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Federal Jurisdiction of Alleged Torturer Under the Alien Tort Statute: Filartiga v. Pena-Irala 630 F.2D 876 (2D Cir. 1980)

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Recent Decisions

FEDERAL JURISDICTION OF ALLEGED TORTURER UNDER THE ALIEN TORT STATUTE

Filartiga V. Pena-Irala
630 F.2d 876 (2d Cir. 1980)

The United States Court of Appeals for the Second Circuit has found that the Alien Tort Statute provides federal jurisdiction to sue for wrongful death resulting from the use of torture conducted under color of official authority.[1] Regardless of the nationality of the parties, whenever the alleged torturer can be served with process by an alien plaintiff within the borders of the United States, violation of the universally accepted norms of the international law of human rights demands this result.

Dr. Joel Filartiga and his daughter Dolly Filartiga, both citizens of the Republic of Paraguary, appealed from a dismissal of their suit against Americo Norberto Pena-Irala, also a Paraguayan citizen, for the wrongful death of Dr. Filartiga's son, Joelito Filartiga.[2] The appellants' complaint alleged that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay.[3] The Filartigas maintain that this torture-murder was in retaliation for the political activities of Dr. Filartiga, an opponent of President Alfredo Stroessner's government.[4]

When the Filartigas began a criminal action in Paraguay against Pena and the police, they were met with further retaliation and frustration. Their attorney was arrested, brought to police headquarters, shackled to a wall and threatened with death.[5] Later, during the criminal proceeding, a member of

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1. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2nd Cir. 1980)
2. *Id.*
3. *Id.* That night the police brought the victim's sister, Dolly Filartiga, to Pena's home where she was shown the body of her brother which evidenced marks of severe torture. As she ran from the house, Pena followed, shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up."*Id.*

The allegations of the appellants' complaint were necessarily accepted as true on appeal because the district court dismissed the suit for lack of subject matter jurisdiction.

4. *Id.*
5. *Id.* The Filartigas allege their attorney has since been disbarred without cause.

Pena's household confessed to the slaying of Filartiga's son. The man claimed that he found his wife and Joelito in the act of love and killed Joelito in a fit of passion.[6] Dolly Filartiga, however, offered evidence of three autopsies showing that her brother's death "was the result of professional methods of torture."[7]

In July 1978, Pena entered the United States under a visitor's visa and remained beyond the term of that visa. Dolly Filartiga, who also entered the United States that year under a similar visa,[8] learned of his presence and informed the Immigration and Naturalization Service. Pena was arrested and ordered deported on April 5, 1979. Miss Filartiga then served a summons and civil complaint on Pena for the wrongful torture-death of her brother, seeking compensatory and punitive damages of ten million dollars.[9] The appellants also sought to enjoin several officials of the Immigration and Naturalization Service from deporting Pena to ensure his availability at trial.[10]

Federal jurisdiction was asserted under 28 U.S.C. § 1331[11] and 28 U.S. C. § 1350, [12] the Alien Tort Statute, which states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Originally, the United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., dismissed the complaint for lack of subject-matter jurisdiction.[13] While recognizing the strength of the argument that official torture is a violation of international law, the court employed dicta from two recent opinions[14] of the Second Circuit which interpreted "the law of nations" as used in 28 U.S.C. § 1350 as excluding that law which governs a state's treatment of its own citizens.[15]

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6. *Id.* The criminal proceeding was still pending at the time of this action more than four years after its initiation.

7. *Id.*

8. *Id.* Miss Filartiga has applied for political asylum in the United States.

9. *Id.* at 879.

10. *Id.* n. 2. These defendants are no longer parties to this action because Pena was deported after the district court's stay of deportation expired and both the Second Circuit and the Supreme Court denied further stays.

11. 28 U.S.C. § 1331(a): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, . . ."

12. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789).

13. 630 F.2d at 880.

14. Dreyfus v. von Finck, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); ITT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975).

15. 630 F.2d at 880.

The United States Court of Appeals for the Second Circuit reversed the judgment of the district court, holding that the Alien Tort Statute provides federal jurisdiction whenever the alleged torturer can be served the process within the United States.[16] Since this civil action was clearly brought "by an alien for a tort only,"[17] the main question before the court was whether torture under color of official authority is a violation of international law.

