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# Homage to Filártiga

Perry S Bechky



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## Homage to *Filártiga*

Perry S. Bechky\*

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“If the Supreme Court barred federal courts from hearing suits about foreign atrocities under the [Alien Tort Statute], it would be making a sad mistake. . . . [It] would embrace the retrograde proposition that distant genocides are not the business of the United States . . . .”<sup>1</sup>

Soon after Judge Leval published these words, the Supreme Court made the “sad mistake” he warned against. In its decision last term in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>2</sup> the Court held that the Alien Tort Statute (ATS) could not be invoked against foreign defendants for atrocities committed outside the United States.

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\* Principal, International Trade & Investment Law; Visiting Scholar, Seattle University School of Law. I thank Seattle University School of Law for its continued support and Tom Antkowiak, Kristine Huskey, Mark Janis, and Won Kidane for their advice and encouragement. All mistakes are my own. This Article was substantially completed immediately after *Kiobel* and has not been updated to account for later developments.

1. Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, 92 FOREIGN AFFAIRS 16, 21 (2013). Judge Leval wrote an emphatic separate opinion in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149–96 (2d Cir. 2010).

2. 133 S. Ct. 1659, 1669 (2013).

*Kiobel* gravely injured *Filártiga v. Peña-Irala*, the Second Circuit's canonical human rights case.<sup>3</sup> *Kiobel* largely closed the door, first opened by *Filártiga*, to human rights litigation under the ATS. Although the *Kiobel* majority never mentions *Filártiga*, its presence is keenly felt: *Filártiga* started the line of cases that led to *Kiobel*, it was discussed at length in the *Kiobel* briefs and oral argument,<sup>4</sup> and it figures prominently in Justice Breyer's concurring opinion.<sup>5</sup>

*Kiobel* put me in a wistful mood. But *Filártiga* lives. This Article is homage, not eulogy: I come to praise *Filártiga*, not to bury it.

This Article draws from my experience teaching *Filártiga* and its progeny, up through the Supreme Court's consideration of *Kiobel*. It is often said that the best way to learn is to teach. As I taught these cases, I learned about *Filártiga* and came to appreciate it all the more. Teaching *Filártiga* helped me to work out my thoughts—indeed, my feelings—about it.

In honoring *Filártiga*, this Article also offers a *Filártiga*-based critique of *Kiobel*, a case that deserves criticism from a full range of perspectives.

Part I briefly introduces the cases and demonstrates the doctrinal limits of *Kiobel* vis-à-vis *Filártiga*. The Article then highlights four aspects of *Filártiga* worth celebrating, none of them extinguished by *Kiobel*: (1) its approach to sources of international law, (2) its conclusion, (3) its vision, and (4) its hope. *Filártiga*, and much of the good it has done, lives.

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3. 630 F.2d 876 (2d Cir. 1980).

4. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 4–5, 10–13, 18–21, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) [hereinafter Supplemental Brief for the United States]. At oral argument in *Kiobel*, *Filártiga* was mentioned thirty-two times. Transcript of Oral Argument, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491). Notably, Justice Ginsburg twice asked respondents' counsel for her position on *Filártiga* and both times Justice Kennedy stressed the importance of Justice Ginsburg's question. *Id.* at 23–24, 36–37.

5. *Kiobel*, 133 S. Ct. at 1671, 1675, 1677 (Breyer, J., concurring). Justice Breyer cites *Filártiga* five times, and its influence is seen elsewhere as well. Justice Breyer's opinion is discussed further below.

## I. BACKGROUND

The First Congress enacted the ATS as part of the Judiciary Act of 1789. As currently worded, it provides, “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.”<sup>6</sup>

A. *Filártiga*

In 1976, a Paraguayan teenager named Joelito Filártiga was kidnapped and tortured to death at the home of Americo Peña-Irala, a senior police official in Asunción, Paraguay.<sup>7</sup> Police brought Joelito’s sister, Dolly, to the home and showed her the body. When she fled, Peña-Irala shouted at her, “Here you have what you have been looking for for so long and what you deserve. Now shut up.”<sup>8</sup> Joelito was tortured and murdered to intimidate his father Joel, who had opposed Paraguay’s government.

Dolly moved to Washington, D.C., where she was granted asylum.<sup>9</sup> While in Washington, she learned that Peña-Irala had moved to Brooklyn.<sup>10</sup> Dolly and her father Joel served Peña-Irala with process to start a civil lawsuit in federal district court in Brooklyn for Joelito’s torture and murder.<sup>11</sup>

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6. 28 U.S.C. § 1350. The original wording in 1789 read: “[T]he district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

7. *Filártiga*, 630 F.2d at 878. This discussion treats the facts as proven, rather than as allegations, because the Filártigas ultimately prevailed. *Filártiga v. Peña-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984). For more about the factual background of the case, see Harold Hongju Koh, *Filártiga v. Peña-Irala: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, in *INTERNATIONAL LAW STORIES* 40–76 (John E. Noyes et al. eds. 2007).

8. *Filártiga*, 630 F.2d at 878.

9. *Id.*

10. *Id.* at 878–79.

11. *Id.*

The Filártigas' main claim was that Joelito's torture and killing violated international law and, thus, gave rise to a cause of action under the ATS.<sup>12</sup> Although the law was then nearly 200 years old, only a handful of plaintiffs had ever filed a claim under it.<sup>13</sup> The district court dismissed the Filártigas' claim.<sup>14</sup> The Second Circuit reversed, holding that torture had become so universally condemned in international law as to constitute a tort in violation of the law of nations actionable under the ATS.<sup>15</sup> On remand, the Filártigas won a judgment of \$10,385,364 against Peña-Irala.<sup>16</sup> Apparently, however, they have never been able to collect any of this judgment.<sup>17</sup>

B. From *Filártiga* to *Kiobel*

*Filártiga* launched modern ATS litigation. Other cases followed, alleging that, like torture and extrajudicial killing, a variety of other government sins also deserved to be actionable under the ATS.<sup>18</sup> This section highlights three developments in ATS case law relevant to the themes of this Article.

First, in 1992, Congress enacted the Torture Victim Protection Act (TVPA).<sup>19</sup> The TVPA allows victims of torture and the heirs of victims of extrajudicial killing to sue the responsible

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12. *Id.* at 879.

13. See Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 832 n.6 (2006) (listing two earlier cases where ATS jurisdiction was upheld and "a dozen or so" where it was denied).

14. *Filártiga*, 630 F.2d at 880.

15. *Id.* at 880, 890.

16. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

17. Koh, *supra* note 7, at 60.

18. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 251 (2d Cir. 2009) (alleging genocide, torture, war crimes, and crimes against humanity); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 233 (2d Cir. 2003) (alleging that excessive pollution harmed "human life, health, and development").

19. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

individuals in certain circumstances.<sup>20</sup> Although generally narrower than the ATS, the TVPA expands it in one significant respect: TVPA cases are open to both U.S. and foreign plaintiffs.

The TVPA confirms *Filártiga*'s reading of the ATS. The House Judiciary Committee's report makes the nexus explicit: it quotes *Filártiga*'s conclusion, summarizes its history, and discusses its holding.<sup>21</sup> The report asserts that *Filártiga* was "met with general approval," explaining that legislation was needed to create an "unambiguous and modern basis" for suits against torturers that avoids the doubt that had been cast by Judge Bork.<sup>22</sup> The report also argues that the ATS "should remain intact" to address violations of other international legal norms "that already exist or may ripen in the future."<sup>23</sup> The Supreme Court has observed, accordingly, that Congress responded to *Filártiga* by "supplementing [it] in some detail."<sup>24</sup>

Second, in the mid-1990s, plaintiffs started bringing ATS cases against corporate defendants. These cases had higher financial and political stakes than in *Filártiga* and its early progeny. In one prominent case, ninety-one individuals and a group representing 32,700 more survivors of apartheid-related violence in South Africa sued "approximately fifty corporate defendants and hundreds of 'corporate Does,'" claiming that the defendants had abetted the apartheid government's wrongdoing.<sup>25</sup> Without commenting on the individual merits of these cases, I think it is fair to say that they prompted legal and political backlash against ATS litigation that reverberates still.

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20. *Id.* § 2. The limits include: (a) the acts must be under the actual or apparent authority, or color of law, of a foreign nation; (b) the plaintiff must have exhausted "adequate and available remedies" in the country where the acts occurred; and (c) suit must be filed within ten years. *Id.*

21. 1 H.R. REP. NO. 102-367, at 4 (1991).

