated supra, this is the least of his considerations. Unlike in the American context, the deterrent effect of a civil judgment is negligible.

B. Cases, Not Contexts

The Anglo-American case precedent system governs an American judge’s analysis of what the law is, and how it should be applied to the facts. When the judge decides a case, she first reviews the facts and the legal issues presented. She then finds the applicable rule of law by looking to prior cases involving similar facts and legal issues. Although each case arises from different events, a common bond still exists. This bond is that they all emanate from the same socio-cultural context—American society.

When U.S. courts adjudicate THR cases, the contextual bond vanishes. The case precedent system does not afford judges the opportunity to tailor their decisions based upon the particular norms of the target localities. They must apply the law as articulated in prior cases lacking a common contextual bond with the case at bar. The system was not designed to regulate parochial phenomena such as international
human rights, which vary from community to community. Therefore, ineffective solutions to the problems of target localities are inevitable.

C. The Effectiveness of Tort Remedies

American tort remedies are based upon an individualized theory of justice. They are designed to make an individual plaintiff “whole again” (to the extent that this is possible), and to deter an individual’s wrongful conduct. They are not designed to repair or deter injustices perpetrated by governments and afflicting entire political communities, nor can they effectively do so. Indeed, even at the individual level, the THR lawsuits filed in U.S. courts provide precious little justice, as the plaintiff is not made “whole again”, and the defendant almost always escapes unpunished. Thus, at both the community and individual levels, the litigation yields no meaningful results. Some injustices cannot simply be “sued away.”

D. “Universal” Norms

Advocates of THR litigation are likely to argue that it is proper for U.S. courts to articulate human rights norms because they are universal in nature, transcending all boundaries. However, human rights are only universal in nature to the extent that some common ground exists regarding the contents of their definitions from one community to the next. The question thus becomes one of who should define this common ground. I submit that this role should not be delegated to American judges and juries, as they are ill-qualified to determine the precise contents of the norms observed by the rest of the world.

E. Conclusion

Expanding upon the contents of Parts One and Two, each of the four premises briefly discussed above further elucidates the faultiness of the presumption that U.S. courts can fairly and effectively adjudicate THR cases. These faults are unavoidable,
regardless of any measures that U.S. lawmakers might take in an effort to improve their international efficacy. If the U.S. truly desires to play a significant role in the effective promotion and advancement of human rights abroad, it must shift its attention away from the rigidly American solution of piecemeal litigation, focusing instead on international solutions. Until then, Judge Kaufman’s benevolent odyssey to advance human rights will continue to lead nowhere.

1 B.A. (summa cum laude), Northern Kentucky University (1993); J.D., University of Cincinnati (1997); LL.M., University of Helsinki (2002). This work is dedicated to my grandmother Mary, and in loving memory of my grandfather Charles. Special thanks are due to my friend and colleague Thomas Vaughan, and to Professors Jan Klabbers and Päivi Leino at the University of Helsinki for their helpful critiques of this work as originally drafted.

2 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). This was not the first time that Judge Kaufman authored a historically profound opinion. He was also the judge who presided over the trials of Julius and Ethel Rosenberg in 1951, sentencing each of them to death for allegedly providing nuclear weapons technology to the Soviet Union. A brief biography of Judge Kaufman appears on-line at www.law.umkc.edu/faculty/projects/ftrials/rosenb/ROS_BIK.HTM (last visited Mar. 25, 2002).

3 See Filartiga, 630 F.2d at 880.

4 Id.


7 See id. at 975-78.


9 Throughout this article, the phrase “transnational human rights” is only intended to include human rights matters between aliens addressing extraterritorial conduct. It is not intended to include matters involving acts in the U.S., or acts committed by U.S. citizens or corporations.

10 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D. C. Cir. 1984) (concluding that the “law of nations” does not apply to terrorist acts of the PLO in Israel, but each on entirely different grounds).