The court considered various methods of ascertaining the applicable international law, including those articulated by the Supreme Court in *United States v. Smith*:[18] "consulting the work of jurists, writing professedly on public law, or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."[19] The Filartigas submitted the affidavits of several international legal scholars who unanimously concluded that international law prohibits absolutely the use of torture as alleged in the complaint.[20] Further, the court's opinion made use of the United Nations Charter and several of the United Nations Declarations as foundations for its conclusion. The United Nations Charter pledges all members to take joint and separate action for the achievement of[21] " . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . . "[22] Freedom from torture is clearly a fundamental human right. The Universal Declaration of Human Rights states that "no one shall be subjected to torture."[23] A later General Assembly Resolution declared that the concepts of

16. *Id.* at 878.

17. *See supra* note 12 and accompanying text.

18. 18 U.S. (5 Wheat.) 153 (Piracy).

19. *Id.* at 160-161.

20. Judge Kaufman's distillation of these affidavits was as follows: Richard Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University, and a former Vice President of the American Society of International Law, avers that, in his judgment, "it is beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations." Thomas Franck, professor of international law at New York University and Director of the New York University Center for International Studies offers his opinion that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Richard Lillich, the Howard W. Smith Professor of Law at the University of Virginia School of Law, concludes, after a lengthy review of the authorities, that officially perpetrated torture is "a violation of international law (formerly called the law of nations)." Finally, Myres MacDougal, a former Sterling Professor of Law at the Yale Law School, and a past President of the American Society of International Law, states that torture is an offense against the law of nations, and that "it has long been recognized that such offenses vitally affect relations between states." 630 F.2d at 879 n. 4.

21. U.N. CHARTER, 59 Stat. 1033 (1945), Art. 56.

22. *Id.* at Art. 55.

23. G. A. Res. 217 (III)(A), 3 U.N. GAOR, Supp. (No. 13) 71, U.N. DOC. A/810 (Dec. 10, 1948).

the Universal Declaration constitute basic principles of international cooperation.[24] Finally, in 1975, the United Nations addressed the topic of torture in the Declaration on the Protection of All Persons from Being Subjected to Torture,[25] which absolutely prohibits any state from permitting torture. Judge Kaufman concluded that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."[26]

The Court then analyzed the prohibition of torture under the "general usage and practice of nations" test[27] noting numerous international treaties prohibiting this practice[28]: the American Convention on Human Rights,

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24. G. A. Res. (XXV), 25 U.N. GAOR, Supp. (No. 28) 3, U.N. Doc. A/8028 (Oct. 24, 1970).

25. G. A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (Dec. 9, 1975). It states in part:

Article 1

1. For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

2. Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.

Article 2

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense 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 human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3

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

26. 630 F.2d at 881.

27. *See supra*, note 18.

28. 630 F.2d at 883.

29. OAS T. S. No. 36 at 1, OAS Off. Rec. OEA /Ser 4 v/11 23, doc. 21, rev. 2 (English ed., 1975).

Article 5,[29] the International Covenant on Civil and Political Rights[30]; and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3.[31] The Court also observed that, according to one survey, torture is prohibited by the constitution of over fifty-five nations,[32] including the United States[33] and Paraguay.[34] Judge Kaufman's analysis also incorporated the experience of the United States diplomatic contacts, which he viewed as further confirming the universal abhorrence of torture.[35] In its Memorandum to this action as Amicus Curiae, the United States stated that in regard to nations with which it maintains diplomatic relations, "no government has asserted a right to torture its own nationals."[36] On the basis of these sources, the Second Circuit Court of Appeals concluded "that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[37] Accordingly, the court refuted the *Dreyfus* dictum[38] upon which the district court had partially relied in dismissing this action.

With the prima facie case for federal jurisdiction established, the court then disposed of the appellee's arguments that jurisdiction cannot exist consistent with Article III of the Constitution, notwithstanding a violation of international law. The Second Circuit found, after a comprehensive historical analysis,[39] that, "The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[40] A case "aris[es] under the . . . laws of the United States"[41] if grounded upon statutes enacted by Congress or upon the common law of the United States.[42]

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30. U.N. General Assembly Res. 2200 (XXI))A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N.Doc. A/6316 (Dec. 16, 1966).

31. Europ. T. S. No. 5 (1968), 213 U.N.T.S. 211 (*semble*).

32. 48 *Revue Internationale de Droit Penal* Nos. 3 and 4, at 208 (1977).

33. U.S. CONST. amends. VIII, XIV.

34. PARAGUAY CONSTITUTION, Art. 45.

35. 630 F.2d at 884.

36. Memorandum of the United States as Amicus Curiae, at 16 n. 34.

37. 630 F.2d at 884.

38. *Id. See also supra* note 14.

