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The Elimination of Torture: International and Domestic Developments

I. Introduction

No country in the world asserts the right to torture its own citizens;¹ in fact, it is clear that any use of torture as an instrument of state policy violates established tenets of international law.² Yet despite these facts, the continued existence of torture as an instrument of state policy is well

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1. This fact was noted, for example, in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), wherein the Second Circuit had to decide whether the federal district court had been correct in dismissing on jurisdictional grounds a damages claim filed by the father and sister of a torture victim against the alleged torturer; all parties were citizens of Paraguay where the torture had taken place. See also Memorandum for the United States as Amicus Curiae Submitted to the Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*. For a fuller discussion of *Filartiga*, see text accompanying notes 36–41 *infra*. For a fuller discussion of official torture, and the lack of official endorsement of torture, see AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* (1984).

2. The United Nations and many other regional treaty organizations have condemned and outlawed torture. According to preambular paragraph 5 of U.N. Resolution 39/46 of Dec. 10, 1984, which contains the text of the Torture Convention, the practice of torture and other cruel, inhuman or degrading treatment or punishment is prohibited in international and national law. In addition, there are numerous intergovernmental organizations, like the U.N.'s Human Rights Committee, the Organization of American States, the Council of Europe, and the Organization of African Unity, and international nongovernmental organizations, like the International Committee of the Red Cross and the International Commission of Jurists, as well as local and national organizations, that work in a variety of ways to eradicate torture or to aid the victims of torture or their families. See also *Filartiga v. Pena-Irala*, *supra* note 1. The Second Circuit emphasized the point that official torture is violative of the law of nations (*i.e.*, international law).

documented.³ It may be used or sanctioned by governments for various reasons. Most commonly, torture is a part of a government's security strategy or continues as a result of the absence of political will on the part of a government to prevent its occurrence.

Although eliminating torture worldwide is likely to be protracted, one key to its abolition may lie in the enactment of international and national enforcement mechanisms that can translate international norms against torture into effective restraints on torture in practice. Occasionally there are developments that provide some basis for optimism that the international community, particularly the United States, recognizes the potential benefits of formal pronouncements against torture and of offers to protect victims and punish their offenders. This article describes three such recent developments: the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention),⁴ adopted

3. In 1984, Amnesty International [hereinafter referred to as AI] published a report, *TORTURE IN THE EIGHTIES*, as part of a two-year international campaign by AI toward the end of abolishing torture in the world. Noting the occurrence of torture, usually on a more or less continuous basis, in more than a third of the world's countries, AI's report was designed in part as an invitation to the world's governments to implement measures demonstrating their commitment to the worldwide abolition of torture.

The centerpiece of AI's report and campaign is a twelve-point program of legal and procedural safeguards which specifies ways in which governments can actually and officially demonstrate their opposition to torture, rather than simply remonstrating against it verbally. Governments are urged to adopt safeguards permitting "prompt and regular access" to prisoners and to ensure that all prisoners are taken before a judicial authority soon after being taken into custody; to protect against the secret detention of prisoners; to adopt procedures for detention and interrogation that protect the rights of prisoners and also encourage independent inspection visits to places of detention; to investigate reports of torture impartially and to make public the findings of such investigations; to protect against the extraction of confessions through torture by not allowing the use of such evidence in legal proceedings; to punish those who engage in torture, and to reject the temptation during a time of war or emergency to suspend the prohibition of torture; to encourage the prosecution of torturers wherever they happen to be found; to instruct those officials involved in the custody, interrogation, or treatment of prisoners in such a way that they refuse to engage in torture; to compensate victims of torture and rehabilitate them; to participate in intergovernmental organizations or mechanisms that will help abolish torture throughout the world; and finally, to "ratify international instruments containing safeguards and remedies against torture."

That torture continues to be practiced throughout the world, with at least implicit official sanction, is also evidenced by the number of documents, international and otherwise, describing or condemning torture. *See, e.g.*, the yearly *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES* submitted to the Committees on Foreign Relations in the Senate and on Foreign Affairs in the House of Representatives by the Department of State in accordance with the Foreign Assistance Act of 1961; the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948); the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975); and the Convention on the Prevention and Punishment of the Crime of Genocide, *done* Dec. 9, 1948, 78 U.N.T.S. 277.

