LITIGATING CUSTOMARY INTERNATIONAL HUMAN RIGHTS NORMS

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The Center for Constitutional Rights (CCR) has for over two decades approached customary international law primarily from the perspective of our clients, victims of human rights violations and human rights activists. Our central goals in litigating human rights cases are the goals of these clients: to protect and compensate victims, to punish those who commit or condone violations and to deter human rights abuses. Viewed from this perspective, customary international law norms serve as both a shield and a weapon, to defend those injured by human rights abuses and to bring perpetrators to justice, and, through these actions, to make such abuses less likely in the future.

Litigation based on customary international law thus conceived is a facet of human rights activism, playing a useful role alongside human rights monitoring and other means to expose human rights abuses and to pressure governments to comply with international obligations. Within the panoply of human rights strategies, customary international law has tremendous potential—much of it, however, as yet unrealized. It will take a broadbased and multifaceted movement to realize that potential, so that the rule of law becomes a reality in the international human rights arena.

In the United States, the drive to enforce international law has often been stymied by U.S. courts' reluctance to apply international norms. Litigants asserting international law claims in U.S. courts are often met with blank stares by judges unfamiliar with this area of law and unwilling to apply anything but domestic law in their courtrooms. In the 1970s, CCR attorneys unearthed a long-overlooked mechanism for raising international issues in

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For further discussion of the issues raised in this article, see Beth Stephens, The Civil Lawsuit as a Remedy for International Human Rights Violations Against Women, 5 HASTINGS WOMEN'S L.J. 143 (1994), and B. Stephens & M. Ratner, Using Law and the Filartiga Principle in the Fight for Human Rights, 2 ACLU INT'L CIV. LIBERTIES REP. 29 (Dec. 1993).
federal court: the Alien Tort Claims Act (ATCA),[1] which provides federal court jurisdiction over suits by aliens for torts "in violation of the law of nations." The initial research, undertaken in response to a request to represent victims of the My Lai massacre in Vietnam, was tabled after the potential plaintiffs decided that litigation in U.S. court was inappropriate in the midst of the war.

Several years later, CCR was approached by Joel and Dolly Filártiga, the father and sister of a young man tortured to death in Paraguay by a Paraguayan police officer who had later fled to New York. Picking up on the research conducted for the My Lai clients, CCR attorneys filed a suit on behalf of the Filártigas in the U.S. District Court in New York City, where the police officer was then living. The complaint alleged that torture constituted a tort "in violation of the law of nations" under the Alien Tort Claims Act. Initially dismissed by the district court, the Second Circuit decision reinstating the lawsuit[2] is a landmark in international human rights litigation. The court held that torture by a state official against one held in detention "violates established norms of the international law of human rights"[3] and thus constitutes a tort "in violation of the law of nations," actionable under the Alien Tort Claims Act.[4]

Just as important, the court placed its decision squarely within an activist human rights tradition:

Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind. Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[5]

Thus, the Filártiga court itself recognized the powerful potential of customary international law to contribute to the prevention of gross human rights abuses.

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[3] Id. at 880.
[4] Id. at 884, 887.
[5] Id. at 890.
Since the *Filártiga* decision, a series of ATCA cases in U.S. federal courts has successfully challenged gross human rights abuses committed abroad. The goals of these cases have been both to expand and develop the *Filártiga* precedent and to use it to address pressing human rights violations. Three cases against an Argentine general resulted in his extradition to Argentina and over $80 million in judgments to several plaintiffs. The mother of a man tortured and murdered in the Philippines won a judgment against Imee Marcos-Manotoc, the daughter of ex-dictator Ferdinand Marcos. Three women tortured in Ethiopia in the late 1970s recently obtained a judgment against the man who had tortured them, currently on appeal to the Eleventh Circuit. A major class action lawsuit against the estate of Ferdinand Marcos for summary execution, disappearance and torture recently resulted in an award of $1.2 billion in exemplary damages and over $770 million in compensatory damages. Decisions in 1994 and 1995 awarded large damage awards to victims of human rights abuses in Guatemala, East Timor and Haiti. Finally, two cases against the leader of the Bosnian Serbs were dismissed by a district court judge for lack of state action; the decision is on appeal to the Second Circuit.

