

FILARTIGA v. PENA-IRALA: INTERNATIONAL JUSTICE IN A MODERN AMERICAN COURT?

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If a Paraguayan citizen, *A*, arrived in Missouri and found there another Paraguayan citizen, *B*, *A* could commence a tort suit in a Missouri state court against *B* and the Missouri court would have jurisdiction if *B* were properly served, even if the tort was committed in Paraguay. This would be true even if both *A* and *B* were in the United States only for a short stay, despite the widely shared view that "jurisdiction based on service on one only transitorily present in the United States is no longer acceptable under international law if that is the only basis for jurisdiction and the action in question is unrelated to the United States."¹ If *B* moved to dismiss for *forum non conveniens*, the motion probably would be granted if *B* were in Missouri for a short stay only. If, however, *A* could prove that no other forum was available to him, the Missouri court probably would proceed to hear the case on the merits.² The court then would be faced with a choice of law issue and most likely would decide the controversy according to the law of Paraguay.³ Under international law, the exercise of jurisdiction to adjudicate could be either wrongful (*e.g.*, based upon a very short stay) or not,⁴ no matter which court in the United States would decide the matter, on the basis of internal jurisdictional

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¹ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, Editors' Notes § 441, at 162-63 (Tent. Draft No. 2, 1981) [hereinafter cited as RESTATEMENT (SECOND)]. See also *id.* at 159-60.

² See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

³ In the hypothetical situation in question, *i.e.*, if *A* and *B* were in the United States only transitorily, both resided in Paraguay, and the tort occurred in Paraguay, most courts in the United States would find a "false conflict." No matter what kind of analysis would be used, the courts very likely would consider this situation to be purely local (*i.e.*, related only to Paraguay). Furthermore, United States courts have been mindful of the fact that an international element may present problems not present in cases involving only an interstate element. In *Tramontana v. S.A. Empresa de Viacao Area Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966), the court observed: "There are obvious implications to be considered in respect of the degree of comity which should obtain between sovereign nations unrestrained by a full faith and credit clause in a world constitution." *Id.* at 473 n.10.

⁴ Compare RESTATEMENT (SECOND), *supra* note 1, §§ 441-443.

rules. Equally, the domestic allocation of jurisdiction among various courts, *e.g.*, federal courts and state courts, is of no importance in international law. The same applies to jurisdiction to prescribe (a state's own rule governing the situation in question).⁵ Application of *lex fori* or the result reached under *lex fori* is either wrongful under international law or not.⁶ Even if the exercise of jurisdiction under international law is not wrongful, a variety of statements by judges may be offensive to foreign States and, possibly, such statements may influence the foreign relations of the United States. It should be noted that the United States Supreme Court has addressed this issue.⁷

In international law, jurisdiction to adjudicate and jurisdiction to prescribe more often than not are intertwined.⁸ Under Tentative Draft No. 2 of the *Restatement of Foreign Relations Law of the United States*,⁹ the general criterion is reasonableness. The Tentative Draft reflects the modern development of jurisdictional concepts in international law,¹⁰ accepted at least by the Western nations. The Tentative Draft's treatment of jurisdiction draws on the evolution of the minimum-contacts doctrine in United States conflict of laws practice. The specific bases of jurisdiction reflect, of course, the classical jurisdictional notions in international law: territorial jurisdiction, personal jurisdiction, jurisdiction based on effects, universal jurisdiction, and so on. The reasonableness concept

⁵ Compare *id.* §§ 402-404.

⁶ This principle extends, of course, to the application of any law other than *lex fori*, but it would be highly unlikely that the Missouri court would apply, *e.g.*, Japanese law to resolve our hypothetical case.

⁷ See, *e.g.*, *Zschernig v. Miller*, 389 U.S. 429 (1968). For example, Justice Douglas wrote: "As one reads the Oregon decisions, it seem that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata. Yet they of course are matters for the Federal Government, not for local probate courts." *Id.* at 438-39. It may be of interest to note that, in *Filartiga*, Judge Kaufman wrote:

[W]e note that the foreign relations implications of this [*forum non conveniens*] and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of fifty states.

Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

⁸ RESTATEMENT (SECOND), *supra* note 1, §§ 402-404, 441-443, Comments, Reporter's Notes.

⁹ *Id.*, Editor's Notes § 441, at 159-60, 162-63.

