

Columbia University in the City of New York
Arthur W. Diamond Law Library
435 West 116th Street
New York, N.Y. 10027-7297

to: firmserv@law.columbia.edu

TO: FIRMSERV@LAW.COLUMBIA.EDU

Notice: this material may be protected
by copyright law (T. 17 U.S. Code)

FOUNDATION PRESS

INTERNATIONAL LAW STORIES

By

JOHN E. NOYES

Professor of Law
California Western School of Law

LAURA A. DICKINSON

Professor of Law
University of Connecticut School of Law

MARK W. JANIS

William F. Starr Professor of Law
University of Connecticut School of Law

FOUNDATION PRESS

2007

THOMSON

WEST

Cover Design: Keith Stout

Photo Credit: The Representatives of Foreign Powers Coming to Salute the Republic as a Sign of Peace, 1907 (oil on canvas) by Rousseau, Henri J.F. (Le Douanier) (1844–1910)

© Musee Picasso, Paris, France/Lauros/Giraudon/The Bridgeman Art Library

Nationality/copyright status: French/out of copyright

This publication was created to provide you with accurate and authoritative information concerning the subject matter covered; however, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Nothing contained herein is intended or written to be used for the purposes of 1) avoiding penalties imposed under the federal Internal Revenue Code, or 2) promoting, marketing or recommending to another party any transaction or matter addressed herein.

© 2007 By FOUNDATION PRESS
395 Hudson Street
New York, NY 10014
Phone Toll Free 1-877-888-1330
Fax (212) 367-6799
foundation-press.com

Printed in the United States of America

ISBN 978-1-59941-086-9



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



Harold Hongju Koh*

***Filártiga v. Peña-Irala:* Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture**

Some cases, Justice Frankfurter said, do not simply revise old precedents; they spawn new ways of looking at the law.¹ One such historic decision was the landmark 1980 ruling of the U.S. Court of Appeals for the Second Circuit in *Filártiga v. Peña-Irala*,² which inaugurated the era of human rights litigation in which we now live. Supported by an important Carter administration amicus brief pressing the administration's human rights policy, *Filártiga* held that a then-obscure federal law, the Alien Tort Claims Act (ATCA),³ conferred district court jurisdiction over a suit by two Paraguayan nationals against a Paraguayan official who had tortured their son and brother to death in Paraguay, while acting under color of governmental authority. A district court later awarded the plaintiffs a more than \$10 million judgment in damages for their loss.

* This law story grows out of a Foreword to WILLIAM J. ACEVES, *THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILÁRTIGA V. PEÑA-IRALA* (2007).

¹ *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945) (discussing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

² 630 F.2d 876 (2d Cir. 1980).

³ 28 U.S.C. § 1350 (2000) (Federal 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.").

The case triggered a sea change in international human rights litigation that continues today. Twenty-four years later, in *Sosa v. Alvarez-Machain*,⁴ six Justices of the Supreme Court confirmed *Filártiga*'s core holding: that when there is a norm of international character accepted by the civilized world, defined with a specificity comparable to recognized paradigms, an alien can sue an alien even for extraterritorial violations of that norm in a federal court under the ATCA.⁵

How did *Filártiga* come to be, and what is its legacy?⁶

Joelito's Death and the Search for a Judicial Remedy

After seizing power in 1954, for thirty-five years General Alfredo Stroessner Matiauda ruled Paraguay with a brutal fist.⁷ "Terror archives" later unearthed in 1992 by human rights activists at a police station in the Lambaré suburb of Asunción, Paraguay's capital, suggested that some 50,000 people had been murdered, 30,000 had disappeared, and 400,000 people had been imprisoned in Operation Condor, a Latin American operation during the 1970s and 80s involving the exchange of intelligence and prisoners among the military governments of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay.⁸ One of Stroessner's vocal critics was Dr. Joel Filártiga, who ran a medical clinic about fifty miles from Asunción. On at least three occasions, Filártiga was detained and tortured.⁹

During the night of March 29, 1976, Dr. Filártiga's seventeen-year-old son, Joelito, was kidnapped from his bed while his two sisters lay

⁴ 542 U.S. 692 (2004).

⁵ *Id.* at 732. Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer joined this portion of Justice Souter's opinion for the *Sosa* Court.

⁶ Filártiga's story has been told in a 1991 movie entitled ONE MAN'S WAR (Home Box Office, 1991), directed by Sergio Toledo and starring Anthony Hopkins, in a 2004 book by RICHARD ALAN WHITE, BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS (2004), and in documentary form in WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF FILÁRTIGA V. PEÑA-IRALA (2007). For two book-length treatments of the doctrines spawned by *Filártiga*, see BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (1996), and THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999).

⁷ See generally CARLOS R. MIRANDA, THE STROESSNER ERA: AUTHORITARIAN RULE IN PARAGUAY (1990).

⁸ See generally Katie Zoglin, *Paraguay's Archive of Terror: International Cooperation and Operation Condor*, 32 U. MIAMI INTER-AM. L. REV. 57, 59 (2001).

⁹ ACEVES, *supra* note 6, at 18 n.6 (citing Transcript of Hearing Before the Honorable John L. Caden at 31-32, *Filártiga v. Peña-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (No. 79 C 917)).

sleeping elsewhere in the Filártigas' Asunción home. He was taken two doors away to the house of the then-Inspector General of Asunción, Américo Norberto Peña-Irala. There he was whipped, beaten, slashed, and subjected to severe electro-shock. After about forty-five minutes Joelito died.

At 4 o'clock in the morning, Joelito's sister Dolly was awakened by a knock on her front door. A policeman told her that "there was a small problem with [her] brother at Peña's house." She walked two doors down and found her brother's body lying on a mattress amid a pool of blood. Later, she saw and confronted Peña, who told her, "[H]ere you have what you have been looking for for so long and what you deserved. Now shut up." Peña then threatened Dolly with a similar fate.¹⁰ Dr. Filártiga was summoned back to Asunción; he asked doctor friends to conduct an autopsy that confirmed that torture had been the cause of his son's death.¹¹ He became convinced that Joelito had been tortured by Paraguayan officials seeking information on his own political activities.

In the months that followed, the Filártiga family tried unsuccessfully to institute Paraguayan legal proceedings against Joelito's murderers. One lawyer who helped them was subsequently disbarred; two others withdrew from the case after being threatened. In 1977, an unsuccessful petition concerning the case was filed against Paraguay with the Inter-American Commission of Human Rights.¹² Meanwhile, the family continued to suffer harassment, threats, and abuse.¹³

In July 1978, Peña-Irala entered the United States on a tourist visa with his common-law wife, son, and niece, ostensibly to visit Disney World. From Florida, they made their way to Brooklyn, New York, where they remained after their visas had expired. Peña's niece wrote a letter back to her father in Asunción, who lived in the same neighborhood as the Filártigas. Incredibly, the letter, which included Peña's return address in New York, was misdelivered to the Filártiga home in Asunción, where Dolly opened it.¹⁴ In October 1978, Dr. Joel Filártiga and Dolly came to the United States as part of an Amnesty International-sponsored tour, but with the real goal of locating Peña-Irala. Having no

¹⁰ The facts in this section draw heavily upon ACEVES, *supra* note 6, at 18–31. Dolly Filártiga recounted the story of her brother's death in Dolly Filártiga, Op-Ed., *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21.

¹¹ ACEVES, *supra* note 6, at 20 n.11 (citing Affidavit of Dr. Joel Filártiga at 1–2, *Filártiga v. Peña-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984) (No. 79 C 917)).

¹² See WHITE, *supra* note 6, at 139–40.

¹³ ACEVES, *supra* note 6, at 23.

¹⁴ *Id.* at 28 n.36 (citing Affidavit of Dolly Filártiga at 2, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79 C 917)).

initial success, Dr. Filártiga returned to Paraguay, but Dolly stayed on to continue the search.

In March 1979, Dolly finally learned through a Paraguayan exile of Peña-Irala's address in Brooklyn. Through lawyer friends, she notified the Immigration and Naturalization Service (INS) of Peña-Irala's whereabouts, which led in April 1979 to his arrest while leaving his Brooklyn apartment. While Peña sat in detention pending deportation at the Brooklyn Naval Yard, Dolly began consulting American lawyers about the possibility of initiating a civil suit against him. Through the Executive Director of Amnesty International USA, she was put in touch with Peter Weiss, a Vice-President and cooperating attorney at New York's Center for Constitutional Rights (CCR). As Weiss later recalled:

[O]ne day the phone rings and it's Gerhard Elston from Amnesty International who says, "They just arrested a Paraguayan torturer. He's being held at the INS detention center in Brooklyn and he is going to be deported in 48 hours. What can we do to keep him here?" ... That's how *Filártiga* started. Nobody had time to think about what the implications were, where it was going to lead or even what the theory was going to be. All we knew was that something had to be done within 48 hours.¹⁵

One idea that came to Weiss's mind was suing Peña on behalf of the Filártigas in a federal court under the terms of the Alien Tort Claims Act (ATCA). The ATCA was an obscure statute originally enacted in 1789 as part of the First Judiciary Act of 1789, which declared that federal 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."¹⁶ Since its enactment, the ATCA had been cited as a basis for federal court jurisdiction in only two known cases, a 1795 maritime seizure dispute¹⁷ and a 1961 child custody dispute in Maryland.¹⁸ CCR had unsuccessfully invoked the ATCA in a Ninth Circuit

¹⁵ *Proceedings: Conference on International Human Rights Law in State and Federal Courts*, 17 U.S.F. L. REV. 1, 57 (1982) (remarks of Peter Weiss).

