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THE ALIEN TORT STATUTE: UNITED STATES JURISDICTION OVER ACTS OF TORTURE COMMITTED ABROAD

Historically, a nation's mistreatment of its citizens within its borders has not been recognized as a violation of international law. After World War II, an international interest in the protection of human rights began to develop. International conventions produced declarations requiring that nations respect the human rights of their citizens. Enforcement of these declarations was left to each nation, however, because individual nations retained primary responsibility for remediating violations of human rights. In *Filartiga v. Peña-Irala*, the United States Court of Appeals for the Second Circuit held that a United States district court had subject matter jurisdiction in a wrongful death action between two Paraguayan nationals for an act of torture committed in Paraguay. The court in *Filartiga* sustained jurisdiction under 28

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4. See International Covenant on Civil and Political Rights, supra note 3. "[E]ach State Party to the present Covenant undertakes to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." *Id.* art. 2, § 2.

5. 630 F.2d 876 (2d Cir. 1980).

6. *Id.* at 887.
U.S.C. § 1350, even though section 1350 had been used only twice before to sustain jurisdiction.

This Comment will consider whether torture is a violation of international law, whether the proper defendant is the torturer or his government, and whether section 1350 properly construed provides a district court with subject matter jurisdiction in actions between aliens for torts committed outside the United States. This Comment concludes that, although torture is a violation of international law, torturers are not liable individually and section 1350, properly construed, does not provide subject matter jurisdiction.

**Filartiga v Peña-Irala**

The wrongful death action in *Filartiga v. Peña-Irala* resulted from the alleged torture of a Paraguayan citizen in Paraguay by another Paraguayan citizen. At the time of the torture, the defendant, Peña-Irala, was the Inspector General of Police in Asuncion, Paraguay. The plaintiffs, Dr. Joel Filartiga, the victim's father and a self-described critic of the Paraguayan government, and Dolly Filartiga, the victim's sister, alleged that the defendant kidnapped Dr. Filartiga's son on March 29, 1976, and tortured him to death in retaliation for Dr. Filartiga's criticism of the Paraguayan regime.

Dolly Filartiga, the victim's sister, and Peña, the defendant, had come to the United States in 1978. In 1979, Dolly Filartiga discovered that Peña was in the United States. Acting on information supplied by Dolly, the Immigration and Naturalization Service discovered that Peña had remained in the United States beyond the term of his visa and arrested him. Dolly and Dr. Filartiga immediately brought a civil action in a United States district court against Peña demanding compensatory and punitive damages for the wrongful death of Dr. Filartiga's son. The plaintiffs based their argument for federal jurisdiction principally on 28 U.S.C. § 1350, which states that "[t]he district courts shall have original jurisdi-

9. 630 F.2d at 878-79.
10. Id.
tion 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.”

The plaintiffs, relying on international documents of the United Nations and other organizations, argued that torture was a violation of the customary international law of human rights; therefore, they argued, the district court had jurisdiction of the case under section 1350.

The United States District Court for the Eastern District of New York dismissed the complaint for lack of subject matter jurisdiction. The district court relied on dicta in Dreyfus v. Von Finck and IIT v. Vencap, Ltd. for the proposition “the laws of nations” as used in section 1350 did not apply to a state’s treatment of its own citizens. On appeal, the Court of Appeals for the Second Circuit reversed and remanded the case, holding that section 1350 provided jurisdiction because “deliberate torture perpetrated under color of official authority violates the international law of human rights.”

TORTURE OF CITIZENS AS A VIOLATION OF INTERNATIONAL LAW

International law is established by the custom and usage of nations. For instance, in The Paquete Habana, the crew of a Cuban coastal fishing vessel interposed a claim for the return of their cargo which the United States Navy had seized and which was the subject of a condemnation proceeding as a prize of war. The United States Supreme Court held that by international custom the cargoes of coastal fishing vessels were exempt from capture as

12. 630 F.2d at 879. The plaintiffs in Filartiga relied on “the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations” Id.
13. Id. at 880.
15. 519 F.2d 1001 (2d Cir. 1975).
16. 630 F.2d at 880.
17. Id. at 878.
18. In United States v. Smith, 18 U.S. (1 Wheat.) 153 (1820), the Supreme Court stated that “the law of nations may be ascertained by consulting the general usage and practice of nations” Id. at 160-61.
19. 175 U.S. 677 (1900).
20. Id. at 678-79.
prizes of war.\textsuperscript{21} The Court relied on opinions of statesmen and scholars, and provisions of treaties, that affirmed and reaffirmed the coastal fishing vessel exemption.\textsuperscript{22}

