INTERNATIONAL LAW AS GUARANTOR OF JUDICIALLY-ENFORCEABLE RIGHTS: A REPLY TO PROFESSOR OLIVER

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In his stimulating Comment in this symposium,[1] Professor Covey T. Oliver expresses a fear which he has voiced elsewhere:[2] that excessive zeal in the invocation of international human rights norms may result not in the furtherance of those norms as rules of law, but in a judicial and legislative blacklash against human rights generally. Professor Oliver's is a concern wholeheartedly shared by this author. Where I respectfully disagree, however, is with regard to whether human rights advocates and the courts have already "gone too far." Professor Oliver thinks they have. I believe that the cases[3] extensively discussed by the contributors to this symposium do not support that conclusion.

INTRODUCTION

Professor Oliver finds two "basic problems"[4] in the application of international human rights norms to domestic litigation. If I may be permitted to paraphrase them, they are as follows:

(i) the difficulty in ascertaining the *content* of customary international law in a complex and heterogeneous world; and

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1. Comment, *Problems of Cognition and Interpretation in Applying Norms of a Customary International Law of Human Rights in United States Courts*, *supra* p. 59.

2. *See*, for example, his article, *The Treaty Power and National Foreign Policy as Vehicles for the Enforcement of Human Rights in the United States*, 9 HOFSTRA LAW REVIEW 411 (1981), and his expert testimony in *In re* Alien Children Education Litigation, 501 F. Supp. 544 (S.D. Tex. 1980), *prob. juris. noted, sub nom.* Doe v. Plyler, 101 S. Ct. 3078 (1981).

3. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981), *aff'g* 505 F. Supp. 787 (D. Kan. 1980). To deflect the suggestion that "human rights activist" counsel characteristically lack candor in citing opposing authority (*see* Oliver, *supra*, p. 59 at n.2, p. 62 at n.13), it is appropriate also to discuss Hanoch Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), *appeal docketed*, No. 81-1870 (D.C. Cir. Aug. 4, 1981), of which more is said at pp. 71-75, *infra*.

4. Oliver, *supra*, at 60.

(ii) the problem of reconciling customary international law with statutory law, with which it may appear to be in conflict.

It is the thesis of this Reply that problem (i) is a traditional one in common law jurisprudence, and that while so to say is not to underestimate its vexatiousness, the means for approaching the problem are neither novel nor obscure. Problem (ii) is indeed trickier, although it is one yet to be squarely addressed by the courts. The decision of the Tenth Circuit in *Rodriguez-Fernandez*[5] suggests, however, that it may be possible to resolve it in most cases without having to choose between two mutually exclusive propositions of law.[6]

FILARTIGA V. PENA-IRALA

Professor Oliver proposes that *Filartiga v. Pena-Irala* "could well serve as an exercise in first year law study of what the rule in a case really is."[7] But Oliver never says what *he* thinks the rule is. Apparently, he is troubled by what he takes to be the following aspects of the Second Circuit's decision:

1) the inconsistency of a norm of customary law prohibiting torture with the widespread practice of nations;
2) the failure of the court to provide a comprehensive definition of the act it finds to be a violation of international law;
3) the omission of any determination regarding the "act of state" defense; and
4) the emphasis in the decision upon torture, rather than wrongful death.

None of these criticisms strikes at the heart of the opinion in *Filartiga*. In fact, the court specifically dealt with problem (1) and resolved it in appellees' favor. Had Judge Kaufman addressed problems (2) and (3) squarely, he would have been guilty of the very kind of judicial lawmaking with which he is taxed by Professor Oliver. Problem (4) is based upon a misunderstanding—albeit a comprehensible one—of what was actually at issue in the case.

The prevalence—nearly the ubiquity—of the practice of torture by states is an incontrovertible fact. It is argued by some that states' conduct in this regard is no more relevant to the existence of a binding rule of law than is New York City's crime rate to the existence of a criminal code in the City. But this is foolish: in domestic law, the best evidence of the *content* of the law is the statute book, assuming its parts to have

5. Oliver, *supra* note 3.
6. *Id.*
7. Oliver, *supra*, at 61.

been properly (*i.e.* constitutionally) enacted.[8] The difficulty in determining the content of customary international law stems directly from the absence of any analog to such a statute book.

