

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DR. JOEL FILARTIGA and	:	
DOLLY M.E. FILARTIGA,	:	
	:	
Plaintiffs,	:	
	:	
-against-	:	
	:	79 Civ. 719 (EHN/RLC)
AMERICO NORBERTO PENA-IRALA,	:	
et al.,	:	
	:	
Defendants.	:	

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PLAINTIFFS' POST-TRIAL MEMORANDUM OF FACTS AND LAW

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Filartiga v. Pena, 630 F.2d 876, 878 (2nd Cir. 1980).

Subsequent to this decision, defendant Pena failed to answer the complaint, and after proper notice a default judgment was entered by the district court (Opinion dated June 26, 1981) thereby eliminating the issue of liability.

The only issue before this Court is the valuation of damages. On February 12, 1982, a hearing was held before this Court*. At the hearing, Dr. Filartiga, Joelito's father, and Dolly Filartiga, his sister, testified about the impact of the torture and the murder of Joelito on them as a family. Robert White, the former U.S. Ambassador to Paraguay and later El Salvador described the role and impact of torture in maintaining Latin America's most repressive dictator, General Stroessner. Jacobo Timerman, the former editor of the Argentinian paper, "La Opinion" and author of Prisoner Without A Name, Cell Without A Number discussed torture from the perspective of an observer of a society decimated by torture as well as a victim trying to understand the impact of torture on the life of a person.

Additional affidavits and evidence are now being submitted to supplement the oral testimony and the exhibits introduced at the hearing. This memorandum will summarize the facts relevant to the valuation of damages and in light of the international ramifications of this case, propose a theory for the application of choice of law, principles to this case.

* Tr. cites refer to the transcript of these proceedings.

STATEMENT OF FACTS

A. The Death of Joelito Filartiga

On March 29, 1976, in the middle of the night, seventeen year old Joelito Filartiga was kidnapped from his bed while his three sisters and a sailor lay sleeping in the house (Pictures of Joelito Filartiga at age 5 and shortly before his death were submitted to this court as Exhibit 2A and 2B). He was taken two doors down to the house of Americo Norberto Pena-Irala (Pena), then Inspector General of Police of Asuncion, Paraguay and the defendant herein. Complaint ¶7. He was whipped, beaten, slashed across his body and appeared to have been subjected to extremely high levels of electric shock. An aluminum wire was placed in his penis for the purpose of applying electric shock. He was tortured in this manner for approximately forty-five minutes* until his young body reached its endurance limit and he died. (Complaint ¶11) The torture of Joelito was in retaliation for the political activities and opinions of his father. (Complaint ¶¶14-15).

* Dr. Filartiga testified that, based on his experience as an observer of the torture of over 300 victims, as well as his experience in treating over 500 victims of torture in his medical practice, that it would take approximately 45 minutes to inflict the degree of torture inflicted on Joelito. Tr. 33. This estimate was supported by Dr. Glenn Randall and Dr. Jose Quiroga in their affidavits.

Dr. Filartiga testified that he believed his son had endured at least 45 minutes of extreme torture and his son died of cardiac arrest (Tr. 40). Drs. Randall and Quiroga note this as one possibility indicating that shock, hemorrhage and an intracerebral bleed as a result of the injuries he suffered could also explain his death. (Affd. of Randall and Quiroga, ¶8, p.6).

At approximately 4:00 a.m. in the morning, Dolly Filartiga, the sister of Joelito and one of the plaintiffs herein was awakened by a loud knock on the front door. The person knocking was Galeano, the Chief of Police for the precinct in that area. He informed her that "there was a small problem with [her] brother at Pena's house. TR 14. She followed Galeano to Pena's house which was surrounded by land filled with policemen. She asked for her brother and was told he was in the back room. TR 15.

Knowing the house, she walked to that room and there she was confronted with the brutally tortured body of her beloved brother. The body lay on a mattress in a pool of blood. Complaint ¶12. (A picture of the body, as it was found, was submitted to this Court as Exhibit 3).

In disbelief, she ran to her brother and tried to awaken him. She wanted to cry, but they did not let her. She wanted to ask for help, but she was stopped. She was told to take her brother's body and bury it quickly. (TR. 15). But she could not think of what to do. In desperation, she ran to the street.

On her way out, Dolly Filartiga met defendant Pena in the hall of the house. She asked him what he had done to her brother and he replied with a confession and a threat: "here you have what you have been looking for for so long and what you deserved. Now shut up." (Complaint, ¶.13, TR 16). He further threatened Dolly with a similar fate. With

this, Dolly ran into the streets in circles, finally finding her way home where she and a younger sister consoled each other and attempted to call relatives. Still Pena insisted that Dolly remove the body of her brother, or it would be thrown into the streets. (TR. 18). With the help of the sailor and a policeman, Dolly took Joelito's body home on the bloody mattress on which she found it.

At the time Joelito was killed, Dolly's parents were in rural Ybycui where they ran a medical clinic for the poor. Dolly had tried unsuccessfully to reach them since the night before and she tried in vain for six hours to summon them after she discovered Joelito. (TR. 18). Over seven hours after Dolly had been led to Joelito, her parents arrived, having been informed by a messenger that "Joelito has suffered a tragedy." (TR. 37).

Both parents were totally devastated by the sight of their son's tortured body. Dr. Filartiga, having seen over 300 victims tortured during his four imprisonments, having treated over 500 victims of torture in his medical practice and having been a torture victim himself on three occasions, knew exactly what had happened to his son. (TR. 39-42). He also knew immediately that his son was killed to punish him. (TR. 28).

His immediate thought, in the midst of all of his grief, was to document what had happened to his son, in order to prevent it from happening to others. (TR. 41-43).

Thus immediately upon his arrival home, he took pictures of Joelito's tortured body. (Four of the pictures were submitted to this Court as Exhibits 5A and 5B). In addition, he summoned three doctors, who along with himself performed an autopsy on Joelito to supplement the false official autopsy. (The text of these reports is contained in Exhibit 11A). Joelito's naked body lay in state at the Filartiga home so that the entire community could pay their respects and be made aware of the brutality that was done to Joelito. Subsequent to his burial and fourteen days after his death, his body was exhumed and a third autopsy was performed on him. (Exhibit 11B). The last autopsy established that there had been burn marks on Joelito's body. (Exhibit 11B). See affidavit of Joel Filartiga ¶4).

The evidence demonstrates that Joelito suffered the most brutal forms of physical torture.

"The torture to which Joelito was subjected probably consisted of the elements suggested in the autopsy report. That is, beating with a fist and other devices, including a looped cord, kicking, removing the nails from their proper places, (although the nails on the photograph provided seem to be intact on the left hand, and the report therefore may suggest loosening as a postmortem change) burning with electricity (or with chemical or other thermal agent) and penetration with sharp objects. These resulted in wounds and ecchymoses of the head and face, lips, malar region, periorbital, temporal aspect of the skull (fracture of the right temporal bone, parietal, and nasal), right shoulder, right and left arms, hands, thorax, abdominal flanks, back, hips, thighs, legs, and feet. These have been described in the autopsy report. There were also penetrating wounds of the thorax and right leg. There were three reportedly burned areas measuring 2 cm. in diameter, 3 x 4 cm., and 5 x 2 cm. respectively. The genitalia were reportedly mutilated and a wire was removed from Joelito's penis by Dr. Filartiga. The photograph of the body of Joelito Filartiga shows

direct evidence of torture in the form of whipping and beating. The patterned marks over the right side of the body are classical for whip marks by a looped flexible cord. The injuries of Joelito were deliberately forceful, multiple and inflicted over a period of time. For example, the mark on the right thigh appears to be older than others. The other marks on the skin were certainly inflicted during life and were intended to produce severe pain. The cause of death probably was not a single stab wound but rather the result of shock and hemorrhage due to multiple traumatic injuries. If the burns were caused by electricity, the amount of current used may have caused his death by cardiac arrest. An intracerebral bleed may have also been responsible. This possibility must be raised because of the fracture of the temporal bone of the skull. To my knowledge no examination of the internal organs or the brain was made. While the pain associated with the beating and stabbing can be imagine to some degree by anyone, the amount of pain from the considerable number of wounds inflicted upon Joelito must be outside the experience of any of us. Joelito's torture and pain may have been more severe than any of the victims we have examined in the United States. We say this because it was severe enough to cause his death. In our research experience 100% of the victims were beaten. The electric shock torture is customarily administered, either by conduction through an electrolyte solution or wet rags, thus, leaving no physical trace. Or through more direct means, by direct application of the electrodes to the skin. This is an extremely painful torture. In the usual apparatus the amount of electricity applied to the electrode can be varied and the electrode can be moved from place to place. The genitalia are often shocked in this way and the urethral wire removed by Dr. Filartiga was probably used for electric torture. 75% of the victims that we have examined were subjected to electric shock torture. After inflicting an unbearable amount of pain, the electric torture commonly causes the loss of consciousness. Only the most severe cases have more than minor evidence of burns, either immediately after torture or years later. Thus, the burns on Joelito, if caused by electricity, represent an agonizing amount of electrical torture.

(Affidavit of Dr. Glenn Randall and Dr. Jose Quiroga ¶¶ 8, 9). See also TR 32 (J. Filartiga). It can be assumed that Joelito was also subjected to psychological torture in the form of taunting and humiliation including "threats

against the family, threats of death and other vague threats" Affidavit of Drs. Randall and Quiroga ¶9. Jacobo Timerman describes the humiliation of torture as worse than death. TR. 60.

The harassment of the Filartiga family by agents of the government did not end with Joelito's death. Immediately thereafter, armed guards surrounded the family home twenty-four hours per day. The clicking of guns could be heard throughout the night. Dr. and Mrs. Filartiga and their three children lived in constant fear that they would be harmed by these guards. (TR. 22). The family was so fearful for the safety of one another that they took turns watching the guards during the night. (TR. 22). They slept under the bed for protection. Threats were made by telephone. Every time the telephone rang they answered it apprehensively. The entire family was threatened with a similar fate as Joelito. See also sealed Affidavit. ¶16, TR 20, 23

Twenty-five days after Joelito's death, Dolly and Mrs. Filartiga were arrested and without being allowed to present any evidence in their own behalf, thrown in jail. They were falsely accused of breaking into defendant Pena's house and scratching one of his sons-in-law. Complaint ¶16. They were released from jail only after Dr. Filartiga published an advertisement in the newspaper asking for security for their lives. (TR 25).

Nor was it possible for the family to achieve justice. All the key witnesses that might explain the case have disappeared. Tr. 49 Dr. Filartiga brought a lawsuit in Paraguay in which he was represented by Horacio Galeano Perrone, a Paraguayan lawyer. He did not get a hearing on his claim, instead, his lawyer was thrown in jail and disbarred. (TR. 45). See also affidavit of Dr. William L. Wipler ¶12. Other lawyers left his case because they were afraid. TR 45.

...We were not allowed to submit evidence or obtain discovery in the proceeding in Paraguay. The court was just sitting on the case until we brought this suit in the United States.

Affidavit ¶8 J. Filartiga.

As former Ambassador White testified:

Q: Based upon your knowledge of the system in Paraguay, do you have an opinion whether or not the Filartigas could get justice in Paraguay?

A. No it's impossible. TR 80

Moreover, as the family persisted in their quest for justice and as they tried to survive the death of their beloved brother and son, agents of the government would appear in the house undercover pretending to be suitors of the Filartiga daughters. The harassment was constant and never ending.* Pena had fled to the United States. When Pena was arrested here Dr. Filartiga was threatened and almost killed in a fabricated traffic accident. Tr. 45-46.

