# The Role of Judges in Advancing the Protection of Human Rights in Domestic Courts

by

**Hon Nathaniel R Jones**
**Circuit Judge**
**United States Court of Appeals for the**
**Sixth Circuit Cincinnati, Ohio**

I am pleased to be here to talk with you today, on this most appropriate occasion of International Human Rights Day. I would like to address the unique role of judges in advancing the protection of human rights. My remarks will focus on the experience of the American judiciary, since that is the area with which I am most familiar. One inspiration for my talk was Mr. Lester's perceptive journal article, regarding the impact of the American Bill of Rights in other nations.[1] He notes that many nations follow with interest the constitutional decisions of courts in the United States. He refers to this as the "overseas trade in the American Bill of Rights." Because of this phenomenon, the role of the American judiciary in the promotion of human rights, whether it leads in advancing human rights or instead lags behind, can have international ramifications.

As Mr. Lester suggests, the international trade in legal developments regarding individual rights should be a "two-way" trade. At times, courts around the world have built upon American innovations to expand human rights in ways not recognized by the United States. Therefore, it is worthwhile for the United States to study developments in the law worldwide. The lives of many people could be improved if the norms of international human rights are better protected in the United States as well as in all other nations.

How can judges, be they American, Nigerian or any other nationality, make international human rights effective at home? Home is, after all, the place where the enforcement of human rights counts. As Eleanor Roosevelt, one of the drafters of the Universal Declaration on Human Rights, observed, human rights begin in "small places, close to home, so close and so small that they cannot be seen on any map of the world. Unless these rights have meaning there, they have little meaning elsewhere."[2]

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1. Anthony Lester, the overseas trade in the [U.S.] Bill of Rights, 88 COLUMBIA LAW REVIEW 537-61 (1988).

2. Eleanor Roosevelt, quoted in Joseph P. Lash, Eleanor: The Years Alone (New York, New American Library, 1972).

We as judges have a unique ability and responsibility for the enforcement and promotion of human rights. As I will discuss, there are both direct and indirect ways of enforcing international human rights standards. Human rights norms may be directly binding on a court and therefore legally enforced if they are contained in a ratified treaty. Additionally, judges can directly enforce a human rights norm if it is universally accepted as evidence of customary international law, irrespective of whether or not it is found in a ratified treaty. Alternatively, a court can always use a human rights norm, even if not directly binding on the court as treaty law or customary international law, indirectly to aid in the interpretation of domestic law.

As I just mentioned, human rights standards can be directly binding on a court if contained in a ratified treaty.[3] Direct enforcement of treaty law has not led to great advances of human rights in the U.S., due partly to the United State's poor record of ratifying human rights treaties. The United States, like Nigeria, has failed to ratify either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social, and Cultural Rights. It is encouraging, however, to see that President Bush has recently urged the Senate Foreign Relations Committee to give priority consideration to the ratification of the Civil and Political Covenant. In any event, the judiciary in the U.S. has constructed an obstacle to the direct enforcement of human rights norms even in the few treaties that it has ratified.[4] Because direct enforcement of human rights provisions in treaty law has not added much to the protection of human rights in the United States, I will focus on the more fruitful approaches.

The application of customary international law is one such approach. Human rights norms will be considered to be customary international law if they are so widely accepted by the international community that they are binding on every nation even if

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3. Richard Lillich, The Role of Domestic Courts in Enforcing International Human Rights Law, in Hurst Hannam, ed., Guide to International Human Rights Practice at 223 (1985); see also Lillich, Invoking International Human Rights Law in Domestic Courts, 54 UNIVERSITY CINCINNATI LAW REVIEW 367 (1985).

