Legal Rights of Refugees: Two Case Studies and Some Proposals for a Strategy

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What rights of refugees are legal rights?

In a recent decision of far-reaching implications, *Filartiga v. Pena-Irala,*[1] the United States Court of Appeals for the Second Circuit not only identified one such right, but provided invaluable guidance as to how the broader question is to be addressed. This essay offers an analysis of the decision in *Filartiga,* as well as a case presenting intriguing points of comparison, *Tran Qui Than v. Blumenthal.*[2] It then proposes several generalizations concerning the identification of legal rights of refugees, suggesting a strategy for their enforcement, the upshot of which is this: creative marshalling and invocation of rights well established in the American legal tradition are the key to major breakthroughs of the *Filartiga* variety. Lawyers representing refugees hold that key in their hands. It is their responsibility to use it.

INTRODUCTION

Ubi jus, ibi remedium. Where there is a right, there is a remedy. The Latin maxim is not a utopian description of an ideal legal system never to be found on Earth. It is, rather, a definition, a statement of the sort described by philosophers as "analytic."[3] It depends upon no empirical evidence to establish its truth, nor can developments, however bizarre, in the history of jurisprudence constitute a challenge to its universality.

The term *jus* in the maxim has a much more limited sense than the English word "right."[4] The Latin word brings with it the trappings of *legal* right, and hence has meaning only within a definite legal system.[5] It does

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not follow, however, that one can compile an exhaustive catalog of a system's legal rights through an investigation of remedies actually provided by its statutes or ordered by its courts. Unhappily, judges make mistakes, and for a wide variety of reasons, fundamental rights may never be tested. Interpretations of unchanging texts may fluctuate dramatically, and rights (and hence remedies) may be found lurking in statutory language consistently thought to be barren.

To speak of a legal right, however, is to indicate the availability of a legal remedy for its enforcement. If such a remedy cannot be devised—if, for example, it would conflict with other even more fundamental norms of the legal system, or if no mechanism exists in the system for providing it—then the reference to a legal right needs to be revised or eliminated. The impossibility of a remedy is inconsistent with the existence of a legal right.

Abandoning the claim that one enjoys a legal right of a certain nature, of course, in no way entails a lessened commitment to moral or political objectives. Indeed, it may be the very realization that no such legal right exists that impels citizens to attempt political action which would establish it. But in exploring here the legal rights of refugees, the primary emphasis is on isolating and identifying precise enforceable rights that judges will recognize, and not on articulating policy objectives, however desirable, that would require additional definition or legislative action. These are rights now vouchsafed to individuals by the existing American legal system. The *Filartiga* court pointed the way to a cache of such legal rights that has lain undiscovered virtually since the earliest days of the Republic. The lesson to be learned from *Tran Qui Than* is that judges may still fail to acknowledge fundamental rights, especially when they are concealed in a tangled thicket of statutes and regulations.

FILARTIGA v. PENA-IRALA: INTERNATIONAL SOURCES OF LEGAL RIGHTS

The Facts and the Decision[6]

On March 29, 1976, seventeen-year old Joelito Filartiga disappeared from his home in Asuncion, Paraguay. His father, Dr. Joel Filartiga, is a physician and artist who has for years been a vocal dissident from the policies of Paraguay's president, General Alfredo Stroessner. During the night following Joelito's disappearance, his sister, Dolly Filartiga, was taken by police officers to the home of Americo Norberto Pena-Irala, inspector general of the Asuncion police. There she was shown the body of her brother, who had apparently been tortured to death. Dolly Filartiga stated that Pena screamed at her as she ran in horror from the house, "Here you have what you have been looking for for so long and what you deserve."

The Filartigas believe—and believe they can prove—that Pena systematically and purposely tortured Joelito in retaliation for his father's political activities. Soon after Joelito's death, Dr. Filartiga began a criminal action in Asuncion against Pena. From 1976 until 1979, no progress took place in that proceeding. Although in 1979 it was reported on Pena's behalf that the case was about to be considered, it is unclear whether any further steps have in fact taken place. Dr. Filartiga's lawyer was, however, allegedly arrested and threatened with death by Pena, and he was subsequently disbarred.[7]

More than two years after the murder of Joelito, Pena and his mistress applied for and were granted visitors' visas to enter the United States. Once in the country, they overstayed the terms of their entry permits, and set up house in New York City. Dolly Filartiga, too, came to the United States in 1978. Through a mutual acquaintance, she learned of Pena's presence in New York, and reported it to the Immigration and Naturalization Service. Pena was arrested and ordered to be deported, being held pending execution of that order in detention facilities at the Brooklyn Navy Yard.

Ms. Filartiga began to consult attorneys in Washington, D.C. and in New York to determine whether a means existed for asserting Pena's civil liability for the wrongful death of Joelito. On April 6, 1979, she caused Pena to be personally served at the Brooklyn Navy Yard with a summons and complaint.[8] The complaint, brought in her father's name as well as her own,[9] alleged as the sources of jurisdiction 28 U.S.C. § 1331 ("federal question" jurisdiction), as well as the Alien Tort Claims Act, 28 U.S.C. § 1350. The Filartigas asked for damages of $10 million, and also sought to enjoin the deportation of Pena pending disposition of the lawsuit.[10]

From the outset, the focus of the defendant's motion to dismiss the action was subject-matter jurisdiction, and especially that alleged under the Alien Tort Claims Act. That statute, originally enacted as section 9 of the Judiciary Act of 1789,[11] in its modern form 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.

No party disputed the contention that the *Filartiga* plaintiffs were aliens, or the description of the suit as one "for a tort only." Issue was joined only with respect to whether the tort Pena was alleged to have committed constituted a "violation of the law of nations," or, to use the more current vocabulary, of international law.

On May 15, 1979, Judge Eugene H. Nickerson of the United States District Court for the Eastern District of New York granted defendant's motion. Acknowledging what he called the "strength"[12] of plaintiffs' ar-

guments for a general prohibition of torture in international law, the judge stated that earlier decisions restricted the scope of applicable international norms to situations in which actor and victim are not of the same nationality. Plaintiffs were unable to persuade either the Court of Appeals for the Second Circuit or the United States Supreme Court to extend the brief stay of deportation granted by Judge Nickerson, and Pena was returned to Paraguay during the last week in May.[13]

The dismissal of the action was appealed to the court of appeals. The plaintiffs, as well as human rights groups as *amici curiae,* submitted briefs urging reversal.[14] During the course of oral argument, on October 16, 1979, the court *sua sponte* invited the Department of State to submit a memorandum. A brief for the United States as *amicus curiae* was filed on May 29, 1980, firmly supporting plaintiffs' position. On June 30, 1980, the court of appeals, in an opinion written by Judge Kaufman, reversed the dismissal below, and remanded the case for trial on the merits.[15] The court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties."[16] Of even greater significance for this analysis was the court's conclusion that "international law confers fundamental rights upon all people vis-a-vis their own governments."[17] Thus the jurisdictional prerequisites of 28 U.S.C. § 1350 were satisfied: plaintiffs, who were aliens, complained of a tort which constitutes a violation of the law of nations.

An appreciation of the enormous importance of the *Filartiga* decision requires a brief summary of earlier cases in which the Alien Tort Claims Act has been invoked.

