CHAPTER 1

The Nature of International Law

International Law and International Relations provides a working knowledge of how international law functions in modern international politics. This chapter introduces international law, looking first a little at its long history, and then at two sample judicial decisions, *McCann* and *Filartiga*, that show how international law is, in the real world, made, adjudicated, and enforced.

When students think of "law," they usually think of domestic law with which international law is sometimes compared unfavorably. Domestic law (which international lawyers sometimes refer to as "municipal law") is ordinarily composed of rules legitimately made by legislatures in statutes or sometimes by judges in their case law; these rules are interpreted and applied by courts, and enforced by executives.

At first glance, international law seems to lack all of these elements. There is no unified international legislature, no generally authoritative international judiciary, and no effective international executive. Yet, whatever its theoretical ambiguities, international law has been practiced by states for centuries. Moreover, international law remains one of the principal tools by which nations order their relationships. Why, with all its faults, is international law so important? Let us briefly explore the foundations of modern international law.

A. THE HISTORY OF INTERNATIONAL LAW

MARK WESTON JANIS, INTERNATIONAL LAW

1–4 (6th ed. 2012)

The roots of international law run deep in history. In early religious and secular writings, there are many evidences of what we now know as international law; there are, for example, the detailed peace treaties and alliances concluded between the Jews and the Romans, Syrians, and Spartans. The Romans knew of a *jus gentium*, a law of nations, which Gaius, in the second century, saw as a law

"common to all men," a universal law that could be applied by Roman courts to foreigners when the specific law of their own nation was unknown and when Roman law was inapposite. In the seventeenth century, the Dutch jurist Hugo Grotius argued that the law of nations also established legal rules that bound the sovereign states of Europe, then just emerging from medieval society, in their relations with one another. Grotius' classic of 1625, *The Law of War and Peace*, is widely acknowledged, more than any other work, as founding the modern discipline of the law of nations, a subject that, in 1789, the English philosopher Jeremy Bentham renamed and refashioned as "international law." Nowadays, the terms *the law of nations* and *international law* are often used interchangeably.

At least since the end of the Thirty Years War in 1648, world politics has principally involved the relations of more or less independent sovereign states. An important part of international law has consequently had to do with the establishment of a set of mutually agreed-upon rules respecting the nature of these states and their fundamental rights and obligations *inter se*. If there is a single international legal principle underlying the modern state system, it probably is the one neatly framed by Montesquieu in 1748 and offered to Napoleon in 1806 by Talleyrand: "that nations ought to do to one another in peace, the most good, and in war, the least evil possible."

International law is sometimes conceived to be divided into public and private parts, the first concerning the legal relations of states, the second involving the law governing the foreign transactions of individuals and corporations. However, the public-private division of international law can be misleading. Many of the laws and processes traditionally within the ambit of public international law actually concern private, not public, parties, while much of the domain of private international law covers the transactions of public entities. Nonetheless, the terms *public* and *private* international law are highly popular and, in a rough kind of way, do compartmentalize legal rules addressing two problem areas: Public international law mostly concerns the political interactions of states; private international law relates to legal aspects of the international economy and conflicts and cooperation among national legal systems.

Few deny that the rules of international law actually influence state behavior. Even international law's most famous jurisprudential critic, John Austin, acknowledged in 1832 that international legal rules were effective. At the same time, however, he argued that, because there was no international sovereign to enforce it, international law could not be the same sort of positive law as that enacted by sovereign states for internal application:

> [T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

Just a few years later, in 1836, the United States diplomat Henry Wheaton, in the first great English-language treatise on international law, was already grappling with Austin's characterization of the rules governing international politics as being a form of mere "morality." Wheaton accepted Austin's view that international law's principal sanction was "the hazard of provoking the hostility of other communities," but contended that "[e]xperience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish the perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State." Unlike Austin, Wheaton found international law sufficiently law-like to justify calling it "law," a definitional outcome reached by generations of subsequent international lawyers.

Whether the international rules regulating interstate behavior are to be properly termed "legal" or "moral" is in truth a question that can only be answered after one has made more or less arbitrary definitions of what really constitutes "law" and "morality," a sometimes sterile exercise.[12] Suffice it to say at this early stage of our own discussion that there are a great many rules regulating international politics commonly referred to as "international law" and that these rules are usually, for one reason or another, observed in international practice. Moreover, there is no doubt that the norms of international law are frequently applied as rules of decision by law courts, domestic as well as international.

International Law? Note how the discipline of what we now call "international law" has changed its name over its two-thousand-year-old history. However named, the discipline has always fulfilled the same function: providing legal rules and process beyond those of a single state or nation. Newer terms are now sometimes employed: transnational law and global law, for example. Add to this the term in different languages. In French, for

[12] "The only intelligent way to deal with a verbal question like that concerning the definition of the word 'law' is to give up thinking and arguing about it." Williams, "International Law and the Controversy Concerning the Word 'Law,' " 22 *British Yearbook of International Law* 146, 163 (1945).

example, one finds *droit des gens* and *droit international*. This is a veritable Tower of Babel from which many confusions can result. Of course, the "babble" characterizes not only international law but all international relationships.

Efficacy. Why does international law work at all? The puzzler in the two cases below is that the decision of the international court, the European Court of Human Rights, is apparently much more efficacious than the judgment of the U.S. Second Circuit Court of Appeals. This seems to contradict expectations; one would think that domestic courts are more powerful than international courts. Keep an eye out for why the applicants in *McCann* and the plaintiffs in *Filartiga* bring their cases. Are they looking to international law for different sorts of results?

B. AN INTERNATIONAL LAW SAMPLER

The two cases that follow explore some of the different ways in which international law is actually made, applied, and enforced. The *McCann Case* illustrates an international legal rule made by a treaty, adjudicated by an international court, and enforced by a regional international legal system. The *Filartiga Case* shows a customary or perhaps fundamental international legal norm adjudicated by a municipal—*i.e.*, a domestic—court and enforced (or not) by the ordinary mechanisms of that domestic legal system.

Following short excerpts from each case, the text introduces issues about the rules, processes, actors, and domains of international law, topics that occupy us throughout the book. Some questions are also posed that may serve as good discussion points.

