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Case Comment


On March 29, 1976, in Asuncion, Paraguay, local police kidnapped and tortured to death Joelito Filartiga. One of the alleged torturers was Americo Norberto Pena-Irala (Pena), Inspector General of Police in Asuncion. Pena subsequently entered the United States on a temporary visa and moved to New York City. In 1979, Dolly Filartiga, a sister of Joelito Filartiga living in the United States, learned of Pena's presence in this country. She notified the Immigration and Naturalization Service (INS), which began deportation proceedings against Pena. While Pena was in INS custody, Dolly Filartiga served him with a civil complaint in federal district court, demanding "damages for violation of human rights for the wrongful torture and murder of the decedent Joelito Filartiga." The district court issued a stay of deportation to secure Pena's testimony for trial, but subsequently dismissed the suit for lack of subject matter jurisdiction. The stay of deportation was lifted, and Pena returned to Paraguay. The Second Circuit Court of Appeals reversed the district court's ruling, holding that there was subject matter jurisdiction under section 1350 of the Alien Tort Statute on the grounds 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." Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

Congress enacted section 1350 as part of the Judiciary Act of 1789 and narrowly limited its jurisdiction to "all causes where an alien sues for a tort only in violation of a treaty of the United States or of international law. Generally, plaintiffs

only, committed in violation of the law of nations or a treaty of the United States." The plaintiffs also claimed jurisdiction under the general federal question statute: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1976) (amended 1980).

10. 630 F.2d at 878.
11. See note 9 supra.
12. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73 (1789). A long-standing and venerable part of the federal judiciary code, the present version of the Alien Tort Statute, 28 U.S.C. § 1350 (1976), has survived relatively unchanged since its first enactment in 1789. See id.; Act of Dec. 1, 1873, ch. 3, § 563, 18 Stat. 96 (1875); Act of March 3, 1911, ch. 2, § 24, 36 Stat. 1091 (1911); Act of June 25, 1948, ch. 85, § 1350, 62 Stat. 934 (1948). The purpose of section 1350 may have been to centralize federal control over matters involving foreign relations and international law. The need for a unified judicial approach in the area of foreign relations was recognized by the framers of the Constitution. Alexander Hamilton wrote that "the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." The Federalist No. 80, at 536 (A. Hamilton) (J. Cooke ed. 1961). See also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964); Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. Pa. L. Rev. 26, 37 (1952). Section 1350 thus fills part of a gap in federal jurisdiction. Without a special grant of jurisdiction over the subject matter, federal courts would be unable to hear a suit involving only aliens as parties. See 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3604 (1975); 14 id. § 3661 (1976).

It might be argued that Congress intended section 1350 to cover only torts recognized in the law of nations, such as piracy and slave trading, that international law defined and punished. See United States v. Smith, 18 U.S. (5 Wheat.) 153, 162 (1820). The first federal cases applying the predecessor of section 1350 involved instances of maritime commerce, supporting the contention that section 1350 was implemented to establish uniform rules in areas of international relations. The Second Circuit holding that torture violated international law, see text accompanying notes 52-53 infra, is consistent with this view. The choice of law issue presented by section 1350, whether international law or applicable state law defines the tort and available remedies, however, was not decided by the Second Circuit.

A related question is whether state courts have concurrent jurisdiction over a case where section 1350 is applicable. No courts applying section 1350 have held that state courts do not have jurisdiction; indeed, state courts have long asserted jurisdiction over transitory tort claims involving aliens, subject only to the doctrine of forum non conveniens. Eingartner v. Illinois Steel Co., 94 Wis. 70, 76, 68 N.W. 664, 665 (1896). If a section 1350 claim were heard in a state court, however, federal substantive law would govern. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964) (intrinsically federal problems created by act of state doctrine required determination according to federal law).
have easily satisfied the alien and tort only requirements.\textsuperscript{13} The requirement that the alleged tort violate a United States treaty or international law, however, has been a threshold barrier to several section 1350 claims.\textsuperscript{14} Because the alien and tort only requirements were not in dispute in \textit{Filartiga}, the central issue presented to the Second Circuit was whether a right of action existed under a United States treaty or a rule of international law.

