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Frank A. Russo*

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Abstract

Dr. Joel Filartiga and his daughter Dolly Filartiga, citizens of Paraguay living in the United States,' brought a civil action in United States District Court for the Eastern District of New York against Americo Norbeto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's son, Joelito, in Paraguay in 1976. Although none of the parties were citizens of the United States and the alleged tort occurred in Paraguay, the Filartigas contended that the court's subject matter jurisdiction was properly based upon the Alien Tort Statute. While the Filartiga decision is bound to have broad-ranged consequences, it does not open the "floodgates." The court here was faced with a clear mandate from the facts to find jurisdiction under the Alien Tort Statute in face of the Filartigas' claim of state sanctioned torture.

RECENT DEVELOPMENT

THE ALIEN TORT STATUTE OF 1789—POLITICAL TORTURE PROVIDES FEDERAL JURISDICTION UNDER THE STATUTE—*Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

Dr. Joel Filartiga and his daughter Dolly Filartiga, citizens of Paraguay living in the United States,[1] brought a civil action in United States District Court for the Eastern District of New York against Americo Norbeto Pena-Irala (Pena), also a citizen of Paraguay,[2] for wrongfully causing the death of Dr. Filartiga's son, Joelito, in Paraguay in 1976.[3] Pena, who at that time was the Inspector General of Police in Asuncion, is alleged to have kidnapped and fatally tortured Joelito in retaliation for Dr. Filartiga's opposition to the government of President Alfredo Stroessner.[4]

Although none of the parties were citizens of the United States and the alleged tort occurred in Paraguay, the Filartigas contended that the court's subject matter jurisdiction was properly based upon the Alien Tort Statute.[5] This "rarely-invoked"[6] statute 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

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1. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980). Dolly Filartiga has since applied for permanent political asylum. *Id.*

2. Pena had entered the United States in 1978 under a visitor's visa. At the time he was served with the complaint in this action, Pena was being held in the Brooklyn Detention Center pending deportation by the Immigration and Naturalization Service for overstaying that visa. *Id.* at 878-79.

3. Dolly Filartiga claims that she was brought to Pena's house and shown the badly brutalized body of her brother. When she fled horrified from the house, Pena is alleged to have pursued her shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up." *Id.* at 878.

4. *Id.* During the course of a criminal action brought by Dr. Filartiga against Pena in Paraguay in 1976, another man claimed he had killed Joelito in the heat of passion after allegedly finding Joelito committing an act of adultery with his wife. Despite this, Dolly Filartiga claims that she can produce evidence of three independent autopsies which show that Joelito died as a result of professional torture. *Id.*

5. *Id.* at 880.

6. *Id.* at 878. *See also* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) ("This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."). *See generally* Humphrey, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105 (1979).

law of nations or a treaty of the United States."[7] As the Filartigas did not allege that their cause of action arose directly under a treaty, the jurisdictional issue was whether the alleged conduct violated the law of nations.[8]

After hearing argument on Pena's motions to dismiss the complaint for lack of subject matter jurisdiction and *forum non conveniens*,[9] Judge Nickerson dismissed the complaint for lack of jurisdiction, "construl ing] narrowly 'the law of nations', as employed in [the Alien Tort Statute], as excluding that law which governs a state's treatment of its own citizens."[10]

On appeal from the order of dismissal, the Court of Appeals for the Second Circuit, after reviewing numerous affidavits of international legal scholars[11] and various international documents,[12] reversed the district court and held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties,"[13] and that the Alien Tort Statute provides federal subject matter jurisdiction whenever the alleged perpetrator is found and served with process within the United States.[14]

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7. 28 U.S.C. § 1350 (1976); *see* notes 15-23 *infra* and accompanying text.

8. 630 F.2d at 880.

9. Subject matter jurisdiction refers to the competence of a court to hear only those cases which are in the judicial power as defined by the Constitution *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (1975). *Forum non conveniens* refers to the doctrine which allows that, upon motion by the defendant, a court may dismiss an action of which it has both personal and subject matter jurisdiction if there exists "another forum so much more convenient for the parties and the courts that the plaintiff's privilege of choosing his forum is outweighed." C. WRIGHT, LAW OF FEDERAL COURTS 185 (3d ed. 1976).

10. 630 F.2d at 880.

11. *Id.* at 879 n.4. Professors Richard Falk of Princeton University, Thomas Franck of New York University, Richard Lillich of the University of Virginia School of Law, and Myres MacDougal formerly of Yale Law School all concurred that torture violates international law.

