The Costs of International Human Rights Litigation
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International human rights litigation in US courts largely began in 1980, with the Second Circuit’s decision in *Filartiga v. Pena-Irala.*¹ In *Filartiga,* two Paraguayans were allowed to sue a former Paraguayan police official for the torture and killing of their family member in Paraguay. The jurisdictional basis for their lawsuit was the Alien Tort Statute, which was first enacted in 1789 as part of the first Judiciary Act.² This statute provides that federal 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.”³ The original purposes and intended scope of this statute are uncertain. In 1975, Judge Henry Friendly referred to the statute as an “old but little used section” and described it as “a kind of legal Lohengrin . . . no one seems to know whence it came.”⁴ In *Filartiga,* however, the Second Circuit held that this statute authorizes US federal courts to adjudicate suits between foreign parties concerning violations of international human rights standards, and that such adjudications are consistent with the federal judicial power authorized by Article III of the Constitution.

Since the *Filartiga* decision, numerous lawsuits have been brought in US courts challenging human rights abuses around the world, ranging from political oppression

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1. 630 F2d 876 (2d Cir 1980).
2. See Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73, 77 (1789) (“[T]he district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”).
3. 28 USC § 1350 (1994). Human rights advocates and some courts refer to this statute as the “Alien Tort Claims Act.” I know of no historical basis for that label, and both the *Filartiga* decision and a US Supreme Court decision refer to the statute as the “Alien Tort Statute.” See *Filartiga,* 630 F2d at 879; *Argentine Republic v. Amerada Hess Shipping Corp,* 488 US 428 (1989). The first judicial use of the phrase “Alien Tort Claims Act” appears to be *Benjaminis v. British European Airways,* 572 F2d 913, 916 (5th Cir 1978).
in Ethiopia, to genocide and war crimes in Bosnia, to violence by the Guatemalan military. This litigation is currently undergoing significant expansion, both in terms of the number of cases filed as well as the scope of the claims raised. Recent examples of this litigation include a suit by survivors of the 1989 Tiananmen Square crackdown against Li Peng, the Chinese prime minister at the time of the crackdown; a suit against Robert Mugabe, President of Zimbabwe, for alleged human rights abuses committed in Africa against his political opponents; a suit by a group of Asian “comfort women” against Japan alleging that they were kept as sexual slaves during World War II; and a suit by Burmese farmers against various oil companies alleging that the companies were involved in human rights abuses in Burma.6

Many international law scholars have assumed that the rise of international human rights litigation in US courts is an unequivocally positive development. In this essay, I will suggest that, notwithstanding its understandable appeal, this litigation entails significant domestic costs, and possibly international costs as well. These costs, like the benefits of international human rights litigation, are difficult to measure and probably vary from case to case. If nothing else, however, the existence of these costs may suggest that courts should await specific guidance from Congress before allowing further expansions of this litigation.

I. THE ATTRACTIONS OF INTERNATIONAL HUMAN RIGHTS LITIGATION

It is easy to understand the attraction of this litigation to human rights victims and their supporters. Probably the most significant limitation on international human rights law has been the lack of an effective enforcement mechanism. Despite numerous human rights treaties and purported customary norms of human rights law, abuses of human rights are still common in many countries. Needless to say, the victims of such abuses often are unable to obtain redress in their home countries. Nor is there typically any international tribunal with the authority to adjudicate and resolve their complaints (although the proposed international criminal court may be a modest step in that direction if and when it begins operation).

Under such circumstances, international human rights litigation in US courts can be viewed as an imperfect but positive vehicle for giving effect to international human rights standards. To be sure, this litigation has not typically resulted in enforceable judgments. Courts are not likely to grant injunctive relief concerning

5. See, for example, Abebe v Negewo, 72 F.3d 844 (11th Cir 1996); Kadlec v Karadžić, 70 F.3d 232 (2d Cir 1995); Xamuz v Gramajo, 886 F. Supp. 162 (D. Mass 1995).

6. See Edward Wong, Chinese Leader Sued in New York Over Deaths Stemming from Tiananmen Crackdown, NY Times A6 (Sept 1, 2000); Bill Miller, Mugabe Sued in N.Y. Over Rights Abuses, Wash Post A3 (Sept 9, 2000); Bill Miller, “Comfort Women” Sue Japan in U.S.; Damages Sought by WWII Sex Slaves, Wash Post A18 (Sept 19, 2000); Doe v Unocal Corp, 110 F. Supp. 2d 1294 (CD Cal 2000), appeal pending (9th Cir).
foreign government activities; nor would they be able to enforce such relief if they did grant it. As for damage awards, individual foreign officials rarely have significant assets, and what assets they do have generally are not located in the United States. As a result, even though US courts have issued a number of large damage awards in these cases, essentially none of these awards has been collected.