12 Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (1994)). The TVPA differs from the ATS in three ways. First, section 2(b) contains an “exhaustion of remedies” clause requiring the claimant to exhaust the “adequate and available remedies in the place in which the conduct giving rise to the claim occurred. Second, unlike the ATS, which expressly requires that an alien be the tort victim, the TVPA also allows U.S. citizens to file suit. Third, section (a) of the statute allows an individual to sue a state actor directly.

13 Filartiga, 630 F.2d at 890.

13 See Koh, supra note 14; Burley, supra note 7; Randall I, supra note 14; Randall II, supra note 14; Dodge, supra note 14; Johnson, supra note 14; Sweeney, supra note 14; Harvey, supra note 14; Kochan, supra note 14; Gruzen, supra note 14; Small, supra note 14; Leh, supra note 14; Pryor, supra note 5; Black, supra note 14; Steinhardt, supra note 14; Fitzpatrick, supra note 14; Scoble, supra note 14; Murray, supra note 14.

16 Russell J. Weintraub, Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities that Violate International Law, 62 BROOK. L. REV. 753, 771 (1996); Fitzpatrick supra note 14, at 497; Steinhardt, supra note 14, at 82; Pryor, supra note 6, at 996-1008; Leh, supra note 14, at 443-58; Small, supra note 14, at 185-94; Gruzen, supra note 14, at 223-26; Harvey, supra note 14, at 352-55; Randall II, supra note 14, at 508-09; Murray, supra note 14, at 706-09.

17 Steinhardt, supra note 14, at 83-86; Small, supra note 14, at 183-85; Gruzen, supra note 14, at 226-27; Harvey, supra note 14, at 355-61; Weintraub, supra note 16, at 772.

18 Frederic L. Kirgis, Jr., Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts, 82 AM. J. INT’L L. 323, 326-30 (1988); Fitzpatrick, supra note 14, at 504-17; Steinhardt, supra note 14, at 86-90; Pryor, supra note 6, at 996-1008; Gruzen, supra note 14, at 227-30; Randall II, supra note 14, at 508; Weintraub, supra note 16, at 776.


20 See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Transnational Publishers 1996). Even this work, which is a virtual “cookbook” for how to commence and pursue a THR claim in U.S. civil courts, only devotes a meager six pages to the issue of how these suits have impacted human rights, providing very few concrete examples. Id. at 233-38.


22 For three and a half years, I practiced as a civil litigation attorney with the firm of Benjamin, Yocum & Heather, LLC in Cincinnati, Ohio, U.S.A. During this time, I was the lead counsel in nine jury trials and approximately forty arbitration proceedings. Most of these matters were personal injury tort cases in which I represented the defendants. I have also co-authored a law review article addressing issues in tort law. See Thomas R. Yocum & Charles F. Hollis, III, The Economic Loss Rule in Kentucky: Will Contract Law Drown in a Sea of Tort?, 28 N. KY. L. REV. 456 (2001).

