

FILARTIGA v. PENA-IRALA: COMMENTS ON SOURCES OF HUMAN RIGHTS LAW AND MEANS OF REDRESS FOR VIOLATIONS OF HUMAN RIGHTS

Gabriel M. Wilner*

The constructive role that national courts can play in the evolution of international law, particularly with respect to individual rights, was demonstrated once again by the decision of the U.S. Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*.¹ The court was, of course, careful to establish the basis of its jurisdiction under its national law, both statutory and decisional.

The jurisdictional issue raised was whether a tort had been committed under the 1789 Judiciary Act, which includes torts "committed in violation of the law of nations or a treaty of the United States."² The essential question was whether judicial redress for violation of the human rights of the deceased, Joelito Filartiga, kidnapped and tortured to death in Paraguay, was available to his father and sister against the alleged torturer, Norberto Pena-Irala who was the Inspector General of Police in Asuncion, Paraguay. All the persons involved were Paraguayans at the time of the event.

The court, in an opinion by Judge Kaufman, recognized that the act committed against Joelito Filartiga amounted to a tort under Paraguayan law and would certainly have been a tort under the forum law in the United States. The issue remained as to the law applicable to the tort once it was decided that for jurisdictional purposes the tort violated international law. The court's immediate task was to decide whether torture violated international law for purposes of taking jurisdiction.

It is well established under international law that a host state breaches its responsibility toward the state of which an individual is a national if the host state subjects the individual to treatment of his or her person below generally accepted standards of state

* Professor of Law, University of Georgia; Director of the Brussels Seminar on the law and institutions of the European Communities.

¹ 630 F.2d 876 (2nd Cir. 1980).

² 28 U.S.C. § 1350. For an excellent review of the case and issues raised, see Blum and Steinhardt, *Federal Jurisdiction Over International Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. J. INT'L L. 53 (1981).

responsibility. Since World War II, however, the direct right of individuals to the protection of their lives and of other civil and political rights has slowly gained recognition, independent of the right of redress by states of which they are nationals. Evidently, the court in the *Filartiga* case considered that it was timely to state the present content of international law on this particular aspect of human rights. The *amicus curiae* brief by the United States government³ indicated approval by the executive branch of the robust stand that the court would take in its judgment.

The court, once it had indicated its obligation under the United States statute to apply international law in the case before it, found "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."⁴ To arrive at this conclusion, the court found that international law provides protection to individuals from torture by any state and its officials, including the state of which an individual is a national. It indicated that the United Nations Charter, a treaty to which the United States is a party, "makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern," although the court admitted that in previous cases it had not found the Charter's broad mandate to be wholly self-executing.⁵

The rule prohibiting torture "has become part of customary international law"⁶ In discussing the sources of international law, Judge Kaufman quoted from the *Paquete Habana* and, in a footnote, quoted article 38 of the Statute of the International Court of Justice (I.C.J.). Thus, in choosing the source for its rule of international law prohibiting torture, the court selected a traditionally approved source for international law—custom. To be sure, the court moved cautiously into human rights law, a complex subject upon which universal consensus is partial at best. However, the court appeared to be secure in its conclusion that "there is at present no dissent from the view that the guarantees include at a bare minimum, the right to be free from torture."⁷ The court then set about to demonstrate how the rule against torture contravenes customary international law.

³ Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

⁴ *Filartiga v. Pena-Irala*, 630 F.2d at 880.

⁵ *Id.* at 881.

⁶ *Id.* at 882.

⁷ *Id.*

The first document, other than the U.N. Charter, used by the court is the Universal Declaration of Human Rights,⁸ which was said to evidence and define the customary international law prohibition against torture. The court considered as "particularly relevant" the Declaration on the Protection of All Persons From Being Subjected to Torture.⁹ Both these declarations were adopted by the General Assembly without dissent.

Judge Kaufman then cited experts in the field. Professor Sohn was quoted for the proposition that the declarations have clarified the obligation of states in the Charter to promote human rights.¹⁰ The U.N. Office of Legal Affairs was quoted on the formal and solemn nature of the declaration of the General Assembly Declaration. This 1962 memorandum goes on to state that a declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by state practice, a declaration may by custom become recognized as laying down rules binding upon the states."¹¹

The court then addressed treaty law and found that "international consensus surrounding torture has found expression in numerous international treaties and accords." Cited were multilateral treaties to which the U.S. has not adhered, such as the International Covenant on Civil and Political Rights.¹² Treaty law here was used as part of the evidence on "the modern usage and practice of nations."¹³ Another source for the consensus on the issue of torture reflects the substance of the international agreements: national law. The court mentioned a survey according to which torture is prohibited "expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay."¹⁴ Earlier in his opinion, Judge Kaufman indicated that eighteen states have incorporated the Universal Declaration of Human Rights into their own constitutions.