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The cases have moved beyond torture, to recognize additional customary international law norms as falling within the reach of the Alien Tort Claims Act. Since Filártiga, summary execution, disappearance, arbitrary detention and, most recently, cruel, inhuman or degrading treatment, have been accepted by one or more U.S. federal courts as violations of the law of nations.\textsuperscript{13} Alien Tort Claims Act litigation helps both to solidify and to expand the definition of each of these international norms. Disappearance, for example, was initially rejected by the \textit{Forti} court as incapable of adequate definition.\textsuperscript{14} On plaintiffs' motion for reconsideration, however, the court reinstated the claim:\textsuperscript{15}

In the Court's view, the submitted materials are sufficient to establish the existence of a universal and obligatory international proscription of the tort of "causing disappearance." This tort is characterized by the following two essential elements: (1) abduction by state officials or their agents; followed by (2) official refusals to acknowledge the abduction or to disclose the detainee's fate.\textsuperscript{16}

This definition, which was accepted in \textit{Xuncax v. Gramajo} as well,\textsuperscript{17} tracks the internationally accepted formulation of "disappearance," thus lending

\begin{itemize}
\item \textsuperscript{13} \textit{Xuncax v. Gramajo}, No. 91-11564 (summary execution, torture, disappearance, arbitrary detention, cruel, inhuman or degrading treatment); Todd v. Panjaitan, No. 92-12255 (summary execution); Paul v. Avril, No. 91-399 (torture, arbitrary detention, cruel, inhuman or degrading treatment); \textit{Trajano}, 978 F.2d 493 (torture, summary execution); Abebe-Jiri, No. 90-2010 (N.D. Ga Aug. 20, 1993) (torture, cruel, inhuman or degrading treatment); \textit{Forti I}, 672 F. Supp. 1531 (torture, summary execution, prolonged arbitrary detention); \textit{Forti II}, 694 F. Supp. 707 (disappearance); \textit{Martinez-Baca}, No. 87-2057 (N.D. Cal. Apr. 22, 1988) (torture, prolonged arbitrary detention); Quiros de Rapaport, No. 87-2266 (N.D. Cal Apr. 11, 1989) (summary execution). Compare \textit{Forti II} (1988 decision holding that cruel, inhuman or degrading treatment was not sufficiently defined by international law so as to constitute a tort under the ATCA) with \textit{Xuncax}, \textit{Todd}, \textit{Paul} and \textit{Abebe-Jiri} (later decisions upholding claims of cruel, inhuman or degrading treatment).
\item \textsuperscript{14} \textit{Forti I}, 672 F. Supp. at 1542-43.
\item \textsuperscript{15} \textit{Forti II}, 694 F. Supp. at 709-11.
\item \textsuperscript{16} \textit{Id.} at 711.
\item \textsuperscript{17} No. 91-11564, slip op. at 44 n.30.
\end{itemize}
strength to the development of customary international law in this area.

Despite plaintiffs' motion for reconsideration, Forti II refused to reverse Forti I's rejection of a claim of cruel, inhuman or degrading treatment.\textsuperscript{18} Several years later, however, the Abebe-Jiri court upheld a claim based on cruel, inhuman or degrading treatment.\textsuperscript{19} The court relied on language the Senate attached as a reservation both the Torture Convention\textsuperscript{20} and the International Covenant on Civil and Political Rights,\textsuperscript{21} which stated:

That the United States considers itself bound by Article 16 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth amendments to the Constitution of the United States.