23 This includes the ATS and TVPA, which also provide jurisdiction over non-transnational cases.


25 Id.


28 Id. (citing Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997)).

29 Id.
30 Id.
31 Id. (citing Flores v. Southern Peru Copper Corp., No. 00 Civ. 9812 (GEL) (S.D.N.Y. Feb. 7, 2001)).
32 Simon, supra note 21, at 71. See also STEPHENS & RATNER, supra note 20, at 166.
33 STEPHENS & RATNER, supra note 20, at 166 (citing Pope v. United States, 323 U.S. 1, 12 (1944); Thomson v. Wooster, 114 U.S. 104 (1885)). The term “well-pleaded” means that a claim in the complaint is supported by all of the factual allegations needed for such a claim to stand on the merits.
34 Simon, supra note 21, at 71.
35 FED. R. CIV. P. 11(b),(c).
36 Simon, supra note 21, at 71.
37 Chibundu, supra note 21, at 1102.
38 Chibundu, supra note 21, at 1102-03.
40 STEPHENS & RATNER, supra note 20, at 186 (citing FED. R. CIV. P. 26(b)(1)).
41 Id. at 186 n.44.
43 MODEL RULES OF PROF’L CONDUCT R. 1.8(b).
44 McFadden, supra note 24, at 37.
46 See STEPHENS & RATNER, supra note 20, at 205.
48 In the year 2000, the average federal district judge had 443 pending cases on his docket. Federal Court Management Statistics, District Court Judicial Caseload Profile, at http://www.uscourts.gov/cgi-bin/cmsd2000.pl. Federal district judges must often assign some of their cases to magistrate judges in order to lighten their often overwhelming dockets. In addition, they often rely on law clerks to do their legal research for them, and sometimes even to draft their decisions. The law clerks are usually recent law school graduates, and sometimes even law students.
49 An example is the trial of the Filartiga case, in which the magistrate judge interpreted and applied Paraguayan law in determining compensatory (but not punitive) damages. Steinhardt, supra note 14, at 94 (citing Filartiga v. Pena-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984) [hereinafter Filartiga II]).
50 McFadden, supra note 24, at 14-15. McFadden states that methodological provincialism, described supra: “causes U.S. courts to: (1) ignore or undervalue custom and general principles of law . . .; (2) undervalue scholarship . . .; (3) overvalue judicial decisions . . .; (4) interpret treaties as if they were domestic statutes or contracts; and (5) support propositions of international law with domestic citations.” McFadden also discusses the phenomenon of “doctrinal provincialism”, which refers to “the judiciary’s use of rules that restrict when international law can provide the rule of decision in a court’s judgment. He observes that “[s]everal rules and practices of U.S. courts limit the use of [international legal] sources in domestic litigation.” Id. at 11. Where THR litigation is concerned, the pertinent “rules and practices include: (1) the rule that prevents litigants from invoking treaties unless they are “self-executing”; . . . (3) the reluctance of U.S. courts to recognize the existence of international custom; (4) the rule that courts may not invoke customary law, unless, like treaties, it is self-executing; . . . and (7) the reluctance of U.S. courts to recognize the existence of an international rule based on the ‘general principles of law recognized by civilized nations.’” Id. at 11-13.
51 McFadden, supra note 24, at 21. See United States v. Alvarez-Machain, 504 U.S. 655 (1992), for an example of the U.S. Supreme Court having failed to even cite the Vienna Convention although the opinion purported to interpret the extradition treaty between the U.S. and Mexico.
53 Id. at 420-21.
54 A good example of how provincialism is reflected in American judges’ rulings regarding issues of international law is their frequent use of the American Law Institute’s Restatement (Third) of Foreign Relations Law “as though it were a codification of international law and foreign relations law
principles, even though its statements are often more aspirational than reflective of settled law.”
Bradley, supra note 27, at 467. Bradley also criticizes these judges for treating the writings of
academic experts as binding international law, even though they often express the academics’ “own
normative beliefs concerning the content of international law and its status in the US legal system.” Id.
at 468.