4. U.N. Doc. E/Cn.4/1984/72, Annex (1984). *See* text accompanying notes 7-29 *infra*.

last year by the United Nations General Assembly; the Joint Resolution on Torture by Foreign Governments (Joint Resolution on Torture),⁵ passed by Congress and signed by President Reagan in September 1984; and the Torture Victim Protection Act,⁶ a legislative proposal which has received the endorsement of the ABA House of Delegates.

II. Efforts to Eliminate Torture

A. THE TORTURE CONVENTION⁷

On December 10, 1984, the United Nations General Assembly adopted, without dissent, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This action followed more than a decade of intense lobbying, negotiation and drafting within the U.N. system.⁸ The process began with the adoption in 1975 of the U.N. Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁹ In 1977, the General Assembly requested that the U.N. Commission on Human Rights prepare a draft Convention.¹⁰ A working party was appointed, and the draft Convention was completed in March 1984.¹¹ After several modifications, the Torture Convention finally was adopted by the General

5. Pub. L. No. 98-447, 98 Stat. 1721 (1984). See text accompanying notes 30-36 *infra*.

6. See text accompanying notes 37-50 *infra*.

7. For a similar treatment of this subject, see contributions of Professors Joan Hartman and David Weissbrodt in Volume 1, Nos. 2 (at 10), 3 (at 4 and 11), and 4 (at 8) of the Amnesty International-USA Legal Support Network Newsletter (LSN Newsletter).

8. Amnesty International—an organization that works toward the release of prisoners of conscience, advocates fair and early trials for political prisoners, and opposes the death penalty and torture or other cruel, inhuman, or degrading treatment or punishment of all prisoners—helped begin this process that culminated in the Torture Convention. Part of AI's first international campaign to abolish torture, which began in 1972, was the publication of a Report on Torture, as well as a petition to the U.N. with more than a million signatures calling for international action against torture.

9. G.A. Res 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1975). The Court in *Filartiga v. Pena-Irala*, *supra* note 1, relied heavily on this Declaration in concluding that official torture violates the "law of nations." 630 F.2d at 878, 879-880.

10. G.A. Res 32/62 (XXXII) (1977).

11. From 1977 to 1983, the Commission was unable to complete its work on the Convention in large part because of the opposition of the Soviet Union and the military regime that then governed Argentina. In December 1983, the General Assembly requested the Commission to complete its work as a matter of highest priority. G.A. Res 38/119 (XXXVIII) (1983). Finally, in 1984, the new civilian government in Argentina gave its support to the Convention, and the Commission was able to complete its work and send a draft Convention to the General Assembly. See Hartman, *Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, LEGAL SUPPORT NETWORK NEWSLETTER, Volume 1, No. 2, at 10.

Assembly and is now open for signature and ratification by the various nations of the world. (It will come into effect one month after it has been ratified by twenty nations.)

Despite the modifications,¹² what emerged is a significant advance in the continuing battle to eradicate the practice of torture. The Convention begins with a definition of torture:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The fundamental obligation imposed on state parties is to "take effective legislative, administrative, judicial or other measures to prevent acts of torture" within their jurisdiction.¹³ This general obligation is followed by a number of specific obligations. Of particular significance, state parties agree not to return (*refouler*) or extradite persons to countries where they "would be in danger of being subjected to torture."¹⁴ State parties are to take steps to ensure that torture is made a criminal offense under their laws¹⁵ and that they will assert jurisdiction in cases of torture where there is any nexus

12. For example, the *Draft* Convention set up a Committee Against Torture—ten independent experts to oversee implementation—and gave the Committee authority to investigate on its own initiative credible allegations of tortures being systematically practiced in any state party to the Convention. In the *final* version, however, such investigations are made dependent on the consent of the state party involved. Torture Convention, articles 20 and 28. Article 28, which permits ratifying states to declare that they do not recognize the competence of the Torture Committee to conduct investigations under article 20, was a last-minute compromise to achieve passage in the General Assembly.

Another modification involves article 19, which sets out the power of the Committee to review state reports on measures taken to implement the obligations of the Convention. The final compromise charges the Committee to make "general comments" in reviewing the reports, while the earlier draft more specifically allowed "comments or suggestions." It has been stated that "[t]hese bland words conceal a serious disagreement between states as to whether human rights implementation bodies in the U.N. system may specifically criticize a state suspected of human rights abuses, or can only give general recommendations to the state parties as a whole." Hartman, LEGAL SUPPORT NETWORK NEWSLETTER, Volume 1, No. 3, at 4. The differences of opinion apparently stem in part from an East-West split over the degree of enforcement power of the Torture Committee and how much that authority is limited by state sovereignty.