¹⁶ 28 U.S.C. § 1350 (2000). The statute originally provided, in language subsequently omitted from later amendments, that federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9(b) (emphasis added). See generally William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986), reprinted in THE ALIEN TORT CLAIMS ACT, *supra* note 6, at 137, 137-54.

¹⁷ *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795).

¹⁸ *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), overruled as stated by *Taveras v. Taveraz*, 477 F.3d 767 (6th Cir. 2007).

case previously brought against Secretary of State Henry Kissinger on behalf of Vietnamese children being massively transferred from Vietnam toward the end of the Vietnam War.¹⁹ In the leading Second Circuit ATCA precedent, *IIT v. Vencap, Ltd.*, the fabled Judge Henry Friendly had stated: “[t]his old but little used section is a kind of legal Lohengrin; although it has been with us since the First Judiciary Act, no one seems to know whence it came.”²⁰ Judge Friendly therefore dismissed the claim before him, reasoning that the only claims for violations of the law of nations cognizable under the statute were those that relate to “international law,” literally understood: that is, relations between states or between individuals and foreign states.²¹

The adverse Second Circuit precedent notwithstanding, Weiss and several other attorneys at CCR quickly drafted a six-page complaint charging Peña with wrongful death and “torts in violation of U.S. treaties and the law of nations;” they asked for compensatory and punitive damages of \$10 million. On April 6, 1979, they filed their complaint before Judge Eugene Nickerson of the Federal District Court for the Eastern District of New York. A few days later, they sought a district court order seeking a stay of Peña-Irala’s deportation, which the judge swiftly granted. In turn, Peña-Irala’s counsel moved to dismiss the lawsuit, arguing that the district court lacked subject matter jurisdiction because the acts alleged did not rise to the level of the jurisdictionally-required “tort in violation of the law of nations.” The Filártigas responded with affidavits from four prominent international law scholars—Professors Richard Falk of Princeton, Thomas Franck of New York University, Richard Lillich of Virginia, and Myres McDougal of Yale—each asserting that torture is unambiguously proscribed by international law.

Following a May 1979 hearing, Judge Nickerson dismissed the suit in a brief four-page ruling. While plainly sympathetic to the Filártigas’ plight, he felt bound by Judge Friendly’s prior decision, which had “held that conduct, though tortious, is not in violation of ‘the Law of Nations,’ as those words are used in 28 U.S.C. § 1350, unless the conduct is in

¹⁹ *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1202 n.13 (9th Cir. 1975) (noting in footnote that the ATCA “may be available. . . . [But] we are reluctant to decide the applicability of § 1350 to this case without adequate briefing. Moreover, we are reluctant to rest on it in any event” because of difficulties in joining other tortfeasors relevant to such action.).

²⁰ *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975). In German literature and opera, Lohengrin arrives in a boat pulled by a swan and offers to defend a beautiful maiden, but warns her never to ask his name. When she asks the forbidden question, he answers, but steps back onto his swan boat, vanishing as mysteriously as he came. See ROBERT JAFFRAY, *THE TWO KNIGHTS OF THE SWAN: LOHENGRIN AND HELYAS* 11 (1910).

²¹ See *Vencap*, 519 F.2d at 1015 (internal quotation marks omitted).

violation of those standards, rules or customs affecting the relationship between states and between an individual and a foreign state, and used by those states for their common good and/or in dealings inter se.”²²

The Filártigas immediately appealed to the Second Circuit. In October 1979, Peter Weiss argued the appeal before a three-judge panel comprised of Chief Judge Irving Kaufman, and Judges Wilfred Feinberg and John Smith (who passed away and was replaced by a newly appointed judge, Amalya Kearse). In a memorandum to the author, Judge Kaufman’s then-law clerk, Bruce R. Kraus, a 1979 Yale Law School graduate who is now a New York lawyer, recounts what happened next.²³

I never took a course in international law. My note was about bankruptcy law and the prisoner’s dilemma, but when I arrived for my first day of work as a clerk on the Second Circuit, there were different prisoners and dilemmas to deal with. . . . [My co-clerk and I] learned that all bench memos to the Judge about cases large and small had to be summarized in a page of rough, 4x6-inch foolscap, double spaced, containing everything important about the case. . . . Briefs for pending cases were kept in upright, green, open-topped boxes cut on the bias to reveal the case names. There was a color coding system for appellants and respondents, replies and sur-replies that has long fled from memory (I’m a deal lawyer now). . . . In any event, through a random assignment calendar drawn up by [my co-clerk or his predecessor], the *Filártiga* case was to be decided by a panel consisting of the Judge, Judge Feinberg, and Judge Kearse. . . .

I had never read a real brief before I delved into that first stack of them. For all I knew, every Second Circuit docket had a case or two with amicus briefs and affidavits from leading legal scholars. But even I must have been astute enough to realize that most opinions do not come up to the Court of Appeals with a note attached from the District Judge that basically said, “Reverse Me!” Judge Nickerson had felt bound by a recent (1975), powerfully-written Friendly opinion that sneered at Section 1350 (“a legal Lohengrin—no one knows from whence it came”) and had all but wiped the provision out of the Judiciary Act of 1789. Whether moved by the cruel facts of this case, or

²² *Filártiga v. Peña-Irala*, No. 79 C 917, slip op. at 2 (E.D.N.Y. May 15, 1979), reprinted in ACEVES, *supra* note 6, at 349.

²³ What follows is an extract from a memorandum entitled “*Filártiga* Memoir,” sent to the author by Bruce R. Kraus, Willkie Farr & Gallagher LLP. For two more formal accounts by the late Judge Kaufman, see Irving R. Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES MAG., Nov. 9, 1980, at 44; Irving R. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1 (1984).

the legal issues at stake, Judge Nickerson's opinion left no doubt that he was hoping for a panel that would reverse *IIT v. Vencap*, notwithstanding Judge Friendly's enormous prestige.

The Second Circuit was a decisive court in those days, a rocket docket, and the Judge (known by his initials IRK) justly claimed credit for the Court's fast turnaround time. As a colleague noted to smiles at the Judicial Conference that year, "he irks us and irks us" to decide our cases and get our opinions out quickly, and preserve our standing as the fastest circuit in the land.

But this case was different. The Friendly opinion was only part of the problem. The Iran hostage crisis began in the middle of all this, and the nation felt itself under siege more than it would again for another 22 years. Everyone knew that if the panel didn't take the easy way out and follow Judge Friendly, we'd be sailing into uncharted waters. This was not just a question of jurisdiction, because a finding of jurisdiction would imply the existence of a new body of substantive law, a law of torts committed in violation of international law. No one seemed to doubt that a finding of jurisdiction comported with our national ideals; the honest question we all had was whether it comported with our national interests as well. So the Judge from the bench did something utterly un-Judge like. He asked (not directing the question to anyone in particular) why we hadn't heard from the State Department about this.

The lawyers were a bit taken aback, but no one raised a separation-of-powers objection to the court's request that the executive branch weigh in. I think the plaintiff's lawyer, Peter Weiss, may have expressed some confidence that the Carter State Department was with him in spirit, but the Judge wouldn't take his word for it, and the decision was postponed until State's views were made known. I don't recall the Judge writing to them himself; I think the lawyers for one side or the other must have done that.

So there the case sat, for the rest of the year, while we waited for a response. . . . Briefs from other cases filled our docket boxes: a trademark case, a copyright case, the case of the administrative law judge seeking administrative law judicial independence. The Judge's legendary temper flared on occasion, but the work of the Chambers got done. I recorded our travails as sitcom episode summaries, in the style of TV Guide, and wrote a bench memo in rhymed dactylic hexameter dismissing the appeal of a suit by a high school student who swore under

his breath at a teacher who had shut the classroom door in his face. Concurrences were usually evidenced by a signed adhesive tab, the precursor of the Post-It note, but Judge [Charles] Brieant concurred with this one in verse of his own.

When the State Department finally responded, my clerkship was about to end. Someone told me later that our request had caused great consternation within the legal counsel's office. Not only were they distracted by the hostage crisis, it wasn't obvious to them, either, which side of this question this country should be on as a policy matter. But in the end, they came down firmly on the side of the plaintiffs, and this view was, in the end, given dispositive weight by the panel.

But who was going to draft the opinion? The new clerks, who hadn't heard the arguments and hadn't even begun to be broken in? Someone else's clerks? Despite the stresses and conflicts of the year, I wanted to do it and so did the Judge, to the point where he managed to wangle an extra two weeks of salary for me. The new clerks arrived the following Monday, and I moved across the hall to the empty chambers normally occupied by (Senior) Judge Timbers. So with a whole law library at my disposal, I read and read, and drafted and drafted, undisturbed and uninterrupted.

I knew how the case was supposed to come out, but how to get there? The Friendly opinion could be distinguished. Its hostility to the statute was so sweeping that by definition it was 98% dictum. So there's a section at the end, with dense footnotes, that cites dictum with approval, turns it into its opposite, and then moves on.

