No. 03-339

IN THE

Supreme Court of the United States

JOSE FRANCISCO SOSA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* INTERNATIONAL JURISTS IN SUPPORT OF AFFIRMANCE

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

U.S. CASES

Cited Authorities

U.S. STATUTES AND RULES

Page

PUBLICATIONS

FOREIGN STATUTES

Cited Authorities

OTHER AUTHORITIES

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

INTEREST OF THE *AMICI CURIAE*

Amici are international jurists who have served as judges and experts on international human rights bodies around the world. They submit this brief to advise the Court that the line of precedent beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), is regarded around the world as a major contribution of U.S. law to the international protection of human rights.[1]

Amici believe that the *Filartiga* doctrine—which the Congress has embraced and the Executive Branch has long relied upon in its dealings with foreign states and international bodies—has enabled the United States to influence positively the development of international human rights law. The *Filartiga* decision has enhanced U.S. credibility in foreign courts and legislatures and in international organizations by demonstrating that the United States takes its international human rights obligations seriously. Overturning *Filartiga* would damage the United States' global standing and reputation on issues of international human rights. *Amici* submit that it would be a fundamental error of law and policy for this Court to abandon this position of global leadership.[2]

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1. Consents to the filing of *amicus curiae* briefs already are on file with the Clerk of the Court pursuant to Rule 37(3) of the Rules of the Supreme Court of the United States. Pursuant to Rule 37(6), counsel for *amici* certify that no counsel for a party authored this brief in whole or in part and that no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. *Amici* take no position on whether the *Filartiga* doctrine was properly applied to the facts of this case. They urge affirmance in the belief that the Court would err greatly if it were to overturn the *Filartiga* line of precedent, on which the ruling below was (Cont'd)

The *amici* subscribing to this brief are:

Mary Robinson was United Nations High Commissioner for Human Rights from 1997-2002. She previously served seven years as President of the Republic of Ireland, and twenty years in the Irish Senate.

Radhika Coomaraswamy is the United Nations Special Rapporteur for Violence Against Women and Director of the International Center on Ethnic Studies in Colombo, Sri Lanka. She is a member of the Global Faculty of the New York University School of Law.

C. John R. Dugard is an *ad hoc* Judge in the International Court of Justice and Professor of International Public Law at the University of Leiden, Netherlands. He has been a member of the U.N. International Law Commission since 1997.

Marcus Einfeld, A.O. Q.C., served as a Justice of the Federal Court of Australia from 1987-2001 and was founding President of the Australian Human Rights and Equal Opportunity Commission. He currently is President of Australian Legal Resources International.

Elizabeth Evatt was formerly Chief Judge of the Family Court of Australia and was a member of the U.N. Human Rights Committee from 1993-2000. She currently is a member of the International Commission of Jurists and Honorary Visiting Professor at the University of New South Wales Law School.

(Cont'd)

based. The other *amicus curiae* briefs supporting Respondents fully explain why violations of the prohibitions against state-sponsored transborder abduction and arbitrary detention should be treated as "torts in violation of the law of nations" for purposes of the Alien Tort Claims Act.

Thomas M. Franck has served as *ad hoc* Judge of the International Court of Justice and is Murray and Ida Becker Professor of Law Emeritus at New York University School of Law and Director of its Center for International Studies.

Jochen Frowein is a Commissioner on the International Commission of Jurists and Director of the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany. He was Vice-President of the European Commission of Human Rights of the Council of Europe from 1981-1993.

Richard J. Goldstone was a Justice of the Constitutional Court of South Africa from 1994-2003, and was Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda from 1994-1996. He is currently a Global Visiting Professor of Law at New York University School of Law.

Louis Henkin is Professor Emeritus and Director of the Institute of Human Rights at Columbia Law School. He served as United States Representative on the U.N. Human Rights Committee from 1999-2002.

Rev. Theodore M. Hesburgh, C.S.C., was President of the University of Notre Dame from 1952-1987. He has held 15 Presidential appointments, including as a charter member of the U.S. Commission on Civil Rights in 1957, as chair of that commission from 1969-1972, and as ambassador to the 1979 U.N. Conference on Science and Technology for Development. Between 1979-1981 he also chaired the Select Commission on Immigration and Refugee Policy, the recommendations of which became the basis of Congressional reform legislation five years later.

Lord Lester of Herne Hill, Q.C., is President of Interights (the International Centre for Human Rights based in London) and a member of the Joint Parliamentary Select Committee on Human Rights.

Claire L'Heureux-Dubé served as a Justice of the Supreme Court of Canada from 1987-2002 and is currently on the Faculty of Law at Laval University, Québec, Canada.

