COMPENSATION FOR CIVILIANS HARMED IN THE PURSUIT OF FOREIGN POLICY GOALS: RECENT LITIGATION IN U.S. COURTS

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Under widely accepted principles of international law, nations are not to harm civilians in other countries. Despite these proscriptions,[1] however, civilians continue to suffer harm and destruction at escalating levels. Consider the fact that in the past decade the number of refugees in the world has increased threefold. There are at present upwards of 15 million people seeking to escape the violence in their home land.[2] These are the lucky ones. While civilian death tolls constituted one-half of the war dead in the 1950s, by the late 1980s this number had increased to nearly three-fourths of the total.[3] Much of this human carnage has occurred in the Third World, but it would be a grave error to view this as only a Third World phenomenon. Instead, many of the conflicts that recently have produced massive numbers of civilian deaths—Afghanistan, Angola, Nicaragua and El Salvador, to name a few—were, in many respects, proxy battles between the superpowers.

It is unclear what recourse, if any, civilians (or their heirs) have. The image of Brecht's Mother Courage is a telling one, not only in terms of the level of personal suffering and destruction of property that she must endure, but also in the sense that there is no apparent means of compensation or restitution, nevermind the means of preventing such atrocities from occurring in the first place. In sum, although nations are obligated not to harm civilians in other countries while pursuing their own foreign policy objectives, they certainly have done so in the past and there is every indication that they will continue to do so in the future. Yet, these same nations have been able to simply walk away from the suffering and destruction they have helped bring about. This, sadly enough, is the international system as it exists today.[4]

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1. For an excellent discussion of the law in this area *see* Weissbrodt & Andrus, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARV. INT'L L.J. 59 (1988).

2. A. ZOLBERG, A. SUHRKE & S. AGUAYO, ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD (1989).

3. R. SIVARD, WORLD MILITARY AND SOCIAL EXPENDITURES 1989 (1989).

4. There has been an interesting Supreme Court jurisprudence in this general area that can only be briefly examined. In Mitchell v. Harmony, 54 U.S. 115 (1852) a merchant who traveled with the U.S. Army and who had some of his merchandise appropriated during hostilities sued to recover the cost of his lost goods. The Supreme Court ordered recovery holding:

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It is this idea that civilians have no recourse for their harm and suffering that has been challenged recently in several cases brought in U.S. federal court. In this litigation, individuals living in countries experiencing civil strife supported directly or indirectly by the United States have brought suit against officials of the U.S. government for the latter's role in bringing about death and destruction. This litigation is scant and uneven, but its importance lies in the fact that it poses a very fundamental question that has up to now been ignored: to what extent should a nation be held responsible for the human consequences of its pursuit of foreign policy objectives?

I. *EMINENTE V. JOHNSON*[5]

Eminente was a suit brought in a United States federal district court by a non-resident alien against officers of the U.S. government seeking monetary damages and/or injunctive relief for the destruction of the plaintiff's property

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> There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner . . . .

Id. at 133. *Accord*, United States v. Russell, 80 U.S. 623 (1871) (compensation ordered for the use of plaintiff's steamboats).

The rule of law began to change when the class of cases changed. For example, in United States v. Pacific Railroad, 120 U.S. 227 (1887), the Court maintained that the government was under no legal duty to compensate those who lost property during the Civil War. The Court provided the following rationale:

> The war, whether considered with reference to the number of troops in the field, the extent of military operations, and the number and character of the engagements, attained proportions unequaled in the history of the present century. More than a million of men [sic] were in the armies on each side. The injury and destruction of private property caused by their operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government.

120 U.S. at 233-34. A more modern examination of this principle occurred in United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952). In this case, the U.S. Army officials had destroyed the plaintiffs' oil terminal facilities in the Philippines so they would not fall into the hands of the advancing Japanese Army. Although the Court of Claims had found for the plaintiffs, the Supreme Court reversed.

> The terse language of the Fifth Amendment is no comprehensive promise that the United States will make whole all who suffer from every ravage and burden of war. This Court has long recognized that in wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign. No rigid rules can be laid down to distinguish compensable losses from noncompensable losses. Each case must be judged by its own facts. But the general principles laid down in the *Pacific Railroad* case seem especially applicable here.

344 U.S. at 155-56.

5. 361 F. 2d 73 (D.C. Cir.), *cert. denied*, 385 U.S. 929 (1966).

in Vietnam. The cursory treatment of this claim is instructive. The district court granted the defendants' motion to dismiss, and this holding was upheld on appeal. The opinion of the appellate court is set forth below in its entirety.