12. *Id.* at 881. Specifically the court looked at the Charter of the United Nations, 59 Stat. 1033, 1 U.N.T.S. xvi (1945); the Universal Declaration of Human Rights, G.A.Res. 217(III)(A) U.N. Doc. A/C.3/306 (1948); and the Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. 1034 (1975).

13. *Id.* at 878.

14. *Id. See generally* Kaufman, *A Legal Remedy for International Torture?* N.Y. Times, Nov. 9, 1980, §6 (magazine), at 44. Judge Kaufman wrote the panel's unanimous opinion in *Filartiga*. 630 F.2d at 877.

I. *THE ALIEN TORT STATUTE AND PRIOR CASE LAW*

The Alien Tort Statute, as now codified,[15] has not undergone any substantial change since its adoption as section 9 of the Judiciary Act of 1789.[16] Although the source of the statute is somewhat of a mystery,[17] it has been found to be one of a group of provisions "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions."[18]

Prior to *Filartiga*, only one court found jurisdiction expressly under the Alien Tort Statute. In *Abdul-Rahman Omar Adra v. Clift*,[19] a Lebanese citizen seeking custody pursuant to a Lebanese divorce decree brought suit against his former wife for the wrongful detention of their daughter. The court in *Clift* found the requisite international law violation in the fact that the defendant transported the child from country to country under a false passport.[20] It should be noted that the international law violation in *Clift* was ancillary to the actual tort of wrongfully detaining the child.[21]

In the remaining cases construing the Alien Tort Statute, the courts generally have found jurisdiction to be lacking.[22] The threshold problem has been for plaintiffs to show a violation of the law of nations.[23]

This difficulty has its source in two aspects of the courts' efforts to deal with international law in the context of the statute.

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15. U.S.C. §1350 (1976).

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

17. *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975); note 6 *supra*.

18. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1963).

19. 195 F. Supp. 857 (D. Md. 1961). *See also* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) (Alien Tort Statute afforded an alternative basis for jurisdiction of suit brought under a treaty to recover slaves taken on the high seas).

20. The child was a Lebanese citizen but was included under her mother's Iraqi passport, thereby concealing the child's full name and nationality. 195 F. Supp. at 861.

21. Although the *Filartiga* court appears to read the statute as requiring that the tort itself be the international law violation, it cites the *Clift* case, noting the distinction, but does not comment. 630 F.2d at 887 n.21. If the *Clift* case was rightly decided, then it would appear that this may be an alternative basis for finding jurisdiction.

22. *See, e.g.*, Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973).

23. 630 F.2d at 887.

First, in the absence of a treaty, courts have required that there be a nearly unanimous consent in the traditional sources of international law that a certain standard of conduct be recognized as a substantive international legal principle.[24]

Thus, for example, in *Huynh Thi Anh v. Levi*,[25] a child custody case arising out of the Vietnam "babylift," the Court of Appeals for the Sixth Circuit found jurisdiction lacking as its "research did not disclose in the traditional sources of 'the law of nations,' or private international law, a universal or generally accepted substantive rule or principle"[26] dealing with child custody. Similarly, the second circuit in *Khedivial Line, S.A.E. v. Seafarers' Union*[27] declined jurisdiction over an action brought by a Dutch shipping company for damages resulting from the alleged denial of its "right" under international law to have free access to port because of a labor union's boycott, by finding that such access was merely a rule of comity.[28]

The second aspect of the difficulty in sustaining jurisdiction under the statute has been the courts' characterization of interna-

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24. The United States Supreme Court has stated that, in the absence of a treaty, the law of nations may be ascertained in the "customs and usages of civilized nations, and as evidence of these, [in] 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." The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* United States v. Smith, U.S. (5 Wheat.) 153, 160-161 (1820). Furthermore, the Court has observed that for a rule or standard of conduct to become a rule of substantive international law, this investigation into the "customs and usages of civilized nations" should disclose a "general assent" on the part of nations that it be so. The Paquete Habana, 175 U.S. at 694. As stated by the *Filartiga* court, "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute." 630 F.2d at 888.

25. 586 F.2d 625 (6th Cir. 1978).