22. *Id.* (discussing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (DC Cir. 1984) (Bork, J., concurring)).

23. 1 H.R. REP. NO. 102-367 at 2-4 (1991).

24. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

25. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 254 n.1, 258, 260 (2d Cir. 2007).

Third, in 2004, the Supreme Court decided its first modern ATS case, *Sosa v. Alvarez-Machain*.<sup>26</sup> That case stemmed from an incident in 1985, when a Mexican drug gang brutally murdered an undercover Drug Enforcement Administration (DEA) agent in Mexico.<sup>27</sup> The DEA suspected that Humberto Alvarez-Machain, a Mexican doctor, had helped to prolong the victim's suffering.<sup>28</sup> The DEA arranged for a group of Mexican nationals, including Jose Sosa, to abduct Alvarez-Machain in Mexico and deliver him to the United States for trial.<sup>29</sup> In 1992, the Supreme Court allowed the trial to proceed even though Alvarez-Machain's presence was procured by abduction.<sup>30</sup> At trial, he was acquitted.<sup>31</sup> Alvarez-Machain then sued Sosa (and others) under the ATS, claiming that his abduction violated the law of nations.<sup>32</sup>

In *Sosa*, the Supreme Court rejected Alvarez-Machain's ATS claim. Justice Scalia's concurrence criticizes *Filártiga* as "nonsense upon stilts" and contends that *Filártiga* started the judiciary down a path toward confrontation with the political branches by "usurping [Congress's] lawmaking power by converting what [judges] regard as norms of international law into American law."<sup>33</sup> Justice Scalia concluded that "American law . . . does not recognize a category of activity that is so universally disapproved by other nations that it . . . automatically gives rise to a private action for money damages in federal court."<sup>34</sup>

The Court did not share Justice Scalia's antipathy to *Filártiga*. Quite the contrary. *Sosa* largely adopts *Filártiga*. It stresses "great caution" more forcefully than *Filártiga*, but agrees that torture claims deserve to overcome "vigilant doorkeeping" to pass through an "ajar" door, along with a "narrow class" of other

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26. 542 U.S. 692 (2004).

27. *Id.* at 697.

28. *Id.*

29. *Id.* at 698.

30. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

31. *Sosa*, 542 U.S. at 698.

32. *Id.* at 697–99.

33. *Id.* at 743, 748–51 (Scalia, J., concurring). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's opinion. *Id.* at 739.

34. *Id.* at 751.

cases.<sup>35</sup> Ultimately, the Court applied what has been called a “modified-*Filártiga* approach”<sup>36</sup> to Alvarez-Machain’s claim and distinguished *Filártiga* on the facts: unlike torture, “a single illegal detention of less than a day . . . violates no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>37</sup>

### C. *Kiobel*

Shell Petroleum Development Company (SPDC), a Nigerian subsidiary of the Anglo-Dutch oil major, operates in the Ogoniland region of Nigeria.<sup>38</sup> According to the *Kiobel* complaint, when Ogoni residents protested SPDC’s environmental practices, SPDC and its parent companies “enlisted the Nigerian Government to violently suppress the burgeoning demonstrations” and abetted atrocities the Nigerian military and police committed when responding to the defendants’ request, including “beating, raping, killing, and arresting residents and destroying or looting property.”<sup>39</sup>

Ogoni residents, who had been granted asylum in the United States, sued SPDC and its parent companies in federal district court in Manhattan, where the parent companies had offices in connection with their listings on the New York Stock Exchange.<sup>40</sup> The plaintiffs sued under the ATS.<sup>41</sup>

The defendants moved to dismiss on various grounds.<sup>42</sup> The district court dismissed several counts, but not all,<sup>43</sup> and authorized

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35. *Id.* at 728–29.

36. Koh, *supra* note 7, at 61.

37. *Sosa*, 542 U.S. at 738.

38. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

39. *Id.*

40. *Id.* at 1633, 1678. The district court dismissed the claims against SPDC for lack of personal jurisdiction. *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 457, 464–65, 468 (S.D.N.Y. 2006).

41. *Kiobel*, 133 S. Ct. at 1662.

42. *See Kiobel*, 456 F. Supp. 2d at 459 (listing the act of state doctrine, international comity, and failure to state a claim on which relief can be granted).

43. *See id.* at 464–68 (denying the defendants’ motion with respect to crimes against humanity; arbitrary arrest and detention; torture; and cruel, inhuman, and degrading treatment).



an immediate appeal of its entire order.<sup>44</sup> The Second Circuit held that the ATS does not allow suits against corporate defendants.<sup>45</sup> As a result, the Second Circuit ordered dismissal of plaintiffs' entire case.<sup>46</sup>

The Supreme Court granted certiorari to settle the question of corporate liability decided by the Second Circuit.<sup>47</sup> At oral argument, however, several Justices displayed interest in a different question: whether the ATS applies to torts that occurred in another country.<sup>48</sup> Days after oral argument, the Court ordered supplemental briefing on this new question.<sup>49</sup> Ultimately, the Court ruled on its own question, leaving the corporate-liability issue for another day.<sup>50</sup>

The Supreme Court unanimously affirmed the dismissal of the plaintiffs' entire case, but the Court split five-four on the reasoning.<sup>51</sup> The majority opinion, by Chief Justice Roberts, applies a modified version of the presumption against extraterritoriality.<sup>52</sup> It closes with this ambiguous dicta:

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44. *Id.* at 468.

45. *Kiobel*, 621 F.3d at 145.

46. *Id.* at 124–45. Judge Leval passionately attacked the majority's holding on corporate liability, while concurring in the judgment on other grounds. *Id.* at 149–54.

47. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1662 (2013).

48. Justice Kennedy injected extraterritoriality into the conversation moments after argument began, and the issue recurred throughout the hour. Transcript of Oral Argument at 3–4, 7–8, 11–12, 41, 54, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

49. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738, 1738 (2012) (“The parties are directed to file supplemental briefs addressing the following question: ‘Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.’”).

50. *Kiobel*, 133 S. Ct. at 1663.

51. *Id.* at 1664.

52. The Court shifted the presumption in at least two key respects to pertain here. First, it extended a presumption “typically appl[ied]” to statutes “regulating conduct” to a statute that is “strictly jurisdictional” and “does not directly regulate conduct or afford relief.” *Id.* at 1664. Second, the Court applied the presumption despite conceding both that the “Court has generally treated the high seas the same as foreign soil for purposes of the presumption” and that there is strong support for applying the ATS to piracy on the high seas. *Id.* at 1667.

[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.<sup>53</sup>

This dicta points to a fault line that divided the majority and prompted two opposing concurrences. Justice Kennedy approved the Court's "careful" approach of "leav[ing] open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," because "[o]ther cases may arise" that are not covered "by the reasoning and holding of today's case," in which case "the presumption against extraterritorial application may require some further elaboration and explanation."<sup>54</sup> Justice Alito took the opposite tack. He lamented the Court's "narrow approach" and advocated a "broader standard" in which contacts with the United States will not overcome the presumption "unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."<sup>55</sup> Given this split, *Kiobel* ought not be the final word on the number and nature of U.S. contacts that will suffice to allow an ATS claim to survive.

Justice Breyer concurred only in the judgment, rejecting the majority's analysis.<sup>56</sup> He criticized the majority's use of the presumption against extraterritoriality.<sup>57</sup> Instead, Justice Breyer proposed an approach "guided by" the international law of prescriptive jurisdiction.<sup>58</sup> That approach would allow ATS cases

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53. *Id.* at 1669 (internal citation omitted).

54. *Id.* (Kennedy, J., concurring).

55. *Id.* at 1669–70 (Alito, J., concurring). Justice Thomas joined Justice Alito's opinion. *Id.* at 1669.

56. *Id.* at 1670–71 (Breyer, J., concurring). Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's opinion. *Id.* at 1670.

57. *Id.* at 1670.

58. *Id.*

where:

(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor . . . for a torturer or other common enemy of mankind.<sup>59</sup>

In the end, Justice Breyer concurred with the dismissal of *Kiobel*'s claim because it lacked any of these connections to the United States.<sup>60</sup>

*D. Filártiga after Kiobel*

This Article celebrates four aspects of *Filártiga* that survive *Kiobel*. But first, this section notes several other, more doctrinal points about *Filártiga*'s survival.