For a treaty violation to be actionable by an individual under section 1350, the treaty must be part of domestic law, either because Congress has acted specifically to make it part of domestic law, or because the treaty is self-executing.\textsuperscript{15} A self-executing treaty confers justiciable rights upon citizens immediately upon ratification by the United States.\textsuperscript{16} Courts examine the treaty's history, purpose, and provisions as a whole to determine whether the treaty, by prescribing rules under which private rights may be enforced, evidences an intent that it be self-executing.\textsuperscript{17} One potential source of rights for litigants have easily satisfied the alien and tort only requirements.\textsuperscript{13} The requirement that the alleged tort violate a United States treaty or international law, however, has been a threshold barrier to several section 1350 claims.\textsuperscript{14} Because the alien and tort only requirements were not in dispute in \textit{Filartiga}, the central issue presented to the Second Circuit was whether a right of action existed under a United States treaty or a rule of international law.

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gants in a case like *Filartiga* is the United Nations Charter, a treaty of the United States.\(^{18}\) Some courts have found various portions of the Charter to be self-executing,\(^{19}\) but the human rights provisions of the Charter have been denied such status.\(^{20}\)

A court may also sustain jurisdiction under section 1350 if the alleged wrong violates international law or the law of nations.\(^{21}\) A court can find a relevant rule of international law for this purpose by referring to written international law, in which a consensus of the world community agrees to be bound by rules established in treaties.\(^{22}\) As in an action based on a United States treaty, the plaintiff must prove that an international treaty creates justiciable rights for private litigants, and that the plaintiff's claim is sufficiently related to the treaty to arise under it.

\(^{18}\) 59 Stat. 1031, T.S. No. 993 (1945).


\(^{21}\) *See* note 9 supra.

\(^{22}\) *Raman, Toward a General Theory of International Customary Law*, in *Toward World Order and Human Dignity* 356, 365 (M. Reisman & B. Weston eds. 1976). *See also* article 38 of the Statute of the International Court of Justice, which provides that in resolving disputes the International Court of Justice shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by contesting states;

b. international custom as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations.

Customary international law, which emerges when nations conform their behavior in national or international affairs to preferred values, may also provide a basis for a section 1350 action. Over time, these preferred rules of conduct become widespread practices, leading to a consensus among nations that these practices are part of international law. Although different in establishment, customary international law is equal in status to written rules of international law. The analytical process for establishing the existence of a rule of customary international law requires an examination of the circumstances and practices forming the widely held belief that an expected rule of conduct has force as international law.

The approach of the United States Supreme Court in *The Paquete Habana* is illustrative of the methodology used by courts to find a rule of customary international law. In reaching the holding that customary international law exempted coastal fishing vessels from capture as prizes of war, the Court examined orders of the King of England, scholarly writings on international law, and agreements between nations.

Most litigants, however, have not successfully proved a violation of international law in a section 1350 action. Part of the difficulty in establishing a cause of action under section 1350 based on a violation of international law is the traditional opinion that only states have rights under international law. Courts have viewed individuals only as objects of international

24. See id. at 369.
27. 175 U.S. 677 (1900). In *The Paquete Habana*, the master of two Spanish ships brought suit to recover the proceeds from the sale of two fishing vessels seized as prizes of war off the coast of Cuba during the Spanish-American War. Declaring the seizure a violation of international law, the Court held, "By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." Id. at 686.
28. Id. at 686.
29. Id. at 686-708.
law, generally without rights, especially against their own states.\textsuperscript{32} The historical development of international law as it evolved to meet the problems of commerce and diplomatic intercourse between nations shaped this perception.\textsuperscript{33} The concept of sovereignty meant that rules governing individuals were the sole province of the state, which could implement whatever domestic law it wished.\textsuperscript{34}

Although evolving standards came to provide individuals with rights in some circumstances,\textsuperscript{35} a profound change in the status of individuals under international law occurred in the aftermath of World War II. The Nuremburg trials of Nazi war criminals established the precedent that the rights of citizens had to be protected even in wartime. Individuals, not just states, were held accountable for crimes against humanity.\textsuperscript{36} Furthermore, individuals could not claim protection by asserting that local law or official duties compelled their acts.\textsuperscript{37}

The involvement of the United Nations in the process of developing norms of international law for human rights originated with the Charter. The countries forming the United Nations pledged to observe human rights\textsuperscript{38} and to take separate and

\textsuperscript{32} H. Lauterpacht, \textit{supra} note 31, at 295-96; L. Oppenheim, \textit{supra} note 31, § 292, at 641.