26. *Id.* at 629. *But cf.* Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975). The court in this "babylift" case stated that "the illegal seizure, removal and detention of an alien against his will in a foreign country would appear to be a tort . . . and it may be a tort in violation of the 'law of nations.'" *Id.* at 1201 n.13. The court declined to reach the Alien Tort Statute on the ground of inadequate briefing and because plaintiffs had not joined as defendants the adoption agencies which placed the children. *Id.*

27. 278 F.2d 49 (2d Cir. 1960).

28. *Id.* at 52. *See also* Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) (jurisdiction declined in an action brought by a Dutch citizen for the wrongful death of his wife in an air crash allegedly caused by the negligence of defendant; the court finding that the law of nations did not prohibit air crashes).

tional law as applying solely to the conduct of nations vis-a-vis each other. In *Lopes v. Reederei Richard Schroder*,[29] the District Court for the Eastern District of Pennsylvania defined a violation of international law as "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."[30] In *I.I.T. v. Vencap, Ltd.*[31] the second circuit, adopting the *Lopes* definition, found that while every municipal legal system may prohibit fraud, conversion and corporate waste, such prohibitions did not govern nations in their dealings *inter se*.[32] Also relying on the *Lopes* definition, the seventh circuit rejected the argument that fraud was considered immoral and unlawful by all nations, and thus was a violation of international law.[33]

Further, in *Dreyfus v. von Finck*,[34] another second circuit decision construing the Statute, the court added in dictum another limitation to what conduct would be considered in violation of the law of nations. After finding that it had no jurisdiction under the *Lopes* definition to hear the claims of a one-time German citizen[35] against West German authorities for damages resulting from the forced sale of property during the Nazi regime, the court stated that "violations of international law do not occur when the aggreived parties are nationals of the acting state."[36]

II. FILARTIGA v. PENA-IRALA: *TORTURE AS A VIOLATION OF INTERNATIONAL LAW*

In *Filartiga* the Court of Appeals for the Second Circuit found that official torture violated universal principles of international

29. 225 F. Supp. 292 (E.D. Pa. 1963).

30. *Id.* at 297. In this case the district court refused jurisdiction of an action brought by a seaman against the defendant shipowner for failing to provide a safe place to work and for unseaworthiness of his vessel. *Id.* at 295. The Court found that the doctrine of unseaworthiness was merely an American concept. *Id. See also* Damaskinos v. Societa Navigacion Interamericana, S.A., 255 F. Supp. 919 (S.D.N.Y. 1960).

31. 519 F.2d 1001 (2d Cir. 1975).

32. *Id.* at 1018.

33. Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142, 145 (7th Cir.), *cert. denied*, 414 U.S. 866 (1973). *See also* Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966).

34. 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

35. *Id.* at 26. At the time of suit, the plaintiff was a Swiss citizen. *Id.*

36. *Id.* at 31.

law, "regardless of the nationality of the parties."[37] Therefore, when personal service is made by an alien in the United States upon the alleged torturer, the Alien Tort Statute provides federal jurisdiction.[38]

Recognizing torture as a human rights issue,[39] the court in *Filartiga* first examined the Charter of the United Nations[40] for the broad proposition that nations have an obligation under international law to respect human rights.[41] Noting that "although there is no universal agreement as to the precise extent of the 'human rights and fundamental freedoms' guaranteed to all by the Charter," the court found it sufficiently clear that these guarantees include the right not to be subjected to torture.[42] As evidence of this the court then looked at the Universal Declaration of Human Rights,[43] wherein Article 5 provides that "no one shall be subjected to torture . . . ."[44] The court noted further that this prohibition against torture as "evidenced and defined"[45] by the Universal Declaration "has become part of customary international law."[46]

In finding that the prohibition against torture has become part of international law, the court observed that this prohibition was "clear and unambiguous, and admits of no distinction between aliens and citizens."[47] Thus, the Court of Appeals for the Second Circuit expressly rejected as being "clearly out of tune with the current usage and practice of international law,"[48] its own four year old dictum in *Dreyfus v. von Finck*[49] that no international law vio-

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37. 630 F.2d at 878.
38. *Id.*
39. *Id.* at 881.
40. 59 Stat. 1033, 1 U.N.T.S. xvi (1945).
41. 630 F.2d at 881. The court specifically looked at Article 55 which provides that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." U.N. CHARTER art. 55; and art. 56 which 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." U.N. CHARTER art. 56.
42. 630 F.2d at 882.
43. G.A. Res. 217(III)(A), U.N. Doc. A/C.3/306 (1948).
44. *Id.* at art. 5.
45. 630 F.2d at 882.
46. *Id.*
47. *Id* at 884.
48. *Id.*
49. 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

lation arises when the injured party is a national of the acting state. Rather, the court found that "the treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights on all people vis-a-vis their own governments."[50]

