FEDERAL JURISDICTION AND THE PROTECTION OF INTERNATIONAL HUMAN RIGHTS

I
INTRODUCTION

The twentieth century has witnessed a marked change in the character of international law in the field of human rights. One of the most significant aspects of that change concerns the extent to which a citizen is entitled to protection against his own country's infringement of his fundamental rights, such as the right to freedom from torture and other cruel or degrading treatment. Traditionally, entitlement to such protection has been characterized as a domestic matter, unrelated to international law. International law has generally involved the relationship among nations and has conferred solely upon the state the right of redress for a violation of international law.[1] A treaty's obligations were perceived as running toward the signatory nations, and not toward the citizens of those nations. Thus, even when the subject matter of a treaty was of great importance to the individual, he was not entitled to invoke international law. An individual could seek relief for a violation of international law only through the internal mechanisms of his own state.[2] He faced a dim prospect of attaining such relief when the state itself was the alleged offender against his fundamental rights.

Gradually, the notion that the right to relief for violations of international law belongs solely to the state, and not to the aggrieved individual, has eroded. The widespread endorsement of such instruments as the United Nations Charter, the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and other international covenants, conventions, and declarations has contributed to this erosion.[3] Still unresolved is the extent to which the human rights norms

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1. *See* J. BRIERLY, THE LAW OF NATIONS 291-96 (6th ed. 1963).

2. R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 55 (1979); *see* C. HYDE, INTERNATIONAL LAW § 11B at 36-39 (2d ed. 1945).

3. U.N. CHARTER art. 1, 55, 56, 59 Stat. 1033, 1045-46 (1945); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/855, at 71 (1948), *reprinted in* BASIC DOCUMENTS OF THE UNITED NATIONS 168 (L. Sohn ed. 1968) [hereinafter cited as Universal Declaration]; European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter cited as European Convention]. *See also* International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter cited as International Covenant].

embodied in these international instruments have become part of customary international law.[4] The question involves the modern attempt to define and enforce substantive human rights. This Note will explore these concerns in relation to the proper role of the federal courts of the United States in deciding cases which involve allegations of torture prohibited under international law.

The Note will focus upon the case of *Filartiga v. Pena-Irala*,[5] which currently confronts the Second Circuit with the question whether, for purposes of jurisdiction under 28 U.S.C. § 1350, the Alien Tort Claims Act, torture should be held to be violative of either the law of nations or of a treaty of the United States. This Note will suggest that the prohibition of torture in human rights instruments has become a norm of international law which binds governments in their relations with their own citizens.[6] Consequently, an alien's allegations of torture committed by an official of the alien's state satisfies jurisdictional requirements when federal jurisdiction is grounded upon violations of international law. This Note will then inquire into the policy considerations relevant to the federal courts' decision whether to exercise that jurisdiction.

II
A TEST CASE: *FILARTIGA V. PENA-IRALA*

Filartiga is an action for damages for the torture and wrongful death of 17-year-old Joelito Filartiga brought by his father, Joel, and sister, Dolly, against Americo Norberto Pena-Irala, a high-ranking official in the political police unit of the Stroessner government of Paraguay. The plaintiffs allege that Pena-Irala tortured Joelito to death in an attempt to obtain a "confession" against and to intimidate his father, an opponent of the Stroessner regime.[7] In April 1979, when both Dolly Filartiga and Pena-Irala were residing as aliens in the United States, the Filartigas brought a tort action in the Eastern District of New York under 28 U.S.C. § 1350, the Alien Tort Claims Act. Section 1350 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."[8]

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4. For an explanation of what constitutes customary international law *see* text accompanying notes 15-18, *infra*.

5. No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979).

6. *See* R. LILLICH & F. NEWMAN, *supra* note 2, at 55; Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 297 (1965-66); Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31, 32 (1978) [hereinafter cited as Humphrey, *Implementation*]; Klayman, *The Definition of Torture in International Law*, 51 TEMPLE L.Q. 449, 452-75 (1978).

7. Brief for Appellants at 4, Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979) [hereinafter cited as Brief for Appellants].

8. Alien Tort Claims Act, § 24, 28 U.S.C. § 1350 (1976). Plaintiffs asserted, as an alternate basis for jurisdiction, the "arising under" or "federal question" statute, 28 U.S.C. § 1331;

The plaintiffs claimed that federal jurisdiction over their tort claim has been triggered because torture is both a tort under domestic law and a violation of either customary international law or of a United States treaty. The district court denied jurisdiction on the basis of dicta in prior Second Circuit opinions construing a "violation of the law of nations" under section 1350 to be a "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*." [9] Under this dictum the "law of nations" would not encompass the relationship between an individual and his own state. While Judge Nickerson felt bound by prior constructions of section 1350, he recognized the strength of the plaintiffs' argument that the statute should be read more broadly and that international instruments, nearly universally accepted, reflect the emergence of a norm of customary international law proscribing torture.[10] Upon dismissal of the complaint, the Filartigas appealed the question whether the case satisfies the prerequisites for federal jurisdiction under section 1350.

In the course of the appeal, the question whether state courts would have jurisdiction was apparently resolved in favor of such jurisdiction. Appellants contended that state courts would have "universal civil jurisdiction" over the action. Since wrongful death by torture is a transitory tort, under principles of private international law the plaintiff's right to redress follows the plaintiff and may be enforced wherever the tortfeasor may be found.[11] Appellants asserted that, though jurisdiction is discretionary rather than compulsory in accordance with *forum non conveniens* principles, state courts in the United States, as courts of general jurisdiction, may entertain foreign tort actions between aliens.[12] During oral argument, the appellee conceded that state jurisdiction

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however, the district court limited its decision to the question of § 1350 jurisdiction. On appeal, while the issue again concerns § 1350 jurisdiction, plaintiff-appellants have argued in addition that the prerequisite of § 1331 jurisdiction is satisfied since treaty law and customary international law are automatically incorporated into the "law of the land," and torture violates both bodies of law. Brief for Appellants, *supra* note 7, at 2. *See also* Brief for Amnesty International–U.S.A., *et al.* as amici curiae, at 21. Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979). This Note will limit its examination to the claims under § 1350.

9. No. 79 C 917 (E.D.N.Y. 1979), slip op. at 4 (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).

10. *Id.* The district court opinion did not address whether a treaty had been violated.

11. Brief for Appellants, *supra* note 7, at 11-14; Transcript of Oral Argument, Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979).

12. Since state courts are courts of general jurisdiction, they do not need a specific grant of jurisdiction, as do federal courts, to decide a tort action such as the Filartigas'. *See, e.g.*, Varkonyi v. Varig, 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968), which did not question that jurisdiction lay in state court over an alien's action though the action was dismissed on *forum non conveniens* grounds. *See also* Mexican Nat'l Co. v. Jackson, 89 Tex. 107, 116, 33 S.W. 857, 861 (1896); Eingartner v. Ill. Steel Co., 94 Wis. 70, 76, 68 N.W. 664,

would be possible as long as it could be shown that the appellee's actions were actionable under the relevant foreign law, the *lex loci delicti commissi*. Pena-Irala contended that the Filartigas' attempt to bring the action in federal court ignored the "normal tort basis" of state court jurisdiction in an effort to base the complaint in international law.[13] The jurisdiction of at least the state courts was thus apparently conceded.

To resolve the issue of federal jurisdiction the Second Circuit must determine whether the prohibition of torture has become a part of customary international law or is contained in any United States treaty, as required for federal jurisdiction under section 1350. This Note will likewise survey the development of the prohibition of torture in international law before examining the proper function of federal courts in enforcing international human rights in cases such as *Filartiga*.

III
TORTURE AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW

A. Determining Which Norms Have Become Part of Customary International Law

American courts have found it difficult to determine the content of customary international law.[14] One problem lies in determining the proper

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667 (1896). The court in *Nat'l Ry. Co. v. Jackson* recognized that jurisdiction will lie in state courts over torts committed in foreign countries and set forth principles behind the propriety of exercising that jurisdiction:

> The reason which influences the courts of one State to permit transitory actions in torts to be maintained therein, when the right accrued in a foreign State or country, is that the defendant, having removed from such other State or country, cannot be subjected to the jurisdiction of the courts where the cause of action arose, and as a matter of comity, but more especially to promote justice, the courts of the place where he is found will enforce the rights of the injured party against him, because it would be unjust that the wrongdoer should be permitted, by removing from the country where he inflicted the injury, to avoid reparation for the wrong done by him.

89 Tex. 107, 116, 33 S.W. 857, 861 (1896). Thus, as in diversity cases, appellants argued that jurisdiction lies in both state and federal forums. *See* note 222 *infra* for discussion of the possible state forum. *See also* Brief for Appellants, *supra* note 7, at 11-14.

13. Transcript of Oral Argument, Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979).

In addition to arguing that official torture does not violate international law, the appellee contended that a finding of federal jurisdiction would be inconsistent with the limited jurisdiction conferred by Article III of the Constitution. Brief for Appellee, Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), appeal docketed, No. 79-6090 (2d Cir. May 16, 1979) at 4-11. As the appellants argued, however, Article III should be construed to confer jurisdiction over cases involving the law of nations, which has always been part of the federal common law. Appellants' Reply Brief, Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979), at 4-13; *see generally* C. WRIGHT, HANDBOOK OF THE FEDERAL COURTS § 60 (3d ed. 1976); Dickinson, *The law of Nations as Part of the National*

sources of international law. Unlike most domestic legal systems where statutes, decrees, regulations, and judicial rulings are formulated pursuant to a constitution, there is no comparable, universally accepted document or institution in the international sphere. While the United Nations serves to some extent as an authoritative body, its Charter and decisions ultimately derive their force from the voluntary consensus of member nations.[15]

The two categories of international law are analogous to aspects of United States domestic law. The first, customary international law, corresponding to the unwritten common law of English and American tradition, is comprised of certain general principles, rules, and usages. The second, the written body of conventional international law, consists of conventions, treaties (including the U.N. Charter), and other international agreements which, though they have the binding effect of domestic statutes, most closely resemble contracts negotiated between states.[16]

Customary international law has broad binding effect: rules which are part of that corpus of law, although uncodified, are binding upon all states.[17] Treaties, by contrast, bind only those states which ratify them, with the important exception of treaties which codify rules of customary international law. International conventions or treaties, such as the U.N. Charter, impose upon ratifying states legal obligations with respect to the observance of human rights.[18] There is a consensus among legal scholars that similar legal obligations are imposed upon nonsignatory states in instances of wide ratification of human rights treaties, either because the treaties declare existing customary international law or because adoption of the treaties has, over time, created norms of customary international law.[19]

According to the United States Supreme Court, norms constituting customary international law "may be ascertained by consulting the works of jurists, writing professedly on public law; or by general usage and practice of nations;

Law of the United States, 101 PA. L. REV. 26, 27 (1952). Accordingly, if torture is prohibited by the law of nations, there would be a constitutional basis for construing § 1350 as conferring federal jurisdiction over the Filartigas' claim. *See* Part IV, *infra*.

14. *See, e.g.*, Dreyfus v. Von Finck, 534 F.2d 24, 30-31 (2d Cir.), *cert. denied* 429 U.S. 835 (1976).

15. R. LILLICH & F. NEWMAN, *supra* note 2, at 54.

16. *Id.* at 55. The legal force of treaties derives from Article VI, clause 2 of the United States Constitution, which makes them, along with federal statutes, the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2.

17. R. LILLICH & F. NEWMAN, *supra* note 2, at 55. *See also* Humphrey, *Implementation*, *supra* note 6, at 32.

18. *See, e.g.*, Schwelb, *The International Court of Justice and the Human Rights Clauses of the Charter*, 66 AM. J. INT'L L. 337, 350 (1972) [hereinafter cited as Schwelb, *The International Court*]. *See also* Schachter, *The Charter and the Constitution: The Human Rights Provisions in American Law*, 4 VAND. L. REV. 643, 646-53 (1951) [hereinafter cited as Schachter, *The Charter and the Constitution*].

19. *See* R. LILLICH & F. NEWMAN, *supra* note 2, at 55; Baxter, *supra* note 6, at 277; Humphrey, *Implementation*, *supra* note 6, at 32; Klayman, *supra* note 6, at 452. *See also* text accompanying notes 41-44, *infra*.

or by judicial decisions recognising and enforcing that law."[20] Article 38 of the Statute of the International Court of Justice provides a contemporary outline of the sources of international law.[21] The sources fall into five categories: (1) "international conventions"; (2) "international custom, as evidence of a general practice accepted as law"; (3) "the general principles of law recognized by civilized nations"; (4) "judicial decisions"; and (5) "teachings of the most highly qualified publicists of the various nations."[22] The first Article 38 category pertains to conventional international law and the other four to customary law. As noted, the conventional and customary bodies of law together constitute international law. To determine whether an allegation of torture satisfies section 1350's requirement of a "violation of the law of nations," then, one must examine the extent to which the prohibition against torture is found in each of the Article 38 categories.

B. Evidence that the Norm Prohibiting Torture Has Become Part of Customary International Law: The Article 38 Sources

1. International Conventions

The United Nations human rights program and similar programs of other international organizations have gradually defined the substantive norms of international human rights law.[23] The U.N. Charter is especially important since it has provided the basis for subsequent humanitarian conventions, which tend to build upon one another.[24] An inquiry into whether the proscription of torture has become part of customary international law must begin with the U.N. human rights program's two principal documents: the U.N. Charter, particularly Articles 1, 55, and 56, and the Universal Declaration of Human Rights.

