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The Case of Joelito Filártiga and the Clinic of Hope

Richard Pierre Claude

This case study details the humanitarian work and adversities befalling the family of Dr. Joel Filártiga and the torture-murder of Joelito, his seventeen-year-old son. The essay describes and analyzes Dr. Filártiga's legal vindication through civil litigation in the United States. Filed in 1979, Filartiga v. Pena-Irala has helped to set United States judicial policy on a course of reform. It has made clear that abusers of internationally defined human rights from other countries who find themselves in the United States can be held liable for damages. As background to this case, it is important to understand recent conditions in Paraguay as the family of Dr. Filártiga has experienced them.

I. THE POLITICAL ECONOMY OF FEAR

Politically independent since 1811, Paraguay is an isolated country beset by economic and political difficulties. Landlocked and situated in the center of the continent, its population of three million is predominantly (95 percent) mestizo, mainly of Spanish and Guarani Indian origin. Agriculture is the mainstay of the economy, employing over half of the country's labor force. In addition to the economic problems that typically confront developing countries, Paraguay faces such specialized problems as the lack of known mineral resources, small domestic markets, and poorly developed transpor-

2. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

275
tation and communication systems. The basic strategy for development emphasizes agricultural exports. Meat, coffee, cotton, soybeans, tannin, and tobacco account for nine-tenths of all officially recorded exports.

Although a lack of adequate transportation facilities has hampered the growth of the Paraguayan economy, air access into the capital city of Asunción provides a large trade in contraband goods—drugs, whiskey, and cigarettes. Although a tobacco exporter, Paraguay is nevertheless the largest importer in the world of cigarettes manufactured in the United States. The oversupply, along with transistors from the Orient, perfumes from France, narcotics and hard drugs, are transshipped abroad where they are either restrictively taxed or sold illegally. A United States Department of State report on economic trends in Paraguay acknowledges “the large amount of unregistered trade (smuggling) of both imports and exports.”

According to the Paraguay Committee for Human Rights (London), the economics of smuggling is so significant that it colors the whole political economy as a segment of trade that “runs parallel to the legal trade and is under strict military control.”

Those who participate in and benefit from the economics of smuggling have ascended into elite positions within Paraguayan society. They shore up and maintain their status of power through the enforcement techniques of “disappearances,” incarceration, killing, torture, and terror. In its 1978 Report on Paraguay, Amnesty International concluded that corruption is a causal factor where egregious human rights crimes are concerned. It asserted: “There is widespread corruption (contraband, drugs traffic, etc.) which itself leads to favouritism and violence in the interests of self-protection. . . . Failure to comply with these procedures is punishable through extra-judicial action.” Ultimately the structure of corruption is powered by the dictatorship of President Alfredo Stroessner, who has

5. Bulletin of the Paraguay Committee for Human Rights (London, 1978). Contraband commerce, accounting for five percent of the economy, forms an integral part of the political and economic system. Separate from contraband trade, operating without official clearance, are “unregistered shipments,” protected by the authorities. In 1981, the Carteira de Comercio Exterior (Brazil) reported $411.5 million in exports to Paraguay and $188 million in imports from Paraguay. The corresponding figures from the Paraguayan Central Bank were $131.3 million and $54.1 million—respectively 32 percent and 28.7 percent of the Brazilian figures (Paraguayan daily Ultima Hora, 6 February 1982). In 1981, the Instituto de Estadistica y Censo (Argentina) reported combined import and export values for the year in trade with Paraguay at 362 percent of the figure noted by the Paraguayan Central Bank (The Asunción ABC Color, 21 February 1982). In short, illegal trade comprises over half of Paraguay's trade with its neighbors, and according to Paraguay Watch 2 (Washington, D.C., July 1979), "the percentage is rising."
demonstrated a preoccupation with the maintenance of internal order as a basis for economic development.\textsuperscript{7}

With political parties gravely inhibited, with academic freedom and trade union restrictions at work, and with press censorship perennial,\textsuperscript{8} an important voice of criticism emanates from the Roman Catholic hierarchy. In his 1977 Christmas Message, Monsignor Ismael Rolón, Archbishop of Asuncion, complained that courts and judges, “should be the chief resource of human rights vindication,” but because the judiciary is utterly dependent upon the government, many judges “are corrupt and immoral.” In order to reinforce his outspoken criticism, the Paraguayan Commission for the Defense of Human Rights awarded Rolón a gold medal “in recognition of his intervention in favor of fundamental human rights.”\textsuperscript{9}

In 1976, the Paraguayan bishops issued a pastoral letter which complained: “The outbreaks of violence and the response through institutional and police repression now going on, profoundly affect not only our Church but the country itself, since there are at stake the property, the honor, the freedom and even the life of the people.”\textsuperscript{10} In a follow-up letter in 1979, the bishops noted that their earlier alarm “still awaits a response worthy of a civilized people.” The more recent letter lamented social conditions ripe with “all kinds of robbery and fraud” in public life. For example, according to the bishops:

It is no longer possible to participate in government contract bidding without going to godfathers, greasing palms and buying people. . . . And those concerns which are not profitable are neglected, such as economical housing and health care.\textsuperscript{11}

Aside from the Catholic hierarchy, groups within Paraguay which attempt to air independent criticism of social and political conditions generally meet a sad fate. In February 1979, the government moved to silence the Paraguayan Commission for the Defense of Human Rights by placing its President, Mrs. Carmen Lara Castro, under investigation for illegal

