CASE NO. 95-16779

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE MARIA SISON AND JAIME PIOPONGCO,

Plaintiffs-Appellants,

vs.

ESTATE OF FERDINAND MARCOS,

Defendant-Appellee,

On Appeal from the United States District Court
for the District of Hawaii

BRIEF OF AMICI CURIAE THE ALLARD K. LOWENSTEIN HUMAN RIGHTS CLINIC, THE CENTER FOR CONSTITUTIONAL RIGHTS, THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE INTERNATIONAL HUMAN RIGHTS LAW GROUP, THE MINNESOTA ADVOCATES FOR HUMAN RIGHTS, AND LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES FLORENTINA SISON, ET AL.

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QUESTION PRESENTED

Is the international law prohibition against cruel, inhuman, or degrading treatment sufficiently specific, universal, and obligatory to trigger United States federal court jurisdiction under the Alien Tort Claims Act, 28 USC § 1350?

STATEMENT OF AMICI CURIAE

The Allard K. Lowenstein International Human Rights Clinic was organized in 1991 at Yale Law School as a faculty-supervised course under the auspices of the Allard K. Lowenstein International Human Rights Project, a student-run organization that seeks to educate and inspire law students, scholars, practicing attorneys and policymakers in the defense of international human rights. The Clinic has acted as counsel for plaintiffs in numerous lawsuits seeking damages for violations of international law and human rights under the Alien Tort Claims Act. See, e.g., Evans Paul, et al. v. Prosper Avril, 812 F. Supp 207 (S.D. Fl. 1993) (awarding $41 million in damages for torture, arbitrary detention, cruel, inhuman or degrading treatment against former dictator of Haiti); Teresa Xuncax, et al. v. Hector Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (awarding $47.5 million in damages for summary execution, disappearance, torture, arbitrary detention, and cruel, inhuman or degrading treatment against former defense minister of Guatemala). The Clinic has also appeared as amicus curiae in a number of U.S. cases applying the Alien Tort Claims Act, 28 U.S.C. § 1350, to claims of international human rights law, including a claim of cruel, inhuman, or degrading treatment or punishment in Abebe-Jiri v. Negewo, No. 90-2010 (N.D.Ga. Aug. 20, 1993), aff'd sub. nom. Abebe-Jira v. Negewo, 1996 U.S. App. LEXIS 321 (January 10, 1996). The important question

presented here regarding the international prohibition against cruel, inhuman or degrading treatment or punishment and its ability to trigger ATCA jurisdiction is therefore of great interest to the Clinic and its clients.

The Center for Constitutional Rights is a non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. CCR has pioneered litigation under the Alien Tort Claims Act and the Torture Victim Protection Act, and handles a broad range of litigation asserting violations of internationally protected human rights. In addition, CCR maintains a diverse docket of cases promoting racial justice, women's rights, environmental protection and economic and social justice.

The Lawyers Committee for Human Rights (Lawyers Committee) is a non-profit organization founded in 1978 to protect and promote fundamental human rights, including the right to be free from abduction; torture; cruel, inhuman and degrading treatment or punishment; and extrajudicial killing. Its work is impartial, holding each government to the rule of law, including the human rights standards affirmed in instruments of international law. The organization regularly sends fact-finding missions to foreign countries, publishes reports on federal policy and legislation, and participates as amicus curiae in cases where it may be of assistance to the court. Most recently, the

Lawyers Committee appeared as amicus curiae in Trajanos v. Marcos, 978 F.2d 493 (9th Cir. 1992), cert. denied, 113 S.Ct 2960 (1993) and Humberto Alvarez-Machain v. United States, No. 95-4072, slip op. (C.D.Cal Jan. 20, 1995). The issues presented in the case are therefore of great concern to the Lawyers Committee.