28 U.S.C. § 1350 Before *Filartiga*

Speaking in support of the Judiciary Act then before the first Congress, Representative John Vining of Delaware stated that he

> wished to see justice so equally distributed, as that every citizen of the United States be fairly dealt by, and so impartially administered, that every subject or citizen of the world whether foreigner or alien, friend or foe should be alike satisfied; by this means, the doors of justice would be thrown open, immigration would be encouraged from all countries into your own, and in short, the United States of America would be made not only an asylum of liberty, but a sanctuary of justice.[18]

In enacting section 9 of the Judiciary Act, laying jurisdiction over certain violations of "the law of nations" in the federal courts, Congress intended to impose uniformity on the new nation's foreign relations. Indeed, the

absence of guarantees of uniformity was a principal weakness of the Articles of Confederation.[19]

In 1789, however, Congress did not question the notion that courts of general jurisdiction (*i.e.*, the state courts) could be seized of tort actions when the defendants were physically present within their territory. The international character of any alleged offense would have been simply irrelevant. The effect of section 9 was not to create a new cause of action, but merely to direct into the federal judicial system certain tort cases in which decisions might be especially sensitive for the foreign policy of the nation as a whole.

With this in mind, one might suppose that invocations of 28 U.S.C. § 1350 have been frequent or even routine. In fact, the opposite is true. Before *Filartiga*, the venerable statute had been the exclusive basis of federal jurisdiction in only a single reported case.[20] In a handful of other cases jurisdiction was denied, generally because the claimed norm of the law of nations whose infringement was alleged had in fact not become enshrined as an international legal principle.[21]

The sole exception is *Abdul-Rahman Omar Adra v. Clift.*[22] In that case, the plaintiff, a Lebanese national, and defendant, his divorced wife, clashed over custody of the couple's daughter. Under the law governing the divorce, the father was entitled to retain custody. To defeat this result, Mrs. Clift had absconded with the girl, obtaining a falsified passport for her to facilitate entry into the United States. The United States District Court for the District of Maryland held that the complaint alleged a tort, and that while the tort itself was not a violation of international law, the defendant's *modus operandi* did involve such a violation: the knowing procurement of a false passport. Ironically, the court, having taken jurisdiction, then proceeded to deny the plaintiff the relief he requested, holding that to remain with her mother in the United States would be in the girl's best interests.

Adra was unique in the reliance on section 1350 as the source of jurisdiction. Courts have refused to find jurisdiction under that section in numerous labor disputes,[23] finding no right in international law of access to ports unimpeded by picketing. The Court of Appeals for the Second Circuit has held that the Warsaw Convention, regulating liability for airline accidents, does not raise such accidents to the status of violations of international law.[24]

In *Lopes v. Reederei Richard Schroder,*[25] an alien seaman alleged that a shipowner's breach of the obligation of seaworthiness was a tort within section 1350. Rejecting that claim, the district court volunteered the view that a violation of the law of nations must consist of

> at least a violation by one or more individuals of those standards, rules or

> customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or dealings *inter se.*[26]

This generalization, plainly an *obiter dictum,* was immediately accepted by other courts as the key to interpreting the language of section 1350. *Lopes* was relied upon heavily in the two Second Circuit cases—*IIT v. Vencap, Ltd.*[27] and *Dreyfus v. von Finck*[28]—which Judge Nickerson held compelled his dismissal of *Filartiga.* In those cases, too, the broad *dictum* borrowed from *Lopes* was far blunter than necessary to decide the issues presented. Thus in *IIT,* plaintiff alleged jurisdiction under the Alien Tort Claims Act for a claim arising from a simple stock fraud. The court declined to hold "that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations."[29] The *Dreyfus* plaintiff relied upon an act of expropriation as constitutive of the "violation of the law of nations" required under section 1350. Again, the court of appeals held that the acts alleged, even if proved, were not violations of international law or of any treaty of the United States.

In none of these cases did the facts present a strong basis for section 1350 jurisdiction. In all of them, the holdings are perfectly consistent with lines of cases establishing what are and what are not recognized international legal norms, since the allegations simply failed to meet the jurisdictional prerequisites. There was no violation of the law of nations in any of these cases. In none of them, therefore, is the *Lopes dictum* limiting the scope of the law of nations a necessary part of the decision. And yet, these cases had the effect of enshrining *Lopes* as setting the limits of the Alien Tort Claims Act.

Filartiga does not overrule *Lopes.* Rather, it shows that the famous *dictum,* far from restricting the applicability of section 1350, points in the direction of its expansion. "[T]he Courts," wrote Judge Kaufman, "are not to prejudge the scope of the issues that the nations of the world may deem important to their interrelationships, and thus to their common good."[30] The *Lopes* criterion, then, according to the *Filartiga* court, allows section 1350 jurisdiction to be invoked on the basis of a flexible, changing view of just what constitutes "the law of nations."[31]

Freedom from torture, including torture by the state of the victim's own nationality, has in the latter half of the twentieth century gradually but definitely taken on the character of a *right.* As the *Filartiga* court stated, "Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture."[32] *Filartiga* embodies that right as a *legal* right in the American legal system. But this having been said, two questions remain: What is the source of the *legal* right to be free from torture? What

are the consequences for American law of considering the law of nations as a creator of legal rights?

What Is the Source of the Legal Right to Be Free From Torture?

Torture has, of course, been unanimously condemned by the nations of the world in a series of treaties and resolutions.[33] Under a number of conventions, allegations of torture by a member state can be brought before special international tribunals which are empowered to interpret and apply international law, and to issue orders. Yet only extraordinarily can an individual who claims to have been a victim of torture pursue remedies against his or her own government.

Thus when the Universal Declaration of Human Rights, for example, speaks of the "right" to "security of person," it does not automatically generate either a *jus* or a *remedium*. The Declaration is not a treaty, much less a self-executing treaty directly enforceable by individuals against its signatory states. Other instruments to which the *Filartiga* court turned for evidence of a consensual international norm condemning torture, with one possible exception, are not treaties, do not bind the United States, or by their language or by the terms of this country's adherence to them are not self-executing.

The possible exception is the United Nations Charter.[34] A treaty, and hence "the supreme law of the land" under Article VI of the Constitution, the Charter does commit member states to "promote . . . universal respect for, and observance of, human rights," and to "pledge themselves to take joint and separate action"[35] to achieve this purpose. These articles have been held not to "impose legal obligations on the individual member nations or to create rights in private persons."[36] The *Filartiga* court expressed views on the Charter that suggest it may be willing, in an appropriate case, to reconsider whether the human rights articles are not self-executing.

Despite the invitation of some of the *amici curiae*,[37] the court declined to assess the contention that torture is a violation of "a treaty of the United States," and hence that jurisdiction lies under 28 U.S.C. § 1350 for that reason. The answer to the question as to the source of the right to be free from torture, the basis of the *Filartiga* decision, cannot be found in the positive law of treaties, incorporated into United States law by the express terms of the Constitution. It must instead be located in customary international law, whose means of ingress into the realm of judicially-enforceable obligations is far more complex.

Since the earliest days of the Republic, the law of nations has been said to be "part of" U.S. domestic law. The classic formulation is that of Mr.

Justice Gray: "International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[38]

For many reasons, "questions of right" based upon the law of nations have only rarely been presented to the federal courts. Not the least of these reasons is the generally held but erroneous view that because individuals are not "subjects" of international law, they cannot be held accountable for violating its norms. Thus the law of nations would, in the typical case, generate enforceable rights only against defendants which are states or public entities. But these defendants have traditionally enjoyed the use of powerful devices to deprive courts of jurisdiction over their persons (sovereign immunity) or over their acts (the "act of state" defense).