Facts, Law, and the Judicial Role. The excerpts from *McCann* are in two parts, first the facts, then the law. This is an ordinary way in which courts explain why they decide a case as they do. The facts are the incidents that have prompted one side, here the "applicants," family members of three deceased members of the Irish Republican Army, to sue the other side, here the "Government," the British government whose agents, special forces Army soldiers, killed the three IRA members in Gibraltar, a British dependency at the tip of the Hispanic Peninsula. The role of any court is to determine the facts, and then to interpret and apply the relevant law, here an article of the European Human Rights Convention, and finally to reach a decision.

MCCANN V. UNITED KINGDOM

European Court of Human Rights, Judgment of 27 September 1995,
Series A, No. 324, Application No. 18984/91 (1995)

The Facts

The case . . . originated in an application (no. 18984/91) against the United Kingdom of Great Britain and Northern Ireland lodged . . . by Ms. Margaret McCann, Mr. Daniel Farrell and Mr. John Savage, who are all Irish and United Kingdom citizens. They are representatives of the estates of Mr. Daniel McCann, Ms. Mairead Farrell and Mr. Sean Savage. . . .

Before 4 March 1988, and probably from at least the beginning of the year, the United Kingdom, Spanish and Gibraltar authorities were aware that the Provisional IRA (Irish Republican Army—"IRA") were planning a terrorist attack on Gibraltar. It appeared from the intelligence received and from observations made by the Gibraltar police that the target was to be the assembly area south of Ince's Hall where the Royal Anglican Regiment usually assembled to carry out the changing of the guard every Tuesday at 11.00 hours.

[On March 5, 1988, a] briefing by the representative of the Security Services included inter alia the following assessments:

> (a) the IRA intended to attack the changing of the guard ceremony in the assembly area outside Ince's Hall on the morning of Tuesday 8 March 1988;
>
> (b) [a group] of three would be sent to carry out the attack, consisting of Daniel McCann, Sean Savage and a third member, later positively identified as Mairead Farrell. McCann had been previously convicted and sentenced to two years' imprisonment for possession of explosives. Farrell had previously been convicted and sentenced to fourteen years' imprisonment for causing explosions. She was known during her time in prison to have been the acknowledged leader of the IRA wing of prisoners. Savage was described as an expert bomb-maker. Photographs were shown of the three suspects;
>
> (c) the three individuals were believed to be dangerous terrorists who would almost certainly be armed and who, if confronted by security forces, would be likely to use their weapons;
>
> (d) the attack would be by way of a car bomb. It was believed that the bomb would be brought across the border in a vehicle and that it would remain hidden inside the vehicle;

> (e) the possibility that a "blocking" car—i.e. a car not containing a bomb but parked in the assembly area in order to reserve a space for the car containing the bomb—would be used had been considered, but was thought unlikely. . . .

Various methods of detonation of the bomb were mentioned at the briefing[.] Use of a remote-control device was considered to be far more likely since it was safer from the point of view of the terrorist who could get away from the bomb before it exploded and was more controllable than a timer which once activated was virtually impossible to stop. . . .

At about 14.50 hours [on March 6], it was reported to the operations room that the suspects McCann and Farrell had met with a second man identified as the suspect Savage and the three were looking at a white Renault car in the car-park of the assembly area.

Witness H stated that the three suspects spent some considerable time staring across to where a car had been parked, as if, in his assessment, they were studying it to make sure it was absolutely right for the effect of the bomb. [Detective Constable] Viagas also witnessed the three suspects meeting in the area of the car-park, stating that all three turned and stared towards where the car was parked. He gave the time as about 14.55 hours. He stated that the Security Services made identification of all three at this moment.

At this moment, the possibility of effecting an arrest was considered. There were different recollections. [Deputy Commissioner] Colombo stated that he was asked whether he would hand over control to the military for the arrest but that he asked whether the suspects had been positively identified; he was told that there was 80% identification. Almost immediately the three suspects moved away from the car through the Southport Gate. He recalled that the movement of the three suspects towards the south gave rise to some discussion as to whether this indicated that the three suspects were on reconnaissance and might return for the car. It was for this reason that the decision was taken not to arrest at this point. . . .

The evidence at the inquest given by the soldiers and Police Officer R and DC Ullger was that the soldiers had practised arrest procedures on several occasions with the police before 6 March 1988. According to these rehearsals, the soldiers were to approach the suspects to within a close distance, cover the suspects with their pistols and shout "Stop. Police. Hands up." or words to that effect. They would then make the suspects lie on the ground with their arms away from their bodies until the police moved in to carry out a formal arrest. Further,

DC Ullger stated that special efforts had been made to identify a suitable place in Gibraltar for the terrorists to be held in custody following their arrest.

On reaching the junction of Smith Dorrien Avenue with Winston Churchill Avenue, the three suspects crossed the road and stopped on the other side talking. Officer R, observing, saw them appear to exchange newspapers. At this point, Soldiers C and D were approaching the junction from Smith Dorrien Avenue. Soldiers A and B emerging from Landport tunnel also saw the three suspects at the junction from their position where the pathway to the tunnel joined Corral Road.

As the soldiers converged on the junction, however, Savage split away from suspects McCann and Farrell turning south towards the Landport tunnel. McCann and Farrell continued north up the right-hand pavement of Winston Churchill Avenue.

Savage passed Soldiers A and B, brushing against the shoulder of B. Soldier B was about to turn to effect the arrest but A told him that they should continue towards suspects McCann and Farrell, knowing that C and D were in the area and that they would arrest Savage. Soldiers C and D, aware that A and B were following suspects McCann and Farrell, crossed over from Smith Dorrien Avenue and followed Savage. . . .

Soldiers A and B continued north up Winston Churchill Avenue after McCann and Farrell, walking at a brisk pace to close the distance. McCann was walking on the right of Farrell on the inside of the pavement. He was wearing white trousers and a white shirt, without any jacket. Farrell was dressed in a skirt and jacket and was carrying a large handbag.

When Soldier A was approximately ten metres (though maybe closer) behind McCann on the inside of the pavement, McCann looked back over his left shoulder. McCann appeared to look directly at A and the smile left his face, as if he had a realisation of who A was and that he was a threat.

Soldier A drew his pistol, intending to shout a warning to stop at the same time, though he was uncertain if words actually came out. McCann's hand moved suddenly and aggressively across the front of his body. A thought that he was going for the button to detonate the bomb and opened fire. He shot one round into McCann's back from a distance of three metres (though maybe it might have been closer). Out of the corner of his eye, A saw a movement by Farrell. Farrell had been walking on the left of McCann on the side of the pavement next to the road. A saw her make a half turn to the right towards McCann, grabbing for her handbag which was under her left arm. A thought that she was also going for a

button and shot one round into her back. He did not disagree when it was put to him that the forensic evidence suggested that he may have shot from a distance of three feet. Then A turned back to McCann and shot him once more in the body and twice in the head. A was not aware of B opening fire as this was happening. He fired a total of five shots.

