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Defining *Filartiga*: Characterizing International Torture Claims in United States Courts

James Paul George*

I. Introduction

A. Scope

On March 29, 1976, Paraguayan police abducted seventeen-year-old Joelito Filartiga from his parents' home just outside Asuncion. He died sometime later that day from a combination of beatings and electrical shocks and burns. Joelito's offense was being the son of Dr. Joel Filartiga, a physician who was himself tortured and imprisoned three times for his open opposition to President Alfredo Stroessner.

Since the Nuremberg trials and the attendant worldwide reaction to Nazi atrocities, the world has taken an increasing interest in preventing government torture. Whenever legal fictions such as national borders and other sovereignty concepts have acted as barriers to torture prevention, the world has responded, slowly and incrementally, with new legal fictions to overcome those barriers. A recent case in a United States federal court, *Filartiga v. Pena-Irala*,\(^1\) is a significant new increment toward the prevention of torture and more generally the international protection of human rights. *Filartiga* holds that torture, long prohibited by virtually all nations' laws and several international conventions and declarations, is now prohibited by customary international law. The case further provides for jurisdiction in a disinterested forum for individual torture claims.

Along with *Filartiga*'s promise are many problematic issues: the jurisdictional theory,\(^2\) the validity of international torture norms,\(^3\)

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

choice of law, and the real value of such lawsuits. Threaded among these problems is a more fundamental question pertaining to the nature of this action—what kind of lawsuit is Filartiga? It is a claim under customary international law brought in a United States federal court. The claim is based on events which occurred in Paraguay for the death of a Paraguayan at the hands of a Paraguayan official. Because of these unusual elements, the Filartiga action has been called many things: an international action, an action under federal common law, a transitory tort, a dedoublement fonctionnel action, an instance of universal jurisdiction, and an example of protective jurisdiction.

Filartiga cannot be all of these things. Some are mutually exclusive. Others are potential complements, such as the international action and federal common law, or the transitory tort and universal jurisdiction. Although these labels address different aspects of the Filartiga action, they are all interrelated. Each has legal implications for Filartiga's jurisdiction, choice of law, or both. It is therefore necessary to characterize—or define—the Filartiga action.

Defining Filartiga is more than an academic exercise for an already concluded case—there is a practical purpose. Filartiga-type claims are likely to recur in the future because of the following circumstances:

1. Filartiga involves an act of torture by a mid-to-high-ranking

3. See supra note 2.
4. See infra notes 44-50 and accompanying text.
5. Questions on Filartiga's value to the human rights movement follow two major themes: skepticism that such lawsuits have any positive impact because the remedies arguably cannot be enforced (these comments tend to be conversational and not the product of scholarly work), and that Filartiga-type litigation will produce more bad than good vis-à-vis foreign policy. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 823-27 (D.C. Cir. 1984) (Robb, J., concurring).
6. These terms are defined and analyzed infra notes 53-63 and accompanying text.
7. See infra text accompanying notes 147-48.
8. For example, transitory tort refers to the situs of the occurrence and has implications for jurisdiction and choice of law. Universal jurisdiction refers to international law's jurisdictional grant to states for certain offenses, providing personal jurisdiction but having no implications for choice of law.

Throughout the analysis of Filartiga, various jurisdictional and choice of law implications which arise from certain characterizations or definitions will be noted. These jurisdictional and choice of law comments, however, are merely cursory and are based solely on an examination of Filartiga and the legal theory of a right to sue. A proper choice of law analysis should also consider various interests of the international system, the United States forum, the situs of the delict, and the parties involved.

9. “Define” as used here means to “characterize” as that term is used in conflict of laws. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7 (1971) [hereinafter cited as CONFLICT RESTATEMENT]. Although “characterize” is the term of art, the word “define” will be used because most of this Article is devoted to defining labels being applied to Filartiga, and because “define” is more cognizable to those readers not well versed in a conflict of laws analysis.
foreign government official—the Inspector General of Police in Paraguay. While government torture in the United States is most commonly committed by low-ranking police officers, the perpetrator of torture incidents in many foreign countries is likely to be a mid-to-high-ranking official. Examples include Nazi torturers and more recently, Argentine military leaders. (These two examples are for illustration—the reader can no doubt think of others.) Involvement of important government officials in torture seems particularly likely where political suppression is the goal. This is because suppression of political opponents and dissidents does not originate with low-ranking police officers.

(2) Many mid-to-high-ranking government officials who commit torture are well paid (even where graft is not involved), and many travel internationally, though not necessarily to the United States. While travelling on government matters they may be immune from Filartiga-type jurisdiction. But when travelling privately they may be subject to service of process, especially if their presence in the forum is more than momentary.

It may be possible to extend Filartiga-type jurisdiction to other cases, such as claims against governments. Regardless of whether Filartiga-type claims could be successfully brought against a government, however, they are likely to recur in the case of a foreign government official who is in the United States on nondiplomatic status. That official would be subject to jurisdiction for torture claims in the Second Circuit, and eventually in other federal circuits.

Thus, Filartiga is the paradigm for studying private torture claims against foreign officials in the United States. As the paradigm, the Filartiga action must be succinctly defined. This will assist inquiries into its judicial jurisdiction and choice of law, and it will make Filartiga-type cases more understandable and therefore more acceptable to critics. This discussion is limited to the assertion of personal jurisdiction over a foreign official for a private torture claim brought in the United States. Although this analysis is focused narrowly on Filartiga, it is designed to enhance understanding of future torture claims as well.

B. Definitions

Filartiga I\(^9\) refers to the Second Circuit's jurisdictional opinion. Filartiga II\(^1\) refers to the district court's damages opinion. References simply to Filartiga will designate the lawsuit in general, or a

10. Filartiga I, 630 F.2d 876 (2d Cir. 1980).
specific portion such as the district court's initial dismissal for lack of jurisdiction.

"United States" is used instead of "America." "United States courts" refers to all courts in the United States, both federal and state. Specific references to federal courts will be identified as such.

"State" means "a territorial unit with a distinct general body of law." Thus, New York, Paraguay, and the United States are all states. Synonyms are nation and nation-state, but they will generally be avoided in favor of "state."

"International law" means public international law, or "the law of nations," that is, the law regulating relations between states, or regulating the singular conduct of states in particular areas such as human rights. International law in this Article does not include private international law, the latter being synonymous with conflicts of law.

"Civil" means non-criminal, as in civil remedies or civil actions in the English common-law sense. When references are made to the legal system known as the civil law system, specific states such as France or Germany will be mentioned, or there will be additional clarifying language.

"Lex delicti" means the law of the state in which the wrong occurred. "Lex fori" means the law of the forum state. "Torture" is any act by which severe pain or suffering, whether physical or

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12. CONFLICT RESTATEMENT, supra note 9, § 3 and comments following. The new Tentative Draft of the Restatement (Revised) of Foreign Relations Law defines "state" as "an entity which has a defined territory and permanent population, under control of a government, and which engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 210 (Tent. Draft No. 2, 1981). See also Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881 [hereinafter cited as 1933 Convention]. Only the CONFLICT RESTATEMENT defines "state" so as to include each component of a federal-state system; e.g., Texas is a "state" under the CONFLICT RESTATEMENT definition, but not under the international law definition as stated in the RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW and the 1933 Convention, supra.

The international law definition is arguably more appropriate to this discussion. Any international torture claim would be based either on international law per se, or the law of one or more national systems, and not on the law of a federal component (e.g., New York) that lacks the capacity to engage in foreign relations. But because choice of law analyses customarily define "state" legal systems as including New York and Texas, the CONFLICT RESTATEMENT analysis will comply.

13. "International law," as used in this Restatement, deals with the conduct of states and of international organizations, and with their relations with persons, whether natural or juridical." RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 101 (Tent. Draft No. 1, 1980).

One casebook defines international law as "the body of 'rules which are considered legally binding by states with each other; or 'the principles which are in force between all independent nations.'" L. HENKIN, R. PUGH, O. SCHACHTER & H. Smit, INTERNATIONAL LAW: CASES AND MATERIALS LVII (1980) [hereinafter cited as HENKIN, P. S. & S.].

mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from his or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons.15

II. Filartiga and the Private Enforcement of Torture Claims

A. Human Rights Background

The years following the Second World War have seen an ever increasing demand for internationally standardized human rights. This demand has resulted in promulgation of international conventions underscoring particular rights,16 as well as such general acknowledgement as the United Nations Charter's guarantee of "basic human rights and fundamental freedoms."17 While the popular mandate for international human rights is clear, the implementation of these rights is less certain.

One of the major roadblocks to implementation is the absence of a true international judicial structure.18 Commentators have urged that various state court systems be used for international human rights claims when it is possible to obtain personal jurisdiction.19

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17. U.N. CHARTER art. 1, para. 3. Additionally, the Charter's preamble states, "We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ." Id. at preamble.
18. The International Court of Justice at the Hague has jurisdiction to decide disputes between nations, based generally on the ad hoc consent of the disputing nations. Nations have, however, submitted to compulsory jurisdiction by treaty. See I. BROWNLE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 716-28 (3d ed. 1979) [hereinafter cited as BROWNLE]. The United Nations has established various administrative procedures for investigating alleged human rights violations. See Cassese, Two United Nations Procedures for the Implementation of Human Rights—The Role that Lawyers Can Play Therein, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, (J. Tuttle rev. ed. 1978); Van Boven, Human Rights Fora at the United Nations, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE, (J. Tuttle rev. ed. 1978) (there are also regional human rights tribunals such as the European Court of Human Rights). See BROWNLE, supra, at 574-76.
the United States, however, courts have hesitated or refused to recognize international human rights as actionable law. Unsuccessful attempts to litigate international human rights claims in United States courts have prompted comments such as the one made by Professor Richard Lillich in a 1978 speech to the American Bar Association:

Although the Sei Fujii case, now over a quarter of a century old, held that the human rights provisions of the United Nations Charter were not self-executing in that they 'do not purport to impose legal obligations on the individual member


20. In the United States, for example, federal courts have generally refused to accept the various international declarations and covenants on human rights as enforceable law. Cases not sustaining jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 (1982) (Filartiga's jurisdictional base), include Lopes v. Reederer Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) (holding that negligence is not a violation of international law); accord Damaskinos v. Societa Navigacion Interamericana S.A., Panama, 255 F. Supp. 919 (S.D.N.Y. 1966) (unsafe working conditions, unseaworthiness of vessel not violations of the law of nations); Abiodun v. Martin Oil Service, 475 F.2d 142 (7th Cir. 1973) (breach of obligation to train plaintiffs as executives not a violation of international law); Khedival Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960) (§ 1350 did not grant jurisdiction to enjoin picketing by United States seamen since international law recognized no universal right to unimpeded access to harbors); Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976) (confiscation of property on racial grounds and subsequent repudiation of settlement was not a violation of international law); IIIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975) (cause of action for fraud, conversion, and corporate waste disallowed because the Bible's Eighth Commandment "thou shalt not steal" is not a part of international law). In Tel-Oren v. Libyan Arab Republic, 517 F. Supp. 542 (D.D.C. 1981), jurisdiction was denied on multiple grounds, principally for failure to allege facts connecting defendants to the offense. The district court took the opportunity to issue strong dicta against Filartiga.