Although the court stated that it was relying on custom for its conclusion, it would appear that, in fact, its sources for an international law rule on the prohibition of torture were diverse and novel and that they had been placed within the mold of customary

⁸ G.A. Res. 217 (III) (A), Dec. 10, 1948.

⁹ G.A. Res. 3452, Dec. 1975.

¹⁰ 630 F. 2d at 883.

¹¹ *Id.*

¹² G.A. Res. 2200 A, 21 U.N. GAOR Supp. (No. 16) 52-58, U.N. Doc A/6316 (1966). As a treaty, it entered into force on March 23, 1976.

¹³ 630 F.2d at 883.

¹⁴ *Id.* at 884.

law in order to conform with traditional views, particularly in U.S. case law, on the sources of international law.

The notion that all individuals have rights independent of what may be granted to them under national law, including their own national law, adds a dimension to international law unknown to it when the sources of the law of nations were set forth in the nineteenth and early twentieth centuries. The principal organs of international organizations have been playing a major role in this area. Foremost among these is, of course, the U.N. General Assembly.

The General Assembly "Declaration" is, according to the Charter, a recommendation to states. Technically, it resembles all resolutions of that organ. However, it seems logical to assume that "declarations" or "charters" or however these instruments are denominated, reflect a consensus on the law by the international community, as presently organized politically, and therefore have a different purpose from the many General Assembly recommendations that deal with day-to-day issues.¹⁵ This is particularly true, it would appear, with respect to the fundamental rights of individuals. The General Assembly is presently the sole multilateral political organ with universal membership of states charged with the vindication and maintenance of the rights of the individual, as set forth in the United Nations Charter. When it speaks by consensus on an issue of fundamental human rights in declaratory terms, it must intend to widen the still all-too-narrow dimensions of human rights law.¹⁶

Should states have a monopoly in the development of the law of human rights, either in international organizations, through diplomatic conferences or other conferences, such as the conference at which the Helsinki Accords were adopted,¹⁷ or by unilateral national action?¹⁸ The law creation process is still

¹⁵ The court in the *Filartiga* case appeared to accept this view by quoting Schwelb to that effect. *Id.* at 883.

¹⁶ It has been recognized, although the consensus is less strong, that human rights are not confined to political and civil rights, but include economic, social, and cultural rights. Evidence of such recognition by the international community of states is the International Covenant on Economic, Social and Cultural Rights, which was adopted without dissent by the General Assembly, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49-52, U.N. Doc. A/6316 (1966). In treaty form, it entered into force January 3, 1976.

¹⁷ Final Act of the Conference on Security and Cooperation in Europe. *Done* at Helsinki, Aug. 1, 1975. See 14 INTL LEGAL MATLS 1292 (1975).

¹⁸ Such national action includes the statement of individual rights in national constitutions, codes and other laws, and the creation of administrative units and the use of courts for the redress of violations of rights. However, national perceptions of human rights vary

dominated by states, of course. The notion of a universal international legislative organ directly elected by constituencies of individuals, perhaps based on the example of the so-called European Parliament, is considered futuristic and utopian. However, there already exist a number of non-governmental organizations devoted to human rights. One such organization, which is composed of groups of individuals from throughout much of the world, is Amnesty International. Another such organization is the International Commission of Jurists, which brings together members of the legal profession from much of the world. Can such groupings of individuals be brought into the norm-creating process in the area of human rights?

Although the court in the *Filartiga* case stopped far short of recognizing new sources of international law, it did expand the concept of customary law to include a bundle of multilateral state actions. This perception of customary law enabled the court to conclude that international law prohibits the use of torture by Paraguayan officials and that the court has the jurisdiction to hear a complaint by an alien based on the tort of torture. What about a tort action in the Second Circuit by a U.S. citizen for torture by a foreign state official, or by a federal or state official in the United States? Would the Second Circuit enforce a money judgment in a tort action based on torture made in favor of a U.S. citizen domiciled abroad against a federal or state official, even if judicial jurisdiction recognized under American legal principles had been gained over the official? The court in the *Filartiga* case boldly asserted: "The treaties and accords stated above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people *vis-a-vis* their own governments."¹⁹ Would this valiant declaration by a forward-looking and humane appellate court be upheld by the national courts elsewhere, or by the United States Supreme Court for that matter?