First, Justice Kennedy's concurrence raises questions about how far *Kiobel*'s holding extends. He noted that the Court "le[ft] open a number of significant questions" to be decided when "[o]ther cases may arise."<sup>61</sup> We can predict confidently that ATS plaintiffs will strive to fit their cases within the door that Justice Kennedy has left ajar.<sup>62</sup> Defendants will not only try to close that door, but will also renew their efforts to prevent plaintiffs from even reaching it by interposing other defenses, such as personal jurisdiction and forum

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59. *Id.*

60. *Id.*

61. *Id.* at 1669 (Kennedy, J., concurring).

62. *See, e.g.*, Press Release, Ctr. for Constitutional Rights, *Kiobel v. Shell: Supreme Court Limits Courts' Ability to Hear Claims of Human Rights Abuses Committed Abroad* (Apr. 17, 2013) (quoting Paul Hoffman, lead counsel for the *Kiobel* plaintiffs, who said that "[t]he Court has left open the issue of whether U.S. corporations and many other defendants can be sued under the [ATS] for human rights violations abroad. We will continue to litigate those cases . . .").

non conveniens.<sup>63</sup> Also, given that the *Kiobel* Court split five-four along its typical ideological lines, we may speculate that the width of the remaining opening may well be determined by the next balance-shifting nomination to the Court, perhaps upon Justice Kennedy's eventual retirement.<sup>64</sup>

Second, *Filártiga* allowed U.S. courts to adjudicate torture claims even in circumstances that have come to be called "foreign-cubed"—where a foreign plaintiff sues a foreign defendant for conduct that happened in a foreign country.<sup>65</sup> *Kiobel*'s resort to the presumption against extraterritoriality extinguishes foreign-cubed ATS cases, at least where *all* of the relevant conduct occurs outside the United States, even when the perpetrator later moves to the United States. However, *Kiobel* does not extend to foreign-cubed torture: a case raising *Filártiga*'s exact facts would proceed today under the TVPA, regardless of *Kiobel*'s construction of the ATS.

Third, as Congress has done already in the TVPA, Congress may do again. Congress can and should provide access to federal courts for victims of torts in violation of international law. As with

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63. *Cf. Kiobel*, 133 S. Ct. at 1677 (Breyer, J., concurring) (questioning the propriety of personal jurisdiction and suggesting that "doctrines such as comity, exhaustion, and forum non conveniens" can exclude inappropriate ATS cases). Days after deciding *Kiobel*, the Court granted certiorari to decide a personal jurisdiction issue presented by another ATS case. *DaimlerChrysler AG v. Bauman*, 133 S. Ct. 1995, 1995 (2013).

64. One might note here the likely significance of Justice O'Connor's retirement: she joined the *Sosa* majority, while Justice Alito joined the *Kiobel* majority. More generally, Justice O'Connor's retirement clearly shifted the Court's balance to the right. *See, e.g.,* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1449 n.29, 1449–50 (2013) (ranking Justice Alito first and Justice O'Connor twelfth in support for business among all Justices since 1946). Justice Kennedy was the only justice in both the *Sosa* and *Kiobel* majorities, a fact that fits with the Epstein-Landes-Posner conclusion that "after the appointment of Roberts and Alito, the other three conservative Justices on the Court became more favorable to business" and also provides fodder for their "conjecture that the three may . . . [have] decided to go along with [Roberts and Alito] to forge a more solid conservative majority across a broad range of issues." *Id.* at 1473.

65. *See Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2894 n.11 (2010) (Stevens, J., concurring) (applying the "foreign-cubed" rubric to securities claims).

the TVPA, Congress should extend this access to both alien plaintiffs and U.S. citizens who suffer such harms. This access should be constrained by both constitutional and international law,<sup>66</sup> generally limiting foreign-cubed cases to a few heinous offenses subject to universal jurisdiction, such as crimes against humanity, genocide, piracy, slavery, war crimes, and—as already provided in the TVPA—torture.<sup>67</sup>

## II. FILÁRTIGA’S SOURCES

As required by the ATS, *Filártiga* considers whether torture is a “tort . . . committed in violation of the law of nations.” The opinion examines a wonderful array of evidence to determine whether torture was forbidden by “‘a settled rule of international law’ by ‘the general assent of civilized nations.’”<sup>68</sup> This evidence includes:

- the human rights aspirations of the U.N. Charter;
- the Universal Declaration of Human Rights, approved by the U.N. General Assembly in 1948;
- the Declaration on the Protection of All Persons from Being Subjected to Torture, approved by the U.N. General Assembly in 1975;
- three treaties that outlaw torture (notwithstanding that the United States was not then a party to any of those treaties);

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66. See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring that assertions of personal jurisdiction comport with “fair play and substantial justice”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–33 (1987) (describing the international law concerning national assertions of jurisdiction).

67. See generally THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (Stephen Macedo ed., 2001) (proposing principles applicable to national assertions of jurisdiction over matters of universal concern).

68. *Filártiga v. Peña-Irala*, 630 F.2d 876, 880–81 (2d Cir. 1980) (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

- the prohibition of torture, “expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay”;
- the views of four leading U.S. scholars of international law;
- a decision of the European Court of Human Rights; and
- the position of the Executive Branch.<sup>69</sup>

*Filártiga* is a superb teaching case. It provides an accessible entrée into the otherwise difficult subject of the sources of international law.<sup>70</sup> It touches a variety of subjects and themes visited throughout an international law course.<sup>71</sup> And it generates lively, rich class discussion:

- Does the U.N. Charter create any binding human rights obligations? If so, what do those obligations require? If not, what significance, if any, should be given to the Charter’s human rights provisions?<sup>72</sup>
- What kinds of state actions count as state practice for the purpose of creating customary law? Does voting for a

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69. *Id.* at 879 n.4, 881–84. Koh describes the events leading to the Carter Administration’s amicus brief in support of the plaintiffs. Koh, *supra* note 7, at 51, 53–58. He quotes the law clerk who drafted *Filártiga* as saying that the court gave “dispositive weight” to the Administration’s brief, *id.* at 53. To see the similarities of the brief and the opinion, compare Brief for the United States as Amicus Curiae at 22–23, *Filártiga*, 630 F.2d 876 (No. 79-6090) and *Filártiga*, 630 F.2d at 884.

70. Several leading casebooks excerpt *Filártiga* in chapters on sources or related topics like the domestic legal status of custom. See, e.g., LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 267 (5th ed. 2009); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 572 (3d ed. 2009); BARRY E. CARTER ET AL., INTERNATIONAL LAW 242 (5th ed. 2007).

71. One leading casebook spotlights *Filártiga* as one of two cases in its opening chapter, noting that it “introduce[s] several of the central issues about the rules, processes, actors, and domains of international law, topics that occupy us throughout the book.” MARK WESTON JANIS & JOHN E. NOYES, INTERNATIONAL LAW: CASES AND COMMENTARY 3, 17 (4th ed. 2011).

72. U.N. Charter pmb., art. 1, para. 3, art. 55, para. c, art. 56.

General Assembly resolution condemning torture count as evidence for a customary norm banning torture? Does engaging in torture count as evidence against?

- When does entering a treaty serve not only to create a treaty obligation but also to contribute to the development of a customary obligation? What concerns are raised by allowing the parties to a treaty to develop customary obligations binding on nonparties?
- Why doesn't the *Filártiga* court explicitly address whether the state practice it deemed relevant was "accepted as law" or done "from a sense of legal obligation"?<sup>73</sup>
- What is the legal status of General Assembly resolutions? If some resolutions are entitled to more legal weight than others, what criteria set them apart? Should states that did not exist in 1948 be bound by the Universal Declaration of Human Rights?<sup>74</sup>
- When is the domestic law of the United States and other countries relevant to the determination of international law? What are "general principles of law recognized by civilized nations," how can they be ascertained, and how do they relate to other sources of international law?<sup>75</sup>

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73. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 [hereinafter I.C.J. Statute]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2).

74. For a sense of the magnitude of this problem, see Lauren Walsh, *A Conversation with Oscar Schachter*, 91 AM. SOC'Y INT'L L. PROC. 343, 344 (1997) ("In 1948, . . . the architects planning the future headquarters asked me how many seats they should make in the General Assembly. . . . An international lawyer would be expected to know how many sovereign states existed and were potential members. I confidently answered the architects . . . that they could safely add twenty seats to the fifty-one [members at that time]. It did not take long for my estimate to be mistaken and for costly renovations to be needed."). The UN has 193 members today. Growth in United Nations Membership, 1945-present, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Mar. 5, 2014).