> The Appeal is from dismissal of an action for damages and related injunctive relief, filed in the District Court by a non-resident alien against the United States without its consent with respect to a non-justiciable issue, namely, damage to property in a foreign country said to have been caused by the armed forces of the United States acting under authority of the Government of the United States.[6]

The brevity of the court's opinion strongly suggests the perceived impropriety of such litigation. In one sense this is correct, but it is also noteworthy that at the time that *Eminente* was handed down, the U.S. government had established a claims program in Vietnam, albeit one of very modest means. Major General George Prugh describes the underlying rationale for such a program.

> The arrival in South Vietnam of massive amounts of material and large numbers of troops in the mid-1960s clearly established the need for an effective claims program to cope with incidents that would involve claims for compensation against the United States. It was also apparent that a well-organized and well-administered indemnification program would be an invaluable asset to the Republic of Vietnam and its allies. Not only would such a program deny the insurgents a propaganda weapon, but it would create a climate favorable to respect for law and order.[7]

Prugh notes that while the Foreign Claims Act[8] excludes payment of any claim that is combat related, still, in many cases compensation was made in situations that were combat indirectly related.[9] Before concluding that the United States made complete restitution and indemnification for the death and destruction it helped bring about in Vietnam, however, consider the fact that death claims were limited to the payment of between $50 and $300.[10]

Despite the Vietnam claims program described above, *Eminente* represents the status quo. The well-worn cliche is that war is hell, and a very large part of this hell is death and destruction. Yet, the idea of a civilian suing to recover damages on this very basis was anathema to our judiciary at that

6. *Id.* at 73 (Burger J., concurring).
7. G. PRUGH, LAW AT WAR 1964-1973, 79 (1975).
8. 10 U.S.C. § 2734 (1956).
9. Prugh, *supra* note 7, at 83.
10. *Id.* at 85.

time, and perhaps at the present time as well. The only real surprise raised by *Eminente*, then, is that a non-resident alien would even consider bringing such a suit in the first place.

If Eminente's claim seems counterintuitive and out of place in our judicial system, a view certainly held by the court of appeals, it is essentially because we are not accustomed to such challenges to the conduct of foreign affairs. Consider, however, some analogous situations. For one, if Eminente's property was located in the United States and owned by an American citizen, there is little question that the U.S. government would have been ordered to make compensation for its destruction. Why the opposite result? As will be shown, the judiciary's concern is in not interfering (or, more importantly, giving the appearance of interfering) with the pursuit of this nation's foreign policy. But would a suit for the destruction of Eminente's property in Vietnam necessarily interfere with the American conduct of the war any more than if the property was in the United States?

Another question that needs to be raised is if Eminente had brought suit *after* the war (we will set aside statute of limitation considerations). That is, Eminente arrives in the United States in 1976 and files the same lawsuit. The claim itself—the destruction of property—is a fairly common one in our judicial system. Moreover, there is no more war between the United States and Vietnam, so the judiciary's abstention cannot be based on the grounds of interfering with its conduct. Why, then, would Eminente's suit be dismissed in 1976 as it was a decade earlier, and as it most assuredly would be today as well?

II. *RAMIREZ DE ARELLANO V. WEINBERGER*[11]

Ramirez de Arellano was a suit brought in a federal district court in July 1983 by an American citizen[12] living in Honduras who claimed that officials of the United States government had effectively seized and destroyed his meat and shrimp packing plant in that Central American country. According to the complaint, in April 1983 the U.S. Defense Department began erecting a Military Training Center on the plaintiffs' property in order to train soldiers from the Salvadoran Army. This training center—replete with a 1000 man tent camp, ammunition and storage facilities, as well as a firing range—took up nearly 90 percent of the arable land on de Arellano's 14,000 acre ranch. As a result of the construction and ensuing military operations, the plaintiffs alleged numerous injuries.

> Prime grazing land and fences have been bulldozed. The flow of water to the plaintiffs' meat-packing plant has been interrupted by

11. 745 F. 2d 1500 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985).