13. Torture Convention, U.N. Doc. E/CN.4/1984/72, Annex (1984) at art. 2(1).

14. *Id.* at art. 3(1). The standard for judging whether the person would be in such danger is "substantial grounds."

15. *Id.* at art. 4(1)

between the state and the incidents of torture.¹⁶ In essence, the Convention provides for universal jurisdiction over alleged torturers. Furthermore, the defense of "superior orders" is eliminated as a means for the torturer to escape responsibility for his acts.¹⁷

Those bound by the Convention also agree to include education and information regarding the prohibition against torture in their training of law enforcement personnel, public officials, and others who may be involved in the custody, interrogation, or treatment of individuals subjected to arrest, detention, or imprisonment.¹⁸ If reasonable grounds exist to believe that torture has been committed, state parties have an obligation to conduct a prompt and impartial investigation of such charges.¹⁹

The rights of torture victims include a right to "fair and adequate compensation."²⁰ Statements made as a result of torture may not be introduced against a victim of torture in any proceedings.²¹ And finally, even without an initiating complaint from the victim, state parties are obligated to conduct an investigation if there are reasonable grounds to believe that torture has been committed, and to prevent other acts of cruel, inhuman, or degrading treatment or punishment not rising to the level of torture.²²

The Convention also establishes a Committee Against Torture that is made up of ten independent experts charged with enforcement of the Convention.²³ The Committee is directed to review and make "general comments" about reports submitted by the states parties; these reports are supposed to describe measures the states have taken "to give effect to their undertakings under" the Convention.²⁴ The Committee is also allowed to

16. *Id.* at art. 5. Articles 6 through 9 create additional obligations relating to the criminal prosecution and extradition of alleged torturers.

17. *Id.* at art 2(3).

18. *Id.* at art 10. In addition, article 11 requires state parties to keep under "systematic review" interrogation practices and "custody and treatment" arrangements involving persons arrested, detained, or imprisoned.

19. *Id.* at arts. 12 and 13.

20. *Id.* at art 14.

21. *Id.* at art 15.

22. *Id.* at art 16. State parties are also bound by article 16, with respect to cruel, inhuman, or degrading treatment or punishment, to observe the obligations imposed in articles 10, 11, 12, and 13.

Generally, the distinction between torture and "cruel, inhuman or degrading treatment or punishment" is a matter of degree. That is, *torture* is a more exaggerated form of "cruel, inhuman or degrading treatment or punishment" rather than being a qualitatively different type of conduct or treatment of other persons. For a more detailed explanation, see *Ireland v. U.K.*, App. No. 5310/71, Eur. Comm. H.R. Report of Jan. 25, 1976, 19 U.B. Eur. Conv. on Human Rights 82, Eur. Court H.R. Judgment of Jan. 18, 1978, Ser. A, No. 25.

23. Torture Convention, *supra* note 13, at arts. 17-23.

24. *Id.* at art 19. See *supra* note 12, regarding the substitution of the directive "general comments" for the probably more demanding standard of the earlier Draft Convention,

initiate, with the state party's requested cooperation, an inquiry into information relating to an alleged systematic practice of torture within the state.²⁵ Furthermore, procedures are set up for the consideration of state and individual complaints alleging violations of the Convention by a state party which has separately declared its recognition of the competence of the Committee to receive such complaints.²⁶

The Convention will enter into force when twenty states have ratified it. At the time of this writing, over thirty states have signed, but no states have yet ratified the Convention.²⁷ The United States has not yet signed it, although the Convention is currently under review in the State and Justice Departments. The ABA House of Delegates will be considering a resolution endorsing ratification of the Convention at its meeting in February 1986.²⁸

"comments or suggestions." The precise meaning of "general comments," however, is not yet clear.

For a discussion of international reporting procedures, see Fischer, *International Reporting Procedures*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS LAW PRACTICE 165, 166 (Hannum ed. 1984).

25. Art. 20. This article was apparently the subject of modification due to a controversy over the power of the Committee to conduct investigations of allegations of systematic torture. The General Assembly added article 28, therefore, which renders article 20 nonmandatory. At "the time of signature or ratification of this Convention or accession thereto," the state party may "declare that it does not recognize the competence of the Committee provided for in article 20."