39. The court reasoned that international law formed an integral part of the common law which became part of United States law upon the adoption of the Constitution. 1 W. BLACKSTONE, COMMENTARIES 263-264 (1st ed. 1765-69). The court also noted that under the Articles of Confederation, the Pennsylvania Court of Oyer and Terminer at Philadelphia applied international law to the prosecution of assault upon the French Consul-General, stating "[t]his law, in its full extent, is part of the law of this state . . ." Republica v. Delongchamps, 1 U.S. (1 Dall.) 113, 119 (1784). 630 F.2d at 886.

40. 630 F.2d at 885.

41. U.S. CONST. art. III, sec. 2, cl. 1.

42. 630 F.2d at 886.

Pena's contention that the district court did not have jurisdiction because the alleged tort occured in Paraguay was held to be without merit. The court observed that common law courts regularly adjudicate tort claims that arise in other geographical jurisdictions.[43] The appellees basically conceded the court's position; a state court would have jurisdiction where "the acts alleged would violate Paraguayan law and the policies of the forum are consistent with the foreign law,"[44] as long as that court had personal jurisdiction over the parties.

Alternatively, the appellees argued that Article III does not specifically refer to cases arising under international law and that the only reference to the law of nations in the Constitution is contained in Article I,[45] giving Congress the power to "define and punish . . . offenses against the law of nations."[46] Thus, only those international laws which Congress has defined as such are incorporated into the laws of this country.[47] The court easily rebutted this argument by citing numerous decisions applying international law.[48] The appellant's theory that the Alien Tort Statute was, in itself, an act which sought to define a law of nations was also refused.[49] Rather, the statute's interpretation was limited to granting federal jurisdiction for actions already recognized as violations of international law.[50]

While this opinion is important because of its recognition of torture as a gross violation of international law, the Pena decision will have little, if any, impact on the reduction of the kind of inhuman practices suffered by Joelito Filartiga. That an alleged torturer can be found by the family of a victim in a foreign country is an unusual occurrence. Rarer still is that the torturer is found in the United States by the victim's family. Further, the most difficult

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43. *Id.* at 885. After noting that a nation has a legitimate interest in the resolution of disputes among those within its borders, the court traced a line of cases stemming from Mostyn v. Fabrigas, 1 Cowp. 161 (1774) (the basis for state court jurisdiction of torts arising outside its territorial jurisdiction) holding that personal injury suits, wrongful death suits and wrongful death actions occuring outside the United States (where unlawful where performed) are transitory. McKenna v. Fish, 42 U.S. (1 How.) 241 (1843); Dennick v. Railroad Co., 103 U.S. 11 (1880); Slater v. Mexican National Railroad Co., 194 U.S. 120 (1904).

44. 630 F.2d at 885.

45. U.S. CONST. art. I., § 8. "[1] The Congress shall have Power . . . [10] To define and punish Piracies and Felonies committed on the high seas, and offenses against the Law of Nations."

46. *Id.*, cl. 10.

47. 630 F.2d at 886.

48. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 198 (1796); *The Paquete Habana*, 175 U.S. 677 (1900); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

49. 630 F.2d at 887.

50. *Id.*

barriers to successful conclusion of such a trial in the United States were not before the court on appeal. While torture is specifically banned in the Paraguayan constitution, there are many nations which have no such formal declaration of prohibition. If this case had been brought against a citizen of a country which did not formally decry torture, the Act of State doctrine,[51] which precludes our courts from questioning the legality of governmental acts of another nation within its own borders, might prevent our courts' consideration of this action.

Finally, the most crucial obstacle might well be the question of *forum non conveniens*.[52] The appellee submitted an affidavit of his Paraguayan counsel stating that Paraguay has a full civil remedy for the act of torture and wrongful death of a citizen.[53] Clearly most of the witnesses are located in Asuncion, Paraguay. The possibility of thoroughly investigating the claim and assembling all the witnesses and evidence in the United States is extremely remote. Hence, the defendant could forcefully and perhaps successfully argue that he is being unjustly forced to litigate in a forum far from the location where the alleged tort arose. In light of these problems, the Alien Torts Act will likely remain a rarely used basis of federal jurisdiction.[54] Nonetheless, the decision should be heralded because of its reaffirmation of the basic rights which should be shared by all of mankind.

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51. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

52. The considerations for the application of this doctrine include the case and cost of securing witnesses and proof and all other barriers which promote an expeditious and inexpensive trial. Dilella v. Lehigh Val. R. Co., D.C. N.Y., 7 F.R.D. 192, 193 (1947).

53. 630 F.2d at 879 n. 5.

54. 28 U.S.C. 1350 has previously been used as a basis for federal jurisdiction where the violation of international law was a falsified passport, Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), and as an alternative basis in an action to determine ownership of slaves on enemy vessels seized in international waters.