12. Ramirez de Arellano also sued on behalf of six corporations, all wholly owned and controlled by him.

> the soldiers' diversion of substantial quantities of water for their own use. Cattle have been shot by stray bullets. "Large numbers of armed soldiers and trainees roaming around [the] ranch and the area of [the] meat-packing plant" have frightened Ramirez's family and his employees. Ranch employees, fearing for their lives, have refused to tend cattle near the military operations, causing the livestock to become undernourished. . . . The operations are destroying the plaintiffs' investment and Ramirez's life's work.[13]

The suit alleged that the defendants' occupation and destruction of the plaintiffs' property was unconstitutional because it was not authorized by any federal statute or provision of the Constitution. The complaint sought declaratory and injunctive relief and any other relief deemed just and proper by the court.

The defendants filed a motion to dismiss, alleging that the action presented a nonjusticiable political question. Although the defendants did not file a formal answer to the plaintiffs' complaint, in their motion to dismiss they disputed the plaintiffs' factual claims, contending that the training center on de Arellano's property was a project of the Honduran government. Although under the Federal Rules of Civil Procedure the plaintiffs' allegations are assumed to be true for purposes of a motion to dismiss,[14] the district court granted the defendants' motion, which the plaintiffs then appealed.

Sitting *en banc*, the Court of Appeals for the District of Columbia overturned the district court order.[15] The essence of this decision was that suit was not barred by the political question doctrine. Instead, the court held that "[t]he plaintiffs do not seek judicial monitoring of foreign policy in Central America nor do they challenge United States relations with any foreign country. The case does not raise the specter of judicial control and management of United States foreign policy."[16] In the court's view, the case was merely one involving "[p]rivate United States litigants seek[ing] a determination of the Executive's deprivation of their private property."[17]

Ramirez de Arellano raises as many issues as it answers. One question is whether the court would have decided the same way if the plaintiffs had alleged personal injury rather than the destruction of property. At one point in his majority opinion Judge Wilkey wrote: "This is a paradigmatic issue for resolution by the Judiciary. The federal courts historically have resolved disputes over land, even when the United States military is occupying the

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13. 745 F.2d at 1507-08.
14. FED. R. CIV. P. § 12(b)(6).
15. 745 F.2d 1500 (D.C. Cir. 1984) (Scalia, Bork, Starr and Tamm, JJ., dissenting).
16. 745 F.2d at 1513.
17. *Id.* at 1514.

property at issue."[18] A related question involves the value of the property in question. In its holding, the court frequently referred to the fact that Ramirez de Arellano had a $13 million dollar investment in Honduras, and that the corporations involved in the litigation were multinational enterprises. Would the court have reached the same result if the plaintiff had simply lost his humble abode? Another unanswered question is whether the court would have upheld a motion to dismiss if the plaintiffs' property had been located in another country, El Salvador for example, where the conduct of U.S. military affairs would have been even more apparent.

The most basic issue that *Ramirez* leaves unresolved, however, is whether the court would have decided the same way if the individual plaintiff had not been a United States citizen. A theme that runs throughout the court's lengthy opinion indicates that it would have mattered a great deal.

> The Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry.[19]
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> . . . .
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> The suggestion [by the defendants] that a United States citizen who is the sole beneficial owner of viable business operations does not have constitutional rights against United States government officials' threatened complete destruction of corporate assets is preposterous. If adopted by this court, the proposition would obliterate the constitutional property rights of many United States citizens abroad and would make a mockery of decades of United States policy on transnational investments.[20]
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> . . . .
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> Because we hold that the United States plaintiffs have a protected property interest for the purposes of the claims asserted here and that they have standing to sue, we do not reach the question whether the alien Honduran corporations also have constitutional rights to judicial relief for the violations alleged here.
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> We analyze this issue, as we must, on the basis of the facts alleged by the plaintiffs. According to the plaintiffs' complaint, the operation is the enterprise of one man—a United States citizen.[21]

Despite the novel and important issues raised in *Ramirez de Arellano*, the case has received a scant amount of academic attention. What principle does

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18. *Id.* at 1512.
19. *Id.* at 1515.
20. *Id.* at 1515-16.
21. *Id.* at 1516-17.

the case stand for? A narrow reading would limit the case to its unique set of facts: an American citizen who owns corporate property in another country which allegedly has been seized and destroyed by the United States government is not barred from bringing suit in a U.S. court on the basis of the political question doctrine. It is possible, of course, to read *Ramirez de Arellano* much broader than that. For example, it could be maintained that the worth of the property in question was irrelevant to the disposition of the case. Thus, the destruction of de Arellano's home or even his tractor would have generated as much concern by the judiciary as the loss of his business establishment apparently did.

