Denver Journal of International Law & Policy

Volume 10
Number 2 *Winter*

Article 11

January 1981

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Keywords

Human Rights Law, Jurisdiction, International Law: History, Torture

DEVELOPMENTS

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The United States Court of Appeals for the Second Circuit recently 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. The court based its holding on a rarely invoked provision of the Judiciary Act of 1789, passed by the First Congress of the United States (the Alien Tort Statute).[1] As has been noted by Judge Philip C. Jessup, the Alien Tort Statute was "an action which may well be considered to have come before its time."[2] In this holding, the court of appeals ruled that when an alleged torturer is found and served with process by an alien within the borders of the United States, the Alien Tort Statute provides federal jurisdiction. The case shows that it is now recognized that nations owe duties not only to other nations, but also directly to individuals within their borders.

In *Filartiga v. Pena-Irala*,[3] Dr. Joel Filartiga, a citizen of Paraguay, brought an action in the Eastern District of New York against Americo Norbeta Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year-old son. Dr. Filartiga charged that Pena, then Inspector General of police in Asuncion, Paraguay, had tortured and killed Dr. Filartiga's son in 1976 in retaliation for Dr. Filartiga's political activities and beliefs.[4] Dr. Filartiga had been unable to achieve adequate relief in the Paraguayan courts.[5]

In 1978 Pena entered the United States under a visitor's visa. However, he remained in the United States beyond the term of his visa. Dr.

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1. Judiciary Act of 1789, ch. 20, para. 9(h), 1 Stat. 73, 77 (1789), (current version at 28 U.S.C. § 1350 (1976)).

2. Jessup, *Revisions of the International Legal Order*, 10 DEN. J. INT'L L. & POL'Y 1, 3 (1980).

3. 630 F.2d 876 (2d Cir. 1980).

4. Dr. Filartiga described himself as a longstanding opponent of the government of President Alfredo Stroessner which has held power in Paraguay since 1954. *Id.* at 878.

5. Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, he was threatened with death by Pena. It was alleged that this attorney was subsequently disbarred without just cause. *Id.*

Filartiga learned of his presence in the United States, and provided information enabling the Immigration and Naturalization Service to arrest Pena. Following a hearing, Pena was ordered to be deported on April 5, 1979. At that time, he had resided in the United States for more than nine months. Filartiga served him with a civil summons and complaint at the Brooklyn Navy Yard, where Pena was being held pending deportation, alleging that Pena had wrongfully caused Filartiga's son's death by torture. The complaint sought compensatory and punitive damages of ten million dollars. The district court dismissed Dr. Filartiga's complaint for want of subject matter jurisdiction, and application for further stays of deportation were denied by a panel of the Second Circuit on May 22, 1979, and by the United States Supreme Court two days later. Shortly thereafter, Pena returned to Paraguay.[6]

Despite Pena's deportation, Filartiga continued his suit for damages, resting his principal argument in support of federal jurisdiction upon the Alien Tort Statute. Implementing the constitutional mandate for national control over foreign relations, the First Congress of the United States provided that "[t]he district courts shall have original jurisdiction of any civil actions by an alien for a tort only, committed in violation of the *law of nations* or a treaty of the United States." (Emphasis added.) Thus, as part of an articulated scheme of federal control over external affairs, Congress provided for federal jurisdiction over suits by aliens where principles of international law are in issue.

The constitutional basis for the Alien Tort Statute is the law of nations, which the court said had always been a part of the United States common law.[7] The court of appeals indicated that "the history of the judiciary article gives meaning to its pithy phrases."[8] Still, only two cases have ever used the Alien Tort Statute as the basis for jurisdiction during its long history. In 1795, the statute provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas.[9] In 1961, it afforded the basis for jurisdiction over a child custody suit between aliens, with a falsified passport supplying the requisite international law violation.[10] However, the court indicated that "[t]he narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-es-

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6. At this stage in the proceedings, the appellate court only decided that federal jurisdiction may properly be exercised over Pena pursuant to the Alien Tort Statute. The action was remanded for further proceedings. *Id.* at 889.

7. In Jefferson's words, the very purpose of the proposed Union was "to make us one nation as to foreign concerns, and keep us distinct in domestic ones." *See* Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 36 n.28 (1952).

8. 630 F.2d at 887. "[A] review of the history surrounding the adoption of the Constitution demonstrates that [the law of nations] became a part of the common law of the United States upon the adoption of the Constitution." *Id.* at 886.

9. Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

10. Adra v. Clift, 195 F. Supp. 857 (D.Md. 1961).

tablished, universally-recognized norms of international law that are here at issue."[11]

The court found that "a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations."[12] However, it had little difficulty concluding that "[t]here 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."[13] In reaching this conclusion, the court relied upon the traditional sources of international law. Quoting a 1920 United States Supreme Court case,[14] the court agreed that the law of nations "may be ascertained by consulting the works of jurists, writing professionally on public law; or by the general usage and practice of nations, or by judicial decisions recognizing and enforcing that law."[15] The court relied upon such modern international sources as the International Court of Justice to confirm the propriety of this approach.[16]

The court recognized that the right to be free from torture has become part of customary international law, as evidenced by the United Nations Charter which makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern.[17] The right to be free from torture is further defined by the Universal Declaration of Human Rights,[18] which states, in the plainest of terms: "No one shall be subject to torture or cruel, inhuman or degrading treatment or punishment."[19] Particularly relevant, too, is the Declaration on the Protection of All Persons from Being Subjected to Torture,[20] which the court set out in full in a footnote. This Declaration expressly prohibits any state from permitting the "dastardly and totally inhuman act of

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11. 630 F.2d at 888.

