79-6090

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

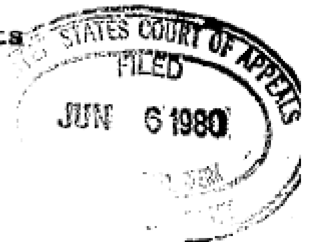
DOLLY M.E. FILARTIGA AND DR. JOEL FILARTIGA,

Plaintiffs-Appellants

v.

AMERICO NORBERTO PENA-IRALA,

Defendant-Appellee



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BPS

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

INTRODUCTION

The United States files this memorandum in response to the Court's request that "the Department of State submit a memorandum setting forth its position concerning the proper interpretation of 28 U.S.C. §1350 in light of the facts of this case."[1/] The memorandum addresses the following questions:

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?

1/ Letter from A. Daniel Fusaro, Clerk, to Roberts B. Owen, October 29, 1979. Under 28 U.S.C. 516, the conduct of litigation in which the United States or an agency is interested is reserved to the Department of Justice. For that reason, the Department of Justice is filing this memorandum, developed jointly by the Department of Justice and the Department of State.

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?

STATEMENT

This appeal involves the interpretation of 28 U.S.C. 1350, which gives the district courts jurisdiction in all cases where an alien sues for "a tort only, committed in violation of the law of nations or a treaty of the United States." The complaint alleges that defendant, acting under color of his authority as a Paraguayan official, tortured and killed Joel Filartiga, a Paraguayan national, and that this conduct was a tort in violation of the law of nations. The district court nonetheless held that it lacked jurisdiction. The court acknowledged the strength of plaintiffs' argument that torture violates international law, but concluded that dismissal was compelled by two prior decisions of this Court, _ITT_ v. _Vencap, Ltd._, 519 F.2d 1001 (1975), and _Dreyfus_ v. _Von Finck_, 534 F.2d 24 (1976), cert. denied, 429 U.S. 835, which it read to establish that (A. 107-108)[2] --

> 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 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_.

2/ "A." references are to the joint appendix.

Because the court dismissed the complaint for lack of jurisdiction, it did not reach defendant's alternative argument for dismissal based on forum non conveniens. Plaintiffs appealed to this Court.

ARGUMENT

I

OFFICIAL TORTURE VIOLATES THE LAW OF NATIONS

The district court dismissed the complaint because it believed that the torture of a foreign citizen by an official of the same country does not violate the law of nations as that term is used in 28 U.S.C. 1350. If Section 1350 reached only those practices that historically have been viewed as violations of international law, the court's decision would very likely be correct. Before the turn of the century and even after, it was generally thought that a nation's treatment of its own citizens was beyond the purview of international law. But as we demonstrate below, Section 1350 encompasses international law as it has evolved over time. And whatever may have been true before the turn of the century, today a nation has an obligation under international law to respect the right of its citizens to be free of official torture.

A. Section 1350 encompasses the law of nations as that body of law may evolve

Section 1350 originated as Section 9 of the Judiciary Act of 1789 (1 Stat. 76 (1789)) and has not changed significantly since that time. It provides that:

> The 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.

This is one of several provisions in the Judiciary Act "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n. 25 (1964).

The law of nations in Section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed.[3/] Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789.

3/ Maritime law has evolved significantly since 1789. See Moragne v. State Marine Lines, 398 U.S. 375 (1970) (overruling an 1886 decision and holding that maritime law affords a remedy for wrongful death on navigable waters).

The Paquete Habana, 175 U.S. 677 (1900), illustrates this evolutionary process. There, the question was whether international law protected fishing ships from capture during times of war. Although a 1798 British case had held that the protection of such ships was a rule of comity only, the Court held that (id. at 694)--

> the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.

If the application of Section 1350 were limited to the subjects encompassed by the law of nations in 1789, leaving only the state courts competent to administer any rules of international law that might subsequently develop, the result would be to frustrate the statute's central concern for uniformity in this country's dealings with foreign nations. Accordingly, the district court's jurisdiction in this case turns not on whether the conduct alleged in the complaint would have been a violation of the law of nations in 1789, but on whether it is customarily treated as a violation of the law of nations today.

B. International law now embraces the obligation of a state to respect the fundamental human rights of its citizens

The view that a state's treatment of its own citizens is beyond the purview of international law was once widely held and is reflected in traditional works on the subject.[4/]

4/ E.g., L. Oppenheim, International Law: A Treatise, Vol. 1, 362-369 (2d Ed. 1912).