The human rights provisions of the U.N. Charter, part of conventional international law, are binding upon member states.[25] The Charter obligates

20. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820). *See also* The Paquete Habana, 175 U.S. 677, 708 (1900).

21. Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

22. *Id.* The Article 38 categories are used in this Note for purposes of organization. They are not indispensible to analysis of the problem.

23. Klayman, *supra* note 6, at 452-53. In international law, the field of human rights, particularly since World War II, must be viewed as a radical departure from international law generally, which did not recognize individual rights. *See* text accompanying notes 111-12, *infra*. *See also* HUMAN DIGNITY: THE INTERNATIONALIZATION OF HUMAN RIGHTS (A. Henkin ed. 1979).

24. Klayman, *supra* note 6, at 452-53.

25. *See* Legal Consequences for the Status of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, 28, 57 [hereinafter cited as South Africa in Namibia] which declares that the Charter imposes affirmative legal obligations in the area of human rights. For discussions of the binding effect of the Charter's human rights articles *see also* Humphrey, *Implementation*, *supra* note 6, at 31; Schwelb, *The International Court*, *supra* note 18, at 349-50; Schachter, *The Charter and the Constitution*, *supra* note 18, at 646-53.

those states to "take joint and separate action in cooperation"[26] with the United Nations in promoting and encouraging "respect for . . . human rights."[27] Although the Charter does not specifically enumerate these rights, subsequent human rights instruments, such as the Universal Declaration of Human Rights,[28] have defined them.

The Universal Declaration, although not a treaty and thus without a treaty's legal force, is a crucial component of the United Nations human rights program. The Declaration interprets and gives substantive content to the Charter's human rights provisions. For example, it explicitly prohibits torture: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[29] The Declaration was adopted without a dissenting vote by a highly representative body of the international community.[30] Since the Declaration's adoption in 1948 it has been invoked as law both within and without the United Nations, notwithstanding its lack of legal effect as a treaty.[31] Some of the Declaration's provisions, such as the prohibition of torture, have been incorporated into international conventions and national constitutions.[32] Moreover, the Declaration has been fully incorporated into certain international treaties and conventions, beginning with the Special Statute for Trieste of

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26. U.N. CHARTER, art. 56, 59 Stat. 1033, 1045-46 (1945). Article 55 provides, in relevant part:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
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> * * *
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> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 provides:

> All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

27. U.N. CHARTER, art. 55(c), 59 Stat. 1033, 1045-46 (1945).

28. *See* International Covenant, *supra* note 3; Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1966) [hereinafter cited as Optional Protocol]; Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75 (M. Bos ed. 1973) [hereinafter cited as Humphrey, *Twentieth Century*].

29. Universal Declaration, *supra* note 3, at art. 5. *See also* International Covenant, *supra* note 3, at art. 7; European Convention, *supra* note 3, at art. 3; American Convention on Human Rights, *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II 23 doc. rev. 2 (English 1975), art. 5, *reprinted in* R. LILLICH & F. NEWMAN, *supra* note 2, at 985 [hereinafter cited as American Convention]; Klayman, *supra* note 6, at 455-75.

30. Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, 1959 AM. SOC'Y INT'L L. PROC. 217, 218 [hereinafter cited as Schwelb, *Influence of the Universal Declaration*]. *Cf.* Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316, 322 (1949), for a discussion of the original intention on the part of some states, including the United States, that the Declaration have no binding effect.

31. *See* Schwelb, *Influence of the Universal Declaration*, *supra* note 30, at 219.

32. *See id.* at 222-23.

1954.[33] This full incorporation has served to give the Declaration the force of law.[34]

Specific prohibitions of torture, closely paralleling the prohibition contained in Article 5 of the Universal Declaration, have also been set down in three landmark multilateral humanitarian treaties: the European Convention for the Protection of Human Rights and Fundamental Freedoms,[35] the International Covenant on Civil and Political Rights,[36] and the American Convention on Human Rights.[37] Although some conventions, such as the International Covenant on Civil and Political Rights, allow states "[i]n time of public emergency which threatens the life of the nation"[38] to restrict the exercise of certain rights provided under the convention, each such convention expressly prohibits any derogation of the right to freedom from torture.[39] Likewise, the U.N. Charter's recognition in Article 2(7) of state sovereignty over essentially domestic matters cannot be invoked as a justification of torture in time of public emergency. U.N. resolutions and conventions have made torture a matter of international concern and would override any such invocation. The prohibition of torture, as a matter of international law, is absolute.[40] States such as Paraguay, which have declared a national state of emergency compelling restrictions on the exercise of certain rights, cannot thereby justify torture.[41]

International conventions are the first source of international law outlined in Article 38 of the Statute of the International Court of Justice. These conventions, binding upon signatory states, may likewise bind nonsignatories if the conventions' norms are also norms of customary international law. Furthermore, these international conventions may be considered in determining

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33. 9 U.N. SCOR, Supp. (Oct.-Dec. 1954) 2, U.N. Doc. S/3301; 31 DEP'T STATE BULL. 556 (1954). *See* Schwelb, *Influence of the Universal Declaration, supra* note 30, at 219-20.

34. Schwelb, *Influence of the Universal Declaration, supra* note 30, at 219-20.

35. European Convention, *supra* note 3.

36. International Covenant, *supra* note 3, art. 7.

37. American Convention, *supra* note 29.

38. International Covenant, *supra* note 3, art. 4(1); *see also* European Convention, *supra* note 3, art. 15(1); American Convention, *supra* note 29, art. 27(1).

39. *See, e.g.*, International Covenant, *supra* note 3, art. 4(2); European Convention, *supra* note 3, art. 15(a); American Convention, *supra* note 29, art. 27(a).

40. 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, 686 (1977).

41. *See id.;* Joint Appendix to Brief for Appellants, at 39, Filartiga v. Pena-Irala, No. 79 C 917 (E.D.N.Y. 1979), *appeal docketed* No. 79-6090 (2d Cir. May 16, 1979) (Amnesty International, U.S.A., Deaths under Torture and Disappearance of Political Prisoners in Paraguay) [hereinafter cited as Joint Appendix]. *See also* Ireland v. The United Kingdom, Application No. 5310/71, *Report of the European Commission of Human Rights* 151-220 [hereinafter cited as *Commission Decision*], *summarized in* [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 512-949 (Eur. Comm. on Human Rights), *aff'd* Eur. Ct. Human Rights, Jan. 18, 1978, *summarized in* [1978] Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Council of Europe); Letter from the Permanent Representative of Greece to the United Nations to the Secretary-General (Aug. 12, 1973), U.N. Doc. E/5415 (1973), *reprinted in* R. LILLICH & F. NEWMAN, *supra* note 2, at 354.

whether a specific prohibition, duty, or value has become a norm of customary international law.[42] Commentators have agreed that multilateral humanitarian treaties may constitute a special class and have particular evidentiary significance in discerning the content of customary international law.[43]

Professor Baxter has suggested that three types of treaties may reflect customary legal norms.[44] At one extreme are treaties expressly purporting to codify such norms; at the other are treaties which constituted new law at their adoption, but have come to embody customary international law as it exists today. Midway between are treaties which happen to conform to customary international law existing independently of the treaty, by virtue of state practice and widely accepted principles. If a treaty is of the first type, purporting to declare existing customary norms, the treaty may simply be taken as evidence of such norms.[45] If a treaty is of the other types, however, it is necessary to undertake a complex process of marshalling proof that the treaty's provisions were concurrently or subsequently identical with customary law before the treaty may be used as evidence of customary norms.[46]

As a general rule, the party relying on a treaty as evidence of a customary legal norm carries this burden of proof. According to Professor Baxter and other commentators, however, humanitarian treaties may be an exception to the general rule.[47] When a humanitarian treaty has received wide ratification, its standards may be taken as adopted into customary law so as to bind nonparties. This may be justified by the special character of humanitarian treaties. While it would be untenable, for instance, to bind nonparties to the standards of a treaty made for the economic benefit of states, such as a treaty concerning customs duties, humanitarian treaties restrain state conduct to protect individual rights, and therefore may be considered universally binding. Furthermore, general standards established in the earlier humanitarian conventions have been built upon in successive conventions, which often contain detailed implementations of the general norms.

These characteristics legitimate the use of humanitarian treaties as evidence of customary international law.[48] Thus, widely ratified humanitarian conventions may be examined to determine whether the prohibition of torture has become a norm of customary international law. In effect, this means that

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42. *See The Prevention and Suppression of Torture*, 48 REVUE INTERNATIONALE DE DROIT PENAL 72 (1977) [hereinafter cited as *Suppression of Torture*].

43. Klayman, *supra* note 6, at 452; Baxter, *supra* note 6, at 277-78.

44. Baxter, *supra* note 6, at 278.

45. *Id.* at 298-99. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 (1951), which carries internal evidence that it is declaratory of existing customary international law.

46. Baxter, *supra* note 6, at 285, 298.

47. *Id.* at 299. *See also* Klayman, *supra* note 6, at 452.

48. Baxter, *supra* note 6, at 285-86. Professor Baxter adds that such a view "requires acceptance of the notion that there is such a thing as true international legislation, by which the majority binds the dissenting or passive minority." *Id.* at 299.

the first Article 38 source, international conventions, may shed light on the second source, international custom, as evidence of a general practice accepted as law.[49] In addition to reflecting state practice, these conventions may constitute evidence of the third source, the general principles of law recognized by civilized nations. Widely ratified conventions indicate the common standards which states, for international purposes, have been willing to recognize concerning the treatment of their citizens.[50] The humanitarian conventions either may reveal and interpret customary rules already generally accepted, or, where they have been adopted by the great majority of states, may have led to the formation of customary international human rights norms binding nonparties as well.[51] Arguably, then, the Charter's provisions and those of other multilateral humanitarian treaties deserve special weight as evidence of the content of customary international law. In these provisions, the international community has manifested recognition of legal standards and current practice. Thus, without attempting to marshal proof as to the precise character of each such convention,[52] one may look to provisions of the Charter and subsequent multilateral humanitarian conventions as evidence of a customary norm prohibiting torture.

2. *International Custom and General Principles Recognized by Civilized Nations*

The second and third sources of international law also comprise international instruments which lack the binding effect of conventions. Among these instruments is the Universal Declaration of Human Rights. Its nearly universal acceptance, its incorporation in treaties and domestic constitutions, and its use in interpreting the U.N. Charter have been discussed.[53] Two statements further reveal the Universal Declaration's status as part of customary international law. The Montreal Statement, adopted in 1968 by the non-governmental Assembly for Human Rights, asserted that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law."[54] That same year, a U.N.-sponsored meeting produced the Proclamation of Teheran which stated that "the Universal Declaration of Human Rights . . . constitutes an obligation for the members of the international community."[55] These invocations, incorporations, and statements have given legal

49. *Id.* at 297 *quoting* I.C.J. STAT., art. 38, para. 1; *see Suppression of Torture, supra* note 42, at 70-72.

50. *See* Baxter, *supra* note 6, at 297; Klayman, *supra* note 6, at 452-53.

51. Klayman, *supra* note 6, at 452.

52. *See* text accompanying notes 44-48, *supra.*

53. *See* text accompanying notes 30-34, *supra.*

54. *Montreal Statement of the Assembly of Human Rights,* 9 J. INT'L COMM. JURISTS 94, 95 (1968).

55. Proclamation of Teheran, U.N. Doc. A/Conf. 32/41 (1968), U.N. Sales Pub. No. E.68 XIV. 2, 3, 4.

force to the Universal Declaration as part of the customary body of law. This conclusion is supported by the consensus among scholars, judges, and states' representatives throughout the international community that the Universal Declaration "is now part of the customary law of nations and therefore is binding on all states."[56]

In 1975, the General Assembly of the United Nations adopted the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which specifies in Article 2: "Any act of torture . . . is an offence to 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."[57] Although resolutions of the General Assembly, such as the Declaration Against Torture, are not binding, they manifest general principles recognized by civilized nations.[58] When such resolutions are "concerned with general norms of international law, then acceptance by a majority vote constitutes *evidence* of the opinions of governments in the widest forum for the expression of such opinions."[59] The Declaration Against Torture's invocation of the Charter, which is legally binding, adds to the resolution's evidentiary significance. The Declaration is one of five General Assembly resolutions concerning torture adopted since 1973.[60] Not a single vote was cast against these resolutions.[61]

In 1978, the General Assembly approved a draft resolution calling upon the U.N. Commission on Human Rights to draft an international convention against torture and other cruel, inhuman, or degrading treatment or punishment.[62] The Draft Convention for the Prevention and Suppression of Tor-

56. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976). *See* R. LILLICH & F. NEWMAN, *supra* note 2, at 65-67; Schwelb, *Influence of the Universal Declaration*, *supra* note 30, at 219-20.

57. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10034 (1975) [hereinafter cited as Declaration Against Torture].

58. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 11 (1st ed. 1966).

59. *Id.*

60. Question of torture and other cruel, inhuman or degrading treatment or punishment, G.A. Res. 3059, 28 U.N. GAOR, Supp. (No. 30) 74, U.N. Doc. A/9030 (1973); Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, G.A. Res. 3218, 29 U.N. GAOR, Supp. (No. 31) 82, U.N. Doc. A/9631 (1974); Torture and other cruel, inhuman or degrading treatment or punishment in relation to detention and imprisonment, G.A. Res. 3453, 30 U.N. GAOR, Supp. (No. 34) 92, U.N. Doc. A/10034 (1975); Torture and other cruel, inhuman or degrading treatment or punishment, G.A. Res. 31/85, 31 U.N. GAOR, Supp. (No. 39) 102, U.N. Doc. A/31/39 (1976).