Soldier B was approaching directly behind Farrell on the road side of the pavement. He was watching her. When they were three to four metres away and closing, he saw in his peripheral vision that McCann turned his head to look over his shoulder. He heard what he presumed was a shout from A which he thought was the start of the arrest process. At almost the same instant, there was a firing to his right. Simultaneously, Farrell made a sharp movement to her right, drawing the bag which she had under her left arm across her body. He could not see her hands or the bag and feared that she was going for the button. He opened fire on Farrell. He deemed that McCann was in a threatening position and was unable to see his hands and switched fire to McCann. Then he turned back to Farrell and continued firing until he was certain that she was no longer a threat, namely, her hands away from her body. He fired a total of seven shots.

Both soldiers denied that Farrell or McCann made any attempt to surrender with their hands up in the air or that they fired at the two suspects when they were lying on the ground. At the inquest, Soldier A stated expressly that his intention had been to kill McCann "to stop him becoming a threat and detonating that bomb." . . .

Inside Farrell's handbag was found a key ring with two keys and a tag bearing a registration number MA9317AF. This information was passed at about 17.00 hours to the Spanish police who commenced a search for the car on the suspicion that it might contain explosives. During the night of 6 to 7 March, the Spanish police found a red Ford Fiesta with that registration number in La Linea. Inside the car were found keys for another car, registration number MA2732AJ, with a rental agreement indicating that the car had been rented at 10.00 hours on 6 March by Katharine Smith, the name on the passport carried in Farrell's handbag.

At about 18.00 hours on 8 March, a Ford Fiesta car with registration number MA2732AJ was discovered in a basement car-park in Marbella. It was opened by the Malaga bomb-disposal squad and found to contain an explosive device in the boot concealed in the spare-wheel compartment. The device consisted of five packages of Semtex explosive (altogether 64 kg) to which were attached four detonators and around which were packed 200 rounds of ammunition. There were two timers marked 10 hrs 45 mins and 11 hrs 15 mins respectively. The device was not primed or connected.

In the report compiled by the Spanish police on the device dated Madrid 27 March 1988, it was concluded that there was a double activating system to ensure explosion even if one of the timers failed; the explosive was hidden in the spare-wheel space to avoid detection on passing the Spanish/Gibraltarian customs; the quantity of explosive and use of cartridges as shrapnel indicated the terrorists were aiming for greatest effect; and that it was believed that the device was set to explode at the time of the military parade on 8 March 1988. . . .

An inquest by the Gibraltar Coroner into the killings was opened on 6 September 1988. The families of the deceased (which included the applicants) were represented, as were the SAS [Special Air Service] soldiers and the United Kingdom Government. The inquest was presided over by the Coroner, who sat with a jury chosen from the local population. . . .

The jury returned verdicts of lawful killing by a majority of nine to two.

The applicants were dissatisfied with these verdicts and commenced actions in the High Court of Justice in Northern Ireland against the Ministry of Defence for the loss and damage suffered by the estate of each deceased as a result of their death. The statements of claim were served on 1 March 1990.

[The applicant's claims concerning the events in Gibraltar were disallowed, on the grounds that governing U.K. law excluded proceedings against the British government unless those proceedings arose "in respect of Her Majesty's Government in the United Kingdom." The United Kingdom includes Northern Ireland but not Gibraltar.]

On 28 April 1988 Thames Television broadcast its documentary entitled "Death on the Rock," during which a reconstruction was made of the alleged surveillance of the terrorists' car by the Spanish police and witnesses to the shootings described what they had seen, including allegations that McCann and Farrell had been shot while on the ground. A statement by an anonymous witness was read out to the effect that Savage had been shot by a man who had his foot on his chest. The Independent Broadcasting Authority had rejected a request made by the Foreign and Commonwealth Secretary to postpone the programme until after the holding of the inquest into the deaths. . . .

The applicants lodged their application with the [European Human Rights] Commission on 14 August 1991. They complained that the killings of Daniel McCann, Mairead Farrell and Sean Savage by members of the SAS (Special Air Service) constituted a violation of Article 2 of the [European Human Rights] Convention.

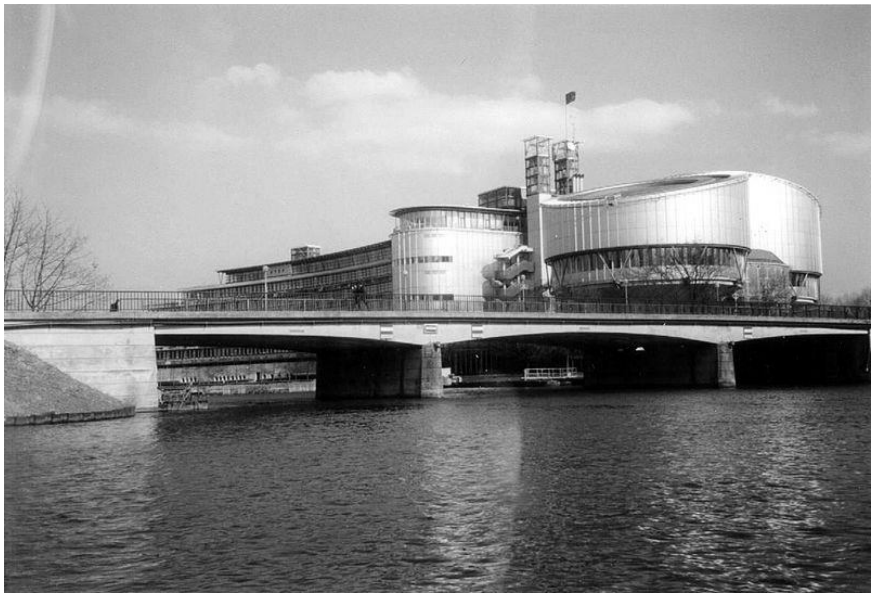
Exhaustion of Domestic Remedies. It is an ordinary rule of international law that one cannot get relief from an international tribunal, like the European Court of Human Rights, until one has "exhausted domestic remedies." Exhaustion respects state sovereignty. Until one has tried all realistic avenues for domestic relief of an alleged violation of international law, one is barred from going to international legal process. Otherwise, the international court will usually dismiss an applicant's case. Can you see how the applicants in *McCann* did all they could to get relief from the British legal system?