Nevertheless, it is submitted that Judge Kaufman's approach to the conflict between states' public pronouncements and their actual practice is the correct one. The point is that even when caught in the very act of torture, nations uniformly and without exception acknowledge the existence of a rule of customary (if not of positive) law forbidding the practice.[9] After all, their votes in the United Nations, their adherence to international agreements, the language of their constitutions, and their responses when they are accused of deviations, do form a part of states' practice for the purpose of inferring what customary law is.[10]

Nor is actual practice to be taken as the sole arbiter of custom. "Customs and usages" form include more than that. It is for this reason that Mr. Justice Gray, in his famous pronouncement in *The Paquete Habana*,[11] refers to the need for evidence of customs and usages derived from the works of legal scholars. Were practice enough, irrespective, for example, of *opinio juris*, it would be enough to canvass the field and to base the determination of whether a customary norm exists on survey data showing whether it is observed in fact.

At one point in his analysis, Professor Oliver suggests that the *Filartiga* court created international custom from a generalization of the Fifth Amendment to the Constitution of the United States.[12] With respect, it is submitted that this suggestion is gratuitous, and wholly without any shred of support in the Second Circuit's decision. The court is hardly guilty of cultural imperialism in citing numerous international instruments to which Paraguay (as well as the United States) is a party, or in referring to that country's own Constitution.[13] The court's holding is no extraterritorial expansion of the *Miranda* rule.[14] Rather, it is a determination, based upon internationally relevant criteria, of a rule of customary international law forbidding the most egregious forms of

8. Indeed, as the District of Columbia City Council recently learned to its sharp regret, many people derive comfort from the presence of laws on the books even when those laws have not been enforced for decades and there is no prosecutorial inclination ever to enforce them. I am referring, of course, to the congressional veto of the City Council's revisions to the District's sex offenses laws.

9. Filartiga, 630 F.2d at 884.

10. The *Filartiga* court goes into each of these in detail, citing examples: 630 F.2d at 880-85.

11. 175 U.S. 677, 700 (1900).

12. Oliver, *supra*, at 60.

13. Article 45; *see* Filartiga, 630 F.2d at 884 n.14.

14. Miranda v. Arizona, 384 U.S. 436 (1966).

state-countenanced brutality.[15]

Professor Oliver expresses dissatisfaction that the Court of Appeals failed in *Filartiga* to give a comprehensive definition of torture.[16] Certainly he is right to suggest that if *all* forms of attempted coercion of prisoners constitute torture, the claim of international consensus sufficient to establish custom is called into question. But the premise on which this argument turns is faulty. Even within the most progressive consensual system for enforcing human rights norms—the European Convention[17]—it has been held that "inhuman and degrading treatment" is not coterminous with torture.[18]

In any event, the *Filartiga* court was not presented with a close question. The plaintiffs alleged—and, for the purpose of deciding the motion to dismiss for lack of jurisdiction, the court was constrained to accept the allegations as true[19]—that Joelito Filartiga, aged seventeen years, was intentionally murdered through the use of such techniques as electric shock, and that the perpetrator of that deed acted with at least the apparent complicity of his Government.[20]

To Professor Oliver's rhetorical question, then, concerning the outcome had Joelito Filartiga been merely deported rather than killed after torture,[21] the answer is clear. Young Filartiga's death was not a definitional prerequisite to the illegality of the torture practiced upon him. Had he not died, but had the description of his treatment been otherwise the same, jurisdiction under 28 U.S.C. § 1350 would nevertheless have lain, for exactly the same reasons expounded by the *Filartiga* court. Of course, the measure of damages ultimately to be recovered might have been different, but that is not the question Professor Oliver has asked.

The Second Circuit therefore cannot be faulted for not exploring

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15. While it is perfectly conceivable that rules of international law invoked by international tribunals would be found according to procedures different from those used in domestic courts, the *Filartiga* decision does track Article 38 of the Statute of the International Court of Justice. *See* 630 F.2d at 881 n.8.

16. Oliver, *supra*, at 61.

17. Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, E.T.S. 5. *See* 45 AM. J. INT'L L. SUPP. 24 (1951).

18. Ireland v. United Kingdom, Application 5310/71 (Eur. Ct. of Human Rts. January 18, 1978), *reprinted in* 17 I.L.M. 680 (1978) (w/o separate opinions). *See* 73 AM. J. INT'L L. 267 (1979). *See also* Filartiga, 630 F.2d at 884 n.16.

19. Newport News Shipbuilding Dry Dock Co. v. Schauffler, 303 U.S. 54 (1938); A.F. Brod & Co. v. Perlow, 375 F.2d 393, 395 (2d Cir. 1967).