4. Unless a court deems the treaty to be "self-executing", the court will not be bound by the treaty terms unless Congress has passed legislation for the specific purpose of implementing the treaty terms domestically. U.S. judicial rulings have generally held that the few human rights treaties that the U.S. has ratified are not self-executing. See Sei Fuji v. California, 38 Cal. 2d 718, 721-22, 242 P.2d 617, 619-21 (1952). Hence, these treaties are regarded as lacking direct legal force. See also Lillich, supra note 3 at 225.

the nation has not ratified any treaty embodying them.[5] The application of customary international law has led to a few spectacular advances in the protection of human rights in the United States. The most notable example of this is the case filed in the United States by a citizen of Paraguay, Dr. Filartiga, who was living in New York at that time.[6] He sued a former Paraguayan police official, Pena-Irala, contending that his teenage son had been tortured to death in Paraguay by the police official in retaliation for Dr. Filartiga's political activities. The Court held that the right to be free from torture had become accepted as customary international law, as defined and evidenced by the Universal Declaration. The Court held that the action of the police official violated customary international law, and awarded a very large monetary damage award in favor of Dr. Filartiga. The enforcement of customary law has been a well established means for advancing the protection of human rights even before the Filartiga case. However, its application to further the protection of human rights has been fairly rare, and I will not belabor its use.

Human rights norms are most widely applied in domestic courts as an aid in interpreting domestic legislation.[7] This indeed can be a powerful strategy in the promotion of human rights. The judiciary in the United States has now progressed to the point where reliance on international human rights law has become an accepted means of providing useful content for identifying, clarifying,

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5. Lillich, supra note 3 at 232. See also Nadine Strossen, Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis, 41 HASTINGS LAW JOURNAL 805, 816 (1990).

6. Filartiga v. Pena-Irala, 630 F.2d 876 (Cir. 1980). The action was brought under the little known Alien Tort Statute, 28 U.S.C. 1350 (1988), which confers jurisdiction on federal courts of suits filed by aliens for torts committed in violation of the law of nations or a treaty.

7. Hans Linde, in Proceedings, 1982, Symposium on International Human Rights Law in State Courts, 18 THE INTERNATIONAL LAWYER 59 (1984). See also, Jordan Paust, On Human Rights: the Use of Human Rights Precepts in United States Historical Origins and the Rights to an Effective Remedy in Domestic Courts, 10 MICHIGAN JOURNAL INTERNATIONAL LAW 543, 596 (1989) (showing that throughout U.S. history, the Supreme Court's reliance on human rights to provide useful content for domestic law has steadily increased).

and supplementing constitutional and strategy norms.[8] However, courts in the United States have not always been ready or willing to acknowledge their use of international human rights norms to give content to domestic law. Civil rights cases in the United States in the post-World War II period of 1946-55 serve as interesting examples of cases where human rights norms played a significant, but unacknowledged, role in the assault upon American apartheid.[9]

In the specter of the atrocities of World War II, the United States shed, at least to some degree, its earlier isolationist posture when it ratified the United Nations Charter in 1945. The Charter reflected the post-war consensus that governments should no longer be able to deprive citizens of their fundamental human rights, such as racial equality.[10]

However, during this era, racial discrimination became an issue of national embarrassment. Although the American Constitution guaranteed equal protection of the law to all, segregation was considered lawful. Separate but equal had been the law since a 1896 Supreme Court decision.[11] Segregation and discrimination displayed their ugly faces in many arena, including employment, voting (where poll taxes and white primaries disenfranchised most Southern blacks), and housing (where racially restrictive covenants in private agreements prevented black ownership or occupancy). A chilling wave of racially inspired violence against blacks

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8. Linde, supra note 7.

9. Bert Lockwood, The United Nations Charter and United States Civil Rights Litigation: 1946-1955, 69 IOWA LAW REVIEW 901 (1984).

10. The U.N. Charter was signed at San Francisco on 26 June 1945. Article 55 of the Charter provides that the United Nations shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 56 states that all Members pledge themselves to take action to achieve the purposes set forth in Article 55. It is not a treaty, but a declaration enumerating important civil and political rights.