75. I.C.J. Statute, *supra* note 73, art. 38(1)(c).

- Is it legitimate for a court to look to the statements of scholars—“the most highly qualified publicists”—as evidence of international law, even as “subsidiary” evidence? What risks are presented when relying on scholars and how should a court address those risks? How can a court determine who are “the most highly qualified publicists”? Should it insist on hearing the views of not only U.S. scholars, but of scholars “of the various nations”?<sup>76</sup>
- How much weight should a U.S. court give to the views of the Administration? What risks are presented by giving too little or too much deference? Should any distinction be drawn between the Administration’s description of international law and of U.S. national interests?
- What matters are of “mutual, and not merely several, concern” among states?<sup>77</sup> Does a state’s torture of its own nationals in its own territory raise “mutual concern” among states?
- Does the court’s opinion support the view that the prohibition against torture is a “peremptory norm” of the international community?<sup>78</sup> Does it matter?

*Filártiga*’s treatment of sources is also a pleasure to read. The Second Circuit takes a moment to note that its treatment of sources is “confirm[ed]” by the Statute of the International Court of Justice.<sup>79</sup> Its treatment is internationalist and sophisticated: it does not reflexively dismiss as irrelevant General Assembly resolutions or treaties to which the United States was not a party, but instead

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76. *Id.* art. 38(1)(d).

77. *Filártiga*, 630 F.2d at 888.

78. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k, reporters’ note 6.

79. *Filártiga*, 630 F.2d at 881, 881 n.8.



accepts them as evidence of norms, principles, and practices.<sup>80</sup> And the court is not distracted by the tragedy of torture's persistence from observing the formation of a legal rule outlawing it.<sup>81</sup>

*Kiobel* has nothing to say about the sources of international law. They are simply not relevant to its analysis. *Kiobel* addresses only the question, based on U.S. rules of statutory construction, of whether the ATS applies to torts occurring outside the United States.<sup>82</sup> Thus, *Kiobel* may be seen as a case about U.S. foreign relations law rather than international law.<sup>83</sup>

Oddly, *Kiobel* only makes one glancing reference to the brief submitted by the Executive Branch.<sup>84</sup> The Administration argued that the presumption against extraterritoriality did not apply and urged the Court to reject a “categorical” approach based on that presumption.<sup>85</sup> Moreover, the Administration specifically cited *Filártiga* as an example where applying that presumption could harm “the foreign relations interests of the United States, including the promotion of respect for human rights”<sup>86</sup> and the interest not to be “perceived as harboring the perpetrator.”<sup>87</sup> The Administration also

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80. *Id.* at 882–84 (rejecting “the dichotomy of binding treaty against non-binding pronouncement”) (internal punctuation omitted). *But see* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734–35 (2004) (failing to consider the Universal Declaration as evidence of custom).

81. *Filártiga*, 630 F.2d at 884, 884 n.15; *see also* *Sosa*, 542 U.S. at 738 n.29 (citing *Filártiga* with approval).

82. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

83. *Cf.* Supplemental Brief for the United States, *supra* note 4, at 14 n.3 (“The United States does not suggest that an extraterritorial private cause of action would violate international law in this case . . . . The issue in this case . . . is instead solely one of the allocation of responsibility among the Branches . . . under U.S. law.”).

84. *Kiobel*, 133 S. Ct. at 1668 (noting, essentially, that the Obama Administration had abandoned the Bush Administration’s reading of Attorney General Bradford’s 1795 opinion about the ATS).

85. *See, e.g.*, Supplemental Brief for the United States, *supra* note 4, at 3–4, 21 n.11.

86. *Id.* at 4–5, 13. The United States also quoted its earlier brief in *Filártiga*: “[A] refusal to recognize a private cause of action in these circumstances’ could ‘seriously damage the credibility of our nation’s commitment to the protection of human rights.’” *Id.* at 19.

87. *Id.* at 4.

noted that Congress appears to support the extraterritorial application of the ATS in circumstances like those in *Filártiga*.<sup>88</sup> Accordingly, the Administration encouraged the Court to reject the plaintiffs' claims on narrow grounds, while allowing the ATS to apply extraterritorially in cases like *Filártiga*, with the details to be determined in later cases.<sup>89</sup> Yet, the Court dismissed the approach advocated by the Administration without even explaining its refusal to defer to the Administration's assessment of "the foreign relations interests of the United States." The Court did so despite claiming that its rationale assures that the courts "defer[]" to the foreign policy decisions of the political branches!<sup>90</sup> *Kiobel* thus fails to offer any guidance about how courts should treat Executive Branch views in cases affecting international relations—except by way of negative example.

### III. FILÁRTIGA'S CONCLUSION

Having asked whether torture is a "tort . . . committed in violation of the law of nations," *Filártiga* answers with a resounding yes: "[O]fficial torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."<sup>91</sup> The court adds, with more rhetorical force, "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture.

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88. *Id.* at 10–11.

89. *See generally id.* at 13–27 ("The Court need not decide whether a cause of action should be created in other circumstances. . . ."). At oral argument, the Solicitor General went so far as to describe *Filártiga* as the "paradigm . . . where we think . . . ATS causes of action should be recognized." Transcript of Oral Argument, *supra* note 4, at 43.

90. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) ("The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.").

91. *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

Indeed, . . . the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”<sup>92</sup>

This is a powerful conclusion, powerfully expressed: a torturer is “an enemy of all mankind.” *Filártiga*’s conclusion helped to distill and propagate the norm against “the dastardly and totally inhuman act of torture.”<sup>93</sup> It has been followed, praised, endorsed, or quoted approvingly by Congress, the Executive Branch, U.S. courts, the House of Lords, the English Court of Appeals, India’s National Commission on Human Rights, the International Criminal Tribunal for the former Yugoslavia, and U.N. agencies.<sup>94</sup> Dolly Filártiga said her case “remains a symbol [in Paraguay] of the injustice of the Stroessner dictatorship, and [her] brother is considered a martyr for human rights.”<sup>95</sup> Moreover, according to Harold Koh, “*Filártiga* inspired a movement . . . that eventually helped persuade the Executive Branch to ratify the U.N. Convention Against Torture and Congress to enact the Torture Victim Protection Act” and it “opened the door . . . for the activist work of new human rights clinics” at U.S. law schools.<sup>96</sup> *Filártiga*’s condemnation of torture inspires pride: pride in our courts, in our laws, in our government, and in our country.<sup>97</sup> Its condemnation is absolute, tolerating neither exceptions nor limitations. It declares torture unacceptable wherever

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92. *Id.* at 890.

93. *Id.* at 883.

94. See Koh, *supra* note 7, at 60–73 (discussing authorities). *Filártiga* therefore evidences what Koh terms “transnational legal process,” through which “[t]ransnational law transforms, mutates, and percolates up and down, from the public to the private, from the domestic to the international level and back down again” as it is “ma[d]e, interpret[ed], enforce[d], and, ultimately, internalize[d].” Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

95. Dolly Filártiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004, at A21 [hereinafter *American Courts*].

96. Koh, *supra* note 7, at 67–68, 73.

97. As Dolly Filártiga herself said after becoming a U.S. citizen, “I am proud to live in a country where human rights are respected, where there is a way to bring to justice people who have committed horrible atrocities.” *American Courts*, *supra* note 95.

committed, by whomever, against whomever, for whatever reason.<sup>98</sup> *Filártiga* lit a beacon to the world spotlighting the United States' determination to end torture.

How tragic that our government later came to torture prisoners captured after 9/11.<sup>99</sup> This tragedy cannot be minimized as the acts of rogues or juniors: it was authorized at the highest levels of government,<sup>100</sup> and blessed by the “blatantly wrong,” “embarrassingly weak,” and ultimately retracted opinions of the

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98. *Cf.* United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2.2, U.N. Doc. A/RES/39/46 (Dec. 10, 1984) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”) [hereinafter U.N. Convention Against Torture].

It should be noted that opinion polls suggest that about half of the American public favors torture in one circumstance: to obtain information needed to stop an act of terrorism. For example, a recent Associated Press poll found that 18% of respondents believed “torture against suspected terrorists to obtain information” can “often be justified,” while 32% said “sometimes,” 22% “rarely,” and 25% “never.” *Balancing Act: The Public’s Take on Civil Liberties and Security*, ASSOCIATED PRESS-NATIONAL OPINION RESEARCH COUNCIL (Sept. 10, 2013), surveys.ap.org (follow “September 10 AP-NORC Poll: civil liberties and security” hyperlink). *But see* David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005) (criticizing strongly the view that torture is acceptable to stop an imminent terrorist attack).