* At one point the youngest of the Filartiga daughters was kidnapped by a police officer, kept away from the family for eighteen hours and was found only after the family went to the American Embassy to protest. (Sealed affidavit p.5).

Still being strong individuals, the family was determined to endure the continued harassment. However, they could not escape the traumatic effect that Joelito's death had on each family member and the family as a whole. Although Joelito's death had a devastating impact on all the family members, the effect with which we are concerned here is as to the plaintiffs: Dolly, his best friend and the one who was first confronted with his brutally tortured body; and Dr. Filartiga, his father, his friend and the person at whom this terrible brutality was directed, and who blamed himself for the suffering and death of his son and that of the entire family.

B. The Impact of Joelito's Death on Dr. Filartiga

Dr. Filartiga's suffering was threefold. He suffered because he lost his only son. He suffered because Joelito was tortured in retaliation for Dr. Filartiga's political beliefs. Finally, he suffered because his entire family was suffering and he blamed himself for their suffering. His suffering was both emotional and physical*.

First, Dr. Filartiga suffers because he lost a companion, comforter, helper, and friend and the person he thought would carry on his work. Joelito and Dr. Filartiga enjoyed each other's company. They went fishing together.

* Reference is made to the Transcript of the Filartigas testimony and to the sealed affidavit and those of Dr. Filartiga, Dolly Filartiga, Dr. Frederico Allodi, Drs. Randall and Quiroga, Michele Anna Burgess.

They took walks. They talked about their respective views of life with each other. Joelito shared his father's concern for the Paraguayan poor, and would show this by frequently assisting his father in the clinic in Ybycui. His father's work became so important to him that Joelito decided to devote his life to helping heal people. Like his father, he was going to become a doctor. Further, Joelito enjoyed art as a form of expression, as did his father. He wanted to also become an architect. (TR. 30). He strongly identified with his father in many ways. Dr. Filartiga expressed this sentiment in a poem:

TO ANOTHER JOEL

by Joel Filartiga

On a sinister and pitch-black night
on a Monday, 29th of March
another way of being Joel
departed.
A painful journey without end.
Youth cut off
cruelly chopped off
by the bearers of death and nothingness.
Others will be what you couldn't become:
soldier of a new dawn.

Joel, your father, another Joel but Joel just
the same.

translated by Robert Cohen

(Exhibit 8).

Second, Dr. Filartiga suffers severe mental anguish and grief not just because he lost his son, but because of the manner in which he lost him. He understood and suffered vicariously the intensity of Joelito's pain because he had been a victim as well as observer of torture while in prison.

As a lifetime opponent of the Stroessner regime, Dr. Filartiga has been imprisoned four times and was tortured three of those times. In 1958, while coordinator of students and workers against the Stroessner dictatorial regime, he was arrested and tortured continuously for eleven days without food and under force labor. (TR. 31). He was also tortured in 1963 and on another occasion. Several forms of torture were used against Dr. Filartiga. A torture method called "telephone" was used which involved striking his ears with both hands. He was kept standing for 76 hours without sleep. His lungs and kidneys were battered, causing him to urinate blood for six days. He was "submarined," which involved submersing him in water almost to the point of exhaustion. This was done under the supervision of a doctor to avoid killing him. (TR 31). Dr. Filartiga testified that

they put salt in the water to stimulate the capacity of the water to communicate electricity, conduct electricity and I was subjected to electric shocks which resulted in lack of control of the sphincters and so that one has to defecate and urinate in the water and one is kept permanently submerged in that water approximately 3 hours each session. (TR 31-32).

He was further tortured psychologically being forced to watch the torture of others. Most notably, he watched a sixty-seven year old man tortured almost to the point of death. As painful as it was to be a victim of torture, Dr. Filartiga found that being a spectator to torture was more painful -- it was psychological torture. Having seen 300

persons tortured, Dr. Filartiga has been psychologically tortured 300 times. To Dr. Filartiga, Joelito's death was the ultimate torture and it has left him in permanent pain. When he saw Joelito's body, he remembered all of the torture he experienced and witnessed and he knew exactly how his son felt when he was brutalized. (TR. 42). Joelito's death has affected every aspect of Dr. Filartiga's life.

He blamed himself for Joelito's death, he felt the accusations of his family and he wished it had been him instead. (See, sealed affidavit ¶10, affidavit of Drs. Randall and Quiroga ¶12,14, TR 50, 51). He felt anger and despair because of his son's death which he expressed in his drawings. (Examples of Dr. Filartiga's drawings after Joelito's death are submitted as Exhibits 6A, 6B, 6C and 7. Additionally, he lived in great fear almost to the point of paranoia. Sealed affidavit, ¶18. He constantly worried that what happened to Joelito would happen to other family members. Soon his emotional response to Joelito's death triggered a physical response.

Dr. Filartiga lost 50% of his capacity to work. (TR 50). His eyesight weakened. His hair grayed. He experienced circulatory problems. He developed an ulcer and he developed a borderline case of diabetes -- which is a known result of extreme stress. Finally, he watched his family suffer and blamed himself for their suffering. Affidavit of Dr. Filartiga, Dr. Allodi, Dr. Randall and Quiroga.

His wife lived in a state of constant fear for the entire family. She feared when any family members left the house and protested whenever Dr. Filartiga left home. She was angry and hostile towards him on the one hand, since she verbally blamed him for Joelito's death, while she was over-protective on the other. (Sealed affidavit). He watched Joelito's death impact on all of his daughters, most notably his oldest daughter, Dolly. When Dolly was forced to seek asylum in the United States, Dr. Filartiga and the family lost not only a son, but for all practical purposes, the companionship, comfort and substantial assistance at home and in the clinic of their oldest daughter, Dolly.

C. The Impact of Joelito's Death on Dolly Filartiga.

Dolly had a very close relationship with her brother. As she described it, they "were great friends, great companions...." (TR 13). They had mutual friends. They went out together and spent a great deal of time with each other. They trusted and confided in each other. As the oldest Filartiga children, they also shared the responsibility of taking care of the house and their younger sisters during the week when their parents were working in the clinic in Ybycui. They also shared the dream of becoming doctors. Both assisted their parents in the clinic whenever it was possible. Both were working towards the eventual goal of attending medical school. Although the family felt the repression of the regime, their lives were

relatively normal -- they went to school, worked, took care of the household, went out socially and always had a houseful of people, until Joelito was brutally tortured to death. His death had a devastating impact on Dolly's life. Her life, since that time, has been a nightmare. TR. 21-26. Affidavit of Dolly Filartiga, ¶¶2, 3, 4, 6, 9, 10, 13.

For the first year following her brother's death, Dolly refused to believe that he was dead. She often thought that she heard the sound of his footsteps or his voice, only to be filled with terrible fear and despair when he did not appear.

Dolly had constant nightmares. In these nightmares, she would see Joelito "raising from the blood-soaked mattress upon which [she] found him with all his wounds and that he [would tell her] that nothing happened." Through the dreams, she constantly relived her forced confrontation in defendant Pena's house, with the brutally tortured body of her beloved friend and brother. Each time, she would wake up screaming, covering her mouth with a pillow to drown the sound.

During this period, Dolly could not sleep. On average, she slept for one hour per day. She could not concentrate, she could not hold a job. She wandered at times, not knowing where she was going. She lost her identity. She felt helpless and insecure. All of her difficulties were apparent in her family interactions which were marked by anger and isolation. Affidavits of Dolly Filartiga ¶8, Drs. Randall and Quiroga ¶12.

Dolly became a compulsive cleaner. She basically cleaned "the same thing over and over...[she could not] stand anything messy"...as she had found her brother. Affidavit of Dolly Filartiga ¶3. She was a picky eater. Her family frequently had to beg her to eat her food. Michele Burgess' affidavit ¶8.

Even so Dolly did not acknowledge Joelito's death until one year after it had occurred. During the middle of a mass, exactly one year after Joelito's death, Dolly realized that he was never coming back. Several days later, she tried to kill herself and was taken to the hospital where her stomach was pumped. Subsequently, severe depression set in. She began to spend a substantial period of time in the house, where she usually remained in bed. She could not communicate with any one. Dolly stated, "I thought I should have died so my brother could live - I wished it had been me. I wanted to die; I felt that he was my only hope, and I could never possibly feel normal again." Affidavits of Dolly Filartiga ¶6, Drs Randall and Quiroga ¶12,13, Deutsch

¶7,10 Dr. Allodi ¶7. Dolly withdrew from both family life and life in her community -- she had no friends. She lost her capacity to enjoy life.

These symptoms exhibited by Dolly closely fit the pattern of post-traumatic stress disorder. (A discussion of this disorder is in the appendix of the affidavit of Dr. Glenn Randall and Dr. Jose Quiroga. See also, affidavit of Ana Deutsch and Exhibit 21.*

Joelito's death also affected the way Dolly perceived her country and her family:

* The American Psychiatric Association, states that "Post-traumatic Stress Disorder" can be produced by "...deliberate man-made disasters (bombing, torture, death camps)." DMS III American Psychiatric Association Diagnostic and Statistical Manual. 1980.

The traumatic event can be reexperienced in a variety of ways. Commonly the individual has a recurrent painful, intrusive recollections of the event or recurrent dreams or nightmares during which the event is reexperienced. In rare instances there are dissociative like states, lasting from a few minutes to several hours or even days, during which components of the events are relived and the individual behaves as though experiencing the event at that moment. Such states have been reported in combat veterans. Diminished responsiveness to the external world, referred to as "psychic numbing" or "emotional anesthesia," usually begins soon after the traumatic event. A person may complain of feeling detached or estranged from other people, that he or she has lost the ability to become interested in previously enjoyed significant activities, or that the ability to feel emotions of any type, especially those associated with intimacy, tenderness, and sexuality, is markedly decreased.

After experiencing the stressor, many develop symptoms of excessive autonomic arousal, such as hyperalertness, exaggerated startle response, and difficulty falling asleep. Recurrent nightmares during which the traumatic event is relived and which are sometimes

(footnote continued next page)

She could not see anything positive about her own country; she only saw that they let the brutal torture and death occur. Dolly blamed not only the government but also her family, specifically her father, for the death of her brother and for the pain she experienced as a result of her loss. Her hostility was tremendous. Reason or logic left her. She was alone. (Sealed affidavit ¶ 21, p.6).

(footnote continued)

accompanied by middle or terminal sleep disturbance may be present. Some complain of impaired memory or difficulty in concentrating or completing tasks. In the case of a life-threatening trauma shared with others, survivors often describe painful guilt feelings about surviving when many did not, or about the things they had to do in order to survive. Activities or situations that may arouse recollections of the traumatic events are often avoided. Symptoms characteristic of Post-traumatic Stress Disorder are often intensified when the individual is exposed to situations or activities that resemble or symbolize the original trauma (e.g., cold snowy weather or uniformed guards for death-camp survivors, hot humid weather for veterans of the South Pacific).

In her affidavit Ana Deutch found that Dolly exhibited the following symptoms of the above disorder:

(a) sleep disturbance (nightmares, insomnia); (b) incapacity to concentrate; (c) incapacity to work; (d) identity confusion ("When people...asked me my name, I drew a blank"); (e) helplessness, insecurity ("I felt that I would never possibly feel normal again"); (f) self-pity, worthlessness ("I wanted to die, I felt that was the only hope"); (g) withdrawals ("I had no friends"); (h) incapacity to enjoy life ("I had no life in Paraguay"); (i) anxiety (Implied into the context of her description and I could not study, I could not live, I could not work, I had no friends, and I felt constantly persecuted"); (j) survivor guilt (her tendency to clean compulsively is a reactive formation against guilt feelings; "I tried to kill myself," or it could be an attempt to defend herself against guilt feelings); and (k) difficulties in establishing interpersonal relationship ("I am fearful of social situations and strangers").