11. Plessy v. Ferguson, 163 U.S. 537, 550-52 (1896). In Plessy, the Court upheld a statute requiring that railroads provide separate but equal accommodations for black and white passengers. The decision amounted to no more than giving a constitutional imprimatur to racial discrimination.

by whites spread. Murders, such as the murder of a black resident of a small town in Georgia who angered some whites because he dared to exercise his right to vote, were included in the rash of violence.[12]

The media around the world focused attention on America's racial discrimination.[13] America's cold war enemy, the Soviet Union, capitalized on the discrepancy between the lofty ideals of the United States Constitution and the harsh reality of race discrimination. In fact, in 1947, when the NAACP (National Association for the Advancement for Colored Persons) filed a petition in the United Nations protesting the treatment of blacks in the United States, the Soviet Union proposed that the U.N. investigate the charge. In the end, the U.N. took no action.[14] However, it became very clear that in order to sell democracy to the world and prevent the spread of communism, America had to dismantle its own apartheid.

During this period, numerous lawsuits were filed challenging various racially discriminatory laws or practices, including school segregation. The U N Charter and the Universal Declaration

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12. Information regarding the cultural and political context in this era was obtained from the fascinating and thorough work by Mary Dudziak, Desegregation as a Cold War Imperative, 41 STANFORD LAW REVIEW 61, 71-72, 84 (1988). Macio Snipes, the only black in his district in Georgia to vote in a state election was killed by four whites in 1946. Id. at 84.

13. For example, a newspaper in Fiji reported that Negroes existed in economic conditions worse than that of "out-and-out slavery." Dudziak, id. at 81. A Greek newspaper writer noted that after visiting the American South, she understood the bitter response of a black child who, when asked by his teacher what punishment he would impose on Adolph Hitler, said "I would paint his face black and send him to America immediately." Id. at 87-88.

14. Dudziak, supra note 12 at 94-96. It is also interesting to note that in 1951 the Civil Rights Congress filed a petition in the United Nations charging that the United States' government committed genocide against American blacks, thereby violating the Convention on the Prevention and Punishment of the Crime of Genocide. The petition contained documentation of 153 killings on the basis of race. The petition drew much international attention toward American racism. The State Department responded by seizing the passport of the organization's executive director. However, as with the NAACP petition, the U.N. took no action on the petition of the Civil Rights Congress. Id. at 97-98.

of Human Rights had recently become available as additional legal weapons that could be used to proscribe these discriminatory practices, and attorneys, including those from the United States Justice Department, repeatedly invoked them. There is support for the idea that international human rights law played a role in influencing the Supreme Court to finally end the national pattern of racial segregation.[15] In the landmark case, Brown v. Board of Education, the issue was the segregation of public schools in several states.[16] In a companion case, which dealt with the same issue in the Washington D.C. schools, attorneys argued that education was a fundamental human right recognized in the Charter and alternately, that the Charter's human rights provisions should aid in interpretation of state and federal constitutions.[17] The Supreme Court determined that segregation in public schools violated the constitutional right to equal protection.[18] Although the Supreme Court did not mention the Charter or the Universal Declaration in the decision, the Brown Court was no doubt well informed of Charter obligations. While there is no way to assess the extent of the effect of human rights law on the judges in this milestone case, it is more than plausible that American pride would not allow the Supreme Court to recognize that the Constitution was inadequate in protecting these civil rights. Instead of referring to international norms, the Supreme Court may have preferred the method of redefining an existing provision of the Constitution so as to proscribe segregation.

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15. Lockwood, supra note 9 at 931-48.

16. Brown v. Board of Education, 347 U.S. 483 (1954), supplemented by Brown, 349 U.S. 294 (1955). Brown involved four consolidated cases, each in which blacks sought admission to public schools on a non-segregated basis.

17. Bolling v. Sharpe, 347 U.S. 497 (1954), Brief for the Petitioners at 57-58.

18. Brown, supra note 16 at 495. The Court did not specifically overrule Plessy, but held that segregation had no place in education. The doctrine of "separate but equal" was not finally eradicated until a series of rulings has invalidated every type of state enforced segregation. The equal protection clause of the Fourteenth Amendment served as the basis of Brown. Bolling, which was decided on the same day as Brown, differed only in that the defendant was the federal government, rather than a state. Because the Fourteenth Amendment does not apply to the federal government, the due process clause of the Fifth Amendment was the decisional basis of Bolling.