It also might be possible to read *Ramirez de Arellano* broadly enough so that it does not matter what the citizenship of the plaintiff happened to be. Under this reading, Ramirez de Arellano should have be able to have his day in a United States court even if he was a Honduran citizen. The destruction of property is the destruction of property, no matter what the citizenship of the owner happens to be. The problem, however, is that this kind of situation begins to sound like *Eminente*: a suit brought by a non-resident alien for the destruction of property by the United States government. It should be noted that *Ramirez de Arellano* was decided by the same court that had previously decided *Eminente,* although no mention of the earlier case was ever made. As a final point, although the Supreme Court granted certiorari in *Ramirez*, the case was remanded and vacated on other grounds in light of the restrictions placed on the construction of a military training center in Honduras by the Comprehensive Crime Control Act of 1984.[22]

III. *SANCHEZ-ESPINOZA V. REAGAN*[23]

A year after *Ramirez de Arellano* was decided by the Court of Appeals for the District of Columbia sitting *en banc*, a unanimous three judge panel of that same circuit denied a similar claim for relief in a suit brought by a group of Nicaraguan civilians against federal officials for the latter's support of the Contra rebel forces.[24] Suit for damages and/or injunctive relief was brought under the Alien Tort Statute which reads: "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."[25]

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22. Pub. L. No. 98-473, 98 Stat. 1884, 1893-94.

23. 770 F.2d 202 (D.C. Cir. 1985).

24. There were two other groups of plaintiffs in this case. One group was comprised of 12 Congressmen who were suing on the grounds that the Executive branch was usurping Congress' role to declare war, and also violating the Boland Amendment which was law at the time that suit was filed. The other group of plaintiffs were two citizens of Dade County, Florida who claimed that the training of Contra rebel forces in that area was a common nuisance. Both of these claims were dismissed, but will not be addressed here. For a more extended discussion of this case see Gibney, *Human Rights and Human Consequences: A Critical Examination of Sanchez-Espinoza v. Reagan*, 10 LOY. L.A. INT'L & COMP. L.J. 299 (1988).

25. 28 U.S.C. § 1350 (1991).

The principal assertion made by the plaintiffs was that the named federal officials had "'[a]uthorized, financed, trained, directed and knowingly provided substantial assistance for the performance of activities which terrorize and otherwise injure the civilian population of the Republic of Nicaragua.'"[26] Among the terror allegedly carried out by the contras was the following: "'[s]ummary execution, murder, abduction, torture, rape, wounding and the destruction of private property and public facilities.'"[27]

The district court granted the defendants' motion to dismiss on the ground that resolution of the claims presented would require the court to address a nonjusticiable political question. In reaching its decision, the district court had relied primarily upon the D.C. circuit's opinion in *Eminente*, discussed earlier. In an opinion by then-Judge Scalia the court of appeals affirmed the decision, but the court rejected the use of the political question doctrine.

The court relied instead on the doctrine of domestic sovereign immunity. In terms of the plaintiffs' claims for monetary damages, the court held: "[i]t would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officials, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States."[28]

The court dismissed the plaintiffs' claim for injunctive relief in a similar vein.

> The support for military operations that we are asked to terminate has, if the allegations in the complaint are accepted as true, received the attention and approval of the President, the Secretary of State, the Secretary of Defense, and the Director of the CIA, and involves the conduct of our diplomatic relations with at least four foreign states—Nicaragua, Costa Rica, Honduras, and Argentina. Whether or not this is, as the District Court thought, a matter so entirely committed to the care of the political branches as to preclude our considering the issue at all, we think it at least requires the withholding of discretionary relief.[29]

There are several aspects of the court's use of the sovereign immunity doctrine that warrant discussion. The first is the jurisdictional distinction that the court makes between domestic sovereign immunity and foreign sovereign immunity.

> Since the doctrine of foreign sovereign immunity is quite distinct from the doctrine of domestic sovereign immunity that we apply

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26. 770 F.2d at 205.
27. *Id.*
28. 770 F.2d at 207 (emphasis in original).
29. *Id.* at 208.