Three recent decisions have also awarded damages for cruel, inhuman or degrading treatment.\textsuperscript{22} Perhaps most important, the Xuncax v. Gramajo decision explicitly recognizes and compensates specific conduct as constituting cruel, inhuman or degrading treatment, including witnessing soldiers mistreat relatives and destroy personal property.\textsuperscript{23}

In addition to seeking recognition of additional human rights violations as falling within the reach of the Alien Tort Claims Act, pending cases also push to expand the definitions of violations which have already been recognized. This work will be of value to litigation under the two-year-old Torture Victim Protection Act, which states a federal cause of action for torture and summary execution.\textsuperscript{24} A lawsuit against the leader of the Bosnian Serbs asserted that rape, forced impregnation and forced prostitution are forms of torture under international human rights law, actionable through

\textsuperscript{18} Forti II, 694 F. Supp. at 711-12; Forti I, 672 F. Supp. at 1543.

\textsuperscript{19} Abebe-Jiri, No. 90-2010, slip op. at 8 (N.D. Ga Aug. 20, 1993).


\textsuperscript{23} Xuncax v. Gramajo, No. 11564, slip op. at 49.

the Alien Tort Claims Act and the Torture Victim Protection Act.  

The Doe complaint incorporates rape and other gender-violence within causes of action for torture and cruel, inhuman or degrading treatment. The claim that rape constitutes torture under international law was also raised in one of the cases against Guatemalan General Gramajo.  

These cases are part of a concerted, international effort to clarify that the definition of torture includes rape and other violence against women. The campaign has had increasing success, both when the rape victim is in detention and when rapes are committed by government agents.  


In 1991, the U.S. State Department listed rapes in detention as incidents of torture in the yearly human rights report. U.S. DEPARTMENT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1991 (1992) (characterizing rape by government agents as a form of torture); Cable from Secretary of State to All Diplomatic and Consular Posts Re: Instructions
issue is of particular importance internationally as the world community confronts widespread rapes and other sexual abuse in the former Yugoslavia, in Haiti and in Rwanda. There has been a growing recognition that rape during war falls within the definition of a "grave breach" of the Geneva Conventions, which bars "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health." Decisions from U.S. courts affirming that rape and other gender violence does constitute torture could provide important impetus to the international

for 1991 Country Reports on Human Rights Practices, P 211857Z (August 1991) (rape and other sexual abuse during arrest and detention or as a result of operations by government or opposition forces in the field constitutes torture and other cruel, inhuman, or degrading treatment or punishment). See also International Human Rights Abuses Against Women: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs, 101st Cong., 2d Sess. 142 (1990) (testimony of Paula Dobriansky, Deputy Assistant Secretary, Bilateral and Multilateral Affairs, Bureau of Human Rights and Humanitarian Affairs) (rape in detention is form of torture).

Amnesty International considers rapes committed while the victim is in the custody of the rapist as a form of torture. AMNESTY INTERNATIONAL, RAPE AND SEXUAL ABUSE: TORTURE AND ILL-TREATMENT OF WOMEN IN DETENTION 1-2 (1992); AMNESTY INTERNATIONAL, WOMEN IN THE FRONT LINE 2, 18-22 (1990).


movement toward a gender sensitive understanding of torture and other human rights abuses.

Customary international law is a developing concept, and with it the law governing the Alien Tort Claims Act. As the *Filartiga* court concluded in finding that a government's torture of its own citizens violates modern international law, "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Violations of customary international law norms against genocide, war crimes and crimes against humanity are alleged in the *Karadzic* litigation. These prohibitions are so universally recognized today that their acceptance as Alien Tort Claims Act violations seems assured. The prohibitions against slavery and piracy are also likely to be adopted for these purposes.