20. It must be remembered, however, that Paraguay was not a defendant in *Filartiga*, and had no opportunity to disavow Pena or his alleged barbarity. On the other hand, the government of that country made no move to intervene voluntarily. *See* p. 69, *infra*, for the relevance of this to the "act of state" defense.

21. Oliver, *supra*, at 61.

the full contours of the concept of torture. Had it done so, its comments would have been entirely *obiter*. For the fact is that Joelito Filartiga did die, and he died an especially brutal, horrible death. *Pace* Professor Oliver, incidentally, according to the allegations of the complaint,[22] this was not a case of trying to make a prisoner "sing."[23] This was a case of conscious and deliberate viciousness for purely vindictive motives.

As to the "act of state" defense, Professor Oliver is quite right to note that it was "avoided" by the court.[24] It was avoided for the simple reason that it was not presented for the court's consideration. Judge Kaufman did note, correctly, however, that it is unlikely that "action by a state official in violation of the Constitution and laws of the Republic of Paraguay, *and wholly unratified by that nation's government*, could properly be characterized as an act of state."[25] To be an "act of state," an act must at the very least be endorsed, underwritten, or embraced by a sovereign as its own. Indeed, in the landmark case of *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[26] one of the matters at issue concerned whether certain statements of Cuba's counsel before the Court of Appeals[27] bore the sufficiently legible imprint of their client.

But Paraguay indicated nothing to suggest it wanted any part of the defense of Pena. The state, not only the individual defendant, would have had to concur in asserting the "act of state" defense. Not only did it choose not to do so; it chose not to appear at all.[28]

Professor Oliver's fourth criticism of *Filartiga*—as I have numbered them above[29]—is the most troubling, not because it is especially difficult to fend off, but because it has already received a kind of backhanded judicial endorsement.[30] It is the objection that Judge Kaufman was tilting at windmills, and that the decision should have confined itself to a discussion of wrongful death, excluding its consideration of torture or of international law. This objection indicates a fundamental

22. *See supra* note 19, and accompanying text.
23. Oliver, *supra*, at 60.
24. *Id.* at 61-62.
25. Filartiga, 630 F.2d at 889, (emphasis added).
26. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).
27. For the Second Circuit, as it happened; *see* Menendez Garcia y Cia., Ltda. v. Saks & Co., 485 F.2d 1355 (2d Cir. 1972).
28. *See* note 20, *supra*, and accompanying text. In any event, "act of state" is not an absolute jurisdictional bar even when it is raised (unlike the sovereign immunity defense, which goes to *personal* jurisdiction over the defendant; *see* 28 U.S.C. §§ 1602-1611, also not at issue in *Filartiga*). It is respected out of comity only. *See*, for example, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). U.S. application of the doctrine is sharply criticized, and its total overhaul advocated, in Mathias, *Restructuring the Act of State Doctrine: A Blueprint for Legislative Reform*, 12 LAW & POL. INT'L BUS. 369 (1980).
29. *Supra* p. 66.
30. Hanoch Tel-Oren, 517 F. Supp. 542 (D.D.C. 1981).

misreading of *Filartiga*, and of the jurisdictional statute[31] applied in that decision.

The venerable provision of the first Judiciary Act at issue in *Filartiga*, as currently codified at 28 U.S.C. § 1350, provides as follows: "The 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."[32] Thus, for an action to be properly before the federal courts under the statute, it must satisfy three tests: it must be brought by an alien, it must be "in tort only," and it must allege that the tort was committed in violation of international law.[33] The complaint in *Filartiga* was held to satisfy all three. Indeed, only the last was contested.

Filartiga was clearly a case "in tort only."[34] The tort alleged was assault, or trespass to the person, resulting in the wrongful death of Joelito Filartiga. As has been explained,[35] the act was no more tortious and no more a violation of international law because its victim died. But the jurisdictional prerequisite of a legitimate complaint sounding in tort was not at issue. What was before the court was the question of whether the tort—assuming it could be proven[36]—was "committed in violation of the law of nations." *That* is why the matter of the legal status of torture occupied such a prominent place in Judge Kaufman's decision.

With respect, Professor Oliver's reasoning (apparently imputed to the court) by which "the greater offense include[s] the lesser"[37] is not to the point. It is the means by which the wrongful death of Joelito Filartiga was allegedly caused which implicates the law of nations, and hence the jurisdictional statute. No more was decided in *Filartiga* than this: the United States District Court for the Eastern District of New York had jurisdiction pursuant to 28 U.S.C. § 1350 over the subject matter of the complaint. Absent a violation of international law, the "wrongfulness" of the death would have mattered little: the federal

31. 28 U.S.C. § 1350.

