

PANACEA OR MIRAGE? DOMESTIC ENFORCEMENT OF INTERNATIONAL HUMAN RIGHTS LAW: RECENT CASES

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In 1980, when a Federal Appeals Court held in *Filartiga v. Pena-Irala*¹ that the federal judiciary had jurisdiction over a case brought by one alien against another for a tort against international law, it was, not surprisingly, received with abundant welcome. This was a pleasant event in the human rights circles which have been pressing hard² for the past three years for the approval of the four major human rights treaties submitted by President Carter to the Senate in 1978.³ Since then, this decision has been the subject of at least two important papers,⁴ and in the present author's estimation, provides the necessary link to and impetus for perhaps the most notable case in the field, *Rodriguez-Fernandez v. Wilkinson*, decided on December 31, 1980.⁵

It is clear that the *Pena-Irala* case has caused a great deal of euphoria; whether this is well founded is the theme of this article. Likewise, the *Wilkinson* case will be analyzed in the same context since, in

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1. 630 F.2d 876 (2d Cir. 1980).

2. Many meetings and conferences involving leading scholars and governmental officials in the field of human rights have been held since 1978 to advocate and press for the ratification of major human rights treaties, e.g., *U.S. Ratification of Human Rights Treaties: With or Without Reservations*, conference held in Washington, D.C., on January 18, 1978 by the International Human Rights Law Group of the Procedural Aspects of International Law Institute in which the following participated: Richard B. Lillich; Howard W. Smith, Professor of Law at the University of Virginia School of Law; Nigel Rodley, Esq., Legal Advisor for Amnesty International in London; Louis Henkin; Hamilton Fish, Professor of International Law and Diplomacy at Columbia Law School; C. Clyde Ferguson, Professor of Law at Harvard Law School; Thomas Buergenthal, Fulbright & Jaworski, Professor of Law at the University of Texas; Arthur W. Rovine, Esq., Assistant Legal Advisor for the Department of State; and Jack Goldklang, Attorney Advisor for the Department of Justice.

3. See President's Message to the Senate Transmitting Four Treaties Pertaining to Human Rights, 14 WEEKLY COMP. PRES. DOC. 935 (Feb. 23, 1978).

4. See Garvey, *Repression of the Political Emigree—The Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78 (1980) [hereinafter cited as Garvey]; 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) [hereinafter cited as Blum & Steinhardt].

5. *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980).

an historical perspective, it is a true landmark. *Wilkinson* has easily gone beyond any domestic case to date. As this is a federal district court case, it is very likely that the higher appellate courts may have something to say since the point of law decided is of vital significance. Nevertheless, the force and simplicity of its *ratio decidendi*: that in the absence of constitutional guarantees and domestic statutes saying otherwise, a person's right of freedom is protected by international law, should occupy a *locus classicus* in the human rights literature of the United States.⁶

It is not the purpose of this article to re-examine the points already covered by the literature on these two cases. Indeed, the present author's main concern is to analyze and discuss whether we have at last a panacea in the United States courts for serious exposure of international human rights violations or whether this is simply a mirage. Is it, when we examine the implications, especially of the *Pena-Irala* case, a case of much ado about nothing in the context of precedential value?

The position taken in this article is that whereas the *Wilkinson* case is really genuinely capable of being used to cover diverse and varied situations in the future, the *Pena-Irala* case, in terms of concrete situations which we can hypothetically envisage, does not seem to take the present state of domestic enforcement of international human rights much further. Its importance lies not in the fact that it is itself capable of much greater application; rather, its significance is grounded in emphasizing an historical shift in the attitude of judges towards human rights violations and the protection which is afforded to this subject by contemporary developments of international law.

In terms of results, whereas the *Pena-Irala* case is really a mirage—a glimpse of an oasis in a desert—the *Wilkinson* ruling perhaps has the potential of being usefully employed in the system of the domestic enforcement of human rights in the United States. But the *Pena-Irala* decision, like a mirage, is not without its uses. It is a psychological thrust to the march of human rights activists to encourage them to keep going. It is precisely this that *Pena-Irala* did, by producing results of a more positive nature in the later *Wilkinson* ruling. In technical terms, it is not the *ratio decidendi* of *Pena-Irala* that is directly capable of significant consequences; rather, the decision's importance lies in its pronouncements of a general nature in an historical context which

6. Since the writing of this paper, *Wilkinson* has been affirmed by the Tenth Circuit court: No. 81-1238 (10th Cir. July 9, 1981); while approving the international norms relevant to the controversy in question, the court essentially held that the indeterminate detention of the "excludable" Cuban was also contrary to the applicable domestic law.

stresses to the legal community of the United States the growing significance of contemporary international human rights law. Let us now proceed to examine the reasons for these submissions.

In the *Pena-Irala* case, a Paraguayan national sued another Paraguayan national in New York for a wrongful death by torture under the Alien Tort Claims Act of 1789.⁷ The plaintiff (Dr. Filartiga) was a well known critic of the local government. The defendant was the Paraguayan Inspector-General of Police. In order to terrorize the plaintiff, the defendant, under the cloak of state authority, tortured Dr. Filartiga's son to death. Subsequently, by one of those strange coincidences, the defendant and the plaintiffs (Dr. Filartiga and his daughter, Dolly) came to New York at about the same time. Indeed when the defendant was sued, he was already in the custody of immigration officials for overstaying his visa.

The plaintiffs sued the defendant in tort for a "violation of the law of nations." This they did under the aforementioned Tort Claims Act. The relevant portion of the statute reads: "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."⁸ In view of the importance of the points raised by the case, as well as the fact that the precedents are not fully supportive of the kind of jurisdiction asserted by the plaintiff, the court requested that the Justice and State Departments file *amicus* briefs; similar briefs were also filed by the lawyers of leading and well known human rights organizations.⁹ Eventually the court found, in a judgment written by Judge Kaufman, that under § 1350 the federal courts did have the jurisdiction to proceed to hear a dispute, provided there was a violation of a rule or norm of international law. It also found that torture had been made illegal by innumerable international pronouncements, instruments, and declarations. It is not necessary to examine the details of these rulings as the same have been examined in two recent law review articles.¹⁰ Accordingly, we proceed to evaluate the real impact of this decision.

To begin with, it may be mentioned that a great many objections could be raised relating to jurisdictional matters. Some of them,

7. 28 U.S.C. § 1350 (1976).