This view has always had to acknowledge myriad exceptions. The Constitution itself empowers Congress "to define and punish . . . offenses against the Law of Nations."[39] As long ago as 1820, the Supreme Court upheld against the charge of unconstitutional vagueness a statute codifying "the crime of piracy, as defined by the law of nations."[40] The courts have consistently affirmed the congressional power to "flesh out" this constitutional authority, in the form of federal laws, for example, against interference with foreign diplomatic missions.[41] Acts committed by individuals have always been triable as violations of the law of war.[42] International developments over the last several decades have defined new crimes under international law (sometimes called "crimes against humanity") which may be committed by individuals and for which the perpetrators are internationally responsible: genocide, certain war crimes, certain treaty violations.[43]

Yet virtually all of these "exceptions" to the general rule excluding individuals from international obligations are instances of *criminal* responsibility. There seems to be no body of law governing *civil* liability in American or other municipal courts for acts which are violations of the law of nations. To meet the prerequisites of section 1350, it is not logically necessary that such a body of law be found. There is considerable authority for the proposition that a transitory tort is actionable wherever the tortfeasor is found, and that an act committed abroad may be reviewed in United States courts. The *Filartiga* decision turns on that authority.[44] In *Filartiga,* the cause of action was a tort: assault, or trespass to the person. Thus in *Filartiga,* international law is invoked not primarily as generator of a cause of action, but as a selector of jurisdiction—as a basis for federal jurisdiction under section 1350, rather than the state court jurisdiction available in the absence of the statute.

To appreciate the significance of this, it is necessary to recall what 28 U.S.C. § 1350 actually says. That statute does not create a new right of

action for international offenses. Rather, it merely lays jurisdiction in the district courts over actions for torts "committed in violation of the law of nations." *Filartiga* is a tort case, and the right that plaintiffs sought to have vindicated is the common law right to be free of the tort of assault. The *Filartiga* court adopted the position, strongly urged on it by plaintiffs, that on the facts alleged, "state court jurisdiction would be proper,"[45] and that through the Judiciary Act, Congress merely expressed its preference that such cases, with potential significance for foreign relations, be heard in federal courts.

In order for the court of appeals to reach this position, however, it was not necessary to find international law to be part of the law of the United States, creating a right to be free of torture. A simpler syllogism would have sufficed:

(1) a tort case, otherwise actionable in courts of general jurisdiction, may be brought in federal court if it alleges a violation of international law;
(2) an allegation of torture is sufficient to allege a violation of international law; and
(3) therefore, the court has jurisdiction under 28 U.S.C. § 1350.

The *Filartiga* court does accept premises (1) and (2). The court seeks additional support for the conclusion, and goes on to show that international law is part of our law, not because more premises are logically necessary, but because of an unavoidable constitutional infirmity in jurisdiction based only on this syllogism. It is in these next steps that the true significance of *Filartiga* lies.

International Law as the Source of Domestic Legal Rights

Pena forcefully argued before the court of appeals that if the Alien Tort Claims Act supports federal jurisdiction of a case brought between foreigners alleging no breach of a statute of the United States, such a grant of authority to the courts exceeds what is permitted under the Constitution. Article III limits the "judicial power" *inter alia* to "all cases, in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."[46] There is, generally, no federal common law of torts, and in any event, normal conflicts of laws rules would have the law of Paraguay—the *locus delicti*—apply to the *Filartiga* complaint.[47]

It follows that exercise of jurisdiction in *Filartiga*, in order to be constitutional, requires that "the laws of the United States" somehow be implicated. Here the conclusion that international law is part of the laws of this

country is critical, for the allegation of torture, a violation of the law of nations, is a charge that United States law, too, has been violated. Following the Supreme Court's directions in *The Paquete Habana,*[48] the court of appeals established the content of the international legal norm by examining international custom, practice, and the works of commentators. In so doing it explored a *corpus* of international law which is necessarily a changing, developing one.

Analysis of international norms regarding torture leads to more than the discovery of a right to be free of such barbarism, which right, incorporated in United States law, becomes a *jus* enforceable in United States courts. It also leads to certain conclusions concerning defenses which might be available in actions alleging infringement of that right. Torture contains as part of its definition some degree of official sanction or complicity, actual or apparent. It might therefore appear that the very facts that must be proved by a plaintiff to constitute torture would be sufficient to establish the "act of state" defense, the preclusion of judicial examination of a foreign government's act carried out within its own territory.[49] On this issue, the *Filartiga* court suggested that the defense will not apply: official renunciation of torture by virtually every nation of the world "does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority."[50] Or, as some of the *amici* put it, "[n]o member of the international community can be heard to plead its own depravity as a defense to the exercise of jurisdiction over its national by an American court."[51]

The defense of sovereign immunity did not arise in *Filartiga.* Any assertion of it, however, by a defendant whose nation is prepared to endorse him as its agent and his act as its official conduct, would presumably be defeated for analogous reasons.[52]

In *Filartiga,* then, the court held that international law forbids torture, that this prohibition gives rise to a legal right in individuals—assuming they can meet the usual jurisdictional prerequisites—to enforce it through civil actions in the courts of the United States. As has been shown, to sustain the constitutionality of this exercise of federal jurisdiction, it was necessary for the court to hold not only that torture is a violation of international law, but also that international law is the source of the right to be free from torture.

Under the *Filartiga* analysis, international law may be the source of individual rights, and as such is part and parcel of United States law. Rights vouchsafed under federal law may be enforced in federal courts, however, not only on the basis of the specialized Alien Tort Claims Act, but because of the far broader constitutional grant of jurisdiction over "federal questions." In a tantalizing footnote, the *Filartiga* court acknowledged that "our reasoning might also sustain jurisdiction under the general federal question

provision, 28 U.S.C. § 1331. We prefer, however, to rest our decision upon [§ 1350], in light of that provision's close coincidence with the jurisdictional facts presented in this case."[53]

Plainly, that "close coincidence" formed no part of the court's opinion. To the contrary, the *Filartiga* court virtually read 28 U.S.C. § 1350 out of the statute book. For in any case in which section 1350 jurisdiction might constitutionally lie, the plaintiff must allege a violation of international law, which is *ipso facto* an infringement of federal law. Where section 1350 does not apply, for example, because the plaintiff is not an alien or the case not one "in tort only," section 1331 will nonetheless allow the invocation in American courts of rights whose origin lies in international law.

Thus, on the strength of *Filartiga,* internationally generated rights may be enforced by individuals in the United States courts. The identification of such rights may not be a simple matter, but it is one to which the creative attention of attorneys concerned with human rights should now be turned.

In *Filartiga,* the court stated that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitation on a state's power to torture persons held in its custody."[54] But other such norms may be emerging, as the international community tends toward consensus on them. Other rights of refugees—the right to return, should they so wish, to their country of origin, or the right to be free of discrimination in their country of flight—may be capable of redress on the *Filartiga* model. These rights may have acquired, or may be acquiring, the status of legal rights, protected by the full force of the United States courts.[55]

The Paquete Habana[56] states that international law is part of the law of the United States. *Filartiga* makes it clear that, like the other fundamental components of federal jurisprudence, international law is the source of individual legal rights.

TRAN QUI THAN v. BLUMENTHAL: LEGAL RIGHTS AND STATUTORY LIMITS

The Facts and the Decision

South Vietnam fell to Communist forces on April 30, 1975. As of midnight on that day, South Vietnam became, by presidential order, a "designated country" under the Foreign Assets Control Regulations.[57] Beginning with that date and time, property of South Vietnam or its nationals subject to the jurisdiction of the United States was blocked, pursuant to the Trading with the Enemy Act of 1917, as amended.[58]

Some two weeks before the fall of Saigon, the directors of the Dong Phuong Bank, including Tran Qui Than, met to consider what they should

do. The directors adopted a resolution, effective on the date when Saigon "will be occupied by the Communist government," granting to those directors "who will be able to leave the country [the power] to manage and to make use of all of the . . . properties that the [Bank] possesses abroad."[59]

On May 1, 1975, the day following the takeover, and hence following the effective date of the directors' resolution, the new government of South Vietnam ordered that all banks be "confiscated and from now on, managed by the revolutionary administration." Later, on August 30, 1975, according to some accounts, the government allowed the banks to reopen for two months, to "settle their accounts with depositors and shareholders."[60] October 30, 1975, marked the end of all private banking activity in Vietnam.[61]

On the effective date of the regulations, the Dong Phuong Bank was owed some $270,000 by the United States Departments of the Army and Navy, as assignee of contractors in Vietnam. Directors holding a total of 56 percent of the bank's outstanding shares left Vietnam after the fall of Saigon for France, Hong Kong, and the United States. Plaintiff Tran Qui Than, who had been "Managing Director" of the bank, came to the United States and established residence in California.

