

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOSE MARIA SISON, et al.,  
PLAINTIFFS/ APPELLANTS

vs.

ESTATE OF FERDINAND MARCOS,  
DEFENDANT/ APPELLEE

No. 95-16779

D.C. MDL-840-MLR  
Hawaii [Honolulu]

On Appeal From the United States  
District Court for the District of Hawaii  
Honorable Manuel Real, Judge, Presiding

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**BRIEF AMICUS CURIAE OF HUMAN RIGHTS ADVOCATES  
AND THE INTERNATIONAL HUMAN RIGHTS LAW GROUP  
IN SUPPORT OF PLAINTIFFS-APPELLANTS  
JOSE MARIA SISON ET. AL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED . . . . .	ii
INTEREST OF AMICI CURIAE . . . . .	1
INTRODUCTION . . . . .	2
STATEMENT OF FACTS . . . . .	2
ARGUMENT . . . . .	3
I. CRUEL, INHUMAN AND DEGRADING TREATMENT VIOLATES THE LAW OF NATIONS . . . . .	3
A. Defining Customary International Human Rights Norms . . . . .	3

## TABLE OF AUTHORITIES

### UNITED STATES CONSTITUTION

Article VI . . . . .	3
Amendments V, VIII, XIV . . . . .	6

### UNITED NATIONS CHARTER

Statute of the International Court of Justice art. 38(1)(b), (c) . . . . .	3
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### STATUTES

Alien Tort Claims Act, 28 U.S.C. § 1350 (1995) . . . . .	1, 2, 3
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### TREATIES AND UNITED NATIONS RESOLUTIONS

African Charter on Human and Peoples' Rights, June 27, 1981, art. 5, 21 I.L.M. 58 . . . . .	5
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American Convention on Human Rights, Nov. 22, 1969, art. 5	
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European Convention for the Protection of Human and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222 . . . . .	5
General Assembly Resolution 3452 (XXX) G.A. Res. 3452, U.N. GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc A/10034 (1976) . . . . .	7
International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171 . . . . .	4
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**CASES**

**United States Supreme Court**

<u>The Paquete Habana</u> , 175 U.S. 677, 700 (1900) . . . . .	3
<u>United States v. Smith</u> , 18 U.S. 153 (1820) . . . . .	3

**Courts of Appeals**

<u>Filártiga v. Peña-Irala</u> , 630 F.2d 876 (2d Cir. 1980) . . . . .	1, 3, 5
<u>Hilao v. Marcos</u> , 25 F.3d 1467, 1475 (9th Cir. 1994) . . . . .	6

128, 130, U.N. Doc. A/41/40 (1986) . . . . .	9
<u>Bailey v. Jamaica</u> (334/1988), reported in 1 Int'l Human Rights Reports 139,140, 143 (1994) . . . . .	8
<u>Buffo Carballal v. Uruguay</u> (R.8/33), Report of the Hum. Rts. Comm., U.N. GAOR, 36th Sess., Supp. No. 40, Annex XI, at 125, 126, U.N. Doc. A/36/40 (1981) . . . . .	8
<u>Cariboni v. Uruguay</u> (159/1983), Report of the Hum. Rts. Comm., U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VII, at 184, 185, U.N. Doc. A/43/40 (1988) . . . . .	9
<u>Collins v. Jamaica</u> (240/1987), Report of the Hum. Rts. Comm., U.N. GAOR, 47th Sess., Supp. No. 40, Annex IX, at 219, 221, U.N. Doc. A/47/40 (1992) . . . . .	8
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The Greek Case from the European Commission on Human Rights, 12 T.B. Eur. Conv. on Human Rights 186 (1969) . . . . .	7
<u>Ireland v. United Kingdom</u> , 25 Eur. Ct. H.R. (ser. A) at 65-67 (1978) . . . . .	7
<u>Larossa Bequiro v. Uruguay</u> (88/1981), Report of the Hum. Rts. Comm., U.N. GAOR, 38th Sess., Supp. No. 40, Annex XVI, at 180, 181, U.N. Doc. A/38/40 (1983) . . . . .	9

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<u>Viana Acosta v. Uruguay</u> (110/1981), Report of the Hum. Rts. Comm. U.N. GAOR, 39th Sess., Supp. No. 40, Annex XI, at 169, 170, U.N. Doc. A/39/40 (1984) . . . . .	8
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Section 102 cmt. i (1987) . . . . .	4
Section 702 . . . . .	5, 6

1 INTEREST OF AMICI CURIAE

2

3 In accordance with Federal Rule of Appellate Procedure 29, amici curiae Human Rights  
4 Advocates and the International Human Rights Law Group (Law Group) have obtained written  
5 consent of all parties to file this brief with the United States Court of Appeal for the Ninth  
6 Circuit. Letters of consent are attached hereto as Exhibits A and B.