European Court of Human Rights. The European Court of Human Rights in Strasbourg, France, can be described as an "international court" in at least two ways. Constitutionally, the Court is established by a treaty: the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Substantively, the rules the Court applies are international law: human rights norms made and protected by the same European Human Rights Convention. As of 2017, some 47 European countries were parties to the European Human Rights Convention and subject to Strasbourg's jurisdiction. More about treaties is found in Chapter 2, and we consider international adjudication in Chapter 4. The structure and substance of European human rights law are more fully explained in Chapter 7.

The Nature of Treaties. As you read the law part of *McCann*, note that the applicable substantive rule is drawn from the 1950 European Human Rights Convention: Article 2 protecting the right to life. The ordinary explanation of the legally binding effect of an international agreement is that a sovereign state may exercise its sovereignty not only by making domestic law but also by making international law. Hence, Article 2 obliges the United Kingdom in international law because of the U.K.'s own consent.

The European Convention on Human Rights thus resembles an international contract among states, but it may also be said to be like an international statute, providing a generally applicable set of rules for all its member states. This helps explain why states are considered to be not only the legislators of international law but also subjects of international law. Of course, since states are sovereign, multilateral treaties, unlike municipal statutes, do not bind non-parties. We consider the nature of the sovereign state in Chapter 3.

Figure 1.A
European Court of Human Rights, Strasbourg, France



McCann v. United Kingdom
The Law

In 3 September 1993 the Commission declared the applicants' complaint admissible.

In its report of 4 March 1994 (Article 31), it expressed the opinion that there had been no violation of Article 2 (eleven votes to six). . . .

The Government submitted that the deprivations of life to which the applications related were justified under Article 2 para. 2(a) as resulting from the use of force which was no more than absolutely necessary in defence of the people of Gibraltar from unlawful violence and the Court was invited to find that the facts disclosed no breach of Article 2 of the Convention in respect of any of the three deceased.

The applicants submitted that the Government have not shown beyond reasonable doubt that the planning and execution of the operation was in accordance with Article 2 para. 2 of the Convention. Accordingly, the killings were not absolutely necessary within the meaning of this provision.

The applicants alleged that the killing of Mr. McCann, Ms. Farrell and Mr. Savage by members of the security forces constituted a violation of Article 2 of the Convention which reads:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.

It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention—indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed. . . .

While accepting that the Convention institutions are not in any formal sense bound by the decisions of the inquest jury, the Government submitted that the verdicts were of central importance to any subsequent examination of the deaths of the deceased. Accordingly, the Court should give substantial weight to the verdicts of the jury in the absence of any indication that those verdicts were perverse or ones which no reasonable tribunal of fact could have reached. In this connection, the jury was uniquely well-placed to assess the circumstances surrounding the shootings. The members of the jury heard and saw each of the seventy-nine witnesses giving evidence, including extensive cross-examination. With that benefit they were able to assess the credibility and probative value of the witnesses' testimony. The Government pointed out that the jury also heard the submissions of the various parties, including those of the lawyers representing the deceased. . . .

As regards the appreciation of these facts from the standpoint of Article 2, the Court observes that the jury had the benefit of listening to the witnesses first hand, observing their demeanor and assessing the probative value of their testimony.

Nevertheless, it must be borne in mind that the jury's finding was limited to a decision of lawful killing and, as is normally the case, did not provide reasons for the conclusion that it reached. In addition, the focus of concern of the inquest proceedings and the standard applied by the jury was whether the killings by the soldiers were reasonably justified in the circumstances as opposed to whether they were "absolutely necessary" under Article 2 para. 2 in the sense developed above.

Against this background, the Court must make its own assessment whether the facts as established by the Commission disclose a violation of Article 2 of the Convention. . . .

The applicants alleged that there had been a premeditated plan to kill the deceased. While conceding that there was no evidence of a direct order from the highest authorities in the Ministry of Defence, they claimed that there was strong circumstantial evidence in support of their allegation. They suggested that a plot to kill could be achieved by other means such as hints and innuendoes, coupled with the choice of a military unit like the SAS which, as indicated by the evidence given by their members at the inquest, was trained to neutralize a target by shooting to kill. Supplying false information of the sort that was actually given to the soldiers in this case would render a fatal shooting likely. The use of the SAS was, in itself, evidence that the killing was intended. . . .

The Commission concluded that there was no evidence to support the applicant's claim of a premeditated plot to kill the suspects.

The Court observes that it would need to have convincing evidence before it could conclude that there was a premeditated plan, in the sense developed by the applicants.

In the light of its own examination of the material before it, the Court does not find it established that there was an execution plot at the highest level of command in the Ministry of Defence or in the Government, or that Soldiers A, B, C and D had been so encouraged or instructed by the superior officers who had briefed them prior to the operation, or indeed that they had decided on their own initiative to kill the suspects irrespective of the existence of any justification for the use of lethal force and in disobedience to the arrest instructions they had received. Nor is there evidence that there was an implicit encouragement by the authorities or hints and innuendoes to execute the three suspects. . . .

The Court therefore rejects as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement amongst those involved in the operation.

The applicants [also] submitted that it would be wrong for the Court, as the Commission had done, to limit its assessment to the question of the possible justification of the soldiers who actually killed the suspects. It must examine the liability of the Government for all aspects of the operation. Indeed, the soldiers may well have been acquitted at a criminal trial if they could have shown that they honestly believed the ungrounded and false information they were given.

. . . In sum, [the applicants] submitted that the killings came about as a result of incompetence and negligence in the planning and conduct of the anti-terrorist operation to arrest the suspects as well as a failure to maintain a proper balance between the need to meet the threat posed and the right to life of the suspect. . . .

The Commission considered that, given the soldiers' perception of the risk to the lives of the people of Gibraltar, the shooting of the three suspects could be regarded as absolutely necessary for the legitimate aim of the defence of others from unlawful violence. It also concluded that, having regard to the possibility that the suspects had brought in a car bomb which, if detonated, would have occasioned the loss of many lives and the possibility that the suspects could have been able to detonate it when confronted by the soldiers, the planning and execution of the operation by the authorities did not disclose any deliberate design or lack of proper care which might have rendered the use of lethal force disproportionate to the aim of saving lives.