61. *Suppression of Torture*, *supra* note 42, at 74. Resolution 3059 was adopted unanimously; resolution 3218 was adopted by a vote of 125-0-1, with Zaire abstaining; resolution 3453 was adopted without vote; resolution 31/85 was adopted without vote. *Id.* at 86-87 & nn. 37, 38, 42, 44.

62. Draft convention against torture and other cruel, inhuman or degrading treatment or punishment, G.A. Res. 31/62, U.N. GAOR, Supp. (No. 45) 137, U.N. Doc. A/32/45 (1977). *See Suppression of Torture*, *supra* note 42, at 74-75.

ture[63] may be considered a codification of the norm expressed in both the Universal Declaration and the Declaration Against Torture. In addition, the Draft Convention defines more precisely the prohibition in existing conventions and provides enforcement procedures. The Draft Convention declares torture to be "a crime under international law."[64] States must enact implementing legislation to ensure that any act of torture is punishable under domestic law,[65] and domestic courts must exercise jurisdiction over offenders under the principle of universal jurisdiction.[66]

A nation's foreign policy is further evidence of international custom and of internationally recognized principles. American foreign policy has particular evidentiary value since the United States has not yet ratified, apart from the U.N. Charter, the major multilateral humanitarian conventions.[67] Any obligations influencing its policy, therefore, must rest upon the U.N. Charter and customary international law. American foreign policy clearly reflects the determination that individuals are entitled to protection against torture under international law. This policy indicates that international "custom" and "general principles" have developed to the point where violations of internationally guaranteed rights of individuals, as subjects of international law, have substantial impact upon relations between nations, the law's traditional subjects.[68]

A clear demonstration of this development exists in an extensive body of federal legislation. Norms developed in international law have become the basis for withdrawals of foreign aid. Incorporating the language of U.N. enactments, Congress has provided for the withdrawal of security assistance from "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights."[69] A substantial number of nations are affected by statutes which require that the Secretary of State report to Congress on human rights practices of those nations being considered for United States aid, such as the Foreign Assistance Act of 1974.[70] For example, with the enactment of that statute, all military aid to Chile has

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63. Draft Convention for the Prevention and Suppression of Torture, 48 REVUE INTERNATIONALE DE DROIT PENAL 265 (1977) [hereinafter cited as Draft Convention Against Torture].

64. *Id.* art. I, at 267.

65. *See id.* art. IV, at 268.

66. *Id.* arts. IV & IX, at 268-69.

67. President Carter has signed the International Covenant, *supra* note 3, and the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) [hereinafter cited as Covenant on Economic Rights]. They have not yet been ratified by the Senate. *See generally* Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

68. *See* text accompanying notes 148-68, *infra*.

69. 22 U.S.C. § 2304(a)(2) (1976); *see also* 22 U.S.C. § 2151n(a) (1976), 7 U.S.C. § 1712 (Supp. 1978). Torture frequently heads the list of violations. *See, e.g.*, 22 U.S.C. §§ 2304(d)(1), 2151n(a) (1976), 7 U.S.C. § 1712(a) (Supp. 1978).

70. 22 U.S.C. § 2304(a)(1) (1976). *See, e.g.*, International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 301 (b), 90 Stat. 729 (1976) (codified at 22 U.S.C. § 2384).

been prohibited;[71] in 1976 a similar restriction was commenced with respect to Uruguay.[72]

Official statements demonstrate that treatment of foreign nationals by their own governments is a prominent concern in the shaping of American foreign policy. In his 1977 address to the United Nations General Assembly, President Carter asserted that "no member of the United Nations can claim that mistreatment of its own citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world."[73] Similarly, Mark Schneider, Deputy Assistant Secretary of Human Rights and Humanitarian Affairs of the Department of State,[74] focused upon the customary norms of human rights embodied in international instruments in his testimony before Congress in 1977:

> To those who argue that our concern for the human rights of people in other lands constitutes intervention, we say look to the Charter of the United Nations, to the Universal Declaration of Human Rights, to the Helsinki Final Act, to the Declaration Against Torture adopted by the United Nations in 1975 . . . . No nation in the world today can hide torture, apartheid, arbitrary imprisonment, censorship, or other such violations of human rights behind assertions of sovereignty. The denial of internationally recognized human rights and fundamental freedoms is a matter of international concern.[75]

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71. *See, e.g.*, Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 25, 88 Stat. 1795 (1974) (codified in scattered sections of 22 U.S.C.).

72. *See, e.g.*, Foreign Assistance and Related Programs Appropriations Act, 1977, Pub. L. No. 94-441, § 505 90 Stat. 1465 (1976).

Other countries affected by such statutes include Ethiopia, Argentina, Brazil, El Salvador, Guatemala, The Philippines, Vietnam, Cambodia, Laos, Angola, Mozambique, and Cuba. *See, e.g.*, Foreign Assistance and Related Programs Appropriations Act, 1978, Pub. L. No. 95-148, §§ 113, 503 A, B, C, 506, 507, 91 Stat. 1230 (1977) (22 U.S.C. §§ 262 (d-1), 1819, and scattered sections). Another restriction on aid pertinent to Paraguay and the *Filartiga* case is pursuant to the International Security Assistance Act of 1978, Pub. L. No. 95-384, § 6, 92 Stat. 730 (1978) (codified at 22 U.S.C. §§ 2304, 2347, 50 U.S.C. §§ 2401, 2403). The Senate version of the Act prohibited use of 1979 funds for Nicaragua and Paraguay. Though the conference committee's version of the Act did not name the countries, the exact amount of funding designated for Nicaraqua and Paraguay was eliminated. CONG. RESEARCH SERVICE, LIBRARY OF CONG., 95TH CONG., 2D SESS., HUMAN RIGHTS AND U.S. FOREIGN POLICY 19 (Nov. 1, 1979).

73. Address by President Carter to the United Nations General Assembly (Mar. 17, 1977), *reprinted in* 76 DEP'T STATE BULL. 329, 332 (1977).

74. In 1976, Congress had established a Coordinator for Human Rights and, the following year, elevated the Coordinator to the position of Assistant Secretary of Human Rights and Humanitarian Affairs as a means of strengthening U.S. foreign policy in the area of human rights. Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 301, 90 Stat. 729 (1976) (codified at 22 U.S.C. §§ 2304, 2384 (Supp. 1979)); Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, § 109, 91 Stat. 844 (1977).

75. *Human Rights and U.S. Foreign Policy: A Review of the Administration's Record, Hearings before the Subcomm. on International Organizations of the House Comm. on International Relations*, 95th Cong., 1st Sess. 2 (1977) (statement of Mark L. Schneider).

Both President Carter and Deputy Assistant Secretary Schneider made the important assumption that each member of the United Nations has an affirmative duty to halt and prevent human rights violations against both its own citizens and those of other states. The Deputy Assistant Secretary's enumeration of the U.N. declarations as binding international instruments implies that the universal prohibition of torture, among other offenses, is grounded in customary international law.

In recent years, wide-scale condemnation by the international community of the governments of Chile and Greece, for example, also indicates the development of a legal norm prohibiting torture.[76] The International Association of Penal Law has found that "torture to extract confessions was at one time a part of most legal systems of the world, but now has been rejected by virtually all nations."[77] No state claims a right to engage in torture.[78] These developments in state policy regarding torture reflect a general principle recognized by civilized nations, the third Article 38 category.

3. The Decisions of Judicial and Quasi-Judicial Organs

The decisions of national and international tribunals, the fourth source of international law, also recognize a legal norm prohibiting torture. An opinion of the European Commission on Human Rights, a quasi-judicial body, is of the kind to be considered in ascertaining the law of nations. The Commission's findings may be considered as both judicial decisions and teachings of the most highly qualified publicists, the fourth and fifth Article 38 categories. In *Ireland v. United Kingdom,*[79] for example, the Commission considered the Irish Government's challenge to the United Kingdom's exercise of an emergency power of internment and use of "five techniques" of interrogation.[80] Finding that the European Convention "by its ratification creates rights of individuals under international law,"[81] the Commission decided that the "five techniques" constituted "inhuman and degrading treatment" and "torture,"[82] in violation of both the Convention and of international law generally.[83]

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76. *See, e.g.*, R. LILLICH & F. NEWMAN, *supra* note 2, at 263-311, 318-62.

77. *Suppression of Torture, supra* note 42, at 28. *See also* Affidavit of Thomas M. Franck, May 9, 1979, Joint Appendix, *supra* note 41, at 63-64.

78. Affidavit of Richard Anderson Falk, May 8, 1979, Joint Appendix, *supra* note 41, at 62.

79. *Commission Decision, supra* note 41, at 151-220.

80. [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 682-85 (Council of Europe). The "five techniques" consisted of the combined use of wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink. *See Commission Decision, supra* note 41, at 396-97.

81. *Commission Decision, supra* note 41, at 484. *See also* O'Boyle, *supra* note 40, at 702.

82. *Commission Decision, supra* note 41, at 399-402.

83. *Id.* at 379. *See also* O'Boyle, *supra* note 40, at 704. On appeal, the European Court of Human Rights affirmed the Commission's decision that the British Government's measures had violated the convention; however, weighing the degree of cruelty involved, the court found that the interrogation techniques were "inhuman or degrading treatment," but not torture within the

The Commission's opinion that torture violates international law generally, as well as the European Convention, reflects a belief that the treaty provision parallels an existing norm of customary international law.[84] The decision itself is evidence that the norm prohibiting torture has passed into customary international law.[85]

A landmark domestic case involving the U.N. Charter was *United States v. Toscanino,*[86] in which the Second Circuit recognized an individual right of redress based upon a violation of a multilateral treaty. The decision recognized the right of a defendant to invoke as a defense to a charge of drug conspiracy alleged violations of the U.N. and O.A.S. Charters by the United States in kidnapping and torturing him prior to prosecution. The court reasoned that the torture and other abuses allegedly inflicted upon the defendant could not be tolerated without debasing the processes of justice.[87]

4. The Teachings of Jurists

The final source of customary international law is "the teachings of the most highly qualified publicists"[88] or, as elaborated by the Supreme Court in *The Paquete Habana,*[89] "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."[90] Throughout this Note the writings of such jurists have been cited in support of the proposition that the prohibition of torture has become a norm of customary international law, so that governments subjecting their own nationals to torture violate international law.[91] A recent report by the International Association of Penal Law, discussing the consensus among publicists, found "apparently unanimous support for the principle that torture is a forbidden practice," and that the condemnation is categorical.[92] Five noted scholars have expressed the opinion, in affidavits submitted in support of the *Filartiga* assertion of federal jurisdiction under section 1350, that torture violates customary international law.[93]

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meaning of Article 3 of the Convention. Judgment of Jan. 18, 1978, Eur. Ct. Human Rights, *summarized in* [1978] Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Council of Europe).

84. *See* Baxter, *supra* note 6, at 296; text accompanying notes 43-46, *supra*. When an act violates both general international law and a particular treaty, the treaty must either codify pre-existing customary international law at its adoption, or lead thereafter to acceptance of norms embodied in the treaty as part of customary international law.

85. *Id.*

86. 500 F.2d 267 (2d Cir.), *rehearing denied,* 504 F.2d 1380 (2d Cir. 1974).

87. *Id.* at 274. For further discussion of the *Toscanino* decision, *see* text accompanying notes 109-10, *infra*.

88. Statute of the International Court of Justice, art. 38, 59 Stat. 1055, 1060 (1945).

89. 175 U.S. 677 (1900).

90. *Id.* at 700.

91. *See* notes 18, 25, 40, 56-58, and accompanying text, *supra*.

92. *Suppression of Torture, supra* note 42, at 80.

93. Affidavit of Richard Arens, Apr. 6, 1979, Joint Appendix, *supra* note 41, at 16; Affidavit of Richard Anderson Falk, May 8, 1979, *id.* at 61; Affidavit of Thomas M. Franck, May

C. Summary: The Customary Norm Proscribes Torture

The emergence of a customary norm proscribing torture is evidenced by the widely ratified multilateral humanitarian conventions forbidding torture. An internationally recognized principle prohibiting torture is also evident in the unanimous adoption of the General Assembly resolutions condemning the practice. The prohibition of torture in the Universal Declaration is particularly significant since, according to a strong consensus, the entire instrument has passed into customary international law. Moreover, the Declaration's proscription of torture has nearly identical counterparts in the major humanitarian conventions, and the Declaration is accepted as the authoritative interpretation of the U.N. Charter. State practice, as evidenced by foreign policy, corroborates the conclusion drawn from the conventions and other documents. Finally, judicial decisions and scholarly writings declare that a right to freedom from torture, in all circumstances, now exists in both conventional and customary international law. The evidence of the existence of an international legal norm prohibiting torture clearly satisfies the classic formulations for deciding the scope and content of the law of nations.

