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Serbia Suit

THE ATROCITIES

U.S. Backs War-Crimes Lawsuit Against Bosnian Serb Leader

By NEIL A. LEWIS

WASHINGTON, Sept. 26 — As the United States announced a preliminary agreement today to settle the war in the Balkans, the Clinton Administration has separately endorsed a lawsuit that would put the leader of the Bosnian Serbs on trial for war crimes — in New York.

In a brief filed with the Federal appeals court in New York last week, the Clinton Administration supported the right of two women to sue the leader, Radovan Karadzic, for suffering caused by what they claim is his participation in war crimes, torture and genocide.

The decision to support the women, whose names were withheld in court documents, came after an intense debate within the Administration over whether the spectacle of a trial and the Administration's support of it would make it more difficult to negotiate with Dr. Karadzic and to win his support for a Balkan settlement.

A lower court had already ruled that the civil lawsuit could not be brought against Dr. Karadzic, but

the United States Court of Appeals for the Second Circuit, which is now considering the case, has a history of favoring such lawsuits.

The two plaintiffs, identified only as Jane Doe 1 and Jane Doe 2, contend that Dr. Karadzic is responsible for what they suffered in the Balkans. The first plaintiff alleges that she was raped and mutilated by Bosnian Serb soldiers and the second woman alleges that she witnessed the rape and murder of her mother by Bosnian Serb forces.

Dr. Karadzic is represented by Ramsey F. Clark, a former United States Attorney General. Mr. Clark did not return telephone calls.

The Karadzic suit is the latest episode in a remarkable development in United States law in recent years — the use of American courts to enforce international human rights standards.

The Second Circuit has ruled that torturers and dictators may be sued in the Federal courts for acts that occurred abroad and that a judgment may be enforced if the subjects come to the United States or their assets here are located. That is the

Will Karadzic negotiate while facing a U.S. trial for rights abuses?

reasoning behind the multi-million dollar lawsuit against Ferdinand Marcos, the late Philippine dictator.

Dr. Karadzic was served with papers as he walked outside his hotel room when he came to the United Nations in February 1993.

Beth Stephens, an attorney for the Center for Constitutional Rights in New York who represents the two women, said she does not know whether Dr. Karadzic has any assets in the United States or elsewhere that could be seized to satisfy a judgment. "But our clients would be satisfied by a judgment that is just, even if they never receive any money," she said.

In supporting the women's right to sue, Drew S. Days, the Solicitor Gen-

eral, and Conrad K. Harper, a State Department legal adviser, said that while Dr. Karadzic is not an official of any recognized nation, he should be as liable for war crimes as were Nazi industrialists who were not government officials.

A State Department memorandum sent to Warren Christopher urging his approval of the brief argued that it would be an opportunity for the Clinton Administration to distinguish itself from its Republican predecessors in the field of human rights.

Dr. Karadzic, a psychiatrist, has also been indicted by a United Nations-sponsored war crimes tribunal sitting in The Hague for a variety of human rights abuses. As a result, he has avoided traveling outside the territory of the former Yugoslavia to avoid being taken into custody.

Administration officials have said the war crimes charges could become part of the peace negotiations. But Ms. Stephens, the lawyer for the two women, said governments and international authorities could not negotiate away the rights of the plaintiffs in the civil suit.

John L. Bates, 85, Interpreter For Roosevelt at Stalin Talks

By BRUCE LAMBERT

John L. Bates, who fled Russia as the son of a top Czarist guard, returned in World War II as a United States military attaché and interpreted for President Roosevelt in his momentous talks with Stalin at Teheran and Yalta, died on Sept. 20 at his home in Fort Belvoir, Va. He was 85.

The cause was cancer, his family said.

Twenty-three years after escaping Russia as a youngster, Mr. Bates was a United States Army major who found himself shaking hands with Stalin and introducing him to Roosevelt in a top-secret meeting at a crucial juncture in the war. The occasion was the Teheran Conference, a 1943 summit meeting of Roosevelt, Churchill and Stalin.

Despite the gravity of the event, its opening scene was a bit disorganized, Mr. Bates recalled.

"Possibly in error, I was the only interpreter present," he said. "I soon found myself the recipient of the Soviet Premier's hand and began introducing him to the small group rushing to see him." Moments later, Mr. Bates translated President Roosevelt's simple, upbeat greeting: "At last!"

Two years later, Mr. Bates, by then promoted to colonel, was an interpreter at Yalta and Potsdam, where the Allies planned for the division of Germany and other boundary changes, war crimes trials, the United Nations, reparations and other issues.

During and after the war, he served as Gen. Dwight D. Eisenhower's Russian interpreter. He also assisted Averell Harriman, the United States Ambassador to the Soviet Union, and Gen. Lucius Clay as he

organized the Supreme Headquarters of All Expeditionary Forces, a precursor to NATO.

His life outlasted the Soviet empire's rise and fall. He savored what he called the "the ironies of history" in his shifting role as a Russian native, refugee, ally, cold war foe and, in 1990, visitor invited home in an era of democracy and reconciliation.

He returned then to help re-establish the Russian version of the Boy Scouts and Girl Scouts, which his father founded in 1909 but which the Communists banished for 70 years.

Mr. Bates was born in St. Petersburg as Oleg O. Pantuhov. His father, a colonel in the Russian Imperial Guard, was in charge of the last defenders of the Kremlin against the Bolsheviks. He fled to Turkey in 1920 with his wife and two sons. They went to America in 1922.

Mr. Bates, who was 10 when he left his homeland, grew up in New York City. He joined the Army, where his fluency in Russian soon drew overseas posts, and in 1943 he spent six weeks in Russia in the Lend-Lease program.

The Army awarded Mr. Bates the Legion of Merit for his efforts. After retiring in 1959, he privately published a four-volume memoir entitled "Journey Through Two Worlds" and was active in Russian-American groups.

His first wife, Natalie Ragsone, died in 1957. His survivors are his wife of 33 years, Hester; three daughters by his first marriage, Lee Olshan of Fairfax, Va., Nina Bates of Berwyn, Pa., and Mimi Pantuhova of Newton, Mass.; three stepsons, Russell Fries of Alexandria, Va., William Fries of Frederick, Md., and Barry Fries of Boise, Idaho; eight grandchildren and a great grandson.

1. What's real procedural posture? Who's doing what now?

1.5. Personal jurisdiction 1.75 - Justiciability

2. Exactly what is your position?

What are the limits?

Consider: - All crimes ^(torts) by anyone (e.g. torture you)

Wanting for Tereza's - Specify: which ^(torts) crimes -

return call

e.g. - crimes of humanity

war crimes

(Also note
short down)

- Specify: which actors / how to define -
center of delinca
territory

e.g. de facto govt // purporting to exercise
st auth

3. Need some limits

- Can't make indiv. the normal routine vehicle for int'l law

- All human rights spring going after for "bad actors" Every
national liberation gp? Freedom fighter / terrorist? Not pretty

- Some litigation will affect int'l power, brokerage of settlement -
surveys in justiciability section

4. Proposal

War crimes (like piracy) - select group of torts where
indiv/actor done sufficient predicate.

Essentially - viols of int'l order + peace

Pretty clear understanding of what this is.

Not even look to W.C. Tribunal - under Hague Charter,

its have oblig to prosecute anyone Hague incidents.

Means to be partners

Use AICJ as vehicle to do that.

Means US judges won't have to decide what's a war ^{crime} ~~at~~

Office of the
Deputy Assistant Attorney General

Washington, D. C. 20530

August 1, 1995

Per memo.

**MEMORANDUM TO DREW S. DAYS, III
SOLICITOR GENERAL**

From: Teresa Wynn Roseborough *TR*
Deputy Assistant Attorney General

Re: Possible Amicus Participation in Karadzic Case

The International Human Rights Law Group (the "Amici" has suggested that the United States participate as Amicus in the appeal of the District Court's decision in Doe v. Karadzic, 866 F. Supp. 734 (S.D.N.Y. 1994). The matter is of considerable interest to our Office because it raises significant legal questions concerning the interplay between President's foreign policy prerogatives and the judicial process.