Custom alone, however, does not establish binding international law: the custom must affect the relations among nations and be used for the nations' mutual good.\textsuperscript{23} Policy that becomes customary in many states merely because each government independently views the policy as a moral good does not become international law.\textsuperscript{24} Simply because nations universally outlaw stealing, for example, does not make theft a violation of the law of nations.\textsuperscript{25} As a practical justification for the rule that a custom must affect the relationship among nations to be part of the law of nations, a nation's interference in the purely internal affairs of another nation can provoke war.\textsuperscript{26} Limiting international confrontations to actions directly affecting the complaining state may minimize the intensity of the reaction by the state to which the complaint is addressed. The number of opportunities for confrontation also will be limited.

Because international law deals with the relationships among states, a nation's mistreatment of its own citizens historically has

\begin{itemize}
\item \textsuperscript{21} Id. at 708.
\item \textsuperscript{22} Id. at 687-713. "[W]hat originally may have rested in custom or comity, courtesy or concession, [has grown], by the general assent of civilized nations, into a settled rule of international law." Id. at 694.
\item \textsuperscript{23} See, e.g., Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963); 1 C. HYDE, supra note 1, § 1.
\item \textsuperscript{24} See 1 C. HYDE, supra note 1, § 3; 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 75 (1963).
\item \textsuperscript{25} Interpreting the breadth of the class of cases that could be brought under 28 U.S.C. § 1350, the United States Court of Appeals for the Second Circuit determined that § 1350 did not permit the "view that the Eighth Commandment 'Thou shalt not steal' [was] part of the law of nations [w]here every civilized nation doubtless [had] this as a part of its legal system." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
\item \textsuperscript{26} See Lane, supra note 2, at 271-78. Lane argues that the Peace of Westphalia marked a change in the world legal order. Prior to the Reformation, Europe "was hierarchical in both its spiritual and secular spheres." Id. at 272. One ruler might be subordinate to another in the feudal structure. This "hierarchical structure could not accommodate" the modern political order and as a result it was extremely difficult to settle peacefully conflicts that "should have been easily resolvable." Id. at 273. To maintain peace among nations it was necessary to recognize "a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority." Id. at 274 (quoting Gross, The Peace of Westphalia, 1648-1948, 42 AM. J. INT'L. L. 20, 28-29 (1948)).
\end{itemize}
not been recognized as a violation of international law.\textsuperscript{27} Nations have been reluctant to find a violation of international law even if a nation treats its own citizens in a manner deemed cruel by most nations.\textsuperscript{28} Accordingly, \textit{Dreyfus v. Von Finck}\textsuperscript{29} reflects the general rule that a nation does not violate international law in dealing with its own citizens.\textsuperscript{30} In \textit{Dreyfus}, the United States Court of Appeals for the Second Circuit held that no jurisdiction existed under section 1350 because confiscation of a German national's property by Germans acting for the German government was not a violation of international law.\textsuperscript{31} The court in \textit{Dreyfus} determined that, because international law dealt only with the relationships between states, violations of international law did not occur when a nation dealt with its own citizens within its borders.\textsuperscript{32}

In \textit{Filartiga v. Peña-Irala},\textsuperscript{33} the Court of Appeals for the Second Circuit argued that torture represented an exception to the general rule that a nation's dealings with its own citizens are purely domestic matters.\textsuperscript{34} The court in \textit{Filartiga} determined that world opinion unanimously maintained that nations could not torture anyone, alien or national.\textsuperscript{35} The court emphasized that worldwide condemnation of torture was expressed in the Universal Declaration of Human Rights and other international declarations and conventions, and that torture had been renounced by many nations individually.\textsuperscript{36} The court in \textit{Filartiga} also noted the amicus curiae brief of the United States, which said that in the experience of the United States State Department no government has claimed a right to torture its citizens.\textsuperscript{37}