While the court was able to find that official torture perpetrated against an individual reached the level of an international law violation, it did not, however, reject the *Lopes* definition of an international law violation as being a violation of those rules of conduct which govern nations dealing *inter se*.[51] On the contrary, the court made it clear that it was not for the courts "to prejudge the scope of the issues that the nations of the world may deem important to their interrelationship, and thus to their common good."[52] In the case of torture "the nations have made it their business, both through international and unilateral action, to be concerned with domestic human rights violations of this magnitude."[53] Thus the court concluded, "the case before us . . . falls within the *Lopes* rule."[54]

III. *OTHER POSSIBLE ACTIONS UNDER THE ALIEN TORT STATUTE*

It is clear from the *Filartiga* decision that it is the fact that Pena was acting under color of official authority which rendered his act of torture an international law violation.[55] Although the Filartigas did not name Paraguay as a defendant, the violation of international law occurred as a result of the breach of the obligation owed by Paraguay to respect the internationally recognized human rights of its citizen.[56] Nevertheless, international law has recog-

50. 630 F.2d 884-85. Particularly relevant for the court in its discussion of torture was the Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975), which the court cites in full. 630 F.2d at 882 n.11.

51. 630 F.2d at 888.

52. *Id.*

53. *Id* at 889.

54. *Id.*

55. *Id.* at 878. "We have been directed to no assertion by any contemporary *state* of a right to torture its own or another nation's citizens." *Id.* at 884 (emphasis added).

56. *See id.* at 884. Accordingly, the court did not discuss the question of the liability of Paraguay for the act of its agent. It is beyond dispute that a state or other entity can only act through its agents. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356

nized individual liability for acts committed by public officials in the discharge of their duties.[57]

Although it has been said that the U.N. Charter and the Universal Declaration of Human Rights authoritatively define "the rights of man,"[58] as the *Filartiga* court notes, these fundamental rights provisions "will be a subject for continuing refinement and elaboration."[59] There are, however, recognized "standards below which no government can fall without offending fundamental values —such as genocide, officially tolerated torture, mass imprisonment or murder, or comprehensive denials of basic rights to racial, religious, political or ethnic groups."[60] Thus, to the extent to which

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(1886). For a thorough discussion of the responsibility of a state for the acts of its agents, see C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW (1928).

57. Generally these acts have been termed international "crimes" and thus the liability has been criminal. *See* Draft Code of Offenses Against The Peace and Security of Mankind, [1951] 2 Y.B. INT'L L. COMM'N 133, U.N. Doc. A/CN.4/SER. A/1951.

58. Address by Secretary of State Henry Kissinger to the Organization of American States, *reprinted in Human Rights Issues at the Sixth Regular Session of the Organization of American States General Assembly: Hearings Before the Subcomm. on International Organizations of the House Comm. on International Relations*, 94th Cong., 2d Sess. 19 (1976) [hereinafter cited as Kissinger]. *See also* LIBRARY OF CONGRESS, FOREIGN AFFAIRS AND NATIONAL DEFENSE DIVISION, CONGRESSIONAL RESEARCH SERVICES, HUMAN RIGHTS CONDITIONS IN SELECTED COUNTRIES AND THE U.S. RESPONSE (1978) [hereinafter cited as HUMAN RIGHTS CONDITIONS].

59. 630 F.2d at 885. The Congress and the Carter Administration have pointed to three elements as compromising "internationally recognized human rights":

> First, there is the right to be free from government violation of the person. Such violations include torture, cruel, inhumane or degrading treatment or punishment, and arbitrary arrest or imprisonment. And they include a denial of a fair public trial, and invasion of the home.
>
> Second, there is the right to the fulfillment of such vital needs as food, shelter, health care, and education. We recognize that the fulfillment of this right will depend, in part, upon the stage of a nation's economic development. But we also know that this right can be violated by a government's action or inaction—for example, through corrupt official processes which divert resources to an elite at the expense of the needy, or through indifference to the plight of the poor.
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> Third, there is the right to enjoy civil and political liberties—freedom of thought; of religion; of assembly; freedom of speech and freedom of the press; freedom of movement both within and outside one's own country; freedom to take part in government.

HUMAN RIGHTS CONDITIONS, *supra* note 58, at 8-9.