¹⁰ The United States has the lion's share in this development. United States assertion of jurisdiction in antitrust and other matters elicited strong reactions and helped to focus on the need to adopt more functional approaches to jurisdictional issues. Compare RESTATEMENT (SECOND), *supra* note 1, at 89-93.

is a balancing factor between the national interest of two or more states in the exercise of jurisdiction in cases where such exercise generally is not accepted by states and where the existence of a more specific basis for jurisdiction is in doubt. Acceptance of a particular (perhaps emerging) basis of jurisdiction or of the exercise of jurisdiction in specific situations by a sizeable number of nations remains, however, the most important criterion of legality. For the purposes of this article, no more need be said about jurisdiction in international law or about the Tentative Draft, except for the concept of "universal jurisdiction."

Universal jurisdiction is based upon acceptance of the exercise of jurisdiction in situations where a regular jurisdictional contact does not exist. It is exceptional and traditionally reserved for a few heinous crimes perpetrated by individuals against the whole of mankind. Hence, in the case of piracy, the old adage holds that pirates are *hostii humani generis*. Judge Kaufman, in *Filartiga*, concludes his opinion with this old phrase, extending it to a torturer: "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."¹¹ There is no doubt that universal jurisdiction must rest on a treaty or on customary international law. Under section 443 of the Tentative Draft,¹² universal jurisdiction to adjudicate exists where the State has jurisdiction to prescribe. Section 404 of the Tentative Draft, which addresses the issue of jurisdiction to prescribe, reads:

A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.¹³

The text of sections 443 and 404 reflects, and the Reporters mention, that "states have exercised jurisdiction on the basis of universal interests in the form of criminal law."¹⁴ According to the Reporters, "international law does not preclude application of non-criminal law on this basis."¹⁵ It is interesting that the Reporters

¹¹ 630 F.2d at 890.

¹² RESTATEMENT (SECOND), *supra* note 1, § 443.

¹³ *Id.* § 404.

¹⁴ *Id.* at 115.

¹⁵ *Id.*

mention the U.N. General Assembly Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 1975.¹⁶ The Reporters also mention that a convention on this subject is being prepared by the Commission of Human Rights and note that "such agreements are effective only among the parties, but if customary law comes to accept any of these offenses as subject to universal jurisdiction . . . any state will be justified in exercising jurisdiction with respect to the offense wherever and by whomever committed."¹⁷

The reader noticed that the comments above rely on the Tentative Draft. Although the prior *Restatement* was not known for extraordinary accuracy in interpretation of international law, this writer finds the comparison between the Tentative Draft and the opinion in *Filartiga* interesting. At any rate, there is not much of a jurisprudence of national courts in the area of international human rights and decisions on this topic rendered by national courts in the foreseeable future will be rendered primarily by courts of the Western nations.

The facts in *Filartiga v. Pena-Irala* are quite simple. Dr. Joel Filartiga and his daughter, Dolly Filartiga, brought a wrongful death action in the United States District Court for the Eastern District of New York against Pena-Irala for allegedly torturing and killing their son and brother, Joelito Filartiga, in 1976 in Paraguay. At that time, the defendant was Inspector General of police in Paraguay. In 1979, when the action was brought, the plaintiffs and the defendant were Paraguayan citizens. Each had entered the United States on a visitor's visa. Judge Kaufman mentioned that Dolly Filartiga had applied for political asylum and thus it could be inferred that she intended to reside in the United States when the action was brought. Pena-Irala entered the United States in 1978, remained in the United States beyond the term of his visa, and "was served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation."¹⁸ Subsequently, Pena-Irala was deported. It was alleged that Joelito was tortured and killed because of his father's political activities. Dr. Filartiga commenced a criminal action in Paraguay against Pena-Irala, which was still pending at the time of the decision of the United States Court of Appeals. According

¹⁶ G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10034 (1975).

¹⁷ RESTATEMENT (SECOND), *supra* note 1, at 116.

¹⁸ 630 F.2d at 879.

to an affidavit of defendant's Paraguayan counsel, a civil action was available in Paraguay.

To establish federal jurisdiction, plaintiffs relied upon the Alien Tort Statute,¹⁹ 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." Defendant moved to dismiss both for lack of subject-matter jurisdiction and on *forum non conveniens* grounds. The district court dismissed the complaint on jurisdictional grounds on May 15, 1979. The district court relied on dicta in *Dreyfus v. von Finck*²⁰ and *IIT v. Vencap, Ltd.*²¹ stating that the law of nations, as employed in section 1350, excludes that law that governs a State's treatment of its own citizens.²² The Second Circuit Court of Appeals reversed and remanded. The reversal also was urged by the United States in its *amicus curiae* brief.²³ Judge Kaufman wrote for the unanimous court:

[We] conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens [I]nternational law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.²⁴

Section 1350 requires that the facts alleged in the complaint state a claim in "tort . . . committed in violation of the law of nations . . ."²⁵, *i.e.*, a wrongful act under customary international law. The court relied on the opinions of qualified publicists,²⁶ the U.N. Charter, the Universal Declaration on the Protection of All Persons from Being Subjected to Torture . . . ,²⁷ and several interna-

¹⁹ 28 U.S.C. § 1350 (1976).