International agreements may create new rules of international

\textsuperscript{28} See 1 C. Hyde, \textit{supra} note 1, § 55.
\textsuperscript{29} 534 F.2d 24 (2d Cir.), \textit{cert. denued}, 429 U.S. 835 (1976).
\textsuperscript{30} \textit{Id.} at 31.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} 630 F.2d 876 (2d Cir. 1980).
\textsuperscript{34} \textit{Id.} at 884.
\textsuperscript{35} \textit{Id.} at 881-84. "[T]here 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." \textit{Id.} at 881.
\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 884.
Moreover, if nations expressly agree to be bound by new rules, the new rules can become binding even upon non-signatory nations. In addition, non-signatory nations will be influenced by the opinions and practices of the signatories. When an international organization makes a declaration, the statement is raised above the level of a national policy statement; the statement receives the support of a separate entity “possessing objective international personality.” Thus, repeated affirmation of principles in agreements and declarations of international scope may indicate that a principle is part of binding international law.

Commentators agree that World War II atrocities generated concern that human rights be made the subject of international protection. Attitudes changed toward the autonomy of the sovereign because the sovereign alone could not be relied on to protect human rights. As the Universal Declaration of Human Rights recognized, “it is essential that human rights should be protected by the rule of law.” Accordingly, the atrocities committed by the German government against German citizens during World War II were declared by the International Military Tribunal at Nuremberg to be crimes against humanity International jurisdiction thus was extended beyond violations of the laws of war, which applied only between nations. The International Military Tribunal, however, limited jurisdiction to actions connected with aggressive war. Persecutions carried out before the commencement of the war, including “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian popula-

38. See, e.g., 1 C. HYDE, supra note 1, § 3.
40. See, e.g., 1 C. HYDE, supra note 1, § 3; The Human Rights Phenomenon, supra note 39, at 681.
42. See 1 M. WHITEMAN, supra note 24, at 74.
43. See, e.g., Klayman, The Definition of Torture in International Law, 51 TEMPLE L.Q. 449, 458 (1978); Lane, supra note 2, at 279.
44. See Lane, supra note 2, at 279.
45. Universal Declaration of Human Rights, supra note 3, at 71.
46. 11 M. WHITEMAN, supra note 24, at 886.
47. Id.
tion,\textsuperscript{48} were not declared crimes against humanity or violations of international law.\textsuperscript{49} The United Nations subsequently affirmed in a 1946 resolution and a 1948 convention that genocide was a crime in violation of international law.\textsuperscript{50} Thus, the United Nations recognized that genocide was not only a moral wrong; genocide caused tangible losses, such as loss of cultural contributions, that directly affected foreign nations.\textsuperscript{51} In addition, the Convention on the Prevention and Punishment of the Crime of Genocide declared that genocide violated international law both in times of peace and war.\textsuperscript{52}

Against this background of international concern with World War II atrocities, international agreements manifested a growing concern with other peacetime violations of human rights. The Universal Declaration of Human Rights was approved by Resolution of the United Nations General Assembly in 1948.\textsuperscript{53} Although the Declaration was more a statement of goals than a statement of binding international law,\textsuperscript{54} the Universal Declaration was significant in several respects. The Declaration suggested that international protection of human rights should not be restricted to special categories such as violations associated with war or persecution of ethnic groups.\textsuperscript{55} In addition, the Universal Declaration suggested that nations had a practical interest in the treatment of citizens in other nations: each nation’s protection of its citizens’ human rights fostered friendly relations between nations.\textsuperscript{56} Violations of human rights threatened world peace because such violations forced peo-

\textsuperscript{48} Id. at 882 (quoting Agreements for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, E.A.S. no. 472, 82 U.N.T.S. 279).

\textsuperscript{49} Id.


\textsuperscript{51} G.A. Res. 96, supra note 50.

\textsuperscript{52} G.A. Res. 260A, supra note 50.

\textsuperscript{53} Universal Declaration of Human Rights, supra note 3.

\textsuperscript{54} The broad-ranging rights of the Universal Declaration, coupled with the Declaration’s self-description as “a common standard of achievement for all peoples” indicates that the Declaration is a statement of goals. See Universal Declaration of Human Rights, supra note 3, Preamble.

\textsuperscript{55} Universal Declaration of Human Rights, supra note 3, art. 2.

