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THE MAKING OF *FILÁRTIGA V. PEÑA*: THE ALIEN TORT CLAIMS ACT AFTER TWENTY-FIVE YEARS

Editor's Note: On June 30, 1980, the Second Circuit Court of Appeals decided *Filártiga v. Peña-Irala*,[1] a groundbreaking case that used the Alien Tort Claims Act to achieve justice for victims of international human rights violations. The twenty-fifth anniversary of the Second Circuit *Filártiga* decision was celebrated on November 2, 2005 by the International Law Committee of the Association of the Bar of the City of New York, the Center for Constitutional Rights (CCR), and the *New York City Law Review* with "The Making of *Filártiga v. Peña*: Alien Tort Claims Act After Twenty-Five Years" at the Association of the Bar of the City of New York. Starting the discussion was Sidney Rosdeitcher, Chair of the City Bar Association's Civil Rights Committee. Moderating the discussion was Felice Gaer, Director of the Jacob Blaustein Institute for the Advancement of Human Rights and Expert Member of the U.N. Committee Against Torture. The panelists were John Huerta, General Counsel at The Smithsonian Institution and former Deputy Assistant Attorney General for Human Rights at the Department of Justice (DOJ); Peter Weiss, Vice-President of the Center for Constitutional Rights (CCR) and counsel for the *Filártiga* plaintiffs; and Rhonda Copelon, Professor of Law and Director of the International Women's Human Rights Law Clinic at the City University of New York School of Law and former CCR staff attorney and counsel for *Filártiga* plaintiffs. Concluding remarks were given by Ralph Steinhardt, Professor of Law and International Affairs and Arthur Selwyn Miller Research Professor of Law at The Elliot School of International Affairs at George Washington University, and Sandra Coliver, Executive Director of the Center for Justice and Accountability. Last but not least, *Filártiga* plaintiffs Dr. Joel Filártiga and Dolly Filártiga were present. Scheduled panelists Patricia M. Derian, former Assistant Secretary of State for Human Rights and Humanitarian Affairs, and Robert White, President of Center for International Policy and former U.S. Ambassador to Paraguay and El Salvador, were unable to attend because of separate emergencies, but the latter submitted comments, which are printed below.

SIDNEY ROSDEITCHER: It's my pleasure to welcome you this evening to a program on *Filártiga* after twenty-five years. It seems very

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

fitting to have this panel this year, looking back on the last few years and some of the infamous memos we have seen about torture. It is quite refreshing to read the *Filártiga* claim and see the simple proposition that torture violates the laws of nations.

It is my special pleasure to welcome Dr. Joel Filártiga and Dolly Filártiga, the two plaintiffs who brought this case and are responsible for the ground-breaking decision. I think we owe them a great debt. Mankind owes them a great debt.

It is now my privilege to introduce the extraordinary moderator for this extraordinary panel, Felice Gaer. Ms. Gaer is currently director of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee. She is past chair and current vice chair of the United States Commission on International Religious Freedom and is now serving her second term as an expert member of the United Nations Committee Against Torture. Ms. Gaer has a long record as a human rights leader and activist: She serves on the steering committee of Human Rights Watch for Europe and Central Asia and on the Board of Directors of the Andrei Sakharov Foundation; she is Vice President of the International League of Human Rights. It is therefore my pleasure to turn the evening over to the good hands of Felice Gaer.

FELICE GAER: Thank you Sydney, and thank you all for joining us today for what I am sure will be both a historic review and a historic look forward. We are going to proceed in a forum that is more or less a roundtable discussion as we look back at the *Filártiga* case. This is an extraordinarily important case: No one would have known in 1976, when the [President Alfredo] Stroessner regime in Paraguay was in its twentieth year, that the murder of Joelito Filártiga would not only change the political dynamics in Paraguay, but it would also change the dynamic in the United States and globally for victims of torture and universal crimes of that nature.

Behind me are some photographs. One of the things that made this case so important was the fact that Dr. Joel Filártiga himself took these photographs. Another thing that was vitally important was that Dolly Filártiga herself was called by the neighbor in the house where Joelito was allegedly killed and told to take her brother's body back. And she did. They carried it back.

MS. GAER: So this case begins with witnesses, documentation, and a background of years of repression through which people had become attuned to this type of situation. Without elaborating on what else went on—because I want those who were there to be able

to tell us what happened—I'll simply point out that there was a lot of activity. A great number of human rights organizations and individuals began to draw attention to this killing and to what didn't make sense about it. Joelito's death was being called a crime of passion by the government and its officials. Yet evidence made clear that there had been systematic torture by very professional torturers, although this could be seen only by people with forensic knowledge. Dr. Filártiga, himself a torture victim, could spot the evidence on his son's body immediately, and he was able to document it and bring it to the attention of others. Although a cover-up followed, the human rights movement didn't let that cover-up stay there as if it was the reality. And what happened thereafter is really for our panelists to tell you.

Now, among our panelists today are Peter Weiss and Rhonda Copelon, both of whom were at the Center for Constitutional Rights and had dabbled with the question of whether the Alien Tort Claims Act, an ancient American one-sentence-long law, could be invoked in the courts. Peter—who is the Vice President of the Center for Constitutional Rights and is well known to everyone for his extraordinary civil liberties work and his work on this case—Peter, could you tell us what led you to bring human rights and the Filártiga case forward in this way? You were one of the architects in this case; how did it actually come about? Why did you pick this approach in this case?

PETER WEISS: Thank you, Felice. Since this part of the program is historical, I'll start briefly at the beginning. Around 1967, we invited a young journalist named Seymour Hersh, who had just written his first book on chemical and biological weapons,[2] to the Center for Constitutional Rights. He gave us a very interesting lecture, and then at five minutes to six he said, "I've got to get going." We asked, "Where are you going?" and he said, "I'm going down to Fort Benning to find the guy who committed the massacre at My Lai." And as you know, he won the Pulitzer Prize for his book about My Lai.[3] Our initial connections with Sy led us to begin to think about what we could do to bring to justice the people who were really responsible for the massacre.

During the course of that investigation we discovered this an-

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[2] SEYMOUR M. HERSH, CHEMICAL AND BIOLOGICAL WARFARE: AMERICA'S HIDDEN ARSENAL (1968).

[3] *See* David Carr, *Dogged Reporter's Impact, from My Lai to Abu Ghraib*, N.Y. TIMES, May 20, 2004, at E4; SEYMOUR M. HERSH, MY LAI FOUR: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1970).

cient one-sentence law: the Alien Tort Claims Act, or Alien Tort Statute, as some people are calling it now. It is so short I'll give you the exact text of it. It says, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[4] We started to develop a case regarding My Lai, but eventually the Vietnamese government decided they didn't want to be in an American court in the middle of the war.

Then, almost ten years later, I was sitting at my desk in my law office, and I got a call from Gerhard Elston at Amnesty International. Gerhard said, "There is a notorious torturer sitting in the INS detention center at the former Brooklyn Navy Yard in Brooklyn. You've got to keep him here and bring him to justice." I said, "How are we going to do that?" He replied, "That's your problem," and he hung up. Of course, that torturer was [Americo Norberto] Peña-Irala.

So, we called an emergency meeting at the Center and decided that it was time to use the Alien Tort Claims Act. I have to tell you it was very hard to convince the staff at the Center that it made any sense to sue a Paraguayan citizen in the United States on behalf of two Paraguayan citizens for an act committed in Paraguay. Fortunately, I had Rhonda there at the meeting, who was then a staff attorney and a crackerjack litigator for the Center. I think her enthusiasm swayed the decision, and we decided to bring Dolly to New York with her Washington lawyer Michael Maggio, who was just recently out of law school and also played an important role at that time, but is unfortunately out of town today. We decided to bring this case immediately because we had ascertained that Peña-Irala was under an order of deportation and might be put on a plane by the INS within forty-eight hours. We worked most of the night and finished the papers by Friday afternoon at four o'clock. We were determined to serve them by five o'clock on Friday at the Eastern District. Then there was the famous taxi ride that Rhonda took with Michael to file the complaint at the Eastern District, and you know what New York traffic is like on a Friday afternoon. I'm told that Rhonda kept saying, "We should have taken the subway. We should have taken the subway." We got there at five minutes to five, and we filed the complaint, and the next day we served Peña-Irala and his companion Juana Villalba at the INS center.

The following Monday we were in court in the Eastern District

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[4] 28 U.S.C. § 1350 (2000).

of New York. We drew Judge Eugene Nickerson. We were very happy about that because he had a wonderful reputation, and indeed he was very interested in the case. At the preliminary hearing, we asked him for an order keeping Peña-Irala and his girlfriend in the country for the trial, and he issued that order. I remember very clearly as he walked off the bench toward his chambers, he turned around and he said, "Interesting case." Well, that was the beginning.