99. The day before the *Kiobel* decision, a distinguished task force issued the most definitive report to date on the mistreatment of detainees since 9/11. The report concludes, “[I]t is indisputable that the United States engaged in the practice of torture.” THE CONSTITUTION PROJECT, THE REPORT OF THE CONSTITUTION PROJECT’S TASK FORCE ON DETAINEE TREATMENT 3, 9, 17 (2013) (“U.S. forces in many instances used interrogation techniques on detainees that constitute torture . . . . U.S. officials involved with detention in the black sites committed acts of torture. . . .”).

100. *See id.* at 9 (“The nation’s most senior officials . . . bear ultimate responsibility . . .”).

Justice Department.<sup>101</sup> According to Arthur Schlesinger, Jr., “No position taken has done more damage to the American reputation in the world—ever.”<sup>102</sup> If only our government had heeded the lesson of *Filártiga*! As Harold Koh said of this tragedy, “[T]hrough it all, . . . *Filártiga* has remained the leading statement by a U.S. governmental institution unambiguously condemning the use of torture.”<sup>103</sup>

Among the many indecencies of the Justice Department’s infamous “torture memos” is an attack on *Filártiga*’s conclusion. One memorandum questioned this conclusion, both by stating begrudgingly that “it *may be* the case that customary international law prohibits torture” and by premising an argument about the supposed irrelevance of custom with the words “*even if*” there is a customary norm against torture.<sup>104</sup> The memorandum even suggested that *Filártiga* illegitimately failed to give due regard to the continued existence of torture:

It is also unclear how universal and uniform state practice must be in order to crystallize into a norm of customary international law. Indeed scholars will even argue that a norm has entered into customary international law, such as the prohibition on torture, while admitting that many states practice torture on

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101. Harold Koh called one memorandum “blatantly wrong” and “just erroneous legal analysis.” *Id.* at 159 (citing Edward Alden, *Dismay at Attempt to Find Legal Justification for Torture*, FINANCIAL TIMES, June 10, 2004). Cass Sunstein called it “egregiously bad” and “embarrassingly weak, just short of reckless.” *Id.* (citing Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 24, 2004, at A14). The Constitution Project’s task force found that “[l]awyers in the Justice Department’s Office of Legal Counsel . . . repeatedly gave erroneous legal sanction to certain activities that amounted to torture . . . .” *Id.* at 14.

102. *Id.* at 158.

103. Koh, *supra* note 7, at 75.

104. Memorandum from John C. Yoo, Deputy Assistant Attorney General, to William J. Haynes II, General Counsel of the Department of Defense 71–72 (Mar. 14, 2003) (emphasis added) [hereinafter “Yoo Memo”], available at [https://www.aclu.org/sites/default/files/pdfs/safefree/yoo\\_army\\_torture\\_memo.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/yoo_army_torture_memo.pdf).

their own citizens. *See, e.g., Filártiga v. Peña-Irala . . .*<sup>105</sup>

Had the Justice Department approached this question with competence and integrity, it would have noted that *Filártiga*'s treatment of this point is expressly based on the position submitted to the court by *the Justice Department*.<sup>106</sup>

This shameful memorandum had a short, unhappy life. After just nine months, the Justice Department placed it under official review and advised the Defense Department that "it should not be relied on for any purpose."<sup>107</sup> The Justice Department formally withdrew it fifteen months later.<sup>108</sup> Even before the memorandum's final demise, the Justice Department undercut the attack on *Filártiga*'s conclusion by declaring that "universal repudiation of torture is reflected in . . . *customary international law* . . . and the longstanding policy of the United States, repeatedly and recently

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105. *Id.* at 72.

106. *Filártiga* actually quotes the United States' amicus brief on this very point. The Justice Department argued that the fact that "some nations still practice torture" does not affect the legal conclusion that "[i]nternational custom" prohibits torture, a conclusion the brief ultimately called "inescapable." Brief of the United States as Amicus Curiae, *supra* note 69, at 16, 20. The court accepted this position. *Filártiga*, 630 F.2d at 884 (quoting Brief of the United States as Amicus Curiae, *supra* note 69, at 16 n.34 and DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1979 SUBMITTED TO H. COMM. ON FOREIGN AFFAIRS AND S. COMM. ON FOREIGN RELATIONS 1 (1980)).

107. Letter from Daniel Levin, Acting Assistant Attorney General, to William J. Haynes II, General Counsel of the Department of Defense (Feb. 4, 2005), available at <http://www.justice.gov/olc/docs/aclu-ii-020405.pdf>.

108. *Id.*

reaffirmed by . . . President [Bush].”<sup>109</sup> Not content to stop there, on his third day in office, President Obama signed an executive order banning torture and forbidding reliance on any of the “torture memos.”<sup>110</sup> In the end, both the Bush and Obama Administrations definitively rejected the Justice Department’s disgraceful attack on *Filártiga*’s conclusion that torture offends customary law—and thus created further state practice in support of that very conclusion.

Nothing in *Kiobel* detracts from *Filártiga*’s denunciation of torture as illegal. The legal status of torture is irrelevant to the majority’s analysis.<sup>111</sup> Meanwhile, Justice Breyer’s concurrence bolsters *Filártiga*’s conclusion by quoting it, drawing on its rhetorical force, and stressing the need to prevent the United States from becoming a safe harbor for torturers and other enemies of mankind.<sup>112</sup>

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109. Memorandum Opinion, Daniel Levin, Acting Assistant Attorney General, to the Deputy Attorney General 1 (Dec. 30, 2004) (emphasis added) (superseding the “torture memo” of August 1, 2002) [hereinafter Levin Memo]. In support of the statement that customary international law prohibits torture, the Levin Memo states:

It has been suggested that the prohibition against torture has achieved the status of *jus cogens* (i.e., a peremptory norm) under international law. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699, 714 (9th Cir. 1992); *Regina v. Bow Street Metro. Stipendiary Magistrate Ex Parte Pinochet Ugarte (No. 3)*, [2000] 1 AC 147, 198; see also Restatement (Third) of Foreign Relations Law of the United States § 702 reporters’ note 5.

*Id.* at 1 n.2. The Levin Memo takes these authorities at face value, without any comment or criticism. Although the Levin Memo itself does not expressly mention *Filártiga*, all three of the authorities cited in the preceding excerpt rely on *Filártiga*.

110. Exec. Order No. 13491, 74 Fed. Reg. 4893–94 (Jan. 22, 2009).

111. See *supra* Part I.C.

112. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671, 1674, 1678 (2013) (Breyer, J., concurring).

IV. FILÁRTIGA'S VISION<sup>113</sup>

*Filártiga* concludes that “official torture is *now* prohibited by the law of nations.”<sup>114</sup> It adds, with ringing rhetoric, “[T]he torturer *has become . . .* an enemy of all mankind.”<sup>115</sup> This is the vocabulary of dynamism. It reveals that the court applies “international law not as it was in 1789, but as it has *evolved* and exists among the nations of the world *today*.”<sup>116</sup> The court also refers to the *modern age* and developments in the *twentieth century*.<sup>117</sup> Most dramatically, in *Filártiga*, the Second Circuit rejects its own dictum from just four years earlier on the ground that it “is clearly out of tune with the *current* usage and practice of international law.”<sup>118</sup>

This dynamism is important in itself. The ATS supplements ordinary alienage jurisdiction, assuring aliens access to federal court to bring claims that they suffered torts in violation of the law of nations.<sup>119</sup> The First Congress thought this access necessary, in keeping with the Founders’ concern that any failure by a state court to treat an alien properly would give rise to national responsibility

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113. Portions of Part IV are adapted from Perry S. Bechky, *Lemkin’s Situation: Toward a Rhetorical Understanding of Genocide*, 77 BROOK. L. REV. 551 (2012).

114. *Filártiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (emphasis added).

115. *Id.* at 890 (emphasis added).

116. *Id.* at 881 (emphasis added).

117. *Id.* at 890 (emphasis added).

118. *Id.* at 881, 884, 890 (emphasis added) (discussing *Dreyfus v. von Finck*, 534 F.2d 24, 31 (2d Cir. 1976)).