\textsuperscript{56} Id. Preamble.
ple to resort to rebellion to secure their rights. In addition to the right to be free from torture, many other rights were enumerated in the Declaration, including the right to freedom from slavery, the right to freedom of expression, the right to work, and the right to leisure time.

The International Covenant on Civil and Political Rights, adopted by a resolution of the United Nations General Assembly in 1966, reaffirmed values expressed in the Universal Declaration of Human Rights of 1948. The Covenant stated that the nations promised to provide remedies for violations of the rights set forth in the Covenant. This remedial language is significantly stronger than the language of the Declaration. Further, the Covenant established machinery for international investigation and mediation of international disputes arising from a nation's alleged mistreatment of its citizens. Although nations may, if necessary, avoid obligations required by the Covenant during national emergencies, even during emergencies the Covenant provides that nations may not: torture any person; delay the abolition of capital punishment; establish slavery or trade in slaves; imprison a person for failure to fulfill a contract; deny recognition of anyone as a person before the law; deny anyone freedom of thought, conscience, and religion; or impose ex post facto sentences or penalties.

57. Id.
58. Id. arts. 4, 19, 23 & 24.
60. Id. art. 2, § 3. "Each State Party to the present Covenant undertakes [t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy" Id.
61. The Universal Declaration states that "every organ of society shall strive by teaching and education to promote respect for these rights and freedoms" Universal Declaration of Human Rights, supra note 3, Preamble.
62. International Covenant on Civil and Political Rights, supra note 3, arts. 28-45. For example, in certain instances, the Human Rights Committee charged with mediating a dispute may require nations involved in the dispute to supply the Committee with relevant information. Id. § 1(f). In 1976 the International Covenant on Civil and Political Rights went into force and the first members of the Human Rights Committee were elected. Status of International Covenants on Human Rights, Note by the Secretary-General, 33 U.N. ESCOR, Annex (Agenda Item 18), U.N. Doc. E/CN. 4/1227 (1977), reprinted in 1 Joyce, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 343 (1978).
63. International Covenant on Civil and Political Rights, supra note 3, art. 4, § 2. The emergency that permits nations to avoid Covenant obligations is an emergency "which threatens the life of the nation and the existence of which is officially proclaimed." Id. art. 4,
The Proclamation of Tehran, endorsed by the General Assembly in 1968, reaffirmed that protection of human rights was an international concern. The Proclamation stated explicitly that the nations of the world believed that all nations were obligated to respect and protect human rights. Although the Proclamation did not establish any new international rights, the Proclamation was significant because it indicated the renewed support of the international community for the International Covenant.

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed by the Council of Europe in 1950, and entered into force in 1953. The Convention represented an ambitious regional effort to foster protection of human rights. Like the International Covenant, the Convention required that nations protect the rights enumerated in the agreement. In times of crisis, a nation may be exempted from its obligations under the conventions but nations can never deny persons of life, torture persons, enslave persons, or hold persons guilty for an act that was not a crime at the time of commission of the act. Significantly, the European Convention established international mechanisms for dealing with complaints of violations of the Convention, including the European Commission of Human Rights, which is empowered to conduct investigations and negotiate settle-

§ 1. Nonetheless, measures taken during such emergencies may not conflict with obligations under international law unless necessary for the “exigencies of the situation.” Id. A nation may never resort to the use of torture. Id. art. 4, § 2.


65. “The Universal Declaration of Human Rights constitutes an obligation for the members of the international community.” Id. § 2.

66. The broad range of rights enumerated in the Proclamation of Tehran demonstrated that the Proclamation was a statement of goals to be sought rather than a list of existing obligations in the international community. See, e.g., id. § 17.

67. “The International Covenant on Civil and Political Rights created new standards and obligations to which states should conform Id. § 3.

68. European Convention, supra note 3.

69. Id. art. 1.

70. Id. art. 15, para. 2. In a national emergency, the European Convention exempts a nation from its obligations under the Convention in much the same way as the International Covenant. Compare European Convention, supra note 3, art. 15 with International Covenant on Civil and Political Rights, supra note 3, art. 4.

71. European Convention, supra note 3, arts. 19-56.
ments of disputes. In addition, the European Court of Human Rights is empowered to render final decisions by which the party-nations promise to abide and can award just satisfaction if the internal law of a country affords only partial reparation to an injured party.