Then we did a certain amount of very feverish research because, up to that point, the Alien Tort Claims Act had been basically dormant for 200 years. There was one case in the Second Circuit, *Dreyfus v. Von Finck*, which was brought by a German refugee against a German bank that had opened an office in New York and which had been used by the Nazis to expropriate the plaintiff's bank account.[5] Judge [Van Graafeiland], who was on the Second Circuit at that time, dismissed that case with some very bad language about international law, saying basically that international law governs only relations between states and has very little to do with individuals.[6] That was the issue that we had to focus on.

We dug up a lot of stuff from the early past making the point that international law started as the law governing relations between states, but was now increasingly becoming of concern to relationships between individuals and states. We did not manage to convince Judge Nickerson at that point; he was rather unhappy about that. He felt that he was bound by the precedent of the *Dreyfus* case. It was clear that he would have preferred to rule for us.

Then we appealed to the Second Circuit. When I was about two minutes into my argument Judge Kaufman interrupted me and asked, "Mr. Weiss, what does the State Department think of this case?" I sort of said to myself, under my breath, "When I went to law school I was told that judges were to act independently of the government, and that was what an independent judiciary was about." I didn't actually tell him that though. But he listened to the argument, and then within minutes after the argument was over he instructed his clerk to obtain the opinion of the State Department.

Ms. GAER: Rhonda Copelon was a staff attorney at the Center

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[5] 534 F.2d 24, 26 (2d Cir. 1976).

[6] *Id.* at 30–31 ("There has been little judicial interpretation of what constitutes the law of nations and no universally accepted definition of this phrase. There is a general consensus, however, that it deals primarily with the relationship among nations rather than among individuals.") (citations omitted).

for Constitutional Rights. Today she is Professor of Law at the City University of New York School of Law and Director of the International Women's Human Rights Clinic. Rhonda, when Peter called you, we understand you were the one who was most supportive of using the Alien Tort Claims Act. This was the first case where a federal court stopped a deportation. There were a lot of issues that were new, including this request to the State Department. Could you tell us a little bit about what your expectations were when you started this; when you said, "Let's try to implement this 200-year-old statute?" How did the case develop after that?

PROFESSOR RHONDA COPELON: Thank you. Greetings everybody. I just want to say that I don't remember it being such a controversy at CCR at the time, but that may have been because I was so busy. I had no time for a controversy, and maybe Peter was more aware of it.

The crazy thing was—I say this to law students, but I am a little reluctant to say this at the Bar Association—it seemed very simple. That statute was very simple.[7] We had an alien, although I don't like using that word; we had a tort. So it seemed to center on the issue, "Is torture a violation of the law of nations?" I was not an international lawyer at that time, and I considered that this was Peter's department. He said to me it was, and I said, "Okay." So it seemed like an immensely simple case.

For all of those who have been working on this since 1979 when we started the case, obviously it was not simple at all. I think that is an interesting part of the story: Peter talked about the point that the concept of international law was a pre-Nuremberg, pre-U.N. Charter concept. Before *Filártiga*, it was the idea that the law of nations was about the relationship between states and was not about people. I remember when Peter and I developed arguments, we dug up very strong material dating back from the beginning of this country, stating that international customary law is an evolving law, it doesn't get stuck in one time, and it keeps moving.

The other concept ignored by the court in *Dreyfus* was that international law was about things that countries felt were needed or useful to the common good. Judge [Van Graafeiland] didn't notice this piece of the standard that had been articulated. I remember one afternoon thinking about the question—and this is common: You are sure you are going to be asked a question, and

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[7] § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

you spend a lot of time trying to figure out an answer to it, and then you are never actually asked the question—"How do we show the court in a pragmatic way that what a state does to its own people is about relations between states?" This matters to international law, and even beyond that it matters that people treat their own people correctly. That is the common good, right? So we had this discussion, and I remember talking about how these violations create massive refugee problems in war, and that you cannot really talk about even having peace between countries when you have these kind of internal problems. In the end, we were never asked that question in court.

It is also important that this case came up before Rule 11 sanctions became more common.[8] When I went to the circuit to have a meeting with counsel, the judge said to me, "What are you doing here with a case that involves Paraguayans and happened in Paraguay and just happens to have a person living here in this country?" I said, "Well, look at the statute. We meet the terms." He said, "I think I should just dismiss this case, or can you settle this case?" And I said, "No. There is no way to do that." I walked out very confident that we had a very strong case knowing that it was the first time we really had in fact brought such a case. Had the use of Rule 11 been as common at the time as it is today, I think that there would have been a lot more reluctance about whether or not to take the risk of bringing a case like this, which illustrates how Rule 11 can block creative litigation.

What happened when we got to the circuit level is that the case got more complicated. It got more complicated in ways that Ralph Steinhardt, who represented [Humberto] Alvarez-Machain in the *Sosa* case two years ago before the Supreme Court,[9] will later explain. As opposed to Stroessner's "mob lawyer" who came out to handle the case at the district court level, a very well-respected New Jersey firm[10] came in at the circuit level and they raised constitutional issues.

First, when they raised the constitutional issues I said, "What is the issue?" The issue, it turns out, was that under Article III of the Constitution—which gives the courts the power to hear cases in-

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[8] Fed R. Civ. P. 11 (2000). Rule 11 provides for monetary and nonmonetary sanctions for, among other things, claims and defenses that are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." *Id.* § (b)(2).

[9] Sosa v. Alvarez-Machain, 542 U.S. 692 (2004); *see infra* comments of Ralph Steinhardt.

[10] Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, P. C.

volving the constitution, laws, and treaties of the United States—what is federal common law? Is federal common law something within the jurisdiction of the courts? Because if it is not, the Alien Tort Claims Act is, as in *Marbury v. Madison*,[11] against the Constitution. And that issue, it seems to me, haunted this whole case until the Supreme Court took it up twenty-four years later in *Sosa*, answering, "Yes, federal common law is part of the laws of the United States."[12]

Also, I would say this about the request for the State Department brief: I think Judge Kaufman asked for it five or six times during the argument, and when we got back to the office, his clerk had called us to tell us the court had asked for the brief; and we said to ourselves, "That brief is going to determine this case." We knew there was a big fight that was going to take place within the State Department about how to come out on this case—but we did not know how they would come out, and it was truly a cliffhanger.

Also, a comment about the judges. There were three judges to begin with: Chief Judge Irving Kaufman, Judge Smith, and Judge Feinberg. Judge Smith seemed very clear at the argument that he understood this was a tort. He understood that this tort could be heard at the state court, and if we didn't want these things to be heard in the state court, the Alien Tort Claims Act existed to have them be heard in federal court. Judge Feinberg seemed sympathetic. Judge Kaufman seemed hostile.[13] Sadly, Judge Smith died before the case was decided. Judge Amalya Kearse, a new appointee by the Nixon Administration, was then appointed to the case.

We are going to turn now to look at what happened at the State Department, but I just wanted to add that I think that was

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11 5 U.S. 137, 178 (1803). ("It is emphatically the province and duty of the judicial department to say what the law is. . . . [I]f a law be in opposition to the [C]onstitution, . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.").

12 *Sosa*, 542 U.S. at 729–30.

13 In an article five months after his decision, however, Judge Kaufman wrote that *Filártiga* "breaks new ground in the body of law governing torture." Irving R. Kaufman, *A Legal Remedy for International Torture?*, N.Y. TIMES MAG., Nov. 9, 1980, at 44.

> Americans are reluctant to interfere in overseas disputes between two foreign nationals. But where torture is involved, on the state or international level, the Federal courts have no choice. The articulation of settled norms of international law by the Federal courts, much like their adherence to constitutional precepts, is an expression of this nation's commitment to the preservation of fundamental elements of human dignity throughout the world.

Id. at 52.

very determinative of the outcome of the case, including the unanimous decision. I think the fact that it was a unanimous decision has meant that a lowly circuit decision lasted around the country, laying the foundation for cases all over the country for twenty-four years before the issue went to the Supreme Court.

Ms. GAER: Earlier, we spoke to both Ambassador Bob White and Patricia Derian, who was Assistant Secretary of State for Human Rights and Humanitarian Affairs at the time. The State Department was engaged on two different levels in this case. First there was the simple question of how was it that Mr. Peña got into the U.S., Peña being the torturer who was responsible for the death of Joel Filártiga. Who gave him the visa and why? Peña came to the U.S. on a tourist visa, saying he was going to Disney World, but the facts later showed that he sold his house and his car in Paraguay before he left. And there was another question: Who in the Embassy gave him the visa? What kind of application was there? What kind of investigation was there?