Thus, the Charter may have played a significant, but uncredited role in helping the United States define constitutional provisions to put an end to America's previously sanctioned apartheid.[19]

More recently, United States courts, both state and federal, have been far more willing to acknowledge the use of human rights law as an interpretive aid to define rights under state and federal law. The power of international legal norms to fill in the gaps of incomplete domestic law was firmly established by the case of Pedro Rodriguez-Fernandez. Fernandez was a Cuban national who arrived in the United States as part of a Cuban refugee freedom flotilla. The U.S. immigration agency determined that Fernandez was not eligible for admission into the United States because of his criminal history, and had him jailed pending possible deportation. He sued, claiming the detention violated his statutory and constitutional rights.[20]

The circuit court looked to the international human rights norms against arbitrary detention to provide content to the relevant federal statute and the Constitution. Fernandez was released based on domestic grounds, but the court relied on international legal principles as support for its construction of the applicable statute.

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19. Lockwood, supra note 9 at 948. As further support for this thesis, Professor Lockwood also refers to the Supreme Court case, Shelley v. Kraemer, 334 U.S. 1 (1948), regarding state court enforcement of racially restrictive covenants. The United States attorneys filed amicus briefs urging that the anti-discrimination norms of the Charter were evidence of public policy. The Court found that judicial enforcement of the covenants, rather than the covenants themselves, violated the equal protection clause. Again, although the Court did not mention the Charter arguments in its decision, the Charter may well have been a motivating factor in the result. Id. at 943-45.

20. Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980) aff'd on other grounds sub nom, Rodriguez-Fernandez v. Wilkinson 654 F.2d 1382 (10th Cir. 1981). It is interesting to note that the trial court afforded Fernandez relief based on a violation of customary international law. It found that customary international law secured the right to be free from arbitrary detention, and that Fernandez's right was being violated. The district court took a far more cautious approach. See also Hassan, The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights, 5 HUMAN RIGHTS QUARTERLY 68 (1983); Martineau, Interpreting the Constitution: The Use of International Human Rights Norms, 5 HUMAN RIGHTS QUARTERLY 87 (1983).

International human rights law has been used to provide content to domestic law in many contexts, including the rights of prisoners, welfare rights, the right to maternity leave, and the right to education.[21] In fact, we as judges need not wait for the parties to refer to human rights instruments: we can apply human rights norms as aids to interpretation even if the parties fail to appreciate the significance of the norms. A California state court judge did just this in a case involving welfare rights.

In that case, county welfare recipients filed a lawsuit when the public assistance grant monies they received were reduced to the minimal level necessary for food and shelter.[22] State law required that the poor be given enough money to adequately "relieve and support" them. The attorneys never raised the applicability of any international instrument, but the judge did himself. The judge relied on the Universal Declaration of Human Rights (which provides that everyone shall have the right to a standard of living adequate for the health and well-being of oneself and one's family) to interpret the California welfare statute as guaranteeing the grant of funds sufficient not only for food and shelter, but also for clothing, transportation, and medical care.

The use of human rights norms to interpret domestic legislation has achieved success outside of the United States as well. A very recent example occurred in Botswana.[23] A female citizen of Botswana challenged a provision of the Citizenship Act as discriminatory against women. The Act provided that children born in Botswana to a male citizen married to a female non-citizen were citizens, but children born to a female citizen married to a male non-citizen were not granted citizenship. Botswana's Constitution prohibits discriminatory laws, and specifically mentions discrimination based on race, tribe, place of origin, political opinions, colour, or creed. Sex is not mentioned.

The judge in the case took a progressive stance by stating that he found it "difficult, if not impossible" to believe that the word "sex" was left out of the Constitution because Botswana

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21. See Stephen Rosenbaum, Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor, in Lutz, Hannam, and Burke, eds., New Directions in Human Rights at 109 (1989).