Subsequent to her suicide attempt and as a result of the symptoms discussed herein, Dolly went into psychoanalysis for one year. However, the pain would not cease. Finally, as the pain over Joelito's death increased, and as the harassment of her family continued, Dolly left home. She came to the United States not only to find defendant Pena, but because life in Paraguay had become unbearable. (Sealed Affidavit ¶22,23). Her problems did not end.

In the United States, Dolly was estranged from her family, and in unfamiliar surroundings. She had to learn a new language and go through a process of assimilation while still struggling to deal with her loss. Now she had lost not only her best friend and brother, but also the comfort and assistance of her entire family. Further, by pursuing Pena in this country, and by bringing the lawsuit in federal court, she had lost all hope of ever returning to the country of her birth -- a country which she loved and hated at the same time. She abandoned as well her ambition to become a doctor -- because she was not "...prepared to handle more pain." TR 83 Affidavit of Dolly Filartiga ¶13.

Six years after Joelito's death, Dolly still cannot read or concentrate, is afraid of social situations, feels estranged from normal life and despairs of ever feeling normal again. All of this pain, dislocation, and suffering would not have occurred but for the brutal slaying of her brother by defendant Pena and others. Six years after her brother's death Dolly is still tormented and there seems to

be no end in sight. Even with extensive therapy, it is unlikely she will ever feel normal again. (See affidavits of Dolly Filartiga ¶6, Drs. Randall and Quiroga ¶¶12,13, Deutch ¶7,10 and Dr. Allodi ¶7. Dolly summarizes the way she feels today:

"I don't think there is a moment in my life when I feel free of the torture of my brother's torture and death. I have always the memory of his tortured body and his death; always the weight of this experience, of my identity; always the great hole in my life left by his death. I used to want to be a doctor and I functioned like a nurse in my father's clinic. Today, I do not think I could bear the pain, just as I still cannot bear to read; or use my intellect; I am fearful of social situations and strangers. I always feel different, and like I will never know what it is like to live a relatively normal life. Affidavit, p.5, ¶13.

D. The Role of Torture in Paraguay

This terrible brutality and its intended consequences for the family members, was no isolated incident in Paraguay but part of a system of lawlessness and cruelty which destroys humanity and sustains Latin America's most brutal dictatorship.

As former Ambassador Robert White testified, "Torture is basic to the repression [in Paraguay]. It's at the heart of the system that enables the Stroessner dictatorship to maintain itself in power." (TR 72). Anyone who has the capacity to play a leadership role, or anyone who challenges the system in any way, can be subjected to torture.

"[P]eople who appear normal get up and go to work and their

work is torture, and then they come home after work and do whatever normal people do. [Torture] is institutionalized in Paraguay." (TR 73). An understanding of the Paraguayan legal system is necessary to put the role of torture in context.

In Paraguay there exists a dual system of authoritative norms, which perpetuates violations of human rights including the use of torture. The first of these laws

"consists of the Constitution, Code, laws and administrative rules and regulations which make up the country's official legal system. The second is an unwritten code of norms assigning rank and influence within a hierarchy of power. The second bears the name in Guarani of mbarete, which in English means "superior power over others." In Paraguay when the code of mbarete clashes with the legal system, it is the latter which must and does give way. Mbarete is the higher law, superior to any and all norms postulated by the legal system."

Affidavit of Dr. William L. Wipfler, p.2, and Exhibits 10A,B,C. Mbarete exists throughout the authoritative system. It allows the will of President Stroessner to be pre-eminent. It allows police, prosecutors and judges to feel a sense of immunity no matter the extent of their lawlessness. "No police official fears retribution for murder, torture or the violation of other basic human rights, nor do prosecutors or judges feel the slightest sense of insecurity about subverting the law." Its corrupting effects are pervasive and deepseated. (Wipfler affidavit, p.3).

However, the servants of the mbarete system, only occasionally exercise it openly and nakedly.

"The government shows a marked preference for legal formality, even when mbarete is at the heart of a decision. Thus state of siege decrees are issued every three months, police reports are filed, prosecutors prepare and present briefs and judges take statements, hear testimony and render opinions and sentences. The police never admit to torture or the murder of prisoners, nor do judges refer to the intervention of illegal pressures in the cases they decide. An effort is made to maintain at least some formal compliance with norms of the legal system."

Wipfler affidavit p.4. Thus, the torture-murder of Joelito, and the clumsy attempt to cover it up as a crime of passion and exonerate Pena fits squarely into the manner in which mbarete operates.

Under the mbarete system "political dissent is repressed through the use of torture, imprisonment and other means. Torture is a perfectly acceptable and almost commonplace instrument of interrogation and repression." (Wipfler affidavit, p.4).

To understand how torture could become so commonplace, one must understand the theory behind the use of torture. According to Jean-Paul Satre:

The purpose of torture is not only to make a person talk, but to make him betray others. The victim must turn himself by his screams and by his submission into a lower animal, in the eyes of all and in his own eyes. His betrayal must destroy him and take away his human dignity. He who gives way under questioning is not only constrained from talking again, but is given a new status, that of a sub-man.

Quoted in M. Ruthven Torture The Grand Conspiracy. (1978), p.284. The Amnesty International Report on Torture 34-35 (Farras, Straus and Giroux) (1975) (Exhibit 15) explains:

Torture implies a systematic activity with a rational purpose. The unwitting, and thus accidental, infliction of pain, is not torture. Torture is the deliberate infliction of pain, and

it cannot occur without the specific intent of the torturer. Inherent in this element of purpose are the goals or motives for employing torture, and while torture can be used for a variety of purposes, it is most generally used to obtain confessions or information, for punishment, and for the intimidation of the victim and third persons. The first two motives relate directly to the victim, while the purpose of intimidation, in wide use today as a political weapon, is intended to be a deterrent to others as well as the victim.

The motives for torture in Paraguay are equally consistent with the above:

In Paraguay, motives for torture are varied since charges of communism are often used as an excuse for arrest and maltreatment in order to dispose of rivals. The most extreme opponents of the regime are summarily disposed of, so that those who are tortured do not usually represent violent opposition, but may simply be the relatives of suspects or persons whom the government deems it desirable to intimidate.

Amnesty International Report on Torture, p.215.

Thus, in this case, when Dr. Filartiga's opposition was not stopped by his own torture, the Stroessner regime turned to a more cruel form of repression, the torture and death of his son.

Joelito and his father were not the only ones subjected to political repression during the period in which Joelito was brutally killed. The entire political climate was especially repressive at that time. The sealed affidavit describes the situation:

Just before Joelito was murder, Paraguayan police killed several alleged "guerrillas" shortly after they had crossed the Argentine border and entered Paraguay. The next week several other members of a new formed "guerilla" group, OPM, the political military organization were killed in an alleged shootout in Asuncion. A few days later the police raided the Catholic Jesuit school Cristo Rey which

they claimed was the center of "guerilla" operation. The government offered no proof of their charges and found no evidence that support their action. Later that month, they raided the agricultural school of Santa Maria in Coronel Oviedo not far from where I lived, saying that it had been a center for communist cell groups operations and that they had found a tremendous amount of subversive literature on the property. Three years later I learned that this material was planted by the police to support their accusations that it was a center for cell groups operations. Just shortly after Joelito's death, over two thousand of our peasant leaders were jailed without being brought before the court and held on the mere accusations that they all had connections or relationships with subversive groups, or with the communist party. It is worth noting that holding citizens without presenting charges against them is in itself a violation of the Paraguayan Constitution. P.2 ¶13.

No doubt many of those arrested were tortured. So long as mbarete exists, torture as a form of repression will exist, since "it is...the suspension of the rule of law, often accompanied by putting a specific group of individuals beyond the limits of a society, which seems to create the matrix for the growth of torture." (Amnesty International Report on Torture, p.242).

The inhumanity of torture is beyond demonstration, and beyond the imagination of those who have never been subjected to it. We can only stretch our imagination through hearing the experiences of victims of torture to glimpse the enormity of this crime and understand why the community of nations has joined to condemn its use without qualification and work towards redress of its victims and its ultimate elimination.

To Jacobo Timerman and indeed to Dr. Filartiga, torture is worse than death. It is "the biggest humiliation, the moment they are changing your world of ideas and your world of values and your biological structure." (TR 60). Torture is something one never forgets -- it can never be overcome. Further, it is something that international law condemns and society should never accept for any reason; torture cannot be rationalized under any set of circumstances. (TR. 61,65). Mr. Timerman explained that the torturer

act[s] like God because they have the power not only to kill you - that it is nothing - because to kill is a power that is in the hands of every human being.

They have a bigger power to torture and to discover, find out and change everything they want to do. And this is the danger.

The moment [torture] is incorporated to a society as routine, a permanent feature of life, as American philosopher H. Arendt said about Eichmann, the banality of everything; the moment you accept that, you haven't changed society, you have changed our civilization.

This is going on in countries like Paraguay, Argentina, Chile, in which torture is an inevitable instrument of the way this society, this country has been built up.

(Tr. 66). In the words of Mr. Timerman, torture destroys life not only through death, as in the case of Joelito Filartiga, but it destroys the essence of life by permanently becoming a part of the lives of its victims.*

* A compelling illustration of this point was made by Mr. Timerman, when he told the story of author James Amery, who was tortured by the Gestapo when he was a Belgium fighter in 1943. "He committed suicide in 1978, and all those times, all those years he was living with the problem of torture." TR 59.

TR 59). Torture is a permanent part of the life of Mr. Timerman and his family, as well as of the Filartiga family. Indeed in Paraguay, it is a part of the lives of almost everyone since, as former Ambassador Robert White testified, "... there is...almost no one in Paraguay who hasn't been touched by torture, in the sense that either they or someone in their family...has been tortured." (TR 75).

In addition, the problem of torture is international* and torture is internationally condemned. As stated in the opinion in this case: [f]or purposes of civil liability, the torturer has become - like the pirate and slave trader before him -- "hostis humani generis," an enemy of all mankind. Filartiga v. Pena-Irala, 630 F.2d at 890. Thus, present in this case is the compelling interest of the community of nations as well as this nation in the condemnation of torture. It is not a simple crime, but a crime which transcends the bounds of civilization itself. As Jacobo Timerman stated:

Torture was condemned as a crime. It was never judged as a problem of our civilization, and this is quite different. ... And this (the Filartiga case) is something absolutely unusual, and I really hope that from here, as so many other times in the history from the U.S. will come a guideline about what is the relation of our civilization with torture. (Tr 58).

* See e.g., plaintiffs' exhibit 10a-c, 13-19 and affidavit of international legal experts on torture: Arens, Falk, Franck, Lillich and MacDougal (plaintiffs' exhibit 20A-E).

Robert White's testimony illustrates the deterrent effect a judgment against torture would have in Paraguay:

The only thing that Paraguay responds to are international pressures. Traditionally Paraguay -- the Stroessner regime has survived pressures of keeping -- by not responding to them, by postponing action, by waiting things out.

There was - I think, that the Carter administration with emphasis on human rights had a great effect in Paraguay and - but now that - in the - that there has been a change in the priorities of the administration, it probably has less effect. But international pressures are the only way.