To a large extent, this case made an issue—for one of the first times in America, I think—of the process for issuing visas and the responsibility of U.S. consular officials for providing them to people with dubious backgrounds and charges against them. They later said there were no charges against Peña in Paraguay, but that conclusion depends on how you interpret Paraguayan law. There was a back-and-forth about the visa question within the State Department—between the Regional Bureau and the Human Rights Bureau—and with the Embassy and its consulate. The Department of State took guidance from the Embassy as to what to say and how to say it. At the same time, the Senate Foreign Relations Committee was recommending a cut-off of economic and military aid to Paraguay. So the State Department's involvement was becoming a live issue.

On the matter of the amicus brief, we learned something about large bureaucracies. Patt Derian told us that they didn't tell her that they were preparing an amicus brief; she only found out about it indirectly. They were trying to keep this from the Human Rights Bureau presumably—and this is my assumption—in order to prevent an outcome that would be favorable to human rights and unfavorable to their view of the case. So there were a lot of currents pulling in different directions. One of Patt Derian's deputies was actually taken and questioned for three hours before the Inspector General in the State Department in order to find out if

the Human Rights Bureau had leaked information about anything related to the visa, the case, the amicus brief, and so forth.

ROBERT WHITE:[14] Lying came as naturally to officials of the Stroessner regime as cheating to card sharks. The official propaganda apparatus had quickly portrayed Lt. Colonel Americo Peña as the wronged husband who killed Joelito in a jealous and righteous rage.

Evil systems are often fatally weakened by the courageous act of one person: Rosa Parks in Alabama;[15] Nelson Mandela in South Africa;[16] Pedro Joaquin Chamorro in Nicaragua;[17] and Jose Filártiga in Paraguay. When the tortured body of Joelito Filártiga was put on display for all to see, Paraguayan citizens waited for the Stroessner regime to eliminate Dr. Filártiga.[18] The usual four men, dressed as civilians arriving in a gray Ford Falcon would take him away, and he would never be heard from again.

Dictatorships do not know how to handle courage. They are particularly helpless when the man of courage has had the foresight to establish himself nationally and internationally as a defender of the human rights of workers, *campesinos*, and the environment. The Stroessner regime, in full view of the Paraguayan people, crumbled.[19] One man had faced them down, and the Paraguayan dictator and his official thugs would never recover. The regime would not fall for several years, but the countdown had begun.

Over the course of his forty-year presidency, General Stroessner would often publicly refer to the American ambassador as "just another member of my cabinet." He never said that about me. When an official of the regime told me that I had to have the *Filártiga* case thrown out of court or else no governmental minister could ever safely visit the United States again, I told him that was precisely the intent of the case and that if the Stroessner govern-

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14 Ambassador White was unable to attend the panel but submitted comments afterwards.

15 Ms. Parks was a civil rights activist famous for her refusal to give up her seat on a bus to a white passenger in 1955. Michael Janofsky, *Thousands Gather at the Capitol to Remember a Hero*, N.Y. TIMES, Oct. 31, 2005, at A16.

16 Mr. Mandela was an anti-apartheid activist, the first democratically-elected president of South Africa, and the winner of a Nobel Peace Prize in 1993. John Darnton, *Note of Unity Pervades Peace Prize Ceremony*, N.Y. TIMES, Dec. 11, 1993, at A7.

17 Mr. Chamorro was a vocal opponent of the Somoza family rule in Nicaragua. *Somoza Refuses Demands for His Resignation*, N.Y. TIMES, Jan. 28, 1978, at A5.

18 Alfredo Stroessner was the president of Paraguay from 1954 to 1989. *Paraguay General Leads a Rebellion*, N.Y. TIMES, Feb. 3, 1989, at A9.

19 On February 2, 1989, rebel army units arrested Stroessner in Paraguay. *Id.*

ment did not change its ways, its officials did not deserve to visit a country where laws and human rights were respected.

United States law gives total discretion to the consular officer to grant or withhold a visa.[20] The most crucial question the consular official must decide is whether the applicant for a non-immigrant visa will return to his or her country; if the applicant will, the visa is granted.[21] An official of a foreign government would almost automatically be issued a non-immigrant visa because his office would establish his bona fides.[22] The embassy, of course, would have no way to know about actions that contradict an intent to remain, like the sale of a house and car. There never has been, nor are there now, resources to investigate non-immigrant visa applicants to this extent.

I believe that today Americo Peña would not have received a visa. There is now a human rights officer in every embassy who, *inter alia*, keeps up to date on pending human rights cases. Most career ambassadors today would impress on the chief of the consular section the need to keep informed about any visa cases with a human rights component.

That being said, I believe our present law still gives too much authority to one official and that some institutional check on a consular officer would be desirable, particularly in countries where human rights violation by government officials are routine.

Ms. Gaer: Now, enter the Department of Justice. We are very pleased to have here tonight Jack Huerta, who is currently General Counsel to the Smithsonian Institution and has an illustrious background in civil liberties litigation. At the time of the *Filártiga* case, he was the Deputy Assistant Attorney General for Civil Rights in the Department of Justice. The amicus brief was submitted jointly by the Department of State's legal advisor and the Department of Justice. My question for John is: Why do you feel that the DOJ Civil Rights Division was brought in and involved in this kind of international case? Was there a conflict within the DOJ about its involve-

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20 8 U.S.C. § 1201(a)(1) (2006), Immigration and Nationality Act (INA) § 221(a)(1).

21 *See* 8 U.S.C. § 1184(b), INA § 214(b) ("Every alien shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, . . . that he is entitled to a non-immigrant status . . . ." (internal citations omitted)).

22 *See* 8 U.S.C. § 1101(a)(15)(A)(i),(ii), INA § 101(a)(15)(A)(i),(ii) (including within the definition of "nonimmigrants"—those who intend to return to their country of origin—ambassadors, public ministers, diplomats, and consular and other officials from countries recognized by the United States).

ment and what position to take? If so, how did you develop that position? Finally, was there a conflict with the State Department?

JOHN HUERTA: Let me start this out with a disclaimer, which is that this all happened twenty-five years ago. I have no access to my files, which I left at the DOJ, so this is an old memory. I will do the best I can in terms of my recollections. Since Rhonda called me, I have been thinking a lot about different conversations, and every day something new occurs to me.

As probably everyone here is aware, shortly after Jimmy Carter became President, he made a presentation to the United Nations about the importance of human rights to his presidency.[23] We, being good bureaucrats in the DOJ, figured we had to do something about international human rights, since that was an issue he was concerned about. Once he named Patt Derian as Assistant Secretary of State for Human Rights, we set out to think about complaints lodged against the United States, such as those from the black community—like the Wilmington Ten[24]—from the Latino community involving police brutality, and from the southwestern Native American community of the Dakotas—Sioux Indians[25]—as violations of human rights. Where we could in those areas, we set up units to investigate and bring prosecutions. Some of them were successful, although some of them didn't get very far in terms of the investigations. So the Department already had this system in place.

After the State Department received the letter, the way this probably would have happened is that they would have referred it to the Justice Department because the State Department can't appear in court without the Justice Department representing them. The letter would have gone to the Associate Attorney General. The DOJ is divided so that there is a Deputy Attorney General in charge of all the criminal matters and an Associate Attorney General who deals with all the civil litigation.

The reason why it went to the Civil Rights Division is because we had previously interfaced with Barbara Babcock, who was the Assistant Attorney General at the time. We had a very close working

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23 Bernard Gwertzman, *Carter Urges U.N. to Step Up Efforts for Human Rights*, N.Y. TIMES, Mar. 18, 1977, at A1.

24 *See* Chavis v. North Carolina, 637 F.2d 213, 214 (4th Cir. 1980) (overturning the Wilmington Ten's convictions for allegedly firebombing a grocery store and assaulting the firemen who responded).

25 *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 390 (1980) (ordering the federal government to pay $17.1 million plus interest dating back to 1877 to eight tribes of Sioux Indians for lands illegally seized by the government).

relationship with her in Civil Rights and had discussed how to handle international human rights issues in the past. She had agreed in advance that the Civil Rights Division would have the lead since we had the strength in terms of domestic civil rights issues. So it came over to us and my boss referred it to me. The final memorandum that was submitted to the court was edited in the Civil Rights Division by Irving Gornstein, who did a terrific job, and Brian Landsberg.[26] We interfaced with the Legal Adviser and the Deputy Legal Adviser at the State Department and especially with Stefan Riesenfeld, a professor at Berkeley who had a very strong interest in human rights who was on leave from Boalt Hall to the State Department during the Carter administration.

I knew there was a strong debate within the State Department on this issue. However, there really was not in the Department of Justice. Folks came together pretty well on it. There was a lot of internal coordination with the Legal Adviser's office and with the Solicitor's office, but folks were pretty progressive on this issue. Still, there were some issues that I can't really recall, but they weren't so significant that there was a question of whether to respond to the court or not. First of all, I remember reading the statute from 1789[27] and being shocked that there was no litigation under this thing and asking: What was it designed to do? I called Rhonda and said, "What is this all about?" We developed a phone relationship over probably three or four months—although we met in person today for the first time—while this thing was being developed and everything was coming together. Overall, I was unaware of internal politics at the State Department.