32. Section 9(b) of the Judiciary Act of 1789, ch. 20, 1 Stat. 73.

33. The Second Circuit rejected the position, urged upon it by the *amici curiae* for whom the author was counsel, that torture is also an act "in violation . . . of a treaty to which the United States is a party" even with the admission that any such treaty would be non-self-executing. Filartiga, 630 F.2d at 880 n.7. For convenience, then, the "treaty violation" alternative is not discussed further in the text.

34. As opposed, for example, to the issue in Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied* 439 U.S. 1114 (1979), in which the claim styled to be in tort was held to be essentially one for breach of contract.

35. *Supra* pp. 68-69.

36. Which was assumed for purposes of the motion to dismiss; *see* note 19 *supra*, and accompanying text.

37. Oliver, *supra*, at 60.

courts are courts of limited jurisdiction, and a jurisdictional basis would have been lacking.

Judge Kaufman had therefore to devote a major part of his opinion to establishing that in fact torture—whether or not resulting in death—violates the law of nations. Another way of stating this conclusion, and it is in logic a perfectly equivalent way, is to state that all persons have a right, vouchsafed by customary international law, to be free from torture. Thus the jurisdictional prerequisites set out in 28 U.S.C. § 1350 were satisfied.[38]

Professor Oliver's misperception, if such it may be termed without disrespect, of *Filartiga* as somehow *essentially* different from a garden variety tort suit (albeit with a special aspect creating federal jurisdiction) is echoed in the decision of the United States District Court for the District of Columbia in *Hanoch Tel-Oren v. Libyan Arab Republic*.[39]

In *Filartiga*, Judge Kaufman attempts to make it clear that tort suits are transitory and that a tortfeasor may at common law be sued wherever jurisdiction may be obtained over him.[40] Despite this attempt, one Stanford University law student,[41] Professor Oliver,[42] and now a federal judge have all faulted the *Filartiga* court, in one manner or another, for skewing the balance between *tort* and *torture*.

The plaintiffs, in *Hanoch Tel-Oren*,[43] were persons injured and the representatives of persons who had been killed in a terrorist bombing incident in Israel. They brought an action against the government of Libya and the Palestine Liberation Organization, as well as certain Palestinian and Arab groups in the United States,[44] asserting (*inter alia*) 28 U.S.C. § 1350 as the basis of federal jurisdiction. At the outset, the

38. Judge Kaufman went on to explore at length the incorporation of international law into the law of the United States, citing, among many other cases, The Paquete Habana, 175 U.S. 677 (1900). The purpose of this part of the holding was to ensure that the *Filartiga* matter could be adjudicated by the federal courts without exceeding the authority conferred upon them by Article III of the Constitution. Professor Oliver appears not to object to this reasoning, which is discussed in Schneebaum, *supra* note 6.

39. *Supra* note 3.

40. Filartiga, 630 F.2d at 885, citing authorities going back to Lord Mansfield in Mostyn v. Fabrigas, 1 Cowp. 161 (1774).

41. Michael Danaher. *See* Note *Torture As a Tort in Violation of International Law*, 33 STAN. L. REV. 353 (1981). *Compare* Blum & Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga*, 22 HARV. INT'L L.J. 53 (1981).

42. Judge Joyce Hens Green of the United States District Court for the District of Columbia in *Hanoch Tel-Oren*, 517 F. Supp. 542 (D.D.C. 1981).

43. *Id.*

44. The Palestine Information Office, the National Association of Arab Americans, and the Palestine Congress of North America.

plaintiffs had to face certain serious difficulties inherent in their statement of claim:

1) the asserted link between the three U.S.-based defendants and the alleged tort was highly tenuous, and required an extremely expansive definition of conspiracy;[45]
2) service of process was not effectuated upon Libya or the P.L.O., and neither of these defendants appeared;[46]
3) the plaintiffs appeared to rely solely upon unratified and/or non-self-executing treaties and General Assembly resolutions[47] as constituting an international positive law of which the alleged tort was claimed to be a violation;
4) some plaintiffs were not aliens but U.S. citizens outside the scope of 28 U.S.C. § 1350;[48] and
5) the action was not brought until nearly three years after the incident, and the District of Columbia statutory limitation period for intentional torts is one year.[49]

Judge Green found each of these infirmities (except the fourth, which could be remedied by an amendment to the complaint) to be fatal. She went on in *obiter dictum*, however, to opine upon the scope of the Alien Tort Claims Act and upon the meaning of the expression "in violation of the law of nations."[50] In so doing, Judge Green relied heavily upon the Stanford Law Review's note on *Filartiga*[51] with its concentration upon the idea of a "private right of action."