Despite these limitations, this litigation still can be attractive to victims of human rights abuses because it offers them a forum for telling and publicizing their stories. In other words, there is some value to these victims in simply informing the world of what has happened. As Anne-Marie Slaughter and David Bosco recently wrote, "the principal benefit of these suits to their plaintiffs is the public attention they generate." This publicity may in some instances increase the pressure on abusive governments to reform their practices. Conceivably, the possibility of this sort of public disclosure might even deter other officials from committing human rights abuses, or at least deter them from later using the United States as a safe haven. Moreover, a favorable judgment from a US court, even if not enforceable, may provide the victims with some moral vindication and psychological redress.

It is also easy to see the attractions of this litigation for some federal judges. In many cases, there is little dispute that egregious conduct has occurred. The equities of these cases, therefore, appear very one-sided. This appearance is only compounded by the fact that the defendants often refuse to legitimate the proceedings by putting on a defense. Furthermore, federal judges may perceive that if they do not pass judgment on this conduct, no one will. And the general unenforceability of their judgments in these cases may actually give judges and juries more freedom to express their moral condemnation of this conduct. In short, federal judges may perceive that these cases offer them a rather unadulterated vehicle for "doing justice."

This attraction is apparent in the statements of Judge Irving Kaufman, the author of the Filartiga decision, in both the decision itself and in his subsequent writings about it. In the decision, Judge Kaufman stated that the court was taking "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." In a subsequent magazine article commenting on the decision, Judge Kaufman wrote that "the articulation of evolved norms of international law by the courts' helps "form the ethical foundations for a more enlightened social order" and "is an expression of this nation's commitment to the preservation of fundamental

8. This phenomenon may explain the recent $4.5 billion jury verdict against Radovan Karadzic, former leader of the Bosnian Serbs—if he is not likely to pay anything, why not make the judgment shockingly large? See David Rhode, Jury in New York Orders Bosnian Serb to Pay Billions, NY Times A10 (Sept 26, 2000).
9. Filartiga, 630 F2d at 890.
elements of human dignity throughout the world." Several years later, in a law review article on judicial decisionmaking, Judge Kaufman used the "noteworthy" Filartiga case to illustrate his approach to judging and stated that "it is always my hope that my ultimate consideration will be not merely the avoidance of injustice, but what we might call the most just result not only for our place and time, but also for what lies before us." Despite the obvious attractions of this litigation, I want to suggest that it also entails significant costs. I will focus below on three, interrelated costs: costs to US foreign relations, costs to US democracy, and costs to the international system. I will also discuss the difficulty of containing this litigation within narrow bounds.

II. COSTS TO US FOREIGN RELATIONS

The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives. The plaintiffs and their representatives decide whom to sue, when to sue, and which claims to bring. These actors, however, have neither the expertise nor the constitutional authority to determine US foreign policy. Nor, unlike our elected officials, will these actors have the incentive to weigh the benefits of this litigation against its foreign relations costs. There is simply no reason to expect that, in pursuing their specific litigation goals, the plaintiffs and their lawyers will take into account broader issues relating to the US national interest. Furthermore, these individuals lack the accountability of elected officials for making bad foreign relations decisions.

Admittedly, foreign relations costs are difficult to measure. Strains in international relationships may undermine a variety of cooperative ventures, ranging from trade, to environmental protection, to the war on drugs, to arms control, to combating terrorism. They also may incrementally heighten the risk of military conflicts and incrementally reduce US national security. But no one case is likely to create a foreign relations crisis, and it is extremely difficult to know exactly how much strain any particular lawsuit will create and what precise effects this strain will cause. It is our elected officials, however, and not private litigants, who have the authority,
expertise, and incentives to make these difficult evaluative and predictive decisions and to balance the benefits of international condemnation against its potential costs.

The US approach to China is a good illustration of the balancing act engaged in by US officials when making these determinations. Although the President and Congress often have criticized China's human rights practices, they have done so as part of a carefully calibrated strategy that balances criticism against the benefits of engagement in economic and related matters. Thus, for example, the US government recently approved permanent normal trade relations with China, but it also has continued to direct measured criticism at China for its human rights practices. Human rights lawsuits, such as the one against Chinese leader Li Peng, threaten to interfere with this sort of political balancing.14

These international human rights lawsuits also pose some foreign relations dangers that are easier to identify. One such danger is that other nations may retaliate by allowing suits against US government actors. There are already warning signs of this possibility. For example, in November 2000, Iran's parliament enacted a law that allows Iranian "victims of US interference since the 1953 coup d'état" to sue the United States in Iranian courts. This law was expressly enacted as a "measure of reciprocity" in response to the recent suits allowed in US courts against Iran.15 Not surprisingly, the US State Department has been very concerned about this danger of suits against the US government and US officials. Indeed, the possibility of foreign criminal trials against US officials has been a key reason for the US reluctance to join the treaty establishing a proposed international criminal court.16