\textsuperscript{8} Amnesty International, note 6 above, 4, 11–12.
\textsuperscript{10} Pastoral Letter of the Paraguayan Episcopal Conference, “Between the Persecution of the World and the Comfort of God.”
incorporation of a civic association and for illegal international affiliations. Later that year—in December 1979—authorities undertook an investigation of the Commission for convening the First Congress on Human Rights in Paraguay. The Congress, attended by British, German, and United States diplomats, focused attention on the human rights situation in a number of aspects of national life: politics, journalism, culture, education, and employment. Under official suspicion was Constantino Coronel, a former political prisoner and peasant activist. Charges against Lara Castro and Coronel for violations of Law 209 were eventually dropped as part of a harassment strategy. Law 209—an antisubversive measure denounced by the Paraguayan Commission as unconstitutional—calls for the imprisonment or expulsion of “those who form part of an illegal association of three or more persons for the purpose of committing crime.” According to reports issued by the International League for Human Rights, the statute has been used by the government to prevent the organization of opposition political groups.12 In sanctioning those “who foment class struggle and internal disorder,” the law contradicts several guarantees of the Constitution of the Republic of Paraguay.

The 1967 Constitution provides for classic safeguards against violations of human rights.13 Such guarantees, however, are held hostage to the broad sweep of Article 79, which establishes the conditions for a state of siege. It may be declared “in order to defend the constitution and the authorities set up in accordance with it.” Rulings of the Supreme Court of Justice make clear that all individual rights may be suppressed under a state of emergency. Routinely, President Alfredo Stroessner has proclaimed a state of siege every three months since he assumed power in 1954. Since then the dictator has lifted it only on election days, returning it to force thereafter on the claim of threats of subversion. In 1978, the Inter-American Commission

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on Human Rights presented to the Organization of American States its report on Human Rights in Paraguay. Its premier recommendation calls for lifting the state of siege and insists on the need to establish a procedure by which detentions are carried out on written orders, identifying the place of imprisonment, the arresting official, and the authority ordering the arrest. Additional safeguards are called for, such as a medical examination at the time of detention and again on release, and a special law to reestablish the rights of habeas corpus and amparo (court protection). The Commission premises this conclusion on the view that without habeas corpus all other human rights are easily lost, leading to irresponsible repression.

Another view of the political economy of fear in Paraguay runs deeper than that which concentrates on legal institutions and the need for their reform. Reliable legal safeguards for human rights are not operative in Paraguay because the structure of power will not allow it. This view was advanced by David Helfeld and William Wipfler, who authored the report of the Third Commission of Enquiry of the International League for Human Rights. Their revealing report documents many human rights transgressions in Paraguay in the late 1970s. They found that those violations were perpetuated by a dual system of authoritative norms. The first consists of the constitution, codes, laws and administrative rules and regulations which make up the official legal system of Paraguay. The second and more important is an unwritten code of norms assigning rank and influence within a hierarchy of power. The second bears the name in the indigenous Guarani language of mbareté. In English, mbareté means “superior power over others,” or “clout.” Helfeld and Wipfler conclude that when the code of mbareté clashes with the legal system, it is the latter which must and does give way. Mbareté is the higher law, superior to any and all norms postulated by the legal system. With President Stroessner at the pinnacle of this system of “clout,” mbareté filters down through all echelons of the hierarchy of governmental and military power to the lowliest official who may exercise it against weak and uninfluential citizens.

According to Helfeld and Wipfler, the corrupting effects of mbareté are pervasive and deepseated. It accounts for the sense of immunity which police, prosecutor, and judges feel regardless of whether their actions may be inconsistent with legal standards. For example, Helfeld and Wipfler say that no police official fears retribution for murder, torture, or the violation of other basic human rights, nor do prosecutors or judges feel the slightest sense of insecurity about subverting the law. They know that they are secure

15. Helfeld and Wipfler, note 12 above.
16. Ibid., 155.
17. Ibid., 156.
as long as they act in harmony with the code of mbareté and do not challenge its essential attributes. The crimes committed by masters and servants of the system of "clout" range from murder and torture, to the subversion of due process, to illegal repression and harassment, to indifference and inhumane treatment of powerless people.18

No full accounting of the victims of the system of mbareté has been undertaken. In its 1977 report on Torture in Paraguay, Amnesty International concluded that "an unknown number of victims of political repression have died under torture or by extra-judicial execution in Paraguay."19

The most serious wave of repression in the last decade began in the early months of 1977 when the police and military detained some 350 persons. Eventually five times as many were jailed, forcing the authorities to build a new detention camp—the notorious Emboscada Prison.20 Among the thirty cases detailed in the report is that of Joélito Filártiga Speratti. His tragic entry reads:

Aged 17 years. Died under torture in Asunción on 30 March 1976. He was the son of a well-known medical doctor, philanthropist and artist, Dr. Joél Filártiga Ferreira, who runs a free medical service in the country town of Ybycúi.21

II. THE POLITICS OF PUBLIC HEALTH IN PARAGUAY

"My clinic is called the 'Clinic of Hope,' and our praxis is hope," Dr. Joél Filártiga stated in 1982.22 He was referring to El Sanatorio la Esperanza, which he founded and operates. It is the largest private health clinic for the poor in Paraguay. This clinic serves between 32,000 and 37,000 campesinos (peasants) in the central great valley and surrounding mountains around Ybycúi. From a tobacco-producing family, Joél Holden Filártiga Ferreira chose to work in the rural area centered at Ybycúi because, in his words, "there was no doctor there to serve the people." In Paraguay there is an overall shortage of health manpower, mainly at the technical and auxiliary levels. Though the capital city of Asunción contains only 16.5 percent of the population, more than 75 percent of all health professionals are concentrated there. Whether in the city or countryside, there are few health facilities for the poor. In Asunción, the large government facility, the Hospital de Clinicas, serves the poor, but it is underfinanced and the medical care provided is often of low quality. Lack of basic equipment and materials has

18. Ibid., 157-158.
20. Ibid., 3. The estimate of 1,500 is made in Stephansky and Alexander, note 12 above, 25.
stimulated strike actions by doctors, nurses, and residents at the hospital, resulting in the dismissal of some of those involved.  