In much of the world, the issue of the possible means of redress for breaches of international law is intimately connected with the effectiveness of the national legal system. The role of national institutions and particularly of national courts in interpreting and enforcing international law, either as directly applicable substan-

greatly, and redress within national contexts will often be non-existent or formal rather than real.

¹⁹ 630 F.2d at 885.

tive rules replacing national law or as a minimum standard, has long been debated. Georges Scelle maintained in his *Cours de Droit International Public*, published in 1948, that "the international legal system can make progress only in coming closer to being a supranational legal system."²⁰ The dual function (*dédoublement fonctionnel*) of national governments as organs of both the national and international legal systems was conceded by Scelle who suggested, however, that it was a dangerous substitute for the institutional organization of international legal orders.²¹ This skepticism regarding the concept of the *dédoublement fonctionnel* was shared by Wolfgang Friedmann, who asserted that it "conceals the tension between the policy orientation of national courts or officials interpreting international law, and the policy orientation of the international order, which requires at least some degree of subordination of national policies to international law."²²

The courts in some countries, like the United States Supreme Court in the *Sabbatino* case,²³ exercise their power of determining the state of international law rules, even in sensitive economic areas, without succumbing to the urge to find that the law necessarily favors their nationals or governments. However, in the still more sensitive areas of individual rights, it would be even more difficult for national courts to take up the challenge posed in the concept of *dédoublement fonctionnel* and base the various elements of their jurisdiction on international law without reference to the national version of such law, including local public policy. Nevertheless, the utility of national courts in enforcing the rights of individuals in certain circumstances should be recognized, even if the enforcement takes place only because national law authorizes such enforcement.

Human rights enforcement on a regional level has become a reality in Western Europe and in the Americas. Based on multilateral treaties, under the auspices of the Council of Europe on the one hand and the Organization of American States on the other, organs have been created that have supranational powers

²⁰ G. SCELLE, *COURS DE DROIT INTERNATIONAL PUBLIC* 22 (1948). The translation is that of this author. The original text reads "... l'ordre juridique international ne peut faire de progrès qu'en se rapprochant d'un ordre juridique supranational."

²¹ *Id.* Scelle stated: "La loi du dédoublement fonctionnel est le succédané de l'organisation institutionnelle défailante des ordres juridiques internationaux."

²² W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 148 (1964).

²³ *Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398 (1964). Note the reference to the *Sabbatino* case by the court in the *Filartiga* case in support of the Supreme Court's examination of the law on the issue of expropriation of foreign-owned assets.

with respect to the recognition of individual rights of nationals of Member States.²⁴ Regional systems that have both administrative and judicial organs represent a most significant advance in the practical problem of the search by individuals for the vindication of rights recognized under international law.

An effective universal system for redress of individual rights has yet to be fashioned. The petition system within the United Nations, while also representing some advance, cannot in its present form fulfill the tasks that could be said to be assigned to it by the existence of consensus on at least a few areas of individual rights.²⁵ The role of non-governmental international human rights organizations will be to continue to put pressure on those who control the present means of redress, particularly through the dissemination of information and the giving of counsel when possible, and to push for the creation of effective regional, supranational, and ultimately universal administrative and judicial organs for the redress of violations of the rights of individuals.

The Court of Appeals for the Second Circuit in the *Filartiga* case found that torture is a violation of international law and appeared to be ready to have the rule applied to the allegations made by the plaintiffs. This cannot help but encourage those who seek to widen the scope of protection for the individual against abuse of the political, economic, and social power of states and those who control them.

²⁴ It may also be suggested that the European Communities' organs have served to vindicate economic and social rights of nationals of Member States.

²⁵ For a recent discussion of the petition system under the International Covenant on Civil and Political Rights (article 28 established the Human Rights Committee), which clearly describes and analyzes the system, see Zuijdwijk, *The Right to Petition the United Nations Because of Alleged Violations of Human Rights*, 59 CANADIAN BAR REV. 103 (1981).