Ms. GAER: The amicus brief was rather simple. It addressed two questions. The first, "Is torture a violation of the law of nations?" And second, "Does it give rise to judicially enforceable remedies—is it a tort within the meaning of the Act?"[28] The State Department/Justice Department response to this is a model response on these issues, and it would be nice to see the same things reaffirmed right now. They were unequivocal. This was 1979–1980, before the Convention Against Torture[29] was adopted and before there was a binding international treaty that the U.S.

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[26] Memorandum for the United States as Amicus Curiae Supporting Appellants, Filártiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 191, Docket 79-6090), at 26, 1980 WL 340146.

[27] 28 U.S.C. § 1350 (2000).

[28] Memorandum for the United States, *supra* note 17, at i.

[29] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

had signed and ratified. The amicus brief came out saying the district court was wrong,[30] and, indeed, when the appeals decision came down, it was unanimous.[31] They got it right. I wonder if we could return to that decision and to the following stage, which was the suit for damages. Rhonda, I want to ask you: Were you surprised by the decision? Throughout this case, Mr. Peña had an attorney provided and paid for by the government of Paraguay, and at a certain point—when they felt that the case was lost or that no one would pay the attorney—there was a default.[32] So when you asked the court for a default judgment later on, were you surprised by the decision? When the issue of punitive damages came up, how did that develop? How do you see this case as important to the subsequent work you have done in the area of international women's human rights, where you do so much work? Has *Filártiga* been an important development?

PROFESSOR COPELON: I think I was surprised by everything. I was immensely relieved. I have to admit that this decision came down on the same day as the decision in *Harris v. McRae*, involving Medicaid funding for abortion.[33] I had argued that case in front of the Supreme Court, and it was the biggest loss of my life—and then this case was the biggest victory. It was hard to juggle those two things on the same day, but it did open up the idea that international human rights had something to do with what happens in the United States. We had actually filed a brief in the Medicaid abortion case for rehearing using a case from the European Court of Human Rights—that where there is a right there ought to be support in the exercise of that right—and although the Court didn't agree with that, it felt better to do it that way.[34]

I think that the fact that the court in *Filártiga* reaffirmed the really old principle that international law is automatically part of our law in the U.S.—that customary international law is part of our federal common law—is extremely important not only to the Alien

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30 Memorandum for the United States, *supra* note 26, at 12.

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

32 Peña defaulted after he lost in the Second Circuit. *See* Filartiga v. Peña-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984).

33 Harris v. McRae, 448 U.S. 297, 326–27 (1980) (holding that the Hyde Amendment, which denied federal Medicaid funds for medically necessary abortions, violated neither the First Amendment nor the Fifth Amendment's Due Process or Equal Protection Clauses). "The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency." *Id.* at 316.

34 *See* Harris v. McRae, 448 U.S. 917, 917 (1980) (denying rehearing).

Tort Claims Act,[35] but also to the whole notion that international human rights—whether we ratify a treaty or not—is part of our law.[36] It is part of our law in this country whether or not we see it properly implemented by the Supreme Court. And I think it was easier for a court to reaffirm in a case that involved something done by another sovereignty as opposed to something done by the United States. Therefore, I think there are so many ramifications stemming from the amazing decision in *Filártiga*.

On the question of damages when we went back to the District Court, I would say that Judge Nickerson was pretty glad that he had been reversed, but he sent us to a magistrate for the hearing. We had some major goals in that hearing. One goal was to give the plaintiffs an opportunity to tell their story—and it's a very painful thing, a very painful opportunity. The second goal was to have the court recognize the necessity for punitive damages in a case such as this. At the hearing before the magistrate, in order to demonstrate the importance of punitive damages, we called Ambassador Bob White, and he told a story that I think really made clear the deterrent effect of the case: After the case had been filed, a couple of Stroessner's henchmen came to him and said, "Well, my God, can't you stop this? You have to do something about this! This case has to be thrown out! We're not going to be able to go visit the United States anymore." I think that had an impact to show the court: "What is this about anyway? Why should we be doing these cases here?"

The other person who testified, in addition to the plaintiffs, was Jacobo Timerman, who had written the book *Prisoner Without a Name, Cell Without a Number*.[37] The purpose of that testimony was to demonstrate that, for the family of a torture victim, there is a life-long, very complex, very everyday process of anguish and suffering and survival. Timerman told stories about how he couldn't socialize with people because he felt that every time someone asked him how he felt, he was being interrogated. He made the issue of torture and the stress of torture very concrete, as did Dolly and Dr. Filártiga when they testified.

What happened? The magistrate issued an opinion providing them with about $175,000 worth of compensatory damages and

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[35] 28 U.S.C. § 1350 (2000).

[36] *Filártiga*, 630 F.2d at 887.

[37] JACOBO TIMERMAN, PRISONER WITHOUT A NAME, CELL WITHOUT A NUMBER (Toby Talbot trans., Univ. of Wis. Press 2002) (1981). Timerman was editor and publisher of *La Opinión*, an Argentinian newspaper critical of the government; he wrote of being arrested and tortured in 1977.

said that he didn't think punitive damages were appropriate.[38] We looked at that and we said, "This is not a traffic accident. This is not a simple assault-and-battery." So we went back to Judge Nickerson and argued that he should add punitive damages.

We did not find a huge amount of support in international law. There were a few arbitral decisions. You could pull out the concept of punishment here and there, but this was different from what had come up previously in the context of the arbitral decisions and in the context of international law. Fortunately, you can read the outcome for yourself. It's the second district court opinion available on Westlaw and Lexis.[39]

Judge Nickerson understood that in order to vindicate the gravity of torture under international law, you had to utilize punitive damages, and so he added what at that time seemed enormous, but today does not. He added $5 million per plaintiff for punitive damages.[40] I think that that was another very important piece of what *Filártiga* generated for future cases, which is the accepted premise that these kinds of acts—whether decided under international law or our federal common law—require a very significant punitive award. And this was not a jury trial at that point; we did this before the judge.

I will very quickly comment on the case's impact on my future work. Dolly was here with us the whole time and worked very closely with us. Dr. Filártiga came from time-to-time for a variety of reasons to pursue the case. I learned through my relationship with Dolly something about what it means to survive torture, although of course I don't really know because it didn't happen to me. More recently I have become very involved in issues of sexual violence against women in the wars in the former Yugoslavia and Haiti, as well as in many other places. It seemed to me that the concept of torture had to apply to something that was seen as trivial, just as very much of the suffering of people who had been subjected to torture in the world—before the massive campaign that NGOs [Non-Governmental Organizations] ran against torture—was not understood as Post-Traumatic Stress Disorder. It was not understood as the suffering generated by this horrendous act, not only for those who had experienced it in their own bodies, but also

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[38] The Magistrate recommended $200,000 in damages for Dr. Filártiga and $175,000 for Ms. Filártiga. *See* Filártiga v. Peña-Irala, 577 F. Supp. 860, 861 (E.D.N.Y. 1984).

[39] *Id.* at 867 (awarding plaintiffs $10,385,364 in punitive damages).

[40] *Id.*

for those who are indirectly affected by it. I think that the whole experience of *Filártiga*, including the profound experience with Dolly in this process, really taught me something I can't let go of. I carry that with me and take it to other places where it's useful.

Ms. GAER: I want to turn back to John Huerta for a moment. You're in a different place now as General Counsel of the Smithsonian than you were in the Justice Department. If you think about the development of civil rights and multicultural understanding—and how this country has developed with regard to civil rights cases—were you surprised or disappointed in any way with the *Filártiga* decision? How do you see the larger impact of the case? And did you, in any way, foresee that the outcome would open the kind of judicial doors that it has for subsequent clients with human rights claims?

MR. HUERTA: I was a Center for Latin American Studies Fellow at U.C. Berkeley when I was in law school, and after I graduated law school I went to Peru for two years. I was very much following developments in Latin America—the rise of other dictatorships there, including the overthrow of [former Chilean President Salvador] Allende.[41] Therefore, I did see long-range implications of *Filártiga* because I was aware, first, of the immigrant flow to the U.S. from Latin America—my father immigrated to this country in 1922 from Mexico—and I was aware that there were a lot of Salvadoran immigrants based on the situation in El Salvador.[42] I had also traveled to speak on international human rights issues in Mexico, Peru, and Paraguay. I was invited to speak in Paraguay by the Colorado Party, which is not Stroessner's party, shortly after we filed our amicus brief in *Filártiga*. I spoke before the bar association there in a very small facility about a fourth the size of this room with a group of about this size. I went to explain why the United States took this position, that torture of Paraguayan citizens was of concern to United States courts. One of the questions I got was, "If you don't torture people, how could you ever convict someone in a criminal matter?" So that shows you the attitude. It was a phenomenon I can talk about for a long time; it was essentially an out-of-this-world

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41 *See* Associated Press, *Junta in Charge: State of Siege Decreed by Military Chiefs—Curfew Imposed*, N.Y. TIMES, Sep. 12, 1973, at A1.