Juan E. Méndez was the President of the Inter-American Commission on Human Rights in 2002, and a Commissioner on the Inter-American Commission on Human Rights from 2000 to 2003. He is currently a Professor of Law and Director of the Center for Civil and Human Rights at Notre Dame Law School.

Pedro Nikken served as President of the Inter-American Court of Human Rights from 1983-1985. He is currently Professor Emeritus of Civil and International Law at the Law School of the Central University of Venezuela and a member of the International Commission of Jurists.

Sir Nigel Rodley is a Professor of Law and Chair of the University of Essex Human Rights Center. He is also a Commissioner of the International Commission of Jurists and Vice-Chair of the Human Rights Committee. From 1993 to 2001 he was the Special Rapporteur on Torture of the United Nations Commission on Human Rights.

Henry G. Schermers is a former member of the European Commission on Human Rights and is currently Director of the Europa Institute, Leiden University.

Stefan Trechsel was President of the European Commission of Human Rights and is currently Professor of Criminal Law and Procedure at the University of Zurich Law School.

SUMMARY OF ARGUMENT

The briefs urging this Court to reverse the decision below represent a well-orchestrated effort to persuade the Court to overturn *Filartiga* and the twenty-four years of jurisprudence based on it. Yet for nearly a quarter of a century, the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350 (1993), as interpreted by *Filartiga*, has provided a domestic judicial remedy for serious violations of universal and obligatory rules of customary international law that has promoted U.S. leadership in protecting human rights.

Filartiga and its progeny represent a major contribution of U.S. law to the protection of human rights around the world. In submissions to the United Nations, the Executive Branch has called *Filartiga* a "pivotal decision" demonstrating the U.S. commitment to protect human rights. The Executive Branch has repeatedly stressed this line of cases as a model for redressing human rights violations and as evidence of U.S. compliance with its international obligations. In turn, U.N. bodies have incorporated the principles expressed in *Filartiga* into different areas of human rights law, and national and international tribunals have applied these principles to adjudicate and redress severe human rights violations.

The *Filartiga* line of cases has contributed to two global trends in human rights. First, the *Filartiga* line serves as a model for providing all individuals, including noncitizens, with an effective judicial remedy for acts of torture, genocide, and other serious violations of international law, wherever

they may be committed. Second, *Filartiga* and its progeny have contributed to the progressive and responsible development of international legal norms prohibiting torture, genocide, and other serious violations of international law.

Amici curiae submit that it would be a fundamental error of law and policy for the Court to overturn *Filartiga* and to abandon the position of human rights leadership that the United States has achieved as a result of that decision. Nor do *amici* understand such a drastic step to be necessary under U.S. law to prevent misuse of the ATCA. U.S. courts have regularly declined subject matter jurisdiction over ATCA claims when no actionable legal norm exists and have regularly dismissed meritless cases for lack of personal jurisdiction, inadequate service of process, sovereign immunity, *forum non conveniens*, or considerations of comity. The Executive Branch has not hesitated to inform courts when it believes that an ATCA lawsuit unduly interferes with U.S. foreign relations. And Congress remains free to use its legislative powers to modify the scope of the ATCA by expanding, limiting, defining or conditioning the causes of actions that may constitute torts in violation of international law, just as it used its powers to enact the Torture Victim Protection Act ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (1993)).[3]

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3. The TVPA, although an important development in U.S. and international law, is not an adequate substitute for the ATCA, as construed in *Filartiga.* Because the TVPA provides no remedy for acts committed under color of U.S. law, the ATCA is the only remedy available to noncitizens for international law violations committed abroad under color of U.S. official authority. *Compare* 28 U.S.C. § 1350 *with* 42 U.S.C. § 1983 (providing a remedy for only U.S. citizens or others within a U.S. jurisdiction). Furthermore, the TVPA provides a cause of action for only two violations of international law—torture and extra-judicial killing—and does not authorize civil redress for other serious violations of international law.

Indeed, when Congress enacted the TVPA, it expressly endorsed *Filartiga*'s interpretation of the ATCA.[4] For the Court now to overturn this pivotal decision—in spite of the support shown for *Filartiga* and its progeny by the lower courts, the Executive Branch, and the Congress—would undercut the role the United States has played in advancing human rights across the world.

ARGUMENT

I. THE UNITED STATES HAS LONG RECOGNIZED *FILARTIGA* AS AN IMPORTANT MODEL FOR PROVIDING AN EFFECTIVE REMEDY FOR SEVERE, EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS.