26. Arts. 21 and 22. Note a difference between article 20, and articles 21 and 22: the former, as modified by article 28, allows an *initial* declaration of *nonrecognition* of Committee competence, at the time of signature or ratification or accession; the latter two articles, however, require *affirmative declaration* of recognition of Committee competence before any action otherwise allowed by articles 21 and 22 may be taken by the Committee. The distinction, of course, would seem to mean that under article 20, as modified by article 28, the state will have to have made the initial declaration of nonrecognition or "lose" the chance to object to Committee competence at a later point in time; whereas under articles 21 and 22 the state will have to take the initiative and make the effort, at whatever point in time either article is triggered, to declare recognition of Committee competence or no action authorized by either article can be taken.

27. Pending the entry into force of the Convention, the U.N. Human Rights Commission in early 1985 created a Special Rapporteur on Torture to "seek," "receive," and "respond" to "credible and reliable information about torture." See Weissbrodt, *Report on the Forty-First Session of the U.N. Commission on Human Rights*, LEGAL SUPPORT NETWORK NEWSLETTER, Volume 1, No. 4, at 9. "[T]he Special Rapporteur on Torture will get information about the occurrence or threat of torture and will, where appropriate, send urgent appeals to the responsible governments. The Special Rapporteur should also request governments to investigate allegations of torture with a view to fact-finding, to assess responsibility, to provide compensation, and to punish wrongdoers." *Id.* at 9-11. Note the significance of "urgent appeals": experience demonstrates that torture ordinarily occurs shortly after arrest or imprisonment; therefore, time is critical, and the "urgent appeals" may help prevent individual cases of torture from occurring.

28. Expedient A.B.A. approval is important because it may help make the difference between prompt ratification, and delayed or no ratification, of the Convention. For example, ratification of the Genocide Convention, *supra* note 3, by the United States has been stymied

Ratification of the Torture Convention by the United States does not appear likely to produce much controversy. There seems to be nothing in the Convention that could merit serious objection. In fact, there are potential weaknesses in the Convention: the length of time before a sufficient number of states has ratified the Convention such that the document comes into force and its implementation measures become operational; the reality that those states most responsible for torture in the world are also not as likely to ratify the Convention; and the lack of implementation devices that would allow the Committee to act in emergency situations to prevent the immediate occurrence of torture.²⁹ Conversely, although the enforcement procedures of the Torture Convention constitute a modest step in the eradication of torture, they will ensure that allegations of torture will receive formal attention in an international body whose sole purpose is the elimination of torture. In that sense, therefore, ratification of the Convention by the United States would be a significant step in the struggle to abolish or at least diminish the occurrence of torture.

B. THE JOINT RESOLUTION ON TORTURE

In September and October 1984, Congress passed and the President signed into law a "Joint Resolution regarding the implementation of the policy of the United States Government in opposition to the practice of torture by any foreign government."³⁰ The Resolution reflects the sense of both Houses of Congress that specific steps should be taken by the Administration to indicate and implement United States opposition to acts of torture

for more than thirty-six years while the treaty languished in the Senate Foreign Relations Committee; the ABA House of Delegates did not endorse the Genocide Convention until 1976.

The Genocide Convention was adopted in 1948 by the United Nations General Assembly and has since been ratified by at least ninety countries (*not* including the United States). Ironically, the United States in fact was instrumental in the drafting of the Convention, whose purpose is to prevent genocide practices by governments or private individuals in times of peace as well as of war:

Under the Genocide Convention, nations oblige themselves to protect specified groups from acts of genocide, whether in time of war or peace, and whether the acts are committed by governments or private individuals. Singled out for protection are any national, ethnic, racial or religious group. Acts of genocide include the killing of group members, causing them serious bodily or mental harm, inflicting living conditions calculated to destroy the group, imposing measures to prevent births within the group and forcibly transferring children from their own group to another.

McDonald Evrard, *The Need to Punish Genocide*, Chicago Tribune, Feb. 29, 1984, at 11.

Among the reasons for failure of the United States to ratify the Convention is the belief of some opponents of the Convention that the treaty, if ratified, will infringe on "states' rights." See Comment, *The United States and the 1948 Genocide Convention*, 16 HARV. INT'L L.J. 683 (1975).