8. *Id.*

9. *Amicus curiae* were filed by Irving Gornstein, Attorney, Department of Justice, Washington, D.C., for the United States. Donald L. Doernberg, Esq., New York, N.Y., and David Weissbrodt, Esq., Minneapolis, Minnesota, for Amnesty International-U.S.A., International League for Human Rights and the Lawyers' Committee for International Human Rights; Allan Abbott Tuttle, Esq., and Steven M. Schneebaum, Esq., Washington, D.C., for the International Human Rights Law Group, the Council on Hemispheric Affairs, and the Washington Office on Latin America.

10. See Garvey *supra* note 4; Blum & Steinhardt, *supra* note 4.

however, have been examined by authors referred to earlier¹¹ and we can assume, for the purposes of this article, that the statute does give the federal courts jurisdiction to proceed to determine situations of the kind present in *Pena-Irala*.

This assumption, though, is not without serious difficulties; the least of which is that in the *Pena-Irala* case the court never really examined the crucial question of its jurisdiction with reference to such key defenses as "act of state" and "immunity." This is partly due to the fact that jurisdictional questions of this nature preventing an examination of the plaintiff's case were never seriously raised. A perusal of the court's order shows that the court expressly noted that there was not even a "suggestion" of a claim of immunity from the defendant.¹² Later in the order, it appears that when the defendant attempted to raise the plea of "act of state," the same was disallowed on the ground that it had not been raised in the court below.¹³ Jurisprudentially, it is thus quite clear that, even in the *Pena-Irala* decision, there is no authoritative and well-considered pronouncement on such jurisdictional matters.

Apart from not examining such defenses which are bound to arise in any future case in which a foreign state may be involved and *seriously* wants to defend the defendant, the court also failed to realistically address the defense based on the doctrine of *forum non conveniens*. It can be safely anticipated that in all such possible actions the plaintiff will plead bias in the local tribunals (as indeed was done by Filartiga),¹⁴ while the defendant will deny it. Many kinds of substantive arguments¹⁵ can be raised by a defendant on this point and therefore, it is well to remember that, without the benefit of an authoritative pronouncement, we have to await what future decisions may decide on this precise issue. Furthermore, the doctrine of incorporation must be successfully applied by the federal court on each alleged "international tort" to allow the federal common law to apply as envisaged by Art. III of the Constitution and 28 U.S.C. § 1331, since otherwise, under the constitutional and statutory provisions, such suits

11. Blum & Steinhardt, *supra* note 4, argue that jurisdiction is available despite arguments arising from considerations of immunity, act of state doctrine, and notions of comity; Garvey, *supra* note 4, does not really examine this point but assumes the existence of jurisdiction.

12. 630 F.2d at 879.

13. *Id.* at 889.

14. Brief for Appellant, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) at 14.

15. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Phoenix Canada Oil Co., Ltd. v. Texaco*, 78 F.R.D. 445 (D. Del. 1978).

between aliens would be nondiverse.¹⁶

Be that as it may, once we assume jurisdiction, the maximum this decision lays down for future use is the following:

- (1) That there must be an undisputed norm of international law which has been violated,
- (2) that the violation must amount to a tort (and not merely a crime), and
- (3) that both the defendant and the plaintiff, who are aliens, must be present in the United States to allow such proceedings to commence.

In the submission of the author, unless all three factors are present simultaneously, no suit under § 1350 can successfully proceed. The realization that this kind of situation is not likely to repeat itself often enough to be meaningful is unquestionably bothersome.

I. ORIGIN AND PRECEDENTS

Historically, the statute's origin is obscure and unknown,¹⁷ and since the close of the 18th century, it has been applied successfully only twice. In both of these precedents the "tort" complained of was not *strictii sensu*, in the human rights area. The first case, in 1795,¹⁸ involved a wartime seizure and the second, in 1961, pertained to child custody.¹⁹ In this respect, *Pena-Irala* is definitely a holding of first impression in the nearly two centuries of the Act's existence. The decision became possible since the wrong complained of was torture which is the subject of many international legal documents noted by the court; accordingly, it manifestly (and easily) qualified as a tort against international law.²⁰ But can we seriously envisage such a clear kind of tort "in violation of the law of nations" appearing more frequently in the future?

The concept of a tort against the "law of nations" will be examined more extensively later. At this stage, let us initially complete our survey of precedents available under § 1350 in the United States where the tort in question was held not to amount to a violation of international law.

In a number of cases since the decade of the sixties, there have

16. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).

17. *Blum & Steinhardt*, *supra* note 4, at 53.

18. *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1, 607).

19. *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

20. In *Pena-Irala* the court said: "[t]here are few, if any, issues in international law today in which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody." 630 F.2d at 884.

been unsuccessful attempts to recognize certain kinds of wrongs as international torts. In 1960, in *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*,²¹ the court, in refusing to stop picketing by United States seamen, said that there was no such right vested in the plaintiffs under international law which would entitle them to the relief they sought. In 1963, in *Lopes v. Reederei Richard Schroeder*,²² the court held that negligence was not a tort under international law. This is an important ruling, for in the domestic field negligence is easily the most frequently indulged tort. Furthermore, the decision stresses that it would be erroneous to conclude that domestic torts have a corresponding acceptance under international law. In 1973, in *Abiodun v. Martin Oil Service*,²³ the court held that the defendants' refusal to train the plaintiffs as executives as provided in a contract signed in Nigeria was not contrary to any international legal norm. In 1976, in *Dreyfus v. Von Finck*,²⁴ the court held that expropriation of property on grounds of race and later repudiation of settlement did not constitute a wrong against international law. In 1975, in *IIT v. Vencap, Ltd.*,²⁵ the court held that non-abstention from stealing was not a wrong against the "law of nations!"

II. SERIOUS PROBLEMS

It is thus clear that many types of wrongs which may be actionable under domestic tort law will not automatically qualify as torts against the "law of nations." Indeed, the very concept of tort in "violation of the law of nations" is very limited, at best. Having stated these fundamental points emphasizing the built-in restrictive ambit of § 1350 to prospective cases, it is now necessary to further articulate other very serious problems.

In order to serve as a sound basis for future developments, we must know why this statute was enacted and what it aims to accomplish. As has already been stated, nothing meaningful is known of its origin. Moreover, nothing is known about why it was enacted. Judge Friendly, in *IIT v. Vencap, Ltd.* said: "[t]his old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, . . . no one seems to know whence it came."²⁶ This lack of knowledge about the object of this law is not to be dismissed lightly. For without the benefit of knowing its object, we are by necessity forced to guess to which situations it might apply. At the very least, we

21. 278 F.2d 49 (2d Cir. 1960).