The Alien Tort Claims Act provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2003). In *Filartiga v. Pena-Irala,* the U.S. Court of Appeals for the Second Circuit held that the ATCA conferred district court jurisdiction over a suit by Paraguayans against a Paraguayan official who had tortured their relative to death in Paraguay, while acting under color of governmental authority. 630 F.2d 876, 889 (2d Cir. 1980). The court found that official torture is a "tort . . . in violation of the law of nations" for purposes of the ATCA. *Id.* at 880.[5]

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4. *See* John M. Walker, Jr., *Domestic Adjudication of International Human Rights Violations Under the Alien Tort Statute,* 41 St. Louis U. L.J. 539, 560 (1997) (noting Congress' decision not to interfere with *Filartiga* precedent).

5. The Second Circuit found that in "light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy (Cont'd)

Since then, a series of lower courts, including the Ninth Circuit in this case, have followed *Filartiga* in holding that federal courts have ATCA jurisdiction to hear suits by aliens based upon torts in violation of "specific, universal, and obligatory" norms of international law, wherever those torts may occur and without the need for additional statutory authority.[6]

(Cont'd)
by virtually all of the nations of the world," the official torture of an individual held in detention violates the law of nations. 630 F.2d at 880.

6. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 103-06, n.11 (2d Cir. 2000) (reversing *forum non conveniens* dismissal of case involving claims including torture, crimes against humanity, and summary execution brought under ATCA and noting that *Filartiga* remains the leading case interpreting the ATCA), *cert. denied*, 532 U.S. 941 (2001); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999) (rejecting ATCA claims based on environmental damage because they did not meet the standard articulated by the Second Circuit); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383-84 (9th Cir. 1998) (arbitrary arrest and detention actionable under ATCA but stating that plaintiff's arrest and detention in instant case were not arbitrary within meaning of international law); *Hilao v. Estate of Marcos*, 103 F.3d 789, 794-95 (9th Cir. 1996) (torture and arbitrary detention actionable under ATCA because they are in violation of specific, universal, and obligatory norms of international law); *Abebe-Jira v. Negewo*, 72 F.3d 844, 847-48 (11th Cir. 1996) (claim of torture actionable under the ATCA, and citing case law from both the Second and Ninth Circuits), *cert. denied*, 519 U.S. 830 (1996); *Kadic v. Karadzic*, 70 F.3d 232, 238-43 (2d Cir. 1995) (jurisdiction exists under the ATCA for torts in violation of well-established, universally recognized norms of international law, including genocide, war crimes, official torture, and summary execution), *cert. denied*, 518 U.S. 1005 (1996); *In re Estate of Ferdinand E. Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (violations of international law actionable under the ATCA must be of a norm, such as that proscribing torture,
(Cont'd)

The *Filartiga* line of cases has helped the United States to fulfill its international responsibilities. The Executive Branch has repeatedly relied on *Filartiga* and the ATCA in representations to the United Nations. In 1995, the U.N. Commission on Human Rights "[c]all[ed] upon the international community to give increased attention to the right to restitution, compensation and rehabilitation of victims of grave violations of human rights and fundamental freedoms" and "[r]equest[ed] States to provide information to the Secretary-General about legislation already adopted, as well as that in the process of being adopted." *Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, U.N. Comm'n on Human Rights Res. 1995/34, U.N. ESCOR Comm'n on Human Rights, 51st Sess., 53d mtg., U.N. Doc. E/CN.4/RES/1995/34 (1995). In one of the most important reports received by the Secretary-General, the U.S. government called attention to the *Filartiga* line, emphasizing 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." *Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/34*, U.N. ESCOR

(Cont'd)

that is specific, universal, and obligatory); *Estate of Lacarno Rodriguez v. Drummond*, 256 F. Supp. 2d 1250, 1262 (N.D. Ala. 2003) (extra-judicial killing actionable under the ATCA); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439-41 (D.N.J. 1999) (claim of forced labor actionable under ATCA because it violates well-established, universally recognized norms of international law); *Jama v. INS*, 22 F. Supp. 2d 353, 362-63 (D.N.J. 1998) (claim of cruel, inhumane, and degrading treatment actionable under the ATCA); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995) (claims of torture, summary execution, arbitrary detention, and disappearance actionable under ATCA).

Comm'n on Human Rights, 52d Sess., Provisional Agenda Item 8, ¶ 13, U.N. Doc. E/CN.4/1996/29/Add.2 (1996); *see also Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Initial Report of the United States*, U.N. Comm. Against Torture, 24th Sess., 424th mtg., ¶¶ 4-8, U.N. Doc. CAT/C/SR.424 (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 the 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.

Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of the United States of America, U.N. Comm. Against Torture, Addendum, ¶ 277, U.N. Doc. CAT/C/28/Add.5 (2000) (emphasis in original). The U.S. government characterized the decision in *Filartiga* as "pivotal" and described its subsequent extension to other human rights claims: "Since that decision was rendered, several other cases have explored the scope of the Act. Human rights lawyers now regularly invoke the Act in litigating international human rights principles in United States courts." *Id.* ¶ 278. The U.S. government explained that "[i]llustrative of recent cases involving extraterritorial acts of abuse are those brought against the self-proclaimed president of Bosnia-Herzegovina and against the estate of the former President of the Philippines." *Id.* ¶ 280 (citing *Kadic v. Karazdic*, 70 F.3d 232 (2d Cir. 1995), *In Re Estate of Ferdinand E. Marcos*, 25 F.3d 1467 (9th Cir. 1994)).

When the United States ratified the International Covenant on Civil and Political Rights in 1992, it assumed an obligation under Article 2.3 of that treaty to "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity . . . ." International Covenant on Civil and Political Rights, art. 2.3, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. The Human Rights Committee has emphasized the importance of civil remedies for victims of international human rights violations. *See, e.g., Report of the Human Rights Committee*, U.N. GAOR, 53d Sess., Supp. No. 40, vol. I, ¶ 260, U.N. Doc. A/53/40 (1998) (Concluding Observations: Finland) ("Criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms. . . . [Priority should continue to be given] to positive measures and to civil processes which are able to determine issues of compensation or other remedies, especially in cases of discrimination."). The Committee has also explained that civil remedies must be available for all individuals, including noncitizens, within the territory of a state party. *See, e.g., Bakhtiyari v. Australia*, U.N. Human Rights Comm., 79th Sess., Communication No. 1069/2002, ¶ 12, U.N. Doc. CCPR/C/79/D/1069/2002 (2003) (concluding in case involving noncitizen that "the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established"). The development of the *Filartiga* line has enabled the United States to provide effective civil remedies to victims of human rights violations in accordance with its obligation under the Covenant.

Far from creating open-ended U.S. jurisdiction, *Filartiga* has been recognized as having given rise to an especially cautious and responsible application of U.S. law, including prudent safeguards that promote a sensible exercise of jurisdiction, and a conservative approach to determining what constitutes an actionable "specific, universal, and obligatory" norm of international law.[7] This careful approach is now followed by other liberal democratic states.

Nor has *Filartiga* in any sense enshrined universal criminal jurisdiction, which is controversial in many countries.[8] When a state exercises universal criminal

7. Petitioner argues that the Court should eliminate the *Filartiga* line of cases because "plaintiffs have demonstrated creativity in the range of putative offenses they would bring within the statute's ambit." Petitioner's Brief at 45. Significantly, however, all the cases cited by the Petitioner as demonstrating such "creativity" were dismissed. *See Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 160-61 (2d Cir. 2003) (affirming dismissal of an action for violations of the right to life and the right to health from intranational pollution brought under the ATCA); *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002) (affirming dismissal of the case for *forum non conveniens* for a class action suit brought by citizens of Peru and Ecuador alleging that defendant polluted rain forests and rivers in their countries, causing environmental damage and personal injuries); *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (affirming dismissal of claim for loss of money from distribution system of the state lottery for failing to state an actionable tort under the ATCA).

8. In separate submissions to the Committee Against Torture and to the U.N. Secretary-General, the U.S. government has emphasized those dimensions of ATCA litigation which significantly distinguish the U.S. federal cases from universal jurisdiction. The government explained:

> The jurisdiction of the district courts to hear claims under the Act is further limited by the constitutional requirement that the court obtain proper personal

(Cont'd)

jurisdiction, it *asserts the right to acquire personal jurisdiction* over a defendant who is not otherwise properly subject to the *in personam* jurisdiction of the court—for example, by initiating extradition proceedings or issuing an international arrest warrant. In contrast, for an action to proceed under *Filartiga*, the defendant must be properly served according to the rules of the jurisdiction in which the action is filed, and prudential doctrines—such as *forum non conveniens*, sovereign and head-of-state immunity, and comity—fully empower courts to dismiss unwarranted cases.

II. THE *FILARTIGA* MODEL CONTRIBUTES TO INTERNATIONAL AND FOREIGN LEGAL NORMS FOR PROVIDING REDRESS FOR HUMAN RIGHTS VIOLATIONS.

Following the U.S. example, international organizations and foreign jurisdictions have regularly looked to *Filartiga* as a touchstone for promoting effective remedies for serious human rights violations.