Judicial opinions of signatory nations of the European Convention indicate that the signatory nations consider themselves bound by the Convention. Thus, the signatory nations made more than token promises to enforce the rights of the Convention through domestic law. Accordingly, a German administrative court stated that "deportation of an alien to a country behind the Iron Curtain, which he left for political reasons, constitutes inhuman treatment and violates Article 3 of the Convention." In addition, a German court of appeals stated explicitly that the Convention was self-executing and had the status of German federal law. Opinions of other courts, if not explicitly recognizing the European Convention as having substantive force in domestic law, attempt to reconcile domestic law with the European Convention.

The American Convention on Human Rights was signed by several members of the Organization of American States in 1969, and came into force in 1978. The American Convention parallels the European Convention by calling for national protection of human rights and providing for international mechanisms to reinforce domestic protection. In addition, the American Convention

72. Id. art. 28. The European Commission can receive complaints from contracting states or from victims of violations by contracting states. Id. arts. 24-25.
73. Id. arts. 52-53.
74. Id. art. 50.
77. See note 75 supra.
against human rights violations. Similarly, a nation may be expected to complain about acts of torture in order to satisfy its citizens that the nation views torture as immoral. If torture is renounced only because it is universally regarded as immoral, as is the case with stealing or murder, nations are not bound by international law to forego torture of their citizens.\footnote{96}

Despite the possible lack of binding sanctions in international agreements and the possibility that nations sign international agreements for purposes that indicate the nations do not intend to be bound domestically by the agreement, the weight of evidence indicates that torture is prohibited by international law. In international agreements, states have agreed that they are obliged to respect certain human rights. The European Convention is especially significant because the signatories behave as though they are obligated to the other nations to respect human rights. The promises of nations not to violate human rights, even if those promises are not binding treaties or backed by sanctions, will encourage and reinforce the expectation of the world community that nations will not violate human rights.\footnote{97} Thus, the court's decision in \textit{Filartiga} that torture violates international law is well-founded.

\section*{Individual or Governmental Liability}

Because international law deals with the relationships between nations, violations of international law generally require some finding of action or assumption of responsibility on the part of a na-
tion's government. The International Covenant, the European Convention, and the American Convention each require that domestic remedies be exhausted before international enforcement machinery may undertake an investigation, mediation, or adjudication of a dispute. Accordingly, until a victim of torture has exhausted all remedies and has been denied justice by his national government, no violation of international law has occurred and no basis for an international dispute exists. Therefore, a transgression of international law does not occur automatically because the torturer acts in some capacity as the agency of the government. If remedies have not been exhausted, a violation of national law by the individual torturer exists. For example, if a police officer in the United States tortures a suspect during interrogation, the police officer is criminally liable under United States law. International liability on the part of the United States does not arise unless the United States fails to provide remedies for the torture. Exceptions to the requirement of complete exhaustion of domestic remedies exist, but these exceptions are justified only if some other form of government acquiescence or ratification of the torture may be implied. One of these exceptions, the existence of an administrative practice of torture, is noted in The Greek Case, heard before the European Commission of Human Rights in 1969. An administrative practice of human rights violations exists when violations repeatedly occur and are tolerated by the government.

98. In Dreyfus v. Von Finck, the Court of Appeals for the Second Circuit stated "[t]here is a general consensus that [international law] deals primarily with the relationship among nations rather than among individuals." 534 F.2d at 30-31.
99. European Convention, supra note 3, art. 26; American Convention on Human Rights, supra note 79, art. 46; International Covenant on Civil and Political Rights, supra note 3, art. 41.
100. "The [European] Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law." European Convention, supra note 3, art. 26. See also 2 C. Hyde, supra note 1, § 288.
102. See id. §§ 286-88.
104. [T]wo elements are necessary to the existence of an administrative practice of torture repetition of acts, and official tolerance. By official tolerance is meant that, though acts of torture are plainly illegal, they are tolerated in the sense that superiors of those immediately responsible though cognizant of such acts, take no action to punish them or prevent their repetition; or that
provides that even in times of emergency a nation may not infringe on: the right to recognition as a person before the law; the right to life; the right to humane treatment, including freedom from torture; freedom from slavery; freedom from *ex post facto* laws; freedom of conscience and religion; the right to have a family; the right to a given name; the right to protection of the child; the right to a nationality; and the right to take part in government through elections.  