The essence of Judge Green's *dictum* appears to be this: "an action predicated on . . . general norms of international law must have as its basis a specific right to a private claim."[52] This was taken to mean that a plaintiff under 28 U.S.C. § 1350 must allege *not only* that an international norm was substantively violated, *but also* that the content of that norm contemplates municipal lawsuits as approved vehicles for remedying the violation.

Such a proposition is inconsistent with *Filartiga*,[53] and would entirely foreclose *any* human rights application of the Alien Tort Claims

45. Hanoch Tel-Oren, 517 F. Supp. at 549.
46. *Id.* at 545 n.1.
47. *Id.* at 545-46, 547-48.
48. *Id.* at 548.
49. D.C. CODE ANN. § 12-301(4); Hanoch Tel-Oren, 517 F. Supp. at 550-1.
50. Hanoch Tel-Oren, 517 F. Supp. at 549-51.
51. *Supra* note 41.
52. Hanoch Tel-Oren, 517 F. Supp. at 549 (footnote omitted).
53. As well as with the other successful application of 28 U.S.C. § 1350 in this century, Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), and with the suggestion of the U.S. Court of Appeals for the Ninth Circuit in Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975). Indeed, even in the numerous cases in which jurisdiction was found *not* to lie (*see* Filartiga, 630 F.2d at 887-88), the lack of a "private right of action" as part of the alleged international norm was not cited as a basis for dismissal.

Act. It ignores the wording of 28 U.S.C. § 1350, which, by requiring that an action be one "in tort only," obviates the need for additional demonstration of a right of action. It ignores the transitory nature of tort actions at common law, by which, as the court held in *Filartiga*, "where *in personam* jurisdiction has been obtained over the defendant, the parties agree that the acts alleged would violate [the law of the situs], and the policies of the forum are consistent with the foreign law, *state court jurisdiction would be proper*."[54] It ignores the historical evidence which demonstrates conclusively the original objective of 28 U.S.C. § 1350: channeling into the federal courts, and away from the state courts, lawsuits which implicate actual or potential foreign policy matters.[55] The serious flaws in the Judge's reasoning are revealed in her endorsement of the following comment from the Stanford article:

> The possible presumptuousness of private human rights lawsuits is self-evident. Imagine a suit brought in Mexico, for example, by the Black Panther Party against the visiting chief of police of Philadelphia, alleging violations of international conventions prohibiting genocide and systematic racial discrimination. Certainly, such an application of international law would meet stiff, and legitimate, opposition in the United States.[56]

For very many reasons, no "presumptuousness" is demonstrated by the example, nor is the example in any way analogous to the cases before the court in *Filartiga* and in *Hanoch Tel-Orch*: The United States is not a party to the cited treaties, and it is almost certainly the case that no norm of customary international law could be taken to forbid whatever the defendant is alleged to have done. The putative plaintiff's standing would be open to considerable question. It is far from clear just what the individual defendant's violation would be said to be: no tort would appear to be alleged. To the extent that the defendant's asserted breach did not exceed the carrying out of official policy, the act of state defense (to the extent it is incorporated in Mexican law) would seem to be unanswerable, and it would be open to the United States to claim sovereign immunity on his behalf.

If, on the other hand, the hypothetical suit did allege that the individual defendant committed a tort the plaintiffs had standing to challenge, then an exercise of jurisdiction by the courts of Mexico—absent an overriding jurisdictional bar—would not be extraordinary or pre-

54. Filartiga, 630 F.2d at 885 (footnote omitted, emphasis added). State courts, of course, are courts of general jurisdiction. *See* note 40 *supra*, and accompanying text.

55. *See* the classic historical study by Dickenson, *The Law of Nations As Part of the National Law of the United States*, pts. 1 and 2, 101 U. PA. L. REV. 26, 792 (1952-53).

56. *See* Note, *supra* note 41, at 359; Hanoch Tel-Oren, 517 F. Supp. at 551 n.5.

sumptuous as a matter of *law*. Whether the United States would express objections on policy grounds or as a matter of diplomacy or comity is, of course, another question.