22. Boehm v. Superior Court, 178 Cal. App. 3d 496 (1986) (invalidating the grant reduction).

23. In the Matter of Unity Dow v. Attorney General, in the High Court of Botswana, held at Lobatse, Misca. 124/90, Judgment, 1991, reprinted in 13 HUMAN RIGHTS QUARTERLY 614 (1991).

wanted sex discrimination to be permitted. The judge confirmed his belief by reliance on Botswana's status as a signatory to the Organization of African Unity (O.A.U.) Convention on Non-Discrimination. Although the terms of the Convention did not have the power of law in Botswana, the judge recognized that the State had obligations under the treaty. Due to Botswana's adherence to the treaty, the court was bound to construe its domestic legislation consistently with the Convention unless such construction is impossible.[24] The judge also noted that it would be "difficult if not impossible to accept that Botswana would deliberately discriminate against women in its Legislation whilst at the same time internationally support non-discrimination against females". The judge thus used international human rights norms to fill in gaps in the Constitution by creating a rule of statutory construction.

As discussed, great potential exists for the advancement of human rights through the use of international human rights instruments as aids in providing substantive content to statutory or constitutional law. There is yet another way in which international human rights law may also be used to expand domestic protection of individual rights. International human rights law can be used as a guide to develop the judicial process or analysis for reviewing claimed infringements of rights.[25]

For example, the equal protection guarantee has become the most important concept for the protection of individual rights in the United States. Thus, the method or analysis used by the court in determining whether governmental laws or policies violate the equal protection clause is a very important facet in the protection of rights.

The United States Supreme Court, in recent years, has tended to apply analytical techniques that take a narrow view of the judicial power to protect individual rights and a broad view of the power of the legislative or executive branches of the government to invade individual rights. International human rights law can be used to counter this trend - to move toward a broader definition of prima facie rights and a narrower construction of permis-

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24. Id. at 624.

25. Strossen, Recent U.S. and International Judicial Protection of Individual Rights, supra note 5 at 866. See also Gordon Christenson, the Uses of Human Rights Norms to Inform Constitutional Interpretation, 4 HOUSTON JOURNAL OF INTERNATIONAL LAW 39 (1981).

sible government limitations on rights.[26]

Specifically, international human rights law can be used to define rights more broadly, by giving a broader scope to the right[27] or by determining that a right is defined in positive terms. If a right is defined in positive terms, the government is not only prohibited from interfering with it, but is required to undertake affirmative actions to safeguard the right. The European Court has recognized this. It has imposed positive obligations upon states to facilitate individuals' enjoyment of their privacy rights even when such obligations are not commanded by express language. For example, the European Court has compelled respondent governments to take affirmative measures to reform their domestic law as a remedy for impermissible limitations upon the right to privacy.[28] In one case, the Court has gone even further, ruling that the State has an affirmative duty to protect privacy against interference not only by state agents, but also

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26. This concept is fully presented in Strossen, Recent U.S. and International Judicial Protection of Individual Rights, supra note 5. Professor Strossen asserts that contrary to the American trend, "[t]he international human rights law approach to legal process appears to be moving in the opposite direction: toward modes of judicial review that result in more expansive interpretations of rights and more restrictive interpretations of the government's power to circumscribe those rights." Id. at 807. Her observations are premised largely on her study of the decisions of the European Commission and Court concerning the right to privacy.

27. For example, the European Court and Commission have uniformly recognized that the right to respect for one's private life includes protection for "honor," "dignity," and "reputation," even though such interests are not expressly protected. See Strossen, supra note 5 at 843. For an example of a case in which the United States Supreme Court could have afforded a broader scope to a particular right, see Michael H. v. Gerald D., 109 S.Ct. 2333, 2341-46 (1989) (court narrowly defined scope of father-child relationship).

