

A COMMENT ON *FILARTIGA v. PENA-IRALA*

Dean Rusk*

The decision of the Second Circuit Court of Appeals in the *Filartiga* case probably will not stand as a landmark case with far-reaching implications for the development of international law. It is more likely to find its place as a legal oddity picked up in "but see. . ." footnotes by diligent scholars.

Filartiga is one of the rare cases arising under a section of the Judiciary Act of 1789 (28 U.S.C. § 1350), which established original district court jurisdiction over all causes where an alien sues in tort for a violation of the law of nations or a treaty of the United States. The alleged facts presented an extreme case—the torture to death of a seventeen-year-old boy by an Inspector General of Police in Paraguay allegedly in retaliation for the political activities of the boy's father. The district court had dismissed the complaint on jurisdictional grounds, citing two recent cases decided by the Second Circuit in 1975¹ and 1976,² which were taken to mean that the law of nations referred to in section 1350 excluded law that governs a state's treatment of its own citizens. The sole question before the Second Circuit was whether the alleged torture was a violation of the law of nations within the meaning of 28 U.S.C. § 1350, thus providing jurisdiction for the district court. The merits of the allegations and other issues such as *forum non conveniens* were not before the court.

One must begin by complimenting the Second Circuit for its decision in this case.³ It is a common law court; the body of tort law has been shaped over the centuries by the artistry of judges informed by a sense of fairness and justice. The facts alleged by the *Filartigas* pointed to acts of extreme brutality, which must shock any normal human being. It is entirely understandable that common law judges might feel that if such an act is not a violation of the law of nations, it jolly well ought to be. The court decided accordingly. The *Filartigas* probably could not bring their action under United States law for a tort committed in Paraguay. To tell them that they must bring their action in Paraguay would be a cynical travesty. Under these circumstances, one can appreciate the

* Samuel H. Sibley Professor of International Law, University of Georgia School of Law.

¹ *IIT v. Vencap, Ltd.*, 519 F. 2d 1001 (2d Cir. 1975).

² *Dreyfus v. von Finck*, 534 F. 2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

³ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

decision and be tolerant of the gossamer web of authority woven by the Second Circuit in getting there. The ghosts of many a common law judge would nod approvingly.

It might be well to note certain problems with the sources cited by the Second Circuit to explain its conclusion that official torture is now prohibited by the law of nations and that the dictum in *Dreyfus v. von Finck*, 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. That some of the sources cited simply are not law does not detract from their value as contributions to the fund of ideas upon which the court's decision rested. Clarity about some of these sources would help the unwary to avoid reading too much into the *Filartiga* case for other purposes.

The court's decision emphasized the importance of the *Paquete Habana* case,⁴ quite rightly as supporting the proposition that customary international law is a part of United States law and is to be applied in the absence of any controlling executive or legislative act or judicial decision. It has been generally supposed that customary international law is founded in (a) the general practice and usage of nations and (b) the recognition of such general practice as binding law. Regarding torture, all the *words* point in the same direction. But what about general practice? Can one really say that the prohibition of or abstention from official torture is the general practice of nations? Does the annual report of the State Department to the Congress on human rights around the world confirm such a general practice? The court noted a survey⁵ finding that torture is prohibited, expressly or implicitly, by the constitutions of more than fifty-five nations; what of the other 105 nations? In its opinion, the Second Circuit reminded us that the Supreme Court was unable to find in *Banco Nacional de Cuba v. Sabbatino*⁶ that expropriation of a foreign-owned corporation's assets without adequate and prompt compensation was in violation of international law because of the attitudes of socialists and of many developing countries.

The Second Circuit might remind us that *Paquete Habana* spoke of the general assent of *civilized nations*. Among the sources of international law listed in article 38 of the Statute of the Interna-

⁴ 175 U.S. 677 (1900).

⁵ 48 REVUE INTERNATIONALE DE DROIT PENAL, Nos. 3 & 4, at 208 (1977).

⁶ 376 U.S. 398 (1964).

tional Court of Justice is "the general principles of law recognized by civilized nations." The phrase "civilized nations" has been taken as an anachronism arising from the desire of the drafters to stay as close as possible to the earlier statute of the Permanent Court of International Justice of the League of Nations. One is not supposed to speak of uncivilized nations or peoples in the modern world.

Where an outrageous act of official torture is concerned, perhaps we stop short of worrying about the truly general practice of the community of nations. Rather, we concentrate on that community we secretly think of as "civilized." Thus, we would ignore Idi Amin's Uganda, the torture of the officers and men of the *Pueblo* by North Koreans and of prisoners of war in Vietnam and of hostages in Iran. Likewise, we could brush aside the Gulag Archipelago, the hollowness of such titles as People's Democratic Republics, and the torture that we know occurs in a number of other nations which are Members in good standing of the United Nations and which solemnly vote in favor of resolutions prohibiting torture. To consult the practice of civilized nations is more dignified than to accept lip service in lieu of practice in support of a claim of general usage. This approach involves a circular argument since we would not consider regimes practicing official torture as civilized nations. However, circular arguments are not unknown to the law.