119. The First Congress created the federal district courts and gave them jurisdiction over, *inter alia*, (a) any civil case in which “an alien is a party” and the amount in dispute exceeded \$500, and (b) ATS cases brought by an alien without any minimum dollar threshold. Judiciary Act of 1789, ch. 20 §§ 9, 11, 1 Stat. 76–77. This suggests Congress saw ATS cases as particularly sensitive, and wished to ensure access to federal courts for these cases even when less money was at stake than was necessary to trigger federal jurisdiction for ordinary alienage (and many other) cases. This distinction continues today, with the dollar threshold now set at \$75,000 for ordinary alienage jurisdiction (which also excludes alien-alien cases). 28 U.S.C. § 1332(a)(2) (2012).



for the United States under international law.<sup>120</sup> When new torts emerge, the same considerations that gave rise to the ATS also support having access to federal court for those newer torts. It is not reasonable to suppose that Congress would want a static interpretation of the ATS that put national responsibility at risk by forcing aliens suffering newer torts into state court.

To be sure, there is an important distinction between dynamism and adventurism. *Filártiga* stays on the safe side of this divide by stressing the clear, universal consensus against torture. Accordingly, *Filártiga*'s dynamism has been endorsed by Congress<sup>121</sup> and fits comfortably within *Sosa*'s later caution that courts should only recognize new ATS causes of action when they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>122</sup> Indeed, *Sosa* acknowledges that *Filártiga* passes this test.<sup>123</sup>

Far more significant than the general idea of dynamism is the particular development at *Filártiga*'s heart. *Filártiga* rests on, underscores, and confirms the defining feature of modern international law: the emergence of human rights as a constraint on each government's treatment of its own citizens.

René Cassin, the main drafter of the Universal Declaration of Human Rights, once offered this argument in support of the declaration: "[W]e do not want a repetition of what happened in

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120. See, e.g., THE FEDERALIST No. 80, at 446 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."); *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 94 (2002) ("Th[e] penchant of the state courts to disrupt international relations and discourage foreign investment led directly to the alienage jurisdiction provided by Article III . . .").

121. See 1 H.R. REP. 102-367, at 2-4 (1991) (stating the ATS "should remain intact" for violations of other international legal norms, which "already exist or *may ripen in the future*") (emphasis added).

122. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

123. *Id.* at 732 ("This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.") (citing *Filártiga*, 630 F.2d at 890).

1933, where Germany began to massacre its own nationals, and everybody . . . bowed, saying ‘Thou art sovereign and master in thine own home.’”<sup>124</sup> The war and the Holocaust made plain that the absolutist conception of sovereignty, which had been dominant before the war, could not stand. Public revulsion created an opportunity to build a new international legal order committed to human rights. As *Filártiga* observes in its magnificent last paragraph:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights . . . . Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. 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.<sup>125</sup>

This passage nicely summarizes the cause (cataclysm), the political consequences (including a fundamental reassessment of states’ interests), and the legal response (human rights law, a real achievement notwithstanding the elusiveness of other aspirations).

The nations of the world moved quickly after the war to bound sovereignty with human rights law through a series of dramatic events: the Nuremberg trials, the 1946 resolution affirming that “genocide is a crime under international law,” the Genocide

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124. SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 76 (2002).

125. *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

Convention, and the Universal Declaration of Human Rights.<sup>126</sup> They have continued this effort through an ever-thickening network of human rights treaties, customary norms, principles, practices, and institutions. Every state in the world, save one,<sup>127</sup> has agreed to at least one human rights treaty imposing limits on how it treats its own citizens in its own territory.

Before the war, it might have been said that states agreed to “a form of *quid pro quo* . . . to mind their own business. What went on within the borders of a sovereign State was a matter that concerned nobody but the State itself.”<sup>128</sup> Today, that “retrograde”—dare I say, antebellum—position is untenable.<sup>129</sup> The states of the world have made “a state’s treatment of its own citizens . . . a matter of international concern”; they “have made it their

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126. See Bechky, *supra* note 113, at 581, 606 (discussing the post-war rise of human rights law as a constraint on sovereignty).

127. At this writing, the fledgling nation of South Sudan, which just became independent in 2011, has not yet ratified any major human rights treaty. It has, however, ratified seven of the International Labor Organization’s eight “fundamental conventions,” such as the Abolition of Forced Labor Convention, thus accepting the same principle that its domestic treatment of its citizens is subject to international obligations. *Ratifications for South Sudan*, INT’L LABOUR ORG., <http://www.ilo.org/> (follow “Labour standards” hyperlink; follow “Country Profiles” hyperlink; then follow “South Sudan” hyperlink) (last visited Mar. 5, 2014). South Sudan has also promised to join the major human rights treaties. See *UN Human Rights Chief “Heartened” South Sudan Will Ratify Major Treaties*, UNITED NATIONS (May 1, 2012), <http://www.unmultimedia.org/radio/english/2012/05/un-human-rights-chief-heartened-south-sudan-will-ratify-major-treaties/>.

128. WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 2* (2d ed. 2009).

129. Leval, *supra* note 1, at 21.

business . . . to be concerned with domestic human rights violations” like torture.<sup>130</sup>

Human rights law changed the conversation among states. It empowers and structures a conversation about domestic misconduct. It makes it easier to raise these concerns and harder to dismiss them. It often obliges the accused state to deny the factual allegations or their characterization as illegal.<sup>131</sup> Accordingly, *Filártiga* quotes the United States’ amicus brief:

[I]t has been the Department of State’s general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.<sup>132</sup>

By changing the conversation in this way, human rights law remade international law. Human rights law did not merely add new topics to the diplomatic agenda; it reconceived the agenda and radically reworked its priorities. Humans had been mere “objects” of international law; we became “subjects.” The state-centric system gave way to the human-centric. Sovereignty ceased to be the end of

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130. *Filártiga*, 630 F.2d at 881, 888. Thus, I cannot accept Justice Scalia’s assertion that “[t]he notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring) (emphasis in original). The rise of human rights law is firmly grounded in state action and consent. It is not some mere figment of the professorial imagination. As the *Sosa* Court said, “modern international law is very much concerned with just such questions” about “a limit on the power of foreign governments over their own citizens.” *Id.* at 727.

131. See Bechky, *supra* note 113, at 623 (discussing JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* xi, 95–96 (1985)).

132. *Filártiga*, 630 F.2d at 884 (quoting Brief of the United States as Amicus Curiae, *supra* note 69, at 16 n.34).

the international legal order and became instead a human-serving means—a construct that is desirable when it enables a government to protect its people and dangerous when it shelters a government that oppresses its people.<sup>133</sup>

The human rights revolution in international law is necessary and proper. It both reflects a genuine change in state practice and accords with the basic principle that governments are instituted among us to secure our rights and safety.

*Filártiga's* vision, then, is that courts performing their traditional role of statutory construction in the context of a statute that expressly incorporates international law may also contribute to the identification, distillation, and propagation of international norms.<sup>134</sup> This vision exemplifies Owen Fiss's idea of courts as governmental actors charged with defining public values and moving society toward those values.<sup>135</sup> It also, as Koh has observed, fits squarely with Abram Chayes's conception of "public law litigation."<sup>136</sup> Chayes has said that judicial participation in the "process of making, implementing, and modifying law" is necessarily "rather tentative" – tentative in proposing norms to other public actors, who may endorse or reject them.<sup>137</sup> *Filártiga* achieved perhaps its most meaningful endorsement in Congress' enactment of the TVPA. Even so, in the case of decisions about international law, the relevant Chayesian actors include not only domestic audiences

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133. See Bechky, *supra* note 113, at 605–07, 623 (describing the impact of the Genocide Convention on the nature of international law and discourse).

134. As *Filártiga's* author put it a few months later, "[t]he enunciation of humane norms of behavior by the global community and the articulation of evolved norms of international law by the courts form the ethical foundations for a more enlightened social order." Irving Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES MAG., Nov. 9, 1980, at 44.

135. See generally Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter Fiss, *Foreword*]; Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

136. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347, 2366–73, 2397–98 (1991).

137. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315–16 (1976).

but also courts, governments, and publics the world over.<sup>138</sup> It bears emphasis, accordingly, that *Filártiga*'s vision comports with international law,<sup>139</sup> just as its conclusion has won broad acceptance at home and abroad.<sup>140</sup>

Chayes concluded that “the ability of a judicial pronouncement to sustain itself in the dialogue and the power of judicial action to generate assent over the long haul become the ultimate touchstones of legitimacy.”<sup>141</sup> *Filártiga* aces this test. For three decades, *Filártiga* has sustained itself in public dialogue and generated widespread assent.