In late 1976, plaintiff sought to be paid the amounts owed to the bank, invoking as the basis for his right to do so the resolution of April 15, 1975. The Office of Foreign Assets Control (OFAC) ruled that the payments were blocked pursuant to the Foreign Assets Control Regulations. Plaintiff sued to obtain review of that determination. The U.S. District Court for the Northern District of California (*per* Schwarzer, J.) upheld the blocking.[62]

The court reasoned that, irrespective of the ownership of the bank, the assets in question were the bank's property. Since the bank was undoubtedly a Vietnamese "national," the assets were "property in which [Vietnam], or any national thereof, has at any time since [April 30, 1975] had any interest," and were therefore properly blocked under 31 C.F.R. § 500.201. It was not for the court to pierce the bank's corporate veil, since under Vietnamese law, nothing had occurred to cause the bank's assets to devolve upon its individual shareholders.[63]

Plaintiff argued that to maintain the blocking would be tantamount to a conferral of extraterritorial effect upon the confiscatory acts of the revolutionary government. Generally, while the "act of state" doctrine precludes judicial review in the United States of official acts of foreign sovereigns confined to their own territory,[64] "[o]ur courts will not give 'extraterritorial effect' to a confiscatory decree of a foreign state, even where directed against its own nationals."[65] In *Tran*, the property in which a Vietnamese interest was asserted by OFAC was located in the United States. Plaintiff argued that since Vietnam as a state expropriating assets

without compensation could not establish an enforceable claim to the funds in United States courts, the presence of any interest on the part of that country was negated.

Judge Schwarzer responded that this, "of course, is not the question before the Court. Vietnam is not a party to this action, and the validity of the confiscation is not in issue. . . . [T]he Court does not decide who will be entitled to the funds."[66] With respect to the limited question held to be ripe for decision in *Tran,* the court held that the Vietnamese nationality of the bank, as well as the new government's claim to be the bank's successor in interest, were sufficient to trigger application of the blocking regulations.

Likewise, the court dismissed plaintiff's arguments that denial of a license to unblock the assets was an unconstitutional "taking" without compensation. A freezing of foreign assets, it held, is "only a temporary action,"[67] not a taking at all. More fundamentally, however, the court found that plaintiff "has failed to establish that he and his fellow shareholders have a constitutionally protected property interest"[68] in the assets at issue. Other legal claims—one based on equal protection and another founded in a bilateral treaty with the Republic of Vietnam[69]—were summarily rejected.

An examination of the issues and assumptions underlying the *Tran* decision, and an analysis of that decision in terms of legal rights, require a brief discussion of the Foreign Assets Control Regulations.

The Foreign Assets Control Regulations

The Foreign Assets Control Regulations are founded upon the statutory power of the president, in times of "national emergency," "under such rules and regulations as he may prescribe," to

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power or privilege with respect to, or transactions involving, any property in which any [designated] foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States.[70]

The establishment of regulations, the declaration of national emergencies, and the extension of this authority to additional countries are essentially foreign affairs functions of the president. The courts have therefore been characteristically loath to assume a critical posture in construing this statutory language. The judicial branch has allowed extremely broad interpreta-

tions of the term "interest,"[71] has not questioned the continuous existence of a "national emergency" for a quarter of a century,[72] and has repeatedly sustained the constitutionality of the authority.[73] Yet the courts have pointed out that even foreign affairs functions of the presidency must be carried out within legal and constitutional limits.[74]

To state this general proposition is not to ignore the line of cases—of which *United States v. Curtiss-Wright Export Corporation*[75] is the most frequently cited—establishing the doctrine of judicial abstinence from political questions, and especially from those involving the foreign affairs functions of the president. It is, rather, to acknowledge that it is Congress to whom legislative power is assigned by the Constitution, and that, absent congressional authorization, even the president is without authority, for example, to take private property for public use.[76] The power of the executive to affect private rights through assets control programs is similarly limited by constitutional constraints.

In *Real v. Simon,*[77] the United States Court of Appeals for the Fifth Circuit overturned a decision of the Office of Foreign Assets Control which blocked part of a Cuban decedent's estate located in the United States. Plaintiffs were the heirs claiming entitlement to the estate, and resided in this country. The Cuban "interest" in the property alleged by OFAC to justify the blocking was that of the decedent himself, since the applicable regulation read, "a person shall be deemed to have an interest in a decedent's estate if he . . . was the decedent."[78]

The court acknowledged the latitude that will be accorded to the executive in establishing regulations under foreign affairs statutes. It noted, however, the primacy even in such cases of law over presidential discretion. "The concept that a dead person is a 'foreign national' in possession of property within the meaning of the Trading with the Enemy Act does not have the support of logic."[79] Such an illogical result cannot lawfully be reached by an agency, and is "akin to other agency actions that have been found to have no basis in law."[80] The blocking of the estate was reversed.

Two years later, the Court of Appeals for the Second Circuit was confronted with nearly identical facts in *Richardson v. Simon.*[81] So strong is the presumption of propriety of presidential acts in the foreign affairs area that the court, by a majority, declined to follow *Real.* No attempt was made to distinguish the earlier case.

It does not appear, however, that the *Richardson* court differed from the *approach* taken in *Real.* Rather, two members of the *Richardson* panel were able to identify a policy basis for deeming a dead person to be a "foreign national" under the regulations, which basis was held sufficient to justify the result. Even *Richardson,* then, is not support for a claimed exception to the general rules of administrative and constitutional law in the case of

blocked assets; one must still acknowledge that there are limits. It would not have been open to President Carter in November 1979, for example, in blocking certain property of Iran,[82] to include the assets of persons born in that country who had long since acquired United States citizenship. Nor could he have attempted to recapture property already delivered to Americans in consummated transactions with nationals of Iran.[83]

Assets control cases are thus not exceptions to the rule that not "every case or controversy which touches foreign relations lies beyond judicial cognizance."[84] Assets control regulations, like any other set of legal rules, must be consistent with the Constitution, and their reach cannot exceed what the law allows.

The *Tran* case should be viewed against this background. Were the Foreign Assets Control Regulations applied in *Tran* consistently with the legal principles that must underlie those regulations? To put the question another way, did plaintiff have rights that the *Tran* decision ignored?

What Rights Did Plaintiff Seek to Assert?

Tran Qui Than's position was straightforward. He claimed that, by virtue of the April 15, 1975 resolution, the bank's property had become his. He, after all, was a director of the Dong Phuong Bank who had been "able to leave the country," and his application for an unblocking license certainly constituted an attempt "to manage and to make use of" the bank's assets in the United States. Tran could therefore argue that from the moment he left Vietnam, as the grantee of an unrestricted power "to manage and to make use of" certain specified property, he (and not the bank) was its owner.