28. See Marckx Case, 31 Eur. Ct. H.R. (ser. A) at 15, (1975). For a discussion of affirmative obligations in this context, see Strossen, supra note 5 at 847.

by non-governmental actors.[29]

A judge's discretion in determining how broadly to define a right dovetails with the choice of the appropriate level of judicial scrutiny to employ. Invoking a heightened standard of judicial review is a powerful means of restricting the government's power to circumvent human rights. Often, the ultimate conclusion as to whether a governmental law or policy satisfies the equal protection guarantee depends in large measure upon the degree of independent review exercised by the judiciary.[30]

Judges in the United States, Nigeria and all other nations may choose to evaluate deprivations of internationally recognized rights under a higher level of judicial scrutiny. This approach can have dramatic consequences in an area such as the protection of economic rights.[31] For example, the International Covenant on

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29. X and Y v. the Netherlands, 91 Eur. Ct. H.R. (ser. A) (1985). In this case, the European Court required the Dutch Government to reform its law to allow the prosecution of a man who had allegedly raped a mentally retarded sixteen year old girl. Under Dutch law, neither she nor her father were able to initiate a criminal prosecution. The Court held this gap in the law violated the father's and daughter's privacy rights. The Court declared that a state's "positive obligations inherent in an effective respect for private or family life ... may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves." See Strossen, supra note 5 at 849.

30. Under current law, if a "fundamental right" or a "suspect class" is at issue, the court must apply a strict standard of review. Where strict scrutiny is invoked, the challenged law or practice will be upheld only if necessary for a compelling governmental reason. Alternatively, if the right being limited is not deemed fundamental, the court will only apply a low level of scrutiny. The legislation will be upheld if it bears any conceivable rational relationship to a legitimate governmental interest. Fundamental rights include but are not limited to those listed in the Bill of Rights as well as the right to vote, to privacy and to freedom of association. Suspect classifications include those based on race or national origin. See Nowak and Rotunda, Constitutional Law at 568-82 (West Publishing, 1991).

31. Bert Lockwood, Toward the Economic Brown: Economic Rights in the United States and the Possible Contribution of International Human Rights Law, in Mark Gibney, ed., World Justice? U.S. Courts and International Human Rights (Westview Press, 1991).

Economic, Social, and Cultural Rights includes the right to safe and healthy working conditions and the right to an adequate standard of living, including adequate food, clothing and housing, education and social insurance. Presently, none of these rights is recognized as fundamental under the United States Constitution. Therefore, any legislation infringing upon such rights would only be subject to the lowest level of review, and would be upheld if there is any rational relationship to a legitimate governmental interest.

A judge could invoke a treaty such as the Covenant on Economic and Social Rights to determine that a right included within the treaty was a fundamental right, even where the United States Constitution does not implicitly recognize the right as fundamental.[32] The level of scrutiny would then be heightened, resulting in a greater protection of the right.

Other methods of using international human rights to narrow construction of the permissible governmental limitations upon rights include:

- determining that an asserted government justification for limiting a right should be assessed in light of democratic values,

- assessing the proportionality between a challenged measure's invasion on rights and its promotion of governmental goals, and

- determining which party bears the burden of proof, and what type and quantum of evidence are necessary to meet that burden.[33]

Finally, I would like to mention how judges can play a prominent role in the promotion of human rights by exercising jurisdiction to the fullest extent permissible over human rights claims. For example, the concept of standing (locus standi) is designed to ensure that the plaintiff has actually suffered some personal loss. However, standing, as a practical matter, can be used by a court as a decisional basis to avoid deciding difficult cases. In order to more fully promote human rights, judges should avoid

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32. See Christenson, supra note 25. See also Strossen, supra note 5 at 838.

33. Strossen, supra note 5 at 848. Professor Strossen lists numerous other examples of legal process issues that may affect the boundaries of permissible governmental restrictions upon rights.

dismissing a case involving human rights for lack of standing unless strictly necessary under the circumstances.[34]

Moreover, judges can effectively increase the protection of human rights by limiting the extent of deference that the court exhibits toward the political branches of the government. As judges, we are mindful of not interfering in the domain of the legislative and executive branches of government. In the United States, long standing doctrines prohibit courts from rendering a decision in cases that involve "political questions" or "sovereign immunity." However, a court must counterbalance these abstention doctrines with its obligation to interpret and apply international law.[35]

Pressure to dismiss a case in deference to political decision makers surfaces often in human rights litigation which involves the consequences of United States foreign policy abroad. The judiciary has recognized that attacks on foreign policy making are not proper subjects for judicial decision, but that claims alleging noncompliance with the law are justiciable. This is true even though the limited review that the court undertakes may have an effect on foreign affairs.[36]

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34. The case of Unity Dow in Botswana, which I discussed earlier, illustrates how the judge refused to allow the case to be disposed on the ground of standing. The State's attorney claimed that the plaintiff lacked standing to challenge the Citizenship Act because she herself was not personally injured. The judge took a broad view of the standing requirement, finding that all the plaintiff had to show was that the application of the law would adversely affect her in some way. See supra note 23 at 622-23.