> here, being based upon considerations of international comity, rather than separation of powers, it does not necessarily follow that an Alien Tort Statute suit filed against the officer of a foreign sovereign would have to be dismissed. Thus, nothing in today's decision necessarily conflicts with the decision of the Second Circuit in *Filartiga v. Pena-Irala*.[30]

The odd result that this dichotomy brings is this. *Filartiga* was an Alien Tort Statute[31] suit brought in a U.S. federal court by Paraguayan citizens against Pena-Irala, formerly the Inspector General of Police in Asuncion, Paraguay, for events arising from the torture and death of the plaintiffs' son, all of which occurred in Paraguay. Under the court's holding in *Sanchez-Espinoza* in language quoted above,[32] there is nothing inconsistent in a United States court hearing one case—*Filartiga*—but not the other one—*Sanchez-Espinoza*—although the latter alleges human rights abuses brought on in part by the United States government, while the former has no connection with the U.S. government, its citizens or its corporations. Beyond this perplexing jurisdictional result, Judge Scalia's notion of the basis for sovereign immunity also raises some serious questions. According to the court, the actions by officers of the U.S. government that are said to be violations of international law and the United States Constitution are protected by the doctrine of domestic sovereign immunity simply because these same actions have received the attention and approval of these same federal officials. In short, in the realm of foreign affairs, the king can do no wrong, and if he does so he is still protected as long as he has given his attention and approval to such illegal actions.

The court's view of the impetus behind the litigation is also interesting to note. Toward the end of his opinion Judge Scalia questions the *bona fides* of the plaintiffs' claims.

> Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens' [sic] using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.[33]

By questioning the motivations behind this particular litigation, Scalia is conveniently able to ignore the very real human consequences of this U.S. backed civil war, the most vivid being the fact that upwards of 30,000

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30. *Id.* at 207 n.5 (citations omitted).
31. *Supra* note 25.
32. *Supra* note 28.
33. 770 F.2d at 209.

civilians died during hostilities. Scalia, however, is also misguided about those filing suit. The testimony provided below is a sample of the atrocities allegedly experienced by the plaintiffs or members of their family.

> In July 1982, 130 Contras, members of the FDN, attacked San Francisco de Guajinaqulapa, with rifles, mortars and machine guns, ransacking houses and overrunning the town. After the attackers left, plaintiff Elia Maria Espinoza found her husband, his head smashed, and brains falling out. . . . Plaintiff Jose Santos-Barrera found his son lying face up, his chest bullet-ridden and his legs destroyed. Plaintiff Maria Espinal Mondragon found the body of her husband, with holes in his neck, stomach and right leg. His throat, as well as the throats of other victims lying near him, had been slit. The attackers kidnapped eight persons, including plaintiff Javier Sanchez-Espinoza.[34]

The court not only assumes that the lawsuit was politically motivated—is it really so political to want to end this kind of suffering?—but it also assumes that a decision by a U.S. court would necessarily "obstruct the foreign policy of our government. . . ."[35] Note that federal officials made the same kind of claim in *Ramirez de Arellano*, but the court rejected the argument in that case, concluding that it was not being asked to monitor American policy in Central America. Ironically enough, there is no mention of *Ramirez de Arellano* in *Sanchez-Espinoza*, although the claims presented are in fact quite similar, and *Ramirez de Arellano* was decided in the same judicial circuit only a year earlier by an *en banc* panel.

A final point to address is the court's position that "we must leave to Congress the judgment whether a damage remedy should exist."[36] Undoubtedly this would be the optimal solution, but what if no damage remedy is forthcoming? Should the judicial branch order compensation only when the political branches have so directed, but not otherwise? What does this say about our system of checks and balances and the notion of separation of powers? What does this also say about the judiciary's role for those harmed by government conduct?

IV. *COMMITTEE OF U.S. CITIZENS IN NICARAGUA V. REAGAN*[37]

The final case that will be examined is *Committee of U.S. Citizens in Nicaragua v. Reagan*, decided by a unanimous three judge panel of the D.C. Circuit Court. The plaintiffs were individual U.S. citizens and organizations

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34. Brief for the Appellants at 8, 770 F.2d 202 (D.C. Cir 1985) (No. 83-1997).