If in fact Tran was the owner of the claims, and if his ownership began on or before the effective date of the regulations, it cannot be asserted that there was a Vietnamese "interest" in the claims sufficient to sustain the blocking. The blocking would work directly to defeat Tran's right of ownership. Judge Schwarzer, however, appears to have concluded otherwise, stating that the Vietnamese revolutionary government which had expropriated certain property in Vietnam "also has the power to assert a claim as the successor to an expropriated bank's foreign-based assets."[85]

This conclusion seems to ignore the import of cases denying extraterritorial effect to foreign confiscatory decrees,[86] which thereby deny to expropriating states the very power to which the judge alludes. Such states have no legal right as successors in interest, and no judicial remedy will be invoked to assist them in their claims. The expropriating state may, of course (like the putative grantee in a fraudulent deed) have an independent claim on the assets. Expropriation, however, confers no legal right enforceable in United States courts to property located in this country, even if the

"act of state" doctrine compels judicial recognition of its effects elsewhere.[87]

These cases seem to suggest that if at all relevant times Tran was the owner of the bank's claims, then Vietnam had no cognizable interest in them, and the blocking was improper. This implication does not in any way turn on the presence or absence of Vietnam as a party before the court. For if Tran owned the claims, his rights to them were protected property rights, and depriving him of his property without compensation was a constitutional violation.

Judge Schwarzer rules that, in the absence of a Vietnamese party to the lawsuit before him, he was unable to reach the question of ownership.[88] The analysis suggested here would urge that the right to ownership was—or should properly have been—precisely the fundamental issue in *Tran*. If the claims were the property of a Vietnamese national on or after the effective date, the decision was correct; if, however, they were Tran's, no basis exists in law for depriving him of them. There is no middle ground, nor does the court suggest one: if the assets belonged to Tran, no lesser interest on the part of Vietnam not rising to the level of a property interest could constitutionally have been asserted to justify the continued blocking.

The right, then, that Tran raised was the right to claim his property. In order to enforce such a right, as against another claimant to the property, a plaintiff must normally show that his title is superior to that from which the defendant derives his competing claim. OFAC's blocking was predicated on the alleged ownership of the new government of Vietnam, or of some Vietnamese entity, obtaining on or after the effective date. Tran's burden was therefore to prove his title superior to that of a claimant not before the court. Only the presence of Vietnam as a party to the action would have been certain to preclude the judge from holding (as he did) that "the validity of the confiscation is not in issue."[89]

Given the absence of Vietnam from the case before it, the court paid the customary deference to the administrative agency, and declined to look behind the exercise of its powers. Since the court ruled that the ultimate disposition of frozen assets was a matter into which it could not inquire, it refused to hear plaintiff's arguments based on public policy.

The following strategy might have increased the likelihood of Vietnam's appearance before the court. While it might not have reversed the outcome of the case (which, given the strength of the court's apparent conviction, might well have been reached for different reasons), it would at least have forced an adjudication of Tran's underlying rights. This strategy would have had as its objective the confrontation of the parties—Tran and the Vietnamese government—who were asserting rights that were mutually exclusive.

The model proposed is that of *Palicio v. Brush & Bloch*[90] and its sequel, *Menendez, Garcia v. Faber, Coe & Gregg.*[91] Plaintiffs in the *Menendez* case were former owners of Cuban cigar companies, expropriated by Fidel Castro in 1960.[92] At the time of the expropriation, the companies were owed money on several months' invoices for cigars previously shipped to buyers in the United States.

Plaintiffs filed actions in New York in 1961 against the American cigar importers, claiming past and future accounts receivable. They apparently relied upon the traditional notion of equity jurisprudence that he who obtains property illegally is liable to its true owner for his profits. Immediately, the government of Cuba intervened. It did so by filing suit, in the names of the nationalized companies, against the law firm representing their former owners, challenging their right to bring the debt-collection actions in the corporate names.

Judge Frederick van Pelt Bryan declined to assess the validity of an official Cuban act as it affected property in Cuba. He therefore held that the expropriation was effective to vest title to property located in Cuba in the Cuban Government. It was not effective, however, to divest the former owners of their assets located in the United States. These included certain industrial property rights, and, as it turned out, significant debts for cigars shipped prior to expropriation.

The debt-collection actions with which the litigation commenced were then reinstated,[93] with two classes of plaintiffs, now claiming rights to different property: the former owners, seeking payment of pre-expropriation debts, and the revolutionary government, attempting to collect on post-expropriation invoices. Obviously, these plaintiffs did not have similar interests.

All of the importers were able to demonstrate that in fact they had paid the Cuban Government for all cigars shipped by the former owners in the ninety days prior to the nationalization on September 15, 1960. They argued that such payment represented proper performance of their obligations, even if they acted in error as to the correct identity of their creditors.

Judge Bryan rejected this defense, holding that "the payments made on account of pre-[expropriation] shipments by the importers did not discharge the importers' obligations to make payment to the owners for such shipments."[94] Payment made in error does not settle a debt, especially when the debtor has knowledge (actual or constructive) of his mistake. Thus the former owners were held entitled to the proceeds of the shipments, and the importers were allowed to deduct these amounts from judgments awarded against them in favor of the Cuban government (the erroneous payee).[95] By holding that the former owners were entitled to certain assets and the new owners—the government—to others, the judge

established and clearly distinguished the legal rights of expropriator and expropriated.

The *Palicio/Menendez* approach might usefully have been applied in *Tran.* Like the *Menendez* plaintiffs, Tran claimed he was owed money on contractual debts that accrued before nationalization. Had he filed suit on those debts, against the debtor (in this case, the Department of the Army),[96] the defendant would presumably have argued that it paid its debt, by writing checks to the Dong Phuong Bank and by depositing such checks in blocked accounts. Plaintiff's rejoinder would have been that he, and not the bank, was the owner of the claims, and that the Army was aware of this. He would have sought to establish his property interest by raising the April 15, 1975 resolution, and by contending that the unrestricted right to dispose of assets without accounting to anyone for them is the legal equivalent of outright ownership. The expropriation of the bank in Saigon cannot, according to *Palicio,* have affected title to property, including accounts receivable, in the United States.

Therefore, the former owners of the bank, those who were expropriated, remained entitled to payment on the underlying contractual obligations. They, in their resolution, decided to grant that and other property to Tran. Whether the resolution was legally effective to wind up the bank is entirely beside the point. The payment to the bank was in error, and Tran should have recovered under *Menendez.*

Had such a litigation strategy been employed, Vietnam would probably have sought to intervene to raise the argument asserted in *Palicio:* that its governmental acts are unreviewable by an American court. But this argument probably would not have prevailed over the right of a litigant to the ownership of his property. Such a Vietnamese intervention would have put what Judge Schwarzer called "the validity of the confiscation" directly in issue.

To follow this reasoning, however, is to see at once how unnecessary such a step is to the legal analysis, and therefore to the resolution, of the case. The judge implies that the confiscation is an act the legal consequences of which cannot be gauged in the absence of its perpetrator. But this is beside the point, for United States law will recognize no legal effect of such an act upon property in this country. Title remains where it was, and he who holds it may dispose of his property as he likes.

The foregoing analysis suggests that *Tran* was wrongly decided. If Tran was the owner of the property in issue, he was entitled to its unfettered use, and the blocking was improper (*i.e.,* there was no Vietnamese national with an "interest" in it). In fact, Tran had a better claim to ownership than the person (the Vietnamese Government, as putative successor in interest to the bank) from whom the competing claim derived. At the instant Saigon fell, the directors' resolution, given Tran's presence outside Viet-

nam, automatically vested title to the bank's then-existing assets in him and in his fellow directors who were then or who would subsequently be able to emigrate. Since the vesting in him, at least, antedated the effectiveness of the regulations, his right to ownership of the bank's unexpropriated assets should not have been denied. The property of refugees cannot be taken from them ever by action of the executive, and the court's deference to the "foreign affairs powers" cannot condone that constitutional defect.[97]

A discussion of the *Tran* case in terms of rights may illuminate its more obscure corners, and may help to show where and why the decision went wrong. The message for litigation counsel representing such refugees as Tran is clear: when foreign affairs statutes and regulations are concerned, counsel can expect arguments of policy to be raised in force to suggest that what rights the refugee client has are somehow predicated upon the discretion or the generosity of the executive. But where there is a right, there is a remedy.