....[I] think one example might illustrate this. After the case was decided in favor of Dr. Filartiga, a Paraguayan official, one of the people closest to General Stroessner, told me that I just had to do everything possible to get this decision reversed. They don't really understand independence of the court system here. And he stressed to me that no Paraguayan government figure would feel free to travel to the United States after every trip that Dr. Filartiga made here and we would get letters from university professors, human rights organizations and just ordinary citizens, Senators, Congressmen, etc., in effect saying, please do everything you can to protect Dr. Filartiga. (TR 78-79).

Former Ambassador White feels that taking action in this case will spread,

[a]n umbrella of protection not only over Dr. Filartiga, but people who were conducting themselves according to the norms of the Constitution of Paraguay and sort of generally accepted civilized norms and so that the government could not without expecting a reaction from the United States, kidnap, torture, kill, whatever. (TR 79).

Dr. William L. Wipfler in his affidavit concluded that:

Given the immunity that mbarete provides to violators of the international human rights norms in Paraguay, this case is crucially important, both practically and symbolically. It challenges the system of mbarete and puts its participants on notice that the freedom they have assumed to

travel to this country and potentially others around the world is constrained. Moreover, the damage award - whether ultimately enforceable or not - will stand as a symbol of the value the international community places on the protection against torture and the heinousness with which such deeds are viewed.

CONCLUSION

No judgment that this Court can render can possibly compensate or full reflect the condemnation of torture or the ineffable life-long suffering it has inflicted on these plaintiffs and all other victims of the system that makes it possible. This Court has the power only to award damages. Money can never repair, can never compensate and cannot adequately punish. It can never bring Joelito back to life or even change his death from the vehicle for the torture and punishment of the family into a normal accidental or natural death of a loved one.

The damage award from this Court must compensate for the identifiable pecuniary losses which are explained in the attached chart. But it has a higher function. In considering the pain and suffering of the plaintiffs and the heinousness of the defendants' crime, this Court must vindicate the right to be free from torture and express the condemnation of the entire international community of this intolerable offense. The award will not be for the personal benefit of the plaintiffs, but will be put in a Foundation "La Esperanza Fund" (The Hope Fund) "devoted to protecting and advancing the health and welfare of the poor people of Paraguay and a symbol that Joelito lives and is helping them." Affidavit of Dr. Filartiga ¶16.

ARGUMENT

Introduction

Plaintiffs submit that damages in this case must be assessed in light of the dual character of the torture-murder at issue. On the one hand, all the acts committed against plaintiffs and their decedent, Joelito Filartiga, are torts under the relevant municipal law which prescribes the scope of damages recoverable. On the other, the torture-murder of Joelito also violates the customary international law. The assessment of damages is, therefore, not confined to what municipal law provides, but must account as well for the international character of the tort and the interest of the international community in just satisfaction. (Point I).

If this case involved a purely domestic offense then choice of law principles would point to the law of Paraguay. (Point II-A). Given the international condemnation of torture, however, choice of law doctrine demands primary consideration of whether the domestic remedy provides just

and full satisfaction as that is understood in international law. (Point II-B). Alternatively, insofar as this case involves the customary international law which is incorporated into the federal common law, this court should apply international principles directly. (Point II-C). In either case, the measure of damage must be sufficient to vindicate the interest of the community of nations in full reparation of the damage and vindication of the world's condemnation of torture.

Plaintiffs have documented \$439,734 in pecuniary losses flowing from the torture-murder of Joelito and the consequences they entailed. (Point III). The major aspect of damage in this cases does not involve pecuniary losses, however, but rather non-pecuniary ones.* This involves what is referred to in Paraguayan, and at times in international law, as "moral" damage, e.g. for mental suffering, loss of companionship and security, injury to feelings, the suffering of illness and physical deterioration, the disruption of relations and way of life and the like; and it includes "punitive" or "exemplary" damages designed to express outrage and deter future offenses.

As we shall show, both Paraguayan and international law require this court to take punitive aspects such as malice, the heinousness of the crime and the severity of the consequences, into account in assessing "compensatory"

See also: Letelier v. Republic of Chile, 503 F.Supp 259, 266-267 (D.D.C. 1980).

damages. (Point IV-A). But in addition the precedents and the principles reflected in the evolving customary international norms with respect to damages* justify an award of explicitly punitive damages in view of the international condemnation and demand that torture be punished. This is particularly so in light of the fact that the defendant has escaped all sanction in Paraguay, being immunized by the system of mbarete from criminal as well as civil liability. (Point IV-B).

POINT I. DAMAGES FOR TORTURE WHICH IS BOTH A MUNICIPAL AND INTERNATIONAL WRONG MUST BE ASSESSED IN LIGHT OF BOTH MUNICIPAL AND INTERNATIONAL PRINCIPLES.

The decision of the Second Circuit in this case makes clear the dual nature of the wrong at issue. It is at once, a tort subject to the principle that

[C]ommon law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. Moreover, as part of an articulated scheme of federal control over external affairs, Congress provided...for federal jurisdiction over suits by aliens where principles of international law are in issue."

630 F.2d 876, 885 (2d Cir. 1980).

In this respect, the torture and the related wrongs enumerated in the complaint are violations of domestic law which are actionable here because of the principle that torts are transitory and follow the wrongdoer. The

* International law has never addressed the question of individual recovery against individual wrongdoers directly. The principles referred to are drawn primarily from the international approach to questions of state responsibility. See Point III-B, infra.

concurrent federal jurisdiction affords a national rather than a state forum for redress of claims involving international law because of the significance of the federal concern with the international relations and obligations.

But the torture, for which the defendant Pena is liable here, is not simply a constitutionally condemned domestic crime, giving rise to civil remedy, under the laws of Paraguay. It is also, as the Circuit held, 630 F.2d at 884, a violation of the customary international law. Because Article III jurisdiction rests on the fact that the "law of nations forms an integral part of the common law of the United States," 630 F.2d at 886, torture is also subject to redress in accordance with international law principles and this court is empowered to enforce those principles. The Circuit made clear that the federal court's authority to discern and apply the principles of international law does not depend upon whether Congress has acted to define it, pursuant to its Article I sec. 8 cl. 10 powers. The Circuit held:

Thus, it was hardly a radical initiative for Chief Justice Marshall to state in The Nereide, 13 U.S. (9 Cranch) 388, 422, 3 L.Ed. 769 (1815), that in the absence of a Congressional enactment, United States courts are "bound by the law of nations, which is a part of the law of the land." These words were echoed in The Paquete Habana, supra, 175 U.S. at 700, 20 S.Ct. at 299. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."

630 F.2d at 887. Also cited as evidencing this principle are, e.g. Ware v. Hylton, 3 U.S. (3 Dall.) 1 L.Ed. 568 (1796); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); United States v. Smith, 18 U.S. (5 Wheat.) 153, 158-60 (1820); Dickinson, "The Law of Nations as Part of the National Law of the United States," 101 U.Pa.L.Rev. 26, 27 (1952) 630 F.2d at 886-87.*

In sum, because of the dual nature of the tort, this Court must fashion a rule of damages that takes into account remedies available to the plaintiffs under the appropriate law and the international interest in vindicating the right to be free from torture.

In its decision, the Circuit made passing reference in dicta to the question of what law provides the rules for decision in this case. Given that torture is actionable in Paraguay, the Circuit suggested that Paraguayan law would probably govern. 630 F.2d at 889. It made clear that, should this be the case, federal jurisdiction established by the international nature of the wrong would not be ousted. *Id.* at 889 n.25.

* Moreover, while the Circuit found it unnecessary to treat §1350 as an exercise of Congress' Article I power to "define and punish...offenses against the law of nations" because the automatic absorption of international law provided sufficient justification for the jurisdictional grant under Article III, it is nonetheless clear that the federal court's duty to apply the principles of international law is further justified by the principle established by Lincoln Mills v. Textile Works, 353 U.S. 488 (1957) that a jurisdictional statute authorizes judicial explication of the federal common law. See 630 F.2d at 877.

The Circuit's reference to Paraguayan law was clearly not intended to settle the question whether Paraguayan law should govern even at the expense of proper vindication of the international interests at stake. Rather in suggesting the applicability of Paraguayan law, the Circuit explicitly left open the possibility that some other rule of decision would be required when the "challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred." id. Here we have a situation where the tort is actionable under Paraguayan law, but where the recovery allowed under Paraguayan does not satisfy the unusually strong interest of the international community in explicitly penalizing the torturer given his status as hostes humani generis. 630 F.2d at 890. It is, therefore, appropriate for this Court to look to international principles to assure that full satisfaction is made. It derives the authority and, indeed, the duty to do this because these international principles and the commitment of each nation to them is the primary consideration under general choice of law principles (II-B, infra), and because the international principles are a part of the federal common law which this court is bound to apply. (Point II-C, infra).

POINT II. CHOICE OF LAW PRINCIPLES
APPLIED BY FEDERAL COURTS IN CASES INVOLVING
A PARAMOUNT INTERNATIONAL INTEREST REQUIRE
FORMULATION OF THE DAMAGE REMEDY IN
ACCORDANCE WITH INTERNATIONAL LAW

A. If Torture Were A Purely Domestic Wrong,
Choice Of Law Principles Would Direct
Application Of The Law Of Paraguay.

To the extent this case is viewed as a municipal tort, stripped of its international aspect, the Circuit's suggestion that Paraguayan law as opposed to New York law, should govern is consonant with choice of law principles applicable to torts. See 630 F.2d at 889.

Section 145 (1) of the Restatement (Second) of Conflict of Laws 2d states that the court should apply the "law of the state which, with respect to that issue (as to the tort) has the most significant relationship to the occurrence and the parties under the principles stated in §6." Section 145(2) outlines the relevant contacts:

"(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered."

New York is not without significant relationship to this matter. One of the the plaintiffs, Dolly Filartiga, is domiciled here and has been granted political asylum as a consequence of the wrongs in question. Pena was found and served in this jurisdiction as a consequence of his effort to escape trial and notoriety in Paraguay. Compare Home

Insurance Co. v. Dick, 281 U.S. 391 (1930).

Nonetheless, we agree that the most significant relationship exists to the state of Paraguay primarily because it is the place where the injury and the conduct causing injury occurred, and where the decedent and his family lived, but also because it is where Dr. Filartiga still lives, and where the defendant lived and continues to live.* Moreover the appropriateness of looking first to Paraguayan law because it has the most significant relationship with the offense and parties is consistent with the approach of international law itself, discussed in section B, infra**

* See also: Section 146, which sets out the choice of law for personal injuries directs application of the law of the situs except where "with respect to the particular issue, some other state has a more significant relationship under the principles stated in ¶6 to the occurrence and the parties, in which event the local law of the other state will apply."

** It should be noted that were it not for the propriety of applying international law here, a strong argument could be made that United States law rather than international law should apply or at least override or supplement any aspect of the situs laws which are inconsistent with United States public policy. But since this country's commitment to condemn torture and provide effective redress is adequately and more properly effectuated through international principles, plaintiffs do not address this question.

B. Choice Of Law Principles Treat The International Character Of The Tort As Primary And Require Recovery In Accordance with International Law.

Section 6 of the Restatement (Second) of Conflict of Law sets out the general principles governing all choice of law questions governed by §145 and §146:

1. A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
2. When there is no such directive, the factors relevant to the choice of the applicable rule of law includes:
 - (a) the needs of the interstate and international system,
 - (b) the relevant policies of the forum,
 - (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue,
 - (d) the protection of justified expectations,
 - (e) the basic policies underlying the particular field of law,
 - (f) certainty, predictability and uniformity of result, and
 - (g) ease in the determination and application of the law to be applied.