Does it's the difference?

Doe consists of two related actions under the Alien Tort Claim Act¹ and other federal and state statutes against Radovan Karadzic, the leader of the Bosnia Serb faction in the civil war against the Government of Bosnia-Herzegovina, and the "President" of the unrecognized Bosnian Serb state, the "Srpska Republic." The plaintiffs in one action seek compensatory and punitive damages for rape and other human rights violations committed by Karadzic's forces; those in the other action seek injunctive relief and compensatory and punitive damages for personal injuries caused by genocidal acts, torture, extrajudicial killing, and other international law violations. It appears that the plaintiff classes consist primarily or wholly of Bosnian nationals or former nationals. The district court (Leisure, J.) granted the defendant's motion to dismiss for lack of subject matter jurisdiction, and the plaintiffs appealed.

The district court's opinion is divided into two main sections: one dealing with federal law, the other with state law. The federal law section is in turn subdivided into two main parts. First, the court addressed the question of justiciability, and concluded that the possibility that the Executive Branch might recognize the defendant as head of a foreign state, "while not dispositive . . . militates against . . . exercising jurisdiction." 866 F. Supp. at 738. Second, the court ruled that it lacked subject matter jurisdiction under the Alien Tort Claim Act, id. at 738-41, the

¹ 28 U.S.C. § 1350.

Torture Victim Protection Act.² *id.* at 741-42, and the federal question jurisdictional statute,³ *id.* at 742-43. Following the lead of the Amici, this memorandum will concentrate on (1) justiciability and (2) the Alien Tort Claim Act. After considering arguments on both sides, we conclude that the plaintiffs' complaint is justiciable. We further conclude, albeit more tentatively, that the Alien Tort Claim Act should be understood to reach conduct of the kind that the plaintiffs challenge.

I.

The district court found that any opinion it rendered on the merits might be advisory, and thus that the case might not be justiciable. "Given that Karadzic's present lack of head-of-state immunity is conditioned upon a decision of the Executive Branch not to recognize a Bosnian-Serb nation and not to acknowledge Karadzic as an official head of state, plaintiffs' claims for relief could potentially become a request for an advisory opinion if the State Department were to declare defendant a Head of State. . . . Were the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction." 866 F. Supp. at 738 (citing Lafontant v. Aristide, 844 F. Supp. 128, 130 (E.D.N.Y. 1994)).⁴

It is well established that the President's recognition power is exclusive. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").⁵ It is also well established that this power is not limited to the bare act of according diplomatic recognition to a particular government, but encompasses as well the authority to take such actions as are necessary to make the power of recognition an effective tool of United States foreign policy. See United States v. Pink, 315 U.S. 203, 229 (1942) (The authority to recognize governments "is not limited to a determination of the government to be

² 28 U.S.C. § 1350.

³ 28 U.S.C. § 1331.

⁴ Implicit in the court's ruling is the assumption that Executive Branch recognition of the Karadzic régime is not a wholly unrealistic and speculative scenario. We would, of course, need to discuss that question with the State Department.

⁵ See also United States v. Belmont, 301 U.S. 324, 330 (1937) ("[T]he Executive had authority to speak as the sole organ" of the United States Government in recognizing the Soviet Union); Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes."); Can v. United States, 14 F.3d 160, 163 (2d Cir. 1994) ("It is firmly established that official recognition of a foreign sovereign is solely for the President to determine"); Phelps v. Reagan, 812 F.2d 1293, 1294 (10th Cir. 1987) ("[T]he question of whether to appoint an ambassador is one vested solely in the Executive Branch."); Americans United for Separation of Church and State v. Reagan, 786 F.2d 194, 202 (3d Cir.) ("[T]he establishment of diplomatic relations" is "one of the rare governmental decisions that the Constitution commits exclusively to the Executive Branch."), *cert. denied*, 479 U.S. 914 (1986); Restatement (Third) of the Foreign Relations Law of the United States § 204 (1987) ("[T]he President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government.").

recognized. It includes the power to determine the policy which is to govern the question of recognition."').

As the Second Circuit itself has recently held, the courts must not encroach on the exclusively Executive recognition power. In Can v. United States, 14 F.3d 160 (2d Cir. 1994), citizens of the former Republic of South Vietnam sought to recover assets belonging to that Republic that had been blocked by the United States under the Trading With the Enemy Act. The court held that the case presented a nonjusticiable political question. The court reasoned that

Were the court to grant appellants the relief they seek, it would not only decide a question of sovereign succession, but it would interfere with executive foreign policy prerogatives more generally. In particular, judicial determination of title would interfere with the President's use of the assets as a bargaining chip in negotiations with the current Hanoi regime. . . . Such negotiations may be critical to a presidential decision whether, and on what terms, to recognize the regime that now rules Vietnam. By long-standing precedent, questions affecting the President's power to settle claims to frozen assets in the process of recognizing sovereignty are non-justiciable. United States v. Pink, . . .

14 F.3d at 163-64.

Despite a fleeting suggestion to the contrary in the Brief of the Amici,⁷ if the Executive Branch were to recognize the Srpska Republic and to treat with Karadzic as its Head, then the courts would (as Judge Leisure said) be barred from adjudicating this case.⁸ In those circumstances, Karadzic could claim immunity to suit, at least with the consent of the Executive Branch, under the "head of state immunity" doctrine.⁹ Indeed, even if Karadzic were not himself Head of State, he could attempt to interpose the "act of state" defense, relying on cases

⁶ Our Office has recently warned against legislative intrusions on the exclusivity of the President's recognition power, maintaining that Congress cannot "trammel the President's constitutional authority to conduct the Nation's foreign affairs and to recognize foreign governments by directing the relocation of an embassy." Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General. Re: Bill to Relocate United States Embassy from Tel Aviv to Jerusalem, at 3 (May 16, 1995).

⁷ See Brief of Amici Curiae in Doe v. Karadzic, No. 94-9035 (2d Cir.) at 20 n.18 (the "Brief of Amici").

⁸ Although Judge Leisure wrote that such events would deprive the courts of "jurisdiction," it may be analytically sounder to say that they would provide Karadzic with a defense. See Dames & Moore v. Regan, 453 U.S. 654, 685 (1981) ("No one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction.'").

⁹ See The Schooner Exchange v. McFaddon, 11 U.S. (7 Cr.) 116, 137-38 (1812); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822); Restatement (Second) of the Foreign Relations Law of the United States, § 66(b) (1965); Memorandum for Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, from Walter Dellinger, Assistant Attorney General, Re: Immunity of Foreign Heads of State from Criminal Prosecution By the United States Government in Federal Courts at 3-6 (March 22, 1994).

such as Underhill v. Hernandez, 168 U.S. 250 (1897).¹⁰ But see Ford v. Surget, 97 U.S. 594 (1878).

The question of justiciability could be framed by asking whether, if the courts were to grant the Karadzic plaintiffs the relief they seek, they would be trespassing upon the exclusive Executive prerogative of recognizing foreign states. If so, Karadzic would present a nonjusticiable question.

It can be argued that permitting the Karadzic suit to go forward would not impair the President's recognition power. True, if the suit were to continue after the recognition of Karadzic as Head of the Srpska Republic, the President's power could be unduly compromised, because Karadzic might insist on immunity as part of a general settlement that included recognition, and the President would be unable to satisfy that demand. But, as discussed above, it does lie within the President's power to shield Karadzic from this suit, if the President decides to recognize him as Head of State. Indeed, if anything, the existence of the suit would seem to bolster the President's position in any negotiations with Karadzic, because the President could offer immunity from the suit as part of a broader settlement of the Bosnian conflict.