THE LEGAL RIGHTS OF REFUGEES: A STRATEGY

As the analyses of *Filartiga* and *Tran* demonstrate, *rights* lie at the heart of legal assistance to refugees. Legal rights, with their correlative remedies, must not be outweighed by considerations of policy. Those in the private bar who represent such persons, suing to vindicate claims in the United States, should accustom themselves to conducting a preliminary investigation of underlying rights. Once they have accomplished this, they should wherever possible build their cases on the foundation of legally enforceable rights, a form of argument well known to judges.

The case studies presented here suggest the following guidelines:

(1) *"Common law" rights of refugees should be pursued through creative "common lawyering."* "Common law" rights—the right to have a contract honored, or not to be the victim of a tort—may be the real essence of the case. Perhaps the complaint and pleadings can be framed keeping those central images in focus, and consigning potentially controversial international aspects to the periphery. Perhaps, for example, the complaint can be drafted in such a way that the defendant's assertion of sovereign immunity will seem less than inevitable. Perhaps, by contrast with the claimed rights of the plaintiff, the defendant's case can be made to appear founded upon a legal technicality. Defendant should be perceived as relying upon international comity in order to avoid having to comply with the most basic of domestic legal obligations.

(2) *International law should be canvassed as a source of legal rights. Filartiga* points lawyers toward consensus in the international arena as the source of rights

enforceable in the United States. While the set of such rights may not be large at the present time, the tendency is certainly toward its expansion. Evidence of this may be found in the growing number of international governmental organizations and commissions concerned with human rights, the proliferation of treaties, resolutions, and conventions, and the growing importance of and respect for such nongovernmental organizations as Amnesty International.

As individual rights become enshrined and established in international law, they are automatically enforceable in American courts, according to *Filartiga.* Advocates representing refugees might well join forces with legal scholars in an effort to prepare a "status report" on the various individual human rights, showing the degree of their (official) recognition, and noting the nature of any obstacle to unanimity.

(3) *Where statutes and regulations are concerned, one should not hesitate to appeal to their real foundation.* It is true that the president, and therefore the executive agencies, have enormous latitude in conducting the foreign affairs of the United States. It does not follow that this latitude is unlimited. Indeed, executive authority under foreign relations statutes is subject to the rule of law, and must be exercised in a way that fully comports with the laws and the Constitution.

It cannot be predicted that a district court will strike down a foreign affairs regulation (or its application) merely because an argument can be raised that it leads to an unintended or even an inequitable result.[98] But such a decision becomes more likely where fundamental rights are shown to be implicated. This course is not an easy one, as may be seen in *Tran,* but it is one worth pursuing. The Constitution does not tolerate discrimination in the recognition of basic rights (such as the right to own and enjoy property) merely because of one's country of origin, unless there is a strong and proven connection between the denial of those rights and a legitimate statutory purpose.

An appeal, where possible, should be founded on both the underlying right and that fundamental purpose.[99] And again, the court should be presented with the controversy in a way designed to accentuate the legal rights of the refugee plaintiff.

(4) *Legal rights are by their nature enforceable, so the existence of rights, not remedies, should be emphasized.* A court *recognizes* a right; it *invokes* or *orders* a remedy. Given the natural (and fully understandable) tendency of the courts to decide no more than is required, it seems better strategy to show the judge that the right plaintiff alleges is a well established one. Once the right has been demonstrated, if an infringement is proved, the plaintiff is entitled to his remedy.

The opposite approach, one which lays emphasis on the award the court is asked to grant, raises controversy too early. It does not allow the court

to ask—much less to answer—the question whether plaintiff is entitled to any relief at all. It is likely to remind the judge of the uniqueness of the challenge being mounted, and thereby to set him on his guard. Moreover, it reduces the chances of getting a favorable decision that is sufficiently well-founded to withstand an appeal.

Concentration on rights is a solid, practical approach that functions in a wide variety of civil litigation. Cases involving refugees are especially amenable to this analysis. For these are persons whose legal rights, both international and municipal in origin, are most frequently and egregiously trampled. If our judicial system cannot be mobilized to vindicate the legal rights of refugees, then that system is far less consistent, complete, and compassionate than many of us continue, despite everything, to believe.

NOTES

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

[2] 469 F. Supp. 1202 (N.D. Cal. 1979); *appeal docketed,* No. 79-4299 (9th Cir., May 3, 1979).

[3] An "analytic" as opposed to a "synthetic" statement is one whose truth depends solely on logic, grammar, or the meaning of words. A tautology is an example of an analytic sentence.

[4] *Jus* is akin to the French *droit* and its cognates in the other Romance languages (Italian *diritto,* Spanish *derecho,* etc.).

[5] This analysis centered on the concept of legal rights owes its inspiration—though not its errors—to R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977), and especially the essay *Hard Cases.*

[6] The *Filartiga* case was dismissed on defendant's motion in the district court, and that dismissal was reversed on appeal. Therefore, the facts as alleged by plaintiffs were assumed by the courts to be true. *See* Newport Shipbuilding & Dry Dock Co. v. Schauffer, 303 U.S. 54 (1938). The recitation of the facts in the text is culled from the complaint and supporting affidavits.

[7] Plaintiffs allege that disbarment is an extremely unusual procedure in Paraguay, and that these events imply the complicity of the Paraguayan courts in an effort to deprive them of any legal remedy.

[8] Pena's presence within the jurisdiction of the court was voluntary and not obtained by fraud or enticement. Personal service upon him during his detention was therefore sufficient to establish *in personam* jurisdiction. *Cf.* Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937).

[9] Both plaintiffs sued in their own rights, and Dr. Filartiga sued also as personal representative of Joelito.

[10] The suit originally named several officers of the Immigration and Naturalization Service as parties defendant, and plaintiffs sought injunctions against their executing the deportation order. When Pena was in fact deported, these persons were not made parties to the appeal.

[11] 1 Stat. 73 (1789). The Act originally referred to actions in law or equity, and was amended to refer to "any civil action" with the enactment of the Federal Rules of Civil Procedure in 1948, 28 U.S.C. § 1350 (1976).

[12] *See* 630 F.2d at 880.

[13] *Id.* Personal jurisdiction having been obtained, Pena's absence from the country did not moot the action.

[14] The groups were: Amnesty International-U.S.A., the International League for Human

Rights, the Lawyers Committee for International Human Rights, the International Human Rights Law Group, the Council on Hemispheric Affairs, and the Washington Office on Latin America.

15 On remand, Pena's attorney withdrew his appearance. As of this writing, further participation in the case by defendant seems unlikely.

16 630 F.2d at 880.

17 630 F.2d at 885.

18 1 ANNALS OF CONG. 821 (Gales & Seaton eds. 1789).

19 *See generally* Dickinson, *The Law of Nations as Part of the National Law of the United States* (parts I & II), 101 U. PA. L. REV. 26, 792 (1952-53), for the classic review of the history and meaning of section 1350.

20 The statute is alluded to in the extremely obscure and brief reported decision in Bolchos v. Darrel, 3 F. Cas 810 (D.S.C. 1795). In Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975), the court held that the jurisdictional prerequisite "may well be" met, but section 1350 had not been briefed, and the case was decided on other grounds.