A. International Organizations Recognize *Filartiga* as a Model in Human Rights Law.

The *Filartiga* jurisprudence is now internationally recognized as a leading source for elaborating core

(Cont'd)

> jurisdiction over the defendant i.e., the perpetrator of the violation must be present within the territorial jurisdiction of the court or must otherwise be subject to the court's jurisdiction.

Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of the United States of America, U.N. Comm. Against Torture, Addendum, ¶ 279, U.N. Doc. CAT/C/28/Add.5 (2000); *see also Report of the Secretary-General Prepared Pursuant to Commission Resolution 1995/34*, U.N. ESCOR Comm'n on Human Rights, 52d Sess., Provisional Agenda Item 8, ¶ 14, U.N. Doc. E/CN.4/1996/29/Add.2 (1996) (submitting same statement).

international human rights obligations. As a result of its careful identification and application of conventional and customary international human rights law, *Filartiga* and its progeny have played a vital role both in identifying a class of fundamental human rights violations actionable under the ATCA, and in establishing a framework for remedying those violations.

Foremost among international human rights institutions that have recognized and promoted *Filartiga* are charter institutions of the United Nations, such as the U.N. Commission for Human Rights. The incorporation of the *Filartiga* approach into the international jurisprudence of the U.N. was in good measure due to efforts of the Executive Branch of the U.S. government, which has repeatedly cited the precedent as one of the prime examples of appropriate remedies for international human rights violations.

1. *United Nations*. The United Nations has recognized that the *Filartiga* line has made the United States a leader in providing judicial remedies for serious human rights violations. For example, the Division for Social Policy and Development of the United Nations Secretariat stated:

> The case of *Filartiga v. Pena-Irala,* heralded a trend towards the domestic incorporation of customary international law. The *Filartiga* court recognized that the law of nations is a dynamic concept, which should be construed in accordance with the current customs and usages of civilized nations . . . .

Division for Social Policy and Development of the United Nations Secretariat, *Compilation of International Norms and Standards Relating to Disability*, § 1.4 (Draft, July 2002) *available at* http://www.un.org/esa/socdev/enable/discom101.htm (last visited Feb. 25, 2004).

So, too, 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" has relied on the ATCA as a leading example for states to "provide remedies for violations occurring outside their territory."[9] 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. *See* Special Rapporteur on Contemporary Forms of Slavery, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-Like Practices During Armed Conflict*, U.N. ESCOR Comm'n on Human Rights, 50th Sess., Provisional Agenda Item 6, at App., ¶ 52, U.N. Doc. 4/Sub.2/1998/13 (1998). Other special rapporteurs have followed suit.[10]

The *Filartiga* line has also shaped the development of international human rights law in various United Nations

9. *See* Note by the High Commissioner for Human Rights, *The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law*, U.N. ESCOR Comm'n on Human Rights, 59th Sess., Provisional Agenda Item 11, ¶ 114, U.N. Doc. E/CN.4/2003/63 (2002).

10. For example, one Special Rapporteur emphasized the ATCA as a leading example of the responsibility "that 'home' States should put in place effective domestic regulation and monitoring mechanisms and provide effective remedies" for violations that occur abroad. The Special Rapporteur invoked 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." *Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food to the General Assembly*, U.N. GAOR, 58th Sess., Provisional Agenda Item 119(b) ¶ 40 & n.31, U.N. Doc. A/58/330 (2003) (citing U.S. cases following *Filartiga*).

organs. The International Law Commission (a U.N. body of elected international legal experts responsible for the development and codification of international law) relied on the *Filartiga* approach in determining standards for the hierarchy of international human rights norms. *Report of the Int'l Law Comm'n on the Work of its Fifty-Third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, ch. IV.E.2, at 284 n.683, U.N. Doc. A/56/10 (2001). The Division for Social Policy and Development of the United Nations Secretariat also relied on *Filartiga* to identify the appropriate scope for judicially enforceable international human rights law:

> Customary law is critical to the role of human rights law. The domestic enforceability of customary international law is manifest in the case of *Filartiga v. Pena-Irala*. . . . [A]s made clear by this case . . . domestic 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 (Draft, July 2002) *available at* http://www.un.org/esa/socdev/enable/discom101.htm (last visited Feb. 25, 2004). Similarly, a 1993 U.N. Sub-Commission on Human Rights relied on *Filartiga* for developing appropriate standards for determining whether conditions of imprisonment fall below fundamental human rights guarantees. *See The Administration of Justice and the Human Rights of Detainees*, U.N. ESCOR Comm'n on Human Rights, 45th Sess., Provisional Agenda Item 10(a), ¶ 69, U.N. Doc. E/CN.4/Sub.2/1993/21 (1993).