In its report on *Health Conditions in the Americas, 1977–1980*, the Pan American Health Organization profiles Paraguay as a country characterized by problems of undernourishment and malnourishment, a high incidence of parasitic and infectious communicable diseases, diseases preventable by vaccination, tuberculosis, Chagas' disease, leprosy, and accidents and violent acts—maladies of extreme poverty, bad sanitation, and neglect. The Pan American Health Organization acknowledges that data from rural areas are often under-reported. Thus anecdotal information takes on heightened significance. Elissa Kleinman, a Harvard Medical School Sheldon Fellow who visited Dr. Filártiga in 1979, said that the problems of rural ill health are exacerbated by the indiscriminate use of phosphorus-containing insecticides over which the government exercises no controls. She argues that in the regions where toxic chemicals are used, they are widely believed to contribute to the high incidence of gastric enteritis, appendicitis, and spontaneous abortion. By any measure, the health situation in Paraguay is unsatisfactory because public financing of health services is insufficient to meet current needs, and because existing health establishments are unable to provide total population coverage. In short, the Paraguayan politics of public health yield bleak prospects for betterment.

The chief hospital serving the needs of the rural poor in Ybycuí is El Sanatorio la Esperanza, the Clinic of Hope, founded by Dr. Joel Filártiga in 1960. Dr. Filártiga says the facility:

> has become my life, an expression of my philosophy. I believe that all people have a basic human right to medical care and, given the reality that all but a handful of doctors refuse to leave the comforts of the cities to practice medicine in the countryside, it was the only decision I could make and still retain my integrity.

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25. Letter from Elissa Kleinman to Edmundo Vargas, Organization of American States (5 February 1979).

La Esperanza receives no government aid. It operates on the basis of Dr. Filártiga's volunteer work, with the assistance of his wife, Nidia, acting as nurse and with the part-time help of their three daughters. Until his death in 1976, Joel, Jr., who was then a high school student, acted as a driver and chauffeur at the Clinic. Patients often pay for medical services by stacking wood or by giving such goods as vegetables and chickens. Since the tragic day when the Filártigas' son was murdered, no charges have been levied on Thursdays as a way of honoring Joellito's memory. As this income is not sufficient to meet the expenses of the Clinic, fundraising is done internationally by the sale of Dr. Filártiga's artwork— which primarily consists of pen and ink drawings designed to symbolize human anguish connected with political irresponsibility.

Dr. Filártiga's art involves a combination of expressionism and surrealism described by the Asunción newspaper La Tribuna as “the pure and unmasked encounter with psychic pain.” The work is in the manner of the Mexican muralists Orozco and Siquieros. It speaks of the poverty and powerlessness of the peasants through such symbols as prison bars, ballot boxes with no slot, broken guitars, and the suffering faces of peasants. His sketches are exhibited in Europe, throughout Latin America, and in the United States. They are found in private collections as well as galleries and museums worldwide. The artist says that he has dedicated both his medicine and his art to the poor. But he says, “this combination of endeavors is seen as political because (in Paraguay) the structure of society inclines many to take advantage of the poor in order to get more profit.” Filártiga also says: “To do the opposite—to try to take what those people have to return it to the poor—it’s a matter that’s seen as subversive.”

In December 1975 and for two months thereafter, Dr. Filártiga went on a fundraising tour in Mexico and the United States. During the tour, he spoke about mindless repression of the peasants and harsh conditions of the rural poor in Paraguay. He noted that his art “is not designed to be beautiful but it is supposed to be true.” He asked for donations from the sale of his art for the Clinic of Hope. For example, on 1 February 1976, Leonard Nimoy (Mr. Spock of television “Star Trek” fame) lent his Los Angeles home for such a fundraising reception. It was organized to pay for the acquisition (from the University of California at Los Angeles Medical School) of medical equipment for Dr. Filártiga's operating room: a cardioscope and a defibrillator, the first such equipment introduced into Paraguayan rural medical practice. His trip was given considerable press coverage in the Asunción press.27

While Dr. Filártiga was away from Paraguay in early 1976 an event developed with fateful results for the Filártiga family. A group of Paraguayan guerrillas initially organized in Argentina, the Organización Políti-co-Militar

27. La Tribuna (21 December 1975), 3; Ultima Hora (16 December 1975), 10; Express (27 January 1976), 3.
Filartiga

(O.P.M.) surprised authorities by its successful infiltration through the border town of Posdas, Argentina. In March and April, confrontations between O.P.M. guerrillas and the Paraguayan police involved several shootouts with losses of life on both sides. A wave of ferocious repression resulted in hundreds of people being detained for their supposed involvement with the O.P.M. Moreover, according to the journal Latin America, President Stroessner took full advantage of the alleged participation of a Spanish Jesuit priest, Miguel Sanmarti Garcia, to step up the campaign against progressive sectors within the Catholic Church in general; the Catholic Agrarian League (Ligas Agrariás); and the Jesuits in particular, of whom eight were expelled from the country. The scope of police action was patently excessive in the view of a spokesman for the Protestant Friendship Mission (Disciples of Christ). After six members of their campesino project were arrested in 1976, their administrative head complained: “Apparently the government’s objective is to suppress any person or organization that strives to help those who live in miserable poverty.”