55 STEPHENS & RATNER, supra note 20, at 119-23.
56 Bradley, supra note 27, at 467.
57 Chibundu, supra note 21, at 1110 n.140 (citing Flatlow v. Iran, 999 F. Supp. 1, 34 (D.D.C. 1998)).
58 A good example is the controversy surrounding President Clinton’s appointment of Susan Dlott to
the position of federal judge for the Southern District of Ohio, Western Division in 1995. Judge Dlott
is the wife of Stanley Chesley, a prominent mass-tort lawyer who raised millions of dollars for
President Clinton and the Democratic Party during Clinton’s 1992 campaign. However, it should also
be noted that Judge Dlott herself was an accomplished trial attorney prior to her appointment. See
Kristina Goetz, The Biggest Case in Town is in Her Court, CINCINNATI ENQUIRER, Feb. 17, 2002,
available at http://enquirer.com/editions/2002/02/17/loc_the_biggest_case_in.html. It would be
particularly interesting to see how Judge Dlott would adjudicate a transnational tort case, given her
husband’s role as plaintiff’s counsel in such matters as the Union Carbide disaster of 1984. See
Chesley v. Union Carbide Corp., 927 F.2d 60, 62 (2d Cir. 1991).
59 STEPHENS & RATNER, supra note 20, at 175. Default occurs when the defendant fails to take active
measures to defend against the lawsuit. This can occur by failing to file an answer to the complaint,
falling to appear for a scheduled court appearance, or failing to comply with a court order.
60 Id. at 177.
61 Id. at 178.
62 Id.
63 Forti v. Suarez-Mason, No. C-87-2058 (N.D. Cal. 1999); Martinez-Baca v. Suarez-Mason, No. 87-
2057 (N.D. Cal. 1988); Quiros de Rapaport v. Suarez-Mason, No. C-87-2266 (N.D. Cal. 1989). These
cases involved claims against Carlos Guillermo Suarez-Mason, an Argentine General, for torture,
prolonged arbitrary detention, summary execution and cruel, inhuman or degrading treatment. See also
STEPHENS & RATNER, supra note 20, at 21, 240.
64 Simon, supra note 21, at 31.
65 FED. R. EVID. 801(c).
66 FED. R. EVID. 801(a).
67 See FED. R. EVID. 802.
1995).
70 STEPHENS & RATNER, supra note 20, at 242.
71 Simon, supra note 21, at 69. Hearsay occurs when A claims that B said something. Double
hearsay occurs when A claims that B claims that C said something. Triple hearsay occurs when A
claims that B claims that C claims that D said something.
73 Steinhardt, supra note 14, at 97.
74 Id. However, the admission by party-opponent exception is based upon the presumption that the
party-opponent will be present in court to admit or deny the veracity of the statement attributed to him.
Given the impossibility of bringing into court every member of the Philippine armed forces to whom
witnesses attributed statements, the judge’s decision to admit these statements is highly suspect. It is
also questionable as to whether the “statement against interest” exception to the hearsay rule should
apply, as this exception only applies where the statement “was at the time of its making so far contrary
to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or
criminal liability . . . that a reasonable person in the declarant’s position would not have made the
statement unless believing it to be true.” FED. R. EVID. 804(b)(3).
75 See Bano v. Union Carbide Corp., 273 F.3d 120, 121 (2d Cir. 2001); Wiwa v. Royal Dutch
Petroleum Co., 226 F.3d 88, 91 (2d Cir. 2000); Kadic v. Karadzic, 70 F.3d 232, 235 (2d Cir. 1995); In
re Estate of Marcos, 910 F. Supp. 1470; Republic of Philippines v. Marcos, 806 F.2d 344, 346 (2d Cir.
1986); Filartiga, 630 F.2d at 877; Xuncax v. Gramajo, 886 F. Supp. 168 (Mass. 1995); Doe v.
76 STEPHENS & RATNER, supra note 20.
77 Id.
As a personal injury defense lawyer, I had a regular working relationship with approximately five different orthopedic surgeons, a neurosurgeon, a labor economist and a biomechanical engineer, retaining all as expert witnesses in various cases.  

STEPPHENS & RATNER, supra note 20, at 178.  

81  As a personal injury defense lawyer, I had a regular working relationship with approximately five different orthopedic surgeons, a neurosurgeon, a labor economist and a biomechanical engineer, retaining all as expert witnesses in various cases.  

82  STEPHENS & RATNER, supra note 20, at 349.  

83  WILLEM A. WAGENAAR, IDENTIFYING IVAN 34 (Harvard University Press 1988).  Wagenaar discusses scientific studies comparing the eyewitness “hit rate” (correct identification of the defendant) in target-present lineups and target-absent lineups.  In twelve studies done, the overall hit rate in target-present studies was 70%, and the false alarm hit rate in target-absent studies was 52%.  Therefore, assuming a 50% prior probability that the target is present, a positive identification increases the probability of guilt to only 57%.

84  See id. at 124-125.  In the Ivan Demjanjuk case, from 9 May 1976 through 12 March 1980, nine different witnesses produced thirteen positive out-of-court identifications of defendant Demjanjuk as “Ivan the Terrible”, who was accused of murdering approximately 850,000 people at the gas chambers of Treblinka during World War II.  Nevertheless, Demjanjuk’s conviction and death sentence were later reversed based upon mistaken identity.  See Papers for ‘Ivan the Terrible’, retireee similar, witness says, CINCINNATI ENQUIRER, June 1, 2001, available at http://enquirer.com/editions/2001/06/01/loc_papers_for_ivan.html.  