12. *Id.* at 880.

13. *Id.* at 881.

14. United States v. Smith, 18 U.S. (5 Wheat) 153 (1920).

15. *Id.* at 160-61.

16. The court cited the Statute of the International Court of Justice as evidence that the court should also apply international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions, and the teachings of publicists as a means for determination of the rules of law to apply in this case. Art. 38, the Statute of the International Court of Justice, *done at* San Francisco, June 26, 1945, *entered into force* for the United States, Oct. 24, 1945, 59 Stat. 1055, T.S. No. 993.

17. Article 55 of the U.N. Charter provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

18. *Adopted* Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

19. *Id.* art. 5.

20. G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975). This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly. *See* Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816 n.18 (1978).

torture."[21]

The court also had little difficulty discerning that torture had been universally denounced in the modern usage and practice of nations. The international consensus surrounding torture has found expression in numerous international treaties and accords, including the American Convention on Human Rights,[22] the International Covenant on Civil and Political Rights,[23] and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[24] Recognizing that torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations,[25] including both the United States[26] and Paraguay,[27] the *Filartiga* court concluded that no contemporary state could assert a right to torture its own or another nation's citizens.[28] Finally, the court cited the opinions of several jurists to conclude that official torture is now prohibited by the law of nations.[29] "The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[30]

Thus, in light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world, in principle if not in practice, the court found that an act of torture committed by a state official against a person held in detention violated established norms of the international law of human rights, and hence the law of nations. The court was concerned enough to conclude: "We believe it is sufficient here to construe the Alien Tort Statute, not as granting new

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21. 630 F.2d at 883.

22. American Convention on Human Rights, *done at* San Jose, Nov. 22, 1969, *entered into force* July 18, 1978, art. 5, O.A.S. T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. 21, rev. 6 (1979), *reprinted in* 9 INT'L LEGAL MAT. 673 (1970).

23. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200(XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 INT'L LEGAL MAT. 168 (1967).

24. Convention for the Protection of Human Rights and Fundamental Freedoms, *done at* Rome, Nov. 4, 1950, *entered into force* Sept. 3, 1953, art. 3, Europ. T.S. No. 5 (1968), 213 U.N.T.S. 211.

25. 48 REVUE INTERNATIONALE DE DROIT PENALE 208 (1977).

26. U.S. CONST. amend. VIII, where "cruel and unusual punishment" is prohibited; *id.* amend. XIV.

27. CONSTITUTION OF PARAGUAY, art. 45, which prohibits torture and other cruel treatment.

28. 630 F.2d at 884.

29. Professor Richard Falk stated that "it is now beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations." Professor Thomas Franck offered his opinion that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Professor Richard Lillich concluded that officially perpetrated torture is "a violation of international law (formerly called the law of nations)." Professor Myres McDougal stated that torture is an offense against the law of nations, and that "it has long been recognized that such offenses vitally affect relations between states." *Id.* at 879 n.4. *See generally* GLOBAL HUMAN RIGHTS (V. Nanda, J. Scarritt, & G. Shepherd eds. 1981).

30. 630 F.2d at 884.

rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[31]

The foreign relations implications of this and other issues that federal district courts will be required to adjudicate underscores the wisdom of the First Congress of the United States in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. According to the *amicus curiae* memorandum of the United States Department of State which was solicited by the court of appeals, "today a nation has an obligation under international law to respect the rights of its citizens to be free of official torture. . . . [There is] wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law."[32] Judge Jessup said that "[t]his official position of the United States will go down in the history of international law as an epochal event. It is the realization of the first keystone of a revised international legal order which I envisioned thirty-five years ago."[33]

The court's holding gives effect to a jurisdictional provision enacted by the First Congress and "is a small but important step in the fulfillment of the ageless dream to free all people from [the] brutal violence" of torture.[34] Although the question was explicitly left open what acts, other than torture, might furnish a basis for federal jurisdiction under the Alien Tort Statute,[35] the Second Circuit widened the scope for federal jurisdiction over torts which occurred entirely in a foreign state. Now that one can plausibly argue that federal courts have jurisdiction for suits against violators of fundamental human rights, dictators can no longer rely on safe haven within the borders of the United States. Those refugees who were denied judicial process within their native countries can now seek legal recourse in American courts.

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31. *Id.* at 887.

32. 19 INT'L LEGAL MAT. 585, 587-89 (1980).

33. Jessup, *supra* note 2, at 4. Judge Jessup's reference is to his *A Modern Law of Nations* (1946), wherein he wrote that the first keystone of a revised international legal order "is the point that international law, like national law, must be directly applicable to the individual." *Id.* at 2.

34. 630 F.2d at 890.

35. "International 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." 630 F.2d at 885. Genocide, summary execution, and slavery may also furnish a basis for jurisdiction. *See* Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981).