\textsuperscript{34} Id. at 594; L. Oppenheim, \textit{supra} note 31, at § 291. The concept of the primacy of domestic law sometimes misleads United States courts into relegating international law to a secondary status, although as part of the federal common law it is equal in status to other federal common law rules. See, e.g., State v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973); Note, \textit{The Human Rights Phenomenon: An Example of International Law as Authoritative Consensus}, 42 \textit{Alb. L. Rev.} 663, 665 n.12 (1978).

\textsuperscript{35} Actions were taken in the late nineteenth century to protect the religious and political freedoms of certain minorities. See, e.g., Treaty of Berlin, in L. Oppenheim, \textit{International Law} § 128, at 296 (8th ed. 1955). Rules of warfare, also developed in the late nineteenth and early twentieth centuries, afforded some protection to civilian populations. \textit{Id.} at § 30. \textit{See also} D. Grieg, \textit{supra} note 33, at 789. The Permanent Court of International Justice ruled in the 1920s that states' actions may give rise to individual rights in international law, not by direct action, but by prescribing expected rules of conduct. Advisory Opinion Concerning the Jurisdiction of the Courts of Danzig [1928] P.C.I.J., ser. B, No. 15, \textit{noted in} H. Lauterpacht, \textit{supra} note 31, at 142, 228-29; see Fachiri, \textit{The Permanent Court of International Justice} 274-76 (2d ed. 1932).

\textsuperscript{36} H. Lauterpacht, \textit{supra} note 31, at 141, 148.


\textsuperscript{38} "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . 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.
collective action to achieve goals protecting human rights. These goals gained more authoritative definition with the United Nation's passage of the Universal Declaration of Human Rights, which established specific, fundamental freedoms for individuals, including the right to be free from torture. The subsequent endorsement of these early human rights principles by third world countries joining the United Nations strengthened the development of the international law of human rights by indicating that these principles are not solely the product of Western nations with democratic traditions. This broad base of support is instrumental to the formation of the international consensus necessary to incorporate human rights, such as the right to be free from torture, into international law.

In 1976, the United Nations issued the “Declaration on the Protection of All Persons from Being Subjected to Torture” (Declaration Against Torture), another important step in the process of defining individual human rights under the Charter. Elaborating on the right of individuals to be free from torture, this declaration defined “torture” as the infliction of severe pain on an individual by a public official as punishment or to obtain information. The Declaration Against Torture also referred to the United Nations Charter, stating that any act of torture or other cruel, inhuman, or degrading treatment or punishment contravenes the purpose of the Charter and vio-

39. “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.” Id. art. 56.
40. G.A. Res. 217, U.N. Doc. A/64/948 (1948). The importance of the Universal Declaration can hardly be overstated. It has been incorporated into the constitutions of eighteen countries and the domestic law of many more. Filartiga v. Pena-Irala, 630 F.2d 876, 882 n.10 (2d Cir. 1980) (citing 48 REVUE INTERNALE DE DROIT PENAL Nos. 3 & 4, at 211 (1977)). See also Ackerman, Torture and Other Forms of Cruel and Unusual Punishment in International Law, 11 VAND. J. TRANSNAT'L L. 653, 667 (1978).
42. Perhaps the strongest indication of this endorsement rests with the prohibition against torture. Ackerman's research found prohibitions against torture or other physical mistreatment in the laws of 112 nations out of 136 countries surveyed. Ackerman, supra note 40, at 657-68.
43. Saario & Cass, supra note 37, at 596-97.
45. Id. art. 1.
lates the Universal Declaration of Human Rights.46 The Declaration Against Torture made the prohibition of torture a duty which may not be derogated, preventing states from justifying torture because of exceptional circumstances, such as war.47