Speaking of events in 1976 and writing in the Jesuit magazine America, Alberto Cabral stated, “in mid-March, when the police first began receiving reports about the O.P.M., they were still attempting to gather information and identify their targets. Because of Dr. Filartiga’s notoriety as an outspoken critic of the regime, he and his family immediately came under suspicion.” Cabral concluded that Filartiga’s exhibition and lecture tour through California and Mexico in 1976 fueled government suspicion. “Furthermore, the family’s frequent trips to visit Mrs. Filartiga’s mother in Posadas, Argentina—the point from which guerrilla reinforcements reportedly were infiltrating—contributed toward making the Filartigas prime suspects.”

III. THE KILLING OF JOELITO

When a society such as Paraguay becomes politicized, nothing is neutral. Thus Dr. Joel Filartiga’s artwork, his clinic, his lecture tours, his work with the poor—all became suspect. Américo Peña-Irala, a neighbor of the Filartigas and police inspector of Asunción, took action. Whether Peña was cleared by the Chief of the Secret Police, Pastor Coronel, and the Paraguayan Minister of the Interior, Sabino Agosto Mantanaro, to kidnap the son of Dr. Filartiga remains a disputed matter. In any event, the kidnapping of Joelito was planned to take place while Dr. and Mrs. Filartiga were eighty miles away at La Esperanza, the clinic in Ybycuí. Supposedly, the scheme was

28. Latin America 10 (7 May 1976), 143.
designed to obtain information from Joelito regarding Dr. Filártiga in order to convict the physician of sedition.31

Late during the night of 29 March 1976, Américo Peña and three other police officials kidnapped Joelito from the Filártiga home in Asunción and took him to the police station (comisaría). There they tortured Joelito brutally for one and one-half hours as they questioned him about his father’s activities. The entire torture and interrogation session was tape recorded. However, no evidence against Dr. Filártiga was obtained; instead the recording carried Joelito’s voice pleading, “I do not know anything. Why are you doing this to me?”

Peña and the three other police beat and whipped the youth severely over his entire body. They also resorted to the use of high voltage electric shocks administered to Joelito through his fingertips and through a wire inserted in his penis. The electric shocks were ultimately increased to such a frequency and intensity that Joelito died of cardiac arrest. In the face of his unexpected death, Peña and the other officers panicked and attempted to disguise their deed by severing Joelito’s major arteries so that the body could not be embalmed and thus would require quick burial.

Paraguayan law excuses from punishment a “crime of passion” by a husband who kills another caught in adultery with his wife. To bring the killing of Joelito under this shield, the four policemen took the body to Peña’s own house (which was only two doors down the street from the Filártiga residence in Asunción). The police inspector supervised the placing of the corpse into the bed of the seventeen-year-old daughter—Rosario Villalba—of Peña’s mistress, Juana B. Villalba. Peña then contacted Rosario’s husband, Hugo Duarte, and told him to come to the Peña residence immediately. Pleading a toothache, Duarte left his work as a night clerk and arrived home only to be beaten by Peña and the other police. He was forced to agree to a fabricated story to the effect that he had found Joelito in bed with his wife and killed him in a fit of passion. Duarte was then arrested, and Dr. Hernán Molines, the Coroner, made out a false medical report supportive of the “crime of passion” theory. Judge Diógenes Martinez, who was later assigned to try the case, arrived at the house to legalize the falsified death certificate.

Four hours after Joelito was quietly kidnapped from the Filártiga house, his twenty-year-old sister, Dolly, was awakened at her home by two uniformed police officers from a nearby police station. She was taken to Peña’s house, where she was shown the whipped, slashed, and electric shocked corpse of her brother. In Dolly’s testimony:

They told me to be as quiet as possible because it was dawn. They also asked me to take away the body of my brother as soon as possible and bury it. To which I

31. The facts are set out in the Inter-American Commission, note 14 above, 26; the files on Case No. 2158 of the Inter-American Commission on Human Rights (Washington, D.C.); and Filártiga v. Pena, 630 F.2d 876 (2d Cir. 1980).
answered them that they should let me think; that I didn't know what to do. In
my desperation, I ran to the street, and I met Peña in the hall of the house. I asked
him, "Sir what have you done to my brother?" He answered me, "Shut up. Here
you have what you have been looking for and deserved." 32

Rosario, the supposed adultress, was arrested as a material witness, but
released on 7 April 1976. She then sent a note to Dr. Filartiga saying that she
wished to speak to him, but before a meeting could be arranged, she disap-
peared. Rosario Villalba has not been found since that time, although a
Filartiga cousin, Juan Alberto Filartiga, attempted to locate her. He too has
subsequently disappeared.

Dr. Joel Filartiga requested and obtained an independent autopsy from
three prominent Paraguayan physicians. They concluded that Joelito was
whipped and beaten in the commonly known execution style used by police
and that he died of cardiac arrest caused by electric shocks. "I thought the
most important thing was to document the facts," Dr. Filartiga said. As part of
the documentation, he took many photographs of the corpse.

Paraguayan law allows a private party, on leave of the court, to proceed
with a criminal suit in conjunction with the state, but with his/her own
lawyer and witnesses. The Filártigas brought such a suit to challenge the
government's version of Joelito's death—the "crime of passion" theory.
When Dr. Filartiga's attorney, Horacio Galeano Peronne asked that key
police officers be summoned, the lawyer was arrested. He was taken to the
central police headquarters where he was caged and shackled to a wall. 33
Inspector Peña arrived on the occasion, 30 September 1976, and threatened
to kill Galeano Perrone as well as members of the Filártiga family and friends
if they continued to press the lawsuit against him. Harassment tactics were
used further to reinforce the threat. Dr. Filártiga was threatened with a loss of
his medical license. Anonymous phone calls were frequent and frightening.
Mrs. Filártiga and her daughter were detained in jail for one day. Attorney
Galeano Perrone was disbarred. Finally, a Paraguayan court denied the
Filártiga request to file the suit.