When it came to the question of whether international law forms part of our law automatically, I really wished I had taken [former Dean and Undersecretary of State] Gene Rostow's course at Yale. At least then I would have had some idea of the received wisdom on this fundamentally important topic. It seemed fairly clear that Chief Justice Marshall had confidently answered this question in the affirmative at the birth of the Republic—back when Americans were grateful and maybe a bit surprised to have been admitted to the comity of sovereign nations at all. Had anyone looked at this question again since the time the newborn nation grew up to be a superpower?

The briefs were all scholarly and excellent, but it was obvious that the plaintiffs and amici were citing scholarship when they'd have cited caselaw, had there been any. So the draft did its best to be balanced, defending its conclusion while

bending over backwards not to open any floodgates. (In that, it seems to have succeeded not at all, and some of my partners spend a lot of time litigating Alien Tort Claims suits brought against American multi-national corporations for alleged complicity with oppressive regimes.)

The “color of state law” idea from domestic civil rights law seemed like a tool ready-made to prevent the torturer from escaping the jurisdictional predicate by claiming, in effect, “I was not following orders.” The opinion tried not to be creating a private right of action under every provision of the Universal Declaration of Human Rights, and, rhetoric notwithstanding, to decide as little as possible.

The draft passed judicial muster: Judges Feinberg and Kearsse sent up their tabs right away.

There’s not much more to tell. I later met Peter Weiss (self-described trademark lawyer by day, human rights lawyer by night). I was aware of the explosion of legal scholarship that followed. I was introduced to a prominent NYU professor as the drafter of the famous opinion, but she assumed I had written a student note *about* the opinion and couldn’t hear otherwise, so I didn’t press the point. Only a few of my friends know of my connection with the case

The Carter Administration Brief

As Judge Kaufman’s clerk recalled, “[t]he Carter Administration’s view, which came down firmly on the side of the plaintiffs, . . . was, in the end, given dispositive weight by the [Second Circuit] panel.”²⁴ But how, exactly, did the Carter administration come to support the plaintiffs’ position in *Filártiga* in the first place? That story turned on both the administration’s human rights policy, and the particular personalities involved.

Early in his presidency, Jimmy Carter had decided that “the demonstration of American idealism was a practical and realistic approach to foreign affairs, and [that] moral principles were the best foundation for the exertion of American power and influence.”²⁵ Moreover, Congress had responded to the nation’s post-Watergate, post-Vietnam disgust over the perceived amorality of the Nixon–Kissinger foreign policy by enacting an extensive body of legislation conditioning foreign assistance to certain countries on their forbearance from consistent patterns of gross

²⁴ *Id.*

²⁵ JIMMY CARTER, KEEPING FAITH: MEMOIRS OF A PRESIDENT 143 (1982).

human rights violations.²⁶ Leading Carter administration officials, including Secretary of State Cyrus Vance and United Nations Ambassador Andrew Young, took prominent public positions advocating the promotion of human rights.

At the Justice Department, Drew S. Days III, First Assistant Counsel at the NAACP Legal Defense and Educational Fund in New York, had been named Assistant Attorney General for the Civil Rights Division. Although that position had previously been viewed as having an entirely domestic focus, Days had formerly been a Peace Corps volunteer in Honduras and spoke fluent Spanish. Later Solicitor General in the Clinton administration, a professor at Yale Law School, and founding director of that law school's Orville H. Schell, Jr. Center for International Human Rights, Days recalled:

I went to a reception in Washington and had a casual conversation with someone from the State Department. That person said, "People write us all the time now, and say that President Carter talks about human rights abroad, but what about human rights at home? There are stacks of letters being sent to us that no one is paying attention to, about cases against the United States at the Inter-American Human Rights Commission and other such places. I can understand why the Soviet Union ignores human rights complaints, but why does the United States?"

I thought he had a point, so following that discussion, I made an arrangement with the State Department whereby we had an Memorandum of Understanding under which human rights complaints brought against the United States would be transferred to the Civil Rights Division at Justice for evaluation and response. We broke with the Soviet practice of declining to address international human rights arguments on the merits. When such complaints would come in, we would review them on the merits and where appropriate, file responses: I remember that we filed one in Geneva about capital punishment in the United States and another about police brutality in Tennessee. I

²⁶ That effort was pioneered by Congressman Don Fraser of Minnesota, who in the 1970s, held numerous hearings before the House Foreign Affairs Committee's Subcommittee on International Organizations and Movements that led to the enactment of a series of laws designed to elevate the status of human rights in U.S. foreign policy. *See generally* FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS* 502-44 (1990) (discussing these laws). For examples of such statutes, see Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795 (codified as amended in scattered sections of 22 U.S.C.); Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (codified as amended in scattered sections of 19 U.S.C.); and International Bank for Reconstruction and Development Act of 1977, Pub. L. No. 95-118, 91 Stat. 1067 (codified as amended in scattered sections of 22 U.S.C.).

designated my political deputy John Huerta as our point person on cases that intersected civil rights and international human rights. I think the *Filártiga* case came over to us through that interagency channel that we had created between State and Justice.²⁷

Accordingly, when the Second Circuit sent in its request for the State Department's views on *Filártiga*, the matter was referred to the State Department Legal Adviser's office. Legal Adviser Roberts Owen (a partner on leave from the Washington firm of Covington & Burling) assigned the matter to Deputy Legal Adviser William Lake (a partner on leave from the Washington firm of Wilmer Cutler & Pickering) and in turn to an international law professor, Stefan Riesenfeld, who was taking a leave from his teaching duties at Berkeley to serve as the Department's Counselor of Public International Law. Born in Breslau, Germany, Riesenfeld had fled Nazi Germany in the 1930s and come to Berkeley, where he began teaching international law and became a U.S. citizen. As civilian legal advisor with the U.S. Office of the High Commissioner in the mid 1940s, Riesenfeld had helped to prepare the West German constitution.²⁸

Because the matter called for the filing of a federal appellate brief, the matter was sent over to the Justice Department and routed to the Civil Rights division, where it landed on the desk of Drew Days's political deputy, John E. Huerta.²⁹ Like Days, Huerta had enjoyed an unusual career for a government lawyer. He too had been trained as a civil rights lawyer, and had also lived in Latin America for several years working on issues of Latin American law and development. As Huerta later recalled, "I testified, for example, about U.S. compliance with the Helsinki Accords. I worked a lot with the State Department on allegations of U.S. violation of international human rights, investigating those

²⁷ Telephone Interview with Drew S. Days III, former Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice (May 5, 2007).

²⁸ Unfortunately, Professor Riesenfeld passed away in 1999 and could not be interviewed for this essay. See *Farewell, Professor Stefan Riesenfeld*, THE BERKELEYAN, Feb. 24, 1999, available at <http://www.berkeley.edu/news/berkeleyan/1999/0224/riesenfeld.html>.

²⁹ After attending law school at Berkeley, Huerta had studied and taught Latin American law and development at the Catholic University Law School in Lima, Peru. After returning from Peru, he joined California Rural Legal Assistance, then spent four years as a member of the law faculty at the University of California, Davis, and was selected to take a one-year fellowship at the Harvard Law School in 1976 before being appointed Deputy Assistant U.S. Attorney General for Civil Rights in the Carter administration. Following his Justice Department service, Huerta became, *inter alia*, Executive Director of the Southern California office of the Mexican-American Legal Defense and Education Fund, the General Counsel of a coalition dedicated to the 1981 California reapportionment, and General Counsel of the Smithsonian Institution.

allegations. We were bringing prosecutions to show that the United States was following the law.”³⁰

Huerta later recalled how *Filártiga* came to his attention:

I joined the Civil Rights Division as a political deputy in September 1978. When the request from the State Department in *Filártiga* came over, I coordinated the Justice Department’s response with Brian Landsberg and Irv Gornstein of the Appellate Section of the Civil Rights Division. We had a heads-up from CCR that the request would be coming over, so we had met with them previously to discuss the case.³¹ We had developed contingency plans in case we decided to come out pro or con, but we ended up developing a civil rights position supportive of the plaintiffs’ position. In developing those positions, I talked to Stefan Reisenfeld, who was working on this at State; I knew him from my law school days at Berkeley, even though I had never had him as a professor for any class. We sat and talked about it and he gave me the crucial international law background. We also had some discussions with Solicitor General Wade McCree’s office, and explored the possible ramifications for the U.S. in case we were ourselves ever accused of torture and sued civilly. Barbara Babcock, the head of civil division [and now a professor at Stanford Law School] was also supportive. Ambassador Robert White, our envoy to Paraguay, also favored the plaintiffs’ position. I remember no White House involvement. [Attorney General and former] Judge Griffin Bell had set up a pretty rigorous screening process to prevent the White House from contacting the Justice Department, except through established channels. Our view eventually prevailed in the Solicitor General’s office. When we filed our Second Circuit brief, I never expected that the case would have such an impact. Since then I have been involved in many civil rights and human rights cases, but of all the cases I have ever handled, this case, in which I played a relatively small role, has probably gotten more

³⁰ Oral History Interview with John E. Huerta (March 7, 21, April 9, and May 11, 1990), at 53, available at [http://content.cdlib.org/xtf/view?docId=hb8c6011pv & brand=calsphere & doc.view=entiretext](http://content.cdlib.org/xtf/view?docId=hb8c6011pv&brand=calsphere&doc.view=entiretext).