The International Human Rights Law Group (Law Group) is a non-profit public interest organization incorporated in the District of Columbia. Its goals include the development and promotion of legal norms of international human rights. To that end, the Law Group has represented individuals and organizations, on a pro bono basis, before United States and international tribunals. In particular, the Law Group has appeared as amicus curiae in a number of U.S. cases applying the Alien Tort Claims Act, 28 U.S.C. § 1350, including claims of cruel, inhuman, or degrading treatment, in Abebe-Jiri v. Negewo, No. 90-2010 (N.D.Ga. Aug. 20, 1993), aff'd sub. nom. Abebe-Jira v. Negewo, 1996 U.S. App. LEXIS 321 (January 10, 1996).

Minnesota Advocates for Human Rights (Minnesota Advocates) is a volunteer-based, non-profit Section 501(c)(3) organization that works on projects supporting the protection of internationally recognized human rights in all countries. To accomplish this goal, Minnesota Advocates investigates and exposes human rights violations, educates the public, represents human rights victims, promotes the universal acceptance of

international standards, and trains and assists groups that protect human rights.

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FACTS AND PROCEEDINGS BELOW

Amici adopt the statement of facts and proceedings below of plaintiffs-appellants.

SUMMARY OF ARGUMENT

The international norm prohibiting cruel, inhuman or degrading treatment is sufficiently specific, universal and obligatory to trigger United States federal court jurisdiction under the Alien Tort Claims Act, 28 U.S.C. § 1350. The norm against cruel, inhuman or degrading treatment is clearly distinguishable from torture under international law, and the international community has identified certain acts which constitute cruel, inhuman or degrading treatment. All branches of the United States government recognize and respect the obligatory norm prohibiting cruel, inhuman or degrading treatment. In particular, the Senate recently gave its advice and consent to two international agreements adopting the norm -- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights -- and accepted the norm against cruel, inhuman or degrading treatment as part of U. S. law. In addition, U.S. courts have predicated jurisdiction on and granted plaintiffs relief for claims of cruel, inhuman or degrading treatment. The district court plainly erred by dismissing plaintiffs' cruel, inhuman or degrading treatment claim, and this ruling should be reversed.

ARGUMENT

I. THE INTERNATIONAL NORM PROHIBITING CRUEL, INHUMAN AND DEGRADING TREATMENT IS SUFFICIENTLY SPECIFIC, UNIVERSAL AND OBLIGATORY TO TRIGGER ALIEN TORT CLAIMS ACT JURISDICTION IN U.S. FEDERAL COURTS.

The Alien Tort Claims Act (ATCA) provides that federal 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."[1] Plaintiffs seeking to predicate jurisdiction on the ATCA "must plead a violation of the law of nations as it has evolved and exists in its contemporary form."[2] Writing for a unanimous panel, Judge Rymer of this circuit has noted in related litigation that, "for a court to determine whether a plaintiff has a claim for a tort committed in violation of international law, it must [first] decide whether there is an applicable norm of international law . . . and [then] whether it was violated in the particular case."[3] In regard to the former task, courts must determine that

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[1] 28 U.S.C. § 1350.

[2] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1539 (N.D.Cal 1987), amended in part, 694 F.Supp 707 (N.D.Cal 1989).

[3] Trajano v. Marcos, 978 F. 2d 493, 502 (9th Cir. 1992), cert. denied 113 S.Ct 2960 (1993).

the norms in question are "specific, universal, and obligatory."[4] In assessing the universality of international legal norms, courts are guided by "the usage of nations, judicial opinions and the works of jurists" as "the sources from which customary international law is derived."[5] Moreover, "courts must interpret international law . . . as it has evolved and exists among the nations of the world today."[6]

Since 1980, plaintiffs have sued for damages under the ATCA for a variety of international torts in violation of the law of nations, inter alia: summary execution; disappearances; torture; arbitrary detention; genocide; war crimes; and cruel, inhuman or degrading treatment. In this case, the plaintiffs allege a violation of the internationally recognized prohibition against cruel, inhuman or degrading treatment. This brief explains why the international norm prohibiting cruel, inhuman or degrading treatment constitutes

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[4] Hilao v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994). See also Forti v. Suarez-Mason, 672 F. Supp. at 1539-40 (international tort must be "definable, obligatory . . . and universally condemned.").

[5] Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d. Cir. 1980). According to the Restatement (Third) of the Foreign Relations Law of the United States, § 103 (2), "[i]n determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states."