These costs and dangers might be acceptable if they reflected a purposeful tradeoff by our elected foreign policy representatives. But this is not the case. While the Executive Branch sometimes has expressed support for specific human rights lawsuits, it also has expressly opposed a number of these lawsuits. For example, it

14. Not surprisingly, China has reacted with "strong displeasure" to the suit against Mr. Li. See Edward Wong, China Protests U.S. Rights Suit Against a Leader, NY Times A4 (Sept 3, 2000).
15. See Tehran to Set Up Special Court for Lawsuits Against the U.S., Agence France Presse (Nov 15, 2000); Iran MPs Cry "Down with America," Approve Lawsuits Against United States, Agence France Presse (Nov 1, 2000). I use this example merely to illustrate the potential for retaliation. As Beth Stephens notes, Iran was reacting in this instance to lawsuits authorized by Congress rather than to the judicially-developed Filartiga doctrine. See Beth Stephens, Taking Pride in International Human Rights Litigation, 2 Chi J Intl L 485, 490-91 (2001). Stephens is thus correct in suggesting that Congress shares some of the blame for the foreign relations problems in this area. The mere fact that Congress sometimes creates foreign relations problems, however, is no justification for the federal courts creating additional problems on their own.
16. In signing the treaty shortly before leaving office, President Clinton stated that the United States was "not abandoning our concerns about significant flaws in the treaty," including the concern about politicized prosecutions of US officials and service personnel. See AP, Clinton's Words: "The Right Action," NY Times A6 (Jan 1, 2001).
resisted assisting with service of court papers on both Mr. Li and Mr. Mugabe, and it filed a suggestion of immunity on behalf of Mr. Mugabe. Nor has Congress authorized this litigation in any meaningful sense. As noted above, the plaintiffs in these cases typically rely on the 212-year-old Alien Tort Statute, which, for most of its history, was not viewed as authorizing international human rights litigation. Nor could the late eighteenth century legislators who enacted this statute have imagined that the law of nations would regulate a government's relationship with its own citizens, or that US courts would stand in judgment regarding the conduct of foreign sovereigns on foreign soil. Moreover, whatever its intended scope, the Alien Tort Statute was almost certainly designed to reduce foreign relations friction with other nations, the precise opposite of the effect of international human rights litigation.

To be sure, Congress did consider and approve some aspects of international human rights litigation in the 1992 Torture Victim Protection Act ("TVPA"). This statute, however, contemplates human rights lawsuits that are much more circumscribed than those brought under the Alien Tort Statute. For example, the TVPA is restricted to claims of torture and extrajudicial killing, and thus does not extend to many of the claims brought under the Alien Tort Statute. In addition, the statute expressly requires state action and thus does not authorize claims against private entities. Furthermore, the statute contains several procedural limitations, including an exhaustion requirement and a ten-year statute of limitations. Finally,

17. The plaintiffs in the Li Peng case attempted to serve Mr. Li by delivering the court papers to State Department officials charged with providing Mr. Li with protective services. The State Department returned the papers to plaintiffs' counsel, explaining that "[t]he function of the Diplomatic Security Protective Detail is to provide security and not to serve process." Declaration of Wendy H. Schwartz Annex B (Oct 12, 2000), in Zhou v Li Peng, No 00 Civ 6446 (WHP) (filed SDNY Aug 28, 2000). It did so apparently unaware that a federal judge had entered an ex parte order allowing service on Mr. Li through "any employee of the United States government or its agencies who is guarding defendant Li Peng during his stay in New York." Id at Annex C.

18. See Suggestion of Immunity Submitted by United States of America (Feb 23, 2001), filed in Tachiona v Mugabe, No 00 Civ 6666 (VM) (filed SDNY Sept 6, 2000). The State Department has filed similar suggestions in other international human rights cases. See, for example, Lafontant v Aristide, 844 F Supp 128 (EDNY 1994). In addition, in one of the cases brought against Ferdinand Marcos, the Reagan Administration submitted a brief arguing that the Alien Tort Statute did not authorize international human rights litigation. See Brief for the United States as Amicus Curiae, Trajano v Marcos, 978 F2d 493 (9th Cir 1980) (No 86-2448). Briefs filed during the Carter and Clinton Administrations, however, accepted the validity of Filartiga.


21. The TVPA is more expansive than the Alien Tort Statute in one respect: it allows for suits by US citizens as well as foreign citizens. Because the TVPA also requires that the torture or extrajudicial killing have been committed under color of foreign law, however, it is not likely to provide a cause of action for many US citizens.
nothing in the statute purports to override official immunities, such as the statutory immunity of foreign governments and their instrumentalities, or the common law immunity of heads of state. A number of bills have since been introduced in Congress that would limit such immunity in cases brought under the TVPA, but Congress has not enacted any of them.\footnote{22}

In 1996, Congress amended the Foreign Sovereign Immunities Act to allow suits against nations labeled by the Executive Branch as "state sponsor[s] of terrorism."\footnote{23} This amendment, like the TVPA, contains a number of important limitations on its scope. Most importantly, it applies to only a handful of nations.\footnote{24} In addition, it applies only to claims of torture, extrajudicial killing, and certain acts of terrorism. Finally, only US nationals or their representatives may bring these suits, and, if the events in question occurred in the territory of the foreign state being sued, the plaintiff must give the foreign state a "reasonable opportunity to arbitrate" before filing suit.