The American Convention provided that the machinery for international enforcement should be established only after the Convention went into effect. Thus, because the American Convention went into effect in 1978, it has not had the practical effect of the European Convention, which has been in effect since 1953. Nevertheless, the American Convention is important because it ratifies the underlying premise of the European Convention that nations are obligated to respect and protect certain human rights.

The above-mentioned declarations have the assent and support of a large and representative part of the international community. Although the declarations place different emphases on different rights, all declare that torture and slavery always are impermissible. Reaffirmation of the principles contained in the agreements confirms the force of these principles as international law. The declarations state that violations of human rights do more than offend human sensibilities of right and wrong; violations of human rights adversely affect the interests of foreign nations in world peace. International mechanisms protect human rights, thus emphasizing that human rights are of international concern and that the community of nations expects individual nations to

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82. *Id.* art. 27.
83. *Id.* art. 79.
84. Because the declarations were accepted by numerous nations, the declarations became a source of international law. See note 38 supra.
87. "[T]he aim of the Council of Europe is the achievement of greater unity between its Members. One of the methods by which that aim is to be pursued is the maintenance and further realisation [sic] of Human Rights." European Convention, *supra* note 3, Preamble.
respect human rights.  

Arguably, due to the lack of real sanctions provided by the international declarations and the lack of sanctions exercised by nations in practice, the international declarations may represent denunciations of torture and other human rights violations that are not binding on nations as international obligations because the declarations leave the enforcement of human rights to domestic law.  

Most of the declarations are nonbinding treaties or have no practical means of enforcement. The binding force of international law, however, does not depend on the existence of sanctions to enforce that law. Even where military or economic sanctions are absent, moral disapproval evidenced by diplomatic sanctions may support the binding character of an international rule.  

Lack of sanctions, however, may evidence lack of intent on the part of nations to be bound by the custom or declaration. As stated above, a rule acquires force as international law because nations consider themselves bound to obey that rule. One commentator has noted that this intent to be bound is difficult to establish because "nations often speak with many voices when explaining an action." Because no real sanctions exist, more nations are willing to sign the declarations, thus rendering the apparent international consensus illusory. In addition, states may sign the declarations out of political expediency. Signatory nations' freedom of action is not limited practically by the agreement, and they gain the benefit of national and international public opinion by taking a stand.

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88. "The principle of domestic definition must be rejected as inconsistent with the basic idea, underlying the existence of international instruments, of establishing international criteria for the definition of human rights." Klayman, supra note 43, at 456 (footnote omitted).

89. See, e.g., note 60 supra.

90. See Lane, supra note 2, at 282-83. For example, under the International Covenant on Civil and Political Rights, the Conciliation Commission may not consider a violation of the Covenant without the "prior consent of the States Parties concerned." International Covenant on Civil and Political Rights, supra note 3, art. 42. Even if the Conciliation Commission considers the matter, the Commission's findings are not binding on the nations. Id.

91. 1 C. HYDE, supra note 1, § 4; 1 M. WHITEMAN, supra note 24, at 58-66.

92. 1 M. WHITEMAN, supra note 24, at 59.

93. See notes 22-24 & accompanying text supra.


95. See Lane, supra note 2, at 283 & n.81.
addition, exhaustion of remedies will not be required of a victim of human rights violations if the remedies provided by the victim's government are not "sufficient or effective," if the victim has been prevented from exercising or exhausting the available remedies, or if there is "unwarranted delay in rendering a final judgment." In each of these situations, the victim is denied relief in practical effect. Thus, government refusal to prevent torture or to provide remedies for torture that has occurred constitutes the international violation.

The court in Filartiga held that "deliberate torture perpetrated under color of official authority violates international law." Although color of official authority may be all that is required to make a government liable for certain violations of the laws of war committed by its soldiers, color of authority is not enough to make an act of torture a violation of international law. The court in Filartiga, by referring to threats made against Dr. Filartiga's attorney, implied that Dr. Filartiga was prevented from exhausting his remedies in Paraguay. The court in Filartiga also mentioned that the man who confessed to the murder of Dr. Filartiga's son had never been convicted or sentenced. These facts indicate that

higher authority, in face of numerous allegations, manifests indifference by refusing any adequate investigation of their truth or falsity, or that in judicial proceedings, a fair hearing of such complaints is denied.