³¹ See ACEVES, *supra* note 6, at 47 (“Throughout the drafting process, the Center for Constitutional Rights was in regular contact with the State Department and Justice Department. As early as July 1979, the Center had contacted the Office of the Legal Adviser in the State Department to seek its intervention in the case. Subsequent communications also occurred with the Civil Rights Division of the Justice Department. On several occasions, lawyers at the Center even reviewed drafts of the U.S. amicus brief and offered comments on its development and argumentation. They also emphasized to U.S. government lawyers the benefits that a U.S. submission would provide their case.”).

subsequent publicity than any other matter in which I have ever been involved.³²

The Justice Department therefore recommended that the United States seek leave to file an amicus brief with the Second Circuit.³³ In a letter from then-Deputy Legal Adviser of the State Department (later U.S. Judge on the International Court of Justice) Stephen Schwebel, the State Department concurred and elaborated upon the legal arguments that should be made in such an amicus brief.³⁴ Incorporating those arguments, the government's amicus curiae brief asked two questions, then answered both in the affirmative:

1. Whether the torture of a foreign citizen by an official of the same country is a violation of the law of nations within the meaning of 28 U.S.C. 1350?
2. If so, whether such a violation gives rise to a judicially enforceable remedy and is therefore a tort within the meaning of that provision?

With respect to the first issue, the administration argued that "Section 1350 encompasses the law of nations as that body of law may evolve," not as the law of nations may have existed in 1789, when the statute was first enacted. International law, the administration recognized, "now embraces the obligation of a state to respect the fundamental human rights of its citizens. . . . [T]his does not mean that all such rights may be judicially enforced. Indeed, it is likely that only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government." Freedom from torture, the administration recognized, now ranks among the fundamental human rights protected by international law, and is therefore cognizable as a tort "in violation of the law of nations" for the purposes of conferring subject matter jurisdiction under the ATCA. The government stated the core of its position this way:

This does not mean that Section 1350 appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations. . . . The courts are properly

³² Telephone Interview with John E. Huerta, former Deputy Assistant Attorney General, Civil Rights Div., U.S. Dep't of Justice (May 5, 2007).

³³ Memorandum from Drew S. Days, III, Assistant Attorney General, Civil Rights Div., Justice Dep't, to the Solicitor General 1-2 (Aug. 29, 1979), *reprinted in ACEVES, supra* note 6, at 485.

³⁴ Letter from Stephen Schwebel, Deputy Legal Adviser, U.S. Dep't of State, to Richard Allen, Office of the Solicitor General, Dep't of Justice (Sept. 14, 1979), *reprinted in id.* at 511. The back and forth between the Justice and State Departments regarding the arguments in the amicus brief are recounted in *id.* at 41-47.

confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community, that the right is protected and that there is a widely shared understanding of the scope of this protection. . . . When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights. As we have shown . . . , official torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate.³⁵

Significantly, in a footnote, the U.S. government raised and rejected the possibility that "Section 1350 is unconstitutional in conferring jurisdiction on federal courts to entertain tort actions under the law of nations." Citing the Supreme Court's decisions in *Banco Nacional de Cuba v. Sabbatino*,³⁶ and *The Paquete Habana*,³⁷ the administration argued instead that "[c]ustomary international law is federal law, to be enunciated authoritatively by the federal courts. An action for tort under international law is therefore a case 'arising under . . . the laws of the United States' within Article III of the Constitution."³⁸

The Second Circuit's Opinion in Filártiga

Judge Kaufman's opinion for the Second Circuit, issued on June 30, 1980, held that torture constitutes an actionable violation of the law of nations, sufficient to confer subject matter jurisdiction on the federal court under the ATCA.³⁹ The opinion relied on an array of international agreements, declarations, and state policy and practice as evidence that the law of nations prohibits torture.⁴⁰ The court further held that federal jurisdiction over such offenses is consistent with Article III of the

³⁵ Brief for the United States as Amicus Curiae Supporting Appellants at 1, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090) (emphasis added), *reprinted in* 19 I.L.M. 585, 606 n.49 (1980) [hereinafter U.S. *Filártiga* Brief].

³⁶ 376 U.S. 398 (1964).

³⁷ 175 U.S. 677 (1900).

³⁸ U.S. *Filártiga* Brief, *supra* note 35, at 606 n.49.

³⁹ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

⁴⁰ *Id.* at 880-85.

Constitution because international law has long been recognized as “part of our law.”⁴¹ Accordingly, the court deemed it unnecessary to determine whether the ATCA itself provided the cause of action for the *Filártigas*’ claims and whether the ATCA should be treated as an exercise of Congress’s power to define and punish offenses against the law of nations.⁴² The ATCA, the court explained, should be understood not to grant new rights to aliens, but to allow individuals to come to federal court to enforce “the rights already recognized by international law.”⁴³ “[F]or purposes of civil liability,” Judge Kaufman declared, “the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”⁴⁴ Recognizing civil liability for acts of torture “is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”⁴⁵

By so saying, the Second Circuit reaffirmed the Nuremberg ideal: that like genocide, torture can never serve as a legitimate instrument of state power. Under the court’s reasoning, official torturers may not invoke comity nor cloak themselves in state sovereignty to avoid individual responsibility to their victims before a court of law. Nor, the *Filártiga* court held, must such cases invariably be dismissed under the doctrine of separation of powers. Even if the Executive Branch had not supported adjudication, the court found, the core issue in the case was quintessentially legal: whether the victims had a right to be free from torture that was actionable in federal court. Resolution of that question required only standard judicial determinations: construction of the Alien Tort Claims Act and human rights treaties. The court concluded that because the customary international law norm against torture was definable, obligatory, and universal, it constituted an actionable “tort in violation of the law of nations” for purposes of the statute.

On remand, U.S. District Judge Eugene Nickerson awarded the *Filártigas* a judgment of nearly \$10.4 million, comprising compensatory damages based on Paraguayan law and punitive damages based on U.S. cases and international law.⁴⁶ By so holding, *Filártiga*’s ruling on remand created a federal common law remedy against torture, which fell squarely within the Supreme Court’s prior recognition that issues “in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law,” made by the

⁴¹ *Id.* at 887 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900) (Gray, J.)).

⁴² U.S. CONST. art. I, § 8, cl. 10.

⁴³ *Filártiga*, 630 F.2d at 887.

⁴⁴ *Id.* at 890.

⁴⁵ *Id.*

⁴⁶ *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 864–67 (E.D.N.Y. 1984).

federal courts, binding on the states, but subject to legislative revision.⁴⁷ By the time that ruling issued, however, Peña-Irala had already been deported, and to this day, the Filártigas have yet to recover any part of their judgment.⁴⁸

Filártiga's Legacy

In *Filártiga*, human rights litigants and scholars finally found their *Brown v. Board of Education*.⁴⁹ The *Filártiga* decision triggered a tidal wave of academic scholarship and more than a quarter-century of human rights litigation in U.S. courts.⁵⁰ In subsequent cases, the lower federal courts elaborated upon *Filártiga*'s holding that when an act represents a violation of a definable, specific, universal, and obligatory norm of international law, an alien can sue under the ATCA and be awarded civil damages for the tort. *Filártiga* came to provide the governing framework for ATCA litigation not only in the Second Circuit, but also in the First,⁵¹ Fifth,⁵² Ninth,⁵³ and Eleventh⁵⁴ Circuits. These lower federal decisions held that not only torture, but also extrajudicial killing,⁵⁵ disappearance,⁵⁶ arbitrary detention,⁵⁷ genocide,⁵⁸ cruel inhuman or degrading

⁴⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). For elaboration, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

⁴⁸ Even while deciding the civil liability of Peña-Irala, the Second Circuit declined to extend the stay of his deportation order, and the Supreme Court denied certiorari on that ruling, leading to Peña-Irala's eventual deportation back to Paraguay. *Filártiga v. Peña-Irala*, 442 U.S. 901 (1979). Apparently, the default judgment has never been collected. See R.H. Hodges, Letter to the Editor, N.Y. TIMES, Mar. 26, 1986, at A34.

⁴⁹ 347 U.S. 483 (1954).

⁵⁰ One scholar has calculated that as of July 1, 2006, *Filártiga* had been cited in some 1100 law review articles and 180 published decisions in the United States. ACEVES, *supra* note 6, at 77.

⁵¹ See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

⁵² *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd* by 197 F.3d 161 (5th Cir. 1999).

⁵³ See *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994) ("We thus join the Second Circuit in concluding that the Alien Tort Act, 28 U.S.C. § 1350, creates a cause of action for violations of specific, universal and obligatory international human rights standards which confer fundamental rights upon all people vis-a-vis their own governments.") (internal quotation marks omitted).

⁵⁴ See, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (adopting *Filártiga* approach to claims of torture and cruel, inhuman, or degrading treatment).

⁵⁵ See, e.g., *Xuncax v. Gramajo*, 886 F. Supp. 162, 184–85 (D. Mass. 1995).

⁵⁶ See, e.g., *Forti v. Suarez-Mason*, 694 F. Supp. 707, 711 (N.D. Cal. 1988).

⁵⁷ *Xuncax*, 886 F. Supp. at 184.

⁵⁸ See, e.g., *Kadic v. Karadžić*, 70 F.3d 232, 241–42 (2d Cir. 1995).

treatment, and other kinds of gross violations⁵⁹ also fit within the category of offenses against specific, definable, universal, and obligatory norms.