Even though the Paraguayan legal process failed, the process of affecting
public opinion did not. 34 Before Joelito's funeral, the family decided upon
the unusual step of displaying the nude, wrecked body of the deceased for
public viewing. The outpouring of local sympathy for the Filártigas was
substantial, with two thousand people attending the funeral. Five thousand
color duplicates of a photo of Joelito's tortured corpse were circulated in
Paraguay and abroad. Pictures and documentation of the crime were sent to
Amnesty International in London. Human rights groups worldwide took an
interest in the case. The U.S. Embassy sponsored a widely publicized exhibi-

Peña, Civil Case No. 79-917 (E.D.N.Y.), at 15–16.
33. Helfeld and Wipfler, note 12 above, 133–35.
34. Cabral, note 30 above, 376–77.
IV. THE FILÁRTIGAS’ SEARCH FOR JUSTICE

By late 1977, the case of the politically motivated torture-murder of Joelito Filártiga had become a major international human rights issue. Under a barrage of criticism for human rights violations in Paraguay, reinforced by suspension of international loans to the country and protests by U.S. Ambassador Robert White, General Stroessner “retired” Inspector Peña from the police. Shortly thereafter, on 21 July 1978, Américo Peña, his mistress Juana B. Villalba, their son and her niece, using their real names, entered the United States. They claimed to be tourists en route to visit Disney World, but instead they went to Brooklyn, New York. There they lived until exiled Paraguayans and human rights groups, primarily the Council of Hemispheric Affairs, discovered Peña’s whereabouts. As a result, the U.S. Immigration and Naturalization Service arrested Peña and those with him, and charged him with overstaying their three-month visa.

Upon arraignment the day after their arrest, Peña, his mistress, son, and niece requested immediate voluntary deportation, and they were ordered deported within five days. But the Immigration and Naturalization Service obtained an order from U.S. District Court Judge Eugene H. Nickerson staying the deportation order to allow further investigation of Peña’s activities while in the United States. Dolly Filártiga, living in Washington, D.C., at the time and seeking political asylum in the United States, was joined by her father—then in New York—in an effort to use U.S. legal process to question Peña. As a result of the request to hold Peña, Judge Nickerson issued a temporary stay of the deportation order to allow the defendants to secure an attorney, to permit questioning by the Filártigas, and to give the Immigration and Naturalization Service an opportunity to review the circumstances surrounding Peña’s entry to the United States.

The Filártigas sought legal representation from Michael Maggio—an immigration attorney in Washington, working in conjunction with the Center for Constitutional Rights in New York. The legal strategy was the creation of Center lawyers Peter Weiss, Rhonda Copelon, and Jose Antonio Lugo. They intervened in the deportation proceeding to file a ten million dollar civil suit against Américo Peña under the little-used provision of the Judiciary Act of 1789. That law, the Alien Tort Statute, now codified as Title 28 of the United States Code, Section 1350, 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." 35

Peña's lawyers filed a motion to dismiss the Filártigas' alien tort action, denying that torture is a tort (personal wrong) in violation of the law of nations (international law). Peña claimed that the proper forum for such a hearing was Paraguay (invoking the doctrine of forum non conveniens) and describing as "mind-boggling" the notion that in the name of human rights a United States court could hold a man in custody on a civil matter. Américo Peña's attorney, Murray D. Brochin, said that there were no grounds to detain his client further and that the suit was simply an attempt to "propagandize against conditions in Paraguay." Peña's defense of forum non conveniens became more persuasive when, just before Judge Nickerson was to rule on the motion, the Paraguayan Supreme Court suddenly and unexpectedly reversed the lower court's ruling denying the Filártigas standing to bring their criminal action. The timing of the court action in Asunción, the circumstances surrounding it, and the ruling itself led to charges that it was politically inspired. In fact, the Filártiga suit was later dismissed in Paraguay.

After Judge Nickerson's stay was granted, a flurry of newspaper articles publicized the case. 36 Some journalists questioned Américo Peña's connections in the United States and Paraguay. The New York Times reported on Paraguayan government activities in the United States, as alleged by a Paraguayan refugee in New York. 37 Gilberto Olmedo-Sanchez claimed that he had been the object of death threats from Paraguayan government agents in New York who were angered by his role in identifying Peña in Brooklyn. The Council on Hemispheric Affairs issued a press release suggesting that there was something faulty about the granting of a visa to Peña in the first place and that the responsible U.S. Consul Officer, William Finnigan, should be queried. 38 The Atlanta Constitution 39 and the Los Angeles Times focused on questionable activity by U.S. officials in Paraguay. For example, Richard Alan White, a historian of Paraguay, presented this argument in a Times opinion editorial:

Peña is a suspected figure in a prostitution ring operating in the New York area. During the past several years, hundreds of young females, the majority from the rural Paraguayan town of Caraguatay, have entered the United States under visas that may have been obtained illegally from the U.S. consulate in

Asunción. . . . These women are induced into prostitution upon their arrival in New York by the Paraguayan ringleaders. In Paraguay, it is generally understood that Peña was among the privileged officials who shared in the profits from international prostitution and narcotics smuggling.40

Despite newspaper and television coverage of the Peña case and related sensational issues, and notwithstanding Carter Administration policy designed to promote international human rights, Judge Nickerson finally ruled in Peña's favor.41 He held the precedent constrained him to interpret the jurisdiction provisions of the Alien Tort Statute so as to preclude consideration of a foreign country's treatment of its own citizens. The ruling rested on recent cases dealing, not with human rights, but with unrelated claims.42 Nevertheless, the district court postponed Peña's deportation while the Filártigas unsuccessfully petitioned the United States Supreme Court for a stay of the deportation order. When the high court did not oblige, Judge Nickerson granted the motion to dismiss the case on 14 May 1979, acknowledging the strength of Peña's argument but leaving the door open for appeal.