[6] Filartiga, 630 F.2d at 881. See also Kadic v. Karadzic, 1995 WL 604585 (2d Cir. Oct. 13, 1995), rehearing denied, Nos. 94-9035, -9069 (2d.Cir. Jan. 4, 1996).

a "specific, universal and obligatory" norm of international law, thus triggering ATCA jurisdiction.

A. Cruel, inhuman or degrading treatment is clearly distinguishable from torture.

The norm against cruel, inhuman, or degrading treatment is now universally recognized by both declaratory and customary international law as a violation of international law clearly distinguishable from torture and summary execution. The Universal Declaration of Human Rights, article 5, provides: "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."[7] All of the major human rights instruments treat the universal norm prohibiting cruel, inhuman, or degrading treatment on an equal footing with the prohibition against torture.[8] Moreover,

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[7] Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) (emphasis added).

[8] See Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 16, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); the American Convention on Human Rights, art. 5, opened for signature Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, O.A.S. Doc. OEA/Ser. L/V/II.50, doc. 6 at 27 (1980) (entered into force July 18, 1978); the International Covenant on Civil and Political Rights, art. 7, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (entered into force Mar. 23, 1976); African Charter on Human and Peoples' Rights, art. 5, adopted

the prohibition against cruel, inhuman, or degrading treatment has been received into customary international law.[9] Indeed, the norm against cruel, inhuman, or degrading treatment is obligatory under all conditions and circumstances.[10] No state may claim the right to cause, encourage, or condone cruel, inhuman, or degrading treatment.[11] Indeed, the Eighth Amendment of the United States Constitution has long mandated that "cruel

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June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986). See also Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, adopted Dec. 9, 1975, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/1034 (1975). According to the Restatement (Third) of the Foreign Relations Law of the United States, "declaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . . and if adopted by consensus or virtual unanimity, are given substantial weight." § 103 cmt. c.

[9] See, e.g., Declaration of Tehran, Final Act of the International Conference on Human Rights 3, at 4, para. 2, 23 GAOR, U.N. Doc. A/CONF. 32/41 (1968) (noting status of Universal Declaration of Human Rights, including prohibition against cruel, inhuman or degrading treatment, as customary international law).

[10] See, e.g., International Covenant on Civil and Political Rights, art. 4, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16), at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 (derogation from right to be free of cruel, inhuman, or degrading treatment not permitted even in time of public emergency).

[11] Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, Principle 6, G.A. Res. 43/173, 43 U.N. GAOR Supp. (No. 49), U.N. Doc. A/43/49, at 297 (1988) ("No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.").

and unusual punishments [shall not] be inflicted."[12]

The core elements of the prohibition against cruel, inhuman, or degrading treatment are well defined. Cruel, inhuman, or degrading treatment consists of acts committed against a person which cause severe and unjustifiable mental or physical suffering. While an overlap exists between torture and cruel, inhuman or degrading treatment, it is possible and practicable for a court to distinguish acts constituting cruel, inhuman or degrading treatment and to identify acts that fall within its scope. Article 16 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,[13] defines state obligations specifically with regard to "other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The distinction between cruel, inhuman, or degrading treatment and torture rests on the special stigma attached to those who commit torture. Torture is both aggravated and deliberate cruel, inhuman, or degrading treatment, causing very serious and cruel

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[12] U.S. Const. amend. VIII.

[13] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51), at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

suffering.[14] Cruel, inhuman, or degrading treatment constitutes a non-deliberate--or deliberate, but less severe--infliction of suffering.[15] The unjustified physical and mental suffering caused by cruel, inhuman or degrading treatment includes the creation of "a state of anguish and stress by means other than bodily assault."[16] Degrading treatment is that which grossly humiliates a person before others; forces the person to act against his/her will or conscience;[17] incites fear, anguish, or inferiority; or attempts to break his/her moral resistance.[18]

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[14] Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, S. Exec. Rep. 30, 101st Cong., 2d Sess. 13 (1990) ("[T]orture is at the extreme end of cruel, inhuman or degrading treatment."). See Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at para. 167 (1978); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, para. 2, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) at 91, U.N. Doc. A/10034 (1976) ("Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.").