35. *Id.*

36. *Id.*

37. 859 F.2d 929 (D.C. App. 1988).

representing the same who lived and worked in Nicaragua. In the complaint filed in federal district court, the plaintiffs alleged that the United States' support for the Contras was in violation of both international law and the U.S. Constitution. In terms of the former, the plaintiffs attempted to rely on the judgment of the International Court of Justice in *Nicaragua v. United States*[38] which decided that the U.S. had violated international law and thus "'[i]s under a duty to immediately cease and to refrain from all acts as may constitute breaches of the foregoing obligations.'"[39] Included among those acts were the "'[t]raining, arming, equipping, financing and supplying [of] the *contra* forces.'"[40]

The plaintiffs' constitutional claim was related to the one made under international law. The plaintiffs alleged that the U.S. government supported and trained the Contras who, in turn, "'[d]etained, threatened and deprived'" plaintiffs of their liberty.[41] (It should be noted that by the time the case came up on appeal, one of the original plaintiffs to the suit had been killed, allegedly by members of the Contras.) Part of the claim of physical harm and the threat of harm rested on a generalized fear of the recurring violence in Nicaragua. But the plaintiffs also alleged that Americans were among the Contras' specific targets. According to the complaint, the Contra leaders had declared that "'[a]ll . . . foreigners, known as internationalists, would be considered enemy targets'" and have "described the internationalists as 'part of the enemy.'"[42]

The suit was dismissed by the district court on the basis of the political question doctrine. The D.C. Circuit Court of Appeals upheld the dismissal, but on other grounds. In fact, the court took special measures to address this issue. "We believe the trial court's reliance on the political question doctrine was misplaced, particularly to the extent that appellants seek to vindicate personal rights rather than to conform America's foreign policy to international norms."[43] Later, the court cited *Ramirez de Arellano* and quoted language from that opinion.

> As our court declared in rejecting a political question defense to a fifth amendment takings claim, "[t]he Executive's power to conduct foreign relations free from the unwarranted supervision of the Judiciary cannot give the Executive *carte blanche* to trample the most fundamental liberty and property rights of this country's citizenry."[44]

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38. 1986 I.C.J. 14.
39. 859 F.2d at 932.
40. *Id.*
41. *Id.* at 933.
42. *Id.*
43. *Id.* at 932.
44. *Id.* at 935 (*citing Ramirez de Arello*, 745 F.2d at 1515).

Despite the court's recognition that the plaintiffs, U.S. citizens, were presenting serious allegations seeking to vindicate their personal rights, the court nevertheless held that the plaintiffs failed to state a claim upon which relief could be granted. In terms of the plaintiffs' claim under international law, the court attempted to address the question of the role, if any, that international law can play in domestic proceedings. "[D]o violations of international law have domestic legal consequences? The answer largely depends on what form the 'violation' takes."[45] The court then expressed the view that if the President and the Congress, acting in concert, had violated an international legal norm, a domestic court has no authority to remedy such a violation if the law or norm was either a treaty or a rule of customary international law. If, however, the political branches have violated a peremptory norm of international law—or *jus cogens*—"[t]he domestic legal consequences are unclear."[46] The court explained:

> Such basic norms of international law as the proscription against murder and slavery may well have the domestic legal effect that appellants suggest. That is, they may well restrain our government in the same way that the Constitution restrains it. If Congress adopted a foreign policy that resulted in the enslavement of our citizens or of other individuals, that policy might well be subject to challenge in domestic court under international law.[47]

The court then went on to say that failure to follow a ruling by the ICJ did not constitute a violation of a peremptory norm of international law.[48] What is interesting to note is that the plaintiffs were not only claiming that the failure to carry out the ruling by the ICJ constituted a violation of international law, but they were also claiming that the judgment itself was evidence—and very strong evidence in fact—that the United States had committed *jus cogens* violations: the aggressive and illegal use of force against another nation. The court, however, chose to ignore the very basis of the holding by the International Court, looking instead only at the failure to enact the decision. In the court's language: "[t]his argument . . . confuses the judgment itself with the ICJ's rationale for that judgment."[49]

By narrowly focusing on the fact that the U.S. had ignored the ICJ judgment (while finding no *jus cogens* violations from this alone), but at the same time viewing the factual allegations behind the judgment as immaterial to the case before it, the court was thereby able to insulate itself from the more serious charges of conduct by the United States government. The court

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45. *Id.*
46. *Id.*
47. *Id.* at 941.
48. *Id.* at 942.
49. *Id.*

did say that a *jus cogens* violation *might* be subject to domestic legal challenge. However, the extreme example used by the court—slavery of a foreign population or of the American citizenry—simply serves to underscore the degree of judicial deference.