²⁰ 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

²¹ 519 F.2d 1001 (2d Cir. 1975).

²² 630 F.2d at 880.

²³ The view of the United States coincides with the view of the circuit court. One cannot help but wonder whether court decisions in the area of human rights would fit the concept of "quiet diplomacy" of the new administration.

²⁴ 630 F.2d at 884-85.

²⁵ The court concluded that there is no "treaty of the United States" applicable in this case.

²⁶ See 630 F.2d at 879 n.4.

²⁷ G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10034 (1975). Article 1 reads in part:

tional tribunals, as well as the general practice of States. The court also noted that torture is a crime under municipal laws, including Paraguayan law.

The opinion of the court, which is likely to become a *cause célèbre*, dealt meticulously with sources of international law and no doubt will appear in textbooks. It is to be particularly appreciated that Judge Kaufman made every effort to avoid a trap of dealing too nonchalantly with U.N. declaratory resolutions. Judge Kaufman acknowledged the requirement that a rule of general customary law must command the "general assent of . . . nations. . . . [W]ere this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."²⁸ On this point, Judge Kaufman distinguished *Filartiga* from *Banco Nacional de Cuba v. Sabbatino*,²⁹ stating that the two cases are "diametrically opposed" because "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."³⁰ To explain, and perhaps to soften somewhat, this strong statement, Judge Kaufman referred to the Department of State's *Country Reports on Human Rights Practices for 1979*, which acknowledges that "there is no doubt that these rights are often violated; but virtually all governments acknowledge their validity."³¹ The court found the prohibition against torture to be specific and positioned this "rule" against mere programmatic statements on a variety of subjects in numerous U.N. declaratory resolutions. This is done much more strongly and explicitly in the United States *amicus curiae* brief, which mentions "principles that are considered desirable but incapable of immediate realization and those provisions that codify fundamental human rights."³²

It is in this context that one should view Judge Kaufman's acceptance of the proposition that U.N. declaratory resolutions are

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. . . .

²⁸ 630 F.2d at 881.

²⁹ 376 U.S. 398 (1964).

³⁰ 630 F.2d at 881.

³¹ *Id.* at 884.

³² *Amicus curiae* brief for the United States at 14, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

evidence of customary law or, at least, of expectations of nations. It should be noted that *Filartiga* presents a suitable fact situation for the opinion. According to plaintiffs' allegations, Joelito's body bore signs of torture, and Pena-Irala's confederate confessed to the killing. There is no need, then, to muse about whether a fifty-year sentence to a substandard prison imposed on a teenager for the sale of a couple of marijuana cigarettes is tantamount to mental or physical torture.

Contemporary international law and the views of nations are, unfortunately, not as straightforward as the court would have it. It is one thing to state that a variety of rules in the human rights area are norms of international law. It is quite another thing to conclude that "official torture now is prohibited. . . . [That] [t]he prohibition . . . admits of no distinction between treatment of aliens and citizens . . . [and that] international law confers fundamental rights upon all people vis-a-vis their own governments."³³ *Stricto sensu*, the question should be whether nations have assented to the universal jurisdiction of national courts of foreign States to sit in judgment on the violation under international law of human rights of a State's citizens committed by State officials acting under the color of official authority within the State's jurisdiction. Little does it matter whether such decisions serve the purpose of establishing jurisdiction to adjudicate only.³⁴ It is almost redundant to point out that the current practice of nations in the area of human rights reflects the struggle between the emphasis by socialist States and many developing nations on the classical concept of sovereignty, subjects of international law and domestic jurisdiction under article 2(7) of the U.N. Charter, and the deeply felt commitment toward human rights and their realization by individuals "in the whole world" by a minority of Western democracies committed to the rule of law.

Professor Sohn, commenting on *Filartiga* in this issue of the *Georgia Journal*,³⁵ wrote that the *Filartiga* court "took an expansive view of international law." Professor Falk, one of the scholars who submitted his views to the *Filartiga* court, has suggested

³³ 630 F.2d at 884-85.

³⁴ There is no doubt that *Filartiga* (irrespective of any distinction between the decision on the merits and on jurisdiction and between dictum and *ratio decidendi*) is not just another decision in a wrongful death or personal injury case involving a foreign element.