Domestic courts have been slow to accept the developments in international law that recognize individual rights.48 Although domestic courts have acknowledged that an alien may have rights against a foreign state, recent cases have applied the traditional view that individual rights under international law do not extend to situations involving a citizen against the citizen's own state.49 Possible reasons for the slow adjustment in domestic judicial attitudes toward this shift in international law are a respect for domestic sovereignty50 and a concern about judicial interference with foreign policy.51

Against this background of human rights developments in international law, the Second Circuit addressed the jurisdictional question in Filartiga. The determinative issue for the Filartiga court was whether international law supplies a standard permitting federal jurisdiction over the claim for wrongful death caused by torture. The court found that the United Nations Charter, the Universal Declaration of Human Rights, and the Declaration Against Torture provide a standard of customary international law forbidding the use of torture.52 Noting that this rule of customary international law does not distinguish between aliens and citizens, the court found that all individuals have the right to be free from torture.53 Because the alienage and tort only requirements were not in dispute, the finding of a violation of customary international law meant that the Filartigas' claim satisfied the jurisdictional requirements of section 1350.

The Filartiga court showed a sensitivity to recent human rights developments in international law. In part, the court could not have avoided the international law issue, given the egregiousness of the wrong alleged by the Filartigas and the

49. See cases cited in note 48 supra.
51. See id. at 427-33.
52. 630 F.2d at 883-84.
53. Id. at 885.
universal condemnation of torture by the international community. Nevertheless, the analytical process used by the *Filartiga* court, which relied extensively on United Nations documents to prove a new rule of international law, gives new meaning to the obligations assumed by nations under the human rights provisions of the United Nations Charter.

The court's analytical process was consistent with the methodology of prior case law because it relied upon diverse sources, including scholarly authority, current national practices, and the declarations of nations in United Nations documents and other international treaties. The court made extensive use of the United Nations Declaration Against Torture and noted that this action was a formal declaration, not simply a resolution of the General Assembly. To the *Filartiga* court this meant not only that the Declaration Against Torture represented the consensus of the international community, but also that the document was an authoritative statement of the legal commitments assumed by countries ratifying the United Nations Charter. Moreover, by giving specific definition to one of the rights enunciated in both the Charter and the Universal Declaration of Human Rights, the Declaration Against Torture removed a major obstacle to finding in the Charter a binding commitment of nations against torture. Once the commitment against torture had risen to the stature of a rule of customary international law, nations could not unilaterally claim that they were not bound thereby.

54. The Second Circuit reprinted the full text of the Declaration Against Torture in its opinion. *Id.* at 882-83.
55. *Id.* at 884. The court contrasted what it called a "clear consensus" on the issue of torture with the problem faced by the United States Supreme Court in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In *Sabbatino*, the plaintiff had brought an action to recover the proceeds derived from the sale of sugar that were paid to Cuba after the Cuban government had nationalized the sugar industry. Although the Supreme Court dismissed the suit on the grounds that it was barred by the act of state doctrine, the Court also discussed the lack of consensus governing nationalization of foreign-owned assets. *Id.* at 427-39. The Second Circuit's reference to *Sabbatino* is confusing, since *Sabbatino* ultimately rested on the application of the act of state doctrine and was not decided as a question of international law.
58. See generally L. Oppenheim, supra note 31, § 340e at 740-42. Some have
The unanimity of international opinion against torture refutes any argument that insufficient time had passed since the adoption of the United Nations Charter and the Declaration Against Torture to justify the Filartiga court's finding of an applicable rule of customary international law. In The Paquete Habana, the Supreme Court applied a standard of international law established over several centuries. Because the work of the United Nations is of comparatively recent origin, however, long-established customs do not exist to indicate national perceptions of commitments under the Charter and to demonstrate the restrictions on, and modifications of, practices as a result of these commitments. If the test of time is needed to create a rule of customary international law, then it might be argued that the finding of the Filartiga court was premature.