D. Torture as a Violation of Customary International Law: The Implications

There are three implications to a finding that torture violates customary international law. First, such a finding indicates that the individual should be considered a proper subject of international law. The "law of nations," a violation of which is required for section 1350 jurisdiction, has been defined as that "body of rules and principles of action which are [sic] binding upon civilized states in their relations with one another."[94] Federal courts, including the Second Circuit, have construed this definition to mean that violations of the law of nations are breaches of "those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."[95] In the Second Circuit decisions which the *Filartiga* court found binding, this construction has been held to exclude violations affecting the relationships between individuals, and between individuals and their own states. Such holdings, however, fail to recognize the concepts of both modern international human rights law as it has developed in this century, and of a

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9, 1979, *id.* at 63; Affidavit of Richard B. Lillich, May 10, 1979, *id.* at 65; Affidavit of Myres S. McDougal, May 10, 1979, *id.* at 71. *See also* O'Boyle, *supra* note 40, at 686-87.

94. J. BRIERLY, THE LAW OF NATIONS 1 (6th ed. 1963). For the requirements for jurisdiction under § 1350, *see* text accompanying note 8, *supra*.

95. Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963); *see also* Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

pertinent line of cases central to the law of nations as it developed in the eighteenth century.

A leading commentator on eighteenth-century American law has pointed out that "the Constitution accepted the Law of Nations as national law, that this law governed individuals no less than states, and that its corpus embraced, not only a multiplicity of matters to be attributed later to so-called public international law, but also the law of merchants and the law maritime."[96] Cited in support of that view is the Judiciary Act of 1789's grant of federal jurisdiction to compensate aliens for tortious injuries committed in violation of the law of nations, as well as in violation of United States treaties.[97]

Thus, during the formative period of the law of nations, civil redress was available in the United States for individuals victimized by violations of the law of nations. Some offenders, such as pirates, were held to be universally accountable for their violative acts. According to Kent, a pirate should "by the law of nations . . . be tried and punished in any country where he may be found, for he is reputed to be out of the protection of all laws and privileges."[98] By congressional statute in 1790, universal jurisdiction applied even when the pirate acted, or purported to act, under color of law.[99]

Today, torture should be viewed as an offense similar to piracy, so that universal civil jurisdiction would extend to the victims of torture as well as to the torturers. Universally condemned, torture violates a legal norm which affects interstate relationships and the relationship between the state and its nationals, including both the official engaging in torture and the victim. Significantly, the Draft Convention Against Torture provides for universal criminal jurisdiction, and, like the 1790 statute, explicitly precludes the defense of "acting in obedience to superior orders."[100]

Aspects of twentieth-century international law follow the eighteenth-century view of piracy, establishing that individual conduct is within the purview of the law of nations. For example, the European Commission on Human Rights, in deciding *Ireland v. United Kingdom*, reaffirmed that the European Convention in Article I gives individuals direct rights in international law, apart from the enforcement mechanism provided under Article 25: "In recognizing the rights of the Convention to everyone within the jurisdiction the High Contracting Parties made it clear that this treaty by its ratification creates rights

96. Dickinson, *supra* note 13, at 48.

97. *Id.* at 47, 55. This grant of jurisdiction corresponds to that currently found at 28 U.S.C. § 1350 (1976).

98. 1 J. KENT, COMMENTARIES ON AMERICAN LAW 186 (2d ed. N.Y. 1832) (1st. ed. N.Y. 1826) (footnote omitted). *See, e.g.*, United States v. Pirates, 18 U.S. (5 Wheat.) 184 (1820). For a summary of views expressed by international jurists in agreement with Kent, *see* United States v. Smith, 18 U.S. (5 Wheat.) 153, 161-63, 163 n.4 (1820).

99. 18 U.S.C. § 1652 (1948). The concept of universal jurisdiction was applied in piracy cases by the United States Supreme Court. For an example of universal jurisdiction extended over an American citizen claiming to have acted under color of law, *see* United States v. Klintock, 18 U.S. (5 Wheat.) 144 (1820).

100. Draft Convention Against Torture, *supra* note 63, art. V, at 268.

of individuals under international law."[101] The Convention's provision against torture and other inhuman treatment has been held to provide enforceable individual rights in international law.[102] Therefore, parallel provisions in other conventions and in instruments codifying customary international law should be similarly construed.

As noted, the prohibition of torture at issue in *Ireland v. United Kingdom*, and embodied in Article 3 of the Convention, is virtually identical with the norm of customary international law prohibiting torture embodied in Article 5 of the Universal Declaration. It has been argued that because the European Convention adopts the same normative standard as the Universal Declaration regarding the prohibition of torture, the legal significance of the two instruments should be identical.[103] The argument likewise may be made for the International Covenant on Civil and Political Rights, in which substantially the same legal norm has been adopted.[104] The International Covenant also includes an Optional Protocol whereby individuals, subject to the jurisdiction of states which are parties to the Protocol, may submit complaints to the Human Rights Committee, alleging violations of rights guaranteed by the Covenant.[105] In addition, the General Assembly's adoption of Resolution 1503 in 1970 is considered a milestone in the U.N. human rights program because it both recognizes an international right of individual petition and establishes implementation mechanisms which the petitioner himself can utilize.[106] These developments illustrate ways in which the rights of the individual have been recognized at the international level.[107]

The European Commission's recognition in *Ireland v. United Kingdom* that the European Convention gives individuals rights under international law suggests a mode of analysis which could be applied in a case such as *Toscanino*, discussed previously.[108] In *Toscanino*, the provisions allegedly violated were those of the U.N. and O.A.S. Charters which protect member states' territorial sovereignty.[109] Those provisions concern the interstate as-

101. *Commission Decision, supra* note 41, at 484. For criticism of the argument, still maintained by some commentators, that multilateral humanitarian conventions do not grant rights directly to individuals, *see* O'Boyle, *supra* note 40, at 702-03.

102. [1978] Y.B. EUR. CONV. ON HUMAN RIGHTS 602 (Council of Europe).

103. Klayman, *supra* note 6, at 469. *See* European Convention, *supra* note 3, art. 3; Universal Declaration, *supra* note 3, art. 5.

104. *See* Klayman, *supra* note 6, at 474; International Covenant, *supra* note 3, at art. 7.

105. Optional Protocol, *supra* note 28.

106. *See, e.g.*, Humphrey, *Implementation, supra* note 6, at 56. *See generally* Procedure for dealing with communications relating to violations of human rights and fundamental freedoms, E.S.C. Res. 1503, 48 U.N. ESCOR, Supp. (No. 1A) 8, U.N. Doc. E/4832/Add. 1 (1970) [hereinafter cited as Res. 1503].

107. *See, e.g.*, Parson, *The Individual Right of Petition: A Study of Methods Used by International Organizations to Utilize the Individual as a Source of Information on the Violation of Human Rights*, 13 WAYNE L. REV. 678, 688-705 (1967); *see also* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

108. *See* text accompanying notes 86-87, *supra*.

109. The provisions which the defendant alleged were violated were Article 2(4) of the U.N. Charter and Article 17 of the O.A.S. Charter, which protect member states' territorial

pect of international law more than the individual rights aspect. Yet in *Toscanino* the Second Circuit recognized an individual right to invoke the violation of these provisions as a defense to prosecution. Although the Second Circuit's basis for sanctioning this individual right was unexplained, the court indicated that the traditional view of individuals as improper subjects of international law was eroding.[110]

Recognition of international human rights law as a distinct corpus of international law, conferring upon the individual a legal status independent of his citizenship in a particular state, is central to an understanding of the proper role of domestic courts in cases such as *Filartiga*. Developments in the field of human rights, particularly since World War II, must be analyzed as radical departures from the traditional view of the relationship between domestic and international law.[111] International human rights law, in both its customary and conventional expressions, is not solely concerned with relationships among nations; rather, a right of redress also belongs to the individual. The individual, as well as the state, now has an "international legal personality,"[112] with certain duties and an entitlement to certain benefits.

The second implication of the recognition of torture as violative of customary international law is that appropriate means for the redress of violations should be applied when feasible. Enforcement of rights grounded in customary international law should be possible in certain instances despite problems of enforcement presented when violations of parallel norms in treaties are alleged.[113] As noted above, the United States Constitution treats the law of nations as national law, governing both individuals and states.[114] The Su-

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sovereignty. Toscanino, 500 F.2d 267, 276-79 (2d Cir. 1974). Apparently, no complaint was filed by Uruguay even though Uruguay, rather than an individual citizen such as the defendant, is logically entitled to enforceable rights under Article 2(4).

110. *See* R. LILLICH & F. NEWMAN, *supra* note 2, at 100-01. The *Toscanino* court's decision could have been supported by a consideration of the United States' obligation under Articles 55 and 56 of the U.N. Charter, which includes the pledge of all members to promote and protect human rights. That obligation was declared by the General Assembly in its Declaration Against Torture to include taking "effective measures to prevent torture" which is a denial of the purposes of the Charter. Declaration Against Torture, *supra* note 57, arts. 4, 2. Accordingly, if agents of the United States used torture in violation of the Charter, a federal court could properly deny those agents the fruits of their wrongful conduct by allowing the victim to invoke the violation as a defense to prosecution, thereby deterring the future use of torture. The court did not rest its decision upon the Charter's human rights articles, however, perhaps influenced by the 1952 decision of the California Supreme Court in Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952), *aff'd on other grounds*, 217 P.2d 481 (1950). *See* text accompanying notes 188-95, *infra*. Although the *Toscanino* opinion did not offer an analysis of the kind suggested, it is difficult to perceive any basis for the decision unless the court determined that the individual is entitled to protection from torture under either conventional or customary international law binding upon the United States.

111. Humphrey, *Implementation*, *supra* note 6, at 33. *See also* R. LILLICH & F. NEWMAN, *supra* note 2, at 54-55.

112. Humphrey, *Implementation*, *supra* note 6, at 33.

113. *See* text accompanying notes 188-226, *infra*.

114. *See* Dickinson, *supra* note 13, at 46-50.

preme Court in *The Paquete Habana* forbade the retention of a noncommercial fishing boat on the basis of customary international law. The Court described this corpus of law as "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law . . . ."[115] The Court's definition of the judiciary's proper role in adjudicating issues under international law implies certain obligations with respect to allegations of torture: "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."[116]

Some actions, however, would not be cognizable in federal court if only a violation of customary international law were alleged. For example, due to United States constitutional requirements, a criminal prosecution for torture would require either a penal law or treaty prohibiting torture.[117] Nonetheless, the Supreme Court in *The Paquete Habana* emphasized that courts, whenever possible, should administer international law in the normal exercise of their jurisdiction.[118] For example, this might permit the courts to refuse to enforce contracts or to apply procedures when such contracts or procedures violate international law.[119] Likewise, in a case such as *Filartiga,* a federal court, having jurisdiction over those claims arising from violations of international law, could award damages.[120]

The third implication of the recognition of torture as a violation of customary international law concerns the long-standing impediment to the enforcement of human rights principles: the assertion by states that a government's treatment of its nationals is a purely domestic matter.[121] This assertion is no longer an effective reason for foreclosing inquiry into complaints of human rights violations. For example, Article 2(7) of the U.N. Charter provides that the United Nations is not authorized "to intervene in matters which are essentially within the domestic jurisdiction of any state . . . ."[122] Former U.N. Human Rights Division Director John Humphrey, however, noted that when allegations of human rights violations were brought before various organs of the United Nations, "the plea of domestic jurisdiction under Article 2(7) of the Charter has been no obstacle. In the prevailing view, gross violations of human rights are not 'essentially within the domestic jurisdiction' of

115. 175 U.S. 677, 686 (1900).

116. *Id.* at 700. *See also* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

117. The Draft Convention Against Torture is an example of a treaty creating criminal jurisdiction. *See* note 63, *supra; see also* Wright, *National Courts and Human Rights—The Fujii Case,* 45 AM. J. INT'L L. 62 (1951); Joint Appendix, *supra* note 41, at 16, 61, 63, 68, 71.

118. 175 U.S. 677, 686 (1900).

119. Wright, *supra* note 117, at 77-78.

120. Joint Appendix, *supra* note 41, at 16, 61, 63, 68, 71. *See also* 28 U.S.C. § 1350 (1976).

121. *See, e.g.,* R. LILLICH & F. NEWMAN, *supra* note 2, at 18-21. *See also* J. BRIERLY, *supra* note 1, at 291-96.

122. U.N. CHARTER art. 2(7).

states . . . ." [123] Multilateral humanitarian conventions themselves preclude the domestic jurisdiction defense to an allegation of torture. The conventions, as noted previously, expressly disallow, during a public emergency, a governmental "right of derogation" of the obligation to refrain from practicing torture.[124] The creation of an international obligation to protect the individual against torture removes this practice from the sole domain of domestic jurisdiction.[125]

In sum, several implications concerning the proper role of American courts in adjudicating a claim such as that presented in *Filartiga* arise from a conclusion that the prohibition of torture has become a norm of customary international law, independent from the legal norm established in the treaties. Customary international law, which resembles the common law in its application, should be applied by courts as a proper exercise of their jurisdiction, as prescribed by the Supreme Court in *The Paquete Habana*.[126] Furthermore, certain obstacles to jurisdiction inherent in a claim grounded in conventional international law are absent in an alleged violation of customary international law. First, whether or not the governments involved are signatories to particular conventions proscribing torture, these governments are bound by customary international law. Second, because the customary legal norm prohibiting torture is not tied, for its establishment, solely to the U.N. Charter, courts implementing that norm are not constrained by precedent holding that the Charter's human rights provisions are not "self-executing," or capable of judicial enforcement.[127] Consequently, claims based on acts of torture as a violation of customary international law present a valuable opportunity for United States courts to play an innovative role in the furtherance of international human rights law.[128]

Filartiga presents such an opportunity to the federal courts. The issue on appeal is whether a tort action for damages for an alleged act of torture satisfies the requirements for federal jurisdiction under section 1350. The following discussion will suggest that a violation of both the law of nations and a treaty

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123. Humphrey, *Twentieth Century*, *supra* note 28, at 85.