[15] See J. H. Burgers & H. Danelius, The U.N. Convention Against Torture: A Handbook on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 150 (1988) ("Unlike in the definition of torture . . . . the purpose of the act is irrelevant in determining whether or not the act should be considered to constitute cruel, inhuman or degrading treatment.").

[16] Report of November 5, 1969, Greece v. United Kingdom, 2 Y.B. Eur. Conv. Hum. Rts. 182 (1958-59) cited in P. van Dijk & G. van Hoof, Theory and Practice of European Convention on Human Rights (1990), at 228 n. 75.

[17] Id. at 186, cited in P. van Dijk & G. van Hoof, supra note 16, at 228 n. 73.

[18] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at para. 167 (1978).

B. International law has identified certain actions which clearly constitute cruel, inhuman or degrading treatment.

Whether treatment is cruel, inhuman, or degrading depends upon an assessment of all the particularities of a concrete case,[19] "including the specific conditions at issue, duration of the measures imposed, the objectives pursued by the perpetrators, and the

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[19] Similar case-by-case application has been undertaken by U.S. federal courts in cases of torture. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), remanded for a determination of damages, 577 F.Supp 860 (E.D.N.Y. 1984); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987), modified by 694 F. Supp. 707 (N.D. Cal. 1988). The duty of a federal judge in defining and applying the evolving international norm of cruel, inhuman, or degrading treatment is comparable to applying the flexible, evolving standard of cruel and unusual punishment under the Eighth Amendment of the United States Constitution. See, e.g., Hudson v. McMillan, 503 U.S. 1, 112 S.Ct 995, 1000 (1992) (the Eighth Amendment's prohibition against cruel and unusual punishment "draws its meaning from the evolving standards of decency that mark the progress of a maturing society," quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)); Ingraham v. Wright, 430 U.S. 651, 670 (1977) (the Amendment prohibits those acts which inflict "unnecessary and wanton infliction of pain"); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (the Amendment also prohibits those acts which contradict "contemporary standards of decency"); Wizniewski v. Kennard, 901 F.2d 1276, 1277 (5th Cir. 1990) (guard placing revolver in mouth and threatening to blow prisoner's head off constitutes cruel and unusual punishment); Parrish v. Johnson, 800 F.2d 600, 605 (6th Cir. 1986) (evidence of "significant mental anguish" is sufficient); Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985) (recognizing right to freedom of bodily movement); Scher v. Engelke, 943 F.2d 921, 924 (8th Cir. 1981) (evidence of "fear, mental anguish or misery" can establish the requisite injury for an Eighth Amendment claim), cert. denied, 503 U.S. 952 (1992); Medcalf v. Kansas, 626 F. Supp. 1179 (D. Kan. 1986) (continuing denial of necessary and proper medical care during incarceration constitutes Eighth Amendment violation).

effects on the person(s) involved."[20] As an evolving doctrine, the universe of proscribed acts is incomplete. Nonetheless, there is a consensus among international law publicists and regional tribunals that the following acts constitute cruel, inhuman, or degrading treatment. This list is illustrative, not exhaustive:

(a) Forcing detainees to stand for long periods of time, subjecting detainees to sights and sounds that have the effect or intent of breaking down their resistance and will, or inflicting severe mental or physical stress on detainees in order to obtain information or confession.[21]

(b) Expulsion from, or refusal of admission to, one's own country according to a discriminatory application of law; or in order to intentionally inflict physical or mental suffering; or without the necessary due process.[22]

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[20] See, e.g., Tyrer Case, 26 Eur. Ct. H.R. (ser. A) 15, at para. 30 (1978) (distinctive element of degradation is degree of humiliation adjudged according to circumstances of individual case); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at paras. 166-68 (1978) (minimum level of severity required to determine violation depends on circumstances of particular case including duration of treatment and physical and mental effects); J.H. Burgers & H. Danelius, supra note 15, at 70, 122; P. van Dijk & G. van Hoof, supra note 16, at 232.