7 Human Rights Advocates and the Law Group respectfully request that the Court consider this  
8 brief in this matter. Human Rights Advocates is a non-profit California corporation that  
9 provides education about the application of international human rights law in both domestic and  
10 international fora. The ultimate objective is to advance the cause of human rights so that basic  
11 protections are afforded all individuals. Human Rights Advocates has appeared as amicus curiae  
12 before a number of U.S. courts including the United States Supreme Court, the Second and  
13 Ninth Circuit Courts of Appeals, and the California Supreme Court. Human Rights Advocates  
14 also participates in proceedings before international fora including the Inter-American  
15 Commission on Human Rights, the United Nations Commission on Human Rights and Sub-  
16 Commission on Prevention of Discrimination and Protection of Minorities.

17 The Law Group is a non-profit public interest organization incorporated in the District of

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## INTRODUCTION

Human Rights Advocates would like to address two issues involving the application of international human rights standards to this case. The first is whether the prohibition against cruel, inhuman, and degrading treatment has risen to the level of international customary international law and therefore can be the basis for an action under Alien Torts Claims Act. 28 U.S.C. § 1350 (1995). The second is whether torture necessarily involves pain and suffering.

The first issue arises from the District Court's dismissal of both Plaintiffs/Appellants Sison's and Piopongco's claims based on violations of the prohibition against cruel, inhuman, and degrading treatment by denying a jury instruction on those claims. The Court refused to allow the instruction on the ground that the standard was too vague. (Transcript, 9/22/92, 5:23 - 6:4.) Amici urge this Court to reverse the denial of this instruction since the prohibition against cruel, inhuman, and degrading treatment is part of the law of nations. Further, it has sufficient definition so that it may be properly applied by the Courts.<sup>1</sup> Indeed, if there is any lack of clarity in the definition, it regards where the line is drawn between torture and cruel, inhuman or degrading treatment or punishment, and not between the latter and other bad acts.

The second issue arises from Judge Real's refusal to allow Plaintiff/Appellant José María Sison to submit his damage claim to the jury. In the liability stage, the jury found that defendant had



1 ARGUMENT

2 I. CRUEL, INHUMAN AND DEGRADING TREATMENT VIOLATES THE LAW OF NATIONS

3 Customary international human rights law includes the prohibition against cruel, inhuman and  
4 degrading treatment. Further, the norm is sufficiently defined so that it may be invoked by  
5 courts under the Alien Tort Claims Act. Thus, the District Court's denial of a jury instruction  
6 on that claim was in error.

7  
8 A. Defining Customary International Human Rights Norms

9 Jurisdiction in this case is granted under the Alien Tort Claims Act, 28 U.S.C. § 1350, which  
10 grants jurisdiction to the district courts for civil actions brought by aliens for torts committed  
11 in violation of the law of nations or a treaty of the United States. The leading case on using  
12 customary international law under this statute is Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir.  
13 1980). In holding that torture under the color of official authority violated universally accepted  
14 international norms, the Second Circuit referred to the analysis in United States v. Smith, 18  
15 U.S. 153 (1820). The Supreme Court in that case ruled that "[t]he law of nations ... may be  
16 ascertained by consulting the works of jurists, writing professedly on public laws; or by the  
17 general usage and practice of nations; or by judicial decisions recognizing and enforcing that

1 show that the principle has been generally adopted by nations.<sup>3</sup> This state practice may be  
2 deduced from treaties, whether ratified or not,<sup>4</sup> national laws, declarations of intergovernmental  
3 bodies, and evidence of the extent to which customary law is observed. See, North Sea  
4 Continental Shelf Cases (W.Ger. v. Den.; W.Ger. v. Neth.), 1969 I.C.J. 3. (February 20).