The Tel-Oren dismissal was recently affirmed. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984). However, each of the three circuit judges offered a separate opinion, with Judge Edwards strongly supporting the notion of § 1350 torture litigation, but voting for dismissal of the Tel-Oren complaint for failing to allege facts sufficient for jurisdiction. Judge Bork concurred in the dismissal, but on the ground that no private right of action exists for violations of international human rights law. Judge Robb also concurred in the dismissal, but believed the entire area of international human rights law is non-justiciable in United States courts for political reasons. Jurisdiction was also denied in Sanchez v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), an action seeking to vindicate international human rights for people allegedly injured by the actions of United States officials and their agents in Nicaragua. In Jafari v. Iran, 539 F. Supp. 209 (N.D. Ill. 1982), the court denied jurisdiction in a claim for expropriated property in Iran, deeming that international law did not prohibit a state's expropriation of its own nationals' property. Jurisdiction in Akbar v. New York Magazine Co., 490 F. Supp. 26 (D.D.C. 1980), was denied because plaintiffs' libel claim did not fall under any international norm of United States treaty, as required by the Alien Tort Statute.

Cases sustaining jurisdiction under the Alien Tort Statute include Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (restitution of wartime neutral's cargo which was on board Spanish ship seized as war prize); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody award upheld because defendant's falsification of the child's passport in child snatching attempt violated international law); Siderman v. Argentina, No. 82-1772 (C.D. Cal.) (Sept. 28, 1984).

But see Nguyen Da Yen v. Kissenger, 528 F.2d 1194 (9th Cir. 1975) (seizure of children in Vietnam and subsequent transportation to United States was "apparently a tort under international law . . .", but the case was inadequately briefed and possibly lacked an indispensable party). See Blum and Steinhardt, Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala, 22 Harv. Int'l L.J. 53, 55 nn.8-10 (1980) [hereinafter cited as Blum and Steinhardt].
nations or to create rights in private persons,' numerous attempts have been made over the years to invoke that Charter, the Universal Declaration of Human Rights, and other international legal instruments in domestic court cases.

While generally unsuccessful, these imaginative efforts, unique in the annals of United States legal history, someday may bear fruit if domestic courts can be convinced to rethink their traditional attitudes and adopt a more enlightened approach toward international human rights claims.

Proponents of Lillich's view argue for enforcement of human rights norms in United States courts under two theories. First, they argue that international law is part of United States federal common law. Therefore, a United States forum could fairly adjudicate both law and fact despite the tribunal's distance from the alleged offense and its unfamiliarity with the alien culture. Second, and more broadly, some human rights advocates argue that United States federal courts and the higher courts of other nations compose the judicial branch of an international legal order and have a duty to implement international human rights law regardless of its status as part of their domestic law. This latter theory is commonly called the dedoublement fonctionnel concept, credited to the German scholar Georges Scelle. Both of these arguments have generally failed in the United States, at least until 1979.

Shortly after Lillich's speech, however, Dolly Filartiga filed an action in federal court for her brother's alleged torture death at the hands of another Paraguayan who was then living in Brooklyn. The Second Circuit's recognition that her claim under international law was litigable in the United States signaled a notable exception to prior United States practice. It may, in fact, mark the "rethink(ing) of traditional attitudes and adopt(ing) of a more enlightened approach toward international human rights claims" that Professor Lillich called for.

Although Filartiga was only recently decided on the merits (after its 1980 remand), it has already generated numerous law review articles, news accounts, and is discussed in the recently published third tentative draft of the Restatement (Revised) of Foreign Rela-

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21. Lillich, supra note 19.
22. See generally supra note 19.
23. See Falk, supra note 19.
24. See infra notes 172-77 and accompanying text.
tions. Although much of the legal commentary has focused on the jurisdictional analysis, many comment-worthy issues arose after the jurisdictional decision. Most notable is the choice of law question: what law should a domestic court apply to the merits of a torture claim invoked under international law? The following brief account of Filartiga's jurisdictional litigation (Filartiga I) depicts this choice of law problem, both as it was resolved in Filartiga and as it will be faced in future litigation.

B. The Filartiga Case

1. The Facts.—Dr. Joel Filartiga is a physician who runs a medical clinic in a rural area near Asuncion, Paraguay. He is also a long-time political dissident who opposes Paraguay's President, General Alfredo Stroessner. Because of his political activity, Dr. Filartiga and his family have been harrassed for years. Dr. Filartiga himself was tortured and imprisoned three times in the 1960's. The repression was stepped up in March, 1976, when Paraguayan police took Dr. Filartiga's seventeen-year-old son, Joelito, from the Filartiga home and tortured him until he died.

Amerigo Norberto Pena-Irala was Inspector General of Police in Asuncion at the time of Joelito's death, and, according to the Filartigas, is the man who killed him. The Filartigas contend that Pena's guilt and his bold abuse of authority are shown by the way in which he had the Filartigas' then-teenage daughter, Dolly, brought to his home on the same day her brother disappeared. Pena showed her Joelito's mutilated body and shouted after her as she ran in horror, "Here you have what you have been looking for so long and what you deserve. Now shut up." According to investigators from the Organization of American States and Amnesty International, Pena is notorious for his acts of torture and murder on behalf of General Stroessner's government.

On the basis of Dolly Filartiga's observation of Joelito's body in

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27. Restatement (Revised) of Foreign Relations Law § 702 reporters' note 5; id. § 703 reporters' note 7 (Tent. Draft No. 3, 1982); id. § 428 reporters' note 4 (Tent. Draft No. 4, 1983).
28. General Stroessner has been President of Paraguay since 1954, and has continued the practice of repeatedly suspending the national constitution under the cloak of a continuing state of emergency. The Organization of American States (O.A.S.) and Amnesty International report that Stroessner's regime is one of the worst in Latin America for human rights violations. See, e.g., Report on the Situation of Human Rights in Paraguay, Organization of American States (1978).
29. Appellant's Opening Brief at 2, Filartiga I, 630 F.2d 876 (2d Cir. 1980).
30. Filartiga I, 630 F.2d at 878. Reports from Amnesty International and O.A.S. state that "Pena and three other policemen beat, whipped, and administered high voltage electric shocks that killed [Joelito]." N.Y. Times, supra note 26.
31. See generally N.Y. Times, supra note 26 (references to Amnesty International and O.A.S. reports).
Pena's home (the apparent site of the torture), and additional evidence, the Filartigas filed a criminal complaint against Pena and the police for Joelito's death. During the ensuing investigation, one Hugo Duarte asserted that he had killed Joelito after catching him in flagrante delicto with Duarte's wife. The Filartigas argue that Duarte's confession is a ruse conceived by Pena to cover his own guilt; Duarte's mother is Pena's live-in mistress, and autopsy reports show that Joelito died of torture-induced injuries inconsistent with Duarte's version of the killing. According to the Filartigas, their pursuit of a local remedy was further hampered when their attorney was arrested, shackled, threatened with death, and disbarred without cause for his connection with the Filartigas. After losing their attorney, the Filartigas continued to pursue the complaint pro se by challenging the Duarte confession and other findings concerning Joelito's death. The local remedies proved to be hopeless. Paraguay has since dropped the criminal investigation and dismissed the complaint.

Two years after Joelito's death, Pena sold his home in Paraguay and came to the United States on a visitor's visa—a move that the Filartigas contend was caused by the growing Paraguayan public outcry over Joelito's death and other atrocities allegedly committed by Pena. Seeking to vindicate her brother's death, Dolly Filartiga followed Pena to the United States. Upon learning that Pena was living in Brooklyn on an expired visa, she reported him to the Immigration and Naturalization Service. Pena was arrested, and on April 5, 1979, ordered deported.

Before Pena could be deported, Dolly Filartiga filed a civil complaint against him in the United States District Court in Brooklyn. She sought damages and other relief for her brother's death as well as an injunction preventing Pena's deportation during the litigation. The theory of her action was that Pena had violated international human rights law by torturing and killing Joelito. She argued that the court had subject matter jurisdiction under the Alien Tort Statute which provides jurisdiction for "any civil action by an alien for a tort only, in violation of the law of nations or a treaty of the United

32. The Second Circuit Filartiga opinion reported that Duarte "has never been convicted or sentenced in connection with the crime." Filartiga I, 630 F.2d at 878. But further testimony by Dr. Filartiga at the damages hearing on February 12, 1982, indicated that Dr. Filartiga believed that Duarte would not have been charged in any event, partly because Paraguayan law allows a husband to kill his wife, her lover, or both after catching them in an act of adultery. Paraguayan law does not allow the same defense for a wife.

33. Testimony of Dr. Filartiga and Dolly Filartiga, Filartiga Damages Hearing (E.D.N.Y.) (Feb. 12, 1982).

34. Filartiga I, 630 F.2d at 878.

35. Interview with plaintiffs' attorney, Rhonda Copelon, in New York City (June 5, 1983).

36. Filartiga I, 630 F.2d at 879. See also N.Y. Times, Apr. 6, 1979, at B4, col. 2.
Pena moved to dismiss, asserting a lack of subject matter jurisdiction and *forum non conveniens*. He prevailed on the jurisdictional challenge. The district court found that Pena's alleged acts did not amount to a violation of international law—a finding based solely on prior unsuccessful human rights cases, and not on a de novo examination of international law. Pending their appeal of the jurisdiction questions, the Filartigas tried to have Pena's deportation further enjoined. Their attempts failed and Pena, to his relief, was allowed to leave the United States.

2. The Second Circuit's Jurisdictional Ruling—Filartiga I.—Although it had denied the Filartigas' motion to stay Pena's deportation, the Second Circuit put life back into the lawsuit after considering the merits of subject matter jurisdiction. The court based its finding of jurisdiction on a framework of international law and federal common law embraced in the Alien Tort Statute (section 1350), a United States jurisdictional statute passed by the First Congress and rarely used since.

The court began its analysis under section 1350 by noting that the Filartigas were not invoking rights under a United States treaty. Accordingly, the primary question was whether international law itself prohibits torture. Succeeding questions necessary for the Filartigas' allegations to fall within section 1350 were: (1) whether the fact that the victim and the defendant were both Paraguayan defeated the international status of the offense; and (2) whether under the Constitution an international law claim may be litigated in a United States court.

After finding that international law did prohibit torture by governments and their agents, that the shared nationality of victim and torturer did not reduce the offense to a local one, and that section 1350's authorization to apply international law in United States federal courts was constitutional, the court concluded that plaintiffs had stated a claim litigable in a United States federal court. The case was remanded for trial.

38. See supra note 21 and accompanying text.
39. *Filartiga* I, 630 F.2d at 880. Pena's relief upon leaving is shown by his comment to the New York Times: "All we want is to be sent back to our country as quickly as possible." N.Y. Times, Apr. 6, 1979 at B4, col 2. It is further shown by Pena's legal opposition to further stay of his deportation. See *Filartiga*, No. 79-917 (E.D.N.Y. Apr. 5, 1979) (requesting expediting of deportation) (letter from Murray D. Brochin, defendant's attorney, May 18, 1979) (filed with the court).
40. *Filartiga* I, 630 F.2d at 884.
41. Id. at 884-85.
42. Id. at 885-89.
3. The Damages Award—Filartiga II.—Upon remand, the now-absent Pena and his attorneys from both Paraguay and the United States decided not to pursue his defense. They failed to file an answer to the now-viable complaint and a default judgment resulted.\(^\text{43}\) The judgment was limited, however, to a finding that Pena was civilly liable for Joelito's death. No damages were awarded and no remedies applied because the district court had no factual evidence as to plaintiffs' injuries, and it was in doubt as to which law governed.\(^\text{44}\) The district court referred these questions to a magistrate.