However, as we have stated, customary international law evolves with the changing customs and standards of behavior in the international community. Early in this century, as a consequence of those changing customs, an international law of human rights began to develop. This evolutionary process has produced wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law.

As we demonstrate in Part II, *infra*, this 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. But this distinction between judicially enforceable rights and rights enforceable only by the political branches should not obscure the central point we make here. The district court's assumption that a nation has no obligation under international law to respect the human rights of its citizens is fundamentally incorrect.

The sources of international law are international agreements, international custom, general principles of law recognized by civilized nations, and judicial decisions and

the teachings of learned commentators.[5] Developments in each of these areas have had a role in establishing the twentieth century international law of human rights.

The first significant treaty development was the Covenant of the League of Nations in 1919, which declared that the members of the League would attempt to secure and maintain fair and humane conditions of labor, and secure just treatment for the inhabitants of territory under their control.[6] Other early developments were the treaties entered into after World War I guaranteeing the religious, cultural, and political rights of national minorities.[7]

5/ Statute of the International Court of Justice, Article 38, June 26, 1945, 59 Stat. 1055, 1060 (effective October 24, 1945). See also, The Paquete Habana, supra, 175 U.S. at 700.

6/ The Covenant of the League of Nations, Articles 22, 23, June 28, 1919, reprinted in Treaties and Other International Agreements of the United States of America 1776-1949, 2 Bevans 48, 55-57(1969).

7/ See, e.g., Treaty Between the Principal Allied and Associated Powers and Poland, signed at Versailles, June 28, 1919, reprinted in Treaties, Conventions, International Acts, Protocol and Agreements Between the United States of America and Other Powers 1910-1923, 3 Malloy-Redmond 3714 (1923). In addition, the general treaties of peace concluding the war included provisions aimed at guaranteeing minority rights. See, e.g., Treaty of Peace with Austria, Part 3, Sec. 5, signed at St. Germaine-en-Laye, September 10, 1919, reprinted in 3 Malloy-Redmond 3149.

Treaty activity accelerated after World War II. In 1945, the United Nations Charter imposed on U.N. members a general obligation to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[8/] The U.N. Charter represents a clear break with the traditional view that a nation's treatment of its citizens is beyond the concern of international law--a break also evidenced by recognition in the Charter of the Organization of American States of "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."[9/]

More recently, the obligation of states to respect fundamental human rights has been reiterated in a growing number of more specific multilateral treaties. These include The International Covenant on Civil and Political Rights,[10/]

8/ United Nations Charter, June 26, 1945, Arts. 55, 56, 59 Stat. 1031, 1045-1046, 3 Bevans 1153, 1166-1167 (1969).

9/ Charter of the Organization of American States, Articles 3(j), 16, 43(a) (entered into force December 13, 1951), as amended by the Protocol of Buenos Aires of 1967 (entered into force Feburary 27, 1970), OAS Treaty Series No. 1-C, OAS, OR, OEA/Ser.A/2 (English), Rev. (1970), 21 U.S.T. 607, T.I.A.S. 6847. See also American Declaration of the Rights and Duties of Man, ch. 1 (1948), OAS, OR, OEA/Ser. L/V/E.23, Doc. 21, Rev. 2.

10/ General Assembly Resolution 2200 (XXI)A (December 16, 1966), entered into force March 23, 1976; Four Treaties Pertaining to Human Rights, Message from the President of the United States, S. Doc. No. Exec. C, D, E, and F, 95th Cong., 2d Sess. (1978).

The American Convention on Human Rights[11/] and The European Convention for the Protection of Human Rights and Fundamental Freedoms.[12/]

International custom also indicates that nations have accepted as law an obligation to observe fundamental human rights. In 1948, The United Nations General Assembly unanimously adopted the Universal Declaration of Human Rights,[13/] which goes beyond the UN Charter in specifying and defining the fundamental rights to which all individuals are entitled. The Universal Declaration has been followed by a growing number of U.N. resolutions clarifying and elaborating on these rights[14/] or invoking them in specific cases.[15/] In a parallel development, the International Conference on Security and Cooperation in Europe, which met in Helsinki and Geneva between 1973 and 1975, adopted a Final Act declaring that the participating nations would respect the human rights of their nationals.[16/] The Final

11/ Signed at San Jose, Costa Rica, November 22, 1969, entered into force July 18, 1978, OAS Treaty Series No. 36, OAS, OR, OEA/Ser.A/16(English).