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

> Appellants must demonstrate . . . that the United States' involvement in this targeting of Americans in *Nicaragua* is sufficient to constitute a due process violation *by our government*. Appellants' fifth amendment claim founders on this requirement; their complaint does not allege that the United States has participated in any way in the targeting or injuries against Americans or their property in Nicaragua. Nor do they allege that such injuries are intended consequences of our government's support for the Contras.[50]

The court then attempted to explain why the actions of the Contras could not be attributed to the United States. "The only alleged fact that links our government to the actions that have harmed appellants is Congress' appropriation of money to the Contras for their continued 'resistance' against the Nicaraguan government."[51]

What the court chose to ignore is that the ICJ had found much more than a financial link between the U.S. government and the Contras. In fact, earlier in its opinion the court had quoted language from the findings from the ICJ ruling which held that the United States had violated international law by "training, arming, equipping, financing and supplying"[52] the Contra rebel forces. Why the court simply chose to focus on the financial connection is unclear. Moreover, even if the only connection between the United States and the Contras had been a financial one, the court also ignored the fact that without these substantial levels of support—both covert and overt, legal and illegal—the Contras would have ceased as a fighting force. Thus, it would not have been stretching legal reasoning, or common sense, to see the actions of the Contras and the United States government as being very closely related.

In addition to the question whether the tie between the U.S. government

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50. *Id.* at 945 (emphasis in original).

51. *Id.* at 946.

52. *Id.* at 932.

and the contras was strong enough to attribute the actions of the latter to the former, the plaintiffs also alleged a constitutional violation on the part of federal officials themselves in their decision to fund the contras. Under this view, assistance to an organization that has committed widespread human rights abuses, and which has targeted U.S. citizens as the enemy, "directly, forseeably, and necessarily increases the risk to the lives and security of U.S. citizens."[53] As a result, the plaintiffs contended that federal officials had violated their constitutional rights in the pursuit of foreign policy objectives.

In responding to this claim, the court went through a tortuous analysis of cases involving government responsibility for the actions of parolees and prison inmates. Although many would find the comparison an apt one, the court ultimately concluded that "[a]ppellants do not allege that the United States exercises the type of control over the Contra forces that prison officials exercise over inmates."[54] The court held that "[t]here must be a much stronger allegation of deliberate targeting of Americans by the Contras, and of congressional awareness of that targeting, before the possibility of due process violation would arise. . . ."[55] Ironically enough, then, what insulates the United States government from liability under this analysis is the fact that it did not have adequate control over an organization that it was funding, but which had also committed gross levels of human rights abuses.

V. DISCUSSION

It is not clear what legal principles emerge from this caselaw. The widely accepted rule seems to be embodied in *Eminente*: a nation is under no duty to provide compensation to civilians who are harmed during the course of the pursuit of foreign policy objectives. Despite the general acceptance of this principle, we have also seen some cracks in its edifice. *Ramirez de Arellano* is arguably an exceptional case because it directly challenges this proposition. In this case, a U.S. court held that one who has property destroyed or confiscated by the United States military may bring suit seeking compensation for these actions. What is uncertain is whether *Ramirez de Arellano* is an aberration. *Sanchez-Espinoza*, decided only a year later and in the same circuit, seems to indicate that it might be. However, the court in *Committee of U.S. Citizens* came very close to finding liability on the part of the United States government for the actions of the U.S.-sponsored Contras.

One principle that these cases do seem to stand for is that it matters a great deal who is bringing suit. An American citizen caught in the crossfire of war or civil strife in another country where the United States government is pursuing foreign policy ends is much more likely to obtain redress in a U.S.

53. 859 F.2d 929 (D.C. Cir. 1989), *citing* Brief for the Appellants, at 16.

54. 859 F.2d at 950.

55. *Id.* at 952.

court than a foreign citizen is.[56] The rationale that seems to be employed is that U.S. citizens enjoy constitutional protection no matter where they happen to be living.[57] While there is a certain intuitive ring to this concept, it easily leads to some inconsistent results.[58] For example, if U.S. military personnel confiscated ten meatpacking plants—nine owned by Honduran citizens and one owned by an American citizen living in Honduras—it would seem odd that only the latter would be able to bring suit in an American court for acts growing out of the same policy of confiscation.

Ramirez de Arellano is not the only indication that under certain circumstances the United States government will attempt to make compensation to civilians in other countries. The extraordinarily modest Vietnamese program was described earlier. In addition, the United States government recently has offered *ex gratia* payment for harm caused by military personnel. The first involved payments to citizens of Grenada for damage done in the U.S. invasion in 1983.[59] The second instance where compensation was offered was when the battleship Vincennes shot down an Iranian commercial airliner.[60] Finally, the United States government provided $420 million in economic assistance to Panama after the U.S. military invasion of that country.[61]

In so-called "friendly" wars, then—Vietnam, Grenada and Panama—the United States seems willing to offer some kind of compensation, sometimes

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56. This point was underscored by the Supreme Court's decision in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). In this case, the Court held that the Fourth Amendment does not apply to searches on foreign soil conducted by U.S. drug agents. The Court did indicate, however, that it would have reached a contrary result if the premises searched had been owned by a United States citizen.