On the other hand, if the suit were to go to judgment and Karadzic were to be held liable, the President's ability to negotiate a settlement might be impaired, unless he could relieve Karadzic of the consequences of the judgment. Dames & Moore v. Regan, 453 U.S. 654, 683 (1981), reaffirmed the proposition that "[p]ower to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President," (quoting United States v. Pink, 315 U.S. at 229). But it is doubtful whether the President, even

¹⁰ Underhill, a United States citizen, sued Hernandez for various tortious acts that Hernandez was alleged to have committed while a revolutionary general attempting to overthrow the Venezuelan government. Hernandez' faction triumphed, and the Executive Branch recognized it as the legitimate government of Venezuela. The Supreme Court held that the act of state doctrine barred Underhill's suit. "The acts complained of were the acts of a military commander representing the authority of the revolutionary party as a government, which afterwards succeeded and was recognized by the United States. We think the Circuit Court of Appeals was justified in concluding that the acts of the defendant were the acts of the government of Venezuela, and as such not properly the subject of adjudication in the courts of another government." 168 U.S. at 254 (citation omitted in original).

Underhill appears to remain good law. See Kirkpatrick Co. v. Environmental Tectonics Corp., 493 U.S. 400, 405 (1990) (citing Underhill); Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 417 ("None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from Underhill.").

¹¹ In Ford, the Court (per Harlan, J.) held that a former Confederate Army officer, acting under military orders, was not liable for burning the plaintiff's cotton, because his allegedly tortious act was consistent with "the laws and usages of war." 97 U.S. at 606. Accord Dow v. Johnson, 100 U.S. 158, 170 (1879). The principle that acts of legitimate warfare cannot be made the basis of individual liability, see Banco de Cuba v. Sabbatino, 376 U.S. at 442 n.2 (White, J., dissenting), would be of no avail to Karadzic, because his alleged offenses are incompatible with the laws of war; cf. Prinz v. Federal Republic of Germany, 26 F.3d 1166, 1183 (D.C. Cir. 1994) (Wald, J., dissenting) (United Nations Statute of the International War Crimes Tribunal for the former Yugoslavia "contains absolutely no indication" that foreign sovereign immunity could provide a defense to charges of genocide or crimes against humanity).

when attempting to normalize relations between the United States and a de facto foreign government, can extinguish claims for money damages that have been finally adjudicated by the federal courts, at least without effecting a "taking" of property belonging to the judgment holders.¹² In such circumstances, therefore, the President might well be unable to hold out to Karadzic the offer of a release from liability. That inability, in turn, could obstruct "the resolution of a major foreign policy dispute between our country and another." Dames & Moore, 453 U.S. at 688, and more specifically could impair the President's exercise of the recognition power. Allowing the Karadzic suit to proceed, then, arguably might injure core Presidential prerogatives.

The district court approached the question of justiciability somewhat differently, focusing on whether it would be rendering a merely "advisory" opinion if it adjudicated the merits. Whether the issue is framed in terms of judicial power or of Executive power, however, the analysis is substantially similar.

On the one hand, it is clear that "Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." Kirkpatrick Co. v. Environmental Tectonics Corp., 493 U.S. at 409 (declining to abstain from entertaining action on grounds that "act of state" doctrine bars courts from imputing improper motives to foreign governmental actors). The bare possibility that the Executive might recognize the Karadzic régime should not non-suit the plaintiffs. Whatever the Executive may ultimately determine, it is arguable that the court has a "responsibility to persons who seek to resolve their grievances by the judicial process," First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1972) (Powell, J., concurring in judgment), and may not "ignore the obligations . . . to dispense justice to the litigants before it," Banco Nacional de Cuba v. Sabbatino, 376 U.S. at 456 (White, J., dissenting). At the very least, on this view, the court should stay the plaintiffs' actions while the Executive Branch is actively considering what to do, rather than dismissing the actions with prejudice.

Moreover, it might be argued that the Executive, through its recognition power, can always control the access of a foreign sovereign to the courts of the United States.¹³ There is nothing exceptionable, therefore, in the courts' ruling on the merits of the Karadzic complaints, even if the Executive Branch can act to bar the litigation.

¹² See Dames & Moore at 654 (Powell, J., concurring in part and dissenting in part) ("The Government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons and subject to the jurisdiction of our courts."). Cf. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447, 1456 (1995) ("[J]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government.") (quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948)).

¹³ "It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue." Pfizer, Inc. v. Government of India, 434 U.S. 308, 319-20 (1978); see also National City Bank of New York v. Republic of China, 348 U.S. 356, 358 (1955).

The counter-argument, urged by the district court, is that by rendering a judgment in these conditions, the judiciary would be issuing merely advisory opinions. "[I]f the President may completely disregard the judgment of the court, it would only be because it is one the courts were not authorized to render." Chicago & Southern Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).¹⁴ The persuasiveness of this counter-argument depends on whether Presidential recognition of Karadzic could, indeed, extinguish a final, non-appealable judgment against him. As discussed above, it is not clear that recognition would have that effect, at least without giving rise to an action for "takings" against the United States.

We think that the better view is that the Karadzic case is justiciable. The bare possibility that the President might, at some future point, recognize Karadzic as a head of State should not operate to confer on Karadzic de facto immunity from suit now. Whatever speculative effect the pendency of the lawsuit or any judgment rendered in the case might have on the President's hypothetical future desire to recognize Karadzic as Head of State does not constitute an unconstitutional interference with the President's prerogatives.

II.

The district court also concluded that it did not have subject matter jurisdiction under the Alien Tort Claim Act, 28 U.S.C. § 1350. See Karadzic, 866 F. Supp. at 738-41.

The Alien Tort Claim Act, 28 U.S.C. § 1350, states that:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The statute originated as part of the Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), which was enacted by the First Congress. Judge Henry Friendly wittily described the provision as "a kind of legal Lohengrin; . . . no one seems to know whence it came." ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).¹⁵ Until the Second Circuit's decision in Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980), the provision had been rarely used, id. at

¹⁴ See also United States v. Waters, 133 U.S. 208, 213 (1890); Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin and David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 95-97 (3d ed. 1988) ("Hart & Wechsler") (collecting cases).

¹⁵ Judge Robert Bork attempted to ascertain the intent of the First Congress in enacting the Alien Tort Claim Act, but found "no direct evidence of what Congress had in mind." Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 812 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985). He offered the "admittedly speculative" proposal that Congress intended to open the federal courts to alien tort actions to redress violations of safe conduct, injuries to ambassadors, and piracy -- the wrongs identified in Blackstone's Commentaries on the Laws of England as the principal offenses against the law of nations. Id. at 815; see also id. at 813.

878, and even now it remains "seldom . . . invoked." Hamid v. Price Waterhouse, 51 F.3d 1411, 1417 (9th Cir. 1995).¹⁶

In Filartiga, the court held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction." 630 F.2d at 878 (emphasis added). The district court in Karadzic construed Filartiga to entail that "acts committed by non-state actors do not violate the law of nations." 866 F. Supp. at 739. Accordingly, it "decline[d] to extend § 1350 to redress acts of torture engaged in by private individuals," id. at 741, such as it took Karadzic to be.¹⁷

The Karadzic court drew support for its conclusion, not only from Filartiga, but also from the judicial decisions that have followed it. Among these, it emphasized two decisions by the District of Columbia Circuit. The first of these was Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984) (per curiam), cert. denied, 470 U.S. 1003 (1985). There the survivors and representatives of persons murdered by the Palestine Liberation Organization (the "PLO") sued the PLO under 28 U.S.C. §§ 1350 and 1331. The court of appeals, in three separate opinions, affirmed the district court's dismissal of the case. In the lead opinion, Judge Harry Edwards followed Filartiga, but declined, "absent direction from the Supreme Court," 726 F.2d at 792, to extend its application of section 1350 to non-state actors such as the PLO. Judge Edwards wrote that such an extension "would require this court to venture out of the comfortable realm of established international law -- within which Filartiga firmly sat -- in which states are the actors," and to assess the extent to which "international law imposes . . . obligations on individuals." Id. Acknowledging that "a number of jurists and commentators either have assumed or urged that the individual is a subject of international law," id., Judge Edwards found the degree of consensus "simply too slight" to justify entertaining claims of international law violations against "individuals acting separate from any state's authority or direction." Id. at

¹⁶ "In nearly two hundred years, jurisdiction has been predicated successfully under section 1350 only three times," one of which was Filartiga itself. Tel-Oren v. Libyan Arab Republic, 726 F.2d at 813 n.21 (Bork, J., concurring). The other two cases cited by Judge Bork were Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961) (child custody dispute between aliens: wrongful withholding of custody was tortious, and falsification of child's passport violated international law), and Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit for restitution of slaves taken when Spanish ship was seized as war prize: section 1350 provided alternative jurisdictional basis). Three post-Filartiga cases finding section 1350 causes of action are cited in Karadzic, 866 F. Supp. at 740.