22. 225 F. Supp. 292 (E.D. Pa. 1963).

23. 475 F.2d 142 (7th Cir. 1973).

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

25. 519 F.2d 1001 (2d Cir. 1975).

26. *Id.* at 1015.

can imagine a broad range of cases which § 1350 might remedy. However, from what has been said above, the available precedents are emphatic that an extraordinary situation will have to arise to give any support to the human rights activists' hopes for the potential use of § 1350. Indeed, the submissions which follow will further strengthen this awareness.

It reveals no secret to state that the real target of the advocates of human rights in the international field are the agencies and governments of those countries in which an actual and large-scale denial of human rights is taking place. It is undeniable that the grossest violations of human rights take place by governments against their own nationals. There are very few cases in which this is not the case. In other words, it is hard to imagine an individual denying somebody else his international human rights without the involvement of state interest. Thus, it is difficult to think of a state not protecting the alleged violator's action by asserting the doctrines of immunity or act of state. Quite apart from the fact that these doctrines are well-recognized principles of international law, we have equally well known and oft-repeated assertions of states, including articles of the United Nations Charter, denying foreign examination of matters which constitute "domestic jurisdiction" of the various states. If a state is really involved in a denial of human rights, it would be naive to think that it will not attempt to defeat the jurisdiction of the United States courts under these well-recognized principles of international law.

Thus, when § 1350 says: "any civil action by an alien for a tort only, committed in violation of the law of nations," it is possible, at least in theory, for this kind of suit to be brought against either a state or an individual. The submission made in this paragraph leads to the conclusion that there is no chance or likelihood of success if the defendant is the *state itself*.²⁷ Having said that it does not seem likely that an offending state can be sued under this law, let us examine the case of the other possible defendant, namely, an individual.

The case of an individual violating the "law of nations" raises different kinds of problems, some of which will be considered later while analyzing the concept of an international tort. However, a few observations may be made here while examining the case of the possible defendants in a § 1350 action.

There is no doubt that an individual could neither sue nor be sued as an individual under classical international law. Thus, it is undeniable that in 1789 when this section was first enacted, an individual could

27. See particularly, 28 U.S.C. §§ 1330-1332, 1602-1605.

not be sued for violating the "law of nations" under international law.²⁸ However, in our context the argument would be a little different. It will be contended that an individual is not being sued directly under international law, rather only indirectly by reference to a domestic statute which incorporates international law and which does have the force of law for the concerned country.²⁹ The application of international law to individuals by a domestic statute or a treaty is always possible and has many precedents in its support.³⁰ Therefore, the bottom line would be that because of § 1350 it will be possible to sue an alien, provided a violation of the "law of nations" has taken place. We have already observed that this means that the rule or norm violated must have the undisputed acceptance of the international community: "[b]ecause the 'law of nations' is its normative reference, the Act allows for claims only when there is public international consensus."³¹ Similarly, Judge Kaufman, in *Pena-Irala*, stated the following:

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.³²

Also of importance, is the point that, by the doctrine of incorporation, international law is considered a part of the common law. The classic formulation of this matter was in the famous words of Justice Gray in *The Paquete Habana*:³³ "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are

28. 1 L. OPPENHEIM, INTERNATIONAL LAW 19 (8th ed. 1962) [hereinafter cited as OPPENHEIM], which states:

Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively. An individual human being, such as an alien or an ambassador, for example, is not directly a subject of International Law.

29. OPPENHEIM goes on to state:

Therefore, all rights which might necessarily have to be granted to an individual human being according to the Law of Nations are not, as a rule, international rights, but rights granted by Municipal Law. . . . Likewise, all duties which might necessarily have to be imposed upon individual human beings according to the Law of Nations are, in the traditional view, not international duties, but duties imposed by Municipal Law in accordance with a right to, or a duty imposed upon, the State concerned by International Law. *Id.*

30. See, e.g., MAVRONMATIS PALESTINE CONCESSIONS [1924] P.C.I.J., ser. A, No. 2.

31. Garvey, *supra* note 4, at 101.

32. 630 F.2d at 881.

33. 175 U.S. 677 (1900).

duly presented for their determination."³⁴

Therefore, the combined effect of the points made above is that, by virtue of § 1350, an individual, if he is present in the United States, can be sued for committing a tort against international law. Furthermore, because the jurisdiction of the forum is made available by this section, the court will be asked to apply the "law of nations" to the tort, initially under § 1350 (because it says so), but also under the doctrine of incorporation.³⁵ Indeed the quintessence of the court's decision is its vigorous adoption of the incorporation doctrine thereby enabling contemporary international human rights norms to be absorbed into the federal common law. As observed earlier, this approach is the *sine qua non* of assuming federal jurisdiction under § 1350 since, under Article III of the Constitution, two aliens to a suit are explicitly nondiverse. The doctrine of incorporation will help to meet the argument that while it is true that human rights formed no part of international law in 1789, today it is definitely an acknowledged part of the "law of nations." Like common law itself, international law continues to endure by the practice and consent of those to whom it is said to apply.³⁶

The philosophic advocacy of the "rights of man" over several centuries has finally begun to see, after the creation of the United Nations, the concrete fulfillment and codification at the international level of various kinds of human rights: the recently evolved International Bill of Rights. The widespread acceptance of many international instruments in this field have thus enabled human rights advocates to emphasize that it is now perfectly justified to acknowledge the status of such rights in the normative content of contemporary customary international law. The foundation of such arguments is, of course, widespread acceptance by the international community of a given right.³⁷

The above discussion has shown that today, as demonstrated in the *Pena-Irala* case, it seems possible to sue an individual under § 1350. But it must be realized that the existence of this kind of jurisdiction is not of great future use, for it is almost certain that we may not see a set of facts for many years wherein the victim and violator are both physically in the United States to commence a suit of this kind. This is, of course, without prejudice to the larger question of whether

34. *Id.* at 700.

35. *See Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), in which the Supreme Court upheld statutes penalizing the violations of international law.

36. "Application of the 'law of nations' requires the evolutionary and ambulatory process of the common law because the law of nations originates in the ever-evolving consensus of states." Garvey, *supra* note 4, at 108.

37. *See generally*, among contemporary authors with such views, M. McDOUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980).

there is a tort which is not merely against concepts of domestic law, but also against the "law of nations."