57. It is not only domestic courts that are far more willing to respond when an American citizen is involved. The same is true (perhaps more true) of the political branches as well. A recent editorial underscores this point. The editorial begins:

> Tens of thousands of Guatemalan civilians have died violently in recent decades, with few of their killers brought to account. Now the suspicious death of an American could spur overdue Government action. The Bush Administration deserves credit for pressing the case.

Death and Democracy in Guatemala, The N.Y. Times, Sept. 20, 1990, at A20, col. 1. While the Bush Administration might well deserve credit for pressing the case of an American civilian, who is to take the blame for decades of inaction when only Guatemalan civilians were killed?

58. For an excellent treatment of the enormous disparities between domestic and international standards *see* L. BRILMAYER, JUSTIFYING INTERNATIONAL ACTS (1989).

59. Weissbrodt & Andrus, *The Right to Life During Armed Conflict: Disabled Peoples' International v. United States*, 29 HARV. INT'L L.J. 59, 64-65 (1988).

60. *See generally* Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325 (1989). In the Vincennes incident, the United States government offered to pay between $100,000 and $250,000 to the families of Iranian civilians and airline personnel who were killed when the battleship mistakenly shot down a commercial airliner. However, the Iranian government has refused this offer and it has brought a suit against the U.S. in the International Court of Justice.

61. Felton, *Panama-Nicaragua Legislation Helps Other Nations, Too*, CONG. Q., June 2, 1990, at 1736.

directly to the individuals who have been harmed,[62] in other instances in the form of a general aid package. Compensation was also attempted in the Vincennes incident, certainly no friendly conflict, but one might be able to explain this particular result on the basis of the amount of negative publicity that the downing of the airliner created. If U.S. military personnel had simply dropped a bomb on an Iranian airport killing 242 people it is quite unlikely that any compensation would ever have been contemplated, although it is difficult to explain the conceptual difference. Moreover, without the Executive's offer of restitution, it is just as unlikely that a suit filed in a U.S. court by the heirs of these Iranian citizens would be successful.

In conclusion, there is some indication that the rules of the international system might be changing and that, at times, a nation will be held accountable for the harm and destruction that it has caused civilians in other countries. The recent conflict in the Persian Gulf should be a true test to see if this principle of international law is accepted in practice as well as in theory.

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62. There is some noteworthy litigation in this area as well. During the Grenada invasion, U.S. military personnel bombed a mental institution killing sixteen patients and injuring six. In November, 1983, the Disabled Peoples' International filed a complaint against the United States with the Inter-American Commission on Human Rights on behalf of the "unnamed, unnumbered residents, both living and dead, of the Richmond Hill Insane Asylum, Grenada, West Indies." The complaint alleged an "unjustified violation of the right to life, liberty and security of the person pursuant to article 1 of the American Declaration of Rights and Duties of Man." In April 1986, the Commission found the complaint admissible, with the Commission finding a *prima facie* violation of the American Declaration by the United States. For an extended treatment of this litigation *see* Weissbrodt & Andrus, *supra* note 1.

Turning to the human consequences of another invasion, administrative law claims have been filed on behalf of 160 Panamanian civilians who were killed or injured during the U.S. military action in that country in December, 1989. The basis of these claims is that although the Foreign Claims Act exempts the payment of compensation for war related claims, *supra* note 8, the U.S. government should be required to follow its precedent in Grenada and elsewhere of paying combat related claims. Interview with John Kiyonaga, Attorney for plaintiffs (Aug. 21, 1990). Moreover, lawyers representing these Panamanian civilians claim that the economic assistance package will not necessarily help individuals who have been harmed. Instead, they argue, it is designed primarily to alleviate Panama's foreign debt, fund government construction programs and provide low-interest loans and trade benefits to Panama's businesses. It includes no compensation for innocent victims of the invasion. Kiyonaga & Kiyonaga, *Compensate Innocents in Harm's Way*, L.A. Times, Apr. 1, 1990, at M7, col. 1.