Sosa v. Alvarez-Machain. These cases culminated on the last day of the U.S. Supreme Court's 2003 Term in the decision in *Sosa v. Alvarez-Machain*.⁶⁰ While the Supreme Court's decision did not embrace *Filártiga* unquestioningly, six Justices—Justices Souter, Stevens, O'Connor, Kennedy, Ginsburg, and Breyer—did reaffirm *Filártiga*'s core insight: when there is a norm of international character accepted by the civilized world, and defined with a specificity comparable to recognized paradigms, an alien can sue for violations of that norm in a federal court under the ATCA.⁶¹

Justice Souter, writing for the Court, adopted a “modified-*Filártiga*” approach to the ATCA. He explained that, although the ATCA was a jurisdictional statute and not an invitation “to mold substantive law,”⁶² neither does it require an explicit statutory or treaty-based cause of action. Rather, the history and intent behind the ATCA indicated that the First Congress expected the statute to have practical effect the moment it was enacted, and to enable actions arising directly from customary international law.⁶³ *Sosa* thus held that courts could infer a private cause of action for certain torts in violation of the laws of nations “as an element of common law,”⁶⁴ consistent with its reading of the history and intent behind the ATCA.

Sosa directed courts considering claims under the ATCA to ask three questions. First, a court must assess whether the asserted claim constitutes a violation of the “present-day law of nations,” not the law of nations as it existed in 1789. To do so, the Court affirmed the approach laid out by Chief Justice Gray over a century ago:

⁵⁹ For a partial list of unsuccessful claims, see Derek P. Jinks, *The Federal Common Law of Universal, Obligatory, and Definable Human Rights Norms*, 4 ILSA J. INT'L & COMP. L. 465, 471–72 (1998) (collecting cases in text and footnotes).

⁶⁰ 542 U.S. 692 (2004).

⁶¹ *Id.* at 728–31.

⁶² *Id.* at 713.

⁶³ *Id.* at 719.

⁶⁴ *Id.* at 725; see also *id.* at 715 (describing a “sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships,” creating a “narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs”).

[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.⁶⁵

Second, the Court must determine whether the asserted violation of the law of nations is “accepted by the civilized world and defined with specificity comparable to the features of the eighteenth-century paradigms we have recognized” as existing at the time of enactment of the ATCA.⁶⁶ Those historical paradigms were the three offenses identified by Blackstone: piracy, violations of safe conduct, and offenses against ambassadors.⁶⁷ More generally, these offenses fell within the category of “rules binding individuals for the benefit of other individuals [that] overlapped with the norms of state relationships.”⁶⁸ When enacting the ATCA, the Founders were thinking of these violations of the law of nations, “admitting of a judicial remedy and at the same time threatening serious consequences in international affairs.”⁶⁹

Third and finally, *Sosa* warned that any inquiry into whether an ATCA claim is judicially enforceable must account for the “collateral consequences” of recognizing such an action,⁷⁰ particularly the foreign policy implications of permitting a judicial remedy for such a claim.⁷¹ Applying this test to the facts before it, the *Sosa* Court rejected Alvarez-Machain’s claim that the law of nations prevented his arbitrary arrest

⁶⁵ The *Paquete Habana*, 175 U.S. 677, 700 (1900) (quoted in *Sosa*, 542 U.S. at 734).

⁶⁶ 542 U.S. at 725; see also *id.* at 732 (“Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”).

⁶⁷ *Id.* at 715.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 732–33. Specifically, the Court identified five reasons that counsel “caution” in recognizing a private right of action to adjudicate new violations of the law of nations: They include: (1) that the prevailing conception of the common law has changed since 1789; (2) post-*Erie* reluctance to involve courts in generating federal common law rules of decision; (3) the general preference for leaving the creation of a private right of action to the legislature; (4) potential disruption of U.S. foreign policy; and (5) the lack of legislative encouragement of “judicial creativity” in this field. *Id.* at 725–29.

⁷¹ *Id.* at 727–28 (“[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences . . .”).

and detention, “defined as officially sanctioned action exceeding positive authorization to detain” under any domestic law.⁷² The Court noted that although a survey of national constitutions revealed that many countries prohibit arbitrary detention, the consensus about this prohibition was “at a high level of generality.”⁷³ In effect, the Court concluded that Alvarez-Machain’s claim of temporary arbitrary arrest did not rise to the level of specificity or acceptance of the acknowledged human rights prohibition against prolonged arbitrary detention.

Significantly, in so holding, the *Sosa* Court effectively rejected three narrower theories of the ATCA that had been asserted throughout the post-*Filártiga* ATCA litigation in the lower courts. The first was the idea that courts should not hear these cases because, by their nature, they raise nonjusticiable political questions, a theory first offered by Judge Roger Robb of the D.C. Circuit in 1984.⁷⁴ But if courts are simply construing an enacted statute, the Alien Tort Claims Act, and the words being interpreted are the words “torts in violation of law of nations,” it is hard to see why construing those words should not be a quintessentially judicial task.

The *Sosa* Court also rejected a second, originalist position, which was first taken by Judge Bork in his concurring opinion in the *Tel-Oren* case in 1984.⁷⁵ Judge Bork asserted that courts were wrong to infer a private cause of action for violations of the law of nations directly from the ATCA, federal common law, or international law itself.⁷⁶ He acknowledged that certain kinds of claims could be heard in these ATCA cases, but he argued that this could only happen if the claims had existed in the eighteenth century, when the statute was first enacted. Contrary to modern views of dynamic statutory interpretation,⁷⁷ Judge Bork essentially asserted that the list of “law of nations” claims cognizable in ATCA cases should be frozen in time and limited to piracy, attacks on diplomats, and violations of safe conduct. Under Judge Bork’s view, a victim of genocide would have no recovery for genocidal acts, even though customary international law had long since evolved to recognize

⁷² *Id.* at 736.

⁷³ *Id.* at 736 n.27.

⁷⁴ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823 (D.C. Cir. 1984) (Robb, J., concurring).

⁷⁵ 726 F.2d at 775. For a discussion of the relationship between the ATCA and the common law, see William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 231–37 (1996).

⁷⁶ See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798–823 (D.C. Cir. 1984) (Bork, J., concurring).

⁷⁷ See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

both an individual human right to be free from genocide and the universal jurisdiction and obligation of all nations to punish it.⁷⁸

Third and finally, *Sosa* refused to adopt a view of the ATCA expressed by two law professors, Curtis Bradley and Jack Goldsmith, and also pressed by some of the briefs in the *Sosa* case: namely, that the courts should recognize no cause of action unless the political branches expressly consent by enacting such claims into positive law.⁷⁹ Under this theory, if there is no implementing act by the national political branches, then international law either has no status in U.S. law, or must be construed as some species of state law. As I have argued elsewhere, it makes little sense to argue that customary international law is really state law.⁸⁰ Professors Bradley and Goldsmith assert that the canonical case of *Erie R.R. Co. v. Tompkins*⁸¹ supports their conclusion, but as every first-year law student knows, the Supreme Court's landmark decision in *Erie* rested on the constitutional argument that in exercising general federal common lawmaking power, the federal courts had "invaded rights which . . . are reserved by the Constitution to the several States."⁸² But no such constitutional problem exists when federal courts determine rules of customary international law, because "[f]ederal judicial determination of most questions of customary international law transpires not in a zone of core state concerns, such as state tort law, but in a foreign affairs area in which the Tenth Amendment has reserved little or no power to the states."⁸³

Even after *Sosa* rejected the claim that customary international law lacks status as federal common law in U.S. law, academic critics of *Filártiga* sought to reassert that claim, but were quickly rebutted.⁸⁴ Writing about the *Sosa* decision, one distinguished federal courts expert, Judge William Fletcher of the Ninth Circuit, concluded:

⁷⁸ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. d & Reporters' Note 3, § 404 cmt. d, § 907 cmt. a (1986).

⁷⁹ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

⁸⁰ Koh, *supra* note 47.

⁸¹ 304 U.S. 64, 79 (1938).

⁸² *Id.* at 78.

⁸³ Koh, *supra* note 47, at 1831–32.

⁸⁴ Compare Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007) (reasserting Bradley and Goldsmith position after *Sosa*), with William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007), available at <http://www.harvardlawreview.org/forum/issues/120/feb07/dodge.pdf> (rebutting that position).

[From] *Sosa*, [w]e now know two things that perhaps we did not know before.

First, we know—because the Supreme Court has told us—that there is a federal common law of international human rights based on customary international law. . . .

Second, we also know—though *not* because the Court has told us—that the federal common law of customary international law is federal law in both the jurisdiction-conferring and the supremacy-clause senses. I am somewhat surprised, given the lead-up to *Sosa*, that the Court did not discuss the subject matter jurisdiction problem that has haunted the ATS almost from the beginning. But despite its lack of discussion, the Court's decision necessarily implies that the federal common law of customary international law is jurisdiction-conferring. . . . [T]he only basis for the federal court to hear an alien versus alien suit under the ATS is the federal nature of the substantive claim.⁸⁵

Filártiga and Transnational Public Law Litigation. While it is still early, there is no indication that *Sosa*'s adoption of the modified *Filártiga* test has opened the floodgates of ATCA litigation. Since *Sosa*, most of the pending ATCA cases have been dismissed on cautionary grounds.⁸⁶ Yet *Filártiga* has undeniably become seminal, not just for what it held, but also for what it triggered: what I have elsewhere called an era of “transnational public law litigation,” a novel and expanding effort by state and individual plaintiffs to fuse international legal rights

⁸⁵ William A. Fletcher, Essay, *International Human Rights in American Courts*, 93 VA. L. REV. IN BRIEF 1, 7 (2007), available at <http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/03/22/fletcher>.