On February 12, 1982, the magistrate heard testimony as to the manner of Joelito's death and the resulting harm to his family. After receiving evidence, the magistrate asked plaintiffs' attorneys to submit arguments as to what law should govern damages and what types of damages would be recoverable under that law. Plaintiffs' attorneys submitted arguments for recovery under both international and Paraguayan law.\(^\text{45}\) On May 13, 1983, the magistrate issued his recommendation to award $375,000 in damages under Paraguayan law.\(^\text{46}\)

Now that the magistrate's recommendation was before the district court the parties had an opportunity to object. Plaintiffs did object, but only to the magistrate's denial of court costs and punitive damages; both denials were based on the unavailability of those damages under Paraguayan law.\(^\text{47}\) Plaintiffs urged that the appropriate remedy to be fashioned for this seminal case was under *lex delicti* (Paraguayan law) to the extent that it adequately reflected international policy against torture, and that where *lex delicti* fell short of the international standard, a supplemental measure of damages should be provided.\(^\text{48}\) The district court adopted plaintiffs' argu-

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44. The Second Circuit also expressed doubt as to the applicable law in *Filartiga*. See *Filartiga* I, 630 F.2d at 889 n.25 and accompanying text.
45. *Filartiga*, No. 79-917 (E.D.N.Y. Dec. 10, 1982), (plaintiffs' memorandum on damages) (The Filartigas claimed $202,979.00 in present pecuniary losses; $236,760.00 in future losses).
46. *Filartiga*, No. 79-917 (E.D.N.Y. May 13, 1983; addendum May 20, 1983) (magistrate's report and recommendation). The Magistrate recommended a total award to the Filartigas of $375,000.00 under Paraguayan law, which the Magistrate applied pursuant to the Second Circuit's dicta that Paraguayan law might be appropriate. *Filartiga* I, 630 F.2d at 889 n.25 and accompanying text.
47. The *Filartiga* district court ascertained Paraguayan law from the affidavits of two experts, Jose Emilio Gorostiaga for the defendant, and later at the damages phase on remand, Alejandro M. Garro for the plaintiffs. Although plaintiffs sought a copy of the Paraguayan Civil Code via inquiries to the Paraguayan consulate, the Library of Congress, and several law schools, no copies were located.
48. Plaintiffs' argument that Paraguayan law ought to be applied initially, and supplemented to the extent that it fell short of the spirit and intent of the international torture proscription, was patterned after article 50 of the European Convention on Human Rights. European Convention on Human Rights, Nov. 4, 1950, art. 50, 213 U.N.T.S. 221, Europ. T.S.
The opinion approved the magistrate's recommendation of $375,000 in actual damages to the two plaintiffs, and added $10,364 in court costs and $5,000,000 in punitive damages for each plaintiff, for a total of $10,385,364.

Because there was a default judgment as to Pena's liability, Filartiga's choice of law dealt only with damages. Even when limited to damages, however, choice of law is crucial. The question is which damages should be allowed in torture cases: loss of income, medical and burial expenses, pain and suffering, survivor's grief, or punitive damages. Strictly within the context of United States law, these items of recovery can vary widely from state to state. When this context is expanded to include common law, civil law, and other legal systems, the variance is even greater. This variance between legal systems will be amplified when Filartiga's progeny are litigated fully on the merits. Issues concerning the definition of torture and permissible defenses will depend on the law that is selected. The first step in choosing substantive law is to determine the nature of the claim.

III. The Background for Defining Filartiga

A. Filartiga's Labels

Commentators have used a variety of descriptive labels in referring to the Filartiga cause of action. Some labels have been casually or mistakenly applied, while others may or may not be correct depending on one's view of the case. Most have been applied in a conclusory manner without the analysis needed to verify their accuracy.

One author who worked on the plaintiffs' jurisdictional brief for Filartiga describes the action as a transitory tort concurrent with an international action under United States law, and alternatively as a transitory international action.\(^5\) Professor Louis Sohn calls Filartiga an action for a universal delict.\(^5\) Professor Rusk terms Filartiga an action under United States jurisdiction for a violation of international law. He analogizes the Filartiga court to an old common-law court whose judge knew a wrong when he saw it and did not worry about the stricter limits of positive law.\(^5\) Rusk's description of the Filartiga action as a hybrid of international law and United States jurisdiction is the most popular among Filartiga commentaries. This description has been phrased a number of different ways: (1) a nonfederal cause of action under international law with jurisdiction

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52. Rusk, *supra* note 2, at 311-12.
in a United States court; an action under federal jurisdiction involving international law; federal jurisdiction for a violation of the law of nations; and international law as creating a federal cause of action. The article providing this last description also suggested that Filartiga might be an instance of protective jurisdiction, or alternatively a transitory action.

To counter this popular description of Filartiga as a hybrid between international substantive law and United States jurisdiction, Professor Wilner refers to Filartiga as an instance in which a national court applied international law. In so doing, the national court was acting as an international forum. This may appear to be a variation on the hybrid theme, but it is not. The various hybrid labels draw on the notion that international law is part of the domestic law of each state. Under this theory a state court applying international law is simply applying an aspect of its own law. In contrast, Wilner’s theory flows from the dedoublement fonctionnel concept that state courts serve not only as courts in their respective territories, but collectively as an international judiciary. Consequently, such courts have authority to hear international claims such as Filartiga. One distinctive result of the dedoublement fonctionnel concept is its implicit requirement that all states provide a forum for international human rights claims regardless of whether local law provides judicial jurisdiction.

Finally it is necessary to consider the labels used by the Filartiga courts. The Second Circuit referred to the claim principally as an action for violation of “universally accepted norms of the international law of human rights . . . .” The court also noted the incorporation of international law into federal common law. In other parts of its decision, however, the Second Circuit discussed Filartiga as a transitory tort and a wrongful death action, and compared it to piracy and slavery prosecutions under universal jurisdiction.

57. Id. at 360-63.
59. Id. at 322. See infra notes 172-78 for a brief explanation of dedoublement fonctionnel.
60. Filartiga I, 630 F.2d at 878, 880. See also id. at 884, 886 (absorption of the international tort into federal common law).
61. The court observed that transitory actions have always been litigable in the lower state courts in the United States. Id. at 885. The court did not state that Filartiga is a transi-
Second Circuit's multifaceted description was simplified upon remand when the district court expressly addressed the question of "Filartiga's nature," or characterization. Observing that Filartiga could be deemed either a wrongful death action arising under Paraguayan law or a claim based on international law, the court chose the latter and concluded that international law must therefore control the substantive issues.\(^6\) Although the district court's characterization of Filartiga as an international tort under federal common law appears to be correct, further consideration is necessary to determine the accuracy of other labels applied by the Second Circuit (transitory and universal) and by other commentators (protective jurisdiction and dedoublement fonctionnel action). Simply because Filartiga may be defined as an international tort litigated under federal common law does not necessarily eliminate the possibility of other characterizations.

**B. Defining Filartiga Through Jurisdictional Rules**

Jurisdiction has many meanings. The first step in pinpointing Filartiga's jurisdictional base and cause of action is to narrow these meanings. A generic definition for jurisdiction is "the authority to affect legal interests."\(^6\) The authority referred to is usually state authority because a state is the entity creating most legal interests. State authority is divided into three categories representing a state's three functions: (1) legislative jurisdiction, or a state's authority to make rules; (2) executive jurisdiction, or a state's authority to enforce rules; and (3) judicial jurisdiction, or a state's authority to subject persons and things to the process of its courts.\(^6\) This Article focuses primarily on judicial jurisdiction, although much of the discussion will apply to legislative jurisdiction as well. Executive jurisdiction action. It may be inferred that the court did not deem Filartiga transitory because the court distinguished between transitory actions litigable in state courts and international claims litigable as federal common law only in federal courts. Nonetheless, many have read this discussion as calling Filartiga transitory. The Second Circuit also referred to Filartiga as a claim for wrongful death, because the plaintiff pleaded an alternative wrongful death claim under Paraguayan law. Id. at 878-79. Although the Second Circuit kept the distinction in mind between a wrongful death action and a torture claim under international law, this reference to wrongful death may lead to mischaracterizations. Equally confusing is the Second Circuit's equating Filartiga with piracy and slavery prosecutions. Id. at 890. Those prosecutions are traditionally subject to universal jurisdiction as delicts prohibited by the national law of most nations. In these cases international law grants jurisdiction to try the defendant under forum law. It is likely that the Second Circuit was making no more than a rhetorical allusion to piracy and slavery prosecutions, but if the court meant literal comparisons, then it may be confusing universal jurisdiction with § 1350 jurisdiction.

\(^{62}\) Filartiga II, 577 F. Supp. at 862-63.
\(^{63}\) See HENKIN, P. S. & S., supra note 13, at 420.
\(^{64}\) See Restatement (Revised) of Foreign Relations Law § 401 (Tent. Draft No. 3, 1982) (where jurisdiction terminology becomes "jurisdiction to prescribe" (legislative), "jurisdiction to enforce" (executive), and "jurisdiction to adjudicate" (judicial)). See also Mann, The Doctrine of Jurisdiction in International Law, 111 HAGUE RECUEIL [1964].
diction is not considered even though it is important to enforcement of *Filartiga*-type judgments.

IV. United States Jurisdiction as Defining *Filartiga*

To define *Filartiga* through its judicial jurisdiction under United States law, it is only necessary to examine subject matter jurisdiction. The United States analysis is further limited to civil jurisdiction because *Filartiga* is only a civil action as far as United States law is concerned. But the international torture norm invoked in *Filartiga* is as much criminal as civil, and as the analysis shifts from United States law to international law, criminal jurisdiction will be considered with civil.

In examining *Filartiga*'s subject matter jurisdiction under United States law, the first step is to note that the action was brought in a federal court, and therefore must be either a federal question or a diversity of citizenship case. It clearly is not a diversity case, although lawyers have mistakenly discussed it as such. Both the Filartigas and Pena-Irala are Paraguayan. This fits into none of the diversity categories.

*Filartiga* must, then, be a federal question case. But what sort of federal question? Several types exist. In addition to general federal question cases, there are actions against foreign states, admiralty and maritime cases, appeals of certain administrative actions, patent cases, tax cases, and other federal subject matter categories. On one hand, *Filartiga* can be described as simply a general federal question. It is based on international law, which is federal common law under the Constitution and case precedent, and thus entitled to federal court jurisdiction.

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65. Not only is *Filartiga* a civil action on its face (a private claim for damages), but it must remain a civil action and no more to retain its jurisdiction under § 1350's limitation to actions "for a tort only."

66. For reasons to consider *Filartiga* as a criminal action, see infra notes 95-107 and accompanying text.


68. 28 U.S.C. § 1331 (1982) provides as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."


70. See Restatement (Revised) of Foreign Relations Law §§ 131-35 and comments following (Tent. Draft No. 1, 1980). As discussed in the Restatement, authority for the status of international law in the law of the United States is founded in the constitution, e.g., art. II, section 2; statutes, e.g., 28 U.S.C. §§ 1332, 1350 (1982); and case law, e.g., The Paquete Habana, 175 U.S. 677 (1900).

71. Restatement (Revised) of Foreign Relations Law § 131 comment e (Tent. Draft No. 1, 1980). Federal jurisdiction may be exclusive, i.e., lower state courts may be pre-
pleaded in the complaint) is more specific than a general federal question. It is a claim under section 1350, which provides for "original jurisdiction of any civil action by an alien for a tort only, in violation of the law of nations or a treaty of the United States." Section 1350 resembles other specific federal question statutes such as section 1333 (admiralty), or section 1340 (federal tax) in so far as these jurisdictional statutes create original jurisdiction in federal district courts for cases arising under specific bodies of substantive law.

Some authorities—including the Second Circuit in Filartiga—have pointed out that section 1350 is nothing more than a jurisdictional grant for Filartiga, and that section 1350 merely creates jurisdiction without providing any substantive rights or remedies. Their conclusion is that section 1350 leaves open the choice of law question. This conclusion misplaces the role of section 1350 as a jurisdictional statute. True, it merely grants jurisdiction without spelling out the substantive rights and remedies, but the same can be said of the admiralty jurisdictional grant in section 1333, as well as the other jurisdictional grants for specific bodies of substantive law. In an admiralty case, section 1333 authorizes federal jurisdiction but requires litigants to resort to admiralty law to determine their rights, remedies, and defenses. The same is true of section 1350—it authorizes federal jurisdiction and requires litigants to turn to international law or a United States treaty to resolve the merits.