12/ Signed November 4, 1950, entered into force September 3, 1953, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

13/ General Assembly Resolution 217 (III)A (December 10, 1948).

14/ See Addendum.

15/ See United Nations Action in the Field of Human Rights (1974), ST/HR/2 (Pub. Sales No. E.74.XIV.2), at 14-15.

16/ Conference on Security and Cooperation in Europe: Final Act (Helsinki, 1975), 73 Dep't State Bull. 323, 325 (1975).

Act, like the UN resolutions, does not have the legal effect of a treaty but provides evidence of customary international law.[17]

General principles of law recognized by civilized nations also establish that there are certain fundamental human rights to which all individuals are entitled, regardless of nationality. Although specific practices differ widely among nations, all nations with organized legal systems recognize constraints on the power of the state to invade their citizens' human rights. In the period 1948-1973, the constitutions or other important laws of over 75 states either expressly referred to or clearly borrowed from the Universal Declaration of Human Rights.[18]

17/ As further evidence, see Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625(XXV) (October 24, 1970). The Declaration proclaims that:

> Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

It further states:

> The principles of the Charter which are embodied in this Declaration constitute basic principles of international law * * *.

18/ United Nations Action in the Field of Human Rights, supra, at 17-18.

In the same period, the Declaration was referred to in at least 16 cases in domestic courts of various nations.19/

The decisions of the International Court of Justice also reflect and confirm the existence of a customary international law of human rights.20/ And the affidavits of four American experts in international law, filed by plaintiffs below, document the broad recognition among legal scholars that human rights obligations are now part of customary international law.21/

In sum, as the Department of State said in a recent report to Congress on human rights practices:

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. * * * There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity. 22/

19/ United Nations Action in the Field of Human Rights, supra, at 19.

20/ Nuclear Tests (Australia v. France), Judgment of December 20, 1974, [1974] I.C.J. 253, 303 (Opinion of Judge Petren); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

21/ See Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Myres S. MacDougal (A. 71); Affidavit of Richard Anderson Falk (A. 61-62).

22/ Department of State, Country Reports on Human Rights Practices for 1979, published as Joint Committee Print, House Comm. on Foreign Affairs & Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. (February 4, 1980) Introduction at 1.

We recognize that a panel of this Court has said that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." Dreyfus, supra, 534 F.2d at 31. As we have shown, however, this statement is incorrect and should not be followed.[23]

C. Freedom from torture is among the fundamental human rights protected by international law

Every multilateral treaty dealing generally with civil and political human rights proscribes torture. These include The American Convention on Human Rights,[24] The International

23/ Dreyfus mistakenly relied on Mr. Justice White's dissent in Sabbatino for its conclusion. At one point in his opinion Mr. Justice White does distinguish several cases decided long before the turn of the century as cases where violations of international law were not present because the parties were nationals of the acting state. 376 U.S. at 442, n. 2. However, Mr. Justice White makes clear elsewhere in his opinion that this is not the law today. In discussing a case in which an individual brought suit to recover property expropriated by the Nazis, Mr. Justice White specifically explained that "racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been condemned in multinational agreements and declarations as crimes against humanity." Id. at 457 n. 18. Accordingly, Mr. Justice White concluded, "the acts could * * * be measured in local courts against widely held principle rather than judged by the parochial views of the forum." Ibid. Mr. Justice White's opinion thus reinforces our view that international law prohibits a nation from violating the fundamental human rights of its citizens.

24/ Article 5 provides in relevant part, that--"No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." OAS Treaty Series No. 36, supra, at 2.

Covenant on Civil and Political Rights[25/] and The European Convention for the Protection of Human Rights and Fundamental Freedoms.[26/] In addition, the Geneva Conventions of 1949 forbid torture in international or domestic conflicts and declare it to be a "grave breach" of the conventions.[27/] This uniform treaty condemnation of torture provides a strong indication that the proscription of torture has entered into customary international law.[28/]

25/ Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." General Assembly Resolution 2200 (XXI)A, supra.

26/ Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

27/ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, Articles 3, 13, 129, 130.

28/ These treaty provisions, in conjunction with other evidence, are persuasive of the existence of an international norm that is binding as a matter of customary law on all nations, not merely those that are parties to the treaties. A, D'Amato, The Concept of Custom in International Law 103, 124-128 (1971).

The United States has signed both the American Convention on Human Rights and the International Covenant on Civil and Political Rights, and those instruments await the advice and consent of the Senate. See Four Treaties Pertaining to Human Rights, supra. Only European countries are entitled to be parties to the third treaty.