⁸⁶ Since *Sosa*, as of May 2007,

there have been thirteen ATCA cases decided by the courts of appeals and thirty-six by the district courts, most of which have been dismissed. Nine of the thirteen court of appeals decisions dismissed all ATCA claims presented: five on political question grounds; two for failure to state a substantive claim; one on sovereign immunity grounds against U.S. officials; and a final case was dismissed based on statutory preemption. Similarly, of the district court cases, twenty-eight of the thirty-six cases were dismissals or motions for summary judgment against the plaintiff: three on political question grounds; sixteen for failure to state a claim (including for non-recognition of corporate or secondary liability); four were for sovereign immunity (against U.S. officials); three were on procedural grounds (e.g., statute of limitations, forum non conveniens); one was dismissed on state secrets grounds; and one on a motion for summary judgment before trial.

Kimberly Gahan, *Litigating the Law of Nations: An Analysis of Post-Sosa Alien Tort Claims Act Developments and Strategies for Future Claims* (Apr. 30, 2007) (unpublished paper, on file with the author).

with domestic judicial remedies.⁸⁷ As I have argued elsewhere,

[t]ransnational public law litigation is characterized by: (1) a *transnational party structure*, in which states and nonstate entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international, private and public law are all alleged in a single action; (3) a *prospective focus*, directed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants' strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement.⁸⁸

The paradigm of transnational public law litigation couples a substantive notion—individual and state responsibility—with the process of adjudication in pursuit of a normative goal—promotion of universal norms of international conduct.

In bringing their human rights cases in domestic courts, transnational public law litigants such as the Filártigas pursue several goals: not only norm-enunciation of clearly established international human rights norms, but also compensation, deterrence, and denial of safe haven to the human rights violator defendant. In *Filártiga*, the Second Circuit acknowledged that the phenomenon of “transnational litigation,” which had originated in the context of private commercial suits in U.S. courts against foreign governments, had properly migrated into the realm of public human rights suits against the United States and foreign governments and officials. The Supreme Court's 2004 ruling in *Sosa* essentially confirmed that transnational public law litigation is here to stay.

Filártiga created a judicial channel for human rights activism in U.S. courts during an era in which other avenues of human rights change often appeared blocked. In the same way that *Brown v. Board of Education*⁸⁹ enabled a generation of public lawyers to devote themselves to the judicial pursuit of civil rights, *Filártiga* empowered U.S. human rights activists and legal scholars of the late twentieth century to employ domestic litigation to promote normative commitments to uphold human rights.⁹⁰ *Filártiga* opened the door not just for expanded scholarly work

⁸⁷ See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2355 (1991).

⁸⁸ *Id.* at 2255 (emphasis in original).

⁸⁹ 347 U.S. 483 (1954).

⁹⁰ For discussions of judicial internalization of human rights in other domestic legal systems, see, e.g., Eyal Benvenisti, *The Influence of International Human Rights Law on*

in international human rights and transnational law, but also for the activist work of new human rights clinics and law professors engaged in transnational public law litigation.⁹¹

Filártiga and Transnational Legal Process. Upon examination, the transnational public law litigation pioneered by *Filártiga* represents only the judicial face of a broader procedural phenomenon that I have called “Transnational Legal Process”: the transsubstantive process whereby states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law.⁹² As I have argued, key agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities.⁹³ In this story, one of these agents triggers an interaction at the international level, works together with other agents of internalization to force an interpretation of the international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law. Through repeated cycles of “interaction-interpretive

the Israeli Legal System: Present and Future, 28 ISR. L. REV. 136 (1994); Eyal Benvenisti, *Judges and Foreign Affairs: A Comment on the Institut de Droit International’s Resolution on “The Activities of National Courts and the International Relations of their State,”* 5 EUR. J. INT’L L. 423 (1994); Gennady M. Danilenko, *The New Russian Constitution and International Law*, 88 AM. J. INT’L L. 451 (1994); Henry G. Schermers, *The Role of Domestic Courts in Effectuating International Law*, 3 LEIDEN J. INT’L L. 77 (1990); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT’L L. 427 (1994).

⁹¹ See, e.g., Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006). *Filártiga* helped spawn clinical impact litigation in human rights and trained numerous human rights clinicians and public interest lawyers, many of whom have become actively involved in litigation surrounding civil liberties after September 11. See generally BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505 (2003).

⁹² See generally Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); OONA HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 173–204 (2006).

⁹³ Transnational legal process highlights the interactions among both private citizens, whom I call “transnational norm entrepreneurs,” and governmental officials, whom I call “governmental norm sponsors.” The interaction among transnational norm entrepreneurs and governmental norm sponsors creates transnational networks and law-declaring fora, which in turn create new rules of international law that are construed by interpretive communities. Through the work of these “agents of internalization,” these international law rules trickle down from the international level and become domesticated into national law. See generally Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

tation-internalization,” interpretations of applicable global norms are eventually internalized into states’ domestic legal systems.

A Transnational Legal Process approach helps explain *how* international law matters, in three key senses. First, it helps to explain how transnational law functions in a *dynamic* way to constrain state behavior. In a second, *normative* sense, it illustrates how law and legal process help to create norms and construct interests. Transnational Legal Process scholars see international norms as filtering through legal process mechanisms to play a critical role in reformulating national interests and reconstituting national interests identities. Third, as one scholar put it, the goal of Transnational Legal Process is *constitutive*: “not simply to change behavior, but to change minds.”⁹⁴

These ideas connect the Transnational Legal Process school to the “constructivist” school of international relations. Unlike interest theorists, who tend to treat state interests as given, “constructivists” have long argued that states and their interests are socially constructed by “commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.”⁹⁵ Rather than arguing that state actors and interests create rules and norms, constructivists argue that “rules and norms constitute the international game by determining who the actors are, [and] what rules they must follow if they wish to ensure that particular consequences follow from specific acts.”⁹⁶

Filártiga and its progeny illustrate the “vertical” dimension of transnational legal process, by which international norms infiltrate domestic law through “trickle-down lawmaking.”⁹⁷ But the doctrine’s evolution also reveals two other facets of Transnational Legal Process: the “horizontal” and “bottom-up” channels whereby such norms are transplanted from one country to another or “uploaded” from national

⁹⁴ Melissa A. Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT’L L. 463, 470 (2007).

⁹⁵ MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996). See also HATHAWAY & KOH, *supra* note 92, at 112–32 (describing constructivist school). Leading constructivists include Friedrich Kratochwil, John Ruggie, Nicholas Onuf, Hayward Alker, Richard Ashley, Ernst B. Haas, and Alexander Wendt. For samples of this work, see, for example, ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994); Alexander Wendt, *Constructing International Politics*, 20 INT’L SECURITY 71 (1995). For a systematic treatment of norms from a constructivist perspective, see THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996).

⁹⁶ Ngairé Woods, *The Uses of Theory in the Study of International Relations*, in EXPLAINING INTERNATIONAL RELATIONS SINCE 1945, at 9, 26 (Ngairé Woods ed., 1996).

⁹⁷ Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1 (2001); see also Koh, *Bringing International Law Home*, *supra* note 93.

into international legal institutions.⁹⁸ Through these channels, domestic courts interpreting international law help to shape the development of international legal norms and the ability of transnational actors to invoke those norms in other national and international fora.

In submissions to the United Nations, the U.S. Executive Branch called *Filártiga* a “pivotal decision” demonstrating the nation’s commitment to protecting human rights, and cited the line of ATCA cases as a model for redressing human rights violations.⁹⁹ In turn, an array of United Nations bodies—including the U.N. Secretariat,¹⁰⁰ the U.N. Commission and Sub-Commission on Human Rights,¹⁰¹ and various human

⁹⁸ Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 399 (2007). The discussion that follows derives from the Brief for International Jurists Mary Robinson et al. as Amici Curiae Supporting Respondent, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), for which the author served as counsel of record.

⁹⁹ In 1995, the U.S. government reported to the U.N. Commission on Human Rights that the ATCA “represents an early effort by the United States Government to provide a remedy to individuals whose rights have been violated under international law.” Secretary-General, Addendum, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment* ¶¶ 13, 15, U.N. Doc. E/CN.4/1996/29/Add.2 (Jan. 18, 1996); see also Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of the United States of America* ¶¶ 4–8, U.N. Doc. CAT/C/SR.424 (Feb. 9, 2001). Several years later, in a report to the U.N. Committee Against Torture, the U.S. government again emphasized the importance of the ATCA, repeating key language from its 1996 report:

U.S. law provides statutory rights of action for civil damages for acts of torture occurring outside the United States. One statutory basis for such suits, the Alien Tort Claims Act of 1789, codified at 28 U.S.C. § 1350, represents an early effort to provide a judicial remedy to individuals whose rights had been violated under international law.

Comm. Against Torture, Addendum, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of the United States of America* ¶ 277, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000). The U.S. government also characterized the decision in *Filártiga* as “pivotal” and described its subsequent extension to other human rights claims. *Id.* ¶ 280 (citing *In re Estate of Ferdinand E. Marcos*, 25 F.3d 1467 (9th Cir. 1994), and *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995)).