124. *See* text accompanying notes 39-42, *supra*.

125. *See* Address by President Carter to U.N. General Assembly (Mar. 17, 1977), *reprinted in* 76 DEP'T STATE BULL. 329, 332 (1977); *see also* Klayman, *supra* note 6, at 479; Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 78 (1978) [hereinafter cited as Schachter, *Implications*].

126. 175 U.S. 677, 686 (1900).

127. *See* text accompanying notes 49-93, *supra*. *See generally* Humphrey, *Implementation*, *supra* note 6, at 32; Baxter, *supra* note 6, at 299. Self-execution issues have generally been raised with respect to provisions in treaties; however, one case has held that the law of nations was not self-executing and therefore did not vest the plaintiff with enforceable individual rights. Pauling v. McElroy, 164 F. Supp. 390, 393 (D.D.C. 1958), *aff'd* 278 F.2d 252 (1960), *cert. denied*, 364 U.S. 835 (1960).

128. *See generally* Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 176-77 (1978) [hereinafter cited as *Role of Domestic Courts*].

of the United States was alleged. Either type of violation, alone, would satisfy the jurisdictional requirements.

IV
SUBJECT MATTER JURISDICTION OVER THE *FILARTIGA* COMPLAINT

A. Section 1350 and a Violation of the Law of Nations

In section 1350[129] Congress granted to the federal courts jurisdiction of a particular class of tort action. State courts, as courts of general jurisdiction, provide an alternative to the federal forum for these tort actions.[130] The United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*[131] indicated that the enactment of section 1350 stemmed from Congress' interest in centralizing power over foreign affairs within the federal government.[132] In *Sabbatino,* the Court found that section 1350 reflects a concern for uniformity in the United States' dealings with foreign nations.[133]

Section 1350 provides access to federal courts for enforcement of a claim for damages under the common law of torts. The statute does not provide directly for the enforcement of individual rights under international law. Once jurisdiction is established under section 1350, the federal courts do not apply substantive international law, but instead apply the law of torts. International law only provides the federal courts' test for jurisdiction, while tort law provides the courts' basis for awarding compensation to the injured plaintiff.

In considering the *Filartiga* case, it is thus necessary to distinguish appellants' action for damages based upon the alleged act of torture as a violation of tort law, from the alleged act of torture as a violation of international law which triggers federal jurisdiction under section 1350. The alleged tort and the alleged violation of international law may, as in *Filartiga,* stem from the same act.[134] On the other hand, the tort and the violation of international law may stem from distinct acts.[135]

This inquiry will focus upon the jurisdictional requirement that the tort must have been committed in violation of international law. The district court in *Filartiga* focused on the issue of whether the claim was cognizable in fed-

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129. Alien Tort Claims Act, § 24, 28 U.S.C. § 1350 (1976).

130. *See* note 12, *supra.*

131. 376 U.S. 398 (1964).

132. *Id.* at 427-28 & n.25.

133. *Id.*

134. *See, e.g.,* Bolchos v. Darrell, 3 Fed. Cas. 810 (D.S.C. 1795) in which jurisdiction under § 1350 was recognized over a wrongful seizure of property which constituted both the tort and the treaty violation.

135. *See* Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 863-65 (D.Md. 1961) in which § 1350 jurisdiction was based upon a falsification of passports, which violates international law, committed in furtherance of a tortious act of kidnapping. *Clift* is the only modern case which has satisfied § 1350's jurisdictional requirements.

eral court as a violation of the law of nations.[136] The decision, however, did not determine whether there had been a United States treaty violation, the alternate component of the section 1350 requirement.

In *Filartiga,* the district court stated that two prior Second Circuit cases, *IIT v. Vencap, Ltd.*[137] and *Dreyfus v. Von Finck,*[138] defined the "law of nations" as used in section 1350 so narrowly as to exclude the claim that torture violates international law.[139] According to the definition set forth in *Vencap* and *Dreyfus,* a violation of the law of nations under section 1350 must contravene "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.*"[140] The plaintiffs in *Filartiga* argued "that 28 U.S.C. § 1350 should not be so narrowly read and that the proscription of torture in numerous international instruments accepted by nearly all the states in the international community reflects the emergence of a norm of customary international law condemning torture."[141] Although it conceded the strength of this argument, the district court nevertheless felt constrained by the Second Circuit's narrow construction of section 1350 and dismissed the complaint.[142] The court, however, did not address the plaintiffs' assertion that even without diverging from the construction given by the Second Circuit[143] an act of torture is violative of the law of nations.

The Second Circuit cases reveal that for several reasons the exercise of section 1350 jurisdiction in *Filartiga* would be wholly consistent with both the *Vencap* and *Dreyfus* decisions. *Vencap* involved a complaint, brought by a Luxembourg investment trust under section 1350, which alleged that a Bahamian corporation had committed acts of fraud, conversion, and corporate waste.[144] Judge Friendly, in dismissing the complaint, stated that the court would not "subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations."[145] The *Vencap* court's dismissal rested on the understanding that a rule which is part of every domestic legal system in the world is not automatically a rule of customary international law.[146]

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136. No. 79 C 917, slip op. at 3. It is assumed, for purposes of this Note, that the allegations of the *Filartiga* complaint satisfy § 1350's requirement that the alien bring a claim cognizable under the law of torts.

137. 519 F.2d 1001, 1015 (2d Cir. 1975).

138. 534 F.2d 24 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976).

139. No. 79 C 917, slip op. at 3-4.

140. *Id., quoting* Dreyfus, 534 F.2d 24, 30-31 (2d Cir. 1976) and Vencap, 519 F.2d 1001, 1015 (2d Cir. 1975).

141. No. 79 C 917, slip op. at 4.

142. *Id.*

143. Brief for Appellants, *supra* note 7, at 46-53.

144. 519 F.2d 1001, 1003 (2d Cir. 1975).

145. *Id.* at 1015.

146. *Id.*

As discussed previously, a rule of customary international law is established when the consensus of the community of nations imposes a legal obligation for which nations are accountable to one another.[147] In the international human rights area, the obligation also governs the relationship of nations to individuals, and of individuals to one another.[148] Thus, in order for the rule to become part of customary international law, the obligation must be imposed by international consensus, not domestic law, no matter how universally shared the domestic norm may be. The question therefore becomes one of determining whether a particular norm has emerged as part of customary international law.[149] A holding that there is jurisdiction over the *Filartiga* complaint under section 1350 would be entirely consistent with the *Vencap* holding that stealing is not prohibited by the law of nations, and, therefore, not cognizable under that section. Unlike stealing, torture is a violation of the law of nations. This conclusion is made manifest through the incorporation of a prohibition on torture in conventions and declarations, and through the adoption of that prohibition by judicial and quasi-judicial decisions, by the general practice of nations, and by the writings of qualified jurists.[150] Thus, a holding that there is jurisdiction over the *Filartiga* complaint under section 1350 would be entirely consistent with the *Vencap* holding that stealing is not prohibited by the law of nations, and therefore not cognizable under that section.

A finding of jurisdiction in *Filartiga* also would be consistent with the holding of the Second Circuit in *Dreyfus v. Von Finck*. In *Dreyfus*, a Jew who had been a citizen of Nazi Germany alleged that his property had been confiscated by the regime and that the government had later repudiated a settlement of compensation for the property.[151] The court dismissed the complaint and held that a state's confiscation of its nationals' property is not condemned by the law of nations. As in *Vencap*, the key issue underlying the holding is whether there was sufficient consensus in the international community concerning the illegality of such confiscations of property.[152] A lack of any such consensus is apparent; for example, section 4 of the General Assembly's Declaration on Permanent Sovereignty over National Resources suggests circumstances in which expropriations are indeed permissible,[153] and the right to own property is one of the few listed in the Universal Declaration that is

147. *See* text accompanying notes 17-20, *supra*.

148. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); ICJ STAT., *supra* note 21. *See generally* Baxter, *supra* note 6; Klayman, *supra* note 6, at 452, 457-75.

149. For discussion of the sources of customary international law, *see* text accompanying notes 14-22, *supra*.

150. *Id.*

151. *See* 534 F.2d 24 (2d Cir. 1976).

152. *See* text accompanying note 30, *supra*.

153. G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc. A/5217 (1962). The resolution suggests the permissibility of expropriation where there is "appropriate" compensation.

omitted in the 1976 Covenants.[154] By contrast, if the Second Circuit were to analyze the subject of torture, it would find that there is an international consensus concerning torture's illegality. Thus, while section 1350 jurisdiction was not present in *Dreyfus*, it is in *Filartiga*.

Although the factual bases of *Dreyfus* and *Vencap* are clearly distinguishable from that of *Filartiga*, the district court considered its dismissal of *Filartiga* to be mandated by the Second Circuit's definition of the law of nations as limited to governing relations between nations or between an individual and a foreign state. Despite the narrowness of that definition, the prohibition of torture is not outside its scope. Torture is a practice which is universally condemned and thereby affects "the relationship between states."[155] Thus, its prohibition is one of those "standards, rules or customs . . . used by those states for their common good and/or in dealings *inter se*."[156]

The establishment of the prohibition of torture as such a standard is demonstrated in the official policy of the United States. The United States' withdrawal of aid to countries engaging in torture and other abuses[157] demonstrates that the condemnation of torture has affected relations between states. In the more than two decades since the signing of the U.N. Charter there has been a significant change in the official position taken by many governments, particularly the United States, regarding the obligatory force of the Charter's human rights provisions.[158] As Professor Schachter has noted, "[the] U.S. government now acknowledges both the obligatory character of the human rights articles of the Charter and its corollary that member states are internationally accountable for the observance of human rights in their countries."[159] Notably, the widespread endorsement of the Universal Declaration, the Helsinki Accord of 1975,[160] and the International Court of Justice's opinion[161] on the binding effect of the U.N. Charter provisions relating to South Africa's presence in Namibia have strengthened the proposition, espoused by the United States government, that the obligations respecting human rights imposed by the Charter "can today be regarded as part of the general international law of universal application."[162]

The effect of gross violations of human rights upon the relationship between states is more emphatically demonstrated in a second aspect of the

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154. *See* Universal Declaration, *supra* note 3; Covenant on Economic Rights, *supra* note 67. Both Covenants became effective in 1976.

155. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

156. *Id.*

157. *See* text accompanying notes 68-72, *supra*.

158. *See* Schachter, *Implications*, *supra* note 125, at 67.

159. *Id.*

160. *Id. See also* Conference on Security and Co-operation in Europe: Final Act, *reprinted in* 14 INT'L LEGAL MATERIALS 1292 (1975).

161. *See South Africa in Namibia*, *supra* note 25.

162. Schachter, *Implications*, *supra* note 125, at 69.

United States' official position. This position, according to Professor Schachter, is that all governments have a "right and responsibility" to protest against human rights violations, even though the protesting state may not have been injured, either directly or through its nationals, by the alleged violations.[163] There are well-founded legal justifications for such a position.[164] The International Court of Justice, in deciding the *Barcelona Traction Case,* distinguished international duties existing between states from those obligations running "towards the international community as a whole," which are "[b]y their very nature . . . the concern of all States."[165] The court specified that those obligations which are derived "from principles and rules concerning the basic rights of the human person" are the obligations of each state toward the entire international community.[166] One of the most basic and universally recognized rights is the right to integrity of the person, which includes freedom from torture. Accordingly, each member of the international community owes a duty to the others to protect its own citizens against acts of torture. Breach of that duty would constitute a violation of international law, affecting relationships between states.

In view of the foregoing, the Second Circuit's narrow definition of a violation of the law of nations which focuses upon the state-to-state aspect of international law[167] would appear to be satisfied by the Filartigas' allegation of torture. Moreover, the definition of the law of nations, borrowed from a decision of a Pennsylvania district court in *Lopes v. Reederei Richard Schroder,*[168] was technically dicta, cited by the *Vencap* court in evaluating the distinction between domestic and international law.[169] As a shorthand formula for the kinds of norms that generally formed customary international law prior to its modern development in the human rights area, the definition might have been useful. Nonetheless, the definition used in *Vencap* should not be construed to exclude modern legal norms affecting the relationship between a state and its own nationals, or between individuals of either the same state or foreign states. To construe the law of nations so narrowly would ignore one of the original subjects of the law of nations, the pirate,[170] and would be in conflict with the establishment of rights, duties, and liabilities of the individual under international law during this century.[171] A statement made by the court in *Dreyfus* that "for purposes of this lawsuit, violations of international law do not occur when the aggrieved parties are nationals of the acting state,"[172]

163. *Id.*
164. *See, e.g., id.* at 70-72.
165. *In re* Barcelona Traction, Light, and Power Company, Ltd., [1970] I.C.J. 4, 33.
166. *Id. See also* Schachter, *Implications, supra* note 125, at 70-72.
167. *See* text accompanying note 140, *supra.*
168. 225 F. Supp. 292, 297 (E.D. Pa. 1963).
169. 519 F.2d 1001, 1015 (2d Cir. 1975).
170. *See* text accompanying note 98, *supra.*
171. *See, e.g.,* text accompanying note 101, *supra. See also* Humphrey, *Implementation, supra* note 6, at 32-33.
172. 534 F.2d 24, 31 (2d Cir. 1976).

contradicts basic norms of multilateral humanitarian conventions[173] as well as customary international law. For example, one of the earliest of the modern humanitarian conventions, the Nuremberg Charter, defines certain acts committed against "any civilian population," national or foreign, as "crimes against humanity."[174] The *Dreyfus* court's restrictive statement is incompatible with the position taken by jurists, judges, and parties to multilateral humanitarian conventions as to the duties of states and the rights of their citizens under international law.[175]

While the *Lopes* definition, quoted by the Second Circuit, is satisfied in the *Filartiga* complaint, an augmented definition is warranted. The view expressed in *Dreyfus* that international law cannot be violated when the aggrieved are citizens of the acting state contrasts sharply with the contemporary status of the individual as an "international legal personality."[176] At least with respect to human rights norms for which there is a universal consensus, the definition of "law of nations" should be expanded to include those standards affecting the relationship between a state and its nationals, and between individuals. Such a supplement would properly take into account norms, such as the prohibition of torture, which give the individual the guarantee of the community of nations of the right to be free from certain abuses.