[21] See Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) 65-67, at paras. 166-68 (1978); Bouton v. Uruguay (37/1978), Report of the U.N. Hum. Rts. Comm. GAOR, 35th Sess., Suppl. No. 40 (1980), Annex XIV.

[22] See East African Asians v. United Kingdom, 3 Eur. H.R. Rep. 76 at paras. 186-88 (Eur. Comm'n H.R. 1973); P. van Dijk & G. van Hoof, supra note 16, at 235-36.

(c) Deprivation of certain basic needs of the person, such as the need for food, water, or sleep, if the pain or suffering inflicted is not severe enough to constitute torture.[23]

(d) Deliberate indifference to a detainee's medical needs and deprivation of the basic elements of adequate medical treatment.[24]

(e) Sexual abuse[25] and other forms of gender-based violence.[26]

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[23] J H. Burgers & H. Danelius, supra note 15, at 118.

[24] With respect to detainees and prisoners, both the Eighth Amendment of the U.S. Constitution and the Standard Minimum Rules for the Treatment of Prisoners, adopted July 31, 1957, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. Res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977) (adding article 95), provide U.S. courts with guidelines to assist in applying the principle of cruel, inhuman, or degrading treatment in a particular case. See, e.g., Lareau v. Manson, 507 F. Supp. 1177, 1187-9, note 9 (D. Conn. 1980) modified on other grounds, 651 F.2d 96 (2d Cir. 1981) (finding Standard Minimum Rules as significant expressions of obligations to prisoners under international law). See also Estelle v. Gamble, 429 U.S. 97, 103-04 (1976) (by reason of deprivation of liberty, state has obligation and duty to provide adequate and humane care to confined persons); Kyle v. Allen, 732 F. Supp. 1157, 1158 (S.D. Fla. 1990) (recognition that prison conditions can deprive inmates of minimal civilized measure of life's necessities in violation of Eighth Amendment).

[25] Cable from Secretary of State to All Diplomatic and Consular Posts Re: Instructions for the 1991 Country Reports on Human Rights Practices, P 211857Z (August 1991) (rape and other sexual abuse during arrest and detention or as a result of operations by government or opposition forces in the field constitutes torture and other cruel, inhuman or degrading treatment or punishment).

[26] U.N. Committee on the Elimination of Discrimination Against Women, Adoption of Report, 11th Sess., General Recommendation No. 19, at 2, U.N. Doc. CEDAW/C/1992/L.1 Add.15 (1992) (gender-based violence violates the right not to

II. ALL BRANCHES OF THE UNITED STATES GOVERNMENT RECOGNIZE THE INTERNATIONAL PROHIBITION AGAINST CRUEL, INHUMAN OR DEGRADING TREATMENT.

All branches of the United States Government recognize and respect the universal and obligatory international law norm against cruel, inhuman, or degrading treatment. In giving its advice and consent to the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[27] and the International Covenant on

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be subject to torture or to cruel, inhuman or degrading treatment or punishment).

[27] The United States ratified the Convention Against Torture in 1990. See 136 Cong. Rec. S10091, S10093 (July 19, 1990) (Text of Resolution of Ratification). The instrument for ratification was deposited with the United Nations on October 21, 1994. See Depository Notification, Ratification by the United States of America, Convention Against Torture and Cruel, Inhuman or Degrading Treatment, United Nations, Reference C.N.382.1994, Treaties-6 (July 15, 1995). Pursuant to Article 27 of the Convention Against Torture, the Convention entered into force for the United States on November 30, 1994, thirty days after the deposit of the instrument of ratification. See also 22 U.S.C. § 262d(a)(1) (stating U.S. policy to seek to channel international assistance away from those countries that violate internationally recognized human rights including cruel, inhuman, or degrading treatment or punishment); 22 U.S.C. § 2304(d)(1) (defining internationally recognized human rights to include freedom from cruel, inhuman, or degrading treatment). The U.S. Department of State's Country Reports detail state acts that violate the international norm against torture as well as the norm against cruel, inhuman, or degrading treatment. See, e.g., Country Reports on Human Rights Practices for 1981 at 329 (Argentina). In 1994, the United States also enacted 18 U.S.C. §2340A, which makes torture or attempted torture a federal offense.