¹⁰⁰ The Division for Social Policy and Development of the U.N. Secretariat relied on *Filártiga* to conclude that “[t]he domestic enforceability of customary international law is manifest in the case of *Filártiga v. Peña-Irala*. . . . [D]omestic court[s] may discover international legal principles by consulting executive, legislative and judicial precedents, international agreements, the recorded expertise of jurists and commentators, and other similar sources.” Division for Social Policy and Development of the United Nations Secretariat, *Compilation of International Norms and Standards Relating to Disability* §§ 1.2, 1.4 (draft July 2002).

¹⁰¹ In 1993, the U.N. Sub-Commission on Human Rights relied on *Filártiga* in developing appropriate standards for determining whether conditions of imprisonment fall

rights Special Rapporteurs¹⁰²—have all incorporated the principles expressed in *Filártiga* into different areas of human rights law. Regional¹⁰³ and treaty bodies¹⁰⁴ have also cited *Filártiga* and its progeny in the process of developing international legal norms prohibiting torture, genocide, and other serious violations of international law. And both the International Court of Justice¹⁰⁵ and the International Criminal Tribunal for the former Yugoslavia (ICTY)¹⁰⁶ have drawn guidance from the *Filártiga* jurisprudence.

below fundamental human rights guarantees. See Hum. Rts. Comm., *The Administration of Justice and the Human Rights of Detainees* ¶ 69, U.N. Doc. E/CN.4/Sub.2/1993/21 (June 25, 1993).

¹⁰² The Special Rapporteur appointed by the Commission on Human Rights to elaborate “the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms” relied on the ATCA as a leading example for states to “provide remedies for violations occurring outside their territory.” High Comm’r for Human Rights, Note, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* ¶ 114, U.N. Doc. E/CN.4/2003/63 (Dec. 27, 2003). Similarly, the Special Rapporteur on Contemporary Forms of Slavery lauded the ATCA as “a potential forum for redress” in cases in which foreign fora have proven inadequate. Gay J. McDougall, Special Rapporteur on Contemporary Forms of Slavery, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practice During Armed Conflict* ¶ 52, U.N. Doc. 4/Sub.2/1998/13 (June 22, 1998). Another Special Rapporteur cited the ATCA as an example of “effective remedies” for gross violations of international law, recognizing that the ATCA is limited in its “appli[cation] to customary international law norms, such as the prohibition of slavery, genocide, torture, crimes against humanity and war crimes.” Secretary-General, Note, *The Right to Food* ¶ 40 & n.32, U.N. Doc. A/58/330 (Aug. 28, 2003) (reporting the findings of the Special Rapporteur on the Right to Food on the potential of the ATCA as a method of redress for violations of human rights by transnational corporations, and citing U.S. cases following *Filártiga*).

¹⁰³ The Inter-American Commission on Human Rights has held that the ATCA, as interpreted in *Filártiga*, constitutes an adequate and effective domestic remedy for international human rights violations. *Kenneth Walker v. United States*, Case P12.049, Inter-Am. C.H.R., Report No. 62/03, OEA/Ser.L./VII.118 Doc. 70 rev. 2 at 550 & n.18 (Oct. 10, 2003), available at <http://www.cidh.org/annualrep/2003eng/usa.p12049.htm>.

¹⁰⁴ The Human Rights Committee of the ICCPR has followed *Filártiga* in urging that under Article 2.3 of that treaty, civil remedies must be available for all individuals, including non-citizens, within the territory of a state party. See, e.g., *Human Rts. Comm., Bakhtiyari v. Australia: Communication No. 1069/2002* ¶ 12, U.N. Doc. CCPR/C/79/D/1069/2002 (Nov. 6, 2003).

¹⁰⁵ In *Arrest Warrant of 11 April 2000 (D.R.C. v. Belg.)*, 2002 I.C.J. 1 (Feb. 14), the U.S., British, and Dutch judges filed a joint concurring opinion that addressed the appropriate scope of universal criminal jurisdiction, *inter alia*, by highlighting ATCA jurisprudence, and describing it as conforming to global trends of extending civil jurisdiction over extraterritorial conduct in appropriate cases. *Id.* at ¶¶ 47–48 (Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal, JJ.).

¹⁰⁶ In the first case prosecuted at the ICTY, the international judges relied on the Second Circuit’s post-*Filártiga* decision in *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), to

Similarly, foreign domestic courts have also followed the *Filártiga* approach in selectively incorporating fundamental norms of international law into domestic law. In the *Pinochet* case, for example, the British House of Lords cited *Filártiga* for the proposition that only a select group of customary international norms are justiciable in national courts—including torture.¹⁰⁷ The English Court of Appeal echoed these sentiments, discussing approvingly *Filártiga*'s characterization of torturers as “hostis humani generis.”¹⁰⁸

Following *Filártiga*'s example, other democratic countries have engaged in remedial efforts parallel to the ATCA, recognizing that their international responsibilities require them to exercise jurisdiction over serious violations committed outside their territory, by their nationals as well as foreign nationals. The National Commission on Human Rights in India, for example, highlighted *Filártiga*'s importance in the development of national judicial remedies for violations of fundamental human rights.¹⁰⁹ In recognition of these responsibilities, many states now indirectly provide civil remedies for serious violations of international law, even when they are committed abroad, by allowing victims to append civil claims to criminal prosecutions.¹¹⁰ Throughout Latin America, the

determine that crimes against humanity do not require an element of state action. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment ¶ 655 (May 7, 1997), 36 I.L.M. 908, 945 (1997) (citing *Kadic*, 70 F.3d at 232). In another significant case before the ICTY, the judges relied on *Filártiga* in determining the status of the prohibition against torture during wartime. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment ¶ 147 (Dec. 10, 1998), 38 I.L.M. 317, 348 (1998) (“There exists today universal revulsion against torture: as a USA Court put it in *Filártiga v. Peña-Irala*, ‘the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.’”) (quoting *Filártiga*, 630 F.2d at 876). In the *Kunarac* case, the ICTY Trial Chamber cited both *Filártiga* and *Karadžić* to conclude that an international criminal tribunal could convict a defendant of war crimes for committing torture during an armed conflict, even if that defendant is not a government official or acting in concert with a government official. Prosecutor v. Kunarac, Case No. IT-96-23-T, Judgment ¶ 470 (Feb. 22, 2001), available at <http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>.

¹⁰⁷ See *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 159 (H.L.).

¹⁰⁸ *Al-Adsani v. Government of Kuwait*, 100 I.L.R. 465 (Eng. C.A. 1994), 107 I.L.R. 536 (H.L. 1996).

¹⁰⁹ See National Comm'n on Human Rights, *Sardar Patel Bhawan*, Case No. 1/97/NHRC, ¶ 23 (Aug. 4, 1997). In particular, the Commission noted the effect of these developments on Indian law: “In India great strides have since been made in the field of evolving legal standards for remedial, reparatory, punitive and exemplary damages for violation of human rights.” *Id.* ¶ 24.

¹¹⁰ See, e.g., Code de procédure pénale [Criminal Procedure Code] arts. 689, 689-2 through 689-10 (Fr.) (extraterritorial jurisdiction for crimes of torture, terrorism, and others); *id.* arts. 2-3 (authorizing victims to join criminal prosecution as *parties civiles*); International Crimes Act of 2003 §§ 2-8, 10, 21 (Neth.) (extraterritorial jurisdiction for

Filártiga case and its progeny have fortified a movement of human rights activists who are now bringing the leaders of Operation Condor to justice in their home countries.¹¹¹

In sum, the *Filártiga* doctrine has promoted a useful and growing partnership among the work of U.S. courts, international tribunals, foreign courts, and human rights organs. By so doing, *Filártiga* illustrates a key claim of an emerging school of international legal theory some call the “New New Haven School of International Law.”¹¹² Building on the idea of Transnational Legal Process, these international law scholars highlight the role of legal pluralism—multiple communities for law development, interpretation, and enforcement—in creating transnational law absent a single global “Leviathan.”¹¹³ New New Haven School theorists see “dialectical legal interactions” among these law-declaring fora—particularly through transnational judicial dialogue¹¹⁴—as helping to refine the scope of international legal obligations. Under this view, *Filártiga*’s key legacy rests in the norm that emerged from the dialogue

genocide, war crimes, torture, and crimes against humanity); Wetboek van Strafrecht [Penal Code] art. 36(f) (Neth.) (authorizing victims to append civil claims to criminal prosecutions); Wetboek van Strafvordering [Criminal Procedure Code] art. 51(a) (Neth.) (same); Poinikos Kodikas [Penal Code] art. 8 (Greece) (extraterritorial jurisdiction for many serious international offenses); Kodikas Poinikes Dikonomias [Criminal Procedure Code] arts. 63–70, 82–88, 108, 137D, 468, 480, 488 (Greece) (authorizing victims to append civil claims to criminal cases); Völkerstrafgesetzbuch [Code of Crimes Against International Law of 2002] (F.R.G.) (criminalizing war crimes and crimes against humanity); *id.* § 1 (“This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.”); Stafprozeßordnung [Code of Criminal Procedure] §§ 403–406(c) (F.R.G.) (authorizing victims to append civil claims to criminal cases); Codice penale [Penal Code] art. 10 (Italy) (extraterritorial criminal jurisdiction over torture); Law No. 498 of 3 Nov. 1988 (Italy) (same); Codice di procedura penale [Criminal Procedure Code] arts. 74, 90, 101, 394, 396 (Italy) (enabling victims to bring civil claims for compensation and restitution within criminal proceedings); Ley Orgánica del Poder Judicial [Organic Law of the Judicial Power] art. 23.4 (Spain) (extraterritorial criminal jurisdiction for serious violations of international law, including torture, crimes against humanity, war crimes, genocide, and international terrorism); Ley de Enjuiciamiento Criminal [Criminal Procedure Code] art. 112 (Spain) (providing that any criminal complaint filed by a victim is also a civil claim unless the claimant expressly states otherwise).