The Paquete Habana, however, did not set a time requirement for determining a rule of customary international law. The essential requirement for making this determination is that a consensus exists that the expected and preferred behavior of nations has the force of law. Customary international law is the product of an evolutionary process; heightened contacts and improved communications today may allow such a
consensus to evolve more rapidly. Thus, the widespread adoption of the Universal Declaration of Human Rights and the reaffirmation of the specific duty to end torture contained in the Declaration Against Torture quickly created the necessary consensus that the use of torture violates international law.

The Filartiga court also rejected the argument that the act of state doctrine posed an obstacle to its jurisdiction. The act of state doctrine, which has its origins in the separation of powers doctrine, seeks to prevent the judiciary from interfering with the conduct of American foreign policy. Although criticized for unnecessarily circumscribing a court's ability to hear legitimate claims, the doctrine precludes United States courts from reviewing the propriety of official acts of foreign governments taken for a public purpose within the foreign country. While the rule has been narrowly construed, it remains as a limit to the exercise of a court's power.

Although officially dismissing this defense because it had not been raised at the district court level, the court stated in strong language that because Pena's actions violated Paraguayan as well as international law, his conduct did not have the attributes of an official act sufficient to claim protection under the act of state doctrine. The failure of the Paraguayan government to protest the bringing of the suit in the United States further attested to the absence of a public purpose behind Pena's conduct. More importantly, because Paraguay's obligations under international law to prevent torture may not be derogated, the act of state defense should not

63. 630 F.2d at 889.
64. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1964). Given the constitutional dimensions of Sabbatino, the act of state doctrine applied only to public acts taken for a public purpose within a country. Id.
68. 630 F.2d at 889.
69. Id. Cf. Lujan v. Gengler, 510 F.2d 62, 68 (2d Cir.), cert. denied, 421 U.S. 1001 (1975) (absent protest from foreign governments in question, petitioner has no grounds to protest his abduction as a violation of international law).
70. See text accompanying notes 44-47 supra. See also International Cove-
be available. Because the State Department's brief allayed the foreign policy concerns implicit in the act of state doctrine, United States courts will have no reason to apply the doctrine in future cases involving a *Filartiga*-type situation.\textsuperscript{71}

Instead of finding an applicable rule of customary law, the *Filartiga* court could have found a rule proscribing torture based on international treaty law. Treaty law may create norms because nations agree to be bound to the terms of the treaty.\textsuperscript{72} Treaty standards may codify existing customary international law,\textsuperscript{73} or lead to the creation of new customary international law.\textsuperscript{74} Even if a treaty is not universally ratified,
widespread adherence to treaty-based rules, as if they were binding as law, may result in a rule of customary international law applicable to all nations. Paraguay could be bound, therefore, to proscribe the use of torture even if it had not signed one of the relevant human rights treaties. Greater reliance on international treaties, however, might have forced the court to address directly the issue of whether the treaties provide a private right of action. Finding an intent to permit this right is difficult, given the weak provisions for private actions in those treaties.

Although the court avoided the question of a violation of a United States treaty, the functional result of the decision may be a limited endorsement of the position that such a treaty was violated. The court's finding that customary international law

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75. See generally sources cited in note 74 supra; Shimoda v. State, 32 I.L.R. 626 (D. Ct. of Tokyo, Japan 1965).


77. Although the appellants based their case on a violation of customary international law, amicus petitionee Amnesty International-USA presented the issue of whether a treaty of the United States provided a basis for jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 (1976). Amnesty International-USA argued that the United Nations Charter, as a treaty of the United States, had been violated because the later declarations of the United Nations on the issue of human rights had sufficiently defined United States and Paraguayan obligations under the Charter to make the Filartigas' claim arise under that treaty. Brief for Amnesty International-USA as amicus curiae at 7-8, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Additionally, the amicus petitioner argued that article 55 of the Charter compelled jurisdiction based on a violation of a United States treaty. Id. at 9. The court did not specifically discuss this jurisdictional argument and only mentioned it in a footnote. 630 F.2d at 880 n.6.