21 Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 1114 (1979) (no jurisdiction under 28 U.S.C. § 1350 for wrongful death action against international airline); Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) (no jurisdiction under 28 U.S.C. § 1350 for action by aliens to recover children from foster home); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975), *on remand,* 411 F. Supp. 1094 (S.D.N.Y. 1975) (no jurisdiction under 28 U.S.C. § 1350 for allegation of fraud and conversion in international finance transaction, as theft is not an aspect of the law of nations); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F. Supp. 919 (S.D.N.Y. 1966) (action by seaman brought under Jones Act does not allege a tort committed in violation of the law of nations); Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324 (E.D. Pa. 1966) (refusal to pay insurance proceeds not a violation of the law of nations or treaty and thus no federal jurisdiction); Lopes v. Reedevei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) (suit based on unseaworthiness of vessel not amenable to federal jurisdiction because requirement of seaworthiness is not imposed by treaty or international law).

22 195 F. Supp. 857, 862 (D. Md. 1961) (jurisdiction exercised under 28 U.S.C. § 1350, as use of false passport in aid of the commission of a tort entails violation of international law).

23 Khedivial Lines v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960) (complaint by alien owner regarding labor dispute does not allege a tort committed in violation of the law of nations); Canadian Transp. Co. v. United States, 430 F. Supp. 1168 (D.D.C. 1977) (no jurisdiction under 28 U.S.C. § 1350 based on alleged treaty violation where such treaty gives no private right of action); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F. Supp. 919 (S.D.N.Y. 1976); Upper Lakes Shipping Ltd. v. Int'l Longshoreman's Ass'n, 33 F.R.D. 348 (S.D.N.Y. 1963) (no jurisdiction under 28 U.S.C. § 1350 where treaty alleged to be violated by labor dispute specifically provides for a dispute settlement process).

24 Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied,* 439 U.S. 1114 (1979).

25 225 F. Supp. 292 (E.D. Pa. 1963).

26 *Id.* at 297.

27 519 F.2d 1001 (2d Cir. 1975).

28 534 F.2d 24 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976) (jurisdiction under 28 U.S.C. § 1350 may be denied where claim based on treaty violation attenuated or insubstantial).

29 519 F.2d at 1015.

30 630 F.2d at 888.

31 The court noted that human rights policy is set at several places in the statute book. In particular, nations engaging in torture are precluded from receiving certain types of foreign assistance: *see* 22 U.S.C. § § 2151(a), 2304(a)(2) (Supp. III 1979). *See also* 7 U.S.C. § 1712 (Supp.

III 1978) (prohibiting agricultural commodity agreements with nations that are gross violators of human rights). Thus, a pattern of torture *does* affect the dealings of states *inter se.*

32 630 F.2d at 890.

33 Those cited by the *Filartiga* court include: the Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10408 (1975); the American Convention on Human Rights, Nov. 22, 1969, OAS Official Records, OEA/Ser. K/XVI/1.1; the International Covenant on Civil and Political Rights, Annex to G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966); and the European Convention for the Protection of Human Rights and Fundamental Freedoms Nov. 4, 1950, 213 U.N.T.S. 221. All are discussed at 630 F.2d at 881-84. This list is certainly not exhaustive.

34 The Charter is a treaty in the constitutional sense. *See* Statement of Harry S. Truman acknowledging ratification of the UN Charter, 59 Stat. 1033 (1945).

35 UN CHARTER, arts. 55, 56.

36 See Fujii v. State, 38 Cal. 2d 718, 722, 242 P.2d 617, 620-21 (1952) (UN Charter is not self-executing). *Accord,* Hitai v. INS, 343 F.2d 466 (2d Cir. 1965) (UN Charter does not invalidate any part of United States immigration law); Vlissidis v. Anadell, 262 F.2d 398 (7th Cir. 1959) (UN Charter does not abolish immigration quota system); Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961) (UN Charter not self-executing with regard to observance of human rights and fundamental freedoms); Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958), *aff'd per curiam,* 278 F.2d 252 (1960), *cert. denied,* 364 U.S. 835 (1960) (UN Charter reference to freedom of the seas not self-executing).

37 The International Human Rights Law Group, *et al., supra* note 14.

38 The Paquete Habana, 175 U.S. 677, 700 (1900).

39 Art. I, § 8, para. 10.

40 U.S. v. Smith, 18 U.S. (5 Wheat) 153 (1820) (crime of piracy is clearly defined by law of nations and thus is punishable by act of Congress).

41 Jewish Defense League v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) (law prohibiting picketing within 500 feet of embassy may be enacted pursuant to constitutional authority to define and punish crimes against law of nations).

42 *See, e.g.,* Ex Parte Quirin, 317 U.S. 1, 27-8 (1942): "the law of war [includes] that part of the law of nations which prescribes, for the conduct of war, the status of rights and *duties* of enemy nations, *as well as of enemy individuals*" (emphasis added, citations omitted).

43 *E.g.,* Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, art. 1, 78 U.N.T.S. 277 (confirming that genocide is a crime under international law); Geneva Convention Relative to the Treatment of Prisoners of War, *done* Aug. 12, 1949, art. 129, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 (persons who violate the rights of prisoners of war may be tried by their own state or may be handed over to a third state); International Convention on the Suppression and Punishment of the Crime of Apartheid, 28 U.N. GAOR Supp. (No. 30) 75, U.N. Doc. A/9233/Add. 1, A/L .712 Rev. 1, art. 1 (declaring apartheid to be a crime against humanity); Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, *done* Feb. 2, 1971, art. 2, 27 U.S.T. 3949, T.I.A.S. No. 8413 (declaring certain terrorist acts to be common crimes of international significance).

44 The court cited authority going back to Lord Mansfield, in Mostyn v. Fabrigas, 1 Cowp. 161 (1774) (action lies in England for tort committed between foreigners abroad where tortfeasor located in England). *See* 630 F.2d at 855.

45 630 F.2d at 885. The court noted with just a bit of overstatement that "appellees conceded" this point at oral argument.

46 Art. III, § 2, para. 1.

47 That the law of Paraguay is the law of decision in the case does not by itself mean, of course, that jurisdiction cannot lie. *See* the court's discussion of defendant's confusion on this point, 630 F.2d at 889, and especially n. 25. The potential constitutional problem is the lack of an American law under which the case "arises."

48 175 U.S. 677 (1900).

49 *See, e.g.*, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250 (1897).

50 630 F.2d at 890. The court's discussion of "act of state" was offered "in passing," since the issue was "not before us on this appeal." *Id.* at 889.

51 Brief of the International Human Rights Law Group, *et al.*, at 28. *See* Note, 13 INT'L LAW. 739, 746 (1979).

52 That is, to assert this defense, the nation would have to drape the mantle of sovereignty around the defendant, espousing him as its official and his act as within his scope of responsibilities.

53 630 F.2d at 887 n. 22. *Amici* Amnesty International *et al.* were the only ones to brief the question of possible section 1331 jurisdiction.

54 630 F.2d at 881.

55 In Rodriguez v. Wilkinson, No. 80-3183 (D. Kan. December 31, 1980), appeal docketed, No. 81-1238 (10th Cir., February 27, 1981) Judge Richard D. Rogers granted a writ of *habeas corpus* to an undocumented Cuban immigrant indefinitely detained in the United States Penitentiary at Leavenworth. Relying in part on *Filartiga*, the judge found that arbitrary and indeterminate detention "is prohibited by customary international law." Slip op. at 20.

56 175 U.S. 677 (1900).

57 31 C.F.R. Part 500. A much fuller explanation of the regulations appears in Malloy, *The Impact of U.S. Control of Foreign Assets on Refugees and Expatriates*, this volume.