¹¹¹ See generally Zoglin, *supra* note 8.

¹¹² Harold Hongju Koh, *Is There a “New” New Haven School of International Law?*, 32 YALE J. INT’L L. 559 (2007).

¹¹³ Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 307, 311 (2007).

¹¹⁴ *Id.* at 321 (emphasis added); see also Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Waters, *supra* note 94.

it fostered: that all nations must provide all individuals, whether citizens or not, with an effective judicial remedy for acts of torture, genocide, and other serious violations of international law, wherever those acts are committed.

The Torture Debate. Finally, *Filártiga* affirmed that U.S. courts must be critical players not just in the general pursuit of human rights, but particularly in the elimination of torture and cruel, inhuman or degrading treatment. *Filártiga* inspired a movement within the U.S. human rights community to promote domestic judicial incorporation of the norm against torture that eventually helped persuade the Executive Branch to ratify the U.N. Convention Against Torture and Congress to enact the Torture Victim Protection Act of 1991.¹¹⁵ Unexpectedly, nearly a quarter century after *Filártiga*, the stability of the domestic incorporation of that norm was called into question by the revelation that torture and other forbidden methods were being used by the United States against detainees both in an Iraqi prison at Abu Ghraib, and as part of “extreme interrogation methods” being deployed in the “War Against Terror” after September 11, 2001.

An August 1, 2002, memorandum opinion soon came to light, which had been sent from then-Assistant Attorney General Jay S. Bybee of the Office of Legal Counsel (OLC) at the U.S. Department of Justice to then-Counsel to the President Alberto R. Gonzales regarding coercive interrogation tactics (“Torture Opinion”).¹¹⁶ The Torture Opinion, which Mr. Gonzales as White House Counsel apparently requested in early summer

¹¹⁵ Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 (2000)). After extensive lobbying by human rights groups, in 1992 Congress finally passed the Torture Victim Protection Act (TVPA), which was designed specifically to supplement and complement, not to narrow, the preexisting scope of the ATCA. See, e.g., House Comm. on the Judiciary, Torture Victim Protection Act, H.R. REP. NO. 102-367, pt. 1, at 3, 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86. The House Report states: “Claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered [by] section 1350. [The ATCA] should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” *Id.* The TVPA codified and extended to citizen plaintiffs statutory causes of action for torture and summary execution suffered under the actual or apparent authority, or under color of law, of any foreign nation. The TVPA’s legislative history expressly declared that “international human rights cases predictably raise legal issues—such as interpretations of international law—that are matters of Federal common law and within the particular expertise of Federal courts.” S. REP. NO. 102-249, at 6 n.6 (1991).

¹¹⁶ Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. For a substantive critique of this opinion, see Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2005), from which the discussion in the text derives. For discussion of the use of torture

2002, explores whether U.S. officials can use tactics tantamount to torture against suspected terrorists, without being held liable under a federal statute that criminalizes torture. Following the release of the opinion, a firestorm ensued and the Justice Department officially withdrew the opinion. In late 2005, a governmental norm sponsor, Senator John McCain, introduced the McCain Amendment to the Defense Authorization Act, prohibiting the use of cruel, inhuman or degrading treatment against any individual in the custody or physical control of the United States.¹¹⁷ The Amendment sought to ban cruel, inhuman or degrading treatment or punishment of people in U.S. custody or under the effective control of U.S. Department of Defense. In addition, the McCain Amendment required all U.S. troops to follow *Army Field Manual* procedures when they detain and interrogate military prisoners.

The McCain Amendment soon became another example of a transnational effort to enforce the international human rights norm against torture. Against the vigorous objections and lobbying efforts of the George W. Bush administration, a transnational network arose, consisting of private citizens and some twenty-eight retired generals, led by former Secretary of State Colin Powell, who came forward to speak in favor of the Amendment. At the same time, numerous human rights NGOs, such as Human Rights First¹¹⁸ and Human Rights Watch¹¹⁹ vigorously pressed the case for the Amendment. The federal courts again became a player in the public debate as Judge Hellerstein of the Southern District of New York ordered the release of dozens more pictures of prisoners being abused at Abu Ghraib.¹²⁰ Despite vigorous White House lobbying, the Republican-controlled Senate and House overwhelmingly voted to strengthen the guidelines governing the treatment of prisoners in U.S. military custody.¹²¹ On the day after the House

by U.S. officials at Abu Ghraib prison in Iraq, see the essay by Laura Dickinson in this volume.

¹¹⁷ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003, 119 Stat. 2680, 2739-40 (2005) (prohibiting “Cruel, Inhuman, or Degrading Treatment or Punishment of Persons Under Custody or Control of the United States Government”).

¹¹⁸ See Human Rights First, *Congress Puts Bush Administration on Notice to Stop Using Abusive Interrogation Methods; But Struggle Continues to Keep Torture Evidence out of Court*, Dec. 30, 2005, available at http://www.humanrightsfirst.org/uslaw/etn/misc/tort_court.htm (last visited Mar. 9, 2006).

¹¹⁹ See Human Rights Watch, *U.S.: Landmark Torture Ban Undercut*, Dec. 16, 2005, available at <http://hrw.org/english/docs/2005/12/16/usdom12311.htm> (last visited Mar. 9, 2006).

¹²⁰ See *A.C.L.U. v. Dep’t of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

¹²¹ Eric Schmitt, *House Defies Bush and Backs McCain on Detainee Torture*, N.Y. TIMES, Dec. 15, 2005, at A14 (reporting that the House voted 308 to 122 and that the Senate voted 90 to 9 to support the McCain Amendment).

approved the McCain Amendment, the White House reversed itself, and President Bush accepted a compromise that Senator McCain had been offering for weeks.¹²² On December 30, 2005, President Bush finally signed the 2006 Defense Appropriations Bill, which included the McCain Amendment. On its face, the McCain Amendment applies to all U.S. personnel everywhere, without regard to whom they are interrogating.

Thus, a transnational network against torture provoked an interaction, which led to an interpretation of law, which apparently promoted the internalization of a norm against torture and cruel, inhuman or degrading treatment into U.S. law. Yet even after the President accepted the law, his presidential signing statement accompanying the Act made only a qualified commitment to follow the new law: “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch.”¹²³ But more recently, under intense public pressure, President Bush has now backed off such extreme claims, recently telling an interviewer: “I don’t think a president can . . . order torture, for example. . . . Yes, there are clear red lines. . . .”¹²⁴ In short, the norm against torture is again apparently internalized into U.S. law, as a matter of judicial decision, legislation, and executive policy.

At this writing, intense controversy still reigns over whether and to what extent the U.S. government has genuinely foresworn the use of torture as an interrogation device in the war on terror. But through it all, the 1980 judicial decision in *Filártiga* has remained the leading statement by a U.S. governmental institution unambiguously condemning the use of torture. The case showed that domestic courts need not be bystanders in modern human rights controversies. Instead, the case showed graphically how international human rights law, invoked in a domestic judicial forum, can illumine life, redress pain, and declare norms to guide future governmental action.

Conclusion

On the day that *Sosa* was argued at the U.S. Supreme Court, Dolly Filártiga wrote this in an op-ed article in the *New York Times*:

¹²² Eric Schmitt, *Bush Will Support McCain on Torture: Bipartisan Support Leads to Reversal*, S.F. CHRON., Dec. 16, 2005, at A7 (reporting that it was a “stinging defeat” for Bush that both chambers had defied his threatened veto to resoundingly support McCain’s measure, especially considering that his party then controlled both houses of Congress).

¹²³ Statement on Signing H.R. 1815, National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

¹²⁴ Interview by Bob Schieffer with President George W. Bush, in Washington, D.C., CBS NEWS (Jan. 27, 2006), available at http://www.cbsnews.com/stories/2006/01/27/eveningnews/main1248952_page3.shtml.

I came to this country in 1978 hoping simply to look a killer in the eye. With the help of American law, I got so much more. Eventually I received political asylum, then became a citizen. I am proud to live in a country where human rights are respected, where there is a way to bring to justice people who have committed horrible atrocities.¹²⁵

More than two years later, an obituary in the same newspaper reported that the author of Paraguay's reign of torture, Alfredo Stroessner Matiauda, had finally died in exile in Brazil. Buried in that story was a notation that while in exile, Stroessner had written to an American diplomat, asking whether he could come to the United States for gallbladder surgery. The diplomat had "advised the general to stay away, warning that he could become the target for a lawsuit [in the United States] by Paraguayans." The general ended up having his surgery in Brazil.¹²⁶

In a war on terror, we often hear the claim that terror must be met with torture, that violence must be met with more violence. In the end, the greatest importance of the *Filártiga* case is that it showed a different way: that violence can be met by law, and that international law—and the human beings it touches—can rise above violence to reveal the truth, to heal, and ultimately to teach.

¹²⁵ Filártiga, Op-Ed, *supra* note 10, at A21.

¹²⁶ Diana Jean Schemo, *Gen. Alfredo Stroessner, Ruled Paraguay Through Fear for 35 Years, Dies in Exile at 93*, N.Y. TIMES, Aug. 17, 2006, at B7.