³⁵ Sohn, *Torture as a Violation of the Law of Nations*, 11 GA. J. INT'L & COMP. L. 307 (1981). Professor Sohn very kindly made his comments available to this writer prior to publication.

three perspectives of international law: positivism, neo-natural perspective, and world order perspective.³⁶ Obviously, the *Filartiga* decision would not fit the positivist perspective. For this writer, the issue is one of the progressive application of international law in general and of the application of international law by national courts in particular. The cause of international law and justice demands application of international law by national courts. Although there are unambiguous rules of treaties and customary law and although national courts occasionally will be bound by an international rule transformed into a domestic statute, it is in the nature of international law that anyone who interprets it is always faced with its constantly changing nature, indeed, to refer to Wolfgang Friedmann, the changing structure of international law; with the process of development, *i.e.*, with the process of transition between a dying rule to which some nations cling, and an emerging rule, upon which other nations insist. The touchstone of acceptability of interpretation for this writer contributes to a goal that is reasonably well-defined and generally accepted by a number of nations. Although it is difficult to establish precise criteria of progress, resort to the historical development of mankind allows one to feel it. The *Filartiga* decision is an important, goal-oriented decision of an American court, which is to be applauded. It would be unthinkable for an American court to interpret international law in any other way than the *Filartiga* court did. Judge Kaufman's reliance on the words of nations embodied in the U.N. declaratory resolutions on human rights was justified, no matter how hypocritical the words and votes in the General Assembly might be.

Two short observations should be added. The court did not comment on the question of *forum non conveniens* despite the fact that the United States, in the *amicus curiae* brief, suggested that the district court could declare itself *forum non conveniens* because "the parties and the conduct alleged in the complaint have . . . little contact with the United States."³⁷ To plaintiffs' assertion that a tort suit in Paraguay would be a sham, the United States responded: "For reasons of comity among nations, however, such an assertion should not be accepted absent a very clear and persuasive showing. In determining whether abstention

³⁶ Address by Falk, American Society of International Law, 75th Annual Meeting (Apr. 23, 1981).

³⁷ *Amicus curiae* brief for the United States at 25 n.48, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

is appropriate, the court should also consider the fact that the defendant has been deported."³⁸ No need exists to comment on the United States confusion of the abstention doctrine with that of *forum non conveniens*. If the plaintiffs' allegations are true, the tort suit in Paraguay indeed would be a sham, especially if the plaintiffs emigrated to the United States. It is not to be underestimated that in foreign policy it is sometimes useful to make a point but to avoid a result thought to be objectionable (in this case to Paraguay). It is submitted, however, that the district court, if it declared itself to be *forum non conveniens*, would admit that the exercise of jurisdiction in this case would be unreasonable because of insufficient contacts with the forum. Abstracting from universal jurisdiction, the court would have territorial jurisdiction. Were it not for Pena-Irala's deportation, one could conclude easily that the parties intended to stay in the United States and avail themselves of all the rights and obligations of residency, which would establish the contacts necessary for reasonable exercise of jurisdiction to prescribe. The reasonableness of adjudication on the merits in this case should be based on the fact that there was no other reasonable forum available to plaintiffs, that the territorial jurisdiction was not purely transitory (e.g., changing planes), and that the commitment to the cause of human rights demands judicial attention.

The Second Circuit dealt with the defendant's assertion that the customary law is not self-executing. The court stated that the question of federal jurisdiction, which requires consideration of international law, should not be confused with "the choice of law to be applied, which [is] addressed at a later stage in the proceedings."³⁹ The court noted that "the choice of law inquiry . . . [is] primarily concerned with fairness"⁴⁰ and implied that the district court could apply the law of Paraguay. Again, in this case application of Paraguayan law would be easy if, as the court implied, Paraguayan law casts defendant in liability. But that misses the point. It would be a pity to reduce this case to the status of just another tort case with a foreign element. It also flies in the face of Judge Kaufman's assertion that "questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of fifty states."⁴¹ This is not a diversity case; the federal

³⁸ *Id.*

³⁹ 630 F.2d at 889.

⁴⁰ *Id.*

⁴¹ See note 7 *supra*.

question involved is created by a federal statute (section 1350), which employs international law as the jurisdictional criterion. If one ignores all issues of the power of federal courts involving the choice-of-law area, it is submitted that United States federal courts do have the power to fashion a federal choice-of-law rule in cases where jurisdiction is established under section 1350. The court should apply international law as part of the "federal common law" if it has jurisdiction to prescribe. Even better, the court should apply, as a matter of law, international law as international law. In doing so, it not only would further the cause of international law in general and human rights in particular, but it also would avoid the charge of trying to subject the whole world to "American law" (in applying *lex fori*).