Filartiga is best characterized as a federal question involving rights under international law. This suggests, but does not mandate, two choice of law conclusions. The first is that there is no genuine choice of law question—we merely apply the law on which the claim and the jurisdictional grant are based. The second conclusion is that if Filartiga is a federal question, then it is not a transitory action since the latter arises under a foreign law. This eliminates one major argument for applying lex delicti to international torture cases. Many commentators argue that foreign torture claims are transitory, and, as noncontractual transitory claims, they should be governed by emptied in cases of universal jurisdiction. See id. § 404 reporters' note 2 (Tent. Draft No. 2, 1981).

73. 630 F.2d at 889.
74. This is the weaker of two arguments for the point that Filartiga has an open choice of law question. The stronger argument is that the choice of law is unsettled because the international torture norm itself provides at best only a grant of jurisdiction, and does not provide the necessary substantive rules to apply to the merits. If this were true, the torture norm would be one of universal jurisdiction. See infra notes 115-16 and accompanying text. It is not true, however, that international law is incapable of resolving a dispute where it only establishes a basic norm (e.g., the customary norm prohibiting torture), and fails to define the delict or state the defenses and remedies. Inspecific norms are applied in international law by resorting to "general principles of international law" and the more basic "general principles of law."
the appropriate foreign substantive law. However, if *Filartiga* is a federal question, then it is not a transitory action because the latter arises under a foreign law.\textsuperscript{75} Accordingly, while *lex delicti* may arguably be a desirable choice of law for policy reasons, its application is not mandated nor even suggested by the nature of the *Filartiga* claim.

The above conclusions, though plausible, are inadequate in failing to consider the applicability of universal jurisdiction, protective jurisdiction, or *dedoublement fonctionnel* concepts. *Filartiga* could arguably be both a federal question and any one of these. Resolving these questions about *Filartiga*’s definition requires an examination of its jurisdiction under international law.

**V. International Law as Defining *Filartiga***

International law is particularly appropriate to *Filartiga* as the law creating the substantive torture claim, and, to some extent, the standard by which other nations and scholars will judge *Filartiga*. On the other hand, the role of international law as an analytical tool to define *Filartiga* is secondary to its role in creating the substantive torture norm. That is, international law plays a primary role in creating the substantive torture norm; it plays a secondary role (forum law is primary)\textsuperscript{76} in fashioning the torture norm for litigation in a United States court. Nonetheless, international law is important to this analysis, particularly in broadening *Filartiga*’s definition to include its criminal law aspects, which are the key to some of the labels applied to *Filartiga*.

International law standards for criminal jurisdiction are much more detailed than are its rules for civil jurisdiction. The former are more helpful in defining *Filartiga* if *Filartiga* can be deemed a penal action to any degree.\textsuperscript{77} One reason for characterizing *Filartiga* as partially penal for purposes of jurisdictional analysis is because “civil jurisdiction is ultimately enforced by criminal sanctions, there is indeed no great difference between the problems created by the assertion of criminal and civil jurisdiction over aliens.”\textsuperscript{78} In other words, if *Filartiga*-type actions are to be valid under international law, they may have to satisfy international law’s stricter standards for state

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\textsuperscript{75} See infra notes 154-169 and accompanying text for a discussion of *Filartiga* and transitory actions.

\textsuperscript{76} Characterizations and definitions relating to conflict of laws are determined by forum law. See Conflict Restatement, supra note 9, § 7.

\textsuperscript{77} See infra notes 93-106 and accompanying text.

\textsuperscript{78} See Brownlie, supra note 18, at 299. See also id. at 309 (stating that as to state legislative jurisdiction under international law, there is no distinction between civil and criminal law, and likewise no distinction between state legislative and executive jurisdiction under international law).
criminal jurisdiction over aliens. Before considering the stricter limits of state criminal jurisdiction, however, the vague limits on civil jurisdiction will be examined.

A. State Civil Jurisdiction Under International Law

International law has few clear rules on state civil jurisdiction and those it has offer little toward defining Filartiga. Those vague guidelines should nonetheless be reviewed to insure a thorough analysis, and to examine Filartiga's validity under international law.

One of the more unsettled areas of international law is the question of what limits, if any, it places on state civil jurisdiction. There are three general views. First is the extreme view that international law places virtually no limits on state civil jurisdiction.

A more accepted view holds that the only limit is sovereign immunity.

The third view espouses a principle of reasonableness based on the forum state's connection to the dispute.

79. According to Akehurst, "Dicey believed that the only limitation on jurisdiction in civil trials was contained in the principle of effectiveness." Akehurst, Jurisdiction in International Law, 46 Brit. Y.B. Int'l L. 145, 170 (1972-73) [hereinafter cited as Akehurst], quoting A. Dicey, Conflict of Laws xxxi (2d ed. 1908). Akehurst does not agree with Dicey, but instead believes that the acid test of jurisdiction is the presence or absence of diplomatic protest. Akehurst, supra, at 176. Rheinstein stated that "at present it seems that no limitations are generally recognized beyond the one which is contained in the principle that no nation's officer is allowed to engage in the exercise of power within the territory of another." Rheinstein, The Constitutional Bases of Jurisdiction, 22 Chi. L. Rev. 755 (1955) [hereinafter cited as Rheinstein]. Fitzmaurice stated that "apparently international law does not effect any delimitation of spheres of competence in the civil sphere, and seems to leave the matter entirely to private international law ...." Fitzmaurice, The General Principles of International Law, 92 Hague Recueil (1951 II) 218 [hereinafter cited as Fitzmaurice]. Chief Justice Marshall decreed that "the jurisdiction of the nation within its own territory is necessarily absolute. It is susceptible to no limitation not imposed by itself. Any restriction would imply a diminution of sovereignty to the extent of the restriction." The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812). But see Rose v. Himely, 8 U.S. (4 Cranch) 241, 276-77 (1808) (Marshall's statement that where a state asserted judicial jurisdiction "contrary to the law of nations, that judgment would not be regarded by foreign courts"). Marshall's statements are not necessarily contradictory, but rest on a relatively narrow view of international law. Most of the no-limits advocates subscribed to the jurisdiction-as-power theory, which may explain Marshall's view. See Mann, The Doctrine of Jurisdiction in International Law, 111 Hague Recueil 9, 73-75 (1964 I) [hereinafter cited as Mann].

80. See Restatement (Revised) of Foreign Relations Law §§ 451-60 (Tent. Draft No. 2, 1981); id. §§ 428-29, 461-67 (Tent. Draft. No. 4, 1983); Henkin, P. S. & S., supra note 13, at 490-540; Akehurst, supra note 79, at 177; M. Whiteman, 5 Digest of International Law 218-19 (1965). Many of the scholars advocating the no-limits view may have simply overlooked the sovereign immunities exception, although some may not have subscribed to it as a jurisdictional limitation, but saw it only as a matter of comity or public policy.

81. See Mann, supra note 79, at 73 (arguing that states comply with international law's limits on civil jurisdiction to give their own judgments international validity). Mann cites a German scholar who suggested a categorical imperative of state jurisdiction, requiring that the state "should act so that, in Kantian language, the principle of its own regulations could serve as the principles of international legislation." Id. at 74, quoting Neuner, Internationale Zuständigkeit 14 (1929). Presumably Neuner's formulation applies to judicial jurisdiction as well as legislative jurisdiction. See also Restatement (Revised) of Foreign Relations Law § 441 and comments following (Tent. Draft No. 2, 1981); id. part IV, introductory note at 94-95. Brownlie has stated that the presumption of territorially based jurisdiction, "Whilst remaining the best foundation for the law, failed to provide ready made solutions for
be the echo of similar standards under various states' laws, and thus may not be an emerging norm of international law. Discarding the poorly supported no-limits view, it is clear that international law places some limits on state civil jurisdiction over foreign sovereigns.

Aside from sovereign immunity and a possible reasonableness standard, international law appears uninterested in regulating state civil jurisdiction. It has no rules on subject matter jurisdiction, and no choice of law theory (although international law may suggest choice of law in specific matters). One explanation for international law's lack of concern with state civil jurisdiction may be that most or all states did not intend for international law to regulate their civil jurisdiction, certainly not to the extent of providing subject matter and choice of law rules.

Fitzmaurice offers another explanation. He states that the purpose of international law is to encourage rather than restrict state civil jurisdiction because the danger is not in states exercising too

82. Restatement (Revised) of Foreign Relations Law part IV, introductory note at 94-95 (Tent. Draft No. 2, 1981). Mann has noted that in spite of international law's greater current impact on state jurisdiction, the notion that states actually recognize an internationally imposed "minimum contacts" standard "could be put forward only with extreme diffidence and caution." Mann, supra note 79, at 74-75.

83. The existence of sovereign immunity is clear; the boundaries of that immunity are not.

84. International law does not concern itself with the division of the judicial workload within each state, and in that sense has no rules of judicial competence relating to subject matter or venue. Of course international law does have subject matter categories such as human rights law and the law of state succession, but these do not have the normative aspect that subject matter competence does. For a description of international law's position, see N. Leach, C. Oliver & J. Sweeney, The International Legal System 109-10 (1973).

85. Akehurst, supra note 79, at 216-26; Mann, supra note 79, at 20. See also Cheatham, Sources of Rules for Conflict of Laws, 89 U. Pa. L. Rev. 430, 431-37 (1941). But see Rheinstein, supra note 79, at 802-17 (arguing that international law did have a conflict of laws system founded on the Roman jus gentium). Other scholars disagree that jus gentium was the equivalent of modern public international law. See, e.g., Henkin, P. S. & S., supra note 13, at 2; Akehurst, supra note 79, at 212. Nussbaum, Rise and Decline of the Law of Nations Doctrine in the Conflict of Laws, 42 Colum. L. Rev. 189, 191-94 (1942). Additional support for a choice of law scheme in international law is found in the duty to provide a forum to resident aliens with foreign claims, coupled with the rule that a state may not apply its own law to a dispute with which it has no connection. See Fitzmaurice, supra note 79, at 220 n.2 and accompanying text. This would not direct the choice of any specific law such as lex delicti, but would steer the court away from applying its own law to certain foreign disputes.

86. Article 11 of the Declaration on the Prevention of Torture provides 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." Declaration on the Prevention of Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975).

Although the Torture Declaration is non-binding, it may be persuasive of the proper choice of law for torture cases. This was the district court's reasoning in Filartiga II for using Paraguayan law to measure actual damages. The court added punitive damages that were unauthorized under Paraguayan law but, according to the court, compelled by international law. See supra notes 47-49 and accompanying text.
much jurisdiction, but in exercising too little.\textsuperscript{87} International law responds to states’ reluctance to assume jurisdiction by not imposing limitations, and by creating a duty to furnish a forum for residents (including resident aliens) with foreign claims. The duty exists even when it means applying a foreign law, although international law does not dictate which foreign law. Note that the duty to provide a forum is not a rule of jurisdiction, but a rule of state responsibility for treatment of aliens. International law obliges states to afford aliens access to local courts, but the aliens’ presence in local courts is still subject to the forum’s jurisdictional standards.

One further limit on state civil jurisdiction is the discrediting and possible prohibition of “tag jurisdiction.” This controversial device is the service of process on a person who is temporarily in the forum’s territory. It is criticized by most commentators and may be contrary to international law,\textsuperscript{88} though it is not yet contrary to United States law.\textsuperscript{89} This point does not undermine \textit{Filartiga}’s jurisdiction because Pena’s presence in the United States was no doubt sufficient; he had sold his home in Asuncion and moved his mistress and her son to live with him in Brooklyn. The disfavor or possible unacceptability of tag jurisdiction is, however, a caveat for \textit{Filartiga}’s would-be successors who are tempted by the transitorily present torturer.