29. Weissbrodt, LEGAL SUPPORT NETWORK NEWSLETTER, Volume 1, No. 4, at 12-13.

30. Pub. Law 98-447, 98 Stat. 1721 (1984), signed into law Oct. 4, 1984.

perpetrated by foreign governments. The outgrowth in large part of a series of hearings held by the Subcommittee on Human Rights of the House Foreign Affairs Committee in the Spring of 1984 for the purpose of investigation of "the phenomenon of torture,"³¹ a number of groups and organizations, such as Amnesty International-USA, for example, view the Joint Resolution as a positive force against the incidence of torture around the world.³²

The Resolution first states the underlying components of United States policy regarding the practice of torture. These include recognition that torture, although "absolutely prohibited by international legal standards," does occur with alarming frequency in many countries; that various laws, practices, and policies may contribute to the continued existence of torture and therefore ought to be altered, with a view toward encouraging the adoption of procedures to lessen the likelihood of torture³³; and that the United States has been supportive of the work involved in developing the Draft Convention Against Torture.

Probably the most significant aspect of the Joint Resolution is the enumeration of concrete actions to be taken by the United States Government. Our Permanent Representative to the United Nations is directed to raise the issue of torture in that forum and to involve the United States in the formulation of international standards and enforcement mechanisms, including the Convention Against Torture, that are designed to abolish torture. In addition, the Secretary of State is directed to instruct (formal instructions) "each United States chief of mission regarding United States policy with respect to torture." These include the examination of allegations of torture and allegations of secret or extended incommunicado detention;

31. See *The Phenomenon of Torture, Hearings and Markup Before the Comm. on Foreign Affairs, Subcomm. on Human Rights and International Organizations*, House of Representatives, 98th Cong. 2nd Sess., May 15-16 and September 6, 1984. See also Lewis, *Report on House Torture Hearings*, LEGAL SUPPORT NETWORK NEWSLETTER, Volume 1, No. 1, at 8-10, for a description of the hearings.

In addition to being incorporated into the Joint Resolution, a number of recommendations that may have come out of the hearings have also been incorporated into the proposed Torture Victim Protection Act. See text accompanying notes 36-50 *infra*.

32. When introduced into the Senate, Sen. Percy noted that the Committee on Foreign Relations had heard testimony on the existence of torture and the need for the United States government to be more involved in attempts to eradicate torture, given that, as reported by Amnesty International in its report, TORTURE IN THE EIGHTIES, the "shocking reality [is] that torture is routinely practiced in more than 60 countries and . . . allegations of torture have been reported in almost one hundred countries. . . ."

33. The Joint Resolution acknowledges procedures, such as "access to detainees, the civil and criminal prosecution of torturers, and the rehabilitation of victims of torture," that many groups have indicated are "critical steps in reducing the practice and effects of torture." One such organization, as already mentioned, is Amnesty International, whose Twelve-Point Program focuses on specific steps that all governments can take to eliminate torture or at least make its occurrence or severity less likely. See *supra* note 3.

the forwarding of gathered information to the Assistant Secretary of State for Human Rights and Humanitarian Affairs for analysis and use in the preparation of the annual Human Rights Country Reports required by the Foreign Assistance Act³⁴; meeting with indigenous human rights monitoring groups about the practice of torture in order to gather information; and the expression of United States concern about individual cases of torture, as well as the sending of trial observers to trials in which there is reason to believe that torture has been used against the accused. Finally, in the last sections of the Resolution, United States commitment to restrictions on the exporting of "crime control equipment," in particular to countries where there is likelihood of their being used for the purpose of torture, is reinforced; and heads of departments that participate in the training of foreign personnel in military and law enforcement are directed to include "instruction regarding international human rights standards and the policy of the United States with respect to torture" in the training of such personnel, particularly in countries where torture is most likely to occur.

Clearly, then, the Joint Resolution is not mere "window-dressing." The Resolution signifies a promise by the United States to oppose torture wherever it occurs in the world. The steps called for in the Resolution, therefore, if in fact implemented vigorously (and it is probably too early to estimate the extent to which the Administration has implemented the terms of the Resolution³⁵), will be significant contributions to the elimination or at least diminishment of torture.