Regardless of whether these statutes reflect wise policymaking,\footnote{25} they cannot fairly be read as endorsements of open-ended Filartiga-style litigation.\footnote{26} Other actions by the political branches confirm this conclusion. Most importantly, the President and Senate have consistently attached non-self-execution declarations to their

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\item[23] See Foreign Sovereign Immunities Act ("FSIA") § 1605(a)(7), codified at 28 USC §§ 1330, 1332, 1602–1611 (1994 & Supp 1998). The initial amendments were enacted in 1996. There have been several subsequent amendments addressing issues such as punitive damages and enforcement of judgments.
\item[24] The only nations currently designated as state sponsors of terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. See 22 CFR § 126.1(d) (2001).
\item[25] The State Department opposed both of these statutory changes on the grounds that they unduly shift control of US foreign relations to private plaintiffs, create a risk of retaliatory suits against US government actors, and are inconsistent with international law and practice. See, for example, Torture Victim Protection Act of 1989, Hearing on S 1629 and HR 1652 before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary, 101st Cong, 2d Sess 22–29 (June 22, 1990) (Statement of David P. Stewart); The Foreign Sovereign Immunities Act, Hearings on S 825 before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary, 103d Cong, 2d Sess 12–15 (June 21, 1994) (Statement of Jamison S. Borek). In signing the Torture Victim Protection Act, President George Bush, Sr. expressed concern that the Act might cause US courts to "become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically-motivated suits, which have nothing to do with the United States and which offer little prospect of successful recovery." Statement of President George Bush upon Signing HR 2092, 28 Weekly Comp Pres Doc 465 (Mar 16, 1992).
\item[26] There are some statements in the legislative history of the Torture Victim Protection Act suggesting approval of Filartiga-style human rights litigation. The text of the statute, however, does not provide general support for such litigation. Nor does the legislative history indicate that this was the purpose of the legislation. See, for example, Torture Victim Protection Act of 1991, S Rep No 102-249, 102d Cong, 1st Sess 3 (1991) ("The purpose of this legislation is to provide a Federal cause of action against any individual who, under actual or apparent authority or under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing.")
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ratification of human rights treaties in an effort to preclude the treaty provisions from being enforceable in US courts.\textsuperscript{27} Although Congress presumably has broad authority to enact legislation authorizing civil suits under these treaties, it has declined to do so, with the exception of the claims allowed by the Torture Victim Protection Act. Thus, for example, Congress has enacted no legislation authorizing suits to enforce the International Covenant on Civil and Political Rights, probably the most important human rights treaty in the world. And, in implementing the Genocide Convention, Congress enacted only criminal legislation and stated in that legislation that “nothing in this chapter shall be construed as . . . creating any substantive or procedural right enforceable by law by any party in any proceeding.”\textsuperscript{28} Furthermore, in codifying foreign sovereign immunity in US courts, Congress disallowed the adjudication of foreign tort claims against foreign sovereign defendants, even in cases involving human rights abuses.\textsuperscript{29}

These affirmative steps by the President, the Senate, and Congress to preclude international human rights litigation further suggest that Congress’s limited enactments in this area should not be read as general authorizations for this litigation.

III. COSTS TO US DEMOCRACY

Another set of costs relates to US democracy. For a number of reasons, this international human rights litigation vests substantial lawmaking authority in unaccountable actors. One reason is the type of law typically applied in these cases. Because of the limited way in which the President and Senate have consented to human rights treaties, the plaintiffs in these cases almost always rely on the “law of nations”—today called “customary international law”—rather than on treaties. Customary international law, according to a widely cited definition, is the law of the

\textsuperscript{27} See, for example, US Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, para III(1), in 138 Cong Rec S4783 (Apr 2, 1992).

\textsuperscript{28} 18 USC § 1092 (1994). Similarly, when President Clinton issued an Executive Order designed to increase Executive Branch compliance with the human rights treaties, he stated in the Order that “nothing in this order shall create any right or benefit, substantive or procedural, enforceable by any party against the United States, its agencies or instrumentality, its officers or employees, or any other person” and that “this order does not supersede Federal statutes and does not impose any justiciable obligations on the executive branch.” Implementation of Human Rights Treaties, Exec Order No 13107, 63 Fed Reg 68991, 68993 (1998).