International law’s vague guidelines on state civil jurisdiction endorse \textit{Filartiga} in two ways. First, international law generally acquiesces in the exercise of a state’s civil jurisdiction rules. If that acquiescence gives rise to the reasonable connection standard discussed above, \textit{Filartiga}’s facts should qualify.\textsuperscript{90} Second, international law requires states to furnish a forum for resident aliens’ claims. This implies more than passive support for \textit{Filartiga}-type litigation; the United States has an affirmative duty to hear such claims.\textsuperscript{91} This is not to say that international law rules on state civil jurisdiction support torture claims per se; it is to say that if an alien has a legally

\textsuperscript{87} Fitzmaurice, \textit{supra} note 79, at 219-20. \textit{See also} \textit{Brownlie}, \textit{supra} note 18, at 299.
\textsuperscript{88} \textit{See Restatement (Revised) of Foreign Relations Law} § 441 comment e and reporters’ note 4 (Tent. Draft No. 2, 1981); Mann, \textit{supra} note 79, at 77; \textit{cf.} Akehurst, \textit{supra} note 79, at 170-71.
\textsuperscript{90} The \textit{Restatement (Revised) of Foreign Relations Law} sets out eleven criteria, any one of which may establish the “reasonableness” link with the forum. The first criterion is presence (other than transitory) in the forum, and the third is residence in the forum. Pena’s presence in New York, where he had established a household with his mistress and her son, and had applied for an extended visa, should satisfy these criteria. \textit{See Restatement (Revised) of Foreign Relations Law} § 441 (Tent. Draft No. 2, 1981).
\textsuperscript{91} \textit{See supra} note 87. This is not to say that the duty is absolute to furnish a forum for resident aliens’ claims. Other factors such as \textit{forum non conveniens} and foreign policy interests may supercede the duty to resident alien claimant.
recognized claim against another alien in the forum, international law endorses a hearing on the merits. Thus there is a presumption in international law which favors resolution of disputes between aliens in a disinterested forum. Admittedly this might run contrary to the forum state’s national interests at times, particularly its foreign policy interests. But such interests should be heeded only on a case-by-case basis and should not give rise to a blanket preemption of human rights claims.

International law rules on state civil jurisdiction are unable to characterize adequately a Filartiga-type action because its rules do not address the subject matter jurisdiction or choice of law problems. The only conclusions that may be drawn from state civil jurisdiction rules is that international law requires a state to furnish a forum for claims made by resident aliens and it acquiesces in the type of jurisdiction exercised in the Filartiga case (assuming that the jurisdiction in Filartiga is based on a reasonable connection with the forum state) to the extent that Filartiga is a civil action. But is Filartiga more than a civil action? To answer this it is necessary to examine international law rules governing state criminal jurisdiction, keeping in mind the premise that “there is in principle no great difference between the problems created by assertion of civil and criminal jurisdiction over aliens.”

B. State Criminal Jurisdiction Under International Law

1. Why Consider Filartiga a Criminal Action?—Filartiga is a civil action, a tort, according to the jurisdictional grant of section 1350. But inherent in Filartiga-type cases under section 1350 (and probably in any torture case under any legal theory) are aspects of criminal prosecution.

The first aspect is the criminal law nature of universal jurisdiction. Filartiga is commonly referred to as an instance of universal jurisdiction not unlike the piracy cases of earlier centuries. Universal jurisdiction, at least up to now, had been for criminal prosecutions even though civil remedies may have been available as well.

92. See supra note 78.
94. See supra note 52 and accompanying text.
96. The piracy conventions refer only to criminal prosecution, with civil restitution to be handled administratively by the prosecuting state. See Harvard Research in International Law, Draft Convention on Piracy, arts. 12 & 13, 26 AM. J. INT’L L. 749, 751 (1932); Convention on the High Seas, art. 19, opened for signature Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 45 U.N.T.S. 82 (both reprinted in Dubner, supra note 95, at 11-12, 90-93). But
Customary international law may not have ordained universal jurisdiction for torture cases, and if so, there may be purely civil alternatives under this new grant of universal jurisdiction. But because of the criminal law history of universal jurisdiction, Filartiga must be considered under the limits of a state's criminal jurisdiction.

The second aspect of a criminal prosecution is Pena's detention. Filartiga was not viewed as a criminal case by the district court or the Second Circuit, but it can be argued that Pena was subjected to criminal type measures. Although he faced only monetary loss in the lawsuit, Pena was detained until the district court dismissed the action for failure to state a claim.98

While Pena's detention was based on his visa violation rather than the section 1350 lawsuit, his detention was continued because of the section 1350 action.99 Pena was released when the trial court dismissed the action for lack of jurisdiction. But since the Second Circuit has ruled that torture violates international law and thus establishes section 1350 jurisdiction, detention such as Pena's would now continue throughout the lawsuit.100

At first glance there is nothing wrong with this detention. If the filing of a civil action reveals a crime, the state may prosecute without "criminalizing" the original civil lawsuit. If, however, the filing of a section 1350 torture claim reveals an immigration crime that gives rise to defendant's detention, and that detention is prolonged during the section 1350 lawsuit when it would have been resolved by deportation if not for the lawsuit, some may see the section 1350 action as quasi-criminal.

The third criminal aspect of Filartiga is the punitive damages sought against Pena. Under United States law (which was not applied in Filartiga), such damages would be available as compensa-
tion for Pena's malicious acts.\textsuperscript{101} Under Paraguayan law (which was applied in \textit{Filartiga}), punitive damages are not allowed.\textsuperscript{102} Civil law jurisdictions, such as Paraguay, view punitive damages as an imposition of punishment in a non-criminal trial that lacks the safeguards of criminal law and procedure.\textsuperscript{103} Another objection is that punitive damages are a windfall for plaintiffs since they compensate beyond the injury suffered.

Many human rights advocates, however, believe that torture compensation should cover nonpecuniary losses, and some call for punitive damages. While criminal jurisdiction is not necessary for punitive damages under United States law, it may be necessary under international law. Accordingly, in order to establish a sufficient jurisdictional basis for awarding punitive damages it is necessary to determine whether United States courts have criminal jurisdiction under international law over accused tortures.

The fourth aspect of \textit{Filartiga} that is partially criminal is the dual civil/criminal nature of the torture prohibition under international law. The customary norm against torture encompasses both state prohibitions and international policy declarations. The state prohibitions include criminal penalties,\textsuperscript{104} and the policy declarations reinforce torture's criminality. Indeed, some future applications of the international torture norm will no doubt involve stern criminal sanctions.

\textit{Filartiga} is both a tort action under section 1350 and an international cause of action with a broader scope. To the extent that \textit{Filartiga} is an international action, we may want to consider using the term "delict" instead of the narrower "tort" to describe the act of torture. A delict is best defined as an intentional wrong, including both torts and crimes.\textsuperscript{108} By calling Pena's acts delicts, we are considering them as wrongs that have both civil and criminal penalties even though the plaintiffs seek only private civil remedies under section 1350.

Accepting the civil/criminal duality of the international torture

\begin{itemize}
\item \textsuperscript{102} \textit{Filartiga}, No. 79-917 (E.D.N.Y. May 13, 1983) (magistrate's report and recommendation). See also XI INT'L ENCYC. COMP. L., ch. 9, at 4 (H. McGregor ed. 1972) (stating that legal systems outside the common law generally reject punitive or retributive damages).
\item \textsuperscript{103} See J. GHIARDI, PUNITIVE DAMAGES LAW AND PRACTICE § 3.03 (1981); K. REDDEN, PUNITIVE DAMAGES §§ 1.3(F), 2.4(D) (1980).
\item \textsuperscript{105} See BLACK'S LAW DICTIONARY 384 (5th ed. 1979).
\end{itemize}
norm does not enlarge the torture action under section 1350. It remains a private action for recovery of actual and punitive damages. Nonetheless, it is advisable to view the section 1350 torture actions in the broader framework of a civil/criminal action. This would account for the criminal overtones of Pena's detention. This would also make *Filartiga* more acceptable to foreign legal systems that might not have understood or accepted the notion of section 1350 as a purely civil remedy because of the punitive damages. Recognizing *Filartiga*'s criminal aspects under international law provides a basis for assessing penalties that might satisfy foreign legal systems without actually criminalizing the action under United States law. This civil/criminal duality should also make *Filartiga* more acceptable in terms of recognizing and enforcing United States judgments in foreign fora where defendants might have assets.

Due process, of course, must be considered as *Filartiga* takes on criminal overtones. Courts receiving section 1350 complaints might want to consider requiring plaintiffs to make a stronger showing at the outset before issuing process against defendants, especially where incarceration is involved. Once that showing is made, incarceration is justified for notorious torturers like Pena, who failed to identify himself fully to immigration officials as the subject of numerous Organization of American States and Amnesty International reports. The court might want to consider further criminal due process requirements, but those requirements need not necessarily meet the standard of United States criminal due process. *Filartiga* actions, whatever their criminal overtones in international law, are still not criminal actions under United States law.

Because *Filartiga* is not a criminal action under United States law, there is no need to inquire into United States law on criminal jurisdiction. To the extent that international law defines *Filartiga* as a criminal prosecution in a United States forum, however, it is necessary to explore the limits of state criminal jurisdiction under international law.

2. International Law Limits on State Criminal Jurisdictions.—Unlike international law's weak regulation of state civil jurisdiction, international law places distinct limits on state criminal jurisdiction. These limits are specific and are stated as subject matter categories. Scholars generally agree that there are five categories, and they agree on the definition and details of four of these subject matter categories. There is some dispute on the fifth category concerning universal jurisdiction.

106. See supra note 31.
107. Section 1350 covers civil claims only.
Ian Brownlie's analysis of state criminal jurisdiction provides the best framework within which to analyze Filartiga's choice of law question. Brownlie lists six limits on state criminal jurisdiction by splitting the traditional universal jurisdiction class into two classes: offenses common to all nations (universal offenses), and offenses against international law. While other scholars may not support Brownlie's distinction between universal and international offenses, neither do they agree among themselves on universal jurisdiction. Given the lack of resolution on universal jurisdiction, Brownlie's analysis is as valid as any. Moreover, Brownlie's analysis facilitates characterization of the Filartiga cause of action by squarely placing Filartiga in Brownlie's sixth category—international offenses. This eliminates the view of Filartiga as a universal cause of action.

Brownlie's six categories of state criminal jurisdiction are based on six principles of authority. These six principles are enumerated below.

(a) **The territorial principle.**—A state has authority over crimes committed within its territory. This is inapplicable to Filartiga because its delict was committed in Paraguay. None of the significant acts occurred in the United States.

(b) **The nationality principle.**—Nationality is generally recognized as a basis for a state's jurisdiction over extraterritorial acts committed by its nationals. This principle is inapplicable to Filartiga because Pena is not a national of the United States.

(c) **The passive personality principle.**—A state has authority to punish aliens for acts committed abroad that harm the forum state's nationals. This is a controversial principle of jurisdiction, but inapplicable to Filartiga because none of the defendant's acts harmed United States nationals. This principle could, however, be the basis for United States jurisdiction over defendants who torture United States nationals in another country, if the defendants could be served with process in the United States.

(d) **The protective (or security) principle.**—A state has au-
authority over aliens who commit acts abroad which affect security of the state, if the acts are against the state's law. This principle focuses primarily on political security, but is not limited to that. Typical crimes are counterfeiting, immigration violations, and other "economic offenses" and acts affecting the operation of the state's governmental functions (and perhaps its quasi-governmental business functions). Brownlie states that the protective principle is not necessarily limited to acts harming the state per se, and thus could include torture offenses; but it is probably inapplicable to Filartiga because Pena's acts did not affect United States security.