Civil and Political Rights,[28] the United States Senate reaffirmed this position. In the Hostages Case,[29] the Executive Branch invoked provisions of international human rights instruments proscribing cruel, inhuman, or degrading treatment in its case against Iran seeking redress for the taking of U.S. citizens as hostages. Judge Edwards in Tel Oren v. Libyan Arab Republic,[30] identified cruel, inhuman or degrading treatment as among a "handful of heinous actions--each of which violates definable, universal, and obligatory norms" of international law.[31] In addition, the American Law Institute's authoritative Restatement (Third) of Foreign Relations Law declares: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . cruel, inhuman, or degrading treatment or punishment."[32]

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[28] The United States signed the International Covenant on Civil and Political Rights on October 5, 1977. On April 2, 1992, the Senate gave its advice and consent to ratify the Covenant. 138 Cong. Rec. S4781, S4783-4 (daily ed. April 2, 1992) (Text of Resolution of Ratification). The Covenant entered into force for the United States on September 8, 1992. See Marian Nash (Leich), U.S. Practice: Contemporary Practice of the United States Relating to International Law, 89 Am. J. Int'l L. 96, 108-111 (1995).

[29] U.S. v. Iran, 1980 I.C.J. 3

[30] 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

[31] Id. at 781.

[32] Restatement (Third) of the Foreign Relations Law of the United States, § 702(d).

A. The political branches have accepted the universal international norm against cruel, inhuman or degrading treatment into U.S. law.

Almost a decade ago, a U.S. court declined to find that a specific claim of cruel, inhuman or degrading treatment constituted a tort actionable under the ATCA,[33] yet subsequent events have made it clear that the perpetration of cruel, inhuman or degrading treatment is a tort in violation of the laws of nations. Most importantly, the U.S. Senate has ratified two international agreements[34] that prohibit the offense of cruel, inhuman or degrading treatment and relate the content of the offense to U.S. Constitutional law.

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[33] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1543 (N.D.Cal 1987) [hereinafter Forti I], modified by, 694 F. Supp. 707, 711-12 (N.D.Cal 1988) [hereinafter Forti II]. In Forti I, two plaintiffs brought suit against a former Argentine general alleging various atrocities. Forti I at 1538. In its 1987 decision, the district court dismissed the plaintiffs' claim for cruel, inhuman or degrading treatment after holding that the "plaintiffs do not cite and the court is not aware of such evidence of universal consensus regarding the right to be free from 'cruel, inhuman or degrading treatment as exists, for example, with respect to official torture.'" Id. at 1543. The court noted "the difficulties for a district court in adjudicating such a claim" without a "universal consensus" as to "what behavior falls within the proscription" of cruel, inhuman or degrading treatment. Id. Notwithstanding affidavits from numerous international legal scholars, the court remained unconvinced that the tort manifested "the requisite elements of universality and defineability." Id.

[34] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, adopted Dec. 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987), reprinted at 24 I.L.M. 535 (1985), and the International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

Since that development, three other courts[35] have been faced with this issue and all have recognized cruel, inhuman or degrading treatment as a tort in violation of the laws of nations.

Since the 1987 decision, the United States Senate has given its advice and consent to two international treaties which expressly prohibit cruel, inhuman or degrading treatment or punishment: The International Covenant on Civil and Political Rights[36] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment.[37] The Senate's reservations to both agreements provide definitional guidance for the meaning of cruel, inhuman or degrading treatment. According to the Senate, the United States "considers itself bound" by the prohibition against cruel, inhuman or degrading treatment "to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth amendments to the Constitution of the United States."[38]

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[35] Abebe-Jiri v. Negewo, No. 90-2010 (N.D.Ga. Aug. 20, 1993), aff'd sub. nom. Abebe-Jira v. Negewo, 1996 U.S. App. LEXIS 321 (January 10, 1996); Paul v. Avril, 901 F.Supp 330 (S.D.Fl. 1994); and Xuncax, et al v. Hector Gramajo, 886 F.Supp. 162 (D.Mass. 1995).

[36] See supra note 10.