We do not suggest that every provision of these treaties states a binding rule of customary international law. Where reservations have been attached by a significant number of nations to specific provisions or where disagreement with provisions is cited as the ground for a nation's refusal to become a party, the near-unanimity required for the adoption of a rule into customary international law may be lacking.[29/] No such disagreement has been expressed about the provisions forbidding torture.

A court also must distinguish between provisions that reflect principles that are considered desirable but incapable of immediate realization and those provisions that codify fundamental human rights. Illustrative of the former category are the declarations in the International Covenant on Economic, Social and Cultural Rights that individuals are entitled to

29/ For instance, Article 20 of the International Covenant on Civil and Political Rights prohibits "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence * * *." Four Treaties Pertaining to Human Rights, supra, at 29. This provision conflicts with principles of free speech that are central to the political values of many democracies. A number of nations, including the United Kingdom, Sweden, Denmark, Norway, and Finland, expressed reservations to Article 20 upon ratifying the Covenant. Multilateral Treaties in Respect of Which the Secretary General Performs Depository Functions, UN Doc. ST/LEG/Ser. D/12 108, 112, 114 (1978). President Carter has proposed a similar reservation in connection with United States ratification. Four Treaties Pertaining to Human Rights, supra, at XI-XII.

favorable working conditions and to social security.[30/] In proposing that the Senate ratify that treaty, the Preside·· observed:

> Some of the standards established under these articles may not readily be translated into legally enforceable rights, while others are in accord with United States policy, but have not yet been fully achieved. It is accordingly important to make clear that these provisions are understood to be goals whose realization will be sought rather than obligations requiring immediate implementation. [31/]

The President further recommended that the Senate express its understanding that these and like provisions "described goals to be achieved progressively rather than through immediate implementation."[32/] The Covenant itself casts these principles in this light.[33/] In contrast, because torture is universally condemned and incompatible with accepted concepts of human behavior, the protection against torture must be considered a fundamental human right.

30/ International Covenant on Economic, Social, and Cultural Rights, Articles 7, 9. Four Treaties Pertaining to Human Rights, supra, at 15-16.

31/ Four Treaties Pertaining to Human Rights, supra, at X.

32/ Id. at IX.

33/ International Covenant on Economic, Social, and Cultural Rights, Article 2(1), Four Treaties Pertaining to Human Rights, supra, at 14.

International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use.[34/] That conduct evidences an awareness that torture is universally condemned. This universal condemnation is made explicit in The Universal Declaration of Human Rights, which declares that "No one shall be subjected to torture * * *."[35/] That principle has been reiterated in a number of unanimous UN resolutions, including the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UN Declaration on Torture").[36/]

34/ See, e.g., Affidavit of Richard Anderson Falk (A. 62); Affidavit of Thomas M. Franck (A. 64). In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of such torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture. The Department's Country Reports on Human Rights, supra, reports no assertion by any nation that torture is justified.

35/ General Assembly Resolution 217(III)A (December 10, 1948), Art. 5.

36/ General Assembly Resolution 3452(XXX) (December 9, 1975). Article 2 of the Declaration provides:

> Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to

(continued)

The UN Declaration on Torture not only confirms that international custom outlaws torture, but also supplies a precise definition of the conduct proscribed. The UN Declaration on Torture defines torture as--

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having

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36/ (continued)

> human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3 provides:

> No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

> committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners. [37/]

This definition provides guidance to any court that may be required to determine whether particular conduct violates the proscription of torture in customary international law.

Analysis of general principles of law also discloses consistent condemnation of torture in national constitutions and legislation. Torture is specifically forbidden in the constitutions of over 40 nations.[38/] The constitutions of over 15 addi-

37/ General Assembly Resolution 3452 (XXX) (December 9, 1975), Annex, Art. 1 (1). The United Nations Human Rights Commission is now drafting a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That draft Convention would require each party to make torture criminally punishable within its jurisdiction. It contains a very similar definition of torture (E/CN.4/1367, Annex at 1):

> For the purpose of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

38/ 48 Revue Internationale de Droit Penal Nos. 3 and 4, at 208 (1977). Paraguay is one such nation.

tional nations contain implicit prohibitions against torture.[39/] Eighteen states have incorporated the Universal Declaration of Human Rights in their constitutions and therefore have accepted the prohibition against torture contained in Article 5 of the Declaration.[40/]

Condemnation of torture is reflected in both constitutional and statutory law in the United States. Conduct falling within the definition of torture in the UN Declaration on Torture would be a criminal offense under 18 U.S.C. 242 and civilly actionable under 42 U.S.C. 1983 or under the United States Constitution. Moreover, with certain exceptions, federal statutes bar assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights", specifically including "torture."[41/] These statutes evidence the United States' acceptance of the international norm condemning torture and reflect the fact that the norm is certain enough to be cognizable by federal courts.