Tellingly, the *Kiobel* majority passed up the opportunity to criticize *Filártiga*—the work, after all, of a lower court—let alone to offer any reasons why its approach is better. This failure is glaring, given that both the Executive Branch and Justice Breyer relied on *Filártiga* and construed the ATS to uphold it. In the face of its silence, we are left to presume that the majority had no good reasons for departing from the approaches advocated by the Executive Branch and Justice Breyer.<sup>142</sup> We may predict, therefore, that *Kiobel* will fare far worse than *Filártiga* in sustaining itself in public dialogue for the long haul.

*Kiobel* narrows the occasions when U.S. courts may follow *Filártiga*'s vision, but it does not diminish the vision itself, possibly

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138. Cf. Koh, *supra* note 136, at 2397 (describing cases like *Filártiga* as, “in [Robert] Cover’s term, ‘jurisgenerative,’ because they both create law and initiate a dialogue with foreign and international courts that engenders further norm-declaration”).

139. See I.C.J. Statute, *supra* note 73, art. 38, para. (1)(d) (treating domestic judicial decisions as “subsidiary” evidence of international law).

140. See *supra* Part III.

141. Chayes, *supra* note 137, at 1316.

142. Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959) (“The virtue or demerit of a judgment turns . . . entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees . . . .”); Fiss, *Foreword*, *supra* note 135, at 13 (“Judges must . . . justify their decisions.”).

because *Sosa* had already affirmed it.<sup>143</sup> U.S. courts will and should continue, in *ATS* and other appropriate cases, to participate with other courts and political actors in the global dialogue about the meaning and evolution of international law. Moreover, as international tribunals proliferate and their dockets multiply, there are more opportunities than ever for adjudicative dialogue about international law.

#### V. *FILÁRTIGA*'S HOPE

After condemning the torturer as the “enemy of all mankind,” *Filártiga* ends with one final sentence: “Our holding today . . . is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”<sup>144</sup> *Filártiga*'s hope is that law can help make real a better world, a world without torture and other official brutality. In this spirit, on remand, the district court awarded the *Filártigas* \$10,000,000 in punitive damages “to reflect adherence to the world community’s proscription of torture and to attempt to deter its practice.”<sup>145</sup>

*Filártiga* and its progeny have given hope and a valuable measure of justice to victims of state brutality. Thanks to these cases, some victims have been able to haul their former oppressors into court, to testify against them, and even to win judgments condemning their heinous acts.<sup>146</sup> The value of giving someone “a day in court” ought never be underestimated. And some victims

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143. Justice Scalia, as mentioned in the text accompanying note 33, had denounced *Filártiga*'s identification of new international torts as illegitimate usurpation of a political function—a view plainly rejected by the six Justices in the *Sosa* majority. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731–32, 738 n.29 (2004) (approving *Filártiga* and holding that courts may identify new international torts in certain limited circumstances).

144. *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

145. *Filártiga v. Peña-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984).

146. Cf. Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT'L L. 279, 281 (2011) (“[F]or us, the widows, it is clear that money is not everything.”) (quoting Paola Martínez). For more on the goals of victims in international human rights adjudication, see *id.* at 282–84.

have won valuable satisfaction by securing judgments labeling their oppressors as “enem[ies] of mankind.”<sup>147</sup>

Still, more is needed to create an effective deterrent to gross violations of human rights. Only rarely do plaintiffs collect on judgments in ATS and TVPA cases,<sup>148</sup> or secure money in out-of-court settlements.<sup>149</sup>

For now, *Filártiga* seems to afford the *possibility* of effective deterrence, but not yet the reliable achievement of that goal. In my view, this is not a criticism of *Filártiga*. The Second Circuit knew it was taking only a “small . . . step” towards the better world to which *Filártiga* aspires.<sup>150</sup> Many more steps must be taken by many other people. It is ever thus: to adapt the words of Martin Luther King, Jr., “The arc of the moral universe . . . bends toward justice,” but it “is

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147. *Filártiga*, 630 F.2d at 890.

148. The Center for Justice and Accountability, for example, has won eight judgments totaling \$199 million, of which it has collected only \$580,000 for one client; this was collected only because the defendant won the Florida lottery. *Cases*, CENTER FOR JUSTICE AND ACCOUNTABILITY, <http://cja.org/section.php?id=5> (last visited Mar. 19, 2014). To be sure, these cases may contribute to other difficulties for the defendants, such as deportation, inability to travel to the United States, “naming and shaming,” and even, in one instance, the prosecution and sentencing in an unrelated mortgage fraud case. See *Criminal Mortgage Fraud Case against Emmanuel “Toto” Constant*, CENTER FOR JUSTICE AND ACCOUNTABILITY, <http://cja.org/article.php?list=type&type=314> (last visited Dec. 11, 2013) (describing Constant’s criminal conviction); *The Alien Tort Statute*, CENTER FOR JUSTICE AND ACCOUNTABILITY, <http://cja.org/article.php?id=435> (last visited Mar. 19, 2014) (describing other effects of ATS litigation).

149. Notably, Unocal settled an ATS case for an undisclosed sum in 2004 and Shell settled an ATS case for \$15.5 million in 2009. Jad Mouawad, *Shell to Pay \$15.5 Million to Settle Nigerian Case*, N.Y. TIMES, June 8, 2009, at B1. One effort to catalog ATS settlements concluded that “[t]here have been maybe a dozen settlements reached in ATS cases against corporate defendants; many of these settlements are confidential . . . .” *Alien Tort Statute Cases Resulting in Plaintiff Victories*, THE VIEW FROM LL2, <http://viewfromll2.com/2009/11/11/alien-tort-statute-cases-resulting-in-plaintiff-victories/> (updated Mar. 2013).

150. *Filártiga*, 630 F.2d at 890.



long.”<sup>151</sup> The work of fulfilling *Filártiga*’s hope is not for *Filártiga* itself, but for all of us.

In truth, real progress has been made since *Filártiga* towards fulfilling its hope. The following list focuses on progress made against torture in particular, but it could readily be extended to such other grotesqueries as crimes against humanity, extrajudicial killings, genocide, slavery, and war crimes:

- In 1984, the U.N. General Assembly approved the U.N. Convention Against Torture. The Convention went into effect in 1987, and today it has 154 parties.<sup>152</sup> The Convention requires every party to both criminalize “all acts of torture” with penalties appropriate to the “grave nature” of the offense and provide civil redress for victims, including “an enforceable right to fair and adequate compensation.”<sup>153</sup> In addition, the U.N. Committee Against Torture monitors compliance with the convention and, if the accused state has consented, can receive and examine complaints submitted by individuals who have suffered torture.<sup>154</sup>
- In 1993, the U.N. Security Council established the International Criminal Tribunal for the Former Yugoslavia.<sup>155</sup> Its jurisdiction includes torture as a war

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151. Rev. Dr. Martin Luther King, Jr., Sermon at the Temple Israel of Hollywood: Keep Moving From This Mountain (Feb. 25, 1965).

152. *Status: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-9&chapter=4&lang=en) (last visited Mar. 15, 2014).

153. U.N. Convention Against Torture, *supra* note 98, arts. 4, 14.1.

154. *See id.* arts. 19–22; 1 OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, SELECTED DECISIONS OF THE COMM. AGAINST TORTURE 1–2 (2008) (reporting that, with sixty-four states consenting to this procedure, the Committee received 332 individual complaints, reached 145 “views,” and found forty-seven violations).

155. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993).

crime and a crime against humanity.<sup>156</sup> The tribunal has indicted, tried, convicted, and imprisoned defendants for this crime.<sup>157</sup>

- In 1994, the U.N. Security Council created another ad hoc tribunal to prosecute those responsible for the genocide in Rwanda.<sup>158</sup> Again, the tribunal has jurisdiction over torture as a crime against humanity or a war crime,<sup>159</sup> and it has used this jurisdiction to convict and imprison torturers.<sup>160</sup>
- In 1998, the Council of Europe invigorated the European Court of Human Rights by empowering individuals to bring cases directly against states.<sup>161</sup> This sea change caused a fifty-fold jump in activity, from about twenty cases per year in the system's first forty years to about 1,000 cases per year since 1998.<sup>162</sup> The court has

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156. Statute of the Int'l Criminal Tribunal for the Former Yugoslavia arts. 2(b), 5(f), May 25, 1993 (adopted in S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) with subsequent amendments).