At the outset it should be noted that the drafters of the Restatement (Second) clearly intended that it govern international as well as interstate conflicts of law. Restatement (Second) of Conflicts of Law, §10. In fact, international considerations, head the list of relevant factors precisely because they are considered paramount.

Comment d to §6 states: "Probably the most important function of choice - of law rules is to make the interstate and international systems work well." Moreover, examination of all the factors listed in section 6(2) in light of the international character of the wrong inflicted upon plaintiffs and their decedent, overwhelmingly direct application of international standards as the choice of law in cases involving human rights violations.

(a) The Needs of the Interstate and International System.

The existence of this case in the federal court today is a function of the fact that the nations of this earth have combined to condemn torture and guarantee to every individual the right to be free from torture. As the Circuit concluded in this case:

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international

behavior. From the ashes of the Second World War arose the United Nation Organization, amid hopes that an era of peace and cooperation had at last begun....In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest.

630 F.2d at 890. See also: 630 F.2d at 888-889. Thus only a remedy tailored to effectuate the purposes of the international guarantees of human rights is consistent with the concurrence of the nations that torture is absolutely forbidden and that its practice violates international law. In such a setting, it is clear that the needs of the international community can be met not by mere application of the law of one or another nation-state having an interest in the matter, but by application of the law directed by international principles and practice itself.

(b) The relevant policies of the forum. As the circuit explained, the enactment of §1350 reflects in significant part the concern of the founders of this nation that disputes of an international character be settled in a manner consistent with international law. See 630 F.2d at 886-887. More recently, this nation has made explicit, its commitment to further respect for human rights guaranteed by the customary international law. See Amicus Brief of the United States; U.S. 630 F.2d at 884. This commitment is embodied as well in congressional statutes denying aid to governments which engage in "gross violations of human

rights" including torture. See e.g. 22 U.S.C. 2151 n (a) and 22 U.S.C. §2304 (Foreign Assistance Act of 1961; as amended); 7 U.S.C. §1712 (Agricultural Trade Development and Assistance Act as amended); 22 U.S.C.A. §262c note and §262d note (International Financial Institutions Act of 1977).

The interest of the United States, here, is not in the application of its own laws, but in the fulfillment of its duty to see that international wrongs are properly redressed in its courts. The fact that the federal courts are "bound by the law of nations" makes clear the duty of this court to provide a remedy which is consistent with international law. The Nereide, 13 U.S. (9 Cranch.) at 422. See also: The Paquete Habana, 175 U.S. at 700.*

c. The Relevant Policies of Other Interested States...

As the Circuit noted, the human rights proscriptions on torture are perhaps the most universally subscribed to of all international norms. 630 F.2d at 884. There is no area of law in which an international remedy is more appropriate, and no area wherein an international remedy would more reflect the common policies of nation-states.

* To the same effect is the Commentary on Article 19 of the Draft Articles on state responsibility, relying on Barcelona, Light and Power Company, Ltd., judgment, I.C.J. Reports (1970), for the proposition that every state has an interest in redressing breach of certain international obligations "in whose fulfillment all states have a legal interest." The Commentary states: "in the event of a breach of these obligations every state must be considered justified in invoking - probably through judicial channels - the responsibility of the state committing the internationally wrongful act." Yearbook of the International Law Commission, Vol. II, Part 2, 99 (1976).

d. The Protection of Justified Expectations

It might be argued that this factor dictates the application of Paraguayan law since the parties are Paraguayan and the torture-death occurred in Paraguay. Such a conclusion is inappropriate, however, since Paraguay, as a signatory of the American Convention on Human Rights has ascribed to the prohibition on torture. Thus neither the state nor its officials have any legitimate expectations of avoiding redress consonant with minimum international standards. Indeed, the Convention obliges the state to adopt measures necessary to give effect to this right. Articles 1, 2 and 5, reprinted in Brownlie, Basic Documents on Human Rights, 392-93 (2d ed. 1981).

e. The Basic Policies Underlying the Particular Field of Law.

This factor hardly needs explication. The policies of discouraging torture worldwide and attempting to alleviate the humiliation, fear and oppression that torture causes, demand the creation of an international minimum remedy that reflects these human rights goals.

f. Certainty, Predictability and Uniformity of Result.

A remedy fashioned by this Court that reflects the human rights concerns of the international community rather than one that reflects only the situs of the torture will promote the certainty of an effective remedy and enhance the predictability and uniformity of the outcome. Absolute

uniformity -- i.e. as would be accomplished by an exclusive international standard is not required. Rather, it is important that international law guarantee a minimum recovery consonant to the offense; if the state of wrongdoing provides more, that will undermine neither international nor national goals.

g. Ease in the Determination and Application of the Law to be applied.

It could be argued that, since international law has only recently begun to develop standards for the redress of individual human rights, the safer course is reliance on traditional domestic law. But this ignores recognition by the international community of the necessity, as well as the progress it has made heretofore, in fashioning international principles for the redress of human rights.

Thus the principles of §6 of the Restatement (Second) all point to international law as the source of rules for assessing damages for a violation of international human rights. Indeed, not to do so could well be viewed as a defalcation of the responsibility of this nation. If this Court were to allow national rules to frustrate vindication of a matter of fundamental international concern, our standing in the world of nations could well be compromised.

The question then is what does international law direct on this question. Interestingly, the international approach is a hybrid. It commands the states to develop and provide

remedies, civil and criminal, for violations of the prohibition against torture. See "Declaration on the Protection of All Persons from Being Subjected to Torture," General Assembly Resolution 3452, 30 U.S. GAOR Supp. (No. 34) 91, U.N. Doc. a/1034 (1975), Articles 4-11, set forth in 630 F.2d at 882. But it does not rest on this alone. For example, European Court on Human Rights, which hears state and individual applications against states only, must assure that the domestic remedy available is an adequate one and if not supplement it in accordance with international standards. This progressive principle is found in Article 50 of the European Convention on Human Rights which provides:

If the court finds that a decision or measure taken by a legal authority of a High Contracting Party is completely and partially in conflict with the obligations arising from the present Convention, and if the internal law of said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the court shall, if necessary, afford just satisfaction to the injured party.

Brownlie, Basic Documents at 242. Article 63 of the American Convention sets forth the power of the Inter-American Court on Human Rights to provide a remedy. It is less detailed than Article 50, but likewise calls for a remedy fashioned by international law standards. It provides that upon finding a violation

The court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured part."

Brownlie, Basic Documents, at 411.

Plaintiffs, therefore suggest that the appropriate course for this Court is to look to the practice under international law. This means that the ultimate remedy must satisfy international standards, but that domestic remedies should be taken into account and ignored or supplemented when they frustrate rather than fulfill the goals of the international community.*

C. Principle Dervied From The Customary International Law Should Govern The Remedy In This Case.

From the principle that our federal common law incorporates the law of nations and obliges our courts to apply it flows the startingly simple and logical principle

* Since this Court sits as an enforcer of the law of nations as part of the federal common law, the rules applied by the federal courts in deciding whether to incorporate state law or fashion a wholly independent federal common law also guide this court to apply international principles here.

In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 27 (1964), the importance to the Union of uniformity and consistency in matters affecting international relations required exclusive application of federal law. See also Texas Industries Inc. v. Readcliff Materials, Inc., ___ U.S. 101 S.Ct. 2061, 2067 (1981). In addition, where tort remedies are concerned, the Court has frequently held that federal law governs or supplants contrary state law. See e.g. United States v. Standard Oil of California, 332 U.S. 301 (1947); Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 120 (1956). These holdings emphasize, by

(Footnote Continued)

analogy, the importance of looking to international standards rather than to the vagaries of the laws of the many nations. They also provide an analogy for the international approach of "borrowing" or incorporating national law where it is consistent with the overriding international police. United States v. Little Lake Misere Land Co. Inc, 412 U.S. 580, 605 (1973). See also: Massachusetts Bonding & Insur. Co. v. United States, 352 U.S. 120 (1957); DeSylva v. Ballentine, 351 U.S. 570, 581 (1946); United States v. Standard Oil Co., 332 U.S. 301, 309-10 (1942); RFC v. Beaver County, 328 U.S. 204, 210 (1946); Royal Indemnity Co. v. United States, 313 U.S. 289 (1941); Board of Commissioners v. United States, 308 U.S. 343 (1940).

that they are bound to apply the rules of international decision. See supra, Point I. In this light, the choice of law inquiry, suggested by the Circuit, as between the forum, the state of the wrong and the law of nations becomes unnecessary. The choice of law applicable is determined by international principles and practice, and the federal court acts, as it should, as the machinery of the international community. The result under this approach is the same as under the choice of law analysis undertaken in the preceding section. The route, however, appears more consonant with the principle that international law is incorporated into United States law.

Whichever approach this Court chooses, it should be underscored that both safeguard the primary interest of the international community in providing appropriate redress; and both avoid the ridiculous spectacle of allowing matters of such fundamental international dimension to be defeated by parochial or self-serving state interests. While the difference here between the Paraguayan and international law of remedies is not so great, see Point IV infra, the principle that local law must not be permitted to defeat international law where gross violations of human rights are involved is essential.

POINT III: PLAINTIFFS ARE ENTITLED TO
COMPENSATION FOR THE
PECUNIARY LOSSES CLAIMED.

Plaintiffs claim a total of \$439,734.00 in pecuniary losses as a result of Joelito's torture and death. These are not, as explained in the affidavit of Dr. Filartiga, in any sense a complete statement of past and future losses.*

The affidavit of Alexandro Miguel Garro, an expert in Latin American and Paraguayan law is submitted herewith to explain to the Court the bases in Paraguayan law for recovery of the itemized losses. Since Paraguayan law provides compensation for these matters, it is unnecessary to turn in detail to an examination of international law, which also recognizes recovery for the losses claimed.**

1. Funeral and Memorial Expenses.

These expenses totaled \$27,670 and are itemized and explained in Dr. Filartiga's affidavit, ¶7. As Mr. Garro

* As Dr. Filartiga explains:

To talk about this terrible suffering in terms of money is very difficult and very inadequate, but I realize I must do to help the Court in its job of trying to set a dollar amount on our damages. The costs outlined below are only the most obvious expenses; there are many I have not tried to remember or itemize. In addition, for the most part, I have no records of these expenses and payments. We do not keep financial records of file financial returns as you do in this country. Therefore I have only certified expenses that I can clearly reconstruct in my memory." ¶6

** See generally Whiteman, Damages Under International Law (1943). With respect to legal expenses, the practice of the European Court on Human Rights is to include them in an award of just compensation. See, e.g., The Nenmeister Case, Judgement, 7 May, 1974.

explains Articles 1118 and 1119 of the Civil Code of Paraguay explicitly provide for the right of the statutory heirs, here Dr. Filartiga, to recover funeral expenses. Garro Affidavit ¶11, 15(b). Court decisions have construed this to include the erection of monuments such as the pantheon for Joelito's grave, id., which was modest and appropriate to the family's circumstances. Dr. Filartiga's Affidavit ¶7(e).

In addition, the Filartigas seek recovery (\$8,770) for the cost of periodic memorial services for Joelito. Affidavit of Dr. Filartiga, ¶7(h). Mr. Garro explains, that while these services would not technically be recoverable under Article 1118, they are recoverable under Articles 939, 940 and 1113 of the Civil Code of Paraguay as incidental consequences of an international wrongful act. Garro Affidavit, ¶15(c), 20.