¹⁷ The Civil Rights Division of this Department, in consultation with this Office and the State Department, filed an amicus brief in Filartiga, arguing that "official torture is a tort in violation of the law of nations that gives rise to a judicially enforceable remedy." See Memorandum for Robert E. Kopp, Director, Appellate Staff, Civil Division, from Robert B. Shanks, Deputy Assistant Attorney General, OLC, Re: "Hanoch Tel-Oren v. Libyan Arab Republic" (D.C. Cir. No. 81-1870 & 81-1871), at 7 (June 6, 1984). Subsequently, the Department changed its position to adopt the analysis in Judge Bork's concurring opinion in Tel-Oren. It argued that the Alien Tort Claim Act "is only a grant of jurisdiction and cannot be the basis for an implied substantive right of action." Memorandum for Stephen J. Markman, Assistant Attorney General, Office of Legal Policy, from Douglas W. Kmiec, Deputy Assistant Attorney General, OLC, at 7 n.8 (Aug. 27, 1986).

792, 793.¹⁸ Because he found that "the PLO is not a recognized member of the community of nations," *id.* Judge Edwards concluded that an action against it under section 1350 would not lie.

The Karadzic court also relied on the District of Columbia Circuit's decision, written by then-Judge Antonin Scalia and joined in relevant part by then-Judge Ruth Bader Ginsburg, in Sanchez-Espinosa v. Reagan, 770 F.2d 202 (D.C. Cir. 1985).¹⁹ That case involved claims under section 1350 by citizens of Nicaragua and others against a variety of defendants, including the so-called "Contra" forces, for tortious acts. Without disputing Filartiga,²⁰ the court rejected the plaintiffs' claim that the alleged torts of the Contras were actionable under section 1350 as violations of the law of nations because international law "does not reach private, non-state conduct" of the kind at issue. *Id.* at 206-07 (citing to and relying upon Judge Edwards' opinion in Tel-Oren, 726 F.2d at 791-96).²¹

The Karadzic court reasoned that "[t]he current Bosnian-Serb warring military faction does not constitute a recognized state any more than did the PLO, as it existed at the time that the District of Columbia Circuit decided Tel-Oren, or than did the Nicaraguan Contras at the time Justice Scalia decided Sanchez-Espinosa. Accordingly, this Court finds that the members of Karadzic's faction do not act under the color of any recognized state law." 866 F. Supp. at 741.

The Amici advance two main lines of argument against the district court's reading of section 1350. First, they argue that, both as an historical matter and under current practice, international law holds private, non-state actors liable for committing acts of the kind charged here: genocide, war crimes, and crimes against humanity. See Brief of Amici at 6-14. Second, they contend that Karadzic "is not simply a private citizen. His actions are conducted under color of official authority. . . . Under long-established understandings of international law, defendant can be held responsible as an official of a de facto government. . . ." *Id.* at 15-16.

First, the Amici argue, with substantial support, that at the time of the enactment of the Alien Tort Claim Act and afterwards, the law of nations was considered to extend to private individuals acting without color of state authority -- pirates and slave traders being the most

¹⁸ See also *id.* at 806 (Bork, J., concurring) ("[T]o interpret various human rights documents as imposing legal duties on nonstates like the PLO would require . . . entering a new and unsettled area of international law . . .").

¹⁹ Judge Ginsburg wrote a "concurring statement" on the "war powers" claim tendered by the plaintiffs. 770 F.2d at 210.

²⁰ It appears that no circuit court has yet disagreed with Filartiga. The Ninth Circuit has expressly "join[ed] the Second Circuit in concluding that the Alien Tort Claim Act . . . creates a cause of action for violations of specific, universal and obligatory international human rights standards which 'confer[] fundamental rights upon all people vis-a-vis their own governments.'" In re Estate of Ferdinand Marcos Human Rights Lit., 25 F.3d 1467, 1475 (9th Cir. 1994) (quoting Filartiga).

²¹ It should be noted that one other circuit has recently declined "to reach the issue of whether the law of nations applies to private, as opposed to governmental[,] conduct." Hamid v. Price Waterhouse, 51 F.3d at 1417-18.

conspicuous examples.²²] They also point out that the first (and for over 160 years, the only) judicial decision to apply the Act involved a defendant who was a private person acting in an individual capacity.²³ As to modern practice, they argue -- again, with substantial support -- that the Nuremberg Trials clearly established that private non-state actors can be held responsible for international law violations.²⁴ In particular, they demonstrate that the Nuremberg Trials held individuals acting in a private capacity to be liable for war crimes; that private actors can be held accountable for acts of genocide under both customary international law and under the Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force for the United States Feb. 23, 1989; and that the four Geneva Conventions of 1949 apply to private, non-state actors who commit crimes in the course of an armed conflict. See Brief of Amici at 9-12. Summing up, they maintain that "individuals like defendant have long been held liable under international law for gross human rights violations such as genocide, war crimes, and crimes against humanity. Where, as here, Congress has prescribed domestic civil remedies against such flagrant violations of the law of nations, a perpetrator may not escape liability simply by asserting that he is not a state actor." Id. at 14.

acting under color of law

In the alternative, the Amici argue, Karadzic "can be held responsible [under section 1350] as an official of a de facto government." Brief of Amici at 15-16. Although the Court has often declared that "without executive recognition a foreign state [is] 'a republic of whose existence we know nothing,'" Baker v. Carr, 369 U.S. 186, 212 (1962) (citation omitted), it would be mistaken to take such statements overliterally. The fact is that the Court and the other branches have shown considerably more realism and flexibility in their treatment of unrecognized, de facto governments. As the Amici point out, during and after our own Civil War, "the courts repeatedly held that the Confederacy was not a recognized de jure government, but nevertheless could be held responsible as a de facto government for its actions." Brief of Amici at 16. See generally Louis L. Jaffe, Judicial Aspects of Foreign Relations 124-99 (1933). More recently, as the Amici again observe, the Executive Branch has held the Government of North Korea accountable for violating international law (by seizing the United States naval vessel The Pueblo), even though it had not formally recognized North Korea. Id. at 18.²⁵ Indeed,

²² See, e.g., United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (piracy violates law of nations; individuals liable). See also Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111 (1784) (individual held liable for violating law of nations by assaulting foreign consul).

²³ Bochos v. Darrel, 3 Fed. Cas. 810 (D.S.C. 1795), was a suit brought by a French national who had seized a Spanish ship as a prize of war for the restitution of slaves taken aboard the vessel. The slaves had themselves been seized and sold by the agent of their "mortgagee" after the ship had been brought to port. As an alternative ground of jurisdiction, the court relied on the Alien Tort Claim Act. The court opined that the law of nations would "adjudge neutral property, thus circumstanced, to be restored to its neutral owner," but found that the treaty with France had altered that law. Id. at 811.

