FILARTIGA v. PENA-IRALA: A CONTRIBUTION TO THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW BY A DOMESTIC COURT

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As with many landmark decisions, the importance of the opinion in the Filartiga v. Pena-Irala\(^1\) case has little to do with the parties involved. Assuming the Filartigas ultimately were able to obtain a judgment on the merits, its enforceability against the defendant in Paraguay seems problematical at best. On a practical level, the approval by a United States court of subject matter jurisdiction in this case may provide inspiration for suits against alleged foreign torturers exiled in this country or just passing through at an untimely moment, but it seems unlikely to offer torture victims and their families much in the way of a satisfactory remedy against such acts.

Nevertheless, the decision is most significant. Supported by a competent analysis of the developing general usage and practice of nations, the court's holding "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"\(^2\) is an important contribution to the growing weight of authority acknowledging the legal status of international standards governing basic human rights. Equally important from a broader perspective is the recognition by a domestic court that international law transcends sovereign boundaries to protect individuals from their own government officials.

Only rarely is an American court called upon to interpret the "law of nations," particularly areas of such law that must be ascertained from the evolving sources of customary international law. In a modern municipal legal system where the law governing most issues is found in statutory codes and court reporters, domestic courts are presented with no small challenge when confronted


\(^1\) 630 F.2d 876 (2d Cir. 1980).

\(^2\) Id. at 878.
with issues governed by a decentralized system of law that does not fit into our "black letter" tradition. The Supreme Court in *Banco Nacional de Cuba v. Sabbatino,* for example, refused to rule on the validity of an act of a foreign government under customary international law "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles."

The difficulty of the task is made more obvious by the wide variance among academic specialists in the field in approaching the sources of international law. On one end of the spectrum are the heirs of Austinian positivism who hold a restrictive view of the role of law in international society, limiting it to issues clearly governed by treaties or customary rules of classical origin. At the other end are the policy-science lawyers of the "New Haven" or McDougal school, who view international law not as a body of existing rules but rather as a process of decision-making in which law is defined so as to promote policies favorable to subjectively chosen world community interests. Both of these approaches, strictly applied, are apt to lead to legal principles without political validity—the first because its narrow search neglects the developing nature of international law and the latter because its value orientation lacks the degree of objectivity and predictability necessary for sound legal analysis.

In *Filartiga,* the court took a middle ground approach which, while referencing the traditional sources, relied prominently upon United Nations General Assembly Resolutions—a source many authorities would give far less consideration. The court first acknowledged the hortatory nature of the United Nations Charter provisions promoting "universal respect for, and observance of, human rights and fundamental freedoms. . . ." Noting also that there is no definitive statement as to the extent of the "human rights and fundamental freedoms" promoted in the Charter, the court observed that "there is no dissent from the view that the [Charter] guaranties include, at a bare minimum, the right to be free from torture." As evidence that this prohibition is now part of customary international law, the court cited language from two General Assembly Resolutions—the Universal Declaration of Human Rights and the Declaration on the Protection of All Persons

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4 *Id.* at 428.
5 U.N. *CHARTER,* art. 55.
6 630 F.2d at 882.

In relying on these Declarations, which were adopted by the General Assembly without dissent, the court obviously was attempting to find a codified statement of the often nebulous law represented by the usage and practice of nations. It declared that these "U.N. Declarations are significant because they specify with great precision the obligations of member nations under the Charter."\footnote{630 F.2d at 883.} Although it may be true that the rights and duties prescribed in them have become part of customary international law, the authority that the court impliedly gives these Declarations is subject to question. Standing alone, General Assembly Resolutions (even those adopted unanimously) have no binding force among the member nations. They are not law, only evidence of it. Their provisions must be balanced against other pronouncements of state practice, which may or may not be consistent with a given resolution.

To its credit, the court cited numerous expressions of international renunciation of official torture in addition to United Nations Resolutions. Two regional conventions on human rights among the Organization of American States and among the members of the Council of Europe are referenced, as well as the prohibitions against torture found in the constitutions of fifty-five nations, including the United States and Paraguay. It also cited State Department surveys noting the international consensus recognizing the validity of governmental obligations with respect to human rights and the absence of claims by governments of a right to torture their citizens.

What is missing from the court’s recitation of state practice is, however, any mention of the reaction of the international community when a state blatantly commits human rights violations. International custom, under article 38 of the Statute of the International Court of Justice, is recognized as a source of international law only to the extent that it is "evidence of a general practice accepted as law."\footnote{Statute of the International Court of Justice, [1970] Y.B.U.N. 1013, art. 38, ¶1(b).} States, like individuals, often are willing to endorse a statement of good intentions, so long as they do not expect to be affected adversely by it. An important inquiry, therefore, is whether the statements found in the cited General Assembly Resolutions, regional conventions, and national constitutions are representative of a practice among nations that is accepted as
The fact that the governments of most nations apparently do not commit acts of torture is some evidence that the prohibition is accepted by them as international law, but there are many purely domestic reasons for a government not to torture its citizens.