The court partially justified its rejection of this issue on the grounds that the appellants did not raise the argument. Id. Given precedents holding that United Nations Charter provisions on human rights are non-self-executing, the
has made the prohibition against torture obligatory is, in effect, a ruling that the Charter provisions, insofar as they incorporate this particular right, are part of domestic law. While Congress can take direct action to make Charter obligations domestic law, it is apparent from *Filartiga* that the development of customary international law can achieve the same result in domestic courts, even if the result is only incremental in scope.\(^7\)

The Second Circuit’s willingness to confront the international law issues in *Filartiga* is a marked departure from the passive role United States courts have recently played in interpreting international law.\(^7\) The fear of interfering with foreign affairs, a belief in the primacy of domestic law, and a general lack of familiarity with relevant international rules among practitioners and the judiciary are perhaps the most important reasons for this passive approach.\(^8\) The concern over interfering with foreign policy in the *Filartiga* case, however, was minimized by the position taken by the Department of State, participating in the case at the request of the Second Circuit.\(^8\) The State Department took a strong stand in favor of the appellants, observing that “where reports of such torture elicit some credence, a state usually responds by a denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.”\(^9\) It can be inferred that the State Department’s brief was instrumental in the *Filartiga* decision, not only because the Department of State infrequently participates in private litigation, but also be-
cause the brief contained a major statement of United States foreign policy.83

The finding of a prohibition against torture within international law was the first significant holding of the Filartiga court; its ruling was even more important, however, because it also recognized that individuals have rights under international law, even against their own states.84 The customary international law rule recognized by the Filartiga court simply made no distinction between the citizens of the responsible state and aliens.85 The failure of the rule against torture to distinguish between aliens and citizens compelled the Second Circuit to overrule the dictum of its earlier decision that "violations of international law do not occur when the aggrieved parties are nationals of the acting state."86 Characterizing that statement as

83. See generally, Lillich, supra note 71; Note, supra note 80.
84. The fundamental importance of this finding is apparent when viewed against the historical development of international law pertaining to human rights, especially the work of the United Nations. Although some authorities have argued that the initial work of the United Nations in this area, especially the Charter and the Universal Declaration of Human Rights, created no binding obligations on countries, see, e.g., D. Greig, supra note 33, at 799; H. Kelsen, The Law of the United Nations 29-32 (1950); Hudson, Integrity of International Instruments, 42 Am. J. Int'l L. 105, 108 (1948), the weight of scholarly authority today is that the United Nations activity, recognizing the importance of the individual and clarifying particular rights, has given the individual new status under international law. See P. Jessup, A Modern Law of Nations 87-93 (1949); H. Lauterpacht, International Law and Human Rights 148-54 (1950); Saario & Cass, supra note 37, at 596. See also Note, supra note 34, at 675.

The effort to give greater substance to these human rights principles supports this position. The United Nations has produced two important covenants on human rights: the Covenant on Economic, Social, and Cultural Rights, and the Covenant on Civil and Political Rights. GA Res. 2200A & 2200B, 21 U.N. GAOR, Supp. (No. 16) 49, 52, U.N. Doc. A/6316 (1966). Passed by a resolution of the General Assembly in 1966, the covenants became effective in 1976 when 35 countries ratified them. Over 60 countries have ratified both covenants, although the United States has failed to do so. See generally Saario & Cass, supra note 37, at 597-98, Weissbrodt, United States Ratification of the Human Rights Covenants, 63 Minn. L. Rev. 35, 35 nn.1 & 2 (1978). These covenants bind ratifying nations to implement and support a broad range of individual political, social, and economic rights. Id. at 35-36. These statements of rights endorsed by the Charter may gain more authority as more countries sign the Optional Protocol, which established the Human Rights Committee as an international tribunal for the protection of human rights. See note 76 supra. See also note 102 infra.

Given those developments, the unnecessary dicta of Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir.), cert. denied, 429 U.S. 835 (1976), and IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (1975), that individuals have no rights in international law was simply wrong. See notes 46-49 supra and accompanying text. In this respect the Filartiga decision makes United States case law consistent with international law. See Humphrey, supra note 76, at 529.
85. See 630 F.2d at 884.
inconsistent with the current usage and practice of international law, the court found that the prohibition against torture fit within a broader definition of international law, as rules or customs affecting the relationships between states and used by those states for their common good or dealings with each other. The Filartiga court said this broader definition, borrowed from an earlier district court ruling, was adequate as long as nations do not limit their interpretation of the scope of international law issues.