\textsuperscript{29} See 28 USC § 1605(a)(5) (limiting non-commercial tort actions against foreign sovereigns to situations in which the injury or damage occurs in the US). Courts have held that even the most serious human rights claims against foreign sovereign defendants—so-called “jus cogens” claims—have been precluded by Congress. See, for example, Sampson v Federal Republic of Germany, 250 F3d 1145 (7th Cir 2001).
international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”

By its very nature customary international law involves less US democratic inputs than other forms of law applied by US courts. Unlike a statute or treaty, customary international law does not involve any agreed-upon text voted upon by US representatives. Moreover, the most populist branch of our government, the Congress, has at best, a very indirect role in the formation of customary international law. Rather, US involvement in customary international law formation comes primarily from the Executive Branch. Nor, even with that involvement, is there any guarantee that the US position will prevail or that customary international law will reflect US legal traditions and culture. The United States simply has one important voice in a community of over 190 diverse states.

In addition, there are substantial uncertainties today concerning both the way in which customary international law is formed and the specific content of this law. This is particularly true in the area of international human rights law. To recite just a few of the many basic questions to which there is no agreed-upon answer: How much state practice is enough to create a customary human rights norm? What counts as state practice? To what extent do treaties or non-binding United Nations resolutions affect the content of customary international law? How does one determine whether nations are acting out of a sense of legal obligation? Under what circumstances is a nation a “persistent objector” to a rule of customary international law and, therefore, not bound by the rule? When will non-governmental actors be liable for violating customary international law rules?

These uncertainties have meant that the adjudication of international human rights cases is a highly creative process. In other words, customary international law—which does not involve much in the way of US democratic input in the first place—is creatively interpreted and applied by US federal judges, who are themselves not politically accountable actors. Many supporters of international human rights litigation do not deny this fact but rather cite it as a key benefit of this litigation. Under this view, the symbolic judgments issued by US federal courts in these cases are desirable because they contribute to the progressive development of international law. It is far from clear, however, that US federal courts have been delegated the power under our constitutional system to operate as international norm creators.

31. For a recent discussion of these and other uncertainties surrounding modern customary international law, see J. Patrick Kelly, The Twilight of Customary International Law, 40 Va J Intl L 449 (2000).
32. See Slaughter and Bosco, 79 Foreign Aff at 115 (cited in note 7).
Because judges are largely operating without political branch guidance in these cases, they have also seen fit to invent a number of procedural doctrines to facilitate this litigation. When questions were raised about how these suits satisfied the jurisdictional requirements of Article III of the Constitution, courts stated that customary international law has the status of federal common law, such that suits under this law arise under federal law for purposes of Article III. In addition to expanding the jurisdiction of the federal courts to cover alien-versus-alien cases like Filartiga, this federal common law holding has potentially dramatic consequences for domestic litigation. For example, it may give federal courts the independent authority to invalidate state laws whenever the courts find these laws to be inconsistent with customary norms of international law. Similarly, when questions were raised about the existence of a private right of action to enforce customary international human rights standards, courts began implying such a private right of action from the Alien Tort Statute.

It is important to note that this lawmaking authority is not always exercised to advance international human rights litigation. Federal judges also have found it appropriate to apply judicially created doctrines to limit this litigation, such as the political question doctrine, the act of state doctrine, the doctrine of international comity, and the so-called “federal common law of foreign relations.” A number of the recent World War II reparations cases either have been taken out of state courts or have been dismissed under these doctrines. In many instances these limiting


34. See Bradley and Goldsmith, Customary International Law as Federal Common Law, 110 Harv L Rev at 842–48 (cited in note 33) (describing some of the implications of the Filartiga holding, according to recent commentators).

35. See, for example, Lea Brilmayer, Federalism, State Authority, and the Preemptive Power of International Law, 1994 S Ct Rev 295.

36. This was not how the court construed the statute in Filartiga. While noting that “such a reading is possible,” the court in Filartiga construed the statute “not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law.” Filartiga, 630 F2d at 887.

37. See, for example, Frunkin v JA Jones, Inc (In re Nazi Era Cases Against German Defendants Litigation), 129 F Supp 2d 370 (DJN 2001) (dismissing claims based on political question doctrine); In re World War II Era Japanese Forced Labor Litigation, 114 F Supp 2d 939 (ND Cal 2000) (allowing removal from state to federal court based on the federal common law of foreign relations); In re World War II Era Japanese Forced Labor Litigation, 2001 US Dist LEXIS 14640 (ND Cal Sept 17, 2001) (dismissing claims based on dormant foreign affairs preemption doctrine).
doctrines—or at least the ways in which they are applied—have no more support in constitutional text, history, or Supreme Court precedent than application of the doctrines favoring international human rights litigation. Nevertheless, the lawmaking authority entailed by the creation of international human rights litigation ends up spawning still additional lawmaking power designed to limit this litigation.