The Filártigas filed notice that they would seek a review of Judge Nickerson's decision in the Second Circuit Court of Appeals. That court was quickly apprised that a number of amicus curiae briefs would be filed supporting the Filártiga position. They would challenge as anachronistic the perception that problems arising under the international law of human rights may not be dealt with by domestic courts.

Political scientists in the United States long ago discarded the notion that the judicial process is devoid of all politics.43 Although the charge is seldom heard in the United States—as it is in Paraguay—that the judiciary lacks independence, nevertheless it is generally conceded that in the United States subtler political considerations, involving no improprieties, are often at work. For example, the litigant in civil suits in the United States who enjoys the assistance (in the form of supporting briefs) of government and private groups has a significant advantage. International concern for the plight of the Filártigas translated into the filing of numerous briefs from agencies of government, prestigious human rights groups, and respected scholars. As appellants, the Filártigas were aided by an impressive array of attorneys from

43. Samuel Krislov, "The Amicus Brief: From Friendship to Advocacy," 72 Yale Law Journal 694 (1963); according to David Weissbrodt, the ruling of the appeals court "was probably very much influenced by an amicus curiae brief filed by the United States Departments of Justice and State, which urged the Court to recognize torture as a violation of customary international law." "U.S. Court of Appeals Rules in Pena Case," Matchbox (Amnesty International U.S.A.), November 1980, 2.
the Center for Constitutional Rights, the Department of Justice, the Department of State, Amnesty International, the International Human Rights Law Group, the Council on Hemispheric Affairs, the Washington Office on Latin America, the International League of Human Rights, and the Lawyers Committee for International Human Rights.

Moreover, the Filártigas submitted to the court of appeals the affidavits of several legal scholars to support the view that the law of nations prohibits torture. Richard Falk of Princeton University averred that "it is now beyond reasonable doubt that torture of a person held in detention that results in severe harm or death is a violation of the law of nations." Thomas Franck of New York University offered the argument that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Richard Lillich of the University of Virginia detailed the sources of authority for the proposition that officially perpetrated torture is a "violation of international law." Myres McDougal of Yale University stated that it has long been recognized that such internationally defined offenses as torture "virtually affect relations between states." 44

Argument in Filartiga v. Pena-Irala took place before Chief Justice Feinberg and Circuit Judges Kaufman and Kearse. Their historic decision came down on 30 June 1980. They unanimously held that officially sanctioned torture is a violation of international law. They therefore found that the Alien Tort Statute provided a basis for the exercise of federal jurisdiction in the wrongful death action brought by the Paraguayan plaintiffs against the Paraguayan defendant.

Because Judge Nickerson in the trial court had dismissed the Filártiga suit for lack of subject-matter jurisdiction, the threshold question for the court of appeals was whether the conduct alleged by the appellants violated the law of nations. 45 In his skillfully composed opinion, Judge Kaufman acknowledged the relevance to that question of the views of leading jurists and scholars. 46 He noted that torture has been consistently condemned by numerous international treaties, 47 including the American Convention of

45. Filartiga, 630 F.2d at 880. The opinion of the court stated:

[We conclude that official 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. . . . ] International law confers fundamental rights upon all people vis-à-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them.

630 F.2d at 884–85.
46. Ibid. at 883.
47. The court included Article 55 of the United Nations Charter in its analysis of treaties. The Charter is described by Judge Kaufman as a treaty binding the United States, and it provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.
Human Rights,48 the International Covenant on Civil and Political Rights,49 and the Universal Declaration of Human Rights.50 Torture is also renounced as an inhuman act in the Declaration on the Protection of All Persons from Being Subject to Torture.51 In that resolution of the United Nations General Assembly, torture is defined as “any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as intimidating him or other persons.” It also calls for redress and compensation for torture victims “in accordance with national law.” Judge Kaufman approvingly noted that these declarations are supposed to specify the obligations of member nations under the Charter of the United Nations.52

The United Nations Charter is a treaty to which both the United States and Paraguay adhere.53 Nevertheless, the court did not rely on the Charter to bring the Filartiga complaint within the treaty provision of the Alien Tort Statute. Rather, the court relied on the Charter and clarifying declarations as evidence of an expression of the evolving law of nations.54 The court acknowledged that “there is no universal agreement as to the precise extent of the ‘human rights and fundamental freedoms’ guaranteed to all by the Charter,” but “there is at present no dissent from the view that the guarantees include, at a bare minimum, the right to be free from torture.” The court ruled further: “This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights.”55

Having found human rights in customary international law, the court was positioned to broaden the reading previously given to the Alien Tort Statute in cases concerning a state’s treatment of its own citizens. These cases, which had inhibited Judge Nickerson, involved commercial matters,

Moreover, according to Article 56, all members of the United Nations “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” 630 F.2d at 881.


52. Filartiga, 630 F.2d at 883.

53. In addition to human rights commitments made in terms of adherence to principles of the United Nations Charter, both the United States and Paraguay claim to eschew torture by virtue of respective constitutional law; e.g., United States Constitution, Amendment VIII, forbidding “cruel and unusual punishment,” and the Constitution of Paraguay, Article 65, prohibiting use of “the death penalty . . . applied for political reasons,” and stating, “No one shall be subjected to torture or to cruel or inhuman treatment.”