[The Court concludes that "the actions of the soldiers do not, in themselves, give rise to a violation of" Article 2, and then turns to the question "whether the anti-terrorist operation as a whole was controlled and organised in a manner which respected the requirements of Article 2."]

It may be questioned why the three suspects were not arrested at the border immediately on their arrival in Gibraltar and why, as emerged from the evidence given by Inspector Ullger, the decision was taken not to prevent them from entering Gibraltar if they were believed to be on a bombing mission. Having had advance warning of the terrorists' intentions it would certainly have been possible for the authorities to have mounted an arrest operation. Although surprised at the early arrival of the three suspects, they had a surveillance team at the border and an arrest group nearby. In addition, the Security Services and the Spanish authorities had photographs of the three suspects, knew their names as well as their aliases and would have known what passports to look for.

On this issue, the Government submitted that at that moment there might not have been sufficient evidence to warrant the detention and trial of the suspects. Moreover, to release them, having alerted them to the authorities' state of awareness but leaving them or others free to try again, would obviously increase the risks. Nor could the authorities be sure that those three were the only terrorists they had to deal with or of the manner in which it was proposed to carry out the bombing.

The Court confines itself to observing in this respect that the danger to the population of Gibraltar—which is at the heart of the Government's submissions in this case—in not preventing their entry must be considered to outweigh the possible consequences of having insufficient evidence to warrant their detention and trial. In its view, either the authorities knew that there was no bomb in the car—which the Court has already discounted—or there was a serious miscalculation by those responsible for controlling the operation. As a result, the scene was set in which the fatal shooting, given the intelligence assessments which had been made, was a foreseeable possibility if not a likelihood. The decision not to stop the three terrorists from entering Gibraltar is thus a relevant factor to take into account under this head. . . .

Although detailed investigation at the inquest into the training received by the soldiers was prevented by the public interest certificates which had been issued, it is not clear whether they had been trained or instructed to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest.

Their reflex action in this vital respect lacks the degree of caution in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the legal responsibilities of the individual officer in the light of conditions prevailing at the moment of engagement.

This failure by the authorities also suggests a lack of appropriate care in the control and organisation of the arrest operation.

. . . In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three

terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2(a) of the Convention.

Accordingly, the Court finds that there has been a breach of Article 2 of the Convention. . . .

FOR THESE REASONS, THE COURT

1. Holds by ten votes to nine that there has been a violation of Article 2 of the Convention;

2. Holds unanimously that the United Kingdom is to pay to the applicants, within three months, £38,700 for costs and expenses incurred in the Strasbourg proceedings, less 37,731 French francs to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;

3. Dismisses unanimously the applicants' claim for damages;

4. Dismisses unanimously the applicants' claim for costs and expenses incurred in the Gibraltar inquest;

5. Dismisses unanimously the remainder of the claims for just satisfaction.

JOINT DISSENTING OPINION OF JUDGES
RYSSDAL, BERNHARDT, THOR VILHJALSSON,
GÖLCÜKLÜ, PALM PEKKANEN, SIR JOHN
FREELAND, BAKA AND JAMBREK

We are unable to subscribe to the opinion of a majority of our colleagues that there has been a violation of Article 2 of the Convention in this case.

As to the section dealing with the application of Article 2 to the facts of the case, we fully concur in rejecting as unsubstantiated the applicants' allegations that the killing of the three suspects was premeditated or the product of a tacit agreement among those involved in the operation.

We also agree with the conclusion . . . that the actions of the four soldiers who carried out the shootings do not, in themselves, give rise to a violation of Article 2. It is rightly accepted that those soldiers honestly believed, in the light of the information which they had been given, that it was necessary to act as they did in order to prevent the suspects from detonating a bomb and causing serious loss of life: the actions which they took were thus perceived by them as absolutely necessary in order to safeguard innocent lives.

We disagree, however, with the evaluation made by the majority of the way in which the control and organisation of the operation were carried out by the authorities. It is that evaluation which, crucially, leads to the finding of violation.

We recall at the outset that the events in this case were examined at the domestic level by an inquest held in Gibraltar over a period of nineteen days between 6 and 30 September 1988. The jury, after hearing the evidence of seventy-nine witnesses (including the soldiers, police officers and surveillance personnel involved in the operation and also pathologists, forensic scientists and experts on the detonation of explosive devices), and after being addressed by the Coroner in respect of the applicable domestic law, reached by a majority of nine to two a verdict of lawful killing. The circumstances were subsequently investigated in depth and evaluated by the Commission, which found in its report, by a majority of eleven to six, that there had been no violation of the Convention.

The finding of the inquest, as a domestic tribunal operating under the relevant domestic law, is not of itself determinative of the Convention issues before the Court. But, having regard to the crucial importance in this case of a proper appreciation of the facts and to the advantage undeniably enjoyed by the jury in having observed the demeanour of the witnesses when giving their evidence under examination and cross-examination, its significance should certainly not be underestimated. Similarly, the Commission's establishment and evaluation of the facts is not conclusive for the Court; but it would be mistaken for the Court, at yet one further remove from the evidence as given by the witnesses, to fail to give due weight to the report of the Commission, the body which is primarily charged under the Convention with the finding of facts and which has, of course, great experience in the discharge of that task.

[The dissenting judges disagree with the legal evaluations of the Court about the alleged failures of the United Kingdom and conclude:]

The accusation of a breach by a state of its obligation under Article 2 of the Convention to protect the right to life is of the utmost seriousness. For the reasons given above, the evaluation in . . . the judgment seems to us to fall well short of substantiating the finding that there has been a breach of the Article in this case. We ourselves follow the reasoning and conclusion of the Commission in its comprehensive, painstaking and notably realistic report. Like the Commission, we are satisfied that no failings have been shown in the organisation and control of the operation by the authorities which could justify a conclusion that force was used against the suspects disproportionately to the purpose of defending innocent persons from unlawful violence. We consider that the use of lethal force in this case, however regrettable the need to resort to such force may be, did not exceed

what was, in the circumstances as known at the time, "absolutely necessary" for that purpose and did not amount to a breach by the United Kingdom of its obligations under the Convention.