²⁴ See, e.g., Judgment of the International Military Tribunal, 22 Trial of the Major War Criminals Before the International Military Tribunal, Proceedings, 411, 465-66 (1948), 41 Am. J. Int'l L. 172, 220-21 (1947), reprinted in The Nuremberg Trial 1946, 6 F.R.D. 69, 110-11 (1947) (international law "imposes duties and liabilities upon individuals as well as upon States").

²⁵ The Legislative Branch, as well as the Executive and the Judiciary, has made provision in various ways for unrecognized, de facto governments. See, e.g., the Taiwan Relations Act, 22 U.S.C. §§ 3301-16.

the Amici note, the State Department has declared that Karadzic himself must answer for his conduct under international law. Id.

III.

There are plausible arguments in support of the district court's ruling on the question of subject matter jurisdiction. First, in the current state of the case law, the weight of authority appears to favor the district court's dismissal for lack of subject matter jurisdiction. The two leading appellate cases on point -- Tel-Oren and Sanchez-Espinosa -- both support that conclusion. Moreover, Sanchez-Espinosa has particular weight because the opinion in that case was written by one future Justice and joined in relevant part by another. And, as Judge Leisure argued, it is not easy to distinguish Karadzic's forces from the PLO or the Nicaraguan Contras.

Moreover, the courts are obviously somewhat uneasy about extending section 1350 jurisdiction beyond the limits marked out in Filartiga. This uneasiness may stem from a sense that a broader application of the statute could seriously constrain the political branches' ability to cope with foreign conflicts. Judicial decisions on the merits in cases such as Karadzic could enmesh the United States more deeply in foreign conflicts from which the political branches sought to stay (or become) disengaged. Findings that foreign actors were liable for international law violations could seriously impair the Government's ability to negotiate settlements with those leaders, leading perhaps to more protracted conflict. It is well to remember that "[t]he President may be compelled by urgent matters to deal with the most undesirable of men," and "[t]he courts must be careful to preserve his flexibility."²⁶ On the other hand, findings that such actors were not liable could also embarrass the Government and undercut its efforts to curb or punish their violence.²⁷

Not as convincing

Further, in limiting the scope of section 1350, the courts may be seeking to protect their own institutional standing and prerogatives, as well as those of the political branches. Respect for the judgments of the federal courts might well suffer from an overreaching assertion of jurisdiction over the parties to foreign conflicts. After all, if Karadzic's faction were to prevail in the Bosnian civil war, how could an adverse judgment from an American court be enforced against him? It is most unlikely that the courts of a Republic of Srpska, dominated by Karadzic, would give that judgment full faith and credit; it is also most unlikely that either Karadzic or Srpska controls assets that could be seized by judgment creditors here.²⁸

Finally, the courts' discomfort with extending the scope of section 1350 may reflect the belief that this two hundred year-old statute cannot have been intended to apply to what the

²⁶ Tel-Oren v. Libyan Arab Republic, 726 F.2d at 825 (Robb, J., concurring in result).

²⁷ Cf. Sabbatino, 376 U.S. at 432 ("If the Executive Branch has undertaken negotiations with an [offending] country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law, would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.").

A weaker starting point.

²⁸ The Sabbatino Court seems to have felt similar concerns about the unenforceability of any title determination it might make. 376 U.S. at 431.

Contemporary world characterizes as human rights abuses. Compare Tel-Oren, 726 F.2d at 788-89 (Edwards, J., concurring) with id. at 813-16 (Bork, J., concurring). While the origins of the statute are obscure, it seems possible to infer at least the general purposes that it was meant to serve. The new Nation, with little or no substantive federal law of its own, sought to minimize the friction that would arise in its political and commercial intercourse with other countries. Accordingly, it authorized its courts to draw upon a developed body of law -- the law of nations -- to settle disputes arising out of incidents such as affronts to ambassadors or the wrongful seizure of alien property moving in international trade. In The Federalist No. 3, John Jay pointed out that the "just causes of war" generally arise "either from violations of treaties, or from direct violence;" that America had already formed treaties with at least six foreign nations, and maintained "extensive commerce" with three such nations; that "[i]t is of high importance to the peace of America, that she observe the law of nations towards all these powers;" and that under the proposed national government, unlike the confederacy, "treaties and articles of treaties, as well as the laws of nations, will always be expounded [in the courts] in one sense, and executed in the same manner," thus lessening the risk that "designed or accidental violations of treaties and of the laws of nations" will afford a cause of war. The Federalist No. 3 at 10-11 (Max Beloff ed. 1987); see also id. No. 80 at 406-07, 408 (A. Hamilton).²⁹ Arguably, section 1350 should be read in light of the general purposes that The Federalist described. Extending the statute's coverage to include the personal injuries inflicted by the partisans in a foreign civil war would be more likely to cause, rather than to eliminate, friction in our foreign relations.

IV.

Despite the arguments that can be adduced to support the district court's jurisdictional ruling, we are inclined to believe that the Amici's position is sounder. First, it can be argued that the correctness of Justice Scalia's opinion in Sanchez-Espinosa and Judge Edwards' opinion in Tel-Oren is doubtful. Nothing in the language of section 1350 explicitly draws a distinction between state and non-state tortfeasors, or directly imports a state action requirement. *law of nations*

Further, the near-contemporaneous judicial construction of the statute in the Bochos case evinced no difficulty whatever in applying the statute to purely private tortious conduct. Other relevant judicial practice appears to support application of the statute to wholly private conduct. The "law of nations" was understood in late eighteenth century jurisprudence to comprehend "all of what we now call 'public international law,' including prize law; such parts of what we now call 'the conflict of laws,' as then existed; the admiralty law; and, most extensive of all, the law of commerce, both internal and international." 1 William W. Crosskey, Politics and the Constitution 570 (1953). In the period in which the statute was enacted, private actors engaged in commercial activities were sued in state court actions brought under the general mercantile law of nations. Id. at 572-73.

So all commercial suits now can be brought in Fed. CT?!

²⁹ The concerns identified by Jay of course remain alive. "[I]ndividuals may have legitimate claims against foreign nations, and may have recourse to some self-help remedies," and "the presence of these claims and the claimants' attempts to collect may seriously harm the relations between the two countries." Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 244 (Cl. Ct. 1983) (Kozinski, C.J.), aff'd mem. 765 F.2d 159 (Fed. Cir.), cert. denied, 474 U.S. 909 (1985).

Moreover, the statute was enacted at a time when the doctrine of sovereign immunity seems to have been at least as protective of state interests as it is now.³⁰ If so, the statute would arguably have had little use unless it permitted suits against purely private actors (as well, perhaps, as suits against individual state agents acting in excess of their authority).

On the question of the statute's intent, moreover, we find an apparently overlooked 1795 opinion by Attorney General William Bradford to be particularly persuasive. American citizens trading off Sierra Leone were alleged to have joined a French fleet in attacking and plundering British property on that coast. The acting Governor of the British colony complained. The United States was a neutral in the Franco-British war. After discussing the availability of criminal prosecution, the Attorney General stated that "there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States." Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) (emphasis in original). This construction of the statute by the Attorney General, at a time very close to its enactment, seems to put it beyond doubt that the torts of private, non-state actors were considered to be actionable.³¹ It is understandable that the courts should try to fashion some reasonable principle to confine the apparently sweeping language of section 1350. But the distinction between state and non-state action does not appear to be an intellectually defensible limiting principle.³²

³⁰ Alexander Hamilton stated boldly that "[i]t is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent." The Federalist No. 81 at 416-17 (Max Beloff ed.) (emphasis in original). An early Attorney General opinion suggests that individual foreign state actors would be suable only if their alleged misconduct were ultra vires. See Suits Against Foreigners, 1 Op. Att'y Gen. 45, 46 (1794) (civil suit against former French Governor of Guadaloupe for wrongful seizure and sale of vessel in Guadaloupe: "if the seizure of the vessel is admitted to have been an official act, done by the defendant by virtue, or under color, of the powers vested in him as governor, that it will of itself be a sufficient answer to the plaintiff's action").