34. Sections 116(d)(1) and 502B(b) of the Foreign Assistance Act of 1961, as amended, require submission (to Congress) by the Secretary of State of a report describing and evaluating "the status of internationally recognized human rights" in countries receiving foreign aid or "security assistance" from the United States and in all countries which are members of the United Nations: "The reports are based upon all information available to the United States Government. Sources include American officials, officials of foreign governments, private citizens, victims of human rights abuse, congressional studies, intelligence information, press reports, international organizations, and nongovernmental organizations concerned with human rights. Senate Committee on Foreign Affairs, Country Reports on Human Rights Practices for 1984, 98th Congress, 1st. Sess. 3, (1985).

35. See, e.g., DEPT. OF STATE, FISCAL YEAR 1986 FOREIGN ASSISTANCE REQUEST OVERVIEW, March 21, 1985.

Question. . . . What efforts have you undertaken to implement the parts of that resolution which call for the coordination between U.S. Embassy officials, and indigenous human rights organizations in documenting torture?

Answer. All embassies were cabled the text of the resolution, and we are preparing instructions to amplify existing guidelines as requested in the resolution. It should be noted that in practice, the reporting of incidents of torture as part of the Department's annual Human Rights Country Reports, already draws on information from human rights organizations as appropriate.

Question. What efforts have been undertaken to raise the instances of documented torture with foreign governments?

Answer. Through quiet diplomacy and through publicizing reports of torture such as those included in the Human Rights Country Reports, we make foreign governments aware that

C. THE TORTURE VICTIM PROTECTION ACT OF 1985

The landmark decision in *Filartiga v. Pena-Irala*³⁶ raised an expectation that United States courts might play a larger role in enforcing the international prohibition against torture.³⁷ In *Filartiga*, the United States Court of Appeals for the Second Circuit was presented with the question whether, as the Court saw it, torture violates the "law of nations" (international law) such that the Alien Tort Statute,³⁸ which authorizes original federal district court jurisdiction over "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,"³⁹ should be applied to allow the father and sister of a torture victim to sue the alleged torturer in federal district court.⁴⁰ (All parties were citizens of

their countries' human rights records affect qualification for U.S. foreign aid and assistance. *Id.*

36. 630 F.2d 876 (2d Cir. 1980). See also *Filartiga v. Pena-Irala*, 577 F.Supp. 860 (1984).

37. *Filartiga* has spawned an enormous body of law review articles. See in particular Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L. J. 53 (1981). Additional references can be found in Whisman, *Selected Bibliography: Articles and Cases on International Human Rights Law in Domestic Courts*, 18 INT'L LAW. 83 (1984).

38. 28 U.S.C. § 1350 (1982). With regard to the Alien Tort Statute, human rights in international law, and the application of international human rights law in United States courts, see, e.g., Burke, Coliver, de la Vega, & Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291 (1983); Hartman, *Unusual Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655 (1983); D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982); Paust, *Litigating Human Rights in U.S. Courts*, 4 HOUS. J. INT'L L. 137 (1981); Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. (1982); Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813 (1978); Dickinson, *The Law of Nations As Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952); Hoffman, *The Application of International Human Rights Law in State Courts: A View From California*, 18 INT'L LAW. 61; and Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act*, 14 U.S.F.L. REV. 105 (1979).

39. A slightly different version of the Alien Tort Statute was enacted by the First Congress in the Judiciary Act of 1789, ch. 20, sec. 9(b), 1 Stat. 73, 77 (1789): Original district court jurisdiction (concurrent with jurisdiction of state courts) was established over "all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." The altered version was then codified at 28 U.S.C. § 1350 (1982).

40. The Second Circuit's opinion in *Filartiga* has been criticized as not sufficiently analyzing the issues. First, does the "law of nations" or international law, include a prohibition of torture? The answer cannot be assumed because it depends upon whether the content of international law changes over time, or must be interpreted as of 1789; this distinction is significant since torture would not have been identified as a violation of the law of nations in 1789. In fairness to the Second Circuit, however, the *Filartiga* opinion does not merely assume that the law of nations includes a condemnation of torture. Instead, the *Filartiga* court concludes that "an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights," 630 F.2d 876, 880 (2d Cir. 1980), but only after examination of recognized sources of international law like United States judicial opinions, United Nations documents, nation-state constitutions, and the writing of international law scholars.