The *Lopes* decision itself supports such an augmentation of the definition of the law of nations for purposes of section 1350 jurisdiction. *Lopes* presented the issue whether the unseaworthiness of a vessel, as the result of negligence, violated the law of nations. The court found that awarding damages for injuries occasioned by a vessel's unseaworthiness is unique to the United States, and, consequently, dismissed the case.[177] A significant phrase, overlooked by the Second Circuit and by the district court in *Filartiga,* prefaced the court's conclusion. There, the court made clear that the decision construed section 1350's requirement of a violation of the law of nations solely "for the purpose of deciding *this issue.*"[178] The *Lopes* court confined its decision to the issue before it, recognizing the capacity of norms constituting the law of nations to develop and change. The court's definition was not meant to be applied as a static, restrictive formula. In formulating its definition of the "law of nations," the court followed a rule of statutory construction first applied by the Supreme Court and stated that the phrase in section 1350 must be considered as part of an "organic growth."[179] The *Lopes* court also recognized the

173. *See, e.g.*, Optional Protocol, *supra* note 28; Res. 1503, *supra* note 106.

174. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (at Nuremberg) (Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis) *signed* Aug. 8, 1945, 59 Stat. 1546, art. 6(c).

175. *See* text accompanying notes 49-93, *supra.*

176. Humphrey, *Implementation, supra* note 6, at 33.

177. 225 F. Supp. 292, 295 (E.D. Pa. 1963).

178. *Id.* at 297 (emphasis added). The court indicated that the phrase could have additional meanings.

179. 225 F. Supp. 292, 295-96 (E.D. Pa. 1963) (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 360 (1959)).

evidentiary sources of customary international law outlined by the Supreme Court: the works of jurists, the general practice of nations, and the decisions of courts recognizing and enforcing that law.[180]

The *Lopes* decision relied principally upon those portions of the writings of eighteenth-century jurists which focus on the state-to-state aspect of international law.[181] With respect to the doctrine of seaworthiness, this may have been proper as a scope of inquiry. Had the *Lopes* court been presented with an issue concerning the legal status of a human rights norm, however, it presumably would have examined the writings of jurists qualified in that aspect of international law.[182] Significantly, other portions of the writings of the same jurists relied on in *Lopes* recognize certain rules of international law which directly concern individual conduct.[183] Where these writings become pertinent in evaluating the status of a norm under the law of nations, *Lopes* would require their consideration.

In sum, *Lopes* permits two approaches to the *Filartiga* claim that torture is a violation of the law of nations. The Second Circuit could, on the one hand, choose to augment the *Lopes* definition of "law of nations" for the purpose of deciding the issue with respect to torture more precisely.[184] Alternatively, the court could make use of the definition formulated in *Lopes,* not restrictively, but rather in recognition of the "organic growth" of the legal norms embodied in the phrase "law of nations." In *Filartiga,* the court indicated the persuasiveness of the evidence that the prohibition of torture had become a norm of the law of nations.[185] To refuse to go further and find a breach of this prohibition as sufficient for section 1350 jurisdiction was to distort the intention of the *Lopes* court, which formulated a definition of the law of nations only for the purpose of deciding an issue concerning seaworthiness. Whether the Second Circuit chooses the former course, augmenting the *Lopes* definition, or the latter, utilizing that definition organically, it should find that the prohibition of torture is part of customary international law. Either way, the *Filartiga* complaint properly alleged "a tort only, committed in violation of the law of nations." The prerequisites for federal jurisdiction under section 1350 have been satisfied.

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180. 225 F. Supp. 292, 295 (E.D. Pa. 1963) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820)).

181. 225 F. Supp. 292, 297 (E.D. Pa. 1963). *Lopes* cites, for example, 1 J. KENT, COMMENTARIES ON AMERICAN LAW 1 (1st ed. N.Y. 1826).

182. *See* 225 F. Supp. 292, 297 (E.D. Pa. 1963). The court's commitment to construing the statutory phrase "law of nations" as part of an "organic growth" would require a consideration of modern commentary on the development of international human rights. *See id.* at 295-96.

183. *See, e.g.,* text accompanying note 98, *supra.* The *Lopes* court cited Kent, who recognized, at least in the case of pirates, that individual conduct is within the purview of international law. 225 F. Supp. 292, 297 (E.D. Pa. 1963).

184. *See* Brief for Appellants, *supra* note 7, at 45.

185. No. 79 C 917, slip op. at 3-4.

B. Section 1350 and Torture as a "Violation of a Treaty of the United States"

Given the evidence that the legal norm prohibiting torture is a part of customary international law,[186] the *Filartiga* complaint need not address the alternate component of section 1350, which establishes federal jurisdiction in the event of a "violation of . . . a treaty of the United States."[187] Nevertheless, an act of torture should indeed constitute a violation of the U.N. charter. Actions in American courts to enforce the human rights provisions of the U.N. Charter have been impeded, however, by the rulings in *Sei Fujii v. State*[188] and its progeny,[189] which have held that these provisions do not satisfy the requirement that they be self-executing. Self-execution requires a treaty's provisions to establish individual rights with sufficient narrowness and clarity to allow judicial interpretation and enforcement in the absence of further implementing statutes.[190] In *Sei Fujii,* the California Supreme Court reversed the court of appeals, which had held that California's Alien Land Law contravened the United States' obligation under the Charter to respect human rights without regard to race.[191] Although a treaty is deemed the "supreme Law of the Land"[192] under Article VI of the federal constitution, the California Supreme Court in *Sei Fujii* held that Articles 55 and 56, the human rights provisions of the U.N. Charter, are neither capable of judicial enforcement, nor self-executing.[193]

Scholars have criticized the ruling in *Sei Fujii* with respect to the Charter, particularly in light of the recent widespread recognition of the obligatory force of the human rights articles.[194] Nonetheless, even assuming that *Sei Fujii* is valid and the U.N. Charter's human rights provisions are not themselves capable of judicial enforcement, there is no obstacle to a damages action such as

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186. *See* text accompanying notes 49-93, *supra.*

187. 28 U.S.C. § 1350 (1976).

188. 38 Cal. 2d 718, 242 P.2d 617 (1952).

189. *See* Hitai v. INS, 343 F.2d 466 (2d Cir.), *cert. denied,* 382 U.S. 816 (1965); Camacho v. Rogers, 199 F. Supp. 155, 158 (S.D.N.Y. 1961).

190. R. LILLICH & F. NEWMAN, *supra* note 2, at 71. *See* Sei Fujii v. State, 38 Cal. 2d 718, 722, 242 P.2d 617, 620 (1952): "In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts." *See also* Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). United States courts have construed certain articles of the U.N. Charter to be self-executing. *See* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974); Diggs v. Shultz, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied,* 411 U.S. 931 (1973); Keeney v. United States, 218 F.2d 843 (D.C. Cir. 1954).

191. 38 Cal. 2d 718, 720-26, 242 P.2d 617, 619-23 (1952). The California Supreme Court also invalidated the Alien Land Law, affirming the result below on fourteenth amendment grounds, but not on the basis of the human rights articles of the U.N. Charter. *Id.* at 725-38, 242 P.2d at 622-30.

192. U.S. CONST. art. VI, cl. 2.

193. 38 Cal. 2d 718, 722-25, 242 P.2d 617, 620-22 (1952).

194. *See, e.g.,* R. LILLICH & F. NEWMAN, *supra* note 2, at 100-01; INTERNATIONAL PROTECTION OF HUMAN RIGHTS 947 (L.B. Sohn & T. Buergenthal eds. 1973).

the Filartigas'. Torture is a violation of those human rights protected by Articles 55 and 56 of the U.N. Charter.[195] Numerous multilateral humanitarian conventions and resolutions have interpreted and implemented these articles to establish protection against torture as one of the human rights that U.N. members are obligated to promote.[196] Thus, an act of torture violates the U.N. Charter even though the Charter's human rights provisions may not be self-executing, or capable themselves of conferring upon the victim a judicially enforceable cause of action.

As a consequence, two arguments may be made to show that torture is a violation of a United States treaty within the meaning of section 1350. First, the statute merely requires that the alien plaintiff bring an action in tort, and that the tortious act itself, or acts that led to its commission, violate a United States treaty.[197] The enforcement of a right under a treaty provision is *not* being sought; rather, damages for a tortious act are being sought. The treaty violation is not the cause of action, but the source of jurisdiction.[198] The court need not decide whether the particular treaty provision is self-executing in order to decide the common law tort action. The treaty violation alleged in *Filartiga* is merely the prerequisite to jurisdiction under section 1350; thus, the violation is not, as in *Sei Fujii*, relied on as the source of the plaintiff's right. The treaty provision therefore need not be self-executing.

Second, even if the Second Circuit were to require that the treaty provision allegedly violated be self-executing, such a requirement would be satisfied by the allegations of the complaint in *Filartiga*. *Filartiga*, according to the criteria for self-execution[199] suggested in the case of *People of Saipan ex rel. Guerrero v. United States Department of Interior*,[200] presents a case in which substantive rights guaranteed in a treaty provision are judicially enforceable. Plaintiffs in *Saipan*, like those in *Filartiga*, alleged a violation of rights protected by U.N. Charter provisions.[201] The court "assume[d] without deciding" that standing alone, the Charter provisions do not create "judicially en-

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195. *See* text accompanying notes 23-41, *supra*.

196. *See generally*, Klayman, *supra* note 6, at 452-53; Baxter, *supra* note 6, at 297.

197. 28 U.S.C. § 1350 provides that an alien may sue in federal court "for a tort only, committed in violation of the law of nations or of a treaty of the United States."

198. *See, e.g.*, Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). In *Clift*, the alleged tort, kidnapping, was a distinct act from the alleged international law violation, the falsification of passports. *See also* Brief of the International Human Rights Law Group, *et al.*, as amici curiae urging reversal, Filartiga v. Pena-Irala, No. 79 C 917 (E.D. N.Y. 1979), *appeal docketed*, No. 79-6090 (2d Cir. May 16, 1979), at 10-13.

199. *See* text accompanying note 204, *infra*.

200. 502 F.2d 90 (9th Cir.), *cert. denied*, 420 U.S. 1003 (1974).

201. *Id.* Plaintiffs in *Saipan*, citizens of a Trust Territory, had sued for alleged violations of Article 73 of the U.N. Charter, which ensures the "just treatment" of the inhabitants of trust territories, and violations of Article 76, which describes the basic objectives of the trusteeship system. *Id.* at 96-97. The Charter provisions allegedly violated in *Filartiga* are Articles 55 and 56, which provide that member nations will promote human rights. *See* Brief for Appellants, *supra* note 7.

forceable obligations."[202] Such obligations were found to arise, however, from the Trusteeship Agreement made pursuant to Article 79 of the Charter. That Agreement, requiring the United States "to protect the inhabitants [of Saipan] against the loss of their lands and resources," provided a "source of rights enforceable by an individual litigant in a domestic court of law."[203] In reaching that decision, the *Saipan* court stated:

> The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purposes of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution.[204]

Saipan presented the classic self-execution problem: since no legislation implementing the Trusteeship Agreement existed, the court had to decide whether, in the absence of an implementing statute, the Agreement's provisions were defined narrowly enough to allow judicial enforcement. In order for the court to find that the plaintiffs had judicially enforceable rights, the Trusteeship Agreement itself had to execute the treaty's purposes to the same extent that subsequent implementing legislation would for a non-self-executing treaty. The court found the Trusteeship Agreement to be self-executing. Through an examination of "contextual factors," the court determined that the Trusteeship Agreement itself established what non-self-executing treaty provisions often establish only through the aid of implementing legislation: a source of enforceable, individual rights.[205] The court found that enforcement of the rights established in the Agreement "requires little legal or administrative innovation in the domestic fora."[206] The court also considered the purposes of the Agreement, the social consequences of self- or non-self-execution, and the fact that the alternative forum, in that case the Security Council, "would present to the plaintiffs obstacles so great as to make their rights virtually unenforceable."[207]

In one respect, the situation in *Filartiga* differs from that in *Saipan*. In contrast to *Saipan*, where the self-executing Trusteeship Agreement provided an alternative source of enforceable rights, there is no comparable alternative international agreement to the U.N. Charter provisions in *Filartiga*. Neverthe-

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202. 502 F.2d 90, 97 (9th Cir. 1974).
203. *Id.* at 97.
204. *Id.*
205. *Id. See* text accompanying note 190, *supra*, for discussion of the purpose served by the requirement of self-execution.
206. 502 F.2d 90, 97 (9th Cir. 1974).
207. *Id.* at 98.

less, the *Saipan* court's analysis of the self-execution issue provides principles which are applicable to *Filartiga*.