The next point of serious legal difficulty is the bar of jurisdiction, by an undisputed long line of precedents, to challenge the acts of a foreign sovereign in its own territory. The bar of jurisdiction in American courts is present, usually irrespective of the nature of the alleged act which is committed in the territory of the foreign sovereign. This territorial principle against the exercise of jurisdiction over foreign acts was initially laid down by Chief Justice Marshall in *Schooner Exchange v. McFadden*.³⁸

The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.³⁹

This principle has been reiterated many times. In *American Banana Co. v. United Fruit Co.*,⁴⁰ Justice Holmes said: "[b]ut the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."⁴¹ The same principle is acknowledged by the Restatement (Second) of Conflicts of Laws.⁴² Indeed, the Restatement (Second) of a State's Foreign Relations Law defines jurisdiction as: "the capacity of a state under international law to prescribe or to enforce a rule of law."⁴³ Some commentators define jurisdiction in a broad sense to mean: "the power of a state to create or affect legal interests which will be recognized by other states."⁴⁴ The thrust of these precedents and writings appears to be that United States courts will refrain from questioning the exercise of jurisdiction by a foreign state for acts done within the foreign state's own territory.

In this view, and keeping in mind that invariably the greatest violators of human rights are states, it is reasonable to conclude that while

38. 11 U.S. (7 Cranch) 116 (1812).

39. *Id.* at 130.

40. 213 U.S. 347 (1909).

41. *Id.* at 356.

42. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9, comment f (1971).

43. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 6, 7 (1965).

44. E. CHEATHAM, E. GRISWOLD & W. REESE, CASES AND MATERIALS ON CONFLICT OF LAWS 93 (5th ed. 1965).

denying their citizens fundamental human freedoms, the states, at the same time, will make formalistic provisions to give them the cloak of legality. This may not be done for sensational types of violations, *e.g.*, torture or genocide, but would be done for the great majority of human rights violations, like the ones found in the two Covenants. There is certain to be a domestic statute or governmental action ensuring that the high-handedness of the state is protected.

For example, the most fundamental human right, and the one most frequently abused, is that of personal freedom. Yet most countries have preventive security or other similar laws by which, *prima facie*, the denial of this human right can take place under the cloak of law.⁴⁵ Thus, if in a case like *Pena-Irala*, had some offensive action or tort been committed by a state functionary under some law or governmental regulation, and this was proved in the proceedings before a United States court, it is very difficult to conceive of a result along the lines eventually reached in that case. Indeed the tort complained of might already have been adjudicated by local courts. The local courts are bound to follow the local law. Possibly, in the eyes of a United States court, the matter may have been wrongly decided by the courts of the foreign country, but that is still not a ground under existing precedents to overturn such a decision especially when the act or tort complained of was not against a citizen of the foreign state, but against the interests of the United States. Nevertheless, in the *Sabbatino* case,⁴⁶ the Supreme Court upheld the sanctity of this accepted doctrine, and it was left to Congress to place some limitations upon it.⁴⁷

Before leaving this discussion which revolves around substantive difficulties surrounding the possible utilization of § 1350, in the future, it would be well to remember the various practical and procedural obstacles which must be successfully crossed in order to hold the defendant guilty. In the first place, an examination of the law of the country where the alleged tort occurred may have to take place. Secondly, evidence and witnesses would, in all probability, mostly exist in that foreign country. One need not over-emphasize the difficulties which would lie in the collection of such evidence, the least of which would be that of serving process. In a contested case, the element of delay (necessarily involved in such proceedings if evidence is to be furnished

45. *E.g.*, in most countries of the former British Commonwealth, such laws are patterned after the Defense of the Realm Rules which were passed by the British Parliament during the two wars 1914-1918, 1939-1945. The present names of these Acts differ from country to country.

46. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

47. Foreign Assistance Act of 1965 § 301(d), 22 U.S.C. § 2370e-1(C) (1976); Folsom, *The Sabbatino Case: Rule of Law or Rule of "No Law"?*, 51 A.B.A. J. 725 (1965).

from abroad) alone might greatly lessen the efficacy of the United States court proceedings. At the same time, an awareness of such difficulties by the court might equally strengthen the arguments in favor of the doctrine of *forum non conveniens*.

In view of the foregoing submissions, it is clear to the present author that despite the optimism which has been expressed by the legal community over the decision in the *Pena-Irala* case, its functional use in any contested case in the future is very uncertain and in all probability, extremely limited.

It is now necessary to examine the meaning of the phrase "in violation of the law of nations" found in § 1350. This is the legal grievance which entitles an alien to bring a civil action before the federal judiciary. The apparent meaning which has now been attributed to this phrase in the *Pena-Irala* case is, *prima facie*, totally against the philosophy of the provision as, perhaps, originally conceived. The Alien Tort Claims Act, originally section 9 of the Judiciary Act of 1789, was enacted by the First Congress. At that time in the history of this nation, one predominant aspect of public thinking was not to antagonize foreign states unnecessarily by denying their citizens access to federal courts. Alexander Hamilton observed as much by maintaining that the Federal Judiciary ought to have jurisdiction over claims by foreign nationals since a denial of access to courts of law may even lead to war.⁴⁸

In the cases under this statute which were noted earlier, an attempt was made to explain this phrase. Initially in *Lopes v. Reederei Richard Schroeder*,⁴⁹ the court said:

[t]he phrase "in violation of the law of nations," . . . means, *inter alia*, at least a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*.⁵⁰

This enunciation was dictum in *Lopes*, but was followed and approved in *IIT v. Vencap, Ltd.*,⁵¹ and was also accepted by the court in *Pena-Irala*.⁵² Other cases have also adopted the same construction.⁵³

Let us now pause to analyze the meaning of this dictum; then we

48. See THE FEDERALIST No. 80 (A. Hamilton).

49. 225 F. Supp. 292 (E.D. Pa. 1963).

50. *Id.* at 297.

51. 519 F.2d at 1015.

52. 630 F.2d at 881.

53. See, e.g., *Benjamins v. British European Airways*, 572 F.2d 913, 916 (2d Cir. 1978); *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966).

must see, in the context of human rights violations which occur or are likely to occur today, whether the contemporary construction given to this phrase fits the original philosophy of the First Judiciary Act of 1789.

In the first place, the formulation of the *Lopes* Court is both vague and imprecise. The operative part of the dictum requires that there be a violation by an individual of those rules which affect standards used by states "for their common good" or in "their dealings *inter se*." A number of interpretations of this formulation are possible. However, what this formulation probably signifies is that the alleged act of the offender should affect the relations of this country with other countries.