55. Filartiga, 630 F.2d at 882.
not human rights. Such cases involving theft and fraud, while lamentable, did not satisfy the jurisdiction requirements of the Alien Tort Statute, but torture has been elevated to an offense against all humanity and a violation of customary international law which is a changing and evolving facet of the law of nations.

In the final paragraph of his opinion, Judge Kaufman employed memorable language which sensitively characterized the impetus behind the modern evolution of customary international law:

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. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind.

Since the court of appeals found that jurisdiction may properly be exercised over the Filartiga's claim, the action was remanded for further proceedings in the district court. But the defendant made no court appearance, and Peña's New York lawyers withdrew when their legal bill remained unpaid. In June 1981, Judge Nickerson entered a default judgment for the Filartigas. In February 1982, hearings to assess damages and to examine the ten million dollar claim of the Filartigas were held before Magistrate John Caden.

In these hearings, four medical experts—physicians and psychologists—presented affidavits on the effects of torture on family survivors. For example, Dr. Frederico Alodi concluded:

. . . both Dolly and Dr. Joel Filartiga complain of and manifest psychological and psychosomatic disturbances that affect their physical and mental health, their familiar, social and occupational performance in a severe and profound manner

56. For example, in Dreyfus v. Von Finck, the tort alleged was that the defendants unlawfully took advantage of the plaintiff by buying his property well below market prices when he was forced to emigrate from Nazi Germany. The court held that this kind of swindle did not violate the law of nations, noting that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." 534 F.2d 24 (2d Cir. 1976) at 31. But in Filartiga, the latter statement was repudiated as "clearly out of tune with current usage and practice of international law." Filartiga, 630 F.2d at 884.

57. Filartiga, 630 F.2d at 890. The opinion cited with approval The Paquette Habana, 175 U.S. 677, 700 (1900), commenting that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the law of nations of the world today." 630 F.2d at 881. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

and will, most probably, affect them for many years to come. It is also my considered opinion that their symptoms of physical and psychological ill health are compatible, in every way, with those manifested by individuals who were subjected to similar experiences, either directly or affecting the persons of close relatives in their Latin American countries in the past decade. It is finally my conclusion that those health and behavioral disturbances are intimately and causally related to the experiences they both underwent as close relatives of a victim of violence and as subjects of the profoundly distressing involvement in a police and legal investigation of the death of their relative, Joel Filártiga. 60

A Canadian psychiatrist, Dr. Allodi is the author of “The Psychiatric Effects in Children and Families of Victims of Political Persecution and Torture.” 61 In his sworn statement in the Filártiga case, Dr. Allodi concluded that damages awarded to Dolly and Dr. Joel Filártiga could not achieve restitution ad integrum — that is, they could not “make the victims whole” — but “symbolic and material compensation will help return to them a sense of trust in the justice and safety of the world, self-esteem and internal calm that is essential for the amelioration of the . . . symptoms of physical and psychological ill health.” 62 Similar conclusions were presented by Dr. Ana Deutsch, an Argentine political exile and a member of a medical group investigating the medical and psychological consequences of torture. 63

In the 1982 hearings, Dolly Filártiga and Dr. Joel Filártiga also testified. They offered poignant statements on the personal consequences for each of them resulting from Peña’s outrageous acts. 64 Dolly Filártiga testified that she had planned to study medicine, but after what had happened, “I think I will not be prepared to handle more pain.” Dr. Filártiga described the three occasions of his own past tortures at the hands of Paraguayan authorities, which he had provoked by bringing free health care and anti-government political views to his rural patients.

59. Affidavit of Dr. Frederico Allodi, Filartiga v. Pena, Civil Case No. 79-917 (E.D.N.Y. 1982) at 2. In an accompanying affidavit by Dr. Glenn Randall and Dr. Jose Quiroga (respectively the San Francisco and Los Angeles chairmen of Amnesty International Medical Groups), the expert findings state, “It is evident that members of the Filartiga family are also victims of Joelito’s torture and have suffered heavily. As victims they suffer in ways similar to the victim but not as a result of physical torture. Their suffering is psychological . . . more difficult to treat and less evident initially” than physical problems. Affidavits of Dr. Glenn Randall and Dr. Jose Quiroga, Filartiga v. Pena, Civil Case No. 79-917 (E.D.N.Y. 1982) at 8. Randall and Quiroga conclude:

In summary, the whole family has suffered since 1976 following Joelito’s death. From what we know, the suffering is characterized by recollection of traumatic events, disintegration of family ties, both biographically and emotionally, feelings of guilt, multiphasic complaints, reduced involvement with the external world, feelings of estrangement with other people, loss of interest in previously enjoyed social activities, sleep disorders and nightmares. These symptoms present in multiple members of the Filártiga family constitute the psychiatric diagnosis of Post-traumatic Stress Disorder.

Ibid., 15.


62. Affidavit of Dr. Deutsch, Filartiga v. Pena, Civil Case No. 79-917 (E.D.N.Y. 1982).

63. Transcript of Hearings before Magistrate Caden, note 32 above, 11.
The next witness was Jacobo Timerman, author of *Prisoner Without a Name, Cell Without a Number*. He said that in the Filártiga case, “torture is on trial.” He testified regarding its effects on the victim and on society at large. Timerman argued that once you have been tortured, torture is with you forever and that there is nothing you can do about it: “the moment you are tortured, and the days after torture, and the years after torture, they have changed your human condition. It is a biological change. . . . Your feelings are different.” The wrong done is the most destructive imaginable, because “in the loneliness of the tortured man, . . . there is nothing, nothing is left to you; not your body, not your mind, not your imagination, and not your dreams, absolutely nothing.” When torture is incorporated into a society, Timerman argued, “you haven’t changed society, you have changed . . . civilization.”