The *Saipan* opinion provides a method for analyzing whether an international agreement, standing alone, performs the task of implementing legislation and, thus, is self-executing. The *Saipan* court was not presented with legislation implementing the Trusteeship Agreement. Therefore, unless the Agreement were capable of implementing itself, the court could not enforce the obligations set out in the Agreement. *Filartiga,* however, presents the Second Circuit with a statutory grant of jurisdiction under section 1350 which permits federal courts to enforce, by means of a tort action, the obligations set out in the human rights articles of the U.N. Charter. The Second Circuit, unlike the *Saipan* court, is presented with implementing legislation in section 1350. The same criteria may be applied in *Filartiga* as were applied in *Saipan* to determine whether the goal of the self-execution requirement—the establishment of "affirmative and judicially enforceable obligations"[208]—has been satisfied. *Saipan* does not explicitly envision an analysis of the combined effect of a non-self-executing treaty provision and a statute which might provide sufficient implementation of that provision. Implicit in the *Saipan* analysis, however, is the notion that a self-executing treaty provision can be judicially enforced when it meets certain standards otherwise met by implementing legislation. It follows that if the Charter's human rights articles, considered together with section 1350, meet those same standards, then the self-execution requirement will be satisfied.

In light of the *Saipan* court's criteria for ascertaining self-execution, section 1350 itself embodies the necessary implementing legislation for the Charter provisions relied on by appellants in *Filartiga*. First, enforcement of the appellants' rights under the Charter's human rights provisions would require essentially no "legal or administrative innovation in the domestic fora."[209] Congress has provided federal jurisdiction for torts committed in violation of a United States treaty, in this case the U.N. Charter's human rights provisions. The Second Circuit need only decide the case under the common law of torts in order to enforce those rights.

Second, the purposes of the implementing legislation, section 1350, in conjunction with those of the Charter's provisions, support the argument for judicial enforceability. Definitive statements concerning the intentions of the framers of section 1350 are lacking. The sole commentary, on the House's disposition toward the statute, attributed to Representative John Vining, indicates the appropriateness of judicial enforcement of a tort claim based on the prohibition of torture in an international treaty. Vining's concern was

> to see justice so equally distributed, as that every citizen of the United States should be fairly dealt by, and so impartially adminis-

208. *Id.* at 97.
209. *Id.*

> tered, that every subject or citizen of the world, whether foreigner or alien, friend or foe, should be alike satisfied; by this means, the doors of justice would be thrown wide open . . . and, in short, the United States of America would be made not only an asylum of liberty, but a sanctuary of justice.[210]

The statement suggests that the impetus behind the passage of section 1350 was a desire to extend to aliens the opportunity to sue in federal courts and to provide an independent, impartial judiciary. That stance, together with the United States' current emphasis on the affirmative duty of states to enhance human rights, reflects a purpose in favor of self-execution as required under *Saipan*.[211]

Third, with respect to the "immediate and long-range social consequences of self- or non-self-execution,"[212] there is a notable division of human rights into two categories now explicit in two major international covenants: the International Covenant on Civil and Political Rights,[213] and the International Covenant on Economic, Social, and Cultural Rights.[214] In general, the latter concerns those rights whose initial implementation depends upon political and not judicial action.[215] It might be inappropriate to hold self-executing a provision allowing a civil damages suit for violation of certain economic rights before implementation by legislation. The case is very different, however, when the alleged violation is of a universally recognized civil right, such as the right to integrity of the person. The distinction between these types of rights is reflected in the attempt by the United States government to establish its priorities with respect to its obligation to promote internationally recognized human rights: Secretary of State Vance, in a 1977 address, listed as a right deserving urgent protection "the right to be free from governmental violation of the integrity of the person. Such violations include torture; cruel, inhuman, or degrading treatment or punishment . . . ."[216] Vance placed next in priority "the right to the fulfillment of such vital needs as food, shelter, health care, and education," the fulfillment of which would "depend, in part, on the stage of a nation's economic development."[217] This categorization, according to Professor Schachter, does not suggest that the rights concerning integrity of the person are more basic or essential; rather, "they are the rights which are seen as requiring prompt fulfillment in all countries, irrespective of their economic development or political system . . . . The important point is the recognition of a class of rights which have [sic] a special claim for immediate observance

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210. 1 ANNALS OF CONG. 853 (Gales & Seaton eds. 1789).
211. 502 F.2d 90, 97-98 (9th Cir. 1974).
212. *Id.* at 97.
213. International Covenant, *supra* note 3.
214. Covenant on Economic Rights, *supra* note 67.
215. Schachter, *Implications*, *supra* note 125, at 76-77.
216. *See* Vance, *Human Rights and Foreign Policy*, 76 DEP'T STATE BULL. 505 (1977).
217. *Id.*

and are [sic] supported by a consensus of a nearly universal character."[218] While the United States recognizes that both classes demand legal protection, this class is distinct from the second category of rights; because of the economic and social factors involved in the protection of rights in the second category, "there has been an understandable reluctance . . . to covert [them] . . . however desirable, into legally enforceable rights," at least to the extent that the elimination of violations requires conditions which are not within the power or economic resources of a disadvantaged state.[219] Political or economic reasons cannot, however, justify torture. Since protection against torture is paramount among the first class of rights, judicial enforcement, in terms of social consequences, is appropriate.[220]

Finally, there is no apparent alternative forum for the enforcement of the plaintiff's rights. The appellants in *Filartiga* alleged, with documentary support, that the Paraguayan forum lacks the judicial independence necessary to a fair hearing on the complaint.[221] Nor are alternative petitioning procedures available to the *Filartiga* appellants.[222]

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218. Schachter, *Implications*, *supra* note 125, at 76.

219. *Id.* at 76-77.

220. In terms of immediate effect, the negative consequences of judicial enforcement, such as a resultant flood of litigation, are unlikely. The circumstances of the *Filartiga* case, which gave rise to the opportunity to secure personal jurisdiction over the defendant, are not likely to be frequently repeated (particularly if it becomes known that torturers are not immune from civil suit in United States federal courts).

221. The Complaint was filed with an extensive appendix which concerned, in part, the present government of Paraguay. Included were findings of Amnesty International, a non-governmental organization, on human rights violations in Paraguay, and of the Commission of Enquiry of the International League for Human Rights, on the lack of independence of the Paraguayan judiciary, as well as the affidavits of the parties concerning the death of Joelito Filartiga. A selective summary of this information is pertinent for purposes of ascertaining whether there is an alternative forum for adjucating the Filartigas' claim. First, it is alleged that following the initiation of a criminal action against Joel Filartiga in accordance with Paraguayan law, the Filartigas and their attorney were subjected to a campaign of harassment in an attempt to dissuade them from pursuing the lawsuit. *See* Brief for Appellants, *supra* note 7, at 6-7; Joint Appendix, *supra* note 41, at 20. Second, the Inter-American Human Rights Commission, the International League for Human Rights, and Amnesty International report that the Paraguayan judiciary lacks actual independence from the executive branch controlled by General Stroessner and the police unit in which Pena-Irala was Inspector General. The U.S. State Department has reached the same conclusion: "Executive influence is excessive and often appears paramount in judicial proceedings." DEP'T OF STATE, 96TH CONG., 1ST SESS., REPORT ON HUMAN RIGHTS PRACTICES IN COUNTRIES RECEIVING U.S. AID 823 (Joint Comm. Print 1979) [hereinafter cited as REPORT ON HUMAN RIGHTS]. Alleged examples of this lack of judicial independence are the unjustified disbarment of the Filartigas' attorney in the criminal action by a Paraguayan judge who instituted a murder-conspiracy complaint against him, and the fabrication by the Paraguayan police of a third person's confession to the killing of Joelito Filartiga as a justifiable homicide ("crime of passion"). *See* Brief for Appellants, *supra* note 7, at 6-7; Joint Appendix, *supra* note 41, at 19-20, 24, 36.

222. For alternative petitioning procedures available to aggrieved citizens of states which are parties to such provisions as the Optional Protocol of the International Covenant on Civil and Political Rights, *see* Optional Protocol, *supra* note 28. Paraguay is not a party to the Optional Protocol. Paraguay has signed but has not ratified the American Convention, which provides an individual right of petition. Such petitions are, however, not admissible until domestic remedies have been exhausted. *See* REPORT ON HUMAN RIGHTS, *supra* note 221, at 823.

The criteria for self-execution thus appear to be satisfied in the *Filartiga* case. The Charter provisions relied on in *Filartiga* can be considered to have attained self-executing status through section 1350 as implementing legislation.[223] The statute implements the right to be free from torture which is embodied in the Charter, making the right capable of enforcement by a federal court.

The United States Supreme Court has never addressed the question whether the human rights provisions of the U.N. Charter are self-executing.[224] Courts should consider the underlying principles of the concept of self-execution as they apply to the particular case rather than rigidly apply the *Sei Fujii* ruling that the Charter's human rights articles are not self-executing. The issue of self-execution should not be seen as requiring an all-

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State courts in the United States present possible fora, since, as courts of general jurisdiction, they could decide the case as a common law tort action. *See* text accompanying note 12, *supra*. A state court, however, would not appear to offer a more suitable forum. Where international law is at issue, Congress has made clear its concern that the federal courts adjudicate the claims of aliens. *See* text accompanying notes 132-33, *supra*. Moreover, while the state court would not be presented with a jurisdictional question, the question of the propriety of abstention would confront a state court just as it confronts a federal court.

Further, the impact of a determination that cases like *Filartiga* could be brought only in state court would be two-fold. First, as discussed by Professor Lillich, domestic courts generally, and state courts in particular, "sensitive to foreign policy considerations, real or imagined, . . . have invoked a variety of techniques to bypass actual determination of the substantive issues" when presented with international human rights claims. Lillich, *Role of Domestic Courts*, *supra* note 128, at 155. Were such a practice to continue, plaintiffs in these circumstances might be denied relief altogether. Second, without a finding of concurrent jurisdiction in federal courts, there would be no opportunity for judicial determination of the status of the prohibition of torture as a norm of international law. That determination would be made only for purposes of deciding whether there is federal jurisdiction under § 1350. A state court would never reach the issue. There is no question as to whether torture constitutes a *tort*, either under the law of the forum or of the *lex loci delicti commissi*. Since torture is an aggravated form of assault and battery, it is theoretically actionable, civilly and criminally, under both American and Paraguayan law. *See generally*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 9-10 (4th ed. 1971). The Paraguayan Constitution guarantees the right to life and to freedom from torture. PARAGUAY CONST., art. 45. Hence, whether individuals have the right to protection against torture under international law most likely would never be decided in state court, since the tort itself would be a sufficient basis for state court jurisdiction.

Finally, if the opportunity exists for federal courts, within the legitimate scope of their power, to decide a damages action based on torture both as a tort and as a violation of international law, a dismissal for lack of subject matter jurisdiction would constitute a substantive decision by a federal court that torture is not, in fact, a violation of a norm of customary international law nor a violation of a U.S. treaty.

223. For historical support for viewing § 1350 as legislation implementing rights embodied in treaty provisions, *see* 26 Op. Att'y Gen. 250, 252 (1907). There, a United States Attorney General recognized the implementing character of the statute currently codified as 28 U.S.C. § 1350, stating that it provided a "right of action and a forum." An American irrigation company had diverted the course of the Rio Grande, injuring Mexican citizens and violating a treaty of the United States. Although the commission established to resolve disputes under the treaty had no power to adjudicate private rights and liabilities, an opinion issued by the Attorney General stated that Congress had provided a right of action in § 1350 for the Mexican citizens under the treaty.

224. R. LILLICH & F. NEWMAN, *supra* note 2, at 100.

or-nothing position as to the effect of any treaty provision.[225] While the obligation to promote human rights frequently must be implemented by legislation before courts can act upon it, this should "not mean that the courts cannot decide those cases which involve a specific and clearly recognized right or freedom."[226]

The *Filartiga* complaint is within the subject matter jurisdiction of the federal courts by virtue of section 1350. The jurisdictional prerequisite, an allegation of a tort committed in violation of international law, is satisfied whether torture is viewed as a violation of "the law of nations" or of "a treaty of the United States." Torture is prohibited under both bodies of international law. The alleged torture violates self-executing treaty provisions because the U.N. Charter provisions and section 1350 together establish a substantive right which has been implemented by a legislative enactment empowering the federal courts to enforce the right by means of a common law tort remedy. Moreover, the *Filartiga* court need not reach the self-execution issue because the violation of the Charter provisions is not the source of the Filartigas' right, but simply the prerequisite to their right of action in tort. Finally, the alleged act of torture satisfies the requirement that a violation of the law of nations be claimed. The alleged tort for which the appellants in *Filartiga* are seeking damages was committed in violation of the norm of customary international law proscribing torture.