A failure to perceive that an action under 28 U.S.C. § 1350 must be an action in *tort* lies at the root of Professor Oliver's criticism of *Filartiga*. With respect, this is the same error that led to Judge Green's *obiter dicta* in *Hanoch Tel-Oren*. With regard to the latter, it is not too late to hope that the Court of Appeals will not further confuse the meaning of 28 U.S.C. § 1350 or the holding in *Filartiga*, and will base its judgment instead only upon the *ratio decidendi* of the case below.[57]

RODRIGUEZ-FERNANDEZ V. WILKINSON[58]

Professor Oliver seems to criticize at least the District Court's decision in *Rodriguez-Fernandez* for its failure to resolve the question: "when does a putative rule of customary international law contradict federal positive law and when does it guide its application and interpretation?"[59] Oliver is quite correct to point out[60] that three potential sources for the petitioner's right to be free from indefinite detention were presented in the case: the Constitution, U.S. statutory law, and the customary international law of human rights.

Judge Rogers held that the first of these was without applicability to Rodriguez-Fernandez, who, as an excluded alien, was nationally to be considered outside the borders of the United States. As he stated his conclusion with respect to such a person, "the machinery of domestic law utterly fails to operate to assure protection."[61] The Judge turned to international human rights as the only remaining source of law that would allow him to do justice. That international law, including customary international law, is a part of U.S. law is of course well established, and Judge Rogers cited both *The Paquete Habana*[62] and *Filartiga* for this essential bridge in the logic of his opinion.[63] Professor Oliver castigates the Judge for "opting against innovating in domestic constitutional law in order to innovate as to the direct application of international law."[64] Leaving aside for a moment the question of a District Court's authority to be "innovate" in the face of what it (rightly

57. *See* notes 45-49 *supra*, and accompanying text.
58. 505 F. Supp. 787 (D. Kan. 1980).
59. Oliver, *supra*, at 60.
60. *Id.*
61. 505 F. Supp. at 795.
62. *See* note 11 *supra*.
63. He found authority for this also in The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815), wherein Chief Justice Marshall wrote that absent a statute, U.S. courts are "bound by the law of nations, which is part of the law of the land." See Filartiga, 630 F.2d at 887.
64. Oliver, *supra*, at 62.

or wrongly) takes to be binding, contrary Supreme Court precedent, it is far from clear whether the direct application of international law to domestic disputes is all that revolutionary. It will be recalled that in defending its continued and potentially permanent incarceration of Rodriguez-Fernandez, the Government was forced to embrace the unattractive position that there were *no* legal constraints upon its treatment of the prisoner. The Court of Appeals pointed out the patent absurdity of this contention: "Surely Congress could not order the killing of Rodriguez-Fernandez . . . on the ground that Cuba would not take [him] back and this country does not want [him.]"[65]

Nor was this the only difficulty facing the Department of Justice in the case. The statute upon which the Government relied for authority to detain Rodriguez-Fernandez, perhaps for the remainder of his natural life, nowhere contains the word "detention." Rather, it directs immediate expulsion of excluded aliens: "any alien . . . arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, . . . unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper."[66] The statute is silent on procedures to follow or rights that must be observed in the event that deportation in accordance with its directive is not possible.

If one accepts the first conclusion that Judge Rogers reached—that Supreme Court precedent constrained him to recognize no constitutional or statutory rights of an excluded alien[67]—then it is perfectly easy to understand why the Judge found Rodriguez-Fernandez's right to freedom to be vouchsafed by international law. But whether or not one does accept that conclusion, this case is not one that presents the conflict suggested by Professor Oliver between domestic positive law and customary international law. Judge Rogers did not find that the United States Government had statutory authority to detain Rodriguez-Fernandez, as it had claimed. Nor, incidentally, would the presence of such a conflict have entailed novel or insoluble difficulties. Chief Justice Marshall pointed the way to a solution as long ago as 1804, an act of Congress ought never to be construed to violate the law

65. 654 F.2d at 1387.

66. 8 U.S.C. § 1227 (1976).

67. It is interesting to note that while reaching this result, Judge Rogers found that he was not required to do so by the strongest case cited by the Government: Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). *See* Rodriguez-Fernandez, 505 F. Supp. at 795. Rather, he relied upon a series of cases in which excluded aliens challenged their *exclusion* (rather than subsequent *detention*) on constitutional grounds. This was, of course, not the question at issue in *Rodriguez-Fernandez*. *See id.* at 789; 654 F.2d at 1386.

of nations, if any other possible construction remains.[68] The "rule" cited (without case authority) by Professor Oliver to the effect that "though customary international law is the law of the land, it is not so if contradicted by federal positive law that by municipal standards is not unconstitutional"[69] is arguably not a rule of law at all. But whether it is or not, it has no relevance to *Rodriguez-Fernandez*.