2. *International Court of Justice.* A recent opinion of the International Court of Justice ("ICJ") highlighted the influential nature of the *Filartiga* precedent. In *Congo v. Belgium*, the ICJ held that a defendant was immune from prosecution by Belgian officials for alleged war crimes. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium),* 2002 I.C.J. 1 (Feb. 14, 2002). The U.S., British, and Dutch Judges filed a joint concurring opinion addressing the appropriate scope of universal criminal jurisdiction, an issue not addressed by the majority. The concurring Judges carefully distinguished universal criminal jurisdiction from other forms of jurisdiction that address extraterritorial conduct. The Judges gave special attention to ATCA jurisprudence, describing it as conforming to global trends of extending civil jurisdiction over extraterritorial conduct in appropriate cases. *Id.* ¶¶ 47, 48 (Joint Separate Opinion of Higgins, Kooijmans, and Buergenthal, JJ.) ("The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality."). The Judges also incorporated principles inherent in ATCA litigation—such as initiation of civil proceedings by victims—to restrict extraterritorial criminal jurisdiction.[11] The ATCA has thus served as an instructive global model for balancing human rights concerns and interstate relations.

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11. The Judges stated:

> [T]he desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or *juge d'instruction*. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

Congo v. Belgium, 2002 I.C.J. 1, at ¶ 59.

3. *International Criminal Tribunal for the former Yugoslavia*. The International Criminal Tribunal for the former Yugoslavia ("ICTY") has also drawn guidance from the *Filartiga* line. In an ATCA case following *Filartiga*, the U.S. Court of Appeals for the Second Circuit held that Bosnian Serb leader Radovan Karadzic could be held liable for genocide and war crimes, when properly subject to personal jurisdiction and served in the United States. *See Kadic v. Karadzic*, 70 F.3d 232, 236, 246-48 (2d Cir. 1995). In the first case prosecuted at the ICTY, the international judges relied on that Second Circuit decision in determining that crimes against humanity do not require an element of state action:

> [T]he United States Court of Appeals for the Second Circuit recently recognized that "non-state actors" could be liable for committing genocide, the most egregious form of crimes against humanity, as well as war crimes. Therefore, although a policy must exist to commit these acts, it need not be the policy of a State.

Prosecutor v. Tadic, ICTY Trial Chamber Opinion, No. IT-94-1-T, ¶ 655, 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 *Filartiga* in determining the status of the prohibition against torture during wartime. *Prosecutor v. Furundzija*, ICTY Trial Chamber Opinion, No. IT-95-17/1-T, ¶ 147, 38 I.L.M. 317, 348 (1998) ("There exists today universal revulsion against torture: as a USA Court put it in *Filartiga v. Pena-Irala*, 'the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind.'") (quoting *Filartiga*, 630 F. 2d at 876).

4. *International Human Rights Bodies*. The Inter-American Commission on Human Rights has held that the

ATCA, as interpreted in *Filartiga*, constitutes an adequate and effective domestic remedy for international human rights violations. Inter-Am. C.H.R., Report No. 62/03, Petition P12.049, Kenneth Walker (United States), ¶¶ 47 & n.18, 50 (Oct. 10, 2003), *available at* http://www.cidh.org/annualrep/2003eng/usa.p12049.htm (last visited Feb. 25, 2004). The Commission found that aggrieved individuals must exhaust such a remedy prior to filing a petition with the Commission, *see id.* ¶ 47, thereby according greater deference to the U.S. judicial system because of the availability of the *Filartiga* remedy. *See id.* ¶ 47 n.18 (citing *Alvarez-Machain v. United States*, 266 F.3d 1045 (9th Cir. 2001)).

The supervisory organs of the major international human rights treaties have similarly encouraged states to exercise jurisdiction over human rights violations, even when such violations are committed outside their territory. *See, e.g.*:

- *Report of the Committee Against Torture*, U.N. GAOR, 52d Sess., Supp. No. 44, ¶ 42(j), U.N. Doc. A/52/44 (1997) (Concluding Observations/ Comments on Report Submitted by the Russian Federation) ("Absence of extraterritorial jurisdiction makes difficult or impossible the implementation of article 5, paragraph 1(b) of the Convention [establishing jurisdiction when the alleged offender is a national of that state].");