Former U.S. Ambassador to Paraguay Robert White was also called to offer his reflections on conditions in Paraguay. He testified that political torture is so “institutionalized” in Paraguay that “perfectly normal people get up and go to their jobs and their work is torture.” Asked whether the Filártigas could get justice in Paraguay, the Ambassador answered simply, “No, it’s impossible.” In reply to the question of whether international opinion provided the Filártigas some protection in Paraguay, he said, “the only thing Paraguay responds to are international pressures.” Ambassador White was further queried, “What role do you think the existence of civil remedies for the victims of torture, as we are here in this court for, might play in the overall effort to stop torture?” In a telling reply, Robert White testified:

> I think one example might illustrate this. After the case was decided in favor of Dr. Filártiga [by the Court of Appeals], one of the people closest to General Stroessner told me that I just had to do everything possible to get this decision reversed. They don’t really understand the independence of our court system here. And he stressed to me that no Paraguayan government figure would feel free to travel to the United States if this judgment was upheld because, you know, they would feel that they would be liable to arrest for just being in any state in the United States.

The U.S. Magistrate on 13 May 1983 issued his damage award recommendation, subject to *pro forma* approval by the district court. The figures are quite high: $200,000 to Joelito’s father and $175,000 to Joelito’s sister for their injury resulting from Peña’s torturing Joelito to death. In Paraguayan money, this is ninety million *Guarans*, which lawyers at the Center for Constitutional Rights believe to be the largest damage amount ever exacted against a Paraguayan national.

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65. Transcript, note 32 above, 78–79.
V. CONCLUSION

The Filártiga episode in Paraguay and later litigation in the United States are important for many reasons. First, the heroic example of the Filártiga family in undertaking humanitarian efforts on behalf of the public health needs of the poor involves a consciousness-raising process. It has had a salutary effect upon the Ybycuí peasantry. They and the residents of Asunción have been educated by Dr. Filártiga’s example, and that of his family, to their human rights and to the prospects for their solidarity. Dr. Filártiga said: “After Joelito died, a peasant told me — ‘You may not understand, Doctor, what is happening to you, because you are too close to it. But we do understand. Your son was killed, not because he was the son of Filártiga, but because he was the son of one serving us, the poor people. The punishment is not just for you, but it is also for us the poor’.”

Second, the example of the Filártiga family in “telling the world” of their human rights complaint demonstrates the efficacy of international public opinion. The painful and hazardous process of building international contact and cooperation with human rights groups helped the Filártigas in their task of “making the world understand.” The work of diverse groups was effective in explaining events in Paraguay. Such groups as Amnesty International, the International Commission of Jurists, the Council for Hemispheric Affairs, the Paraguayan Commission for the Defense of Human Rights, the International League for Human Rights, and the Inter-American Commission for Human Rights all helped in the mobilization of shame. In the light of the reports of such groups, Dr. Filártiga said that the family was consoled by the lesson that “the dead count when they leave a testimony.” He said that reports of such organizations have impressed upon Paraguayans the lesson that “the torturers are seen as criminals publicly judged.”

Third, the court of appeals decision represents a victory, not only for the Filártiga family but also for the many governmental and nongovernmental organizations which lent their fact-finding skills to scrutinize the problem of institutionalized torture in Paraguay and elsewhere. Such groups are sustained by an occasional moral victory. Several of them joined efforts in the multiple friend of the court briefs presenting research and analysis that discernibly influenced the judgment of the court of appeals.

Fourth, the ruling in Filártiga v. Pena “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” is a significant contribution to the growing weight of authority focusing on international standards of basic human rights. In this, the United States is by no means alone. In the period 1948 to 1973, the constitutions or other important laws of over 75 states either expressly referred to or clearly bor-

67. Interview, note 22 above.
rowed from the Universal Declaration of Human Rights. The Declaration has also been relied upon in a number of cases in domestic courts of various nations. In *Filartiga v. Pena*, the United States joined a growing number of countries whose courts have recognized that international law transcends sovereign boundaries to protect individuals from their own government officials.68

Finally, *Filartiga v. Pena* should have an important impact on the prospects for international human rights enforcement. International law and its implementation is based upon a horizontal power structure with no central enforcing authority. Compliance is the result of any given state’s internal motivation, desire for accommodation, need for reciprocity with other states, and—in the words of Thomas Jefferson—its “decent respect for the opinion of mankind.” Where the United States is concerned, the *Filartiga* ruling means that those who flagrantly disregard accepted norms of the international law of human rights should not expect refuge from justice in the United States and that, in appropriate cases, the doors of United States courts are open to the persecuted who find themselves shut out of their homeland. As if welcoming the opportunity to place the United States on the right side of social justice, Judge Kaufman concluded the *Filartiga v. Pena* opinion thus: “Our holding today giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”69 The unanimous Court of Appeals for the Second Circuit found that torture is a violation of international law, and the district court applied this rule to the allegations made by the Filártigas. Thus the issue was crystallized as one of the progressive application of international law in general and of the application of international law by national courts in particular. This development cannot help but encourage those such as Dr. Filártiga who courageously reject establishment-serving myths and frauds and those human rights groups which seek to widen the scope of protection for the individual against the abuse of power.

69. *Filartiga*, 630 F.2d at 890.
Dr. Joel Filártiga at the Clinic