It does appear, however, that claims of individuals against foreign States for violation of treaty or international law rights were recognized in some circumstances. In 1793, Secretary of State Thomas Jefferson, acting on President George Washington's instructions, announced that the United States would espouse the claims of our merchants for "any injuries they may suffer on the high seas or in foreign countries, contrary to the laws of nations and existing treaties," from French seizures of their neutral commerce. Quoted in Gray v. United States (The French Spoliation Case), 21 Ct. Cl. 340, 355 (Ct. Cl. 1886). Moreover, scholars have argued that "there was no unanimity among the Framers that [sovereign] immunity would exist." David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789-1888 19 (1985); see also Hart & Wechsler at 1108-09.

³¹ There is also an apparent reference to a civil action under this statute in Abduction and Restitution of Slaves, 1 Op. Att'y Gen. 29, 30 (1792). Again, the defendant would seem to have been a private tortfeasor.

³² It might be argued that, under the prevailing notions of jurisdiction in the late eighteenth century, the statute could reach torts against aliens committed within the United States or on the high seas, and possibly also torts against aliens committed by United States nationals anywhere, but that it could not reach torts committed by aliens against other aliens in a foreign sovereign's territory. The torts in action here, like those in Filartiga, appear to be of the latter kind. Conceivably, this change in the underlying jurisdictional predicate of the statute could provide a limiting principle: the statute could be read to extend no further than it would have under the

Moreover, the underlying assumption of the Scalia-Edwards holdings is that there is no consensus on the question whether "international law imposes . . . obligations on individuals . . . acting separate from any state's authority or direction." Tel-Oren, 726 F.2d at 792, 793 (Edwards, J., concurring). But in the face of the very powerful evidence of contemporary international law detailed by the Amici, it seems at best mistaken, at worst disingenuous, to profess such agnosticism. Indeed, intensive preparation for a war crimes trial under United Nations auspices of Karadzic and other leading Bosnian Serb figures is now underway. This activity appears to confirm that a sufficient international consensus exists.

but haven't de facto? what happened to that? argument.

Furthermore, fears that a broad reading of section 1350 may complicate the work of the political branches, or undermine the credibility of the judiciary, are arguably unfounded. Filartiga has been on the books for some fifteen years, and no such harmful consequences have become manifest: indeed, litigation under the section remains infrequent. It is hard to see why extension of the statute to de facto government actors like Karadzic would cause especially untoward consequences, when its application to de jure government actors has not done so.

Finally, if the apparent sweep and breadth of section 1350 are thought to be alarming, then the remedy lies with Congress, not with the courts.³³ Despite the visibility of cases such as Filartiga and Tel-Oren, however, Congress has left the statute undisturbed. Indeed, if anything, Congress appears to be satisfied with a broad construction of the statute: in the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), 28 U.S.C. § 1350, Congress actually codified "the private right of action against official torture set forth in Filartiga." Karadzic, 866 F. Supp. at 741. If problems emerge from a further extension of the statute, it is reasonable to assume that the political branches will correct them.

But that has been applied only to state actors. Not the other way.

Accordingly, we are inclined to believe that subject matter jurisdiction exists in this case.

Too late for this. Shrimsher, a CI area.

Oh, is that what you are saying? But where does that distinction come from? It's as made up as the other - + w/ no support in the case law. And what's the definition of a de facto gov't?

jurisdictional doctrines that prevailed at the time of its enactment.

The Filartiga court found "without merit" the argument that it could not, consistently with Article III, assume jurisdiction over a controversy between aliens over an incident that occurred on foreign soil. 630 F.2d at 885. It reasoned, first, that "[i]t is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction." Id. Moreover, it held that such suits properly arise under the "laws of the United States." U.S. Const., art. III, § 2, because the law of nations forms part of the federal common law, id. at 885-86. But it did not specifically address the argument that as a matter of construction -- rather than of constitutional necessity -- the statute should not be read to reach actions by aliens against aliens for torts committed in foreign territory. (It did acknowledge that the statute would be applicable only if the international law norms claimed to be violated were "well-established" and "universally recognized," id. at 888.) Any argument for that limitation would apparently require us to ask for Filartiga to be overruled, despite the fact that it appears by now to be well-entrenched in the law.

³³ See, e.g., The Marianna Flora, 24 U.S. (11 Wheat.) 1, 39-40 (1826).

PHOTOCOPY
PRESERVATION

~~Commerce -~~

~~Glen Piercy~~

~~4082-4777~~

sec. asst in GC's office.

~~Michael M. Daniels~~
~~Defense~~

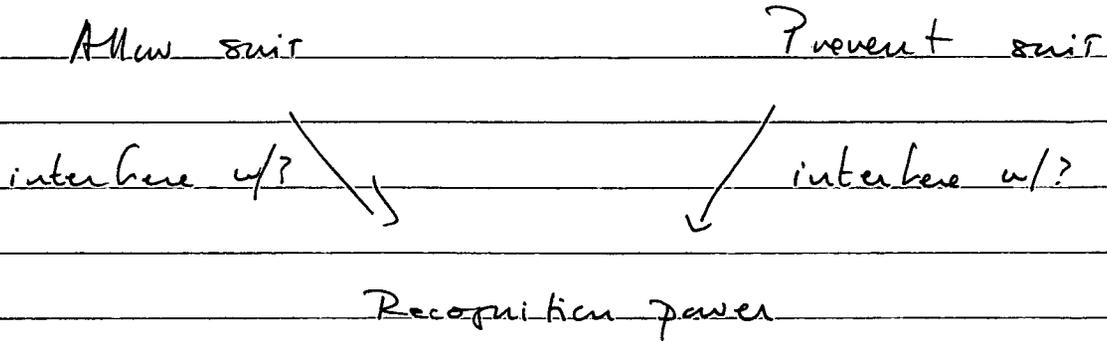
~~Talk to Marvin~~

Proposed to incur
bill comments

Legislative reform
measures

- 10x a day.
- full right to know act
- if deadline not met
don't comment.
- something legal about it.

impede recognition power at all?



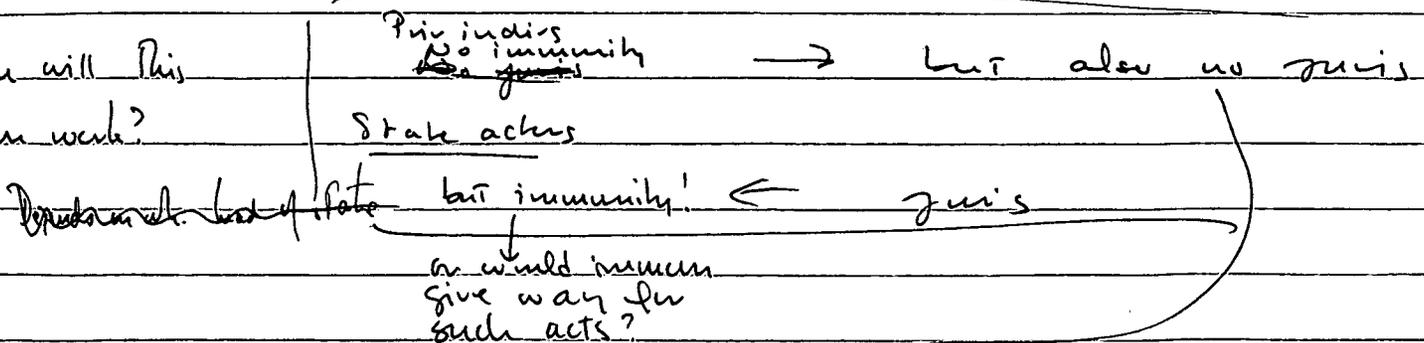
You might one day be a judge, but we shouldn't give you judicial immunity now.