In one of the two cases in which § 1350 was successful, the court observed that: "[t]he importance of foreign relations to our country today cautions federal courts to give weight to such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant consideration."⁵⁴ Therefore, presumably on account of foreign policy considerations, the courts should embark upon and assume jurisdiction rather than refrain from doing so. This clearly has been the attitude of the judiciary in the past when such implications were involved. Evidence of the attitude of Congress can be seen by the enactment of the Hickenlooper Amendment. This Amendment required the courts to examine expropriation of property according to the principles of international law without being checked by foreign policy constraints.⁵⁵

It is clear, therefore, that the philosophy of action in support of assuming jurisdiction emphasizes that the usual judicial reluctance (at least in the two types of cases mentioned above) when foreign policy matters arise has been changed and modified. It is equally clear, however, that this change in the judicial attitude is against the original philosophy of this law. When we go deeply into the question to identify the most likely culprit of human rights violations, we find ourselves in a strange dilemma. In most cases, the victim suffers at the hands of his government. In other words, if a United States court assumes jurisdiction, it will not be to keep the friendly or good relations between the countries intact; instead, it will be *against* the "standard" or the "common good" of the existing relations between the United States and that

54. Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 865 (D. Md. 1961).

55. See 22 U.S.C. § 2370(e)(2) (1976). The amendment followed *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); see also *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957, 972 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

country. This is manifestly against what was observed about the original goals of the lawmakers when the First Judiciary Act was enacted.

Once we have made this point, another serious matter arises. The phrase "in violation of the law of nations," in terms of the offender, was described by the dictum of the *Lopes* case to refer to "one or more individuals." It has already been argued above that in most cases the violation of human rights is really at the behest of the government of a country. If this is true—at the very least in the great majority of cases—then who are the "individuals" of whom we are speaking? If it means to separate the individual, *i.e.*, the official or the actual actor in the denial of human rights of the victim from his government as in the *Pena-Irala* case, are we not missing the point? Manifestly, the real offender is the government; realistically, the authority is in the hands of one or of a few individuals. However, since the authority is not ostensibly linked to the act of the offender, we satisfy ourselves by simply holding the individual responsible. This device for the use of § 1350, as in the *Pena-Irala* case, may satisfy the need of the human rights activists to obtain at least some achievement in the domestic enforcement of human rights; however, the ability to hold responsible the wrong person, or merely a "small fry" in the organized torture perpetrated by a government is hardly an achievement at all.⁵⁶

Although today the field of human rights constitutes a major area of emphasis in contemporary international law, a few observations may be made here in the context of the present discussion. To begin with, until almost the end of World War II, the clear majority view was that the individual and human rights were not directly the concern of international law. The contention was that international law dealt only with regulating the relations among states. The best known exposé of this position is illustrated by the following passage from Oppenheim's INTERNATIONAL LAW:

Several writers maintain that the Law of Nations guarantees to every individual at home and abroad the so-called rights of mankind, without regarding whether an individual be stateless or not, or whether he be a subject of a member state—State of the Family of Nations or not. Such rights are said to comprise the right of existence, the right to protection of honour, life, health, liberty, and property, the right of practicing any religion one likes, the right of emigration, and the like. But such rights do not in fact enjoy any guarantee whatever

56. In the rarest of cases, it is possible in theory that the real "offender" may indeed be the real culprit.

from the Law of Nations, and they cannot enjoy such guarantee, since the Law of Nations is a law between States, and since individuals cannot be subjects of this law.⁵⁷

These views originally appeared in the 1912 edition of his work. The above position also appears in several successive editions; but a change from the position articulated above begins to be perceived in the editions coming in the post-World War II period. For example, the 1955 edition of his work states the following:

The individuals belonging to a state can, and do, come in various ways in contact with foreign States in time of peace as well as of war. Moreover, apart from being nationals of their States, individuals are the ultimate objects of International Law—as they are, indeed, of all law. These are the reasons why the individual is often the object of international regulation and protection.⁵⁸

Then, further on in the passage, he says: “It is therefore quite correct to say that individuals have these rights in conformity with, or according to, International Law, provided it is remembered that, as a rule, these rights would not be enforceable before national courts had the several States not created them by their Municipal Law.”⁵⁹ From this proposition he later says:

The same applies to those rights of aliens which the territorial State is bound to respect and which the home State is entitled to protect. However, the fact that individuals are normally the object of International Law does not mean that they are not, in certain cases, the direct subjects thereof . . . To the extent to which individuals are not subjects but objects of the Law of Nations, nationality is the link between them and International Law. It is through the medium of their nationality that individuals can normally enjoy benefits from the existence of the Law of Nations.⁶⁰

Finally, he sums up his remarks by saying:

As far as the Law of Nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty—and in particular the general obligation, enshrined in the Charter of the United Nations, to respect human rights and fundamental freedoms It is doubtful whether that view is expressive of the actual practice of States. For it is generally recognized that, apart from obligations undertaken by treaty, a State is entitled to treat both its own nations and

57. OPPENHEIM, *supra* note 28, § 292 (2d ed. 1912).

58. *Id.* (8th ed. 1955), § 288.

59. *Id.*

60. *Id.*, §§ 290-291.

stateless persons at discretion and that the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself.

At the same time it cannot be said that the doctrine of the "rights of mankind" is altogether divorced from practice. In the first instance, it is clear that the State is bound to respect certain fundamental rights of aliens resident within its territory—although it is often said that the rights in question are not international rights of the aliens, but of their home State.⁶¹

It was because of this state of affairs that at both the regional and international levels tremendous activity was created by the advocates of human rights to establish a more recognized and enforceable system of human rights. At the level of the United Nations and U.N.E.S.C.O., remarkably great strides were taken and numerous declarations were made and actions undertaken to create rights and procedures for the enforcement of those rights.⁶²

The object of creating treaty regulatory procedures in the human rights field was indicative of at least two facts: (i) that existing international law was not sufficient to provide unqualified acceptance of, or a remedy for breach of, any of the rights mentioned in the relevant treaty, and (ii) that no rule or norm of international law relating to the matters which were the subject of these treaties could come into existence without the consent of the States. Indeed, that is why the need to have a treaty was felt in the first place.

The conclusion which emerges from this laconic description of the history and present position of human rights law is that while some aspects of this law may have been accepted by practice or by formal acceptance, many aspects of human rights law are still on the threshold

61. *Id.*, §§ 291-292.

62. See generally, R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS*, (1979); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973).