88  See STEPHENS & RATNER, supra note 20, at 161.  The astuteness of Stephens & Ratner’s book makes it clear that they have mastered the “art” of litigating THR cases.  


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

91  STEPHENS & RATNER, supra note 20, at 174.  

92  Translators may charge exorbitant amounts for their services, as I came to discover when it was necessary to translate a third-party complaint into German in order to properly sue a Swiss party in accordance with the Hague Convention.  

93  See Klabbers, supra note 21, at 555.  

94  See id.  

95  Fitzpatrick, supra note 14, at 491 (noting that “Marcos was the first human rights case brought under the [ATS/ATCA] to be fully contested in a trial on the merits. . . .”).  

96  Jurors are commonly selected by drawing names from lists of registered voters and licensed drivers.  

97  STEPHENS & RATNER, supra note 20, at 168.  

98  Chibundu, supra note 21, at 1069.  

99  Id. at 1111-12.  

100  Id. at 1112.  

101  In theory, compensatory damages are supposed to restore the status quo ante, placing the plaintiff in the position that he was in prior to commission of the harm.  See Beth Van Schaack, In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention, 42 HARV. INT’L L.J. 141, 156-57 (2001).

Steinhardt, supra note 14, at 94.


Volokh, supra note 102, at 7; Van Schaack, supra note 101, at 158.

Normally, in order for the court to award such damages, the plaintiff must demonstrate that the defendant acted with “ill will, malice, or evil motive,” or in a manner that demonstrates a “conscious indifference to harmful consequences.” Volokh, supra note 102, at 16.

For this reason, punitive damages are sometimes called “exemplary damages.”


Id. at 864. Cf. Hilao v. Estate of Marcos, 95 F.3d 848 (9th. Cir. 1996) (applying Philippine law, which does allow for punitive damages).

Filartiga II, 577 F. Supp. at 864.

See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), for use of this term.

Murphy, supra note 86, at 47; Fitzpatrick, supra note 14, at 500; Steinhardt, supra note 14, at 98-99.

See Fitzpatrick, supra note 14, at 499.

Murphy, supra note 86, at 47 (noting the reasonable doubt standard in American criminal cases); ICTY Rules of Procedure & Evidence, supra note 42, at R. 87; ICTR Rules of Procedure & Evidence, supra note 42, at R. 87; Rome Statute, supra note 42, at art. 66(3).

Federal Court Management Statistics, supra note 48 (noting that in 2000, the median period of time between the filing and trial of a civil case in federal district court was 20 months.) Furthermore, 12.2% of the civil cases on the dockets of these courts were over 3 years old) However, THR cases are far more likely to take longer to prepare for trial, due largely to discovery complications.

Steinhardt, supra note 14, at 68.

Id. at 65.

See STEPHENS & RATNER, supra note 20, at 186-87.

Klabbers, supra note 21, at 555.


Tachiona v. Mugabe, 169 F.Supp.2d 259, 267 (S.D.N.Y. 2001). Mugabe was served with a complaint while he was in New York attending a conference at the United Nations. Id. The federal district court dismissed the suit against him on the bases of diplomatic and head-of-state immunity. Id. at 317.


The U.S. Supreme Court has unanimously said no to this question in situations where the President of the U.S. is the defendant and the alleged conduct occurred prior to his inauguration. See Clinton v. Jones, 520 U.S. 681 (1997). But see Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding that the President has absolute immunity from civil damages arising out of the execution of official duties of office).

Klabbers, supra note 21, at 556.

