

# TORTURE AS A VIOLATION OF THE LAW OF NATIONS

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A provision of United States law, which Judge Friendly once called a "legal Lohengrin,"<sup>1</sup> has formed the basis of a recent decision of the United States Court of Appeals for the Second Circuit. Constituting an important milestone in international enforcement of basic human rights, *Filartiga v. Pena-Irala*<sup>2</sup> declared that United States federal courts have jurisdiction in an action for damages by an alien against another alien, if the act complained of constituted a violation of the law of nations. The court applied the jurisdictional clause in 28 U.S.C. §1350, derived from the Judiciary Act of 1789, that federal district courts "shall have 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." The *Filartiga* court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, section 1350 provides federal jurisdiction."<sup>3</sup>

In finding that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations," the court took an expansive view of international law. Following *The Paquete Habana*,<sup>4</sup> the court made 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." While acknowledging that "the general assent of civilized nations" is necessary to establish "a settled rule of international law,"<sup>5</sup> the court considered that this stringent requirement was met in the case at bar, as "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."

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<sup>1</sup> *ITT v. Vencap*, 519 F.2d 1001, 1015 (2d Cir. 1975).

<sup>2</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>3</sup> *Id.* at 878.

<sup>4</sup> 175 U.S. 677, at 700 (1900).

<sup>5</sup> These requirements were also taken from *The Paquete Habana*.

The court relied on the provisions in the Charter of the United Nations by which all Member Nations pledged themselves to take joint and separate action in cooperation with the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>6</sup> The court considered that these provisions made it clear that "in this modern age a state's treatment of its own citizens is a matter of international concern," and disagreed in this respect with the lower court, which held that the concept of "the law of nations" employed in section 1350 did not extend to a state's treatment of its own citizens.<sup>7</sup> Neither was the court sympathetic to the contention that the Charter was not a self-executing treaty. It was satisfied that the Charter can be used as "evidence of binding principles of international law." In particular, the court relied on several United Nations declarations, adopted without dissent, which made clear, *inter alia*, that "no one shall be subjected to torture," and that a victim of torture "shall be afforded redress and compensation." The court pointed out that these declarations specified with great precision the obligations of Member Nations under the Charter and had become a part of binding, customary international law. Other international treaties (to which the United States is not a party) confirmed the universal renunciation of torture in the modern usage and practice of nations; similarly, the laws of many countries prohibit torture, expressly or implicitly. Finally, the court relied on the practice of nations, especially on the fact that in modern times "no government has asserted the right to torture its own nationals," and that governments accused of torture either have denied its occurrence, or have asserted that "the conduct was unauthorized or constituted rough treatment short of torture."<sup>8</sup>

While there were several other issues raised in this case, both with respect to jurisdiction and the applicable law, the importance of the case lies in its clear recognition that international law has been transformed by developments after the Second World War, and that certain violations of that law with respect to in-

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<sup>6</sup> U.N. CHARTER, arts. 55 & 56.

<sup>7</sup> The court also held that the dictum in *Dreyfus v. von Finck*, 534 F.2d 24, at 31 (1976), to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The court also referred to recent United States statutes refusing assistance to governments engaged in "a consistent pattern of gross violations of internationally recognized human rights." See, *e.g.*, 22 U.S.C. § 2304 (2).

<sup>8</sup> Memorandum of the United States as *amicus curiae* at 16, n.34.

dividuals, even when they are nationals of the acting state, are no longer matters of domestic jurisdiction. The practice of the international community, manifested by general and special international agreements, declarations of international institutions adopted without dissenting votes, or concurrent bilateral as well as unilateral acts, has led to acceptance of new rules of international law, for the violation of which an individual can be held responsible. In the past, issues of responsibility of states have been considered primarily on the international plane, through the diplomatic channel or before international tribunals; but this decision makes possible direct enforcement against the individual responsible for the violation of international law, at least in a few cases where a particular violation of human rights is clearly recognized as a violation of a generally binding rule of customary international law. It is not likely that this provision will be applied in many cases, but there may be an occasion, as in this case, where the violator can be found and served with process within the borders of a country willing to provide a remedy for the violation. Thus, in cases of universal crimes, such as piracy, slavery, or—in this case—torture, either criminal prosecution, or at least a tort remedy, will be available. In such a situation, international law recognizes that a state can exercise jurisdiction over the violator of a rule of international law, and that his national state cannot contend that such an exercise of jurisdiction is itself a violation of international law. What acts will be subject to such jurisdiction will, of course, depend on the development of international law.

According to the court, as a result of recent developments, an act of torture committed by a state official against one held in detention constitutes a violation of the international law of human rights, and hence the law of nations. In this respect, the view of the court coincides with that of the executive, as stated in the *amicus curiae* brief filed in this case on behalf of the United States. Together, they constitute an important addition to international practice in the field of human rights, which—it may be hoped—other countries may be willing to follow.