42 From 1980 through 1991, El Salvador was engulfed in a violent civil war between the right-wing military dictatorship and a leftist rebel group. Both military "death squads" and insurgents executed thousands of civilians. U.N. Sec. Council, *From Madness to Hope: The 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador*, U.N. Doc. S/25500 (1993), *available at* http://www.usip.org/library/tc/doc/reports/el_ salvador/tc_es_03151993_toc.html.

experience. These were people who wanted to know—I think they were sympathetic, but they were afraid to ask questions, so a lot of them spoke in hypotheticals.

About the decision, I was hopeful. I was very happy. I was more worried about the precedent that Mr. Weiss referred to—*Dreyfus*[43]—but I knew they had two fairly recent cases, both of which were not good precedents. The Second Circuit had to overcome those opinions, so I was very happy when it did.[44] Then, with the Supreme Court becoming more conservative over the years, I followed the case somewhat. When the Supreme Court decided *Sosa*, I was just thrilled.[45] I didn't really expect that result out of the Court.

Ms. GAER: Thank you. I want to ask Peter: You've continued to be involved in other initiatives to make human rights violators accountable, to use this law, and to pursue universal jurisdiction. Can you tell us if you were surprised by the decision, or by the judgment, or the compensation? What do you feel has been this case's effect on international law generally?

MR. WEISS: We weren't so surprised by the decision, which by the way took a long time—about six months—to come down because the people in the State and Justice Departments were busy with the Iran hostage situation.[46] I wasn't surprised because I was totally convinced that we were right, but I was still elated. It was a wonderful decision. It's fair to say that the *Filártiga* case has been cited more often in human rights litigation than any other case—and there have been hundreds and hundreds of citations. More than one hundred law journal articles have been written about it. It was important not only for the narrow issue before the court, but in a larger way.

Let me tell you what Anne-Marie Slaughter, former president of the American Society of International Law, said in article she wrote. She said, "[T]he Alien Tort Statute cases have . . . forced U.S. courts to grapple with developments in international law that might otherwise have received little attention—a much-needed tonic for a judicial system often lamentably out of touch with inter-

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43 Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976).

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

45 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

46 *See* Bernard Gwertzman, *Reagan Takes Oath as 40th President; Promises an "Era Of National Renewal"—Minutes Later, 52 U.S. Hostages in Iran Fly to Freedom After 444-Day Ordeal*, N.Y. TIMES, Jan. 21, 1981, at A1; Associated Press, *Significant Dates in the Hostage Crisis*, N.Y. TIMES, Jan. 21, 1981, at A7.

national law."[47]

The Court of Appeals decision made a number of very important points that have remained basically unreversed. One had to do with how to interpret international documents like the U.N. Charter and the Universal Declaration of Human Rights.[48] The Circuit Court said that the U.N. Charter, which is a treaty of the United States, makes clear in this modern age that "a state's treatment of its own citizens is a matter of international concern."[49] That was the first time a court ever said that, and the particular part is the protection of citizens from being subjected to torture.[50] If you ask anyone in an official position in Washington these days, they say "U.N. resolutions? Forget it, they mean nothing." This court, however, said that they have a legal value and they create customary law. These days Washington says, "What is customary law? Nobody knows." That's how far away from the *Filártiga* teachings we have come. Also, it brings in the question: What is an act of state? The court said, in passing, that it doubted "whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state."[51]

What has this brought, then? It has brought, in my opinion, an explosive development of a jurisprudence of universal jurisdiction. Not every country around the world is as litigious as the United States; not every country seeks to redress torts through civil actions; many other countries go the criminal way. There's a very interesting article by Beth Stephens, who used to be with CCR and is now a professor at Rutgers-Camden School of Law, called *Translating* Filártiga, which takes a comparative-law view of the *Filártiga* decision and points out how other countries take a more criminal approach to these types of wrongs.[52]

In terms of asserting universal jurisdiction, people tend to think of the International Criminal Court (ICC), which has its first

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47 Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFAIRS, Sept./Oct. 2000, at 106.

48 Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

49 *Filártiga*, 630 F.2d at 881.

50 *Id.* at 882–84 (citing Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), at 91, U.N.Doc. A/1034 (Dec. 9, 1975)).

51 *Id.* at 889.

52 Beth Stephens, *Translating* Filártiga: *A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1 (2002).

case, the Darfur case—which the United States reluctantly agreed to send to the ICC despite its strong opposition to the court.[53] I want to very quickly run through developments of universal jurisdiction. There was an arrest warrant issued in London for a prospective Israeli war criminal, who, upon arrival in England, decided to immediately get on a plane and go back to Israel [to avoid arrest].[54] However, an Afghan warlord has been found guilty in the United Kingdom for acts committed in Afghanistan in July 2005.[55] In the Netherlands, in the summer of 2005, two Afghan journalists who had been granted asylum were exposed by Afghan refugees as members of the Taliban and charged with committing torture.[56] They were tried in a Dutch court, and sentenced to eight and twelve years in a Dutch prison.[57] In Spain, a former Argentine Navy officer, who admitted to having participated in taking people who had been arrested under the junta on airplane rides and dumping them into the ocean, was tried in early 2005 and sentenced to spend the rest of his life in a Spanish prison.[58] In May 2005, Spain's Constitutional Court—which sits over the Supreme Court there—reversed the Supreme Court and ruled that the court could assert jurisdiction over war criminals even when Spanish citizens were not victims, saying that the principle of universal jurisdiction takes precedence over national interests.[59] All this confirms my theory of history: It proceeds simultaneously in opposite directions.

Ms. GAER: Thank you. I want to ask Rhonda to comment on

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53 Marlise Simons, *Sudan Poses First Big Trial For World Criminal Court*, N.Y. TIMES, Apr. 29, 2005, at A12. The Bush Administration withdrew the United States from the treaty establishing the ICC and has opposed the court's jurisdiction over Americans. *Id.* "After two months of opposition and diplomatic wrangling, the Security Council was only able to refer the Darfur crisis to the [ICC] because the United States agreed to abstain, rather than cast its veto." *Id. See also* International Criminal Court: Darfur, Sudan, http://www.icc-cpi.int/cases/Darfur.html (last visited Dec. 26, 2006).

54 Vikram Dodd & Conal Urquhart, *Israeli Evades Arrest at Heathrow over Army War Crime Allegations*, GUARDIAN, Sept. 12, 2005, at 5, *available at* http://www.guardian.co.uk/israel/Story/0,2763,1568001,00.html. Doron Almog, retired Israeli Major General, remained on his plane at Heathrow airport until it flew back to Israel after learning he would be arrested upon disembarking.

55 *See* Sandra Laville, *UK Court Convicts Afghan Warlord*, GUARDIAN, July 19, 2005, at 2, *available at* http://www.guardian.co.uk/afghanistan/story/0,,1531456,00.html.

56 *See* Marlise Simons, *Two Afghans Face Dutch War-Crimes Charges from 80's Soviet Era*, N.Y. TIMES, Sept. 29, 2005, at A13.

57 Marlise Simons, *Prison for Afghan War Crimes*, N.Y. TIMES, Oct. 15, 2005, at A6.

58 SAN, Apr. 19, 2005 (S.A.N., No. 16); *see also* Renwick McLean, *Argentine Officer Convicted*, N.Y. TIMES, Apr. 20, 2005, at A8.

59 STC, Sept. 26, 2005 (S.T.C., No. 237), *available at* http://www.tribunalconstitucional.es/jurisprudencia/Stc2005/STC2005-237.html.

how the findings in these kind of cases have expanded: Are we still dealing with mostly torture cases or is there now something different in cases?

PROFESSOR COPELON: I am going to answer this really fast. I think there are three ways. The *Filártiga* principle has been utilized for twenty-four years in cases in this country. There have been a number of groups that have grown up as a consequence of this, and we've all worked together in different ways on a series of cases.