While I am not suggesting that courts should never create law, there are reasons why our Constitution vests the general legislative power in Congress, not the federal courts. Federal courts are slow, decentralized decisionmakers; they depend heavily on the parties for information; they typically focus only on the particular cases brought before them rather than on the broad legal and political landscape; and they have relatively little ability to adjust their decisionmaking to changing conditions. Furthermore, federal judges are appointed rather than elected and essentially cannot be removed from office. As a result, federal courts generally lack both the institutional resources and the democratic authority to operate as legislators. These reasons are only heightened in the area of foreign relations, an area in which the lawmaking authority and competence of the federal courts is particularly low. 35

A related problem in this litigation is the substantial reliance by courts on the opinions of academic writers. Because of their unfamiliarity with international law and the relative difficulty of doing direct research on international law questions, judges rely heavily on secondary sources in these cases. 36 Thus, for example, they often treat 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. 37 Similarly, they frequently rely on the written and oral testimony of academic experts, as well as the experts’ scholarly writings. 38

38. For a discussion of some of the structural limitations on the ability of courts to regulate foreign policy, see John Yoo, Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act, 20 Hastings Intl & Comp L Rev 747 (1997).
39. Contrary to David Bederman’s suggestion, I am not arguing that federal judges have been “hoodwinked to be the pawns of a shadowy, academic conspiracy.” David J. Bederman, International Law Advocacy and Its Discontents, 2 Chi J Intl L 475, 476 (2001). I am simply suggesting that judges may have somewhat less ability to independently evaluate academic claims in this area than in other types of cases.
40. See, for example, Hilaır v Estate of Marcos, 103 F3d 789, 795 n 9 (9th Cir 1996) (citing Restatement for the proposition that customary international law prohibits prolonged arbitrary detention); Kadiri, 70 F3d at 240 (citing Restatement for the proposition that state action is not required for violations of the customary international law prohibiting genocide); Kuman, 886 F Supp at 193 (citing Restatement for the proposition that there is “universal jurisdiction” under international law allowing every nation to adjudicate human rights abuses without regard to where the abuses occurred).
These academic experts typically are not reporting on objective facts, such as empirical information concerning global human rights practices. Instead, they are expressing their own normative beliefs concerning the content of international law and its status in the US legal system, typically with citations to other experts and international organizations who share those beliefs. In effect, these academic experts, like the judges, are engaged in a form of law creation. Some international law scholars have referred to this phenomenon with substantial pride. Professor Louis Sohn, for example, has observed that “states really never make international law on the subject of human rights;” rather, “[i]t is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals.” 42 Needless to say, however, these academic experts have even less democratic accountability than the federal judges themselves.

Furthermore, there are reasons to question the objectivity of these experts. One reason is that most international law professors have an understandable interest in having their area of study assume a more prominent role in domestic courts. In other words, international human rights litigation provides symbolic benefits not only to the plaintiffs, but also to law professors who believe in the importance of international law. A more tangible reason is that many law professors who engage in scholarship concerning human rights issues also are directly involved in human rights litigation, through either representation of the plaintiffs or the filing of amicus curiae briefs and supportive affidavits. 43 One can assume complete good faith on the part of these professors and admire their commitment to public service and yet still question their ability to neatly separate their scholarly and advocacy roles.

Admittedly, the actual influence of academic opinion on these cases is difficult to measure, especially given that, as discussed above, some federal judges may be independently attracted to international human rights litigation. But we do know from reported decisions that judges often refer to academic materials in these cases, especially in attempting to discern the content of customary international law. We also know that academics continue to become involved in these cases, suggesting that at least they believe their views can make a difference.

It is not a sufficient answer to these democracy concerns to say that Congress can always cut back on this litigation by statute. This answer could be given to any non-constitutional lawmaking by the federal courts. Yet essentially everyone agrees that the lawmaking powers of the federal courts are, and should be, substantially narrower than the lawmaking powers of Congress. In addition, the enactment of federal legislation is politically costly and time-consuming, which means that it often will not

43. For one of many recent examples, see Brief of Amici Curiae International Human Rights Organizations and International Law and Human Rights Law Scholars in Support of Plaintiffs-Appellants, in Doe v Unocal Corp, No 56603 (filed Feb 28, 2001 9th Cir).
under guard by State Department employees. This is precisely what happened in the suits against Li Peng, Robert Mugabe, and Radovan Karadzic. The international agreement that brought the UN to the United States contains immunities for government officials visiting the UN on official business, but the federal circuit court for New York, which is the same court that decided Filartiga, has construed these immunities very narrowly. The UN can hardly serve its function as a forum for international exchange if foreign leaders risk US litigation from disgruntled foreign nationals any time they set foot in this country.

V. DIFFICULTY OF CONTAINMENT

Perhaps these costs would not be worthy of serious concern if we could be assured that this litigation would be contained within narrow bounds. Recent trends, however, suggest that this is not the case.