Id. at 195-96.

105. In The Greek Case, the European Commission determined that "the three applicant governments had not at that stage offered substantial evidence of an administrative practice in Greece of torture ..., that nevertheless the remedies indicated by the respondent Government could not be considered as sufficient or effective." Id. at 187.

106. American Convention on Human Rights, supra note 79, art. 46.

107. Id.

108. Where torture has become official policy or exists by official sufferance, national remedies are likely to be insufficient or nonexistent. In this context, the usual rule of exhaustion of local remedies is a cruel hoax upon the torture victim. In order to prevent this charade of the torturing government insisting that the victim run a gauntlet of meaningless remedies, the [European] Commission developed the notion of an administrative practice of torture.

Klayman, supra note 43, at 509 (footnotes omitted).

109. 630 F.2d at 876.

110. See 3 C. HYDE, supra note 1, § 713.

111. See notes 98-108 & accompanying text supra.

112. 630 F.2d at 878.

113. Id.
the Paraguayan government failed to provide criminal and civil remedies for the torture, and thus exhaustion of domestic remedies was not necessary for a finding that the torture was a violation by Paraguay of the international law of human rights. The court in Filartiga, however, did not explicitly make denial of remedies the basis of its holding that international law had been violated. To this extent, the court's holding is inconsistent with international law.

A separate issue is whether the individual torturer may be liable under international law for an act of torture. Unlike war crimes and the acts of genocide for which individuals are held internationally liable, only governments must answer internationally for violations of human rights such as the peacetime torture of persons within their jurisdictions. Individuals are liable only under domestic law for human rights violations such as torture. The enforcement mechanisms of the European Convention provide for complaints only against governments. Thus, in The Greek Case, the European Commission for Human Rights made recommendations to Greece to remedy violations of human rights; no individual was brought before the commission as a defendant because the international law of human rights deals only with the actions of governments.

In Filartiga the court held that because torture violates international law, a torturer is subject to the jurisdiction of a United

114. See notes 98-108 & accompanying text supra.
115. See 11 M. WHITEMAN, supra note 24, at 1019.
116. "Persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A (1948), reprinted in BASIC DOCUMENTS, supra note 3, at 70.
117. The international enforcement bodies concern themselves only with convention violations committed by nations. For example, the European Convention states that "[a]ny High Contracting Party may refer to the Commission any alleged breach of the provisions of the Convention by another High Contracting Party." European Convention, supra note 3, art. 24.
118. The European Convention, for example, provides that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority." Id. art. 13.
119. See, e.g., id. arts. 31-32.
120. See notes 103-05 & accompanying text supra.
States district court under 28 U.S.C. § 1350. To the extent that this holding is based on the torturer's violating international law, the holding misconstrued established principles of international law. The torturer's nation violates international law by failing to provide civil and criminal remedies for the act of torture, but the individual torturer violates only domestic law. Therefore, the court should not have extended its jurisdiction over an individual torturer.

CONSTRUCTION AND APPLICATION OF THE ALIEN TORT STATUTE

The language of the Alien Tort Statute, codified at 28 U.S.C. § 1350, is cast in broad, undefined terms: "The district courts shall have 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." Assuming a violation of the "law of nations" or a "treaty of the United States" may be identified, the size of the class of cases cognizable under section 1350 remains uncertain. Arguably, the language of section 1350 permits a district court to have subject matter jurisdiction of any alien's claim against any other alien, regardless of the situs of the alleged wrong, because section 1350 does not require a tort claim to have any relationship with the United States. Although the statutory language does not require expressly a nexus between the alien's claim and the United States, limiting district courts' jurisdiction under section 1350 to actions with some nexus to the United States is reasonable and consistent with the purposes of the statute.

Legislative intent is usually the most important basis for statutory construction. Unfortunately, the legislative history of the Judiciary Act of 1789, of which the Alien Tort Statute was a part, is not conclusive. Nonetheless, history indicates that the Judiciary Act of 1789 was a conservative compromise won by those members of Congress who desired to limit the power of the federal judi-

121. 28 U.S.C. § 1350 (1976); 630 F.2d at 876.
123. See, e.g., Graver v. Commissioner, 142 F.2d 363, 366 (4th Cir. 1944).
124. Congressional debates over the Judiciary Act of 1789 that appear in the annals of Congress are not helpful. Mention of § 9(b) of the Judiciary Act, which gives jurisdiction to federal courts over alien complaints of tortious violations of international law, does not appear. 1 ANNALS OF CONGRESS 782-85, 796-809 (Gales & Seaton eds. 1789).
Accordingly, this narrow interpretation of section 1350 lends support to the view that section 1350 provides jurisdiction only if a nexus exists between the United States and the claim asserted.