McCann *and the Court of Public Opinion*. When the British government, then the Conservative government of John Major, complied with the *McCann* judgment and paid the sums ordered by the European Court of Human Rights, it was condemned in the British media. The *Daily Mail*, for example, gave the payment its main headline: "£40,000 PRESENT FOR IRA FAMILIES." The front-page story began as follows: "The Government handed a Christmas gift of nearly £40,000 to relatives of three IRA terrorists." The article said that members of the House of Commons "branded the decision 'appalling' and 'unthinkable' " and that the "[f]amilies of IRA victims were also horrified." *Daily Mail* (London), Dec. 27, 1995, at 1. The *Times* took a more nuanced position, noting that "[o]nly certain aspects of the [Gibraltar] operation have been condemned in this judgment," but still remarking that the "cost of denying the IRA the status of an army is to swallow hard when a continental court wags its finger." *The Times* (London), Sept. 28, 1995, at 21.

The Efficacy of International Law. The British government was originally reluctant to pay the *McCann* judgment. The Prime Minister "had hinted that the Gibraltar case and other setbacks suffered by the United Kingdom before the European Court might cause it to withdraw from the convention." John Cary Sims, "Compliance Without Remands: The Experience under the European Convention on Human Rights," 36 *Arizona State Law Journal* 639, 650 (2004). Why in the end did the U.K. government satisfy the Strasbourg Court's judgment? What "sanction" could have been applied against the U.K. if the government had failed to comply with the ruling? Why should a sovereign state like the United Kingdom voluntarily comply with an international court judgment like *McCann*? What would the United Kingdom lose if it were to be expelled from other European institutions for failure to comply with decisions of the European Court of Human Rights? Could the United Kingdom expect other states to comply with the Convention if it repudiated the Court's judgment? Would repudiation spoil the U.K.'s reputation and make it more difficult for the government to conclude treaties in the future?

The many European countries that are parties to the European Convention on Human Rights have their own domestic legal rules and processes protecting human rights. Why should they also enter into an

international legal system establishing European rules about human rights and setting up European institutions to enforce those rules?

Domestic Courts and International Law. Perhaps surprisingly, the great proportion of international law judgments are made, not by international courts like the European Court of Human Rights, but by domestic courts. There are, of course, thousands of domestic courts, and many of them have the authority to interpret and apply the rules of international law. Below in *Filartiga* we watch one such court, the U.S. Court of Appeals for the Second Circuit, interpret a rule of customary international law based on state practice. The rule it expounds was deemed so important that the Second Circuit hinted that what may be at issue is a fundamental legal norm, more powerful than either a customary or a treaty rule.

FILARTIGA V. PENA-IRALA

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

IRVING R. KAUFMAN, CIRCUIT JUDGE:

Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations. Under the Articles of Confederation, the several states had interpreted and applied this body of doctrine as a part of their common law, but with the founding of the "more perfect Union" of 1789, the law of nations became preeminently a federal concern.

Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), *codified at* 28 U.S.C. § 1350. Construing this rarely-invoked provision, we hold 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. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.

The appellants, plaintiffs below, are citizens of the Republic of Paraguay. Dr. Joel Filartiga, a physician, describes himself as a longstanding opponent of the government of President Alfredo Stroessner, which has held power in Paraguay

since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa, and has since applied for permanent political asylum. The Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. Because the district court dismissed the action for want of subject matter jurisdiction, we must accept as true the allegations contained in the Filartigas' complaint and affidavits for purposes of this appeal.

The appellants contend that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. Later that day, the police brought Dolly Filartiga to Pena's home where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled, horrified, from the house, Pena followed after her shouting, "Here you have what you have been looking for so long and what you deserve. Now shut up." The Filartigas claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Shortly thereafter, Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.

During the course of the Paraguayan criminal proceeding, which is apparently still pending after four years, another man, Hugo Duarte, confessed to the murder. Duarte, who was a member of the Pena household, claimed that he had discovered his wife and Joelito *in flagrante delicto*, and that the crime was one of passion. The Filartigas have submitted a photograph of Joelito's corpse showing injuries they believe refute this claim. Dolly Filartiga, moreover, has stated that she will offer evidence of three independent autopsies demonstrating that her brother's death "was the result of professional methods of torture." Despite his confession, Duarte, we are told, has never been convicted or sentenced in connection with the crime.

In July of 1978, Pena sold his house in Paraguay and entered the United States under a visitor's visa. He was accompanied by Juana Bautista Fernandez Villalba, who had lived with him in Paraguay. The couple remained in the United States beyond the term of their visas, and were living in Brooklyn, New York, when Dolly Filartiga, who was then living in Washington, D.C., learned of their presence. Acting on information provided by Dolly the Immigration and Naturalization Service arrested Pena and his companion, both of whom were

subsequently ordered deported on April 5, 1979 following a hearing. They had then resided in the United States for more than nine months.

Almost immediately, Dolly caused Pena to be served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation. The complaint alleged that Pena had wrongfully caused Joelito's death by torture and sought compensatory and punitive damages of $10,000,000. The Filartigas also sought to enjoin Pena's deportation to ensure his availability for testimony at trial. The cause of action is stated as arising under "wrongful death statutes; the U.N. Charter, the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations," as well as 28 U.S.C. § 1350, Article II, sec. 2 and the Supremacy Clause of the U.S. Constitution.

. . . The Filartigas submitted the affidavits of a number of distinguished international legal scholars, who stated unanimously that the law of nations prohibits absolutely the use of torture as alleged in the complaint.[4] Pena, in support of his motion to dismiss on the ground of *forum non conveniens*, submitted the affidavit of his Paraguayan counsel, Jose Emilio Gorostiaga, who averred that Paraguayan law provides a full and adequate civil remedy for the wrong alleged. Dr. Filartiga has not commenced such an action, however, believing that further resort to the courts of his own country would be futile. . . .

The district court continued the stay of deportation for forty-eight hours while appellants applied for further stays. These applications were denied by a panel of this Court on May 22, 1979, and by the Supreme Court two days later. Shortly thereafter, Pena and his companion returned to Paraguay.

Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only,

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[4] Richard Falk, the Albert G. Milbank Professor of International Law and Practice at Princeton University, and a former Vice President of the American Society of International Law, avers that, in his judgment, "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, professor of international law at New York University and Director of the New York University Center for International Studies, offers his opinion that torture has now been rejected by virtually all nations, although it was once commonly used to extract confessions. Richard Lillich, the Howard W. Smith Professor of Law at the University of Virginia School of Law, concludes, after a lengthy review of the authorities, that officially perpetrated torture is "a violation of international law (formerly called the law of nations)." Finally, Myres McDougal, a former Sterling Professor of Law at the Yale Law School, and a past President of the American Society of International Law, states that torture is an offense against the law of nations, and that "it has long been recognized that such offenses vitally affect relations between states."

committed in violation of the law of nations or a treaty of the United States." Since appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820); *Lopes v. Reederei Richard Schroder*, 225 F.Supp. 292, 295 (E.D.Pa.1963). In *Smith*, a statute proscribing "the crime of piracy [on the high seas] as defined by the law of nations," 3 Stat. 510(a) (1819), was held sufficiently determinate in meaning to afford the basis for a death sentence. The *Smith* Court discovered among the works of Lord Bacon, Grotius, Bochard and other commentators a genuine consensus that rendered the crime "sufficiently and constitutionally defined." *Smith*, *supra*, 18 U.S. (5 Wheat.) at 162.

The Paquete Habana, 175 U.S. 677 (1900), reaffirmed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 700. Modern international sources confirm the propriety of this approach. . . .

The United Nations Charter (a treaty of the United States, *see* 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. 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.

Id. Art. 55. And further:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Id. Art. 56.

While this broad mandate has been held not to be wholly self-executing, *Hitai v. Immigration and Naturalization Service*, 343 F.2d 466, 468 (2d Cir. 1965), this observation alone does not end our inquiry. For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217(III)(A) (Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture."[10] The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law." G.A.Res. 2625 (XXV) (Oct. 24, 1970).

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc. A/1034 (1975)[.] The Declaration expressly prohibits any state from permitting the dastardly and totally inhuman act of torture. Torture, in turn, 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." The Declaration goes on to provide that "[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law." This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly. Nayar, "Human Rights: The United Nations and United States Foreign Policy," 19 *Harv. Int'l L.J.* 813, 816 n.18 (1978).

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[10] Eighteen nations have incorporated the Universal Declaration into their own constitutions. 48 *Revue Internationale de Droit Penal* Nos. 3 & 4, at 211 (1977).

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Sohn, "A Short History of United Nations Documents on Human Rights," in *"The United Nations and Human Rights," 18th Report of the Commission* (Commission to Study the Organization of Peace ed. 1968). Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/cn.4/1/610 (1962) (memorandum of Office of Legal Affairs, U.N. Secretariat). Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'nonbinding pronouncement,' but is rather an authoritative statement of the international community." E. Schwelb, *Human Rights and the International Community* 70 (1964). Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." 34 U.N. ESCOR, *supra.* Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law. Nayar, *supra*, at 816–17; Waldock, "Human Rights in Contemporary International Law and the Significance of the European Convention," *Int'l & Comp. L.Q.*, Supp. Publ. No. 11 at 15 (1965).

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. *Smith*, *supra*, 18 U.S. (5 Wheat.) at 160–61. The international consensus surrounding torture has found expression in numerous international treaties and accords. *E.g.*, *American Convention on Human Rights*, Art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/II 23, doc. 21, rev. 2 (English ed., 1975) ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights, U.N. General Assembly Res. 2200 (XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211 (*semble*). The substance of these international agreements is reflected in modern municipal—*i.e.* national—law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of

over fifty-five nations, including both the United States and Paraguay. Our State Department reports a general recognition of this principle:

> There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. . . . There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity.

Department of State, *Country Reports on Human Rights for 1979*, published as Joint Comm. Print, House Comm. on Foreign Affairs, and Senate Comm. on Foreign Relations, 96th Cong. 2d Sess. (Feb. 4, 1980), Introduction at 1. We have been directed to no assertion by any contemporary state of a right to torture its own or another nation's citizens. Indeed, United States diplomatic contacts confirm the universal abhorrence with which torture is viewed:

> In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture.[15]

Memorandum of the United States as *Amicus Curiae* at 16 n.34.

Having examined the sources from which customary international law is derived—the usage of nations, judicial opinions and the works of jurists[16]—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. Accordingly, we must conclude that the dictum in *Dreyfus v. Von Finck*, [534 F.2d 24, 31 (2d Cir.), *cert. denied,* 429 U.S. 835 (1976)], to the effect that "violations of international law do not occur when the aggrieved parties are nationals of the acting state," is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as

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[15] The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law. As one commentator has put it, "The best evidence for the existence of international law is that every actual State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law." J. Brierly, *The Outlook for International Law* 4–5 (Oxford 1944).

[16] *See also Ireland v. United Kingdom*, Judgment of Jan. 18, 1978 (European Court of Human Rights), *summarized in* [1978] Yearbook, European Convention on Human Rights 602 (Council of Europe) (holding that Britain's subjection of prisoners to sleep deprivation, hooding, exposure to hissing noise, reduced diet and standing against a wall for hours was "inhuman and degrading," but not "torture" within meaning of European Convention on Human Rights).

well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-á-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. . . .

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. 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. 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.

Individuals as Subjects of International Law. *Filartiga* involved international human rights claims of Paraguayan citizens against an official of the government of Paraguay. *McCann* concerned individuals' international human rights claims against the U.K. government. Why in principle and practice should either the Paraguayan or U.K. government be subject to international law rules or process with respect to complaints by their own or foreign nationals?

J.L. Brierly in his classic British introduction to international law defined the discipline "as the body of rules and principles of action which are binding upon civilized states in their relations with one another." J.L. Brierly, *The Law of Nations* 1 (4th ed. 1949). How well does Brierly's definition describe the law the rules of which were actually applied in *Filartiga* and *McCann*? How might this definition be reformulated in the light of these two cases where individual rights in international law were in issue? More about individual rights under international law is in Chapter 7.

States as Subjects of International Legal Process. In *McCann*, the United Kingdom was subject to the jurisdiction of the European Court of Human Rights because it had ratified an international convention formally and explicitly accepting the jurisdiction of the Court. The U.K. government had agreed that the dispute could go to the Court for judgment. In *Filartiga* why should Paraguayan government officials be subject to the jurisdiction of United States federal courts in New York? If it appeared unlikely that the government of Paraguay would permit the Filartigas to sue in Paraguayan courts, would it be likely that the Paraguayan courts would respect or enforce a U.S. judgment in favor of the Filartigas?