As new norms develop, they may also form the basis of ATCA suits. The *Kadic* complaint, for example, lists separate causes of action for rape, forced pregnancy and enforced prostitution, as well as torture. As international law comes to recognize violence against women as a human rights abuse, norms protecting against such specific abuses may attain customary international law status, and, therefore, fall within the ATCA. Develop-

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29 Filartiga v. Peña-Irala, 630 F.2d at 881.
32 See *Restatement*, supra note 31, § 404 (piracy, slave trade); Blum & Steinhardt, *supra* note 31, at 92, 95 (slavery). For discussion of piracy, a recognized violation of the law of nations at the time the ATCA was passed, see Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813-14 (D.C. Cir. 1984) (Bork, J., conc.).
ments in other areas as well are likely, including, for example, environmental protections and the right to political access (i.e., to vote) and other attributes of democracy.

U.S. courts deciding what international law violations fall within the purview of the Alien Tort Claims Act look to the recognized sources of international law: state practice and statements, international and domestic judicial decisions, and the opinions of international law scholars. In several of the ATCA cases, plaintiffs have relied successfully on affidavits from groups of scholars who summarize the current state of international law and offer their expert opinion about its content. This process should

The U.N. declaration defines violence against women as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women." Art. 1. Both declarations include private violence as well as governmental violence as an international human rights violation. State complicity in tolerating private violence, or in failing to prevent it, is viewed as sufficient to hold the government liable for private violence against women. See R. Copelon, Intimate Terror: Understanding Domestic Violence as Torture, in The Human Rights of Women: International and National Perspectives (R. Cook ed. 1994).

A district court recently found that environmental torts fall within the jurisdictional reach of the ATCA. Aguinda v. Texaco, No. 93-7527, 1994 U.S. Dist. LEXIS 4718 (S.D.N.Y. April 11, 1994).

See, e.g., United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820): What the law of nations on this subject is, may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.

See also The Paquete Habana, 175 U.S. 677, 700 (1900); Restatement, supra note 31, §§ 102 n.1, 103(2), 113; Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055 (1945).

The Supreme Court in The Paquete Habana stressed the importance of consulting "the works of jurists and commentators," . . . who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

175 U.S. at 700.

See discussion of experts' submissions in Forti II, 694 F. Supp. at 709-10, 712. As noted earlier, the Forti plaintiffs were unable to convince the court to permit a claim for cruel, inhuman or degrading treatment, despite the use of expert affidavits. See discussion, supra note 18. Expert affidavits as to the content of international law have also been introduced in several cases, including Xuncax v. Gramajo, No. 91-11564, 1995 U.S. Dist. LEXIS 5307
allow litigants to introduce new norms as they develop.

These cases offer international human rights attorneys a manageable means by which to convince reluctant U.S. judges to apply international law, since the reference to "the law of nations" is written into the authorizing statute. In addition, the fact patterns of most of the cases to date are so striking as to overcome judicial hesitation. Further, it is often easier to convince a U.S. court to apply international law to judge conduct committed abroad, rather than that committed by our own government. One must hope that as they become more familiar with the concepts of international law, U.S. courts will begin to accept international law arguments in a wider range of cases. ATCA litigation contributes toward that familiarity.

International human rights litigation will greatly increase in value if it is conducted in many countries around the world, not just in the United States. Some legal systems resist such suits, arguing that jurisdiction requires a nexus between the forum state and the human rights violation or the parties. An argument can be made, however, that international law permits—or even obligates—states to provide a remedy to victims of gross human rights violations, even if those violations did not occur in the forum state. The legislative history of the Torture Victim Protection Act indicates that the U.S. Congress believes that provision of a civil remedy is an obligation under conventional international law:

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . . . obligates state parties to adopt measures to ensure that torturers are held legally accountable for their acts. One such obligation is to provide means of civil redress to victims of torture.\(^{38}\)


The Torture Convention actually requires criminal prosecution (or extradition), not access to a civil remedy, a contradiction noted by President Bush when he signed the statute. See Statement by President George Bush upon Signing H.R. 2092, 1992 U.S.C.C.A.N. 91 (expressing regret that legislation to implement the Torture Convention (presumably through a statute authorizing extraterritorial criminal jurisdiction) has not yet been enacted and stating that the TVPA "does not help to implement the Torture Convention").
The concept of universal jurisdiction already requires states to offer criminal remedies to victims of certain gross human rights violations. In addition, several human rights instruments establish the right to a remedy:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating... fundamental rights. ...39