In the general field of human rights and humanitarian law there exist today innumerable declarations, instruments, protocols, and treaties. Some of the major international human rights treaties are the following: Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277; Convention Concerning the Abolition of Forced Labor (ILO No. 105), *adopted* June 25, 1957, 320 U.N.T.S. 291; Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, *opened for signature* Dec. 10, 1962, 521 U.N.T.S. 231; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, 660 U.N.T.S. 196; International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966); American Convention on Human Rights, *done* Nov. 22, 1969, OAS T.S. No. 36, OAS O.R. OEA/Ser. A/16. It is well to remember that the U.S. is signatory, but not a party, to these instruments.

of unqualified acceptance. An important qualification in this respect is the notion of the consent of the state concerned. For example, as long as the United States does not become a party to the human rights treaties enumerated elsewhere,⁶³ it would be naive to suggest that because of large acceptance of these treaties by other states, they have become a part of United States common law by incorporation (by further assuming that they are declaratory international law).⁶⁴ In short, we still have not reached the stage in the formation and evolution of international legal norms wherein the consent of the state becomes irrelevant.⁶⁵

In view of these submissions, the present author finds that undoubtedly because of a strong desire to strengthen international law, the court in *Pena-Irala* exaggerates the real validity or acceptance of international human rights law. This becomes apparent when the court states that: “[t]he treaties and accords cited above as well as the express foreign policy of our own government, all make it clear that *international law confers fundamental rights upon all people vis-à-vis their own governments*.”⁶⁶ Indeed this is not only an overstatement, but equally an oversimplification. Both of the points made therein as expository of the actual United States position are subject to serious doubts. The reference to “foreign policy of our own government” in respect of international human rights law is strange; it ignores the fact that since the United States is merely a signatory, not a party, to any of the major human rights treaties, it is somewhat difficult to state the position so unreservedly. It is not necessary to further substantiate this point, but the position taken by the United States government in many domestic cases would further prove that acceptance of international human rights law is by no means the unqualified policy of the United States.

63. See treaties listed in note 62, *supra*.

64. Nevertheless it is interesting to note that although the U.S. has only signed but not ratified the treaties, for example, mentioned in note 62, *supra*, the Memorial of the U.S. in the hostages case before the I.C.J. said:

The existence of such fundamental rights for all human beings, nationals and aliens alike, and the existence of a corresponding duty on the part of every State to respect and observe them, are now reflected, *inter alia*, in the Charter of the United Nations, the Universal Declaration of Human Rights and corresponding portions of the Human Rights and corresponding portions of the International Covenant on civil and political rights, regional conventions and other instruments defining basic human rights . . .

Memorial of the United States before the International Court of Justice at 71, in Case Concerning United States Diplomatic and Consular Staff in Tehran, [1980] I.C.J. 1, 42, *reprinted in* 19 I.L.M. 553, 573 (May 1980).

65. It may be pointed out that under the Vienna Conventions on the Law of Treaties, Article 18, U.N. Doc. A/CONF. I.L.M. 39/27, at 289 (1969), a country is expected to refrain from acts in violation of a treaty which it has signed but not yet ratified.

66. 630 F.2d at 884 (emphasis supplied).

The second point, that international law confers rights upon citizens against their own governments, is equally subject to grave doubts. At best, it is only true of a handful of sensational or notorious denials of human rights, such as torture or genocide. As a broad proposition of contemporary international law, it certainly does not reflect what is the reality of both fact and law. If indeed international law did give all kinds of "fundamental rights," the tedious process of concluding the kinds of international treaties mentioned above would become meaningless. As previously noted, treaty rights both at the regional and the international levels are being codified so as to provide to the people the enforcement of fundamental rights "vis-a-vis their own governments." *Ex hypothesi*, without the treaty enforcement mechanism, they cannot be enforced. Furthermore, the fundamental rights are not unrestricted; they are confined, *a fortiori*, to the ones mentioned in the treaty in question.

It is clear to the present author that the *Pena-Irala* court's rejection of the dicta in *Dreyfus v. Von Finck*⁶⁷ and *IIT v. Vencap, Ltd.*⁶⁸ regarding a state's treatment of its own citizens is not free from serious doubt. In *Pena-Irala* the court said that the district judge had 'narrowly' adjudicated the case, by observing the following:

Judge Nickerson heard argument on the motion to dismiss on May 14, 1979, and on May 15 dismissed the complaint on jurisdictional grounds. The district judge recognized the strength of appellants' argument that official torture violates an emerging norm of customary international law. Nonetheless, he felt constrained by dicta contained in two recent opinions of this Court, *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975), to construe narrowly "the law of nations," as employed in § 1350, as excluding the law which governs a state's treatment of its own citizens.⁶⁹

The court, after discussing contemporary happenings in the international field pertaining to torture, concluded that: "the dictum in *Dreyfus v. von Finck*, *supra*, 534 F.2d at 31, to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law."⁷⁰

It is submitted that while this may be, generally speaking, the correct evaluation with respect to torture, which is specifically the subject

67. 534 F.2d at 31.

68. 519 F.2d at 1015.

69. 630 F.2d at 880.

70. *Id.* at 884.

of a number of international instruments, it is certainly too broad a proposition to state that a "violation of international law" will occur whenever a state impinges on the rights of the nationals of that state. As submitted earlier, international human rights law has not yet reached the stage at which a state can become liable to its citizens, without its formal consent, with respect to a violation of a great many human rights which are acknowledged by international law.⁷¹ As much as we would like to dispense with this consent aspect, unfortunately, given the setup of the present international legal order,⁷² it is likely to remain an important one.

III. 'TORT' IN "VIOLATION OF THE LAW OF NATIONS"

In examining the crucial question of what constitutes a tort in "violation of the law of nations," we must realize that the assertion that today we possess a more developed body of international human rights law than we did fifty years ago is quite distinct from the question of what constitutes a tort against the "law of nations." An affirmative answer to the first point does not mean that whenever there has been an interference with an "international human right," *ipso facto* a tort "in violation of the law of nations" has occurred. Even in domestic law, no legal system with which the author is familiar, *e.g.*, common law, civil law, Hindu law, or Islamic law, has a concept of torts or delicts which always satisfies the maxim *ubi jus, ubi remedium*. Nor is it an undisputed maxim of validity to say *ubi culpa est, ubi poena subesse debet*. Thus, the assumption that whenever an acknowledged human right in international law is violated, it automatically becomes a tort under that law is quite unfounded and erroneous.