[37] See supra note 8.

[38] 136 Cong, Rec. S10091, S10093 (July 19, 1994) (Text of Resolution of Ratification); see also 138 Cong. Rec. S4781, S4783-4 (identical reservation amended to the International Covenant on Civil and Political Rights ratified in September 1992).

In this way, the political branches of the United States government have accepted the norm against cruel, inhuman or degrading treatment as part of U.S. law at least to the extent that such treatment also constitutes "cruel and unusual punishment" as contemplated by the Eighth Amendment. While amici do not agree that the concept of cruel, inhuman or degrading treatment or punishment is necessarily limited by the range of offenses that violate the Eighth Amendment, the Senate's action does remove the now-inapposite objection raised by the district court in Forti I and Forti II, at least with respect to cruel, inhuman or degrading acts that violate the Eighth Amendment. It has thus become incumbent upon the judiciary to apply and interpret these binding commitments.

B. United States courts have predicated ATCA jurisdiction on claims of cruel, inhuman or degrading treatment.

After the United States ratified the Torture Convention and the International Covenant, Abebe-Jiri v. Negewo[39] emerged as the first case to involve a cruel, inhuman or degrading treatment claim. In this case, three plaintiffs claimed that Defendant Kelbassa Negewo, an official within Ethiopia's former military regime, was responsible

[39] No. 90-2010 (N.D.Ga. Aug. 20, 1993), aff'd sub. nom. Abebe-Jira v. Negewo, 1996 U.S. App. LEXIS 321 (January 10, 1996).

for their detention, torture and cruel, inhuman or degrading treatment and punishment in 1977 and 1978. The torture and cruel, inhuman or degrading treatment suffered by plaintiffs included being hung from a pole while being beaten, being whipped with a wire, being repeatedly threatened to death, being denied food, and being subjected to other humiliations and degradations.[40] In an August 20, 1993 ruling, Judge Tidwell of the Northern District of Georgia found that cruel, inhuman or degrading treatment, along with prolonged arbitrary detention and torture, constitutes a tort in violation of the "law of nations" as required by the ATCA.[41] In so holding, Judge Tidwell noted that the prohibition against cruel, inhuman or degrading treatment is "found in all of the major international human rights treaties."[42] The plaintiffs clearly established their claims of torture and cruel, inhuman or degrading treatment or punishment and received a judgment of $1.5 million in compensatory and punitive damages. The Eleventh Circuit recently affirmed that judgment.[43]

In the second case addressing the prohibition of cruel, inhuman or degrading treatment, Paul v. Avril,[44] six Haitian citizens brought suit against defendant Prosper

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[40] Id. at 3-6.
[41] Id. at 7.
[42] Id. at 8.
[43] Abebe-Jira v. Negewo, 1996 U.S. App. LEXIS 321 (January 10, 1996).
[44] 901 F.Supp 330 (S.D.Fl. 1994).

Avril, the former military leader of Haiti, for relief under the ATCA. The plaintiffs suffered a series of abuses and indignities, including being beaten with truncheons, nightsticks, iron bars, rifle butts, and thorny branches; having their homes ransacked; and being deprived of food and medical treatment.[45] In a July 1, 1994 decision, Judge Ferguson of the Southern District of Florida found that each of the plaintiffs suffered "arbitrary detention, torture, and other cruel, inhuman or degrading treatment"[46] inflicted by soldiers under the direction and control of defendant Prosper Avril. Plaintiffs were granted compensatory and punitive damages totaling $41 million.[47]

In Xuncax v. Gramajo,[48] Judge Woodlock of the District of Massachusetts elaborated upon the content of the norm and identified specific acts of the defendant that violated the international prohibition against cruel, inhuman or degrading treatment. In these consolidated cases, nine Guatemalan plaintiffs and a U.S. plaintiff brought suit against Hector Gramajo, Guatemala's former Ministry of Defense, for devastating injuries they suffered at the hands of Guatemalan military forces. In an April 12, 1995 opinion, Judge Woodlock noted that "[t]he international prohibition against such