The early cases following Filartiga generally involved several limiting features: they involved official state action rather than private action; they were directed at foreign government actors rather than domestic actors; the claims were limited to particularly egregious conduct, such as torture and summary execution; the defendants were usually lower-level officials; and the defendants were often from nations with relatively low foreign relations power. In recent years, however, the litigation has expanded significantly. International human rights lawsuits are now being directed at private companies, on the theory that these companies cooperated with or benefited from foreign government human rights abuses. This litigation is also being directed at US government defendants, at both the state and federal levels. Furthermore, the claims have expanded to include challenges to conduct such as detention practices, environmental contamination, and aspects of the US death penalty. And, perhaps encouraged by the Pinochet extradition case in Great Britain, the plaintiffs are now bringing more claims against high-level officials, such as sitting or former heads of state, as well as foreign governments themselves. In addition, the suits now concern conduct in the territory of major world players such as Germany, Japan, and China.

47. See Kadid, 70 F3d at 247–48.
49. See, for example, Winja v Royal Dutch Petroleum Corp, 226 F3d 88 (2d Cir 2000); Unocal Corp, 110 F Supp 2d at 1294; Eastman Kodak Co v Kavlin, 978 F Supp 1078 (SD Fla 1997).
50. See, for example, Jama v INS, 22 F Supp 2d 353 (DNJ 1998).
operate as a meaningful check on federal judicial lawmaking. Finally, a reliance on Congress to override federal judicial lawmaking in these cases runs counter to the usual constitutional presumption that state law governs in the absence of federal political branch action. 44

IV. COSTS TO THE INTERNATIONAL SYSTEM

International human rights litigation is often defended from an international system perspective. It is often claimed, for example, that this litigation will help deter human rights abuses and will help develop the international rule of law. There is, in fact, no real evidence that the ad hoc, symbolic judgments in these cases have produced such benefits, or that they will do so in the future. Furthermore, there are reasons to believe that this litigation may actually have negative international effects.

In addition to the foreign relations friction that this litigation can generate, discussed above, the adjudication of these foreign human rights abuses by a US court may disconnect these events from the society most affected by the abuses. It is hard to imagine that this litigation—by an outside domestic tribunal with no real connection to the events—will result in the same sort of internalization of norms and responsibility that would be associated with a local resolution, whether it be a local adjudication, truth commission, or even an agreed-upon amnesty. Instead, these judgments 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. Such dismissal is made even more likely by the common perception that the United States is hypocritical when it comes to international human rights law. The US government often assesses other nations’ compliance with international human rights standards, but it generally has been unwilling to apply international human rights law inward against domestic governmental actors. 45

Another more concrete danger of this litigation concerns the US role as host to the United Nations. Most proponents of international human rights litigation are also strong supporters of the UN, yet some aspects of this litigation may undermine the effective functioning of that organization. The defendants in these suits ordinarily must be served with court papers in the United States. In an increasing number of cases, plaintiffs are attempting to serve foreign government representatives with court papers when they make official visits to the UN in New York, often while they are

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There are a number of reasons why this litigation has been difficult to contain. Perhaps most importantly, it is subject to the decentralized control of private plaintiffs and their counsel. Under such circumstances, there will always be lawyers seeking to push the boundaries of the law. Even strategically sensitive advocacy groups, which might have more of a long-term interest in this litigation, cannot be counted on to exercise significant caution. The Center for Constitutional Rights, for example, which represented the plaintiffs in the Filartiga case and has been involved in many of the subsequent Alien Tort Statute cases, undoubtedly is concerned with the long-term viability of this litigation. But it also has continually attempted to expand the boundaries of this litigation. For example, it represents the plaintiffs in the Li Peng case, a case that has posed significant foreign relations difficulties for the United States. It also has been involved in several cases attempting to extend international human rights law to private companies. These efforts are not at all surprising or even blameworthy—advocacy groups naturally will seek to expand upon their successes and take advantage of legal ambiguities to achieve their ends.