In the *Filartiga* case, the Second Circuit leans upon the Universal Declaration of Human Rights, proclaimed by the U.N. General Assembly in 1948 on the basis of a report from the United Nations Commission on Human Rights. The simple fact is that this Declaration was not drafted or proclaimed to serve as law. Mrs. Eleanor Roosevelt, then Chairman of the Commission on Human Rights, in presenting the Declaration to the General Assembly, said:

In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.⁷

⁷ XIX Bulletin, Department of State, No. 494, Dec. 19, 1948, at 751.

As one of the authors of the instruction that Mrs. Roosevelt received from her government on this point, I can report that there was no question in Washington or in New York that the Universal Declaration was not intended to operate as law. There was no serious consultation with the appropriate committees or Congress, as would have been essential had there been any expectation that law was coming into being. Indeed, Mrs. Roosevelt was given great leeway in her part in the drafting of the Declaration partly because it was understood that law was not being created.

The Second Circuit, also found support in Resolutions of the U.N. General Assembly. In one Resolution passed in 1970, the General Assembly declared that the Charter precepts embodied in the Universal Declaration "constitute basic principles of international law."⁸ Subsequently, in 1975, the General Assembly adopted a Declaration on the Protection of All Persons from Being Subjected to Torture.⁹ The central question here is whether the U.N. General Assembly has the authority under the Charter to enact law on such matters. Clearly, the General Assembly can make certain decisions that are legally binding or legally effective when it (a) adopts a U.N. budget, (b) allocates the costs of the U.N. among Members, (c) establishes subsidiary organs with their terms of reference, and (d) supervises the internal housekeeping of the United Nations itself, to name the most important. The Charter, however, did not contemplate that the General Assembly would be a legislative body in the field of international law generally. Article 13 states that the General Assembly shall *initiate studies* and *make recommendations* for the purpose of promoting international cooperation in the political field and for encouraging the progressive development of international law and its codification. There is little doubt that a general legislative power vested in the General Assembly would have prompted the Senate of the United States to refuse advice and consent to the Charter. The Charter sets forth the basic conditions for United States membership in the United Nations. There may be those who think that the promotion of General Assembly Resolutions to the status of international law would be a major step forward in the development of international law; they must keep in mind, however, that any such assumed role could lead to the break up of the United Nations.

⁸ G.A. Res. 2625 (XXV) (Oct. 24, 1970).

⁹ G.A. Res. 3452, 30 U.N. GAOR Supp., the text of which is printed in the margin of the Second Circuit's opinion.

This sounds like a rather harsh warning; it is intended to be just that. There are Members who simply would not submit to a fundamental change in the role of the General Assembly by stealth.

It is easy to point out that many General Assembly Resolutions are passed without a formal vote but by consensus, and that others are passed with near unanimity. It should be noted, however, that votes cast with the knowledge that the result will not be law are very different from votes that would be cast if there were a general awareness that the result would be operationally and legally binding. Resolutions of the General Assembly are entitled to a considerable degree of respect, but one must be careful. A General Assembly that was given limited powers when the United Nations had fifty-one Members cannot expect those powers to be increased significantly when there are 153 Members. Nations representing less than ten percent of the world's population can now cast a two-thirds vote in the General Assembly; new Members recently have been admitted to the U.N. with populations approximately the same as Athens, Georgia. Perhaps the most one can say is that the Assembly can contribute to that fund of ideas from which courts could find, in the words of the Second Circuit, "emerging principles" of customary international law where other principles of law are present and compelling, if not technically available, for the case at hand.

In its decision, the Second Circuit alluded to certain international treaties on human rights, including the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The first two of these were among the four treaties on human rights submitted by President Carter to the Senate for its advice and consent in 1978.¹⁰ Neither in the court's opinion nor in the *amicus* brief filed in the *Filartiga* case jointly by the Departments of Justice and State, was reference made to the reservations, declarations, understandings, and statements that President Carter recommended that the Senate include in its resolution of advice and consent.¹¹ The effect of these qualifications of the two treaties would be to render them non-self-executing for the United States, requiring implementing legislation to become effective as law in the United States.

¹⁰ Four Treatise Pertaining to Human Rights, Message from the President of the United States, S. Doc. No. Exec. C, D, E and F, 95th Cong., 2d Sess. (1978).

¹¹ See my *Personal Reflection on International Covenants on Human Rights*, 9 HOFSTRA L. REV. 515 (1981).

The questions raised in this comment do not go to the decision of the Second Circuit on the merits of the specific case. They are intended to inject a note of caution about reading too much into the *Filartiga* case, a caution reflected both in the court's decision and in the *amicus* brief submitted by the executive branch. It is submitted that the decision does not mean that lip service has replaced actual practice in determining the existence of customary international law. It does not mean that resolutions of the U.N. General Assembly create binding law. It does not mean that draft treaties that are awaiting ratification can be asserted as law by private individuals in an American court by claiming that they become law under the heading of customary international law. If the decision is taken to mean that those officials who commit brutal acts of torture are advised to stay away from the United States, most of us would applaud.

Finally, the opinion of the Second Circuit closed with an eloquent thought deserving special notice:

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, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.¹²

¹² *Filartiga v. Pena-Irala*, 630 F.2d at 890.