By uncritically adopting this definition of international law established in a lower court decision, however, the Filartiga court missed an important opportunity to strengthen its holding that international law now encompasses individual human rights, in addition to the prohibition against torture. If the Second Circuit was seeking to base its decision on domestic case law, it could have more aptly chosen The Paquete Habana for that purpose. Although the methodology used in The Paquete Habana to find customary international law is often cited, the case is also recognized as precedent for the principle that individuals have rights under international law. By establishing a new definition of international law that incorporated recent changes in that law, the Second Circuit would have given more effective guidance to courts in handling future human rights disputes.

Although the Filartiga court found the prohibition against torture clearly expressed in the United Nations documents, courts may experience difficulty in applying the prohibition to particular fact situations. The Declaration Against Torture defines “torture” as the intentional infliction of severe mental or physical pain to extract information or to punish individuals. The Declaration additionally describes torture as “an aggravated and deliberate form of cruel, inhuman or degrading treat-

87. 630 F.2d at 884.
88. Id. at 889.
89. The definition came originally from Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963), an action under the Alien Tort Statute, 28 U.S.C. § 1350 (1976), involving an alien's suit for damages resulting from a shipowner's negligence and his breach of a duty to keep a vessel seaworthy. The suit was dismissed for failure to show a relevant rule of international law. 225 F. Supp. at 297.
90. 630 F.2d at 888.
91. 175 U.S. 677, 714 (1900) (the individual bringing the action received redress under international law).
The qualifying word "aggravated" suggests the classical concept of torture—the rack and hot iron of the Inquisition and the modern use of electrical shock and weighted rubber hose. Other conduct, such as mental abuse, has the same result as torture, but is difficult to identify and to classify as torture, because it does not necessarily fit the classical definition.

The need to determine whether a particular act is torture might not arise if the basic right to be free from torture is part of a broader right to be free from mistreatment. The sources used by the Filartiga court to find the customary international law rule prohibiting torture refer not only to torture, but also to other forms of "cruel, inhuman or degrading treatment or punishment." Moreover, these other forms of mistreatment are also regarded as repugnant violations of human rights and fundamental freedoms. The references to other forms of mistreatment in international documents, which unambiguously establish an international prohibition against torture, indicate that the concerns of the international community over mistreatment are broader than torture.

93. Id. § 2.
94. United States prisoners of war during the Korean conflict experienced a variety of ill treatment designed to make soldiers completely dependent and compliant, without necessarily fitting the classical definition of torture. The difficulty of classifying certain conduct as torture may also arise in political contexts. As a result of the internal unrest in Northern Ireland, Britain was accused of using degrading and physically debilitating treatment on prisoners held in confinement. The investigation by the European Court on Human Rights cleared Britain of any charges of torture, although the practices were criticized. Ireland v. the United Kingdom, [1978] Y.B. Eur. Conv. on Human Rights 602 (Eur. Comm. on Human Rights). See Note, Torture in the International Community—Problems of Definition and Limitation—The Case of Northern Ireland, 11 CASE W. RES. J. INT'L L. 159 (1979).
96. Declaration Against Torture, G.A. Res. 3452, art. 2, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975). One arguably distinguishing characteristic of torture which would place it in a class separate from other forms of mistreatment is its use in a political context to subjugate and control persons or groups. See id. art. 1; AMNESTY INTERNATIONAL, REPORT ON TORTURE 10 (1973); Note, supra note 94, at 159-60. Torture is also unique in some sense because of its aggravated nature, and because governments do not assert a right to torture their own citizens. See text accompanying note 93 supra. Although different only in degree from other forms of mistreatment, this very difference might have been essential to formation of the consensus needed by the Filartiga court to make the rule against torture part of customary international law.
97. But differences in available resources and social mores concerning punishment, rehabilitation, and treatment, especially with nonpolitical prisoners or the mentally-ill, may make it more difficult for customary international law to encompass an expanded right to be generally free from mistreatment. See, e.g., sources cited in note 41 supra.
Even if it is limited to the issue of torture, the *Filartiga* decision is fundamentally important for demonstrating how individual human rights can become part of international law. The court's innovative reliance on United Nations documents will provide an example for other courts in the use of this relatively unfamiliar area of law as a new source of individual rights. The court's limited rejection of the view that the human rights provisions of the United Nations Charter are not part of domestic law, however, could have important implications for the further assertion of human rights in domestic courts, based on the United Nations Charter or other well-defined actions of the international community. This may be especially vital if the Senate fails to ratify the Human Rights Covenants signed by President Carter in 1977.