The International Covenant on Civil and Political Rights elaborates on this provision, requiring each state party "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy," "to develop the possibilities of judicial remedy," and "to ensure that the competent authorities shall enforce such remedies when granted."40 In general terms, the right to a remedy encompasses access to a judicial system


40 The International Covenant on Civil and Political Rights, supra note 21, art. 2(3).

Several international agreements contain similar obligations. For example, the Declaration on the Elimination of All Forms of Racial Discrimination, art. 7, 5 I.L.M. 352 (1966) (entered into force Jan. 4, 1969), states:

Everyone shall have the right to an effective remedy and protection against any discrimination he may suffer on the ground of race, color or ethnic origin with respect to his fundamental rights and freedoms.


The documents often specify a right to compensation as well. See, e.g., Torture Convention, supra note 20, art. 14; International Covenant on Political and Civil Rights, supra note 21, art. 9(5); American Convention, art. 63(1); European Convention, art. 5(5); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, arts. 8-21. See discussion, State Responsibility, supra note 39, at 482. The Declaration on the Protection of All Persons from Enforced Disappearance states specifically that individuals responsible for forced disappearances are liable under civil law. G.A. Res. 47/133, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/133 (1992).
empowered to hear allegations of abuse, render judgments and award compensation.  

The Sub-Commission of the U.N. Human Rights Commission declared in 1988:

all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims, either individually or collectively.  

A Special Rapporteur asked to develop guidelines for the implementation of this right stated:

As a matter of principle every State has the responsibility to redress human rights violations and to enable the victims to exercise their right to reparation. . . . Every State owes it to the victims of gross violations of human rights to see to it that . . . those who have suffered receive reparation. The legal system of every State should, therefore, deal with such issues in a just and effective manner.

41 State Responsibility, supra note 39, at 479.
Civil lawsuits can play an important role in the exercise of this right. Indeed, in his final report, the Special Rapporteur called for the creation of special human rights courts—civil as well as criminal—to hold those responsible for human rights abuses accountable for their actions and to provide victims redress for the harm they have suffered.44

Although the obligation to provide a remedy has generally been understood as applying to the state responsible for the underlying human rights abuse, the glaring absence of effective remedies for victims of human rights abuses, combined with the ability of violators to escape judgment by fleeing to other countries, mandate a reexamination of the obligations of states which provide a haven to human rights abusers who cannot be brought to justice at home or who flee from their home countries.

Litigation under the Alien Tort Claims Act and the Torture Victim Protection Act serves the movement for human rights in many ways. The individual plaintiffs often find the process of the lawsuit a vindication of their rights and helpful to their healing process.45 The human rights movement in the country where the abuses took place draws strength from a U.S. court’s judgment about the defendant’s responsibility—especially in countries where no redress or accountability has yet been possible. And the defendants—and countless other human rights violators like them—receive a powerful message about the possible repercussions of their acts.46

In addition, this line of litigation serves an important role in the development of customary international law, by helping strengthen and expand the norms themselves, and offering a means by which to enforce them. In this way, this civil litigation contributes to the overarching long term goal: a society in which human rights violations are rare, because international law is strictly enforced, and violators are promptly brought to justice.

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45 For most of the plaintiffs in the litigation to date, the failure to collect judgments awarded by the courts has been of minor significance, compared to the satisfaction obtained from the judicial process and the judgment itself.
46 Even though most defendants have not yet been forced to pay judgments, the need to defend themselves in a U.S. court, the negative publicity which accompanies the litigation, and the possible restrictions such a lawsuit and judgment place on their ability to travel to the United States are by themselves of grave concern to the actual and potential targets of such litigation.