(e) The universality principle. A state has authority over nonnationals for certain foreign violations when circumstances, including the nature of the crime, justify repression of the act as a matter of international public policy. Brownlie suggests that common crimes such as murder are suitable for universal jurisdiction when the state in which the crime occurred refuses prosecution or extradition. Another example is a crime by a stateless person in a place not subject to any state's territorial jurisdiction. Filartiga does not fall within Brownlie's definition of universal jurisdiction because Filartiga's substantive claim under section 1350 is based on a violation of international law. If, however, the Second Circuit is wrong in holding that customary international law prohibits torture, then the Filartigas' claim might be suitable for universal jurisdiction.

(f) Crimes against international law. A state has authority
to punish violations of international criminal law and any state with custody of the suspected criminal may prosecute. This category is separate from the universality principle because the distinction between violations of international law per se and violations of laws common to all nations should be maintained. *Filartiga* fits squarely within the sixth principle if torture is considered a violation of customary international law. Accordingly, the validity of the United States assertion of jurisdiction over Pena in accordance with this principle depends on the separate issue of whether torture is a violation of customary international law.

Summarizing the criminal jurisdictional limits on *Filartiga*, the first three principles—territorial, nationality, passive personality—clearly do not apply to *Filartiga*. The fourth principle, protective jurisdiction, may apply if the United States has some national interest at stake in a Paraguayan torture case. The fifth principle, universal jurisdiction, applies to *Filartiga* only if one rejects Brownlie’s distinction between universal crimes and crimes against international law. If Brownlie is followed, the term universal should not be applied to *Filartiga*. If, on the other hand, the Supreme Court or the Second Circuit strikes down the *Filartiga* holding that torture violates international law, torture claims could still be litigated under the universal jurisdiction category as offenses against the collective national laws prohibiting torture. Under the Second Circuit’s holding in *Filartiga*, the sixth principle regarding crimes against international law appears to be applicable, but may not be directly appropriate in a *Filartiga*-type torture claim (a section 1350 civil claim) unless the sixth principle provides private remedies for international crimes. Or, alternatively, the sixth principle may apply if *Filartiga*-type litigation under section 1350 is considered a partially criminal prosecution.


118. The protective jurisdiction principle may also apply if the United States meaning of protective jurisdiction is embraced within the international law meaning and if international law has granted national courts special jurisdiction in this matter. (This special authorization by international law is more appropriately termed “universal jurisdiction”).

119. The recent appellate decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), may signal the judicial split likely to occur in *Filartiga*’s progeny. Judge Edwards believes that *Filartiga* is a valid model for human rights litigation, but that the Tel-Oren plaintiffs had not alleged sufficient facts to state a *Filartiga*-type claim. Judge Robb did not address *Filartiga*’s legal validity; he believes the controlling issue is United States foreign policy, which he believes cannot withstand foreign torture claims being litigated in United States courts.

120. See supra notes 94-103 and accompanying text.
VI. Defining *Filartiga*: The Five Possible Actions

In order to determine what law should apply to the *Filartiga* case, it is necessary to determine what type of cause of action it is. The different labels that have been applied to *Filartiga*-type jurisdiction give rise to five different possible causes of action. *Filartiga* may be any one, or more than one, of these actions. The five types are: (1) international delict adopted into United States federal common law; (2) universal jurisdiction action; (3) transitory action; (4) protective action; and (5) *dedoublement fonctionnel* action.

**A. Type One: *Filartiga* as an International Delict Adopted into United States Federal Common Law**

An international delict is an offense against international law as it is found in custom, convention, general principles of international law, or other sources of international law. Claims under international law are capable of enforcement in an appropriate forum, which often is an international arbitral tribunal or the International Court of Justice. But if the delict entails private remedies, either expressly or implicitly, then it is enforceable by private parties in state courts having jurisdiction under both international law and state law. The United States has adopted international law into its...
federal common law, and substantive international law is thus litiga-
ble in the United States.¹²⁶

1. *Is Filartiga a Type One Action?*—Yes. The Filartigas’ claim was based on human rights norms of international law. The Second Circuit founded its *Filartiga* jurisdictional decision on the conclusion that torture is a violation of customary international law. And, as discussed both in the Second Circuit *Filartiga* opinion and throughout this Article, the *Filartiga* claim is also part of federal common law because of international law’s status in the United States. Thus, the Type One label fits squarely on *Filartiga*.

2. *Is Type One Permissible Under International Law?*—To the extent that Type One is a civil action in a United States court, international law would probably place no limit on it¹²⁷ beyond the requirement that there be a connection between the forum and the dispute.¹²⁸ *Filartiga* satisfies the connection requirement because the parties were residents of the forum at the time the action was filed. The conclusion that international law would place no other limits on *Filartiga* as a Type One civil action is underscored by a state’s affirmative duty under international law to provide a forum for resident aliens, regardless of which law creates the claim.¹²⁹

If *Filartiga* is considered a Type One *criminal* action, jurisdiction in a United States court is probably valid under Brownlie’s sixth principle of international criminal jurisdiction for states—jurisdiction for crimes under international law.¹³⁰ However, this is only to say that international law does not limit such jurisdiction by states. The question of whether such jurisdiction is permissible under United States law is addressed below.

3. *Is Type One Permissible Under United States Law?*—It is according to the Second Circuit, whose jurisdictional holding in *Filartiga* was based in part on this question.¹³¹ Some commentators

¹²⁶ *See* RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 131 and comments following (Tent. Draft No. 1, 1980).

¹²⁷ The majority view is that international law places no limits on state civil jurisdiction. *See supra* note 79.

¹²⁸ *See supra* note 80.

¹²⁹ *See supra* note 87.

¹³⁰ *See supra* note 117 and accompanying text.

¹³¹ The Second Circuit’s *Filartiga I* opinion did not clearly define the action. The court’s language implied that *Filartiga* is transitory, 630 F.2d at 885, and universal, *id.* at 890. But the court’s express description of the action is one of “federal jurisdiction over suits by aliens where principles of international law are in issue.” *Id.* at 885. Thus the Second Circuit *Filartiga* opinion relied on a Type One definition of the action.
have criticized this aspect of Filartiga.\textsuperscript{132} The basis in the Second Circuit decision to permit a Type One action is that: (1) torture violates customary international law;\textsuperscript{133} (2) international law is litigable in United States federal courts;\textsuperscript{134} and (3) the court had competence under section 1350 because section 1350 was both constitutional\textsuperscript{135} and pertinent to the Filartigas' claim.\textsuperscript{136}

The Second Circuit's analysis, however, was based on a characterization of Filartiga as a civil action. If Filartiga is viewed as the prosecution of an international delict involving criminal sanctions,\textsuperscript{137} the United States' jurisdictional response might be different. Under international law, states may prosecute those who violate international law. But in order to prosecute international crimes in the United States, the Constitution requires Congress to define the international crime.\textsuperscript{138} Thus, if Filartiga was considered to have significant criminal overtones, or if a criminal complaint were filed in the United States based on international law torture norms, there would probably be no jurisdiction until Congress approves.

In summary, Filartiga is a Type One action, a delict under customary international law litigated as federal common law in a United States federal court. Such litigation, to the extent that it is a civil action, is permissible under both international and United States law.

B. Type Two: Filartiga as a Universal Action

Universal jurisdiction covers offenses, usually criminal, that are prohibited by all nations,\textsuperscript{139} and for which international law provides jurisdiction over nonnationals, even though international law has not itself prohibited the act.\textsuperscript{140} Universal jurisdiction is valid under international law in any state where the defendant is detained and proper process served.

This analysis is based on Brownlie's definition of universal jurisdiction.\textsuperscript{141} His definition differs from that of others in so far as it narrows universal jurisdiction to exclude acts prohibited by international law (those are a separate category of jurisdiction), and broad-

\begin{itemize}
\item 132. See supra note 2 for a list of critics of Filartiga's jurisdiction.
\item 133. 630 F.2d at 881-85.
\item 134. Id. at 885-89.
\item 135. Id. at 885-86.
\item 136. Id. at 889.
\item 137. See supra notes 94-103 and accompanying text.
\item 138. Article I, section 8 provides that Congress shall have the power: "To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations." U.S. Const. art. I, § 8. See also Restatement (Revised) of Foreign Relations Law § 404 and comments following (Tent. Draft No. 2, 1981).
\item 139. See supra note 115.
\item 140. See Brownlie, supra note 18, at 305 n. 2 and accompanying text.
\item 141. Id. at 304-05.
\end{itemize}
ens universal jurisdiction to include common crimes such as murder that are universally proscribed and for which, under certain circumstances, there is a compelling international interest in prosecuting the defendant in a foreign court.

Other definitions of international law provide for jurisdiction over specific acts (such as piracy) that international law has decreed can be prosecuted under forum law wherever the defendant is properly detained and served. These definitions would exclude common crimes such as murder. Under Brownlie's broader view of universal jurisdiction which includes common crimes like murder under certain circumstances, a torture claim could more easily qualify. The claimants would not have to show that torture was one of the designated delicts such as piracy—they would only have to show that the act was egregious and that it would probably go unpunished in the state where it occurred.

1. Is Filartiga a Universal Jurisdiction Action?—No. Although torture is a universal delict in the sense of being prohibited by virtually all legal systems, state-based or otherwise, the Filartiga claim did not arise from such norms, either individually or collectively. Rather it arose from international law. While it is true that the collection of state torture norms comprised part of the basis for the Second Circuit's finding that torture is proscribed by customary international law, the international delict is nonetheless distinct from state norms.

Brownlie's distinction between universal jurisdiction and jurisdiction for international delicts supports the conclusion that Filartiga is not an instance of universal jurisdiction. Under the more common view of universal jurisdiction, which includes international delicts, Filartiga would be an instance of universal jurisdiction. Such a characterization of Filartiga, however, would be unhelpful in analyzing the choice of law question.

Although Filartiga is not an instance of universal jurisdiction, it is feasible to speak of a torture claim under universal jurisdiction. It is therefore appropriate to discuss the validity of universal jurisdiction under international law.

2. Does International Law Permit Universal Jurisdiction Ac—

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142. See, e.g., Restatement (Revised) of Foreign Relations Law § 404 (Tent. Draft No. 2, 1981), which describes universal jurisdiction as including only certain offenses such as piracy, slave trade, war crimes, and others. No reference is made to common crimes whose facts compel international attention (Brownlie's view). However, the Restatement does refer to Brownlie's distinction between universal jurisdiction and jurisdiction for violations of international law, though it does not cite Brownlie. See id. § 404 reporters' note 1.
143. See 630 F.2d at 883-84.
144. Id. at 884.
tions?—Yes. Universal jurisdiction actions are valid under the universality principle. If the action is civil, the permissibility is all the more clear because of international law’s deference to states in civil cases.

3. Does the United States Permit Universal Jurisdiction Actions?—Probably not with respect to torture claims. Brownlie states that the United States and other Anglo-American legal systems disfavor universal jurisdiction in cases other than piracy and air hijacking. Torture claimants could argue that the policies favoring prosecution of piracy and air hijacking should support prosecution of torture, but courts may be slow to accept that argument in the absence of Congressional action.

If, however, United States courts did decide to accept torture claims as an instance of universal jurisdiction because of the international pronouncements against torture, such claims would be viable. There are no other categorical jurisdictional barriers to such actions in the United States. Jurisdiction would be proper only in federal courts because the threshold question of universal jurisdiction is one of international law, and hence federal law. This analysis suggests jurisdictional validity only for civil claims under universal jurisdiction. Criminal prosecution under universal jurisdiction would encounter problems too numerous to consider here.