157. *See, e.g.*, Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment of the Appeals Chamber, ¶¶ 155–63 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (affirming conviction on Count 13); Prosecutor v. Delalic et al., Case No. IT-96-21-A, Judgment of the Appeals Chamber, 306–07 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (affirming conviction on several counts of torture, while dismissing other counts as unduly cumulative).

158. S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

159. Statute of the Int'l Criminal Tribunal for Rwanda arts. 3(f), 4(a), Nov. 8, 1994 (adopted in S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) with subsequent amendments).

160. *See, e.g.*, Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgment of the Appeals Chamber, 130 (Int'l Crim. Trib. for Rwanda May 20, 2005) (affirming conviction on Count 11).

161. Protocol No. 11 to the Convention for the Prot. of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby art. 34, May 11, 1994, E.T.S. No. 155.

162. EUROPEAN COURT OF HUMAN RIGHTS, OVERVIEW 1959–2011, at 4 (2012) [hereinafter "ECHR OVERVIEW"]. Another important factor was the expansion of the Council of Europe after the Cold War: Russia alone accounted for 22% of cases pending on December 31, 2012, while seven of the top ten "high case-count states" had been Communist. EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2012, at 8 (2013).

jurisdiction over allegations of torture,<sup>163</sup> and it has found eighty-four torture violations—plus another 1,007 instances of degrading or inhuman treatment.<sup>164</sup>

- In 2002, the Rome Statute went into effect and established the International Criminal Court as a standing court, again with jurisdiction over torture as a crime against humanity or war crime.<sup>165</sup> Some defendants have been charged with torture.<sup>166</sup>
- In addition, the Inter-American Court of Human Rights was founded contemporaneously with Filártiga.<sup>167</sup> The Court has jurisdiction over torture allegations when complaints are brought by other state parties or by the Inter-American Commission on Human Rights.<sup>168</sup> The Court has a notably broad, “victim-centered” approach to remedies.<sup>169</sup> For example, in one case where the Court found extensive torture at a Peruvian prison, the Court ordered Peru to “effectively investigate the facts” and identify and “punish those responsible”; preserve police documents; identify remains of deceased victims and deliver them to next of kin at public expense; pay burial

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163. European Convention for the Prot. of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, E.T.S. No. 5.

164. ECHR OVERVIEW, *supra* note 162, at 6–7.

165. Rome Statute of the International Criminal Court arts. 5, 7(1)(f), 8(2)(a)(ii), July 17, 1998, U.N. Doc. A/CONF.183/9 (1998).

166. *See, e.g.*, Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, 7–8 (Mar. 4, 2009) (finding reasonable grounds to charge Al Bashir with, *inter alia*, torture). In the Court’s only conviction to date, the prosecutor did not charge torture, although thirty victims reported suffering or seeing it. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 16 & n.54 (Mar. 14, 2012).

167. Statute of the Inter-American Court on Human Rights, Jan. 1, 1980, O.A.S. Res. 448 (IX-0/79).

168. Organization of American States, American Convention on Human Rights, arts. 5(2), 61(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67.

169. *See* Antkowiak, *supra* note 146, at 288–92 (describing the Inter-American Court’s “victim-centered” approach).

costs for deceased victims; apologize and accept responsibility for the misconduct “in a public ceremony with the presence of high State authorities”; offer specialized “medical and psychological treatment” for the victims and their next of kin at public expense; “design and implement . . . human rights education programs” for the police; publish and broadcast specified parts of the Judgment; pay both pecuniary and non-pecuniary damages; and submit a compliance report to the Court within eighteen months to allow the Court to monitor compliance until the Judgment is fully implemented.<sup>170</sup>

All told, this amounts to a remarkable new architecture of rules and institutions aimed at eradicating torture.<sup>171</sup>

A world without torture may be an unreachable star, but in the years since *Filártiga*, the international community has made striking efforts to reach toward it. And the world is better for this.

The Second Circuit did not see itself acting alone in *Filártiga*, but as part of a shared effort toward a common goal. In the context of *Filártiga*'s magnificent last paragraph, its closing self-description as “a small but important step in the fulfillment of [an] ageless dream” can be seen as an invitation to others, especially to

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170. Case of the Miguel Castro-Castro Prison v. Peru, Judgment, 2006 Inter-Am. Ct. H.R. ¶¶ 262–350, 470(8–24) (Nov. 25, 2006).

171. In limited circumstances, the powerful mechanism of investor–state arbitration may even supplement the standard anti-torture architecture. In 2008, an arbitral tribunal ordered Yemen to pay moral damages for the “physical duress” of a business executive. *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 284–91 (Feb. 6, 2008). The tribunal set the damages at \$1,000,000, a level meant to be “more than symbolic.” *Id.* ¶ 290. Now, a Turkish investor has started an arbitration seeking damages from Turkmenistan, after the UN Human Rights Committee found that Turkmenistan had imprisoned him inhumanely and stated that Turkmenistan is “under an obligation” to compensate him, prosecute those responsible, and prevent recurrences. Jarrod Hepburn & Luke Eric Peterson, *After Claims of Human Rights Violation are Borne Out, Businessman Pursues Ad-Hoc Investment Treaty Arbitration against Turkmenistan*, INVESTMENT ARB. REP. (Apr. 3, 2013); *Bozbey v. Turkmenistan*, Communication No. 1530/2006, U.N. Doc. CCPR/C/100/D/1530/2006, ¶¶ 5, 7.3, 9 (2010).

other courts, to band together, with hope and an enlightened appreciation of their individual and collective interests, to reach together toward this dream. *Filártiga* thus echoes John Lennon: “You may say I’m a dreamer, but I’m not the only one. I hope someday you’ll join us. And the world will live as one.”<sup>172</sup>

I wish I could say that *Kiobel* has no effect at all on *Filártiga*’s hope for a global project against grave abuses of human rights. Technically, the effect is limited because the TVPA now covers claims like those brought by the *Filártigas* and *Kiobel* does not reach the TVPA. But hope is not measured in technicalities. And, anyways, *Filártiga*’s hope extends beyond torture and extrajudicial killings to other horrors not addressed by the TVPA.

In *Filártiga*, the Second Circuit subjected to tort liability a torturer who had moved to the United States. Justice Breyer wished to ensconce that “no safe harbor” principle into ATS law, but the *Kiobel* majority silently rejected that approach.<sup>173</sup> *Filártiga* invites other courts to join in a global project of cooperation against those whose violence has made them enemies of all mankind. *Filártiga* sees more litigation as part of the solution to the horrific problem of official brutality. *Kiobel*, by contrast, speaks not to the problem of inhumanity, but to the problem of litigation. *Kiobel* worries that litigation in U.S. courts invites foreign courts to entertain copycat suits.<sup>174</sup> *Filártiga*’s hope is *Kiobel*’s fear.

Thus, we have to admit that *Filártiga*’s hope shines less brightly today. Fortunately, hope is stubborn. Hope is resilient. If need be, hope is a phoenix. And hope is empowering. All the new international architecture shows that other courts and institutions are trying to harness law to make real a better world. Other courts are following *Filártiga*’s path. Other courts are carrying forward *Filártiga*’s hope.

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172. JOHN LENNON, *Imagine*, on IMAGINE (Apple Records 1971).

173. See *supra* Part I.C.

174. See *Kiobel*, 133 S. Ct. at 1669 (“[A]ccepting petitioners’ view would imply that other nations . . . could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.”).

## VI. CONCLUSION

*“We’ll always have Paris.” – Casablanca*<sup>175</sup>

With these immortal words, Rick (Humphrey Bogart) sent off to safety Ilsa (Ingrid Bergman), his lover from happier pre-war days. The couple will be separated, and yet also bound together. Thus, when Ilsa replied, “I said I would never leave you,” Rick answered, “And you never will.”<sup>176</sup>

Likewise, we’ll always have *Filártiga*. Not as a memory, but as a living presence and a beacon for the future. Its sources, conclusion, vision, and hope all still shine. *Filártiga* has not left us and never will. Here’s looking at you, kid.

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175. CASABLANCA (Warner Bros. 1942).

176. *Id.* Bob Dylan expresses the same emotion: “And though our separation, it pierced me to the heart / She still lives inside of me, we’ve never been apart.” BOB DYLAN, *If You See Her, Say Hello*, on BLOOD ON THE TRACKS (Columbia Records 1975).