2. Legal Costs.

The Filartigas' futile efforts to bring the defendant to justice in Paraguay have been very costly, as has the suit here.* The total cost is \$101,364. Affidavit of Dr. Filartiga, ¶8-10. The expense continues as Dr. Filartiga has been, without any notice of a proceeding against him, assessed a fine of \$12,000 at the request of Hugo Duarte who was inserted into this case to confess to the murder of Joelito but plead excuse based on the hidebound notion that a husband has the right to kill his wife's lover, thereby protecting both Pena and himself from criminal

* The Center for Constitutional Rights provides services without fee. If the possibility of recovering the damages materializes, the Center will request the Court to order attorneys fees.

liability. This fine, which has been secured by an attachment against his clinic in Asuncion requires continued legal expense. Affidavit of Dr. Filartiga, ¶8(f).

Mr. Garro tells us that the legal expenses, court costs, travel and living expenses connected with litigation, as well as the fine and its attendant costs, are recoverable under Paraguayan law. ¶¶17-21. The expenses of suit in Paraguay are recoverable under two theories. Had the Filartiga's criminal suit prevailed in Paraguay, he would have been entitled to his fees. Furthermore, the unsuccessful lawsuit is a "mediate" consequence of the torture murder of Joelito according to Article 935. ¶19-21. Even if this suit, which represented an act of extraordinary courage given the conditions in Paraguay, was not have been foreseeable to the defendant, the expenses associated with it are recoverable as incidental consequences of an intentional wrong under Articles 939 of the Civil Code. Garro Affidavit, ¶21-22. Under the same principle, the expenses of suing here, which could be said to be even less foreseeable, are also recoverable as incidental expenses. id at ¶21. So also is the fine assessed against Dr. Filartiga as a consequence of the suit against Duarte and the legal expenses associated with fighting that fee and the attachment of his clinic in Paraguay. id.

3. Medical expenses incurred by Dr Filartiga for himself and his family as a consequence of Joelito's torture-murder.

The torture-murder of Joelito has had devastating effects on the physical and mental health of the plaintiffs and their

family. Here Dr. Filartiga claims compensation for the medical costs associated with the health problems of himself and his wife as a consequence of the extreme emotional trauma and stress they have undergone. Although they were not the direct victims of the torture in a technical legal sense, they were its intended victims and have suffered psychological and somatic disturbances which are characteristic of torture victims and their families. See Affidavits of Randall and Quiroga, ¶18, Allodi, ¶7, Tr. 50. The total cost of out-of-pocket medical expenses (i.e., not including the values of Dr. Filartiga's own medical services) is \$50,740.

The Paraguayan Civil Code explicitly provides for compensation for these expenses. Article 1113 of the Paraguayan Code obliges the torfeasor to repair the damage suffered "by any person who has suffered therefrom even in an indirect manner." Garro Affidavit, ¶13. Article 1112 provides for the recovery of moral damages where the wrong, as here id. at ¶31, constitutes an offense under the criminal law. Moral damage arises from suffering as a result of the offense caused by "molesting him in his personal security, or in his enjoyment of his property, or wounding his legitimate affections." id. at ¶9.

In addition, Mr. Garro advises that Paraguayan law accepts that physical disablements can flow from psychological stress: "Should Dr. Filartiga prove that his health problems appeared for the first time or were seriously exacerbated after Joelito's death, it is reasonable to assume that a Paraguayan court could find that those health injuries are more probably than not related to the wrongful act imputed to the defendant." id. at ¶29.

This same principle applies as well to the medical problems of Mrs. Filartiga, for which Dr. Filartiga bears the expense. Since Dr. Filartiga functions as his own doctor and the physician for his family and since there are no medical people in this country who know their medical history, Dr. Filartiga's affidavit is the only direct evidence of the sudden and increasing physical deterioration. Affidavit of Dr. Filartiga ¶12-14, Tr. 50.

He describes the rapid deterioration of his eyesight, circulatory problems, an ulcer and, since the attachment of the Asuncion clinic, the development of borderline diabetes. ¶13(a-d), and avers that prior to Joelito's death his health at the age of 43 was normal. id. at ¶13(e).

He also describes his wife Nydia as having been 36 years old and in good health when Joelito was killed. She also experienced a rapid loss of eyesight which required several vitamin treatments. She suffers from the recurrence of kidney stones, which are clearly stress-produced, as she had previously suffered this problem only when Dr. Filartiga was jailed and tortured and had been free of it for four years before Joelito's death. Now this problem, exacerbated by great weight loss continues to plague her with pain and requires treatment. ¶14(b).b. In addition, she has suffered severe memory loss since Joelito's death for which she requires expensive vitamin treatments. ¶14(c).

Dr. Filartiga's information is corroborated by the sealed affidavit which describes the pain and rapid aging of Dr. and Mrs. Filartiga following Joelito's torture and death. ¶28. In

addition, the expert doctors who examine torture victims and examined the affidavits and testimony in this case corroborate the onset or aggravation of stress-related somatic disorders as a consequence of torture. Allodi affidavit, ¶7; Randall and Quiroga, ¶18.

4. Dolly Filartiga's medical expenses.

Dolly Filartiga suffered from severe suicidal depression in Paraguay and required hospitalization and therapy the expense of which plaintiffs have not yet been able to reconstruct. The expense sought here is for therapy, past and projected in this country totaling \$29,120.

Dolly describes her trauma in her affidavit. Ana Deutsch, a clinical psychologist who has been involved with Amnesty International's investigation on the Medical and Psychological Sequelae of Torture, (affd. ¶¶1-3), examined the documents describing Dolly's reaction to her brother's torture and acts directed against her. Ms. Deutsch projects that Dolly will need at least 4 years, amounting to 337 sessions, of decreasingly intensive therapy to work on the effects of this trauma. ¶12-14. At an average United State rate (affidant of Michael Schneider) this will cost \$26,960. In addition, Dolly claims \$2,160 for earlier treatment here. This is demonstrated by Exhibit 12. The psychiatric problems that plague her are typical of the consequences of torture-induced stress. Affidavits of Ana Deutsch, ¶7-8; Dr. Allodi, ¶7; Drs. Randall and Quiroga, ¶12.

Mr. Garro's affidavit explains that although Dolly is not considered a direct heir under the laws of Paraguay and, therefore, not entitled to recover under Articles 1118 and 1119, she is entitled to recover for her pecuniary and non-pecuniary losses under Article 1113 and related provisions of the Code. Garro Affidavit ¶24-25.

5. Dr. Filartiga's lost income.

Dr. Filartiga estimates having lost \$71,300 in the last 6 years since Joelito's death and projects the loss of \$162,500 over the next ten years. His losses are explained as a consequence of Joelito's death and his efforts to have Pena prosecuted and convicted in Paraguay, as well as his reduced capacity to work as a product of the physical and mental disorders produced by the torture-murder. Affidavit of Dr. Filartiga, ¶15.

Mr. Garro's affidavit makes clear that Dr. Filartiga is entitled to recover his lost income as a result of his son's death under Articles 1102 and 1103, which defines the scope of pecuniary losses, and under Article 1113, which recognizes damage suffered by a person other than the direct victim. id. at ¶¶9, 13 and 27.

POINT IV.

PLAINTIFFS ARE ENTITLED TO RECOVER FOR
THEIR NON-PECUNIARY LOSSES AS A MATTER
OF COMPENSATION FOR "MORAL DAMAGE"
AND AS A MATTER OF PUNITIVE OR
EXEMPLARY DAMAGE UNDER INTERNATIONAL LAW

The heinousness of the crime of torture, the virtually unparalleled brutality of the torture inflicted upon Joelito, the intentional and enduring psychological torture and resulting physical suffering of Dr. Filartiga, Dolly, and their family, the systemic encouragement of torture and immunization of its perpetrators from both criminal and civil sanction in Paraguay -- all these call for the harshest sanction of which this Court is capable.

The pecuniary losses discussed in Point III reflect but the tip of the iceberg of plaintiffs' true and irreparable losses as a result of Joelito's torture and death. In this Point, we discuss the non-material aspects of their suffering which have endured for over 6 years and will affect them, physically and emotionally, on a daily basis for the rest of their lives.

As a legal matter, the plaintiffs pain and suffering flowing from the physical, psychological, political and legal consequences of the torture and murder of Joelito is recoverable under alternative theories of compensatory and punitive damages. In subsection A, we discuss the principles of awarding damages under compensation for "moral damage" or non-pecuniary losses recognized under both Paraguayan and international law. Though described as "compensation," it

is important to note that under the principles of both legal systems, factors which are considered punitive under United States law must be taken into account in the assessment of adequate compensation. Subsection B discusses the evidence that punitive damages would be awarded in the extraordinary circumstances of this case in accordance with the norms of the customary international law and the explicit interest of the international community in seeing the torturer -- "the modern day hostes humani generis" -- punished.

A. Compensation For Moral Damage Is Required Under Paraguayan And International Law And Must Take Into Account The Heinousness Of Torture And Its Impact On The Suffering Of The Plaintiffs

1. Paraguayan Law

The affidavit of Mr. Garro sets forth the entitlement of plaintiffs under the Civil Code of Paraguay to recover for "moral injury" (agravio moral) which the offense may have caused the person to suffer either "by molesting him in his personal security, or in the enjoyment of his property, or wounding his legitimate affections," because the wrong inflicted is a crime under the laws of Paraguay. Article 1112. ¶¶9, 22. He indicates further that "moral damage" is recoverable both by Dr. Filartiga as Joelito's "necessary heir," and Dolly "as her brother's death entails a wound to her "legitimate affections." id, ¶¶12 and 25.

Because the Paraguayan system so effectively immunizes the common practice of torture, there is no case which comes close to this one to cite as a direct precedent of the

approval of the Paraguayan courts of punitive damage. Nor is there a case which involves international crimes notwithstanding that they are clearly committed in Paraguay. Thus the ascertainment of Paraguayan law provided here by Mr. Garro must, of necessity, be based entirely on the precedents and theories applicable to common place wrongs and crimes of and purely domestic character. Garro affidavit ¶31.

In the normal case, Paraguayan law would not recognize punitive damages as a separate and explicit category of damages. Mr Garro states:

¶32. In the civil law tradition, the line between civil and criminal law is more sharply drawn than in common law jurisdictions. Thus, the ideal of punitive damages, as known in this country, designed to express society's outrage at the offense, to punish the defendant, and to deter future violations is foreign to the civil law, at least since the recognition of the state's monopoly over criminal sanctions. The punishment of morally reprehensible (i.e., malicious or grossly negligent) actions are generally matters for the criminal court rather than for the civil law. Thus in the prevailing view reflected in court decisions and the opinions of most legal commentators, recovery for non-pecuniary losses (agravio moral) under article 1112 of the Civil Code is not aimed at punishing the defendant but at compensating the victim.

This does not mean, however, that punitive considerations play no role in the assessment of moral damages for pain and suffering caused the direct and indirect victims of an intentional tort which violates the criminal law. Rather the Paraguayan courts can and do take into account factors that United States law commonly characterizes as "punitive;" but they term them "compensatory." As Mr. Garro explains the law:

¶33. Civil liability is concerned with reparation: a just and adequate compensation to the injured person for the losses arising from the wrongful act. It must be acknowledged, however, that the nature of compensation for non-pecuniary harm is hardly free of punitive connotations. In spite of the compensatory nature of the award of damages for moral injuries, there is an unavoidable connection between the gravity or seriousness of defendant's fault and the harm inflicted to the victim. This close relationship existing between fault and damage, as pointed out by Givord, shows that blurred line between punishment and compensation in the award for moral damage. F. Givord, *La reparation du prejudice moral* 123 (1938). The Court of Appeals of Asuncion has held:

"The award of damages to compensate moral injuries must be left to the prudence and discretion of the judges. It is obvious that no mathematical rule can be fixed in order to measure the award. All sorts of considerations must be taken into account: the seriousness of the harm, the age, sex, and social position of the victim, the mediate and immediate consequences resulting from the injuries, etc."