60. Kissinger, *supra* note 58, at 19. The argument has been advanced in public international law that there is a class of principles which no government may infringe on in any way. This concept is known as the doctrine of *jus cogens*. It has been defined as "a norm accepted and recognized by the international community of

such actions constitute torts, as in the case of torture, it would appear that the statute would provide jurisdiction for purposes of civil liability.[61]

Outside the area of governmental abuse of human rights, it has been recognized that certain actions by individuals are of such a nature as to be of international significance.[62] Such actions might include "terroristic [*sic*] activities, assassinations of heads of states, counterfeiting foreign currencies, the slave trade, and traffic in narcotics . . . ."[63] Although such activities are essentially criminal in nature,[64] in so far as they create a tort liability to a particular plaintiff, the Alien Tort Statute should apply.

CONCLUSION

While the *Filartiga* decision is bound to have broad-ranged consequences, it does not open the "floodgates." The court here was faced with a clear mandate from the facts to find jurisdiction under the Alien Tort Statute in face of the Filartigas' claim of state sanctioned torture.

States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, G.A. Conf. 39/27, *reprinted in* 8 INT'L LEGAL MATS. 679, 699 (1969). "The least controversial examples of the class are the prohibition of aggressive war, the law of genocide, the principle of racial nondiscrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy." I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 500 (2d ed. 1973). *See also* Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 951 (1967).

61. Racial discrimination is not itself a traditional tort, unless it is some form of intentional infliction of emotional distress. *See generally* W. PROSSER, LAW OF TORTS §49 (4th ed. 1971), the conduct has been so uniformly denounced that "those who use violence against national, racial, or religious minorities should be considered 'violators of the law of nations.' " P. JESSUP, A MODERN LAW OF NATIONS 183 (1968).

In this regard, the doctrine of "abuse of rights" should be mentioned. The gist of the doctrine is that as the community confers legal rights upon individuals, it cannot tolerate their antisocial use and, the interest of the community is adversely affected when the exercise of a hitherto legal right degenerates into an abuse of rights. *See generally* H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286-88 (1966). For the prohibition of abuse of rights as the basis for the law of torts, see *id.* at 295-97.

62. *See* P. JESSUP, *supra* note 61, at 178; C. EAGLETON, *supra* note 56, at 41.

63. P. JESSUP, *supra* note 61, at 178. *See also Draft Code of Offenses Against the Peace and Security of Mankind*, [1951] 2 Y.B. INT'L L. COMM'N 134, U.N. Doc. A/CN.4/SER. A/1951.

64. *See* note 56 *supra*.

In its recognition that there exists under international law a body of fundamental rights, and by expressing a willingness to redress violations of these rights where there is a clear standard for guidance, the *Filartiga* court clearly emphasizes the United States concern for human rights.[65] The decision leaves unanswered many legal questions,[66] but by opening federal courts to an alien for claims of this nature it represents a step forward in the administration of international justice.[67]

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65. One commentator has gone so far as to say:

> [t]he United States is the dominant law-oriented state. As a result, it possesses a special responsibility that can only be discharged by a self-conscious realization of its long-term interests in the development of a more stable world order. The use of domestic courts [to apply substantive principles of international law when an effective consensus of states favors the implementation of the rule] provides a symbolic means for the promotion of these interests.

R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 12-13 (1964).

66. *See* Kaufman, *supra* note 14, at 52:

> The Court of Appeals did not . . . determine whether Pena was in fact liable to the Filartigas, nor did it decide what nation's law would be applied to determine Pena's liability. These issues will be decided when the case is heard in the lower court. The hearing of such civil suits will raise difficult issues for the courts, and for the plaintiffs, as well. For instance, much of the evidence and many of the witnesses will be overseas. And courts will have to determine whether statutes of limitations will serve as a bar.

Moreover, it is not clear that the survivors of someone killed by an act of torture have a claim under international law as most wrongful death actions are creatures of statute in municipal law. *See generally* W. PROSSER, LAW OF TORTS §§ 126, 127 (4th ed. 1971). *See also Declaration on the Protection of All Persons From Being Subjected to Torture*, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34), 91, at art. 11, which vests the right to recover in the victim.

67. N.Y. Times, Aug. 20, 1980, at A18, col. 1. *See also* Klement, *Foreign Victims and U.S. Forums*, Nat'l L. J., Oct. 13, 1980, at 1, col. 4.