V

THE PROBLEM OF JUDICIAL ABSTENTION FROM THE EXERCISE OF JURISDICTION

The international protection of certain universally recognized human rights has developed to the point where legal norms exist which absolutely prohibit infringement of those rights. The prohibition of torture in particular may give rise to an individual right of action, as illustrated by the *Filartiga* case. These rights are cognizable in United States federal courts. A court's exercise of jurisdiction will depend, however, upon the plaintiff's overcoming certain objections. These objections may be characterized as concerns of international comity, and the potential affront to the principle of domestic sovereignty implied by certain exercises of jurisdiction by another nation's courts.

Concern for human rights cannot be divorced from political realities. Some countries, for example, fear that if stronger protections are afforded individual rights, the rights of groups and of the collectivity may be undermined.[227] Former U.N. Director of the Division of Human Rights John

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225. Schachter, *The Charter and the Constitution*, *supra* note 18, at 656. *See also* Wright, *supra* note 117, at 77-78.

226. Schachter, *The Charter and the Constitution*, *supra* note 18, at 656. *See also* Wright, *supra* note 117, at 77-78; Schachter, *Implications*, *supra* note 125, at 66-67.

227. Humphrey, *Twentieth Century*, *supra* note 28, at 101-05.

Humphrey has noted the "increasing politicization of human rights in the United Nations."[228] For instance, there has been some reluctance on the part of developing nations to provide protections for individual rights which may jeopardize the security of the state.[229] The kind of political consideration which may influence a country's willingness to enforce human rights is illustrated by one African delegate's explanation for her abstention from the Optional Protocol to the Covenant on Civil and Political Rights, which provides for the filing of complaints by individuals against the state: "[We are apprehensive] about the utilization of these rights . . . for political ends or propaganda. . . . [T]here can be no human rights where there is no state. That is why our countries are particularly concerned with the security of the state—in other words the collectivity at the expense of the individual."[230]

In its human rights policy, the United States has attempted to be sensitive to legitimate claims to domestic sovereignty. By defining their concern as "internationally recognized human rights," Congress and the Executive have, in Professor Schachter's view, "deliberately avoided reference to a purely American conception of human rights."[231] Thus, the United States has recognized that there may be an area of legitimate diversity among nations in determining which "human rights" the state is legally bound to promote. Responsible choices as to which rights have priority may, for example, require consideration of "the likely efficacy of proposed action or the degree of support it will receive from others."[232]

When considering, then, the propriety of judicial intervention, the classes of human rights which the United States considers itself obligated to promote are relevant.[233] Where the United States has attempted to avoid imposing its human rights values on other nations, by referring to values which are internationally recognized, its decision to give priority to that class of rights pertaining to the integrity of the person has special significance. Only gross violations of rights within that class, such as the right to be free from torture, have given rise to specific protests and congressional withdrawals of aid.[234] In taking such action, Congress and the Executive must have determined that this class of human rights is indeed universally recognized, and is not simply a reflection of American values. There is no room for diversity among national policies concerning the right to be free from torture.

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228. *Id.* at 104. Humphrey suggests, for example, that various political considerations, including the fear of socialism in some countries, may have influenced the General Assembly to draft two International Covenants instead of one. *Id.* at 102. *See* International Covenant, *supra* note 3; Covenant on Economic Rights, *supra* note 67.

229. *See generally* Humphrey, *Twentieth Century*, *supra* note 28.

230. *Id.* at 102.

231. Schachter, *Implications*, *supra* note 125, at 75.

232. *Id.* at 79.

233. *See* text accompanying notes 216-17, *supra*.

234. Schachter, *Implications*, *supra* note 125, at 78.

Issues concerning separation of powers may be raised whenever a court is confronted with a case involving international protection of human rights. As with the often delicate and complex issues presented to Congress in determining whether to withdraw economic aid to violators of human rights, the issues may be political in nature.[235] Their resolution may demand time, fact-finding procedures, and means of implementation institutionally tied to the political rather than the judicial branches. Until now, American courts, concerned with foreign policy implications, have skirted decisions on substantive issues in certain human rights cases through invocations of the political question, sovereign immunity, and act of state doctrines.[236] Where, however, the political branches have clearly demonstrated their recognition of an international obligation to enforce a specific class of human rights, there would appear to be little basis for judicial reluctance to play an active role in enforcing these rights, once jurisdiction is established. As the Supreme Court has asserted, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[237]

The act of state doctrine, invoked as a defense in *Filartiga*, provides a useful vehicle for examining some of the issues, particularly those related to the separation of powers question, underlying the problem of judicial inaction. In a leading Supreme Court decision, *Banco Nacional de Cuba v. Sabbatino*,[238] a Cuban bank in the United States, which had claimed proceeds from a sale of sugar, invoked the act of state doctrine. The issue was whether the Cuban government's expropriation of the property without compensating the American owner was an act of the Cuban government within its own territory which precluded United States courts from passing upon the validity of the expropriation.[239] The Supreme Court, deciding in favor of the bank, carefully confined its decision to the question whether the judiciary should "examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles . . . ."[240]

The factors considered by the *Sabbatino* Court reveal the inapplicability of the act of state doctrine to a case alleging an act of torture. The Court in *Sabbatino* referred to the work of Professor Falk, who recognized that the doctrine should be applied to promote certain general policies: "[M]unicipal courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies."[241] According to Falk, however, domestic courts are

235. *Id.* at 79-87.

236. *See* Lillich, *Role of Domestic Courts, supra* note 128, at 155.

237. Baker v. Carr, 369 U.S. 186, 211 (1962).

238. 376 U.S. 398 (1964). It is outside the scope of this Note to discuss the *forum non conveniens* issue presented by the *Filartiga* case.

239. *Id.* at 427-37.

240. *Id.* at 428.

241. R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 72 (1964). *See* Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398, 424 n.22 (1964).

not precluded from deciding the validity of acts of state which violate universal standards:

> In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then the domestic courts properly act as agents of international order only if they give maximum effect to such universality.[242]

Sabbatino involved a standard about which, as the *Dreyfus* case also indicated, legitimate diversity still exists: the right to property.[243] By contrast, the universal condemnation of torture precludes any contention that there may be legitimate diversity among states in enforcing the prohibition. Indeed, states accused of violating the norm against torture do not seek to justify the violation; rather, they deny it.[244]

Sabbatino's discussion of the act of state doctrine focused on whether the case presented a legitimate diversity of values, thereby rendering judicial review inappropriate. The Court stated that since neither international law nor the Constitution prohibits the judiciary from reviewing foreign acts of state, application of the doctrine actually depends upon "the proper distribution of functions betwen the judicial and political branches."[245] In determining the proper separation of powers, the Court considered two propositions:

> [1] 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* . . . rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.
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> [2] the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.[246]

The Court then concluded that abstention under the act of state doctrine was appropriate to the case, carefully specifying that it was not "laying down . . . an inflexible and all-encompassing rule";[247] rather, it was deciding an issue

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242. R. FALK, *supra* note 241.

243. Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976); Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398 (1964).

244. *See* Joint Appendix, *supra* note 41, at 62 (Affidavit of Richard Anderson Falk, dated May 8, 1979: "No state claims a right to engage in torture").

245. 376 U.S. 398, 427-28 (1964).

246. *Id.* at 428 (numbers and emphasis added).

247. *Id.*

involving expropriation, about which there is extreme division in the international community.[248]

The international controversy over the issue of property rights contrasts strikingly with the consensus on torture. The prohibition of torture is universally accepted; torture is prohibited under Paraguayan law, and Paraguay has not, in the *Filartiga* case, sought to condone the alleged act.[249] The Second Circuit is simply called upon to apply "an agreed principle,"[250] rather than perform the "task of establishing a principle not inconsistent with the national interest or with international justice."[251] Under multilateral humanitarian conventions, the prohibition of torture may not be derogated: the defense of legitimacy is precluded. The prohibition is absolute as a matter of international consensus,[252] not merely as a function of "justice" or "national interest."

Judicial restraint in a case such as *Filartiga* would also appear to be inappropriate under the second proposition considered by the Court. There is less justification for judicial abstention as the implications of an issue, such as whether to provide a forum for an alien's tort action for torture inflicted in foreign territory, become less important for United States foreign relations.[253] Since the United States' official policy has held all nations to an international obligation to respect the rights to integrity of the person, and has imposed sanctions upon violators, the propriety of judicial intervention should not be challenged. The courts would not be involved in creating foreign policy, but in exercising jurisdiction in particular cases where official policy is already established. Since 1973, almost every major piece of foreign relations legislation has incorporated human rights provisions.[254] Indeed, judicial inaction would contravene the government's official position: in contrast with Congress' program of economic sanctions and Executive exhortations to eradicate torture, individual violators of human rights could expect sanctuary rather than civil suit in the United States.

The act of state doctrine, as a justification for judicial abstention, appears to be wholly inapplicable to a case alleging torture, a universally condemned violation of human rights. The Draft Convention for the Prevention and Suppression of Torture states in Article V: "The fact that a person was acting in obedience to superior orders shall not be a defence to a charge of torture."[255] As already noted, the Draft Convention also provides in Article IX

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248. *Id.*

249. PARAGUAY CONST., art. 45; *see* Brief for Appellants, *supra* note 7, at 56; Joint Appendix, *supra* note 41, at 10.

250. Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398, 428 (1964).

251. *Id.*

252. *See* text accompanying notes 45-87, *supra.*

253. Sabbatino v. Banco Nacional de Cuba, 376 U.S. 398, 428 (1964).

254. *See* CONG. RESEARCH SERV., LIBRARY OF CONG., 95TH CONG., 2D SESS., HUMAN RIGHTS AND U.S. FOREIGN POLICY 13 (Nov. 1, 1979). *See also* text accompanying notes 67-72, *supra.*

255. Draft Convention Against Torture, *supra* note 63, at 268.

that, under the principle of universal jurisdiction, domestic courts shall prosecute and punish offenders,[256] and, in Article IV(e), that "victim[s] of torture [shall be] afforded adequate and proper redress and compensation."[257] This essentially criminal convention, though still in the drafting stage, indicates the international community's unequivocal condemnation of torture. Conduct which is so universally prohibited cannot be shielded from judicial scrutiny as an act within the authority of one's office.[258] The torturer, under international law, is in a position paralleling that of the eighteenth-century pirate, for whom action under color of any state was no defense.[259] The torturer's position also parallels that of the modern criminal against humanity: as the Nuremberg Tribunal stated, "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorising action moves outside its competence under international law."[260] Thus, the recognition of federal jurisdiction in a case such as *Filartiga* is appropriate. Adjudication of a case properly within the jurisdiction of the court is simply and undeniably the proper judicial response.

VI
CONCLUSION

The right to protection against torture is one of the most firmly established of internationally guaranteed human rights. There is a universal consensus concerning the obligation of states to protect their citizens from torture. There are no extenuating circumstances for the use of torture.

United States federal courts have been granted original jurisdiction not only over the broad spectrum of cases in which the cause of action arises under federal law, including conventional international law, but also over the narrow field of tort actions by aliens for injuries allegedly committed in violation of international law. An alien's action for damages, such as the Filartigas', for wrongful death by torture committed by an official of the alien's state, falls squarely within federal jurisdiction as granted in section 1350.

The judiciary cannot escape responsibility for upholding the international prohibition of torture by invoking the doctrines of judicial abstention and def-

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256. *Id.* at 269.

257. *Id.* at 268.

258. *See* Golbert and Bradford, *The Act of State Doctrine: Dunhill and Other Sabbatino Progeny*, 9 SW. U. L. REV. 1 n.3 (1977) defining an act of state as "an act by the sovereign power of a foreign state or by its authorized agent within its own territory and *within the scope and authority of that office*, and which cannot be questioned or made the subject of legal proceedings in a domestic court of law." (Emphasis added.) Torture is prohibited by international consensus and cannot be authorized by a government without violating international norms.

259. 18 U.S.C. § 1652. *See* text accompanying notes 98-100, *supra*.

260. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 545 (1st ed. 1966).

erence to the political branches. An action based on violations of internationally recognized human rights demands judicial scrutiny.

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As this issue of the Review *was going to press, the Second Circuit reversed the judgment of the district court in* Filartiga *dismissing the claim for want of federal jurisdiction. Judge Kaufman, writing for the court, held that section 1350 confers subject matter jurisdiction over the action on the grounds that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations. Although the court did not wholly repudiate its previous formulation of what constitutes a violation of the law of nations, it noted that "the narrowing construction that the Alien Tort Statute has previously received reflects the fact that earlier cases did not involve such well-established, universally recognized norms of international law that are here at issue,"* Filartiga v. Pena-Irala, *No. 79-6090, slip op. at 3936-37 (2d Cir. June 30, 1980), and that "the courts are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good."* Id. *at 3938. The court further held that the exercise of federal jurisdiction is consistent with Article III of the Constitution on the ground that the law of nations has always been part of the federal common law. The court reserved choice of law questions, the act of state defense advanced by Pena-Irala on appeal, and the issue of* forum non conveniens *for the district court to decide on remand.*

The court did not address the question whether torture violates the U.N. Charter and whether, therefore, the alternative basis for jurisdiction under section 1350 has been satisfied. As this Note suggests, the court could have held that section 1350 also confers jurisdiction over the Filartigas' action on the ground that a treaty of the United States has been violated by the alleged act of torture. Nevertheless, the Second Circuit by "giving effect to a jurisdictional provision enacted by our First Congress, [has taken] a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." Id. *at 3942.*

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