The first includes a series of cases involving state actors: The development went from Peña, a direct torturer—who was clearly a high-trained person although low-level—to major issues of command responsibility and superior responsibility for those who were not directly involved in the violations but bear responsibility by virtue of their power and authority. That is the series of cases that has been going on for the last twenty-four years.[60]

Another important expansion consistent with the evolution of international law is the expansion in relation to private actors. There were early cases involving war crimes: The major case most people are familiar with involved a Bosnia-Serbian leader, where the Second Circuit wrote a brilliant decision insisting upon the application of this principle to war crimes and non-state private actors.[61] That concept opens the door for holding armed groups responsible for their conduct. We used the principle against an armed Islamic group in Algeria when no one else was paying much attention to Algeria.[62]

Finally, the third really significant development has been in utilizing *Filártiga* and the Alien Tort Claims Act[63] [against] violations by corporations where they have committed violations that, under international law, can be committed by private actors: supporting war crimes, supporting crimes against humanity, support-

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60 *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (finding torture of Ethiopian prisoners by the leader of a local government unit under Ethiopian military dictatorship in the 1970s); *In re* Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994) (torture, execution, and disappearance of Filipino citizens by former President of the Phillipines); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (suing former Guatemalan Minister of Defense for acts of torture and violence perpetrated by Guatemalan armed forces).

61 Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995) ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.").

62 *See* Doe v. Islamic Salvation Front, 257 F. Supp. 2d 115, 121 (D.D.C. 2003) (granting defendant Anwar Haddam's motion for summary judgment because of lack of evidence connecting him to terror and violence suffered by plaintiffs); s*ee also* Bob Herbert, *Terrorism by the Book*, N.Y. TIMES, Nov. 30, 1997, at § 4, p. 9.

63 28 U.S.C. § 1350 (2000).

ing state violations.[64]

Ms. GAER: As Rhonda stated earlier, we are going to hear from Ralph Steinhardt and Sandra Coliver from the Center for Justice and Accountability. Ralph will begin first. He is at George Washington University Law School and was the counsel for the *Sosa* case, which was the *Filártiga*-type case that went to the Supreme Court recently.[65] There has been a lot of pressure from the government to challenge its constitutionality and to eliminate this jurisdiction. Could you comment on the Supreme Court's decision? Where is the opposition to ATCA coming from? What is their argument? What is its future? Can ATCA be kept alive?

RALPH STEINHARDT: In many respects, I'm the token here, since I represent the legions of lawyers and plaintiffs who have relied on the Alien Tort Claims Act and the *Filártiga* case. I was a second-year law student and a summer associate at a law firm when the *Filártiga* case was being litigated, and I worked on the smallest corner of a tiny little amicus brief that went to the International Human Rights Law Group—but it changed my life. It was an interesting set of ideas and energies. I felt as though I had tapped into a huge vein of possibility. It has kept me going for almost a quarter of a century.

In the immediate aftermath of the decision, there were probably more academic conferences on Alien Tort Claims Act cases than there were cases, and there were a great deal more people on the panels than there were in the audience. As time went on, however, there was an expansion of actual claims for wrongs, including genocide, slavery, war crimes, crimes against humanity, human traf-

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64 *See, e.g.*, Bano v. Union Carbide Corp., 273 F.3d 120, 122 (2d Cir. 2001) (defendant corporation allegedly violated international law by virtue of conduct leading up to Indian toxic gas disaster), *aff'd*, 2006 WL 2336428 (2d Cir. 2006); Bigio v. Coca-Cola Co., 239 F.3d 440, 444 (2d Cir. 2000) (defendant corporation knowingly purchased property that was acquired unlawfully on the basis of religious discrimination), *rev'd*, 448 F.3d 176 (2d Cir. 2006); Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1120 (C.D. Cal. 2002) (defendant corporation accused of war crimes, human rights violations, racial discrimination, inflicting environmental harm, and causing civil war to island), *aff'd in part, vacated in part, rev'd in part*, 456 F.3d 1069 (9th Cir. 2006); Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002) (defendant corporation allegedly violated international law by polluting rain forests and rivers in Ecuador and Peru); Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 92 (2d Cir. 2000) (defendant corporation allegedly imprisoned and tortured plaintiffs in retaliation against their political opposition to defendant's oil exploration activities); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 432 (D.N.J. 1999) (defendant corporation allegedly committed war crimes and human rights violations when it profited from use of forced labor in Nazi Germany).

65 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

ficking, terrorism, consular access for people facing the death penalty, and environmental torts.

We also had an expansion of the class of defendants, which brought on much of the current opposition to the Alien Tort Claims Act. For example, one case going to the Second Circuit this January on behalf of victims of apartheid in South Africa has caused unrest among corporations because of its expanded theory of liability.[66] One part of the theory of liability suggests that if you do business in a bad place at a bad time, you could be violating the rule of nations. Other parts suggest that corporations bear responsibility under the law of nations if they are complicit in the human rights violations of the government with which they do business. In short, the theory is that where corporations engage in joint ventures with governments that involve violations of human rights for profit, they can be held liable for those human rights violations.

There are some crimes that don't require state action at all. The definition of "genocide" in Article 4 of the Genocide Convention makes it clear that private entities acting alone can violate prohibitions against genocide.[67] If we had a corporation that was making poison gas for the destruction of Jews in a concentration camp or a corporation that was a front for a piracy ring or slave trafficking ring, there is not much doubt that such a corporation would face liability, even where state action was not present. I think that the set of cases now pending, like *Khulumani*, where the corporations face liability because they are enmeshed with a government that has violated human rights, present a more intriguing theory of liability and can also reach a broader class of defendants.

The class of plaintiffs bringing Alien Tort Claims Act claims has also expanded. Instead of having courageous individual plaintiffs, like the Filártigas, many cases are being brought as class actions or by NGOs.

Perhaps the most important development is that cases under the Alien Tort Claim Act have moved from default judgments to full-scale trials. This means that there will be pretrial motions, evidentiary rulings, and actual awards of damages. As an aside, I have to say that very few of my clients expect damages or really think that damages will make them whole. One of my Filipino clients was

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66 In re S. African Apartheid Litig., No. 05-2141-cv (2d Cir. argued Jan. 24, 2006). Plaintiffs appeal from the district court's dismissal for lack of subject matter jurisdiction in *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 543 (S.D.N.Y. 2004).

67 Convention on Prevention and Punishment of the Crime of Genocide, art. 4, Jan. 12, 1951, 78 U.N.T.S. 277.

gang-raped at a police station and was told that she was everybody's girlfriend. When we brought a case challenging Marcos's government for creating a climate of impunity in which this torture was acceptable and expected to occur, we got a huge judgment on paper.[68] I said, "There's a decent chance that you may never see a dime." She said—and I'll never forget this—"It's enough to be believed!" Even if plaintiffs don't see the actual money, I think the fact that we can now have a full-scale trial and the actual award of damages is extremely significant.

In recent years, a significant challenge for plaintiffs under ATCA was battling a restrictive interpretation of the scope of the Act put forward in 1984 in Judge Robert Bork's concurring opinion in *Tel-Oren v. Libyan Arab Republic*.[69] Bork stated that wrongs recognizable under ATCA should be limited to those recognized in the late eighteenth century—for example, piracy and attacks on diplomats.[70] He also argued that the Alien Tort Claims Act could not create a private right of action.[71]

This restrictive interpretation was kicked around in a number of cases in the 1980s and 1990s and eventually reached the United States Supreme Court in the petitioners' brief in *Sosa v. Alvarez-Machain*.[72] That case involved the abduction of a Mexican doctor [Alavarez-Machain] by the Drug Enforcement Agency (DEA) under the theory that he had been involved in the frightful torture and murder of a DEA agent and his pilot in Mexico. The government of Mexico had cooperated in investigating the agent's killers but did not go after Alvarez-Machain. The DEA, allegedly in an operation authorized by the regional office in Los Angeles, hired former Mexican *federales* to kidnap the doctor from Mexico and bring him to Texas to be arrested. Alvarez-Machain challenged his indictment, arguing that his abduction was in violation of the treaty between U.S. and Mexico, and the [criminal] case went to the U.S. Supreme Court for the first time in 1992.[73] The Supreme Court held there was no explicit prohibition on kidnapping in the extradition treaty, and therefore that it must be lawful.[74] Of course the

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68 The jury awarded $1.2 billion in exemplary damages and $766 million in compensatory damages. Hilao v. Estate of Marcos, 103 F.3d 767, 772 (9th Cir. 1996).

69 726 F.2d 774, 798 (D.C. Cir. 1984) (Bork, J., concurring).

70 Id. at 813–16.

71 Id. at 817–19.

72 Brief of Petitioner, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339), at 16-20, 2004 WL 162761.

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

74 *Id.* at 668–69.

rules of Monopoly do not say that you cannot rob the bank, but I would assume most of us would know that that is not okay. In any event, he was then put on trial and acquitted in a directed verdict.[75]

After his acquittal, Alvarez-Machain brought an Alien Tort Claims Act suit against his kidnappers in which we represented him.[76] When the case went to the Supreme Court, we were concerned that the U.S. government and corporations which thought the Alien Tort Claims Act was out of control would push Bork's restrictive approach.