Finally, judicial decisions and the commentary of experts confirm that official torture violates international law. As shown in Part I-B, these authorities recognize the modern emergence of human rights norms in customary international law. Plaintiffs have submitted the affidavits of four American scholars confirming

39/ *Id.* at 208-209.

40/ *Id.* at 211.

41/ 22 U.S.C. 2304(a)(2), (d); 22 U.S.C. 2151.

that the proscription of torture is such a norm.[42/] And published commentary is to the same effect.[43/] In these circumstances, the conclusion that international law prohibits torture is inescapable.

II

OFFICIAL TORTURE IS A TORT AND GIVES RISE TO A JUDICIALLY ENFORCEABLE REMEDY

Not every violation of international law is a tort within the meaning of Section 1350. However, some such violations are judicially cognizable as torts. A corollary to the traditional view that the law of nations dealt primarily with the relationship among nations rather than individuals was the doctrine that generally only states, not individuals, could seek to enforce rules of international law. Sabbatino, supra, 376 U.S. at 422-423. Just as the traditional view no longer reflects the state of customary international law, neither does the latter doctrine.

Indeed, it has long been established that in certain situations, individuals may sue to enforce their rights under international law. For example, when a ship is seized on the high seas in violation of international law, the owner of the ship may sue to recover the ship as well as seek damages. The Paquete Habana, supra. Similarly, when there has been an assault on a foreign ambassador in violation of international law, domestic courts may properly furnish a remedy. Cf. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

42/ Affidavit of Richard Anderson Falk (A. 61-62); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Myres S. MacDougal (A. 71).

43/ O'Boyle, Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom, 71 Am.J. Int'l L. 674, 687-688 (1977).

The more recently evolved international law of human rights similarly endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. The highly respected Constitutional Court of Germany has recognized this right of individuals. The court declared that, although "contemporary generally recognized principles of international law include only a few legal rules that directly create rights and duties of private individuals by virtue of the international law itself," an area in which they do create such rights and duties is "the sphere of the minimum standard for the protection of human rights."[44/]

As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. As the Supreme Court said in The Paquete Habana, supra, 175 U.S. at 700:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

44/ In Matter of the Republic of the Philippines, 46 BVerfGE 342, 362 (2 BvM 1/76, December 13, 1977) (translated from the German by Stefan A. Riesenfeld); see also Borovsky v. Commissioner of Immigration, Judgment of September 28, 1951 (S.Ct. Philippines), summarized in [1951] United Nations Yearbook on Human Rights 287-288; Chirskoff v. Commissioner of Immigration, Judgment of October 26, 1951 (S.Ct. Philippines), summarized in id. at 288-289; Judgment of Court of First Instance of Courtrai (Belgium) of June 10, 1954, summarized in [1954] United Nations Yearbook on Human Rights 21 (courts relied on Universal Declaration of Human Rights in ordering release from detention).

Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Baker v. Carr, 369 U.S. 186, 211 (1962). Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government. See Sabbatino, supra, 376 U.S. at 423, 430 n. 34.

This does not mean that Section 1350 appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations. Cf. Sabbatino, supra, 376 U.S. at 423. The courts are properly 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. Sabbatino, supra, 376 U.S. at 428, 430 n. 34. 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 in Part I-C, official torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate.45/

From what we have said, it should be clear that a court is not at liberty to enforce its own views of policy under the guise of interpreting the requirements of international law. On the other hand, as the Supreme Court stated in Sabbatino, supra, 376 U.S. at 428:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

45/ There are few decisions which base judgments against torturers directly on customary international law. But this attests to the longstanding condemnation of torture under municipal law and the more recent evolution of international human rights law. Courts have, nonetheless, invoked customary international law along with municipal and treaty law in cases involving torture. Ireland v. United Kingdom, Judgment of January 18, 1978 (European Ct. of Human Rights) summarized in [1978] Y.B. Eur. Conv. on Human Rights 602 (Council of Europe) (UN Declaration of Torture relied on in interpreting the European Convention of Human Rights); Auditeur Militaire v. Krumkamp, Pasicrisie Belge, 1950.3.37 (February 8, 1950) (Belgian Counseil de guerre de Brabant), summarized in 46 Am.J. Int'l L. 162-163 (1952) (Article 5 of Universal Declaration of Human Rights, which prohibits torture and cruel treatment, cited as authority that under customary international law the defendant accused of war crimes was not free to use torture).