Murphy, supra note 86, at 36 (quoting Torture Victim Protection Act: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the Senate Comm. on the Judiciary, 101st Cong., 22-29 (1990) (Statement of David P. Stewart, Assistant Legal Adviser, Department of State)).
126 STEPHENS & RATNER, supra note 20, at xiii.
127 Simon, supra note 21, at 4-5. Simon also notes that the CCR has had plenty of opportunities to initiate THR litigation against the representatives of left-wing governments by serving them with summonses and complaints while they were in the U.S. Examples include Fidel Castro, various PLO representatives, Daniel Ortega, and various Nicaraguan, Salvadoran and Guatemalan guerilla leaders who have all visited the U.S. The CCR did not participate in Tel-Oren, the only lawsuit against a leftist group. Simon, supra note 21, at 5 n.15.
128 It would be interesting to know whether the CCR has ever turned away a potential client who was the victim of human rights abuses by a leftist government. Naturally, this issue is not addressed in Stephens and Ratner’s book. However, because the most likely victims of human rights abuses by leftist regimes are ostensibly rightist sympathizers, it is easy to imagine why the CCR would refuse to help them.
130 See ABA MODEL RULES OF PROF’L CONDUCT R. 1.2(a), stating that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued.”
132 Under a typical contingency fee arrangement, the plaintiff and his attorney agree that the attorney’s fee will be one-third of the amount recovered in settlement or at trial, plus the reimbursement of all expenses incurred in assembling the case. However, it should be noted that the U.S. tax code precludes non-profit organizations, such as the CCR, from executing contingency fee agreements with their clients. See Stavis, supra note 87, at 238.
133 The notion that American plaintiffs’ attorneys are entitled to evidence regarding a foreign corporation’s net worth for the purpose of suggesting how to meaningfully punish it is generally baffling to the directors and officers of these companies. I experienced this first-hand when I defended a British corporation in a case involving a claim raised against it for punitive damages.
134 Koh, supra note 14, at 2365-66.
137 Id.
139 See Simon, supra note 21, at 28.
140 STEPHENS & RATNER, supra note 20, at 218; See also Gruzen, supra note 14, at 209.
141 It is true that THR litigation in U.S. courts did play a role in the settlements reached between holocaust victims and the governments, corporations and banks that exploited them. See Harvard Law Review Association, Corporate Liability for Violations of International Human Rights Law, 114 Harv. L. Rev. 2025, 2040-2041 (2001). However, there is no indication that these settlements would have been impossible but for the litigation. Furthermore, these suits address conduct that occurred several decades ago at the hands of the German government, German corporations and Swiss banks. These institutions are far less likely to violate human rights in today’s world. Advocates of such litigation also argue that the Suarez-Mason lawsuits served to publicize the Argentine general’s whereabouts, which led to his extradition and prosecution in Argentina. See Lutz, supra note 136, at 21. However, it seems fatuous to argue that the institution of a lawsuit was necessary to achieve such a result.

Stavis, supra note 87, at 214.

Id.

Id. at 215.

Id.

Id.

Id. at 216.


Van Schaack, supra note 101, at 175 (noting that the U.S. actually launched the Hague Convention project in 1992, based upon its “unequal negotiating positions vis-à-vis the members of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters” Id.).

Id. at 142.

For example, every country in Europe denies the enforcement of a judgment contravening domestic policy. See Volker Behr, Enforcement of United States Money Judgments in Germany, 13 J.L. & COM. 211, 221 (1994).


Behr, supra note 152, at 231.

Id.

Aamley, supra note 153, at 2183-84.

Id. at 2183 (citing the cases of Kadic v. Karadzic, 70 F.3d 232, 246-48 (2d Cir. 1995); Filartiga II, 577 F. Supp. 860, 885 (E.D.N.Y. 1984); Xuncax v. Gramajo, 886 F. Supp. 162 (Mass. 1995); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996). Plaintiffs’ attorneys have occasionally exploited the United Nations’ Headquarters location in New York by serving their summonses and complaints upon world leaders, such as Robert Mugabe and Li Peng, while attending functions there. See Tachiona v. Mugabe, 169 F.Supp.2d 259, 267 (S.D.N.Y. 2001); Gruzen, supra note 14, at 208.

Amley, supra note 153, at 2183-84 n.23.

See id. at 2190-91.

Id. at 2190 n.66 (citing Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 AM. J. COMP. L. 1, 34 (1988)).