At the end of the day, the Supreme Court ruled that the Alien Tort Claims Act furnished jurisdiction for only a relatively modest set of actions alleging violations of the rules of nations.[77] It then articulated a rule of evidence for assessing whether claims were proper under Alien Tort Claim Act.[78] It said that any claim based on the current law of nations must rest on a norm of international character accepted by a "civilized world"—and we all know who that excludes—and must be defined with the specificity comparable to the eighteenth century paradigms we have recognized under the law of nations.[79] These eighteenth century paradigms refer *inter alia* to the actions of a man who took his cane and tripped a French diplomat on the streets of Philadelphia, creating a huge diplomatic controversy.[80] Presumably then, if there are current violations of the current law of nations at that level, they will be recognized under the Alien Tort Claims Act. This standard sounds funny, but the fact is that U.S. courts have always been able to distinguish bogus claims from legitimate ones—which is why we now have an actual core that includes genocide and crimes against humanity, but does not include a right if you won the New York State lottery to get your award in a lump sum rather than an annuity. In fact that was one of the claims that was put forward under the

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75 *See* Alvarez-Machain v. United States, No. CV 93-4072 JGD (JHx), 1994 U.S. Dist. LEXIS 21702, at *8 (C.D. Cal. Jan. 20, 1995), *aff'd in part, rev'd in part*, 107 F.3d 696 (9th Cir. 1997). The district judge granted Alvarez's motion for acquittal on December 14, 1992 because the government lacked sufficient evidence to support a guilty verdict; more than thirty-two months after his abduction, Alvarez was released. *Id.*

76 The Supreme Court eventually heard the case of *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

77 *Id.* at 712, 724–25.

78 *Id.* at 725.

79 *Id.*

80 Respublica v. DeLongchamps, 1 U.S. 111 [1 Dall. 111; 1 L. Ed. 59] (1784). The scandal was known as the Marbois incident; the French minister threatened to leave Pennsylvania if there was not a satisfactory outcome in the case. *See Sosa*, 542 U.S. at 717 n.11.

ATCA and lost; it lost because there is no right under international law to receive a lottery award in a lump sum.[81] So the courts have been able to distinguish the good from the bogus cases. Nonetheless, we were quite concerned that some of the systematic attacks on the statute would prevail: That it contains no cause of action; that it intrudes on the domain and discretion of the executive branch; or that it is an open invitation for judicial activism.

Sosa was a mixed victory: It was a victory for human rights activists in the sense that escaping the great fire was a victory in itself. Everybody in the world, except me, thinks they won. The corporate side feels it got a rhetoric of caution instructing lower courts that the door is left only slightly ajar for these cases to go forward; on the other hand, the human rights community thinks it won the case because the Alien Tort Claims Act was not read out of existence. I, on the other hand, had a client to represent, and I'm pretty sure he lost.[82]

Still, the only lower court decision that the Supreme Court disapproved was *Alvarez-Machain*.[83] It cited with approval *Filártiga*,[84] *Karadzic*,[85] *Marcos*,[86] and a number of others, all of which suggested that the argument that [ATCA] was an awakening monster, in the words of some of its opponents, was over the top; and that you could trust the courts of the United States to distinguish the weak from the strong claims. At the end of the day then, *Sosa* reinforced the doctrine that the law of nations was part of our law and rejected the most systematic attacks on the reach of the Alien Tort Claims Act.

I will comment briefly on the Feinstein legislation. In October 2005, Senator Dianne Feinstein of California introduced a bill called the Alien Tort Statute Reform Act,[87] which many human rights activists believe would eviscerate [ATCA]. Within two days of

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81 Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam). The court called the lawsuit an "unusually frivolous . . . action" and declined jurisdiction under ATCA, which only applied to "shockingly egregious violations of universally recognized principles of international law." *Id.*

82 *Sosa*, 542 U.S. at 737–38 (finding that the facts alleged by Sosa regarding his kidnapping and arbitrary detention were not specific enough to be called a violation of binding customary international law).

83 *Id.* at 699 (reversing Alvarez-Machain v. United States, 331 F.3d 604 (9th Cir. 2003)).

84 *Id.* at 725, 731, 732, 738 n.29 (citing Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)).

85 *Id.* at 733 n.20 (citing Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)).

86 *Id.* at 732 (citing In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994)).

87 S. 1874, 109th Cong. (2005).

the bill's introduction, human rights activists met with Senator Feinstein to point out the most unfortunate aspects of this legislation. They wanted to spell out to her the difference between what she said on the floor of the legislature and the likely effect of the law. She then informally withdrew the bill by asking the Chair of the Judiciary Committee, Senator Arlen Specter, not to schedule a hearing. She stated, "I believe the present legislation calls for refinement in light of concerns raised by human rights activists."

It seems to me that the Senator's failure to find co-sponsors for the bill makes analysis of the bill unnecessary. But I think it is a mistake to dismiss the key question that animated the proposal: Whether the district courts have the expertise and the doctrinal understanding of international law to distinguish legitimate cases. Feinstein wanted to give greater voice to the executive branch in derailing these cases, but she realized there was too much politics involved. I don't think any folks will get anywhere in reforming ATCA without the support of the human rights community.

Ms. GAER: Sandy Coliver is an active litigator who has been working from a concept that recognizes that litigation is also part of the healing process for victims of torture. Sandy, can you fill us in on the concept of victims of torture and how litigation is part of the healing process—and how compensation is part of it? Sandy has recently been the director of the Center for Justice and Accountability. She's now here in New York working with the Justice Initiative. I wonder if you could summarize the effect of these cases and what difference they have made.

SANDRA COLIVER: Thank you, Felice. I will speak briefly and my remarks will be a tribute to the Filártigas. The Center for Justice and Accountability was just one of the most recent organizations formed to carry forward the precedent established by the Filártigas and their legal team. Ralph Steinhardt was active with Amnesty International, recognizing that there wasn't an organization dedicated to using the *Filártiga* precedent against individual perpetrators. I want to also thank Earthrights International, which is using the Alien Tort Claims Act and *Filártiga* in the *Unocal* case.[88]

It's hard to say in a few words, but let me give you some num-

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[88] Doe v. Unocal Corp., 395 F.3d 932 (2002), *vacated*, 403 F.3d 708 (9th Cir. 2005) (en banc) (granting parties' stipulated motion to dismiss and settling the case). *See also* Press Release, Earthrights International, Final Settlement Reached in Doe v. Unocal (March 21, 2005), *available at* http://www.earthrights.org/legalfeature/final_settlement_reached_in_doe_v._unocal.html; Press Release, Earthrights International, Historic Advance for Universal Human Rights: Unocal to Compensate Burmese Villagers (April 2, 2005) *available at* http://www.earthrights.org/legalfeature/historic_

bers, as well as a few stories. Since Peña was held accountable, sixteen more individuals have been brought to justice from twelve different countries. Those countries—you may have heard about some of the more high-profile cases—are of a wide range. They are Argentina, Bolivia, Chile, El Salvador, Guatemala, Venezuela, Bosnia, Ghana, Rwanda, Ethiopia, the Philippines, and Indonesia.[89] Each of these cases was a mini-truth commission. Each of them represented survivors and the families of victims from many generations.

Defendants in these cases included top perpetrators. One was [former Bosnian Serb leader Radovan] Karadzic, a sitting leader of a paramilitary state.[90] There were two former heads of state and three former ministers of defense.[91] This active precedent is now being used against corporations and against our own Secretary of Defense Donald Rumsfeld in a case brought by the Center for Constitutional Rights.[92] Individual cases have established that ministers of defense from foreign countries can be held responsible when the evidence establishes their command responsibility.

These cases have clearly had an impact on deterring human rights abusers from coming to this country. Following the *Filártiga* decision, researchers found there was a drop in requests for visas from Paraguay, as well as a drop in the issuing of such visas. It did send a message to the consulates to be more careful about issuing visas. Beyond that, the survivors from countries that were targeted by the active cases reported that abusers from their countries were no longer coming to the United States; no longer coming to visit such places as Disneyland and San Diego. Communities in South Florida, for example, have said they were all now on the lookout

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advance_for_universal_human_rights_unocal_to_compensate_burmese_villagers.html.

89 *See, e.g.*, Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006) (El Salvador); Cabello v. Fernandez-Larios, 402 F.3d 1148 (11th Cir. 2005) (Chile); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (Ethiopia); Kadic v. Karadzic, 74 F.3d 377 (2d Cir. 1996) (Bosnia); In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994) (Phillipines); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (Guatemala); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), *reconsideration granted in part by*, 694 F. Supp. 707 (N.D. Cal. 1988) (Argentina).

90 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

91 Arce v. Garcia, 434 F.3d 1254 (11th Cir. 2006) (two former defense ministers of El Salvador); In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir.1994) (former president of the Phillipines); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (former defense minister of Guatemala).