As with any federal litigation, there is also likely to be substantial forum shopping. For example, many of the Alien Tort Statute cases are filed in New York in an effort to take advantage of—and expand upon—the Filartiga decision and its Second Circuit progeny. A particularly egregious example of such forum shopping is the recent re-filing of a suit against the Southern Peru Copper Company. A group of Peruvian citizens sued that company in Texas state court several years ago, claiming that they had been harmed by pollution from the company's smelting and refining operations in Peru. After the company successfully removed the case to federal court, the case was dismissed on grounds of forum non conveniens and international comity.\footnote{See Torres v Southern Peru Copper, 113 F3d 540 (5th Cir 1997). The basis for removal of that case to federal court—that the case arose under the "federal common law of foreign relations"—is questionable. See Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 86 Va L Rev 1617 (1997). Ironically, the federal common law of foreign relations concept—used in that case as a basis for allowing a federal court to dismiss an international case—is often relied upon by proponents of international human rights litigation in an effort to overcome jurisdictional barriers to this litigation.} One of the plaintiffs' lawyers now has re-filed essentially the same claims in a federal court in New York, this time under the Alien Tort Statute, in an apparent effort to take advantage of the Second Circuit decisions concerning that statute.\footnote{See Amended Complaint, Flores v Southern Peru Copper Corp, No 00 Civ 9812 (GEL) (SDNY filed Feb 7, 2001).} A similar example is the recent re-filing, under the Alien Tort Statute, of claims against Union Carbide concerning the 1984 gas plant explosion in Bhopal, India—claims that had been dismissed from US courts years earlier under the forum non conveniens doctrine and that subsequently had been resolved in India pursuant to a settlement agreement.\footnote{See Bano v Union Carbide Corp, 2000 US Dist LEXIS 12326 (SDNY Aug 28, 2000).}
Another reason why this litigation is difficult to contain is that the principal statutory vehicle for this litigation, the Alien Tort Statute, provides no guidance on the procedural or substantive issues surrounding this litigation. The statute (because it was not intended for this type of litigation) does not specify the defendants who can be sued, the nature of the claims allowed, or the limitations on such claims. Courts instead must look to customary international law and other common law principles. As noted above, however, there is significant uncertainty today surrounding both the method of customary international law formation and its content. Consequently, there is substantial room for creativity by lawyers and judges.

Proponents of international human rights litigation typically respond to this containment problem by stating that federal judges can be trusted to dismiss the most problematic cases. As an initial matter, one can question the sincerity of this response. These same proponents, after all, are often extremely critical of the approach of US courts, especially the US Supreme Court, to international law issues. Moreover, these proponents have objected vigorously to, and are seeking reversal of, the very dismissals that they rely on to show the narrow scope of this litigation.  

In any event, while it is true that some of the recent cutting-edge Alien Tort Statute cases have been dismissed, the amorphous nature of the law in this area means that this is far from guaranteed. To take just one recent example, the Second Circuit recently reinstated a suit brought by several Nigerian citizens against two foreign oil companies alleging that the companies had been involved in human rights abuses in Nigeria. It did so despite substantial arguments that there was no personal jurisdiction over the defendants and that the suit should be dismissed under the doctrine of forum non conveniens.  

More importantly, this response to the containment problem misses the point. The foreign relations damage that can be caused by these lawsuits may well occur even if the suits are ultimately dismissed. The suits themselves, after all, are designed to, and do, generate substantial publicity. They also often require that courts make some assessment of foreign government conduct prior to dismissal. In addition, the current, uncertain state of the law invites continual attempts to expand the boundaries of this litigation, even in the face of judicial dismissals. The availability in many of these cases of free legal assistance, from advocacy groups and academics, makes such attempts even more likely.

54. For example, a group of international law scholars is involved in an appeal of the district court’s summary judgment in Doe v Uneoal Corp, 110 F Supp 2d 1294 (CD Cal 2000). In their brief to the Ninth Circuit, these scholars have argued that international human rights litigation under the Alien Tort Statute should not be limited to the most serious human rights violations—so-called jus cogens violations—but rather should extend to any violation of customary international law. See Brief of Amici Curiae (cited in note 43).
In short, there is every reason to believe that, if left unchecked, this litigation will continue to expand. Even without the Alien Tort Statute, US courts are a magnet for international litigation, given the country’s high damage awards, liberal personal jurisdiction rules, broad discovery standards, and allowance of class actions and contingency fee arrangements. As England’s Master of the Rolls, Lord Denning, has observed, “[a]s a moth is drawn to the light, so is a litigant drawn to the United States.” Now that Alien Tort Statute litigation has expanded to include corporate defendants, which have deeper pockets than individual foreign officials, the incentives to bring this litigation are only heightened, as are the dangers of its abuse by some plaintiffs’ attorneys. The fact that almost no other nation allows for this sort of litigation only increases the likelihood that it will continue to be concentrated in US courts.

VI. CONCLUSION

A full assessment of the value of international human rights litigation must take into account not only its attractions for plaintiffs, human rights advocates, and some federal judges, but also its costs for US foreign relations, for US democracy, and for the international system. Once these costs are considered, it is not self-evident that the symbolic and monetary ends sought in this litigation justify the means. If nothing else, the uncertainty on this question may suggest that courts should await specific congressional authorization before allowing further expansions of this litigation. It may also suggest that it is time for the Supreme Court to review the Filartiga line of cases. Seventeen years ago, Judge Edwards on the DC Circuit observed that this area of law “cries out for clarification by the Supreme Court.” That observation is even more apt today, given the recent expansions in international human rights litigation.

56. Smith Kline & French Labs, Ltd v Blech, 2 All ER 72, 74 (Ct App 1983) (Denning).
57. Tel-Oren v Libyan Arab Republic, 726 F2d 774, 775 (DC Cir 1984) (Edwards concurring).