Fernandez v. Melgarejo, Court of Appeals of Asuncion, June 20, 1977 reported in 1 La Ley 36 (1977) (emphasis supplied). In fact, some court decisions in Argentina have explicitly based recovery for moral injuries (agravio moral) on a punitive rather than compensatory theory, holding, for example, that the loss of child is non-compensable. E.g., 93 L.L. 504.

¶34. Thus, in awarding moral damages to compensate for pain and suffering, a Paraguayan court would have discretion to consider factors which in this country are treated as punitive damages. It is likely that a Paraguayan court would view the pain and suffering produced by the death of a son by means of torture as of a different intensity and duration than the suffering produced by the death of a son in an automobile accident. Thus, the more heinous the tort, the greater is the pain to the survivors and, consequently, the larger the award which must be given in order to "compensate" them for moral damage. The increase of the award is not justified by the desire to punish the defendant, however, but by the purpose of compensating the greater pain suffered by the plaintiff.

The Paraguayan authorization of moral damages for pain and suffering as a result of offenses which are classed as criminal corresponds, therefore, in some part, to what we describe as punitive damages:

Where the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime, all but a few (U.S. State) courts have permitted the jury to award in the tort action "punitive" or "exemplary" damages.... Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example. Occasional decisions have mentioned the additional purpose of reimbursing the plaintiff for elements of damage which are not legally compensable, such as his wounded feelings or the expenses of suit.

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant.

Prosser, Law of Torts ¶2 4 n ed. (1974).

Thus if this Court were applying solely Paraguayan law, it would be permissible and appropriate for it to enhance the award of moral damages for the pain and suffering entrained by this act to Dr. Filartiga and Dolly, because their suffering is inseparable from the heinous and malicious nature of the act. And, while Paraguayan law does not compensate the pain and suffering of the decedent, Garro affidavit ¶¶12-14, the pain and suffering caused to Joelito should be accounted for in the award to the plaintiffs since their daily suffering is certainly a consequence of the

indelible vision of his battered body with which they live and Dr. Filartiga's ability from his own experience of torture, to imagine all too clearly the enormity of the abuse his son endured. Mr. Garro states: "Insofar as those indirectly harmed suffer moral injury on account of pre-death suffering of the deceased, they would be entitled to recover for the pain it caused them. id ¶14.

Finally, Paraguay's refusal to recognize a distinct category of punitive damages is rooted in the view that the criminal justice machinery is the proper mechanism for imposing punishment. ¶32, quoted supra. Here, the defendant has evaded criminal sanction as a function of fleeing to this country and of the extra-legal immunity which the Paraguayan system gives him. If the system were not corrupt, we can only speculate whether the enormity of his crime and his avoidance of criminal sanction would move a Paraguayan court to assess punitive damages contrary to the normal rule. It is clear, however, that as with Joelito's suffering under torture, the defendant's immunity from criminal sanction and the protection he has enjoyed have substantially aggravated the Filartiga's terrible anguish and should be accounted for in the award of moral damages. Garro affidavit ¶14.

2. "Compensation Under International Law"

As in Paraguayan law, international law has consistently recognized that "the traditional conception of responsibility already contained not only the idea of reparation in the strict sense of the word but also the idea of punishment [and] that in practice some of the forms of reparation had a distinctly punitive purpose Garcia-Amador, "Draft Article on the Responsibility of the State for Injuries Caused in its Territory To The Person or Property of Aliens," in Garcia-Amador, Sohn & Boxter, Recent Codifications of the Law of State Responsibility for Injuries to Aliens, 10 (1974).* The famous discussion by Umpire Parker of damages in the Lusitania Cases recognizes that elements which are embodied in the concept of punitive damages in this country have been traditionally treated as part of compensation in international cases:

That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards make them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. The tendency of the decisions and statutes of the several American States seems to be to broaden the scope of the elements to be considered in assessing actual and compensatory damages, with the corresponding result of narrowing the application of the exemplary damages rule.

cited in: I. Whiteman, Damages In International Law, 718-19 (1943) (hereinafter "Whiteman").

* Hereinafter Recent Codifications.

One of the most recent discussions of the problem of distinguishing punitive and compensatory remedies underscores their inextricable interrelationship. In the "Second Report on the Content, Forms and Degree of State Responsibility (Part Two of the Draft Articles) by Mr. Riphagen, The Special Rapporteur for the International Law Commission, group on State Responsibility, U.S. Doct. A/CN. 4/344 (May 1, 1981), it is stated:

¶74... [I]t should be noted that the term "reparation" is often used in a sense covering [inter alia] "punitive damages" and other forms of "penalty," id at 16.

....

¶82... [T]he "quantitative" factors of the "attitude" of the author State in respect of the breach, and the "seriousness" of the result of the breach from the point of view of the injured State, cannot but influence the opinion of the international judicial body dealing with the case.

....

¶84... [I]t is understandable that controversy exists between learned writers, e.g., as to whether pecuniary compensation for moral damage has or has not a "punitive character." Actually in all cases where, somehow or other, a pecuniary compensation is awarded as a counterpart of an irreparable loss, the obvious incomparability between the receipt of a sum of money and the loss suffered invites analogy with a "penalty." Nevertheless in many national legal systems such pecuniary compensation is awarded under the title of damages rather than under any other title.

id at 16-19.

Thus, the traditional reluctance of international law to recognize an explicit and separate category of punitive damages is, in significant part, semantical.

B. The Precedents And Evolving Principles of International Law Warrant This Court's Recognition of Punitive Damages In the Circumstances of This Case.

Given that torture is an international crime, the job of this Court, as enforcer of the federal common law of nations, is to vindicate the interest of the world of nations in accomplishing the elimination of torture through assuring appropriate sanctions, and to express the moral outrage which the status of torture as a violation of the customary international law demands. While there are no established conventions or codifications in international law concerning the occasions for imposition of punitive damages, there is both precedent and authoritative evidence of evolving doctrine that justify application of punitive damages in this case.

Since the traditional international law of damages has developed primarily through resolution of claims made by one state against the other on behalf of its injured nationals, it is rare to see awards of punitive damages. Whiteman explains this as follows:

Punitive, vindictive, or exemplary damages are generally based in local law upon the presence of gross fraud, malice, willful negligence, or oppression, etc. The refusal of international tribunals to assess punitive, vindictive, or exemplary damages, as such, against respondent governments may be explained in part by the absence of malice, or mala mens, on the part of government of the respondent state. This is especially true in cases where the wrong against the alien was committed in the first instance by someone other than an official within the jurisdiction of the respondent.

In other cases where the original wrong is committed by an officer of the respondent government, those charged with the settling of the claim may feel that the people of the state as a whole should not be charged with additional damages for a wrong on the part of one or more officers, of which they had neither knowledge nor wrongful intent. Apart from this, it is plain that international tribunals have hesitated, eo nomine, to pass judgment upon the actions of states in the form of punishment... Where a state is held

responsible in damages by an international tribunal or through diplomatic channels, the wrong is not denominated a crime, but merely an international delinquency which gives rise to the payment of compensatory damages.

I. Whiteman, 716-17 (1943). (footnotes omitted).

There are exceptions even to this general rule, which involves considerations of the appropriateness of directly punishing a state that are not present in this case where the defendant is an individual. Whiteman cites in a footnote the case of the I'm Alone (Canada v. United States) where the American and Canadian claims Commissioners recommended, in addition to compensatory damages, the payment of \$25,000 for the "wrong" done to Canada by the

United States in intentionally sinking a Canadian ship. id at 717 n.263. See also; id at 150-157.* And Whiteman catalogues a number of cases demonstrating that "[w]hile punitive or exemplary damages, as such, have rarely been awarded by arbitrators, they have at times apparently been assessed in diplomatic settlement." id at 722 et. seq. Demands for punitive or exemplary damages have been frequently made not only by the United States, but also by civil law governments that do not explicitly recognize such damages as a routine matter of domestic law. id

Since World War II, the notion that certain acts of a state in violation of international law should entail state responsibility of a punitive nature has been evolving. Initially, the early work on state responsibility was directed to injuries affecting aliens. Mr. Garcia Amador, who was until 1962 the Special Rapportuer of this topic for the International Law Commission, an explicit distinction between civil responsibility or the duty to make reparation and criminal responsibility was drawn. Garcia Amador, Sohn & Baxter, Recent Codification of the Law of State

* By contrast, the Mixed Claims Commission, United States and Germany, expressly refused to allow punitive damages for the victims of the sinking of the Lusitania. While this decision is often cited, it is not precedent for preclusion of punitive damages, first, because it recognizes that punitive damages were developed to deal with the difficulty of adequately compensating for mental injury and suffering which is compensable id at 718-19, quoted supra, and, second, because to award punitive damages was beyond the power of the Commissioner: "[I]t is not necessary for this Commission to go to the length of holding that exemplary damages cannot be awarded in any case by any international arbitral tribunal. A sufficient reason why such damages cannot be awarded by this Commission is that it is without the power to make such awards under the terms of its charter - the Treaty of Berlin." id at 719.

Responsibility for Injuries to Aliens, 9-11 (1974). While the International Law Commission's work on state responsibility has taken on different focus not limited to injuries to aliens, it has continued to examine the question of distinction between international wrongs that are criminal and those that are simply delicts.* This distinction is embodied in Part I of the Draft Articles on State Responsibility. Yearbook of the International Law Commission, Vol. II, Part 2, pp. 69-122 (1976). In particular Article XIX of Part I distinguishes international delicts and international crimes defined in subsection (2) as

An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

The purpose of this distinction, as explained by the commentary is "not purely descriptive or didactic, but 'normative'":

* Codification is not essential in international law for evolving principles to be evidence of the customary international law and carry legal authority as such. This is particularly true of the reports and draft articles approved by the the International Law Commission. See, Jennings, Recent Developments in the International Law Commission: It's relation to the Sources of International Law, 13 Intl & Comp. L.Q., 385-93 (1964) cited in Henken, Pugh, Schachter & Smit, International Law, Cases and Materials, 95 & 98 (1980). See also: Henken at 91 et seq.

[I]t should be known that the establishment of a distinction between internationally wrongful acts, based on the differences in importance--for the international community as a whole--of the subject-matter of the obligations breached, and at the same time of the extent of the breaches, will necessarily be reflected in the legal consequences attached to the internationally wrongful acts falling into one or the other of the two categories, and on the determination of the subject or subjects of international law authorized to implement those consequences.

id. at 97. The provisional adoption by ILC part I of these draft articles is persuasive authority for the acceptance of a distinction between punitive and reparative consequences. particularly since it involves the ultimate question of state responsibility and punitive sanction against the state. Supra at 18 n.*.

Moreover, the work on Part II of the draft articles which is intended to deal with remedies continues to explore the role and function of establishing explicit punitive sanctions in addition to their inclusion in concepts of reparation, as previously discussed, supra at Riphagen Report, at 15-41. It states: "if a breach 'is recognized as a crime' by the international community as a whole, it may be assumed that such "recognition" particularly relates to what this international community and its members consider to be an adequate response on their part to such a breach." id at 24.

It should be again noted that this discussion of penalties relates to the far stickier questions of imposing penalties directly on states and the need for some international organization to do so, unlike this case where the question is only what should be exacted from the individual wrongdoer.