So, if every conceivable violation of the "law of nations" is not a tort (just as every conceivable violation of a right or interest of a

71. In any case, we do not have a list of acknowledged human rights in the international field. Instead, we have different rights or different sets of rights enumerated by various regional and international instruments.

72. The U.S. at present is a party to the following major *human rights* conventions (excluding those pertaining to humanitarian law): Slavery Convention, Sept. 25, 1926, 46 STAT. 2183, T.S. No. 778; Protocol Amending the Slavery Convention, *opened for signature* Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S., 3; Inter-American Convention on the Granting of Political Rights to Women, *signed* May 2, 1948, 27 U.S.T. 3301, T.I.A.S. No. 8365; Convention on the Political Rights of Women, March 31, 1953, 27 U.S.T. 8289, 193 U.N.T.S. 135; Protocol Relating to the Status of Refugees, Jan. 21, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; Protocol to the Amendment to the Charter of the Organization of American States (Protocol of Buenos Aires), Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

domestic legal system is not a domestic tort) what kind of objectionable conduct would possibly qualify as such?

In the *Pena-Irala* case, the court observed the following: "Indeed for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis (sic) humani generis*, an enemy of all mankind."⁷³ The use of the phrase *hostes humani generis* is indicative of the fact that the court was indeed thinking of precedents from the field of international criminal law and not that of the law of torts. Undoubtedly, classical international law had accepted an ancient rule of maritime law that offenders on the high seas could be tried by the municipal courts of any country. However, what actually constituted this international crime was a matter of some doubt and confusion.⁷⁴ The reason for this confusion was that many domestic statutes also punished people for certain wrongs, and it was unclear whether this domestic enforcement was of the same "wrongs" which were acts of piracy under international law. Under French law, for example, any armed vessel with irregular keepers is guilty of piracy. Under an English statute of 1824, "slave-trade" has been defined as piracy. However, it is clear that neither of these examples is considered piracy under international law which simply defines piracy as armed robbery on the high seas.⁷⁵

The result of the above discussion seems to be the following:

- (i) That domestic legal notions are not *pari passu* with international legal notions even with respect to a wrong labelled by both as 'piracy.'
- (ii) That in any case, reference to *hostes humani generis* is definitely related to the criminal aspects of international law and not to any conceptions of a civil character.

These submissions of the author lead to the conclusion that both theories and precedents of international criminal wrongs were apparently also the basis of the *Pena-Irala* decision. That these conclusions of the court cannot be reasonably supported is, jurisprudentially, equally clear; to sustain a tort, one cannot justifiably make use of the jurisprudence of the criminal law. However, once this is said, it must be quickly added that the *Pena-Irala* decision could be supported on

73. 630 F.2d at 890.

74. See J. BRIERLY, *LAW OF NATIONS* 312 (6th ed. 1963).

75. *Id.*; The Geneva Convention of 1958 defined piracy as:

any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft, and directed on the high seas against another ship or aircraft, or against persons or property on board such ship or aircraft.

Id. at 313.

the limited ground (which is also elaborately discussed by the court) that torture, quite apart from any considerations of *hostes humani generis*, was a contemporary wrong, a tort, a delict, and so its occurrence was prohibited by notions of modern and contemporary international law.

But let us now proceed further. Even if we accept that in a handful of situations such as torture, genocide, and summary executions, there exists considerable modern international law, we are still left with two problems: (1) how we can hold an "individual," as opposed to a state, responsible for the brutal denial of human rights; and (2) how international law can hold a person *liable* for a civil wrong (as opposed to granting the victim rights for its violation). The only precedents in support of the proposition of holding an individual liable are from the field of what can be best described as international criminal law. It is, therefore, very difficult to agree to the proposition that international law, which is very basically a law among states, can hold an individual responsible for civil wrongs.⁷⁶ It is true that modern international law is granting and recognizing a great many human rights for the individual.⁷⁷ But it is the submission of the author that, in legal theory, the granting of a right is an altogether different matter from that of imposing civil liability. This is as true in the international legal field as it is in the municipal one.

For the action of an individual to constitute an international tort, the act or omission must be attributable to a subject of international law.⁷⁸ Due to the nature of sovereignty, states are responsible only for their own organs and, as such, are not responsible for spontaneous individual acts. As an illustration, if individuals in a democratic state organize a boycott of Japanese cars without the organization of any government agency, surely this would not amount to a breach of a treaty of commerce with Japan for the import of cars or to a breach of any international legal principles.

76. The Nuremberg and Tokyo war crimes trials dealt with criminal as opposed to civil wrongs under international law.

77. *E.g.*, Universal Declaration of Human Rights, 3 U.N. GAOR, 3 Annexes (Agenda Item 58) 535, 536 U.N. Doc. A/810 (1948), and two International Covenants of Human Rights: The International Covenant on Economic, Social and Cultural Rights, adopted unanimously by the General Assembly in G.A. Res. (XXI) 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) and entered into force January 3, 1976; and the International Covenant on Civil and Political Rights, adopted unanimously by the General Assembly in G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967) and entered into force on March 23, 1976. See Comment, *The International Covenant on Civil and Political Rights and United States Law: Department of State Proposals for Preserving the Status Quo*, 19 HARV. INT'L L.J. 845 (1978).

78. I G. KEETON & G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 166 (4th ed. 1960).

Under classical international law, individuals benefit from rules of custom, such as minimum standards regarding the treatment of foreigners. In addition to the major treaties dealing with human rights and humanitarian law, further benefits are derived from treaties of commerce, friendship, and navigation. On the world societal level, organizations such as the United Nations strive to protect fundamental human rights; however, until the recent case of *Pena-Irala*, recognition of the duties imposed in the domestic field by these fundamental human rights instruments under the normative rules of international law was still very uncertain. The uncertainty persists unless we agree to the proposition that declaratory international law has started placing duties on individuals as a result of various treaties and declarations. As international law begins to approximate national law, the individual will stand a better chance of becoming the recipient of international legal rights *and duties*. But that stage under international law (as distinct from municipal or treaty law) has still not been reached, at least in the domain of civil liability.

The court in *Pena-Irala* dealt with the fundamental human right violation of torture, but failed to address the obvious question of what other violations would be actionable under § 1350. The court held that “international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.”⁷⁹ Hence, the court has clearly recognized that there is, indeed, at least one international human rights norm; however, in order to identify further norms, it must be determined what specifically that norm is and how it was constituted.

Tortious acts which may perhaps be cited as violative of fundamental human rights principles include torture, genocide, summary execution, and slavery.⁸⁰ Torture has been defined as follows:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having

79. 630 F.2d at 885.