- U.N. ESCOR Comm. on Economic, Social and Cultural Rights, 30th Sess., ¶ 12, U.N. Doc. E/C.12/ 1/Add.86 (2003) (Concluding Observations on Report Submitted by Luxembourg) ("welcom[ing] the extraterritorial application of certain provisions of the Criminal Code, allowing for the criminal prosecution of persons, both nationals and non-nationals, for sexual crimes committed abroad");

- U.N. Convention on the Rights of the Child, 20th Sess., ¶ 22, U.N. Doc. CRC/C/15/Add.101 (1999) (Concluding Observations on Report Submitted by Sweden) (commending "current efforts to review domestic legislation so as to eliminate the 'dual criminality' requirement for . . . legislation" involving sexual exploitation of children outside national borders);

- U.N. Convention on the Rights of the Child, 20th Sess., ¶ 6, U.N. Doc. CRC/C/15/Add.98 (1999) (Concluding Observations on Report Submitted by Austria) ("welcom[ing] the adoption of legislation establishing" jurisdiction for nationals of the State party involved in the sexual exploitation of children" outside national borders);

- U.N. Comm. on the Elimination of Discrimination Against Women, ¶¶ 169, 178, U.N. Doc. A/51/38 (1996) (Concluding Observations on Report Submitted by Belgium) (commending "a landmark law" providing extraterritorial jurisdiction for trafficking in women).

In sum, the *Filartiga* doctrine has promoted a useful and growing partnership among the work of U.S. courts, international tribunals, foreign governments, and human rights organs.

B. Foreign Legal Systems Have Adopted the Approach of *Filartiga.*

Foreign courts have followed the measured approach articulated in *Filartiga* for selectively incorporating fundamental norms of international law into domestic law. In the *Pinochet* case, for example, the House of Lords relied

on cases in the *Filartiga* line for the proposition that torture is among a select group of customary international norms that are justiciable in national courts. *See Regina v. Bow St. Metro. Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. 147, 198, 248 (H.L. 1999) (judgments of Lord Browne-Wilkinson and Lord Hope of Craighead). In another case, the English Court of Appeal echoed these sentiments, discussing approvingly *Filartiga*'s characterization of torturers as "*hostis humani generis*." *Al-Adsani v. Gov't of Kuwait*, 107 I.L.R. 536, 544, 546 (Eng. C.A. 1996); *Al-Adsani v. Gov't of Kuwait*, 100 I.L.R. 465, 470 (Eng. C.A. 1994). In both cases, these British courts noted that the U.S. courts have limited the application of the ATCA in appropriate cases by doctrines such as foreign sovereign immunity. *See Bow St. Metro. Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte* (No. 3), [2000] 1 A.C. at 243-44 (judgment of Lord Hope of Craighead) (citing *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993)); *Al-Adsani v. Gov't of Kuwait*, 107 I.L.R. 536, 547-48 (Eng. C.A. 1996) (same).[12]

The National Commission on Human Rights in India highlighted the importance of *Filartiga* in the development of national judicial remedies for violations of fundamental human rights. *See* National Commission on Human Rights, Sadar Patel Bhawan, Case No. 1/97/NHRC, ¶ 23 (Aug. 4, 1997), *available at* http://www.punjabjustice.org/legalbattles/nhrcdocs/aug97.htm (last visited Feb. 25, 2004). 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.

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12. While the government of the United Kingdom has occasionally objected to what it has deemed exorbitant exercises of U.S. long-arm jurisdiction, those cases have not involved gross abuses of international law or crimes against humanity.

The ATCA has been complemented by parallel remedial efforts in other democratic countries. Many states now recognize that their international responsibilities require the exercise of jurisdiction over serious violations committed outside their territory, whether by their nationals or by foreign nationals. In recognition of these responsibilities, states have recently begun to identify the availability of their own relevant laws when reporting to the treaty bodies. *See, e.g.*:

- *Colombia*: *Second Periodic Reports of States Parties Due in 1993: Colombia*, U.N. Comm. Against Torture, ¶ 73, U.N. Doc. CAT/C/20/Add.4 (1995) (State Party Report) ("[T]he Penal Code establishes the notion of the extraterritoriality of Colombian criminal law, which satisfies the requirements . . . of the Convention against Torture. . . . 'Colombian criminal law shall apply . . . [t]o an alien who has committed an offence abroad prejudicial to another alien, if and only if . . . [h]e is in Colombian territory . . .'");

- *Denmark*: *Second Periodic Report of Denmark*, U.N. Comm. on the Rights of the Child, 27th Sess., 700th mtg., ¶ 51, U.N. Doc. CRC/C/SR.700 (2001) (Summary Record) ("Under an extraterritorial jurisdiction regime, the Danish courts could prosecute Danes for sexual abuse of children abroad.");