In this case, not only is there a consensus in the international community that official torture is unlawful, but Paraguay's Constitution expressly prohibits official torture[46/] and Paraguayan law recognizes a tort action as an appropriate remedy.[47/] The compatibility of international law and Paraguayan law significantly reduces the likelihood that court enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement.

Because international law and Paraguayan law both prohibit torture, this Court need not decide whether considerations of comity or a proper construction of Section 1350 might require a different result if, despite the nearly universal condemnation implicit in the existence of a rule of customary international law, the jurisdiction with the most immediate interest in the controversy did not prohibit torture. Similarly, this case does not present any questions concerning whether international law, Paraguayan law or federal common law will govern other aspects

46/ Article 45 of the Paraguayan Constitution.

47/ A. 51-53, 80.

of this lawsuit. The only question presented is whether official torture is a "tort * * * committed in violation of the law of nations * * *."[48] Because the district court erred in concluding that it is not, its judgment should be reversed and the case remanded for further proceedings.[49]

48/ Because the lower court dismissed for lack of jurisdiction, it did not decide whether the case should be dismissed on the ground of forum non conveniens. Although we agree with plaintiffs that this question should be addressed by the district court first, we note that when the parties and the conduct alleged in the complaint have as little contact with the United States as they have here, abstention is generally appropriate. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953). Plaintiffs assert that abstention is inappropriate because a tort suit in Paraguay would be a sham. For reasons of comity among nations, however, such an assertion should not be accepted absent a very clear and persuasive showing. In determining whether abstention is appropriate, the court should also consider the fact that the defendant has been deported. Compare United States v. Castillo, 615 F.2d 878, 882 (9th Cir. 1980).

49/ Defendant erroneously suggests (Br. 4-16) that Section 1350 is unconstitutional in conferring jurisdiction on federal courts to entertain tort actions under the law of nations. Customary international law is federal law, to be enunciated authoritatively by the federal courts. Sabbatino, supra, 376 U.S. at 425; see The Paquete Habana, supra, 175 U.S. at 700. 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. See Note, Federal Common Law and Article III: A Jurisdictional Approach to Erie, 74 Yale L.J. 325, 331-336 (1964).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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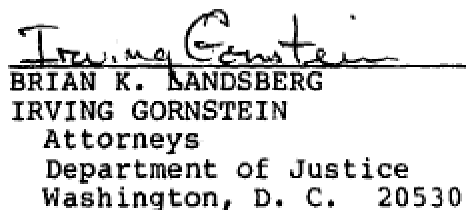

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ADDENDUM

1. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663(XXIV)C (July 31, 1957) and 2076(LXII) (May 13, 1977).

2. Declaration of the Rights of the Child, General Assembly Resolution 1386(XIV) (November 20, 1959).

3. Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514(XV) (December 14, 1960).

4. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 1904(XVIII) (November 20, 1963).

5. Declaration on the Elimination of Discrimination Against Women, General Assembly Resolution 2263(XXII) (November 7, 1967).

6. Declaration on Territorial Asylum, General Assembly Resolution 2312(XXII) (December 14, 1967).

7. The Proclamation of Tehran, unanimously proclaimed by the International Conference on Human Rights at Tehran, May 13, 1968, (convened pursuant to General Assembly Resolutions 2081(XX) (December 20, 1965), 2217(XXI)C (December 19, 1966) and 2339(XXII) (December 18, 1967), Final Act of the International Conference on Human Rights, Tehran, Iran, May 13, 1968, Human Rights: A Compilation of International Instruments of the United Nations (1973) ST/HR/1 (Pub. Sales No. E.73.XIV.2).

8. Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, General Assembly Resolution 3074(XXVIII) (December 3, 1973).

9. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly Resolution 3318(XXIX) (December 14, 1974).

10. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 3452(XXX) (December 9, 1975).

CERTIFICATE OF SERVICE

I certify that on May 29, 1980, I served this memorandum on all counsel by mailing two copies, first-class mail, postage prepaid to:

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