35. See Ralph Steinhardt, Human Rights Litigation and the "One-Voice Orthodoxy in Foreign Affairs", in Gibney, World Justice?, supra note 31 at 24.

36. DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236, 1238 (D. Cir. 1987). Despite this recognition, the outcomes in similar cases have not been consistent. See Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985) (holding justiciable a claim for damages and injunctive relief against the U.S. for the expropriation of land in Honduras for training of Nicaraguan resistance forces); Chaser Shipping Corp. v. United States, 649 F.Supp. 736 (S.D.N.Y 1986), aff'd mem., 819 F.2d 1129 (2d Cir. 1987), cert. denied, 108 S.Ct. 695 (1988) (where related policy of mining the Nicaraguan harbors gave rise to a similar injury, the destruction of private property, but claim held to be nonjusticiable).

Human rights claims that beg for justice can go unanswered when a judge dismisses a case on the grounds of a political question or sovereign immunity. An illustration of this occurred in a suit brought by Nicaraguan civilians against the United States government for the human consequences of the United States foreign policy forays in Nicaragua.[37] In simplistic terms, the Nicaraguan plaintiffs suffered horrible personal losses perpetrated by members of the contra rebel forces in their homeland. The plaintiffs alleged that the United States gave aid to the contra rebel forces, who in turn committed the terrorist raids. The case was dismissed as involving a nonjusticiable political question and sovereign immunity.

The extent of judicial deference to the political branches exhibited in this case does not appear to be necessary.[38] The Court focused on the danger of citizens using the courts to obstruct foreign policy. It also envisioned judicial control over U.S. military policy in Central America, but this by no means had to be the result of a lawsuit by individuals for their personal harm. By ignoring vital issues which the court was capable of addressing, such as the plaintiffs' claim for compensatory damages for past harm, this court missed an opportunity to remedy potentially egregious violations of human rights.[39]

Thus, we as judges can better advance the protection of human rights by exercising deference to the political branches of the government only in narrow circumstances. Overstating the political magnitude of a case or underestimating the ability of the court to decide a case inflates the perceived need for judicial inactivity, and denies to individuals the chance to have human

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37. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. 1985). The district court justified the dismissal on political question grounds, arguing that the suit would require the court to oversee U.S. military affairs in Central America. The appellate court upheld the dismissal on the basis of sovereign immunity.

38. Mark Gibney, Courts as "Teachers in a Vital National Seminar" on Human Rights, in Gibney, ed., World Justice?, supra note 31 at 81.

39. Id. A claim for compensatory damages for past harm would not involve the judiciary in any degree of judicial control over the carrying out of U.S. foreign policy in Central America. See Gibney, supra note 36 at 92.

rights abuses remedied.[40]

In conclusion, I hope that I have conveyed to you a sense of the importance of the role of judges in advancing human rights. International human rights law can come into play at any stage in a proceeding, from guiding us into accepting jurisdiction over a matter to serving as the basis for the decision. If we downplay our role in the promotion of human rights, the interests of justice may suffer. I would like to leave you with the wisdom of Albert Camus, who commented that "[f]reedom is not a gift received from the state or a leader, but a possession to be won everyday by the effort of each and the union of all."

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40. Professor Steinhardt concludes that deference should be exercised in narrower circumstances, "namely, when the political branches have actually committed the United States internationally pursuant to a delegated and exclusive power in the Constitution, when there are no international standards to apply, and when individual rights are not at issue." See Steinhardt, supra note 35 at 44.