The Court of Appeals differed from Judge Rogers as to the availability of constitutional protections for excluded aliens. *Mezei*,[70] which the court called "[t]he linchpin of the government's case,"[71] is both distinguished on numerous grounds and sharply criticized. It held that there *is* some core or nucleus of constitutional due process rights to which even excluded aliens are entitled.[72] *Mezei* aside, the Tenth Circuit found no shortage of support in the decided cases for this proposition.[73] Having established that such a nucleus exists, the court next turned to the question of its content. It was in this connection that international human rights law was canvassed. "Due process," said the court, is a developing concept which "undergoes evolutionary change to take into account accepted current notions of fairness." Part of the definition of such current notions includes international principles. "No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."[74]

Customary international law, then, acts as a context, a kind of *Zeitgeist*, which informs or inspires the notion of due process of law, and against which that notion is to be measured. In the ultimate analysis, however, it is domestic law—and in fact constitutional law—which is the basis for holding the indeterminate imprisonment of Rodriguez-Fernandez to be impermissible. This, of course, amounts to a marked difference from the District Court's reasoning.

Two points held in common by the District Court and the Court of Appeals should be noted, however. Both are critical to an understanding of the *Rodriguez-Fernandez* decision; neither appears to have been accorded its proper significance by Professor Oliver.

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68. Alexander Murray, Esq. v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, (1804).

69. Oliver, *supra*, at 62.

70. *See* Note 67 *supra*.

71. Rodriguez-Fernandez, 654 F.2d at 1388.

72. Although these rights do not apply to the process of exclusion itself *see* Rodriguez-Fernandez, 654 F.2d at 1386, *citing*, *inter alia*, Kliendienst v. Mandel, 408 U.S. 753 (1972).

73. *See* Rodriguez-Fernandez, 654 F.2d at 1386, 1387. The most important cases cited were Yick Wo v. Hopkins, 118 U.S. 356 (1886); Wong Wing v. United States, 163 U.S. 228 (1896); Petition of Brooks, 5 F.2d 238 (D. Mass. 1925).

74. Rodriguez-Fernandez, 654 F.2d at 1388.

First, neither Judge Rogers in his order of December 31, 1980,[75] nor the Court of Appeals, directed that Rodriguez-Fernandez be released forthwith. It is not proper to describe either court's action as the issuance of a writ of habeas corpus.[76] Both courts, indeed, went out of their way to say that the Government was being left options *other* than opening the gates of the federal penitentiary to Rodriguez-Fernandez.[77] In fact, the Government was unable or unwilling to adopt any of those other options so carefully delineated by both courts. Pedro Rodriguez-Fernandez was released from prison on August 7, 1981. The *Miami Herald* reported that he was free for the first time in thirteen years.[78]

The other critical common aspect of the two decisions is this: *both* courts held that customary international law forbids arbitrary detention, and is binding upon governments. *Both* courts reached that conclusion in the traditional way set out by Mr. Justice Gray in *The Paquete Habana*[79]: by reviewing state practice, treaties and other agreements, and the writings of jurists. Neither found a treaty norm to be self-executing or directly enforceable, but that is not the point. *Both* found that customary international law was the law of the United States, and that it contained a norm prohibiting the potentially permanent incarceration of a prisoner never accused, much less convicted, of a crime in the jurisdiction of his detention.

As the Court of Appeals stated, it is a principle of international law that "individuals are entitled to be free of arbitrary imprisonment."[80] This court—one considered not "innovative" by Professor Oliver[81]—had no trouble finding a firmly established norm of international law to that effect. Professor Oliver's worries that the holding was somehow tentative or the existence of the rule uncertain are simply not consistent with the language of the decision itself. Neither court expressed views on international human rights law "unnecessarily," as Professor Oliver suggests.[82] Rather, both applied legal norms long accepted as part of the corpus of United States law. Freedom for the

75. That is, in the decision reported at 505 F. Supp. 787.

76. On December 31, 1980, Judge Rogers decided that he *would* issue a writ *if* the Government did not terminate petitioner's detention within 90 days. 505 F. Supp. at 800. The writ was issued on April 22, 1981, when the District Court determined that its earlier order had not beenb complied with, and that Rodriguez-Fernandez was still incarcerated. *See* 654 F.2d at 1385.

77. *See* 505 F. Supp. at 800; 654 F.2d at 1390. Judge Rogers did finally direct that the writ issue at a hearing on April 22, 1981, when the Government had failed to comply with his earlier order the Rodriguez's illegal confinement be terminated within ninety days. The Tenth Circuit stayed the writ and expedited its consideration of the case. 654 F.2d at 1385.