58 40 Stat. 411. The relevant presidential authority under the Trading With the Enemy Act, § 5, 50 U.S.C. app. § 5 (Supp. III 1979), has since been revised by the International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977), codified at 50 U.S.C. § 1701 (Supp. III 1979) and other sections of 50 U.S.C. The new statute preserves intact the authority discussed in the text. The *Tran* case concerns the 1917 Act and regulations promulgated thereunder.

59 469 F. Supp. at 1205.

60 469 F. Supp. at 1208.

61 *Id.*

62 469 F. Supp. 1202 (N.D. Cal. 1979).

63 469 F. Supp. at 1207-08. Plaintiff did not argue that the resolution of April 15 was a legal act of dissolution by the bank.

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

65 F. Palicio y Compania, S.A. v. Brush and Bloch, 256 F. Supp. 481, 488 (S.D.N.Y. 1966), *aff'd mem.*, 375 F.2d 1011 (2d Cir. 1967), *cert. denied*, 389 U.S. 830 (1968). The situs of a debt, such as the assets at issue in *Tran*, is with the debtor.

66 469 F. Supp. at 1210.

67 *Id.*

68 *Id.*

69 T.I.A.S. No. 4890; 12 U.S.T. 1704, art IV. The court held that "the Republic of Vietnam" was no longer in existence. 469 F. Supp. at 1211.

70 Trading With the Enemy Act, 40 Stat. 411, § 5(b), 50 U.S.C. app. § 5(b) (Supp. III 1979).

71 *See, e.g.*, United States v. Broverman, 180 F. Supp. 631, 636 (S.D.N.Y. 1959) (there is a Chinese "interest" in goods merely by virtue of their manufacture in China). In U.S. v. Quong, 303 F.2d 499, 503 (6th Cir. 1962), the Sixth Circuit Court of Appeals held that "[t]he

term 'any interest' must be defined in the broadest sense and includes any interest whatsoever, direct or indirect." *But see* Heaton v. United States, 353 F.2d 288, 290 (9th Cir. 1965) (it is reasonable to distinguish between pre-effective date exports in which there is no "interest" and later exports in which an "interest" is present).

72 A "national emergency" was declared by President Truman on December 16, 1950, and continued in existence until Congress terminated it through the National Emergencies Act of 1976, Pub. L. No. 94-412, 50 U.S.C. § 1601 (1976), on September 14, 1976. Existing assets blocking programs were expressly continued by the Act, § 502(a)(1), 50 U.S.C. § 1651 (1976).

73 *See, e.g.*, Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966).

74 *See, e.g.*, United States v. Curtiss-Wright Export Co., 299 U.S. 304, 319, 320 (1936). *See also* Reid v. Covert, 354 U.S. 1, 12 (1957) (the United States "has no power except that granted by the Constitution"); Toledo, P. & W. R.R. v. Stover, 60 F. Supp. 587, 593 (S.D. Ill. 1945) ("[t]he executive department of our government cannot exceed the powers granted to it by the Constitution and the Congress, and if it does exercise a power not granted to it, or attempts to exercise a power in a manner not authorized by statutory enactment, such executive act is of no legal effect").

75 299 U.S. 304 (1936).

76 *See, e.g.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The history and scope of the "political question" doctrine, especially as it concerns the president's foreign affairs authority, is discussed in L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972). *See also* Gordon, *American Courts, International Law and "Political Questions" Which Touch Foreign Relations*, 14 INT'L LAW 297 (1980).

77 510 F.2d 557 (5th Cir. 1975), *reh. denied*, 514 F.2d 738 (5th Cir. 1975). Both *Real* and *Richardson* (*infra* note 81 and accompanying text), as well as *Sardino* (*supra* note 73), concern the Cuban Assets Control Regulations, 31 C.F.R. § 515 (1980), assertedly promulgated under the same authority as, and identical in relevant parts to, the regulations at issue in *Tran*.

78 31 C.F.R. § 515.327 (1980).

79 510 F.2d at 564.

80 510 F.2d at 565. The court gave as an example regulations out of harmony with their authorizing statutes, citing Ruiz v. Morton, 415 U.S. 199 (1974).

81 560 F.2d 500 (2d Cir. 1977), *app. dismissed*, 435 U.S. 939 (1978).

82 Exec. Order 12170, 44 Fed. Reg. 65,729 (1979). *See* 31 C.F.R. § 535 (1980) (Iranian Assets Control Regulations).

83 In fact, the president's authority has been judicially confined in at least one case in the area of Iranian assets control: *see* National Airmotive Corp. v. Government of Iran, 499 F. Supp 401 (D.D.C. 1980), although it has been fully sustained in other Iranian assets cases. This matter is almost certain to be reviewed by the Supreme Court in the near future.

84 Baker v. Carr, 369 U.S. 186, 211 (1962).

85 469 F. Supp. at 1209.

86 *See* note 65 *supra* and accompanying text. *See also* Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966) ("When property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States,' " 353 F.2d at 51).

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

88 Judge Schwarzer found support for the positing of a Vietnamese "interest" in the case of Nielsen v. Secretary of the Treasury, 424 F.2d 833 (D.C. Cir. 1970). But in *Nielsen*, the act causing claims to the blocked assets to devolve upon shareholders (*i.e.*, the nationalization) occurred, and, indeed, the relevant debts accrued, after the regulations were in effect, and hence after the required Cuban "interest" in them was established. The judge held that this "mere fact" does not distinguish *Nielsen*. 469 F. Supp. at 1209.

89 469 F. Supp. at 1210. *See* text at note 66 *supra.*

90 256 F. Supp 481 (S.D.N.Y. 1966).

91 345 F. Supp. 527 (S.D.N.Y. 1972), *rev'd as to other issues sub nom.,* Menendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *cert. denied,* 425 U.S. 991 (1976).

92 These facts are best set out in the two district court opinions, 256 F. Supp. 481 (S.D.N.Y. 1966); 345 F. Supp. 527 (S.D.N.Y. 1972).

93 Thus, the consolidated *Menendez* cases, though filed first, were decided after the Cuban Government challenge in *Palicio.*

94 345 F. Supp. at 542.

95 The question whether this setoff procedure could sustain a net award against Cuba (*i.e.,* where the mistaken payment exceeded the affirmative award) went up to the Supreme Court, where it was decided in a landmark case concerning the "act of state" doctrine. Alfred Dunhill v. Republic of Cuba, 425 U.S. 682 (1976).

96 It appears, from the reported decision and the briefs filed on appeal, that the positions of the Army and the Navy may have been significantly different. The Navy apparently paid its debt to a contractor, who turned the money over to Tran under an assignment agreement. The Army (which was responsible for nearly 90% of the total amount claimed) paid into a blocked account. When Tran applied to unblock the Army funds, OFAC moved to block the Navy payment as well. *See* 469 F. Supp. at 1205-06.

97 This analysis assumes that blocking is constitutionally equivalent to taking. While *Tran* and some other cases (*e.g., Sardino supra* note 73) assert the contrary, that view seems to be born not of conviction and analysis but of deference to executive authority.

98 *See,* for example, the general unblocking license enjoyed by partners in former Cuban business enterprises, but not by shareholders in limited liability companies. 31 C.F.R. § 515.557. This distinction seems to have little basis in logic, yet it is unlikely that its arbitrariness is of such a scale that it would be struck down by a court.

99 In *Tran,* and in numerous other assets control cases, this approach has not been successful. Judge Schwarzer's decision recites the articulated policies behind the regulations, 469 F. Supp. 1209 n.1, but merely concludes that those policies are met if the assets are ones "in which Vietnam may assert an interest." This, of course, assumes the outcome of the case.