Not head of state;
Doesn't get help from
fact that not Sunday of
no relevance

No juris under ATCA if
acts are by priv indivs.

When will this
even work?



de facto priv?
or are priv indivs also where acts are provided etc.

Under Hague Charter, all cts have oblig to prosecute anyone whom H. indicts

↳ W.C. Tribunal.

Int'l tribunals / national cts - essentially partners

ATCA - natural vehicle to do that.

Judges shouldn't be in business of deciding who's a war crim.

Pigggy back on int'l ct's finding.

Rome litigation?

Affects brochure of settlement.

Licenses all human cts etc.

Impinges on P's foreign policy power.

Darkest scenario - you're trying to cut a deal.

If major judgment.

Buy says - wait come to your country, wait negotiate w/ you.

(Do leverage on one part, give that Pres can't interfere with judgment of Ct.)

Have to be careful abt Div. ^{file}

PCO as example?

↳

This obj. disappears if it's to war crimes as defined by intl tribunal

Every national liberation of?

Building nations not pretty.

Steru camp - Israel.

One man's br lighter is another man's territory.

Re priv actors -

what is the dividing line here?

Cosa nostra? (i.e. indivs committing murder, etc)

Hamas?

etc.

De facto gov't

- ATCA -



Law of nations - means state action -

to bring w/in ambit of int'l law

"I can torture you" - "not a viol of int'l law"

Under law as it stands - no.

|| Arg - IL - proscribes torture by anyone who pretends to exercise st. auth.

} De Facto - meet? control of defined territory? no How to define.
close to sub'l terrorist.
No real authority for this.

Opening a door to mltip indiv The unit for IL. They have indep status.

* || New category - war crimes. Some catg of torts - can be directed ^{by committed} by indivs - e.g. pirates. This is modern analogue. Vids of int'l peace-war crimes - trial of int'l tribunal. Since Nuremberg. Clear understandings. Only states can make war??

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOLLY M.E. FILARTIGA AND DR. JOEL FILARTIGA,
Plaintiffs-Appellants

v.

AMERICO NORBERTO PENA-IRALA,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 79-6090

DOLLY M.E. FILARTIGA AND DR. JOEL FILARTIGA,
Plaintiffs-Appellants

v.

AMERICO NORBERTO PENA-IRALA,
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES
AS AMICUS CURIAE

INTRODUCTION

The United States files this memorandum in response to the Court's request that "the Department of State submit a memorandum setting forth its position concerning the proper interpretation of 28 U.S.C. §1350 in light of the facts of this case."^{1/} The memorandum addresses the following questions:

1. Whether the torture of a foreign citizen by an official of the same country is a violation of the law of nations within the meaning of 28 U.S.C. 1350?

^{1/} Letter from A. Daniel Fusaro, Clerk, to Roberts B. Owen, October 29, 1979. Under 28 U.S.C. 516, the conduct of litigation in which the United States or an agency is interested is reserved to the Department of Justice. For that reason, the Department of Justice is filing this memorandum, developed jointly by the Department of Justice and the Department of State.

2. If so, whether such a violation gives rise to a judicially enforceable remedy and is therefore a tort within the meaning of that provision?

STATEMENT

This appeal involves the interpretation of 28 U.S.C. 1350, which gives the district courts jurisdiction in all cases where an alien sues for "a tort only, committed in violation of the law of nations or a treaty of the United States." The complaint alleges that defendant, acting under color of his authority as a Paraguayan official, tortured and killed Joel Filartiga, a Paraguayan national, and that this conduct was a tort in violation of the law of nations. The district court nonetheless held that it lacked jurisdiction. The court acknowledged the strength of plaintiffs' argument that torture violates international law, but concluded that dismissal was compelled by two prior decisions of this Court, ITT v. Vencap, Ltd., 519 F.2d 1001 (1975), and Dreyfus v. Von Finck, 534 F.2d 24 (1976), cert. denied, 429 U.S. 835, which it read to establish that (A. 107-108)^{2/}--

conduct, though tortious, is not in violation of 'the Law of Nations', as those words are used in 28 U.S.C. §1350, unless the conduct is in violation of those standards, rules or customs affecting the relationship between states and between an individual and a foreign state, and used by those states for their common good and/or in dealings inter se.

^{2/} "A." references are to the joint appendix.

Because the court dismissed the complaint for lack of jurisdiction, it did not reach defendant's alternative argument for dismissal based on forum non conveniens. Plaintiffs appealed to this Court.

ARGUMENT

I

OFFICIAL TORTURE VIOLATES THE LAW OF NATIONS

The district court dismissed the complaint because it believed that the torture of a foreign citizen by an official of the same country does not violate the law of nations as that term is used in 28 U.S.C. 1350. If Section 1350 reached only those practices that historically have been viewed as violations of international law, the court's decision would very likely be correct. Before the turn of the century and even after, it was generally thought that a nation's treatment of its own citizens was beyond the purview of international law. But as we demonstrate below, Section 1350 encompasses international law as it has evolved over time. And whatever may have been true before the turn of the century, today a nation has an obligation under international law to respect the right of its citizens to be free of official torture.

A. Section 1350 encompasses the law of nations as that body of law may evolve

Section 1350 originated as Section 9 of the Judiciary Act of 1789 (1 Stat. 76 (1789)) and has not changed significantly since that time. It provides that:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

This is one of several provisions in the Judiciary Act "reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n. 25 (1964).

The law of nations in Section 1350 refers to the law of nations as that body of law may evolve. There is no reason to believe that Congress intended to freeze the meaning of the law of nations in this statute as of 1789, any more than it intended the simultaneous grant of jurisdiction over maritime actions to be limited to maritime law as it then existed.^{3/} Since the law of nations had developed in large measure by reference to evolving customary practice, the framers of the first Judiciary Act surely anticipated that international law would not be static after 1789.

^{3/} Maritime law has evolved significantly since 1789. See Moragne v. State Marine Lines, 398 U.S. 375 (1970) (overruling an 1886 decision and holding that maritime law affords a remedy for wrongful death on navigable waters).

The Paquete Habana, 175 U.S. 677 (1900), illustrates this evolutionary process. There, the question was whether international law protected fishing ships from capture during times of war. Although a 1798 British case had held that the protection of such ships was a rule of comity only, the Court held that (id. at 694)--

the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.

If the application of Section 1350 were limited to the subjects encompassed by the law of nations in 1789, leaving only the state courts competent to administer any rules of international law that might subsequently develop, the result would be to frustrate the statute's central concern for uniformity in this country's dealings with foreign nations. Accordingly, the district court's jurisdiction in this case turns not on whether the conduct alleged in the complaint would have been a violation of the law of nations in 1789, but on whether it is customarily treated as a violation of the law of nations today.

B. International law now embraces the obligation of a state to respect the fundamental human rights of its citizens

The view that a state's treatment of its own citizens is beyond the purview of international law was once widely held and is reflected in traditional works on the subject.^{4/}

^{4/} E.g., L. Oppenheim, International Law: A Treatise, Vol. 1, 362-369 (2d Ed. 1912).

However, as we have stated, customary international law evolves with the changing customs and standards of behavior in the international community. Early in this century, as a consequence of those changing customs, an international law of human rights began to develop. This evolutionary process has produced wide recognition that certain fundamental human rights are now guaranteed to individuals as a matter of customary international law.

As we demonstrate in Part II, infra, this does not mean that all such rights may be judicially enforced. Indeed, it is likely that only a few rights have the degree of specificity and universality to permit private enforcement and that the protection of other asserted rights must be left to the political branches of government. But this distinction between judicially enforceable rights and rights enforceable only by the political branches should not obscure the central point we make here. The district court's assumption that a nation has no obligation under international law to respect the human rights of its citizens is fundamentally incorrect.