Historically, section 1350 has been viewed as part of a scheme to enable the federal government to meet its international obligations. Accordingly, if the United States has committed a violation of international law against an alien, or if an alien is injured by an internationally wrongful act and the United States has a duty of jurisdiction under international law, section 1350 gives an alien access to United States federal courts, enabling the United States government to meet its international obligations to the alien and the alien's government. Thus, the perceived purpose of section 1350 is consistent with the requirement that a nexus exist between the United States and the claim asserted. So long as the United States has an international obligation to fulfill, a nexus will...
exist between the United States and alien's claim.

Previous interpretations of a statute carry great weight in determining the correct interpretation of the statute. Although no court has decided directly the question of whether there must be a nexus between the claim and the United States to sustain jurisdiction under section 1350, in *Abdul-Rahman Omar Adra v. Clift* the United States District Court for the District of Maryland sustained jurisdiction of an alien's claim in circumstances in which the nexus was present. In *Clift*, the defendant, an Iraqi citizen, brought her child into the United States using an illegal passport. The plaintiff, a citizen of Lebanon and the defendant's husband, sued to recover custody of the child, arguing that the defendant unlawfully had taken and withheld the child. The court in *Clift* sustained jurisdiction under section 1350; because a passport was a "political document," use of an illegal passport was a violation of the law of nations. Significantly, because the violation occurred within United States territory, the United States had some responsibility of jurisdiction over the offense. Thus, *Clift* conforms to the rule that section 1350 should be used to enable the United States to meet international obligations, and supports the view that, for the court to sustain jurisdiction under section 1350, the United States must have some nexus with the action.

The court of appeals in *Filartiga*, however, did not inquire into the nature of jurisdiction extended by section 1350. In discussing the statute, the court stated that the body of international law expands over time and that therefore the class of international rights amenable to section 1350 jurisdiction expands over time. This analysis is deceptive because the class of defendants and requirements for connection with the forum established by the statute

130. Jurisdiction has been sustained under § 1350 in only two cases. See note 8 & accompanying text supra. Other courts declined to sustain jurisdiction under § 1350 because no violation of international law had been shown. See, e.g., Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963).
132. Id. at 859, 864-65.
133. Id. at 859.
134. Id. at 864-65. The Court in *Clift* also recognized that the use of the illegal passport by the defendant constituted a violation of the law of the United States. Id. at 864.
135. 630 F.2d at 887.
should not expand over time. In addition, the court in *Filartiga* granted jurisdiction for an alien plaintiff suing an alien defendant for an action occurring in the alien’s country. Because individual torturers do not incur international liability, the United States was under no international duty to assert jurisdiction, absent a nexus between the claim asserted and the United States. The United States is not bound internationally to provide remedies for acts of torture occurring in foreign nations. Thus, because the tort complained of did not have any nexus with the United States, section 1350 does not provide jurisdiction. In this regard, the court’s decision in *Filartiga* was erroneous.

**Conclusion**

The court in *Filartiga* was correct in holding torture to be a violation of international law. The court, however, misapplied the principles of international agreements in holding individual torturers liable. In any event, the court’s decision in *Filartiga* will provide major support for the contention that nations are obligated under international law to protect those within their borders from torture.

Although the legislative intent behind section 1350 is unclear, the court’s application of section 1350 was inconsistent with a logical construction of the statute. Because individual torturers are not liable to torture victims, and because acts of torture lacking some nexus with the United States should not provide jurisdiction under section 1350, *Filartiga* should not have any significant effect on subsequent litigation in the United States. If, however, the court’s interpretation in *Filartiga* stands, then the United States federal courts could become an international forum for complaints about torture and other human rights violations. Such potentially unlimited jurisdiction is not justified under present federal jurisdictional principles or international law, and *Filartiga* should not be asserted as a basis for unlimited jurisdiction in federal courts.

T.M.

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