5 Amici now turn to an examination of the sources used by the Filártiga court as well as state  
6 practice and general principles of law recognized by civilized nations to determine whether the  
7 prohibition against cruel, inhuman or degrading treatment has reached the level of an  
8 international customary norm.

#### 9 10 B. Cruel, Inhuman, or Degrading Treatment Violates the Law of Nations

11 Consideration of the sources used by the Filártiga court to establish that official torture is a  
12 violation of customary international law, as well as general principles of law recognized by  
13 civilized nations, leads to the conclusion that cruel, inhuman or degrading treatment violates the  
14 law of nations.

15 The Filártiga court looked at the Universal Declaration of Human Rights, other General  
16 Assembly resolutions, treaties, and national laws to conclude that there was international  
17 consensus that torture was condemned. Review of those sources indicates the exact same

1 African Charter on Human and Peoples' Rights, June 27, 1981, art. 5, 21 I.L.M. 58 (entered  
2 into force Oct. 21, 1986); American Convention on Human Rights, Nov. 22, 1969, art. 5, 1141  
3 U.N.T.S. 123 (entered into force July 18, 1978);<sup>5</sup> European Convention for the Protection of  
4 Human and Fundamental Freedoms, Nov. 4, 1950, art. 3, 213 U.N.T.S. 222 (entered into force  
5 Sept. 3, 1953);<sup>6</sup> Declaration on the Protection of All Persons from Being Subjected to Torture  
6 and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N.  
7 GAOR, 30th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1976); Body of Principles for  
8 the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 173,  
9 U.N. GAOR, 43rd Sess., Supp. No. 49, at 297, U.N. Doc. A/43/49 (1988). It would be  
10 incongruous to hold that the prohibition against torture violates the law of nations but not cruel,  
11 inhuman or degrading treatment.<sup>7</sup>

12 This conclusion is further supported by Section 702 of the Restatement (Third) of the Foreign  
13 Relations law of the United States. The Restatement constitutes as a separate source for  
14 determining which rights have reached the status of customary international law. See Richard  
15 Lillich, "The United States Constitution and International Human Rights Law," 3 Harv. Hum.  
16 Rts. J. 53, 72-73 (1990). The Restatement confirms that the prohibition against cruel, inhuman  
17 or degrading treatment is one of the rights which has reached the status of customary

1 international law. Restatement § 702 cmt. n and reporters' note 5.

2 There is ample authority to support the conclusion that the prohibition against cruel, inhuman  
3 and degrading treatment, like that against torture, is part of the law of nations.

4  
5 C. The Prohibition Against Cruel, Inhuman, and Degrading Treatment is Sufficiently Well  
6 Defined

7 This Court has held in earlier proceedings in this matter that in order for an international tort  
8 to be applied by courts in the United States, it must be specific, universal, and obligatory. Hilao  
9 v. Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994). As was argued above, it is clear that the  
10 prohibition against cruel, inhuman or degrading treatment is universal and obligatory. There  
11 is overwhelming authority to support the conclusion that it is sufficiently specific as well.  
12 Indeed, several courts have recently found that cruel, inhuman or degrading treatment violates  
13 the law of nations and the norm prohibiting it is sufficiently well defined. See e.g., Xuncax v.  
14 Gramajo, 886 F.Supp. at 187-89<sup>8</sup>; Paul v. Avril, 901 F. Supp. 330, 335 (S.D. Fla. 1994).

15 The District Court in this case did not allow the jury instruction regarding cruel, inhuman, and  
16 degrading treatment on the ground that the standard is too vague. The only authority for this  
17 proposition comes from Forti v. Suarez-Mason. 694 F. Supp. 707 (N.D. Cal. 1988) ("Forti

1 inhuman or degrading treatment did not. Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D.  
2 Cal. 1987) ("Forti I").