98. See also, Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153, 177 (1978). The decision in *Filartiga*, while specifically addressing the Alien Tort Statute, also adds another dimension to the concept of standing developed in two recent cases. See *Diggs v. Shultz*, 470 F.2d 461 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); *People of Saipan v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1972), *cert. denied*, 420 U.S. 1003 (1975). Infringement of a potential right sufficient to establish standing does not mean, however, that a cause of action can be sustained under federal jurisdictional statutes. The particular right being asserted under article 55 of the United Nations Charter must be sufficiently defined to be part of international law, or otherwise incorporated into domestic law. See notes 77-78 *supra* and accompanying text. See generally Garvey, *Repression of the Political Emigre—The Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78, 95-110 (1980).

99. The ramifications of the *Filartiga* decision could extend to Americans involved in merchandising the instruments of torture or actually participating in interrogations using torture. See generally United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), in which the petitioner alleged United States law enforcement officials were present when Brazilian officials tortured him before sending him back to the United States to face drug charges. The *Filartiga* decision may also present a new way of looking at prisoners' rights cases generally. The eighth amendment proscription against "cruel and unusual punishment," U.S. CONST. amend. VIII, has been used to force several states to bring prison conditions up to an acceptable minimum standard. E.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Battle v. Anderson*, 564 F.2d 388 (10th Cir. 1977); *Adams v. Mathis*, 458 F. Supp. 302 (M.D. Ala.), aff'd 614 F.2d 42 (5th Cir. 1978). As the meaning of the international right to be free from cruel, inhuman, or degrading treatment gains added application, it might be an alternative ground for establishing the rights of prisoners. See *Fernandez v. Wilkinson*, No. 81-1238, slip op. at 13 (10th Cir. July 9, 1981); *Larsen v. Manson*, 507 F. Supp. 1177, 1185 (D. Conn. 1980). International standards may also define available rights to persons confined involuntarily in mental institutions. See *Kaimowitz v. Michigan Dep't of Mental Health*, No. 73-19434-AW, slip op. at 25-27 (Wayne County [Mich.] Cir. Ct. July 10, 1978); cf. *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) (eighth amendment protection extends to the institutionally-confined mentally retarded).

100. See generally Weissbrodt, *supra* note 84. The lack of Senate approval does not totally end United States obligations to support the rights endorsed in the covenants. See Vienna Convention on the Law of Treaties, May 23, 1969,
Unfortunately, the decision of the Second Circuit may eventually provide the Filartigas with only limited or no relief. Without the presence of the defendant, the plaintiffs are denied a forum in which to litigate their claim. Assuming a forum is available and the plaintiffs' claim succeeds, even a simple money judgment may be uncollectible, thus illustrating the difficulties and limitations of enforcing emerging international liberties. The prescriptive force of international law may eventually compel nations to improve treatment of their citizens, but until that time only limited opportunities to gain relief will be available.

The ruling in *Filartiga* suggests that United States courts may be more willing to assume jurisdiction in cases involving international claims alleging a violation of human rights. Even if these cases are confined to narrow circumstances, future actions in United States courts will further the development of new standards for the international law of human rights. This effort should be supported. The fact-finding process and public record established in this country may aid other judicial forums in implementing human rights and in protecting these rules from political interference.

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101. *But see Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980), in which the plaintiff was awarded damages from the Chilean government for a death resulting from a bombing attack on a former Chilean government official.