- *Luxembourg*: *Fourth Periodic Reports of States Parties:* Convention on the Elimination of Discrimination Against Women, art. 6, ¶ 31, U.N. Doc. CEDAW/C/LUX/4 (2002) ("Article 5-1 of the Code of Criminal Procedure, as amended, extends the application of the national law of Luxembourg

for certain offences committed on foreign soil by a national of Luxembourg or by a foreign national present in Luxembourg.");

- *Norway*: *Report of the Committee Against Torture*, U.N. GAOR, 44th Sess., Supp. No. 46, ¶ 88, U.N. Doc. CAT/A/44/46, (1989) (Concluding Observations: Norway) (noting that Norway provides jurisdiction for "offences committed outside Norwegian territory by non-Norwegian courts [sic], provided that the offender was present on Norwegian territory and that the offence was punishable either in the country where the act had been perpetrated or under Norwegian law");

- *Sweden*: *Second Periodic Report of Sweden*, U.N. Comm. on the Rights of the Child, 20th Sess., 522d mtg., ¶ 27, U.N. Doc. CRC/C/SR.522 (1999) (Summary Record) ("[T]he second report offered little more than the first [concerning issues of child abuse]. Swedish law in that matter was nonetheless commendable, and in fact provided for extraterritorial prosecutions.");

- *United Kingdom*: *Report of the Committee Against Torture*, U.N. GAOR, 47th Sess., Supp. No. 44, ¶ 117, U.N. Doc. CAT/A/47/44 (1992) (Concluding Observation) ("[T]he representative stated that the courts of Great Britain and Northern Ireland had wide extraterritorial jurisdiction to deal with any person present in the United Kingdom, regardless of the nationality of the offender or victim.").

In addition, many states 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. *See, e.g.*:

- *France*: Code de Procédure Pénale, arts. 689, 689-2–689-10 (extraterritorial jurisdiction for crimes of torture, terrorism, and others); *id.* arts. 2-3 (authorizing victims to join criminal prosecution as *partie civile*);

- *Germany*: Völkerstrafgesetzbuch (Code of Crimes Against International Law of 2002), §§ 6-12 (criminalizing genocide, crimes against humanity and war crimes); *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."); Strafprozeßordnung (Criminal Procedure Code), §§ 403-406c (authorizing victims to append civil claims to criminal cases);

- *Greece*: Penal Code, art. 8 (extraterritorial jurisdiction for many serious international offenses); Criminal Procedure Code, arts. 63-70, 82-88, 108, 137D, 468, 480, 488 (authorizing victims to append civil claims to criminal cases);[13]

- *Italy*: Codice Penale (Penal Code), art. 10 (extraterritorial criminal jurisdiction over serious criminal offenses involving harm to foreign persons, foreign states, and the European Union); Law No. 498 of 3 November 1988 (extraterritorial criminal jurisdiction for torture); Codice di Procedura Penale (Criminal Procedure Code), arts. 74, 90, 101, 394, 396 (enabling victims to bring civil claims for

13. *Amici* have relied in part on an English-language summary available at http://www.u-j.info/index/140054 (last visited Feb. 25, 2004).

compensation and restitution within criminal proceedings);

- *Netherlands*: International Crimes Act of 2003, §§ 2-8, 10, 21 (extraterritorial jurisdiction for genocide, war crimes, torture, and crimes against humanity); Wetboek van Strafvordering (Criminal Procedure Code), art. 51a (authorizing victims to append civil claims to criminal prosecution);

- *Spain*: Ley Organica del Poder Judicial (Organic Law of the Judicial Power), art. 23.4 (extraterritorial criminal jurisdiction for serious violations of international law including genocide and terrorism); Ley de Enjuiciamiento Criminal (Criminal Proceedings Law), art. 112 (providing that any criminal complaint filed by a victim is also a civil claim unless the claimant expressly states otherwise).

As this Court is well aware, too many countries in the world have dysfunctional judicial systems or fail to provide their own citizens with any remedies even for the grossest abuses that occur at home. The *Filartiga* doctrine, and the parallel precedents and legislation it has spawned abroad, have prudently helped to fill this glaring gap. This Court should not now turn the clock back by undoing the foundation stone of an important and evolving global jurisprudence.

CONCLUSION

Filartiga and its progeny represent a major contribution of U.S. law to the protection of human rights around the world. This Court should preserve the *Filartiga* approach to the ATCA, which has provided a visible and influential model of U.S. human rights leadership for other jurisdictions, by affirming the judgment below.

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