There is also precedent for awarding punitive damages here in the rules and practice of the Nuremberg and other war crimes tribunals, as well as Denazification proceedings in Germany following World War II.

The International Military Tribunal, Nuremberg sentenced Alfred Krupp to forfeit all real and personal property United Nations War Crimes Commission, X Law Reports of Trials of War Criminals, 158 (1949);* and the penalty of forfeiture was imposed by other war crimes tribunals. See, e.g., Trial of Ganleiter Arthur Greiser before the Supreme National Tribunal. United Nations War Crimes Commission, XIII Law Reports of Trials of War Criminals, 104 (1949). Moreover in the Denazification proceedings crimes of lesser dimension than war crimes were also punished by forfeiture. To fulfill the mandate to denazify, these proceedings, established by agreement of the occupying forces, were designed to eliminate nazis from positions of any importance and mete out appropriate punishment. They regularly imposed severe fines and forfeitures on individuals for varying degrees of participation in Nazi activities. These financial sanctions were intended as punitive and not to compensate the victims. See: Dept. of State, Germany, 1947-49: The Story in Documents, 107-111 (197); Friedman, The Allied Military Government of Germany, 110-25

* Counsel has been advised by one of the former U.S. prosecutors at Nuremberg that the forfeiture was commuted thereafter. As no evidence has been found of this in the Nuremberg records, she believes the commutation was given by German authorities.

(1947).

Perhaps the closest analogy for this case derives from the original class of "enemies of all mankind"; the pirate. The international law has always recognized punitive damages in instances that are analogous to intentional torts at common law: in war prize claims, where a hostile relationship exists between the states that are party to the litigation. The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), though reversing the award of a Cuban fishing vessel as war prizes, reflects the standard rules that ships of an enemy state, combatant or non-combatant, are subject to seizure as war prizes when captured under both customary international law and such codification as the Hague Convention Relative to Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval Warfare, of 1907.

Now that individuals are able to sue under international law, it is important to note that in the only area of traditional international law where the legal claim was based on a hostility between the parties, punitive damages in the form of condemnation of capture property was awarded. As this court now has before it two private parties with a claim based on intentional commission of a universally condemned practice, it should conclude that, just as traditional international law awarded punitive damages in such cases so should this court, in this case.

There is thus substantial support in past practice and in the progressive developments of international law, through the work of the International Law Commission, for the proposition that vindication of the international guarantee against torture warrants an award of punitive damages against the defendant, rather than incorporating the punitive elements into a compensatory award for moral damage and irreparable loss.

The Circuit has recognized the criminal nature of the torturer as hostes humani generis. 630 F.2d at 890. The criminal character of torture under international law is evidenced by the fact that it is universally condemned by the nations. 630 F.2d at 884.* Finally, the view of the international community that torture should be criminally punished is explicit in the Declaration on the Protection of

* See : Article 38 (1) (c) of the Statute of the International Court of Justice, 59 State 1055, T.S. 99313 Bevens 1179.

It should be noted that while Article XIX of Part I discussed in the 1976 Report of the International Law Commission does not explicitly mention torture. Article XIX (3) describes as an international crime inter alia: "(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid." The guarantee of freedom from torture has become in recent years a peremptory norm in the eyes of the international community of states as a whole. See authorities cited, Filartiga v. Pena, 630 F.2d at 881-884, and therefore qualifies under Article XIX (2) and (3) (c), which is explicitly not an inclusive list. In all cases the gravity of the act is taken into account as well as whether it is as, in Paraguay, part of a systematic or persistent pattern of violations of the obligations set forth in the Universal Declaration of Human Rights. 1976 Yearbook, Vol. II, part 2 at 110.

All Persons From Being Subjected to Torture, General Assembly 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975) which requires that states shall (1) "ensure that all acts of torture ... are offenses under its criminal law," (Article 7); (2) impartially investigate, sua sponte, a reasonable belief that torture occurred (Article 9); (3) institute criminal proceedings against the alleged offender or offenders in accordance with national law. (Article 10); as well as (4) afford redress and compensation to the victims in accord with natural law. 630 F.2d at 883-84 n.11.

Thus need for redress of a punitive nature is not only made express by this Declaration. It is made essential by the fact that Paraguay has immunized this defendant from appropriate criminal sanction. Had sanctions been imposed in Paraguay, it might be argued that punishment had been exacted and is unnecessary here. But this is not the case. If this Court's award fails to take into account the international demand for punishment, then the defendant escapes all sanction both real and symbolic. Since this Court has a responsibility under the customary international law to respect and enforce its norms and to express the condemnation of the community of nations, it is crucial that the remedy of money damages,--which is inherently inadequate to compensate an irreparable loss and irreversible consequences of this dimension, but which is the only remedy available to this Court,--be used to the fullest.

In connection with this Court's computation of an award for both compensatory and punitive damages, whether on the theory that they are separate or that the one incorporates the other, there follows a necessarily incomplete and inadequate list of the physical and emotional pain and suffering inflicted upon plaintiffs:

For Dolly Filartiga:

Apprehension at being awakened and called to Pena's house
Confrontation with her brother's tortured, blood-soaked body
Being harrassed and forced to carry his body home
Having to tell her younger sisters
Being threatened by Pena and told to shut up, or it would happen again and that they got what they were looking for
Having to endure the sight of her brother's body in their home during the wake
Recurrent nightmares reenacting the discovery of her brother's body and expressing the wish that he were still alive
Arrest and false imprisonment, without knowing for 6 hours whether she and her mother would ever be released
Constant surveillancce and threatening actions around her home by the police
One year of frequent episodes of believing that her brother would reappear; and then no one came
Loss of his friendship, society and her closest confidant
Isolation within her family
Anger and withdrawal
Guilt that she blames her father; anger at her father
Realization, one year later, that her brother would never return

Severe depression, loss of appetite, ability to read, concentrate, study, mostly confined to bed

Inability to sleep, and fear of attack during the night

Contemplation of and attempt to commit suicide

Loss of companionship of friends; people being afraid to associate with the Filartigas due to fear of reprisals

Difficulty establishing personal relationships, apprehension at social occasions

Constant feeling of being different

Constant consciousness of the torture-murder and loss of her brother

Inability to continue school in Paraguay

Inability to maintain a job, to find work

Worry about other family members, the kidnapping of her sister, whether she'd be found

Personal harassment, rumors and slander; police agents pretending to be suitors, impugn her reputation

Inability to obtain justice in Paraguay

Apprehension at leaving Paraguay

Separation from home, family and her country

Inability to go home; to leave the United States

Traumas of adjustment to a strange culture, new language, no job

Apprehension at the filing of the lawsuit in this country; knowing she could never go back; fearing for her family

Homelessness; waiting in limbo for three years for processing of political asylum

Having to be strong

For Dr. Filartiga

Apprehension on hearing in Ybycui that something was wrong at home; reckless drive back to Asuncion

Apprehension entering his home

Confrontation with his son's tortured body

Watching his wife's inconsolable hysteria; his children's suffering

Experiencing his son's pain; reliving his own torture and the others he witnessed being tortured over and over

Mourning at the wake; watching his family, anger

Finding photographers, doctors to conduct second autopsy

Exhuming his son's body for a third autopsy

Blaming himself; feeling blamed by his family, feeling fury

Wishing it had been himself who had been tortured and died

Constant police harassment; fear for himself and his family; paranoia

Recklessness and anger; desire to destroy himself

Missing his son, his companionship

Anger and grief over his death; late nights all alone drawing, writing poems, imagining the instruments of torture, the screams, the taunts

Loss of potential colleague, Joelito, who loved the rural people and would have carried on his work

Preparing and trying to prosecute a lawsuit; constant surveillance; constant roadblocks; constant threats; losing lawyers; lawyer arrested

Fearing Dolly and his wife would not be released from prison; fearing his youngest daughter would not be returned by her kidnappers

Watching his wife's suffering - her loss of eyesight, memory, weight; her terrible pain with kidney stones; feeling responsible

Experiencing the loss in her two miscarriages; her sadness

Feeling numbness, pain and cramps in his limbs from circulatory problems

Severe pains from ulcer; losing eyesight; borderline diabetes

Inability to work; loss of half his capacity to work and anguish at being the only source of health care for the people of Ybycui

Inability to obtain justice; persistence

Isolation and aloneness

Separation from Dolly; loss of her care of the younger children, her work in the clinic

Feeling responsible for the upset of his younger daughters

Separation from his family on trips to the United States

Apprehension for his family's safety; threats against him on his return to Paraguay

Facing death and torture

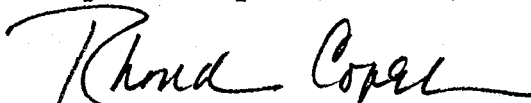
Anger and responsibility

Going on.

CONCLUSION

It is obvious in this case that so long as Paraguay continues to immunize the defendant, it is unlikely that he will ever pay just redress or compensation or be subject to sanction. It is not in expectation of money that plaintiffs pursue this suit, but out of the conviction that this Court can, in a symbolic way, vindicate the enduring personal anguish of the victims of torture and take another "small but important step in the fulfillment of the ageless dream to free all people from brutal violence." 630 F.2d at 890.

Respectfully submitted,



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APPENDIX

TABLE I

TABLE OF PAST PECUNIARY LOSSES AS A CONSEQUENCE OF JOELITO'S
TORTURE AND DEATH

	<u>TYPE OF EXPENSES</u>	<u>AMOUNT</u>	<u>SOURCE*</u>
1.	Funeral Expenses	\$18,900	Dr. Filartiga's Affidavit, ¶7
2.	Memorial Services	5,810	Dr. Filartiga's Affidavit, ¶9
3.	Legal Costs (Paraguayan suit)	71,000	Dr. Filartiga's Affidavit, ¶10
4.	Costs connected to U.S. lawsuit	10,364	Dr. Filartiga's Affidavit, ¶10
5.	Medical Expenses (Dr. Filartiga)	4,100	Dr. Filartiga's Affidavit, ¶13
6.	Medical Expenses (Mrs. Filartiga)	19,340	Dr. Filartiga's Affidavit, ¶14
7.	Medical Expenses (Dolly Filartiga's past psychiatric care)	2,160	
8.	Lost Earnings	71,300	Dr. Filartiga's Affidavit, ¶15
	TOTAL	\$202,974	

* See the designated affidavit or document for itemized account.

TABLE II

TABLE OF FUTURE PECUNIARY LOSSES AS A
CONSEQUENCE OF JOELITO'S TORTURE AND DEATH

	<u>TYPE OF EXPENSES</u>	<u>AMOUNT</u>	<u>SOURCE*</u>
1.	Medical Expenses (Dr. Filartiga)	\$10,600	Dr. Filartiga's Affidavit ¶13
2.	Medical Expenses	16,700	Dr. Filartiga's Affidavit ¶14
3.	Medical Expenses (Dolly Filarti- ga's psychiatric care)	26,960	Affidavit of Ana Deutsch ¶14 & Michael Schneider ¶3.**
4.	Future Lost Earnings (Dr. Filartiga)	162,500	Dr. Filartiga's Affidavit ¶15
5.	Future Legal Expenses	20,000	Dr. Filartiga's Affidavit ¶9(f) and (g)
TOTAL		236,760	

* See the designated affidavit or document for itemized account.

** This figure was computed by assuming the cost per session to be an average of the going rates as set forth in the affidavit of Michael Schneider and, on the basis of Ana Deutsch's estimate of Dolly's need for 337 sessions spanning 4 years.