3 The Court in Forti II found that while the treaties, declarations, Restatement, and scholars'  
4 declarations established the universality of the proscription of cruel, inhuman, or degrading  
5 treatment they did not offer definitions. 694 F. Supp. at 711. In making that ruling, the Court  
6 failed to consider the numerous cases of various international and national tribunals that do  
7 indeed define what constitutes cruel, inhuman or degrading treatment.<sup>9</sup> A review of those cases  
8 not only establishes that the norm is "sufficiently defined" but also that many of the acts held  
9 to have occurred in the present case constitute a violation of the norm. The Court seemed not  
10 to consider that it is the courts and tribunals applying the standard that give it definition, just as  
11 courts in the United States have given definition to the Eighth Amendments prohibition against  
12 cruel and unusual punishment.<sup>10</sup>

13 Nearly two decades ago, in Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 65-67  
14 (1978), the European Court of Human Rights held 1) that five techniques, used in the detention  
15 and interrogation of persons in Northern Ireland by British authorities, constituted inhuman  
16 treatment because they caused intense acute psychiatric disturbances during interrogation,<sup>11</sup> and  
17 2) that the techniques were also degrading because they aroused feelings of fear, anguish and

1 interrogation, holding them pending interrogation in a room where there was a continuous loud  
2 hissing noise, depriving them of sleep pending interrogation, and depriving detainees of adequate  
3 food and drink during the period of detention.

4 Decisions of the Human Rights Committee, the body charged with enforcing the Covenant on  
5 Civil and Political Rights, further define what is meant by cruel, inhuman or degrading  
6 treatment. (Amicus will make copies of the decisions of the Committee available upon request  
7 of the Court or the parties.) That tribunal has found that being forced under threat of  
8 punishment to stand blindfolded for 35 hours or to sit motionless on a mattress for several days  
9 to be inhuman and degrading treatment. Soriano de Bouton v. Uruguay (R.9/37), Report of the  
10 Hum. Rts. Comm., U.N. GAOR, 36th Sess., Supp. No. 40, Annex XIV, at 143, 144, U.N.  
11 Doc. A/36/40 (1981). Forced psychiatric experiments against the will of the imprisoned victim  
12 have been found to be inhuman treatment, Viana Acosta v. Uruguay (110/1981), Report of the  
13 Hum. Rts. Comm. U.N. GAOR, 39th Sess., Supp. No. 40, Annex XI, at 169, 170, U.N. Doc.  
14 A/39/40 (1984), as was deprivation of food and drink for four days after arrest. Tshisekedi v.  
15 Zaire (242/1987), Report of the Hum. Rts. Comm., U.N. GAOR, 45th Sess., Supp. No. 40  
16 (Vol. II), Annex IX, at 77, 81, U.N. Doc. A/45/40 (1990). Repeated beatings with clubs, iron  
17 pipes and batons. and then left without any medical attention in spite of injuries to head and

1 GAOR, 36th Sess., Supp. No. 40, Annex XI, at 125, 126, U.N. Doc. A/36/40 (1981); Massiotti  
2 v. Uruguay (R.6/25), Report of the Hum. Rts. Comm., U.N. GAOR, 37th Sess., Supp. No. 40,  
3 Annex XVIII, at 187, 188, U.N. Doc. A/37/40 (1982); Larossa Bequio v. Uruguay (88/1981),  
4 Report of the Hum. Rts. Comm., U.N. GAOR, 38th Sess., Supp. No. 40, Annex XVI, at 180,  
5 181, U.N. Doc. A/38/40 (1983); Cariboni v. Uruguay (159/1983), Report of the Hum. Rts.  
6 Comm., U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VII, at 184, 185, U.N. Doc. A/43/40  
7 (1988); Martínez Portorreal v. the Dominican Republic (188/1984), Report of the Hum. Rts.  
8 Comm., U.N. GAOR, 43rd Sess., Supp. No. 40, Annex VII, at 207, 208, U.N. Doc. A/43/40  
9 (1988); Marais v. Madagascar (49/1979), Report of the Hum. Rts. Comm., U.N. GAOR, 38th  
10 Sess., Supp. No. 40, Annex XI, at 141, 144-5, U.N. Doc. A/38/40 (1983); and Wight v.  
11 Madagascar (115/1982), Report of the Hum. Rts. Comm., U.N. GAOR, 40th Sess., Supp. No.  
12 40, Annex VIII, at 171, 177-8, U.N. Doc. A/40/40 (1985).