80. Blum & Steinhardt, *supra* note 4, also seem to think this is so; however, it must be emphasized that genocide, summary execution, and slavery are proscribed by international treaties. It is nevertheless clear that criticism offered in this article, that one cannot automatically hold an internationally prohibited criminal wrong as an international tort, is also applicable here.

committed, or intimidating him or other persons.⁸¹

Genocide has been defined in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, as follows:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births;
- (e) Forcibly transferring children of the group to another group.⁸²

Article III of the Geneva Convention defines summary execution as "the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁸³ Finally, slavery is defined by the Slavery Convention of 1926 as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."⁸⁴

The issue to be addressed at this point is whether there are further torts, as opposed to crimes, which may realistically be considered to be such that they will present themselves on a continuing basis. That is, will issues of international human rights, as addressed in *Pena-Irala* and *Wilkinson*, actually be presented to courts frequently enough to be considered important to the degree recent authors have asked us to believe?⁸⁵ The probability that further torts will appear seems to be low. First, groups, rather than individuals, have generally been known to be prosecuted for the previously mentioned torts. The bare requirements of man-labor alone needed to organize and carry out these torts has

81. Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975), art. 1.

82. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, art. II.

83. Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

84. Slavery Convention, Sept. 25, 1926, 46 STAT. 2183, T.S. No. 778, art. I.

85. See generally, Blum & Steinhardt, *supra* note 4; Garvey, *supra* note 4.

served to create group rather than individual violations. Secondly, as illustrated through definition of the aforementioned crimes and torts, violations of this type, once recognized as violations of international human rights law, are incorporated into treaties and conventions. When this happens, as in the case of the two Covenants, the enforcement machinery is the one provided by that treaty alone. As such, it seems unlikely that the enforcement of international human rights law as witnessed by *Pena-Irala* will become a predominant force of issue in United States district courts through § 1350.

Of course, speculation will remain high in the eyes of many since *Wilkinson* was indeed a landmark decision in the field of international human rights law.⁸⁶ However, a brief review of the factors and variables involved in the *Wilkinson* case, and which would again be required for a similar decision, will hopefully serve to bring into realistic perspective the mirage-like effect that *Pena-Irala* has produced.

Firstly, the violation of detaining an alien, occurring in *Wilkinson*, could easily have been prevented had the United States used its normal screening techniques for unwanted aliens in the originating country rather than detaining them after their arrival in the United States. Secondly, as the *Wilkinson* decision noted, the respondent's suggestion that Congress had intentionally failed to amend immigration laws to include specific time limitations on detention of excludable aliens can only be met by the reasoning that the instant situation had not been a common occurrence, and, therefore, legislation had not been needed in the past.⁸⁷ Hence, this contingency would likely be covered now since the situation is known to be a 'real' possibility. But this much is at least made clear by the *Wilkinson* ruling: if no domestic law stands in the way, and a denial of those human rights which are acknowledged by international law is taking place, a court can invoke international law to protect the individual from the persecution in question. If there is no enabling statute such as § 1350 to confer jurisdiction, there is the advantage that the court is not circumscribed by the words of a statute to assume jurisdiction. A general type of jurisdiction, like that designated by international law or by common law, is capable of much wider use than one with which the court must strictly comply in order to adjudicate.

On the optimistic side, therefore, the *Wilkinson* ruling has the potential to serve as a panacea for many shortcomings of the domestic

86. In the *Wilkinson* case the District Court in Kansas held that the jailing for an indeterminate time of an illegal alien who had come in the summer of 1980 from Cuba was contrary to international law. 505 F. Supp. at 800.

87. 505 F. Supp. at 792.

systems. On a less conservative evaluation, it is still an important milestone, like the *Pena-Irala* case, in the development of domestic enforcement of human rights in the United States. We seem to have come a long way from those cases of the seventies in which the courts in this country refused to come to the aid of progressively developing international human rights enforcement.⁸⁸

The incorporation doctrine received a big boost in the context of our discussion in *Pena-Irala*, which in turn has been taken further by *Wilkinson*. However, because of the difficulties pointed out above, functionally, the *Pena-Irala* decision may not be as useful as *Wilkinson* in the future. Moreover, on a broader plane, the emphasis of *Pena-Irala* on accepting and acknowledging international human rights norms in domestic forums, which has been given even greater force by the *Wilkinson* ruling, has generally encouraged a shift in the courts to be more *receptive* to the incorporation doctrine. If in a given situation this is not directly possible, then accepted and internationally recognized norms may be progressively used as analogies and guides in matters involving interpretations of domestic laws. That this has already started can be seen by looking at two more recent cases involving the treatment of prisoners: *Lareau v. Manson*⁸⁹ and *Sterling v. Cupp*.⁹⁰ In both of these cases, the courts stressed that it was perfectly legitimate and proper while adjudicating cases covered by domestic law to be aware of and to conform to international standards. In both of these cases the courts referred to, *inter alia*, while making this international survey, the Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations.⁹¹ In the *Cupp* decision the Oregon Supreme Court said the following:

Indeed, the same principles have been a worldwide concern recognized by the United Nations and other multinational bodies. The various formulations in these different sources in themselves are not constitutional law. We cite them here as contemporary expressions of the same concern

88. See, e.g., *South African Airways v. New York Div. of Human Rights*, 64 Misc. 2d 707, 315 N.Y.S.2d 651 (Sup. Ct. 1970); *New York Times Co. v. City of New York*, 9 Misc. 2d 1046, 362 N.Y.S.2d 321 (Sup. Ct. 1974) *aff'd* 49 A.D.2d 851, 374 N.Y.S.2d 9 (1975), *aff'd*, 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977); *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1975), *cert. denied* 411 U.S. 931 (1973); *Diggs v. CAB*, 516 F.2d 1248 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 910 (1976). In a subsequent case, *Ralphe v. Bell*, 569 F.2d 607 (D.C. Cir. 1976), the court took an opposite view when examining a similar point; *Diggs v. Richardson*, 555 F.2d 848 (D.C. Cir. 1976).

89. 507 F. Supp. 1177 (D. Conn. 1980).

90. *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981).

91. The *Standard Minimum Rules for the Treatment of Prisoners* adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 and approved by the Economic and Social Council in 1957 (Resolution 663C (XXIV)).

with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in article I, section 13.⁹²

It is, therefore, appropriate to end this discussion by acknowledging that these recent cases have greatly enhanced, in the ways articulated above, domestic (United States) enforcement of international human rights law.

92. *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981).