The more telling evidence that the prohibition has been accepted as international law is the censure rendered by the world community against regimes in violation of it. Although this sanction is applied unevenly in our multipolar international legal system, it can often be very effective. The regimes of "Emperor" Bokassa and Idi Amin, to mention only the most obvious, suffered fatally from the international ostracism imposed principally because of their human rights violations. Violations by the Soviet Union, both domestically and in Afghanistan, have been acknowledged by vigorous disapprobation which, while perhaps having little appreciable corrective affect, is evidence of international acceptance of the legal status of human rights standards. The point here is not that the application of sanctions is *sine qua non* to the existence of a law—it is not. The point is, rather, that the court's argument establishing official torture as a violation of international law would have been more convincing had it offered evidence of a practice among nations of applying the sanctions that usually accompany such violations.

In addition to the contribution the *Filartiga* opinion makes to the growing body of human rights law, the court's decision to reject its own dictum to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state" may be even more significant. This dictum, recited by the court only four years earlier and relied upon by the lower court in refusing jurisdiction, represented the classical view that public international law was in fact "interstate" law and governed only the actions of state actors among themselves. Any attempt to invoke the application of international rights and duties *vis a vis* a recognized government and its nationals was viewed as an unlawful interference in the internal affairs of a sovereign state. Although this view has suffered much erosion in this century, it is still widely accepted and is the principal defense asserted against international claims of the type involved in *Filartiga*.

For a domestic court to acknowledge international rights in the realm of domestic affairs—albeit the domestic affairs of another nation—is bound to impact upon the validity of claims based on in-

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" 630 F.2d at 884.
ternational rights and obligations beyond those involved in this case. The most obvious of these is the right of self-determination. This right has enjoyed a developing evolution of acceptance similar in pattern to that of international human rights. It is referred to as a guiding principle in the United Nations Charter; it has been acknowledged in a number of General Assembly Resolutions (the most important of which being the unanimously adopted Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States\textsuperscript{12}); and it has a history of acceptance in state practice. The right of self-determination has been applied most often in the effort to decolonize the developing world, but by definition it has broader relevance and has been asserted effectively within the municipal boundaries of non-colonial states—witness, Bangladesh. Conceivably, a class action tort suit could be brought under the Alien Tort Statute\textsuperscript{13} against a foreign official for unilaterally denying political status to a class of people in his country. Admittedly, there remains some disagreement among authorities as to the exact nature of the right as it actually exists in customary international law, and the doctrine of sovereign immunity would bar most private actions based on the right no matter how it is defined. Regardless of whether it can be judicially enforced in a national court, the right of self-determination and other international rights traditionally subordinated to international principles proclaiming the inviolability of state sovereignty have been enhanced by the Filartiga decision.

While giving due recognition to the important statements made by the court on issues of universal application, one must admit to finding the case somewhat peculiar from a political standpoint. Traditionally, questions concerning acts of a public nature committed by foreign officials with respect to foreign nationals within foreign state boundaries would be well beyond the scope of an American court's desired realm of authority. Based upon principles of international comity and in deference to the constitutionally prescribed role of the executive branch in conducting foreign affairs, courts usually avoid passing judgment on such acts even when directed against United States citizens. The role of the act of state doctrine in providing a rationale for judicial abstention on international political issues has diminished substantially in recent years. Yet, as noted in the Sabbatino decision, the doctrine

continues to have vitality to the extent of "its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." The Supreme Court there observed that "some aspects of international law touch more sharply on national nerves than do others," indicating that some issues remain on which judicial abstention may be appropriate.

The issues involved in *Filartiga* are certainly of a politically sensitive nature. The mere fact that the court asserted jurisdiction over a case involving the acts of a foreign official with no immediate American interest involved is bound to evoke resentment abroad as an act of moral imperialism. Nonetheless, it is difficult to fault the court's careful legal analysis in assuming jurisdiction in this case—given the rather odd statute on which it was based. The court found ample precedent for application of international law by a United States court and documented well that tort claims, transitory by nature, often are adjudicated outside the jurisdiction where they arise. Because the act of state doctrine was not argued below, that issue was not before the court on appeal. The court, however, noted in passing that "we doubt whether action by a state official in violation of the Constitution and Laws of the Republic of Paraguay, and wholly unratiﬁed by that nation's government, could be characterized as an act of state." It must also have been comforting for the court to have had the strong encouragement for assuming jurisdiction provided in the *amicus* brief submitted by the Departments of State and Justice.

On balance, the treatment of international issues by domestic judicial authorities should be welcomed as a positive development. There is little enough discussion of such issues by the international judiciary; a larger role adopted by the various national courts in dealing with international problems can only enhance the role of international law in resolving such problems. Subjecting politically sensitive questions—whether international or domestic—to objective legal analysis can often have the effect of relaxing the emotional tensions that produce political conflict.

It is hoped that other courts will follow the lead of the Second Circuit in this decision and not seek out means, as many courts have, to avoid jurisdiction on issues such as those involved in this case. The only worry is that *Filartiga* may be more of an aberra-

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15 *Id.*
16 630 F.2d at 889.
tion than an innovation. The application of the Alien Tort Statute is obviously limited, and the *amicus* briefs of the executive departments may well be less supportive of the court’s decision the next time this statute is interpreted, particularly in view of the Reagan Administration’s shift in foreign policy away from an emphasis on human rights. The court concluded its opinion with the statement that its holding “is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”

Victims of torture, as well as those of us who wish to see law assume a larger role in international affairs, can only hope that this does not prove to be an overstatement.

17 *Id.* at 890.