13 The Committee also has held that certain prison practices aimed at humiliating prisoners and  
14 making them feel insecure constitute degrading treatment. Contreris v. Uruguay (139/1983),  
15 Report of the Hum. Rts. Comm., U.N. GAOR, 40th Sess., Supp. No. 40, Annex XI, at 196,  
16 198, U.N. Doc. A/40/40 (1985) (repeated solitary confinement, subjection to cold, persistent  
17 relocation to a different cell). Women prisoners subjected to humiliation by being hanged naked

1 detention manacled continuously by one hand and one foot to a cot, denied the use of his eye  
2 glasses, and confined in a small, suffocating hot room with no natural light. He was allowed  
3 neither exercise nor reading materials, and was not told how long those conditions would  
4 continue. He spent the rest of his eight-and-a half years of detention in solitary or near solitary  
5 confinement. Mr. Piopongco was held incommunicado and subjected to mock executions in  
6 addition to ill treatment he received during four and a half years of house arrest.

7 Just as judges in the United States can now refer to prior cases brought under the Eighth  
8 Amendment to provide juries with instructions regarding U.S. violations, they can now look  
9 at decisions such as those cited above to help provide juries with instructions on how to apply  
10 the inhuman or degrading treatment standards; and surely there is no reason for regarding the  
11 inhuman or degrading definitions as being more vague than the word "cruel" which over 200  
12 years ago was regarded as a fair test for the Eighth Amendment.

## 13 14 II. TORTURE NECESSARILY INVOLVES PAIN AND SUFFERING

15 A good starting point for defining the prohibition against torture is found in the Convention  
16 Against Torture. Article 1 provides:  
17



1 III. CONCLUSION

2 For the foregoing reasons, Amici urge this Court to reverse the District Court's 1) dismissal  
3 of Plaintiffs/Appellants' claims for cruel, inhuman or degrading treatment and 2) refusal to  
4 submit Plaintiff/Appellant Sison's claim for damages to the jury.

5  
6 Respectfully submitted,

7 USF Law Clinic

8  
9 Dated: *Jan. 24, 1996*

10 *Constance de la Vega*  
11 Constance de la Vega  
12 Supervising Attorney  
13 Sara Chang  
14 Betsy Lawrence  
15 Lilita Naficy  
16 Certified Law Students  
17 Attorney for Human Rights Advocates

15 Dated: January 24, 1996

16 *Steven M. Schneebaum*  
17 Steven M. Schneebaum  
Attorney for the International Human  
Rights Law Group



*Liberty and Justice for All*

January 8, 1996

**BY FACSIMILE AND REGULAR MAIL**

Professor Connie De La Vega  
University of San Francisco  
School of Law  
Kendrick Hall  
2130 Fulton Street  
San Francisco, California 94117

Re: Sison v. Estate of Marcos  
Piopongco v. Estate of Marcos

Dear Ms. De La Vega:

This letter will confirm that the appellants/plaintiffs in this appeal hereby give their consent to the filing of an amicus brief by Human Rights Advocates and any other organizations working with human rights advocates in this appeal.

Best regards,

PAUL L. HOFFMAN  
Attorney for Appellants/Plaintiffs

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Re: Sison, et al. v. Estate of Marcos

Dear Professor de la Vega:

Appellee consents to the filing of an amicus curiae brief by the Human Rights Advocates

## PROOF OF SERVICE

I, Delia Ann Flores declare:

I am and was at all times herein mentioned a citizen of the United States, over the age of eighteen years and not a party to the within action or proceeding; that my business address is c/o University of San Francisco Law Clinic, 2130 Fulton Street, Kendrick Hall, San Francisco, California 94117-1080.

That I mailed two copies of a **BRIEF AMICUS CURIAE OF HUMAN RIGHTS ADVOCATES AND THE INTERNATIONAL HUMAN RIGHTS LAW GROUP** by placing a copy thereof in an envelope addressed as follows:

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Said envelope was then sealed, and, on the twenty-fourth day of January, 1996 was placed for collection and mailed at my place of business following ordinary business practices. Said correspondence will be deposited with the United States Postal Service in San Francisco, CA, on the above referenced date in the ordinary course of business; there is delivery by the United States mail at the place so addressed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, CA on January 24, 1996.



---

Delia Ann Flores