A second issue is whether the Alien Tort Statute authorizes a cause of action, or must be read

Paraguay, where the acts of torture, resulting in the death of Joelito Filartiga, occurred, but while in the United States the Filartigas discovered that the alleged torturer was residing in New York.) The *Filartiga* Court held that customary international law prohibited official torture and that the relatives of a torture victim could sue the alleged torturer for damages in federal court using the Alien Tort Statute. On remand, a default judgment of \$10.2 million was entered against the defendant by the district court.⁴¹

Since the *Filartiga* case was decided, however, at least two decisions have cast doubt on the expectation that the decision would be followed by other courts. In *Tel-Oren v. Libyan Arab Republic*,⁴² the United States Court of Appeals, District of Columbia Circuit, affirmed in a per curiam decision the dismissal of a damage claim brought under the Alien Tort Statute. The claim had arisen out of a terrorist attack on civilians in Israel by members of the Palestine Liberation Organization. Two of the three opinions accompanying the decision took issue with the reasoning of the Second Circuit in *Filartiga*. The opinion written by Judge Bork argued, inter alia, that no cause of action had been stated, either in *Filartiga* or in *Tel-Oren*. He concluded that, at least as to anything other than acts recognized by the law of nations as it stood in 1789, when the Alien Tort Statute was first enacted as part of the Judiciary Act of that year, the Alien Tort Statute did not authorize any cause of action. Basing his reasoning mostly on "considerations of separation of powers,"⁴³ Judge Bork disagreed vehemently with the conclusions of the Second Circuit in *Filartiga* and argued that any such "sweeping" use of section 1350, the Alien Tort Statute, would open up the federal courts to "tort suits for the vindication of any international legal right . . . [in a manner] inconsistent with the severe limitations on individually initiated enforcement inherent in international law . . . and would run counter to constitutional limits on the role of federal courts."⁴⁴

as only granting jurisdiction. If the latter, then the Statute arguably requires identification in the law of nations of a right to sue. See, e.g., the opinions of Judge Edwards and Judge Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775, 798 (D.C. Cir. 1984). The *Filartiga* court addressed this issue also, however, concluding that the "constitutional basis for the Alien Tort Statute is the law of nations" and that the law of nations forms "an integral part of the common law . . . of the United States." 630 F.2d 876, 885 (2d Cir. 1980). According to the *Filartiga* court, it was not necessary for Congress to have acted to include a prohibition of official torture within the law of nations in order for the conduct itself to be sufficient basis for suit and assertable under the Alien Tort Statute without the need for the law of nations to grant a cause of action.

41. *Filartiga v. Pena-Irala*, 577 F.Supp. 860 (1984).

42. 726 F.2d 774 (D.C. Cir. 1984).

43. "The considerations of separation of powers . . . provide ample reason for refusing to take a step that would plunge federal courts into the foreign affairs of the United States." 726 F.2d at 811.

44. 726 F.2d at 812. For a good discussion of Judge Bork's opinion in *Tel-Oren*, see D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92 (1985); reply by Rubin, *Professor D'Amato's Concept of American Jurisdiction is Seriously Mistaken*, 79 AM. J. INT'L L. 105 (1985); and response by D'Amato, *Professor Rubin's Reply Does Not Live Up to Its Title*, 79 AM. J. INT'L L. 112 (1985).

Such a view would virtually eliminate the use of section 1350, the Alien Tort Statute, to redress violations of the international law of human rights since this body of law and principles is largely a product of the post-World War Two era. But in addition, Judge Robb's opinion in *Tel-Oren* also rejected the conclusions of the Second Circuit in *Filartiga*. Focusing specifically on acts of terrorism, but in an opinion that swallows the reasoning of the Court in *Filartiga* applicable to official torture, Judge Robb concluded that claims of this kind violate the political question doctrine and, as such, should not be entertained by the federal courts.⁴⁵

In *Handel v. Artukovic*,⁴⁶ District Judge Pamela Rymer adopted much of Judge Bork's reasoning in *Tel-Oren* to rule that the plaintiffs in a class action brought by Holocaust survivors against an alleged Nazi war criminal could not invoke federal jurisdiction to assert claims under international customary law.⁴⁷ She concluded that the plaintiffs first had to prove that the customary norms upon which they relied explicitly provided a private right of action for damages. This view, of course, if adopted by other courts, would preclude any possibility of damage actions brought to enforce customary norms.

The uncertainty involved in the controversy over the use of the Alien Tort Statute has led to attempts to introduce, sometime in the fall of 1985, the Torture Victim Protection Act (Protection Act).⁴⁸ The basic concept of the Protection Act is to codify the principle adopted in the *Filartiga* decision so as to avoid any argument that section 1350 cannot be extended to apply to basic violations of international human rights norms; in addition, the Protection Act would permit United States citizens as well as aliens to bring claims for such violations in appropriate cases.