92 *See* Rasul v. Rumsfeld, 414 F. Supp. 2d 26, 28 (D.D.C. 2006) (dismissing claims under ATCA, FTCA, and constitutional claims on the basis of defendants' immunity); *see also Ex-Guantánamo Inmate Files Suit*, N.Y. TIMES, Oct. 28, 2004, at A10.

for the visiting human rights violators. Indeed, there was a statement issued by retired military leaders from El Salvador stating that they felt persecuted because they could no longer travel to the United States.

There was a case that CCR brought against Hector Gramajo Morales, who had been the top general of Guatemala.[93] He decided to transform himself into a civilian leader; to get himself ready to become president of Guatemala, he went to the Kennedy School at Harvard.[94] On his graduation day, he was served with a complaint by the CCR.[95] He then returned to Guatemala and his party no longer wanted him as their lead candidate because, in order to be the president of Guatemala, you need to be able to come to the United States without embarrassment—and that was made impossible by the lawsuit.

A final case I want to mention was a successful case brought in 2002 against two El Salvadoran former ministers of defense—top generals in the Junta.[96] One of our clients in the case, Carlos Mauricio, had the privilege to meet Dolly Filártiga at the press conference for the *Sosa* decision. He said that it was a wonderful experience. It was the culmination of his involvement overcoming terror and imposed silence, which was the impact and the intended impact of the torture. Having heard the numbers and the jurisprudence of the cases, the tremendous impact of these cases is the fact that they can give back voices to people who had their voices intentionally taken away. The main impact of torture is the terror to the community.

Carlos right now is leading a caravan to Fort Benning. He will be stopping in Memphis at another ATCA trial against another Salvadoran perpetrator. After the decision in his case was rendered in 2002, we received a letter from the Dean of the University of San Francisco, a Jesuit institution, inviting us to come and observe the anniversary of the death of the Jesuit priests who had been killed

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93 Xuncax v. Gramajo, 886 F. Supp. 162, 202 (D. Mass. 1995) (awarding plaintiffs $47.5 million in compensatory and punitive damages after default judgment).

94 Tim Golden, *Controversy Pursues Guatemalan General Studying in U.S.*, N.Y. TIMES, Dec. 3, 1990, at A6.

95 Neil A. Lewis, *Suing Dictators (and Similar Types) Here for Violations Committed Elsewhere*, N.Y. TIMES, Mar. 3, 1995, at B8.

96 *See* Arce v. Garcia, 434 F.3d 1254, 1256 (11th Cir. 2006) (upholding district court's award of $54,600,000 against defendants Jose Garcia and Carlos Vides Casanova). Garcia was minister of defense and Casanova director general of the national guard from 1979 to 1983; after Garcia resigned in 1983, Casanova became minister of defense until his resignation in 1989. *Id.*

on November 16, 1989 in El Salvador.[97] For thirteen years that tragedy had been observed with sadness and anger, but for the first time, that year, they could observe it with the possibility of justice.

That is what these cases bring; that is what the Filártigas have brought to us; and that is what these lawyers have made possible.

Ms. GAER: Thank you, Sandy. Thanks to all the panelists. Now, I'd like to give the attorney the privilege of introducing the clients.

PROFESSOR COPELON: I think we were all moved last week when Rosa Parks's body lay in state in the nation's capital.[98] Rosa Parks said that when she refused to give up her seat on the bus, Emmett Till was on her mind. Emmett Till was the young African-American boy from Chicago who, while visiting family in Mississippi, was said to have whistled at a white woman and, as a result, was brutally tortured and murdered.[99] His body was finally retrieved by the authorities and returned to Chicago. The government of Mississippi said that under no circumstance should the casket be opened. But Mamie Till, Emmett's mother, insisted upon opening it. And when Mamie Till opened it—and what she saw was a brutally tortured child—she took pictures. She insisted that there be an open casket at the funeral and that her son be shown to the world. And she said: "Everyone has to see this; we're going to pull the lid off Mississippi."

When I heard that story, it was the story of the Filártigas. It was the story of what they did in the midst of Stroessner's regime of terror, just like Mamie Till did in the midst of the whites' terror in Mississippi. They took pictures. They took this beloved body, and they laid it in their house; like in Chicago, hundreds of people risked their own lives to come and bear witness to what had happened. The courage of this family to do what they did is extraordinary. It is the courage of this family that brought us the *Filártiga* case. It is part of the thread of the demand for social justice that has existed through history.

In particular, I think this case would not have happened if it were not for Dolly Filártiga. When she miraculously discovered where Peña was living in Brooklyn, by the fact that a letter was sent to the Filártiga household,[100] Dolly Filártiga said, "I must go to New

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97 Lindsey Gruson, *Six Priests Killed in a Campus Raid in San Salvador*, N.Y. TIMES, Nov. 17, 1989, at A1.

98 Janofsky, *supra* note 15. R

99 *See* Shalia Dewan, *How Photos Became Icon of Civil Rights Movement*, N.Y. TIMES, Aug. 28, 2005, at A12.

100 *See* Selwyn Raab, *Paraguay Alien Tied to Murders in Native Land*, N.Y. TIMES, Apr. 5, 1979, at B1.

York and find him." And she took her father with her.

She stayed here and sat with us through the pain of making affidavits for the case, through all the processes of the case, through all of its uncertainties. She did that. She did that because, like Rosa Parks, she wasn't going to take it sitting down. Something moved history in Dolly Filártiga, and it's that courage, that demand, that spirit that she brings to us and every other person that uses the *Filártiga* case. With that, I'd like to introduce Dolly Filártiga.

Ms. Filártiga: Thank you very much. I did not imagine that we would accomplish the whole thing, you know. I just came here to find Peña, to look at him and ask him why he had to kill my brother. And what the Center for Constitutional Rights gave me that we were able to have trust in not only us, but in other cases that they were claiming, is unbelievable. I was twenty when they killed my brother. I was a student of medicine. . . . There is certainly a moment where—rapidly your life changes completely. I'm living in another country; you don't know what to do. I met Rhonda and Peter through my mother, and they changed my life. They tell me to—do you mind if I just keep quiet for awhile and let him talk and then continue?

Mr. Weiss: I would like to introduce Dr. Joel Filártiga. First, I would like to quickly mention all the things he will not tell you—about the threats on his life; the attempts on his life; about how his lawyer was disbarred in Paraguay. As you can see, there are a certain amount of genes that Dolly got from her father. He is an amazing man. He is a doctor. He runs a clinic in Paraguay for poor people. He is an artist, a poet, a renaissance fighter for justice. We are here to honor him.

Dr. Filártiga [translated from Spanish]: We lost a son in a horrible situation. We lost a son in a terrible situation. And yet far, far within the same continent we find great brothers and great friends. Extraordinary fighters for justice. Because crime and injustice does not have a territory, it does not have a nationality. Torture is the highest sin. Torture has no territory. It is an eternal and horrendous crime. We feel it in our spirits as if it were today. We live it every moment. We are living it with each moment.

It's important that this great country not allow more torture. That there are no more Abu Ghraibs,[101] no more Guantánamos.[102]

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101 Douglas Jehl & Eric Schmitt, *In Abuse, a Portrayal of Ill-Prepared, Overwhelmed G.I.'s*, N.Y. Times, May 9, 2004, at A1; James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. Times, Apr. 29, 2004, at A15.

That there is no longer that monstrous virus that is torture.

Right now there are other indirect ways of torture. Thousands of workers are dying in my country, intoxicated by agrotoxics that are being used in differential ways: There are 40,000 liters, 18,000, 20,000 liters per year of pesticides used in a country of only six million inhabitants. These pesticides destroy the brainwaves. Two people per day commit suicide in Paraguay. Three people per day die of cancer. We have a sick country, miserable because the improper cultivation of soy has devastated our forests. Paraguay was an earthly paradise. It was a Mesopotamia with two enormous rivers—the Paraguay and the Paraná. Today there are no more forests. Because there are no more forests, there is no more rain. The Paraguay river is a nest of water right now. The climate has changed completely. There are no more birds. The Guyra Campana, the bell bird that was born in Paraguay, no longer exists because there are no more forests.

Not only were Paraguayans tortured, our Paraguayan land is being tortured right this moment. We are the fourth producer of soy in the world—what a pity. We don't have birds, we don't have water, we don't have good health, our workers don't have any more land. And the city centers create delinquents—Paraguayans can't go out when there is no light out. This is a problem of massive proportions that my country is struggling with now.

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102 Eric Schmitt & Tim Golden, *Force-Feeding at Guantánamo Is Now Acknowledged*, N.Y. TIMES, Feb. 22, 2006, at A6; Warren Hoge, *Investigators for U.N. Urge U.S. to Close Guantánamo,* N.Y. TIMES, Feb. 17, 2006, at A6.