If the United States courts did not accept torture claims under universal jurisdiction—there is another way to bring the same civil claim in nonfederal courts in the United States under a different jurisdictional theory. If a delict such as torture is so widely prohibited that it qualified for universal jurisdiction, it is probably prohibited by the state where the act occurred. If so, the claim can be brought as a transitory action in a state district court. The Filartigas, for example, could have filed their claim under Paraguayan law in a New York state court. This could be done regardless of whether federal courts were willing to accept the argument that torture claims qualified for universal jurisdiction. There is no theoretical problem for plaintiffs currently bringing torture claims as transitory civil actions in state district courts, provided the claim is based on a foreign law applicable to them.

Note the similarity between universal jurisdiction actions and transitory actions. Both assert rights under lex delicti, and lex delicti would determine the merits in both cases. But universal jurisdiction actions are litigable only in federal court (because of the in-
international law questions of universal jurisdiction). Transitory actions are litigable only in a state district court unless there is diversity of citizenship or pendent jurisdiction to qualify it for federal court.

Another important point is that the term universal jurisdiction probably should be applied where some United States scholars are calling Filartiga a “protective action.” Within the realm of international law, protective jurisdiction means “jurisdiction for state security purposes.” The United States definition of protective jurisdiction is somewhat closer to the human rights mark because it refers to federal court acceptance of jurisdiction for rights guaranteed by nonfederal law in cases in which state courts may be inadequate for social or political reasons.

While the United States definition of protective jurisdiction as jurisdiction utilized to protect rights threatened by social or political unrest may seem appropriate to the Filartigas’ claim, it is nonetheless confusing because of the very different meaning of protective jurisdiction in international law. To avoid this confusion, the term protective jurisdiction should not be applied to international human rights actions. Instead, the term “universal jurisdiction” should be used for cases involving rights that are universally recognized by state law, and which should be prosecuted in foreign courts as a matter of international policy.

C. Type Three: Filartiga as a Transitory Action

“Transitory action” has more than one meaning, or at least more than one usage. Its definitions range from “an obligation based exclusively on a specific foreign law” to “an action arising under no particular law, but simply based on facts occurring outside the

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147. See supra note 71.
148. See infra notes 166-67.
149. See supra notes 58-59 and accompanying text.
150. See supra note 113 and accompanying text.
151. See supra note 114 and accompanying text.
152. Filartiga (Plaintiffs’ Appellate Brief on jurisdiction, filed July 23, 1979) 11-12, citing Slater v. Mexican National Railway Co., 194 U.S. 120, 126 (1904). See also Blum and Steinhardt, supra note 20, at 63 n.52 and accompanying text. This is the Bealean meaning of transitory, based on the now discarded “vested rights” theory. While that theory has yielded to the view that torts are governed by the law with the most significant relationship to the claim (CONFLICT RESTATEMENT, supra note 9, §§ 6, 145), the author believes that the Bealean theory is still reflected in the common usage of “transitory action,” particularly with torts. Two points underscore this: First, even if transitory torts are no longer conclusively governed by the lex delicti, there is still a strong presumption favoring lex delicti. See, e.g., CONFLICT RESTATEMENT, supra note 9, §§ 145-79. Second, now that Beale’s vested rights theory of foreign claims is not followed, and foreign torts are merely presumed to be governed by lex delicti, the use of the term transitory in reference to causes of action appears to be declining in the United States. This leads to the conclusion that transitory is a term linked to the Bealean vested rights notion of rights based exclusively on a specific law.
though another definition of transitory may be more proper in these post-Bealean times when vested rights is a discredited theory, this Article will focus on the meaning of "transitory action" that is most popular with those who call Filartiga a transitory tort. That meaning is "a tort claim based on lex delicti, litigable wherever personal jurisdiction is obtained in a state whose public policy is not offended by the litigation." Transitory actions are generally civil actions. The United States does not allow transitory criminal actions and international law disapproves of them except when the crime is of sufficient international interest to justify universal jurisdiction.

1. Is Filartiga a Transitory Action?—No. The Filartiga claim is based on international law, not on lex delicti (in the Filartiga case

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154. If "transitory action" is to have any relevance to current United States conflicts law, it is not in relation to specific foreign causes of action. Instead it may be used (as it is in venue matters) to distinguish between claims that are litigable in any forum where the defendant is served with process (which are transitory claims), and claims litigable only where the property or subject matter is located (local actions). This is Leflar's usage. See supra note 153. Another possible usage is to distinguish between claims based on events occurring in the forum, and claims based on events outside the forum. This usage has choice of law significance because the claim based on foreign events carries a presumption of nonforum law being applied. However, some foreign claims will overcome the anti-forum-law presumptions; see, e.g., Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) and similar cases discussed in E. Scoles & P. Hay, Conflicts of Laws 594-602 (1982). Some of the claims based on events in the forum will not be eligible for forum law (e.g., where the parties have contracted for another substantive law). If "transitory action" is used in this latter sense, as a claim based on events (but not "arising under" a law) occurring outside the forum, then Filartiga is a transitory claim. This latter usage does not appear common in discussions on Filartiga.

155. Filartiga v. Pena-Irala, No. 79-917 (E.D.N.Y. July 23, 1979) (plaintiffs' appellate brief on jurisdiction) citing Cheshire's Private International Law 257-61 (8th ed. 1970); Westlake's Private International Law 267-72 (6th ed. 1922); Phillimore, Commentaries Upon International Law, 3d ed., Vol. 4 (1889); 2 C.J.S. 47-48. These older sources are indicative of the Bealean usage of "transitory action" by plaintiffs' attorneys. See also Filartiga 1, 630 F.2d at 885, for the use of transitory fact as a lawsuit based on a specific foreign law.

156. Restatement (Revised) of Foreign Relations Law § 442(1) comment a (Tent. Draft No. 2, 1981); Conflict Restatement, supra note 9, § 89 (1971).

157. Brownlie's view of universal jurisdiction is that it includes common but heinous crimes such as murder in certain circumstances where a compelling international interest requires prosecution in a foreign court. See supra notes 139-42 and accompanying text. If Brownlie is correct that common crimes can, because of their compelling circumstances, sometimes offend international policies and interests and thus be eligible for universal jurisdiction, then such crimes could be prosecuted in United States courts. Although this formula would satisfy international law, it might not satisfy United States law. United States courts will not "enforce the criminal law of a foreign state in a criminal proceeding." Restatement (Revised) of Foreign Relations Law § 442(1) comment a. See also Conflict Restatement, supra note 9, § 89. Moreover, a person cannot be prosecuted for an international crime in the United States unless Congress has adopted a statute to define and punish the offense. Restatement (Revised) of Foreign Relations Law § 804 reporters' note 1. See United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); United States v. Coolidge, 14 U.S. (1 Wheat) 415, 417 (1816). These limitations on criminal jurisdiction, however, do not necessarily prevent plaintiffs from seeking civil remedies under criminal norms.
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*lex delicti* would be Paraguayan law). Nevertheless, the Filartigas could have pursued a transitory claim under Paraguayan law. Such an action could be filed in a court of general jurisdiction in the United States, or in a federal court as a pendent claim,158 or under diversity jurisdiction.159 In Filartiga all parties were Paraguayan, so diversity of citizenship did not exist. But ancillary jurisdiction was possible because of Filartiga's primary claim under international law. The Filartigas' attorneys pressed this distinction between a transitory Paraguayan claim and an international law claim and asserted distinct arguments. The Second Circuit, however, found jurisdiction only for the claim under international law.160

The Filartigas also had the option of filing a transitory action in a New York state court, based solely on Paraguayan law. Because this option is open to torture and other human rights claimants, it will be helpful to discuss its jurisdictional validity.

2. *Does International Law Permit Transitory Actions?*—Yes. Transitory actions are generally private civil actions,161 and as such are only loosely regulated (if at all) by international law. The only limit international law may impose on transitory actions is the requirement that the forum be reasonably connected with the dispute. This requirement would probably be satisfied if the parties were residents of the forum. It may even be satisfied if the defendant were only temporarily present.162 Temporarily present does not mean transitorily present—the latter may be unsatisfactory for personal jurisdiction under international law.163

International law not only acquiesces in but actually encourages states to accept transitory actions. States have a duty under international law to provide a forum for resident aliens even if it means applying a foreign law. This rule seems tailored to the transitory action. Even though this rule is not jurisdictional (it is a policy rule,

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158. For a general discussion of pendent jurisdiction, see C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, Jurisdiction § 3567 (1975); Hart & Wechsler, supra note 67, at 917-26.
161. This is another way of stating that governments do not often litigate transitory actions. There are no transitory criminal actions under United States law, and civil claims by public bodies in the United States are most often litigated in the forum belonging to that government entity.
162. See Conflict Restatement, supra note 9, § 28 comment a (1971) (stating that "[i]t is immaterial that the individual is only temporarily in the state. His presence in the state, even for an instant, gives the state judicial jurisdiction over him." But see Restatement (Revised) of Foreign Relations Law § 441 comment e (Tent. Draft No. 2, 1981) ("'Tag' jurisdiction, e.g., jurisdiction based on service of process on a person only transitorily in the territory of the state, is not generally acceptable under international law.").
163. See supra note 88.
jurisdiction must be established separately),\textsuperscript{164} it does encourage the acceptance of transitory claims.

3. \textit{Does United States Law Permit Transitory Actions?}—Yes. Courts of general jurisdiction in the United States may accept transitory civil actions under their conflict of laws rules. These rules require minimum contacts between the forum and defendant, and notice and opportunity to be heard.\textsuperscript{165} United States federal courts may not accept transitory actions unless there is diversity jurisdiction,\textsuperscript{166} or the claim is pendent to a primary federal claim.\textsuperscript{167}

D. Type Four: Filartiga as an Action Under Protective Jurisdiction

This critique of protective jurisdiction will focus only on the international law meaning, which is jurisdiction over issues affecting a state’s protection or security. As noted in the earlier section on universal jurisdiction, the United States’ notion of protective jurisdiction—the protection by federal court jurisdiction of rights guaranteed under nonfederal law—is included in the international law concept of universal jurisdiction, at least as far as human rights or civil rights are concerned.

Protective jurisdiction under international law is the authorization for a state to impose its judicial jurisdiction on aliens for acts committed outside the forum state’s border when such acts threaten the forum state’s security.\textsuperscript{168} The actions are typically criminal offenses, but do not necessarily exclude civil remedies.\textsuperscript{169}

1. \textit{Is Filartiga a Protective Action?}—No. Filartiga does not fit the international meaning of protective jurisdiction because the rights at issue in \textit{Filartiga} do not involve security of the forum state. It would seem that \textit{Filartiga}-type claims, or any private claims for

\begin{itemize}
  \item \textsuperscript{164} See \textit{supra} note 87.
  \item \textsuperscript{165} See \textit{Conflict Restatement}, \textit{supra} note 9, §§ 24-25 and comments following. This assumes that the forum has judicial competence under local law.
  \item \textsuperscript{166} See \textit{supra} note 159.
  \item \textsuperscript{167} See \textit{supra} note 158.
  \item \textsuperscript{168} \textit{Brownlie}, \textit{supra} note 18, at 303-04.
  \item \textsuperscript{169} \textit{Restatement (Revised) of Foreign Relations Law} § 441 (Tent. Draft No. 2, 1981) states as follows:
    \begin{enumerate}
      \item \textsuperscript{(2)} A state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted, any one of the following applies:
        \begin{enumerate}
          \item \textsuperscript{(j)} the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct or foreseeable effect within the state, which created liability, but only in respect to such activity;
        \end{enumerate}
    \end{enumerate}
  \end{itemize}

\textit{Comment} c states that this applies to criminal and civil jurisdiction. See also \textit{Conflict Restatement}, \textit{supra} note 9, § 37.
human rights, would never fit international protective jurisdiction because private rights and state security rarely coincide. One instance in which they might coincide is when protection of an alien's private right is essential to the ongoing protection of that same right for the forum state's citizens. Piracy cases in the nineteenth century are an example, as is genocide in the twentieth century. But as noted elsewhere in this Article, such claims are generally based on universal jurisdiction.170

Because protective jurisdiction as defined by international law is apparently inapplicable both to Filartiga and other human rights litigation, an examination of its jurisdictional validity is unnecessary here. Some commentators, however, have determined its validity under both international and United States law.171

E. Type Five: Filartiga as a Dedoublement Fonctionnel Action

Some scholars have proposed that state jurisdiction in Filartiga-type cases is valid under the notion of dedoublement fonctionnel. This theory—which is a policy argument rather than a legal doctrine—holds that higher level courts in each state compose an international judiciary, and that as such they have a duty to hear claims under international law for which there is otherwise proper jurisdiction. The policy argument is that maintenance of the international order is in everyone's interest, and that states, as the prime functionaries in the international order, should promote international interests through their executive, legislative, and judicial branches.