Perspectives on Litigating International Human Rights Law. Each of the participants in *Filartiga* had a particular perspective on the case. Why did the Filartigas sue in a U.S. court? In some cases it was possible for litigants like the Filartigas to win significant monetary damages to redress violations of international law. Professor Murphy pointed out that at one time in Alien Tort Claims Act litigation "the chances for a successful civil suit were substantially greater than those for a successful criminal prosecution." John F. Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution," 12 *Harvard Human Rights Journal* 1, 47 (1999). So too for claims against "perpetrators of international terrorism." John F. Murphy, "Civil Lawsuits as a Legal Response to International Terrorism," in *Civil Litigation Against Terrorism* 37, 44 (John Norton Moore ed. 2004). Probably, the Filartigas' battle was more about political goals and public recognition of their cause than actually to win monetary damages. Roberts B. Owen, the Legal Adviser to the U.S. Department of State at the time of the case, viewed Dr. Filartiga as "one of the leading political opponents of the present [Paraguayan] regime." Roberts B. Owen, "Address at the Annual Dinner of the American Branch of the International Law Association, the Princeton Club, New York City, November 14, 1980," *Proceedings and Committee Reports of the American Branch of the International Law Association 1981–1982*, at 14.

Owen also described how lawyers for the U.S. government were divided about what side to take in *Filartiga*, some feeling that there was "a consensus that customary international law now imposes upon every government an obligation to refrain from torture" and others concerned that "our courts and our government would gradually become self-appointed policemen for the world." Finally, "after much soul-searching and debate," the U.S. government chose to file its *amicus* brief for the plaintiff's position, Owen agreeing "that it is a good thing for the U.S. courts to be available to provide remedies for

persons aggrieved by violations of internationally protected rights." *Id.* at 16. When the U.S. government fails to take foreign opinion into account, the United States can lose some of its ability to influence world politics. See Joseph S. Nye, Jr., "The Decline of America's Soft Power: Why Washington Should Worry," 83 *Foreign Affairs*, May/June 2004, at 16.

Over and above his judgment, Judge Kaufman had strong views about the case. He authored an article on *Filartiga* in which he wrote that "the decision breaks new ground in the body of law governing torture." Irving R. Kaufman, "A Legal Remedy for International Torture?," *New York Times Magazine*, Nov. 9, 1980, at 44. Several years later he chose *Filartiga* to conclude an article about his judicial career. Irving R. Kaufman, "The Anatomy of Decisionmaking," 53 *Fordham Law Review* 1, 20–22 (1984). *Filartiga* has been recognized as a "landmark legal precedent." Beth Stephens, "*Filartiga v. Peña-Irala*: From Family Tragedy to Human Rights Accountability," 37 *Rutgers Law Journal* 623 (2006). The case "triggered a sea change in international human rights litigation." Harold Hongju Koh, "*Filartiga v. Peña-Irala*: Judicial Internationalization into Domestic Law of the Customary International Law Norm Against Torture," in *International Law Stories* 45, 46 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds. 2007).

The lawyers who brought the *Filartiga* case hoped for just this result. They explained that they turned to the Alien Tort Claims Act, "a little-used 200-year old statute," in their search for a way to give lawyers "the opportunity to establish that officials who violate the rights of their own citizens could be brought to justice in U.S. courts." After *Filartiga*, their goal "was to bring more cases, obtain more circuit court opinions in our favor and make the *Filartiga* principle unassailable." They plainly acknowledged that they were "political lawyers, [wanting] to use the *Filartiga* precedent to fight those who were violating human rights." Michael Ratner & Beth Stephens, "The Center for Constitutional Rights: Using Law and the *Filartiga* Principle in the Fight for Human Rights," in American Civil Liberties Union, *International Civil Liberties Report*, Dec. 1993, at 29. For an excellent account of the efforts made by the attorneys in *Filartiga*, see William J. Aceves, *The Anatomy of Torture: A Documentary History of* Filartiga v. Pena-Irala (2007). In general, for the relation between municipal courts and international law, see Chapter 5.

The Fate of Filartiga. On its facts, would *Filartiga* be decided the same way today? The first significant holding of the Supreme Court on the Alien Tort Claims Act, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), seemed to preserve a *Filartiga*-like cause of action. However, a second Supreme Court ATCA

judgment, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 12 (2013), raised doubts about whether the territorial linkages of a case like *Filartiga* would nowadays satisfy the Court's presumption against the extraterritorial application of a U.S. statute. We consider both *Sosa* and *Kiobel* and their implications in Chapter 5.

The Nature of Customary International Law. Whatever the eventual outcome of the Supreme Court's test about the extraterritorial reach of the Alien Tort Claims Act, *Filartiga* remains an excellent introduction to the nature of customary international law. In theory, at least, customary international law is developed as a result of the actual practice of states. If the Paraguayan government and other governments do actually torture their own citizens, how can there be a rule of customary international law proscribing such practice? Is the court in *Filartiga* truly applying customary international law, or is it perhaps finding and applying rules drawn from some sort of fundamental international law, an international human rights law analogous to municipal constitutional guarantees of human rights?

Note the diverse evidences of international law employed by the *Filartiga* court in deciding that international law prohibits torture. Did the court give any one kind of evidence primacy over the others? Did some evidences seem more or less persuasive? Did the judgment demonstrate that Paraguay has consented to the rule prohibiting torture or only that the community of nations generally supports such a rule? Chapter 2 further explores customary international law and the various non-consensual sources of international law, such as *jus cogens*.

The Efficacy of International Law. Although one might assume that national courts, like the U.S. federal courts, are usually more efficacious than international courts, here the expectation was reversed in practice. Though the decision of the international court in *McCann* was respected, the decisions of the national courts in *Filartiga* were not. On remand, the district court imposed a judgment for $10,385,364 against Pena-Irala in order "to reflect adherence to the world community's proscription of torture and to attempt to deter its practice," 577 F.Supp. 860, 867 (E.D.N.Y.1984), but these damages were never paid.

Nonetheless, *Filartiga* had considerable effect as a judicial precedent, spawning many subsequent cases in U.S. courts. The jurisdiction of the Alien Tort Claims Act grew to reach not only individual actors, but also governments and private corporations. Plaintiffs included non-governmental organizations as well as individuals. Moreover, courts in other countries, including Spain, the Netherlands, and the United Kingdom, followed in *Filartiga*'s wake. Association of the Bar of the City of New York, Panel, "The Making of *Filartiga v. Peña*: The

Alien Tort Claims Act After Twenty-Five Years," 9 *New York City Law Review* 249, 267–73 (2006).