Id. at 2192.

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

Id. at 845-46.

Id. at 846.

See id.


Id.

See, e.g., Murray, supra note 14, at 710; Weintraub, supra note 16, at 765.

Murray, supra note 14, at 710 (citing THE LAWYERS’ COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, BRIEFING BOOK: THE TORTURE VICTIM PROTECTION ACT OF 1986, 1, 3 (1986)).

Amley, supra note 153, at 2178.


Steinhardt, supra note 14, at 96; Murray, supra note 14, at 710; Stavis, supra note 87, at 217.


Id. at 9.

Id.

Perhaps this assertion is best supported by the difficulties I experienced in my search for non-U.S. sources commenting on the adjudication of THR cases in U.S. courts.

Stephens, supra note 129, at 154.
Tzeutschler, supra note 142, at 368 (stating that “[i]n spite of their inability to collect damages, successful plaintiffs have expressed their satisfaction at having the chance to tell their story . . . ”). See also STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW- BEYOND THE NUREMBERG LEGACY 211 (Oxford University Press 1997); STEPHENS & RATNER, supra note 20, at 233-38.


Assuredly, if even the semblance of such a legacy existed, THR litigation advocates such as Stephens and Ratner would have been quick in calling it to our attention.

Schneebaum, supra note 14, at 65-6. See also Fitzpatrick, supra note 14, at 498.


Id. (citing Alejandro v. Cuba, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997)).

Id. (citing Flatlow v. Iran, 999 F. Supp. 1, 34 (D.D.C. 1998)).


Goldsmith, supra note 193, at 368. See also Short, supra note 19, at 1066.

Goldsmith, supra note 193, at 367. See also Short, supra note 19, at 1066 n.292 (citing as an example the U.S.’s reservation to the Convention Against Torture that limits its application, requiring conformity with the jurisprudence of the 8th Amendment of the U.S. Constitution, which does not recognize the death penalty as a form of “cruel and unusual punishment”).

Goldsmith, supra note 193, at 367.

Id. at 369.

Bradley, supra note 27, at 469.

Goldsmith, supra note 193, at 366. See also Murphy, supra note 86, at 1 (commenting that the U.S.’s position at the Rome Convention, which advocated a very limited jurisdiction for the court, was opposed by an overwhelming majority of the delegates from 160 countries attending the conference. More specifically, in a vote on whether to accept the draft statute without further amendments proposed by the U.S., 120 countries voted in favor, with 7 opposing and 21 abstaining. In addition to the U.S., the other countries opposing the draft statute were Iraq, Libya, Qatar, Yemen, China and Israel.) See also Slaughter & Bosco, supra note 174 (commenting that “it appears that the U.S. is eager to haul foreign defendants into its own courts, while at the same time opposing any initiative, like an International Criminal Court, that poses even a minimal danger to American citizens”).

Goldsmith, supra note 193, at 366.

Steven M. Schneebaum, Symposium on the Future of International Human Rights: Human Rights in United States Courts: The Role of Lawyers, 55 WASH. & LEE L. REV. 737, 756 (1998). To underscore his point, Schneebaum alludes to the U.S.’s purported withdrawal from the compulsory jurisdiction of the International Court of Justice in an effort to avoid losing the judgment in the Nicaragua case. Id. at 756 n.120.


Klabbers, supra note 21, at 559.

Id.

See id. at 563.


211 Id. at 111.

212 Stephens, supra note 129, at 163.

213 Stephens, supra note 138, at 493.

214 Small, supra note 14, at 203.

215 Id. at 204.

216 Boyd, supra note 19, at 79.


218 Chibundu, supra note 21, at 1088 (addressing similar comments).


220 Id.

221 Bradley, supra note 27, at 469.


223 Murray, supra note 14, at 714.

224 Klabbers, supra note 21, at 556.

225 Id. at 560.

226 Bradley, supra note 27, at 469.

227 Chibundu, supra note 21, at 1140-41.

228 Hassan, supra note 219, at 257-58.

229 Bradley, supra note 27, at 469.