The original dedoublement fonctionnel theory was espoused by the French scholar Georges Scelle.172 Scelle suggested that states' executives have a double function: as the highest officials of their own countries they have a duty to advance its interests and carry out its law; as the principal actors in the international political order they also have a duty to respect and advance the laws and interests of the international order. It is possible that these duties might conflict when a state's interest is inconsistent with the international interest. The duty to the international order is a counterpart to the duty to the domestic order, and the international interest should not be summarily subordinated to the domestic interest.

170. See supra notes 132-33, 146 and accompanying text.
171. See BROWNLIE, supra note 18; at 303-04; RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 441(2)(j) (Tent. Draft No. 2, 1981); CONFLICT RESTATEMENT, supra note 9, § 37.
States' executives have this duty to the international political order because their states are part of that order and have actually or tacitly agreed to uphold it. An analogy can be made to the chief executive of a business corporation who has duties both to his stockholders and directors on the one hand, and to the larger business community on the other. This could require him to honor a contractual duty seemingly contrary to the company's interests in order to fulfill his obligation as a functionary in the business community. Naturally the company's interests would prevail most of the time. But even when self interests prevail, the company president is conscious of his other obligation to the business community.

At first glance, this example seems to differ from dedoublement fonctionnel because the company president may face legal sanctions if he violates rules of the larger group. But the erring state also faces legal sanctions when it violates international law.\textsuperscript{173} The state's chief executive thus has an incentive to obey international law, just as the company president has an incentive to obey local law. Regardless, fear of legal sanctions is not the point. Rather, the point is that these duties—the state executive's to the international system and the company president's to the business community—are not merely duties prescribed by law. These duties are necessary for the respective systems to work. Thus, the chief executive of a state has a duty both to advance the state's interests and to adhere to the interests of the international system; both are necessary for our present world to function.

Just as states' executives have an obligation to the international order, states' judiciaries also have a role in maintaining the system. International law is allowed in states' courts. It is commonly litigated in United States federal courts in matters of admiralty, expropriation, treaty interpretation, and so on. The only requirement for such litigation is that the forum's jurisdictional rules be satisfied. The policies that cause federal courts to hear admiralty and expropriation claims support human rights litigation as well.\textsuperscript{174}

The policy behind dedoublement fonctionnel is that states' courts should be used to support international human rights. Now, it is one thing to argue that states' judiciaries should entertain international human rights claims—it is quite another to argue that states' judiciaries should do so as part of an international judicial system. The latter argument proposes the existence of an international judi-


If *dedoublement fonctionnel* is applied to states' judiciaries, there are three distinct interpretations. First, to the extent that *dedoublement fonctionnel* simply encourages states to hear international human rights claims in their courts, it may be nothing more than a restatement of the states' obligation to furnish their courts to aliens with foreign claims. This interpretation should be rejected because it adds nothing to existing policy and renders *dedoublement fonctionnel* meaningless.

The second interpretation is that *dedoublement fonctionnel* may be a rule of subject matter jurisdiction that allows a court to hear cases not covered by its own subject matter rules. Regardless of a forum state's subject matter jurisdiction rules, *dedoublement fonctionnel* urges that the state's highest level courts be available for torture claims which meet personal jurisdiction requirements. If *dedoublement fonctionnel* is an imposition of subject matter jurisdiction on state courts, it is superfluous in the United States where federal courts have subject matter jurisdiction over international law claims. The *dedoublement fonctionnel* concept would still be useful, however, for those states where subject matter jurisdiction for international law is less certain.

The third interpretation is the most radical one. Under this interpretation, *dedoublement fonctionnel* means a state court should act in an abnormal capacity, that is, to function as something other than a state court. If the *dedoublement fonctionnel* description is taken literally to mean that high level state courts compose an international judiciary, then state courts ought to function as "international courts" as opposed to merely being state courts trying international claims. The effect this would have on courts' behavior is speculative.

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175. States have a duty to furnish a forum for resident aliens' claims, either under local law or foreign law. See supra note 87. Arguably, *dedoublement fonctionnel* simply reflects this duty to provide a forum, and adds claims arising under international law to the existing categories of forum law and foreign law under which aliens might have transitory claims.

176. Although this interpretation adds nothing to the existing doctrine that obliges states to furnish a forum to aliens with foreign claims, that obligation has not been met in regard to human rights claims. Thus, even if *dedoublement fonctionnel* is no more than a restatement of a preexisting obligation, it may be necessary to encourage acceptance of valid human rights claims.

177. When a New York court applies Pennsylvania law to a case, the court retains its procedural norms: the method and content of pleading; burdens of proof and other fact finding norms; evidentiary rules; and so on. If the New York court were to somehow "become" a Pennsylvania court, the most immediate change would be the switch to Pennsylvania procedure.

But in addition to the procedural switch, there is an added dimension of shifting the court's identity. A New York court—the judge and other personnel—have a certain understanding of their function that runs deeper than the function of legal procedures. It is their understanding of their place in the system, *i.e.*, both their social relevance in the immediate legal system and in the larger society. This understanding might not be lost in transplanting a
when the court is acting as an international body. This extreme view is probably untenable both politically (for foreign policy reasons) and practically (because of the difficulty in ascertaining and applying a different judicial procedure). On the other hand, history offers examples of the "redeploying" of courts. One example is the United States and English experience in combining equity and law courts. The law/equity duality differs from the dédoublement fonctionnel proposal in that the former was commanded by a sovereign. Nevertheless, the law/equity examples illustrate the benefits and the feasibility of assigning a dual purpose to a court. Of course, the decision to use United States federal courts as international tribunals has never been faced. But if Filartiga-type litigation becomes common in the United States and elsewhere, and if international law is used as the substantive law, then use of non-forum procedures for certain issues may be appropriate.

Thus, dédoublement fonctionnel as applied to states' judiciaries may be another name for the "forum furnishing" doctrine, or it may be a subject matter jurisdiction rule, or it may be a concept that would radically alter the function of state courts litigating certain international claims. The first interpretation adds nothing to current practice. The second is unnecessary in the United States where there is already subject matter jurisdiction for international law claims in federal courts. The third is untenable for political and practical reasons. Because dédoublement fonctionnel does not add anything to Filartiga's choice of law analysis, comment on its jurisdictional validity under international and United States law is unnecessary.

VII. Conclusion

Although Filartiga was originally pleaded as three different types of causes of action, only one label applies. Filartiga is an international delict litigable under United States federal common law, and nothing more. It is not a transitory action, nor one of universal jurisdiction (although it could have been both). It is not a protective action, either in the international or the United States meaning of that term. It may or may not be an instance of dédouble-

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New York court to Pennsylvania, but it would be lost or at least disturbed in calling upon a New York court to act as an international body. This confusion of identity appears to be the strongest argument against the extreme dédoublement fonctionnel theory (that the highest level of domestic courts in each state should act as an international judiciary). If we are to have an international judiciary, institutions should be created for that purpose rather than imposing the function on domestic courts.

178. In plaintiffs' appellate brief, Filartiga was argued as: (1) a wrongful death action under Paraguayan law (a transitory action); (2) an action under universal jurisdiction for the torture offense; and (3) a violation of international law. Although these causes of action labels were used, all were focused on one cause of action under section 1350. See Appellant's Brief at 11-53, Filartiga I, 630 F.2d 876 (2d Cir. 1980).
ment fonctionnel, but that theory adds nothing to the jurisdictional or choice of law inquiry.

A proper characterization of *Filartiga* is a predicate to the choice of law question involved in *Filartiga*-type cases. Having defined, or characterized, the *Filartiga* action as an international delict litigated as United States federal common law, it is now possible to prepare for the second phase of choosing *Filartiga’s* law—examining the legal system that might apply, the norms within those systems, and the policy reasons for choosing one legal system over another.

Before closing this initial phase of *Filartiga’s* choice of law analysis, there are a few cursory choice of law conclusions to be made. The first relates to the use of the term “wrongful death” in describing the *Filartiga* action. While the term “wrongful death” may be factually accurate, it has no legal significance in the *Filartiga*’s claim under international law. If Pena’s delict were governed by United States law, it is very likely that wrongful death would name the cause of action, or at least one of the causes of action. But under international law the term wrongful death is no more than rhetoric. The delict is torture. The fact that Joelito died aggravates the offense, it does not deal in specific causes of action, but only in norms, violations of those norms, and remedies.

A second cursory conclusion flowing from *Filartiga’s* definition is that because this is an international law claim, international law should apply to the merits. Some scholars have depended on *Filartiga’s* mistaken labels to support the application of something other than international law—in most instances, Paraguayan law.

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179. The term “wrongful death” is used throughout the Second Circuit’s opinion in *Filartiga*, as well as in the plaintiff’s jurisdictional briefs. Plaintiffs’ brief states: “The Filartigas brought this action in the Eastern District of New York against Amerigo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga’s seventeen-year-old son, Joelito.” Appellant’s Opening Brief at 1, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

Wrongful death has been used to describe the events in *Filartiga* as well as the plaintiff’s alternative claim under Paraguayan law. Joelito Filartiga’s death is better described as a torture-death, for both the legal and the semantical import.

Use of the term “wrongful death” to describe *Filartiga* is inappropriate. *Filartiga’s* invocation of the torture proscription under international law is no more a wrongful death action than a section 1983 lawsuit for prisoner mistreatment is an action for assault. By adhering to accurate terms, international human rights law will be put in its proper focus, which is the regulation of a government’s relationship and interaction with individuals. The use of inaccurate terms such as wrongful death gives the impression that international human rights law is nothing more than an alternative system for redressing private claims against governments. International human rights law is much more than an International Federal Tort Claims Act.

180. See Brownlie, *supra* note 18, at 473-75.

181. D’Zurilla argued that international law does not prohibit torture, but that torture is a universal crime to which the court could apply either Paraguayan law or federal common law. D’Zurilla, *supra* note 2, at 214-15, 216-17. See also Comment, *The Alien Tort Statute: International Law as the Rule of Decision*, 49 FORDHAM L. REV. 872 (1981) (cautioning that the *Filartiga* court should apply Paraguayan law unless there are compelling reasons to apply international law).
Article has countered such conclusions to the extent that they are based on an inappropriate definition of *Filartiga* as anything other than an international delict under federal common law.

This is not to say that international law is now mandated as the choice of law, or that other considerations besides *Filartiga*'s definition do not dictate the application of Paraguayan law. Although characterizing *Filartiga* as an international delict under federal common law indicates that international law should apply, other considerations are also involved in a choice of law analysis as well. Fairness to the defendant and other international interests may dictate application of some other law.