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[45] Id. at 332-335.
[46] Id. at 335.
[47] Id. at 336.
[48] Xuncax, et al v. Hector Gramajo, 886 F.Supp. 162 (D.Mass. 1995).

treatment appears to be no less universal than the proscription of official torture, summary execution, disappearance and arbitrary detention. Indeed, most of the major international human rights instruments conjoin in the same sentence the prohibitions against torture and against cruel, inhuman or degrading treatment."[49] He found "no difficulty" concluding that the following acts constituted cruel, inhuman or degrading treatment in violation of international law: 1) witnessing the torture or mistreatment of an immediate relative; 2) watching soldiers ransack one's home and threaten one's family; 3) being bombed from the air; and 4) having a grenade thrown at one.[50]

While Judge Woodlock acknowledged that the outer limits of the offense of cruel, inhuman or degrading treatment remain indistinct, he maintained that,

> It is not necessary that every aspect of what might comprise a standard such as 'cruel, inhuman or degrading treatment' be fully defined and universally agreed upon before a given action meriting the label is clearly proscribed under international law, any more than it is necessary to define all the acts that may constitute 'torture' or 'arbitrary detention' in order to recognize certain conduct as actionable misconduct under that rubric. Accordingly, any act by the defendant which is proscribed by the Constitution of the United

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[49] Id. at 186.

[50] Id. at 187. For support, Judge Woodlock referred to the Greek Case, 12 Y.B. Eur.Conv. on H.R. 186, 461-65 (1969) (Eur. Comm'n on Hum. Rts.), which identified "acts of intimidation, humiliation, threats of reprisal against relatives, presence of torture of another, and interference with family life" as cruel, inhuman or degrading treatment.

> States and by a cognizable principle of international law plainly falls within the rubric of 'cruel, inhuman or degrading treatment' and is actionable before this court under §1350.[51]

Woodlock's holding recognized that a core group of actions can be easily identified as a subset of the set of acts of cruel, inhuman or degrading treatment. In adopting this approach, Judge Woodlock agreed with amici's position that the Senate reservation too narrowly "ties the content of the abstract standard not to international customs and norms, but to Constitutional law, i.e. the organic domestic law of the United States."[52] Notwithstanding this constitutional nexus, Judge Woodlock insisted that the reservation does not mean that "no aspect of the norm can qualify as international law." On the contrary, to the extent "American constitutional law and international law overlap," the international norm is "simply embodied in domestic constitutional directives."[53]

Under the standards articulated above, the lower court in this case plainly erred in dismissing plaintiffs' cruel, inhuman or degrading treatment or punishment claims. This case marks the only deviation -- and an unjustifiable one -- from the recognition of the prohibition of cruel, inhuman or degrading treatment as an international norm triggering

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[51] Id. at 187.
[52] Id.
[53] Id.

the ATCA. In the landmark case of Filartiga,[54] the Second Circuit held that courts construing the ATCA must ascertain the content of the law of nations by "interpret[ing] international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[55] The Second Circuit reaffirmed that point only days ago, in denying rehearing *en banc* on January 4, 1996 in Kadic v. Karadzic,[56] as did the Eleventh Circuit in Abebe-Jira v. Negewo.[57] A government official has no more right, under international law or our law, to subject an individual to cruel, inhuman or degrading treatment, than he has to torture that person, cause his disappearance, or summarily execute him. The norm against cruel, inhuman or degrading treatment or punishment is no less "specific, universal and obligatory"[58] than the norms against torture, summary execution and causing disappearances, which this circuit has recognized as triggering ATCA jurisdiction.

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

[55] Id. at 881.

[56] Kadic v. Karadzic, Nos. 94-9035, -9069 (2d. Cir. Jan. 4, 1996). (See attached appendix).

[57] 1996 U.S. App. LEXIS 321 (January 10, 1996).

[58] Hilao v. Marcos, 25 F.3d 1467,1475 (9th Cir. 1994); Forti I, 672 F. Supp. at 1539-40.

Conclusion

For the foregoing reasons, the District Court's ruling with respect to the plaintiffs' cruel, inhuman or degrading treatment or punishment claim should be reversed.

Dated: January 25, 1996

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