The Protection Act will not apply to all violations of internationally-recognized human rights: the bill will apply only to "torture" and "extra-

45.

The certain results of judicial recognition of jurisdiction over cases such as this one are embarrassment to the nation, the transformation of trials into forums for the exposition of political propaganda, and debasement of commonly accepted notions of civilized conduct. . . .

. . . To allow [section] 1350 the opportunity to support future actions of the sort both countenanced in *Filartiga* and put forward here is to judicially will that statute a new life. 726 F. 2d at 826, 827 (Robb, J. concurring).

46. 601 F.Supp. 1421 (C.D. Cal. 1985).

47. Judge Rymer limited her decision to claims asserted under 28 U.S.C. section 1331. She did not challenge the decision in *Filartiga* based on 28 U.S.C. section 1350. The *Handel* case was affirmed on appeal. *Handel v. Artukovic*, No. 85-5633 (9th Cir. Oct. 11, 1985).

48. The Torture Victim Protection Act is under revision by the Lawyers Committee for International Human Rights in Washington, D.C. According to the Lawyers Committee, the bill will be introduced in Congress sometime this fall. Likely sponsors of the bill are Gus Yatron (D-Pa) and Jim Leach (R-Iowa), according to the House Foreign Affairs Subcommittee on Human Rights and International Organizations.

judicial killings."⁴⁹ Each of these norms will be defined in the Protection Act by reference to the "law of nations" applicable at the time of the conduct out of which the claim arises. The Act will establish a cause of action for damages for injuries caused by torture or extrajudicial killing under color of the statute, regulation, custom, or usage of any nation or foreign place. A court may decline the Protection Act's grant of jurisdiction to hear such claims only if it determines by clear and convincing evidence that justice can be assured where the conduct giving rise to the claim occurred and that the plaintiff has not exhausted adequate and available domestic remedies.

Though by no means clear that the Protection Act is necessary, at least in cases involving foreign plaintiffs, given the *Filartiga* decision, the proposed legislation recognizes the uncertainty currently surrounding *Filartiga* and also expands *Filartiga* to include United States citizens who have been tortured or arbitrarily killed. More important, passage of the Protection Act will lend to actions based on international human rights norms the kind of political support that addresses the judicial philosophy expressed in Judge Bork's opinion in *Tel-Oren*.⁵⁰ As with each of the other two recent developments discussed in this article, the Torture Convention and the Joint Resolution on Torture, the Protection Act thus represents a significant step, albeit small, toward the eventual worldwide abolition of torture as an instrument of state power.

III. Conclusion

The chilling reality is that torture continues to be practiced and covertly sanctioned by at least one third of the world's governments. Increasingly, however, governments are recognizing both the perverse effects worldwide whenever torture is allowed or encouraged by governments, and the improvements that can result from efforts to abate such instances of torture. Outrage and public pressure are key ingredients in the movement towards the diminishment and, hopefully, eventual abolition of torture.

49. A summary of international norms prohibiting "extra-judicial killings" is found in AMNESTY INTERNATIONAL, POLITICAL KILLINGS BY GOVERNMENTS, 88-99 (1983).

50. The basic concept of the Protection Act was endorsed by the ABA House of Delegates at its meeting in July 1985:

Be it resolved that,

The American Bar Association supports the concept of federal legislation which would clearly establish a federal right of action by both aliens and United States citizens against persons who, under color of foreign law, engage in acts of torture or extrajudicial killing as defined by the law of nations; and

The chairpersons of the Sections of International Law and Practice and Individual Rights and Responsibilities and the chairperson of the Standing Committee on World Order Under Law are authorized to assist the President of the ABA by jointly drafting a recommended text of such legislation and jointly appearing before appropriate committees of Congress in support of such legislation.

This article has described three documents that could become focal points in worldwide efforts to eliminate torture. These three documents—the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is a United Nations document; and the Joint Resolution on Torture and proposed Torture Victim Protection Act, both of which are United States documents—represent the kind of integrated effort required if attempts to eliminate torture are to be successful. The world's communities must outlaw, individually and collectively, government tolerated or sanctioned torture. While each of these documents may only be described as a "small step," therefore, together they send a message that allegations of official torture will be taken seriously and that those who continue to practice torture will no longer find refuge in indifferent world opinion.