78. Miami Herald, Aug. 13, 1981, at 1, col. 1.

79. *Supra* note 11, at 700.

80. 654 F.2d at 1390.

81. Oliver, *supra*, at 62.

82. *Id.*

victim of human rights violations was ultimately won, and it was won through the careful, precise, and eminently traditional judicial reasoning of the United States Court of Appeals for the Tenth Circuit.[83]

CONCLUSION

Professor Oliver is perfectly right to point out the difficulties in identifying, isolating, and enforcing norms of customary international law. But such difficulties should not overwhelm the persuasive powers of human rights advocates or the analytical powers of judges. Many areas of the law present such problems. Yet the living fountain of the common law would become a brackish, stagnant pond if it were not kept constantly in motion by dynamic, eager, and aggressive advocacy.

Customary international law of human rights is hard to distill to its essential individual rights and specific obligations. When advocates are unable to perform this distillation persuasively, they will lose their cases. The fault then may lie with their skill as lawyers, or it may derive from the simple fact that the law is against them. But none of this means that they—that we—should not try to expand the incorporation of the international law of human rights into the law of the United States. *Filartiga* and *Rodriguez-Fernandez* represent important way stations along that road. Perhaps their most lasting significance, however, will be seen not in "big" cases, but in engendering an awareness on the part of lawyers and judges of the existence of a corpus of law heretofore ignored.

Thus, the United States District Court for the District of Connecticut[84] and the Supreme Court of the State of Oregon[85] have since *Filartiga* invoked (*inter alia*) the United Nations Standard Minimum Rules for the Treatment of Prisoners[86] in sustaining challenges to correctional institution policies. The United States District Court for the Northern

83. This is not to suggest a blanket endorsement of the Court of Appeals' decision in all of its details. The opinion is, with respect, perhaps not entirely satisfactory in its treatment of the Attorney General's discretion to parole excluded aliens, of the possibility of continuing the detention of demonstrably dangerous persons, and of the power of the Government to deport excluded aliens to countries other than those of their origin. But these are mere quibbles, insignificant by comparison with the admirable argument that supported the court's final order.

84. Lareau v. Manson, 507 F. Supp. 1177 n.8, (D. Conn. 1980). The case concerns conditions at the Hartford Community Correctional Center, and, specifically, overbedding, overcrowding, and the treatment of pretrial detainees.

85. Sterling v. Cupp, No. 26907 (Sup. Ct. Ore. *en banc* Mar. 4, 1981), at note 21. At issue were prison regulations permitting female prison guards to conduct searches of male inmates.

86. Economic and Social Council: ESC Res. 663 (XXIV) C; 24 U.N. ESCOR, Supp. (No. 1) 11; U.N. Doc. E/3048 (1957).

District of Georgia[87] endorsed the Tenth Circuit's decision in *Rodriguez-Fernandez* and ordered the release of over 300 "freedom flotilla" Cubans who had been held in prison without charge or conviction, and who were able to demonstrate they represented no threat to public order and safety in this country.[88]

If there is any cause for optimism about the human condition in the closing decades of the twentieth century, perhaps it is this: the gradual emergence of a consensus that the very humanity of every man and woman confers certain rights which are not only moral, but legal. Dedicated practitioners, able and sensitive judges, and eminent scholars must now join forces to solidify the gains that have been made, and to lay a firm foundation upon which further developments of the law may be built. If we proceed calmly and rationally, there will be a smooth, continuous evolution.

It is not necessary, and indeed would be neither helpful nor appropriate, to mount a massive assault on such citadels as the doctrine of self-executing treaties.[89] Customary international law is and has always been part of the law of the United States, and the enlightenment of the former will chase the shadows from the latter's dark corners. As Judge Kaufman wrote in *Filartiga*: "In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest."[90] It is respectfully submitted that practicing and academic lawyers urge the courts of the United States to take their proper place in fostering the growth, and in encouraging the protection of these legal rights.

87. Fernandez-Roque v. Smith, 91 F.R.D. 239 (N.D. Ga. 1981). *See also* Soroa-Gonzales v. Ciriletti, 515 F. Supp. 1049 (N.D. Ga. 1981).

88. Judge Shoob, unlike Judge Rogers and the Tenth Circuit in *Rodriguez*, held that the Attorney General's failure to parole these individuals constituted an abuse of his statutory discretion. *See* note 83, *supra*.

89. *See* Oliver, *supra* note 2.

90. 630 F.2d at 890.