The sources of international law are international agreements, international custom, general principles of law recognized by civilized nations, and judicial decisions and

the teachings of learned commentators.^{5/} Developments in each of these areas have had a role in establishing the twentieth century international law of human rights.

The first significant treaty development was the Covenant of the League of Nations in 1919, which declared that the members of the League would attempt to secure and maintain fair and humane conditions of labor, and secure just treatment for the inhabitants of territory under their control.^{6/} Other early developments were the treaties entered into after World War I guaranteeing the religious, cultural, and political rights of national minorities.^{7/}

^{5/} Statute of the International Court of Justice, Article 38, June 26, 1945, 59 Stat. 1055, 1060 (effective October 24, 1945). See also, The Paquete Habana, supra, 175 U.S. at 700.

^{6/} The Covenant of the League of Nations, Articles 22, 23, June 28, 1919, reprinted in Treaties and Other International Agreements of the United States of America 1776-1949, 2 Bevans 48, 55-57(1969).

^{7/} See, e.g., Treaty Between the Principal Allied and Associated Powers and Poland, signed at Versailles, June 28, 1919, reprinted in Treaties, Conventions, International Acts, Protocol and Agreements Between the United States of America and Other Powers 1910-1923, 3 Malloy-Redmond 3714 (1923). In addition, the general treaties of peace concluding the war included provisions aimed at guaranteeing minority rights. See, e.g., Treaty of Peace with Austria, Part 3, Sec. 5, signed at St. Germaine-en-Laye, September 10, 1919, reprinted in 3 Malloy-Redmond 3149.

Treaty activity accelerated after World War II. In 1945, the United Nations Charter imposed on U.N. members a general obligation to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."^{8/} The U.N. Charter represents a clear break with the traditional view that a nation's treatment of its citizens is beyond the concern of international law--a break also evidenced by recognition in the Charter of the Organization of American States of "the fundamental rights of the individual without distinction as to race, nationality, creed, or sex."^{9/}

More recently, the obligation of states to respect fundamental human rights has been reiterated in a growing number of more specific multilateral treaties. These include The International Covenant on Civil and Political Rights,^{10/}

^{8/} United Nations Charter, June 26, 1945, Arts. 55, 56, 59 Stat. 1031, 1045-1046, 3 Bevans 1153, 1166-1167 (1969).

^{9/} Charter of the Organization of American States, Articles 3(j), 16, 43(a) (entered into force December 13, 1951), as amended by the Protocol of Buenos Aires of 1967 (entered into force February 27, 1970), OAS Treaty Series No. 1-C, OAS, OR, OEA/Ser.A/2 (English), Rev. (1970), 21 U.S.T. 607, T.I.A.S. 6847. See also American Declaration of the Rights and Duties of Man, ch. 1 (1948), OAS, OR, OEA/Ser. L/V/E.23, Doc. 21, Rev. 2.

^{10/} General Assembly Resolution 2200 (XXI)A (December 16, 1966), entered into force March 23, 1976; Four Treaties Pertaining to Human Rights, Message from the President of the United States, S. Doc. No. Exec. C, D, E, and F, 95th Cong., 2d Sess. (1978).

The American Convention on Human Rights^{11/} and The European Convention for the Protection of Human Rights and Fundamental Freedoms.^{12/}

International custom also indicates that nations have accepted as law an obligation to observe fundamental human rights. In 1948, The United Nations General Assembly unani-^{13/}mously adopted the Universal Declaration of Human Rights, which goes beyond the UN Charter in specifying and defining the fundamental rights to which all individuals are entitled. The Universal Declaration has been followed by a growing number of U.N. resolutions clarifying and elaborating on these rights^{14/} or invoking them in specific cases.^{15/} In a parallel development, the International Conference on Security and Cooperation in Europe, which met in Helsinki and Geneva between 1973 and 1975, adopted a Final Act declaring that the participating nations would respect the human rights of their nationals.^{16/} The Final

^{11/} Signed at San Jose, Costa Rica, November 22, 1969, entered into force July 18, 1978, OAS Treaty Series No. 36, OAS, OR, OEA/Ser.A/16(English).

^{12/} Signed November 4, 1950, entered into force September 3, 1953, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

^{13/} General Assembly Resolution 217 (III)A (December 10, 1948).

^{14/} See Addendum.

^{15/} See United Nations Action in the Field of Human Rights (1974), ST/HR/2 (Pub. Sales No. E.74.XIV.2), at 14-15.

^{16/} Conference on Security and Cooperation in Europe: Final Act (Helsinki, 1975), 73 Dep't State Bull. 323, 325 (1975).

Act, like the UN resolutions, does not have the legal effect of a treaty but provides evidence of customary international law.^{17/}

General principles of law recognized by civilized nations also establish that there are certain fundamental human rights to which all individuals are entitled, regardless of nationality. Although specific practices differ widely among nations, all nations with organized legal systems recognize constraints on the power of the state to invade their citizens' human rights. In the period 1948-1973, the constitutions or other important laws of over 75 states either expressly referred to or clearly borrowed from the Universal Declaration of Human Rights.^{18/}

^{17/} As further evidence, see Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, General Assembly Resolution 2625(XXV) (October 24, 1970). The Declaration proclaims that:

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

It further states:

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law * * *.

^{18/} United Nations Action in the Field of Human Rights, supra, at 17-18.

In the same period, the Declaration was referred to in at least 16 cases in domestic courts of various nations.^{19/}

The decisions of the International Court of Justice also reflect and confirm the existence of a customary international law of human rights.^{20/} And the affidavits of four American experts in international law, filed by plaintiffs below, document the broad recognition among legal scholars that human rights obligations are now part of customary international law.^{21/}

In sum, as the Department of State said in a recent report to Congress on human rights practices:

There now exists an international consensus that recognizes basic human rights and obligations owed by all governments to their citizens. * * * There is no doubt that these rights are often violated; but virtually all governments acknowledge their validity. ^{22/}

^{19/} United Nations Action in the Field of Human Rights, supra, at 19.

^{20/} Nuclear Tests (Australia v. France), Judgment of December 20, 1974, [1974] I.C.J. 253, 303 (Opinion of Judge Petren); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16.

^{21/} See Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Myres S. MacDougal (A. 71); Affidavit of Richard Anderson Falk (A. 61-62).

^{22/} Department of State, Country Reports on Human Rights Practices for 1979, published as Joint Committee Print, House Comm. on Foreign Affairs & Senate Comm. on Foreign Relations, 96th Cong., 2d Sess. (February 4, 1980) Introduction at 1.

We recognize that a panel of this Court has said that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." Dreyfus, supra, 534 F.2d at 31. As we have shown, however, this statement is incorrect and should not be followed.^{23/}

C. Freedom from torture is among the fundamental human rights protected by international law

Every multilateral treaty dealing generally with civil and political human rights proscribes torture. These include The American Convention on Human Rights,^{24/} The International

^{23/} Dreyfus mistakenly relied on Mr. Justice White's dissent in Sabbatino for its conclusion. At one point in his opinion Mr. Justice White does distinguish several cases decided long before the turn of the century as cases where violations of international law were not present because the parties were nationals of the acting state. 376 U.S. at 442, n. 2. However, Mr. Justice White makes clear elsewhere in his opinion that this is not the law today. In discussing a case in which an individual brought suit to recover property expropriated by the Nazis, Mr. Justice White specifically explained that "racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been condemned in multinational agreements and declarations as crimes against humanity." Id. at 457 n. 18. Accordingly, Mr. Justice White concluded, "the acts could * * * be measured in local courts against widely held principle rather than judged by the parochial views of the forum." Ibid. Mr. Justice White's opinion thus reinforces our view that international law prohibits a nation from violating the fundamental human rights of its citizens.

^{24/} Article 5 provides in relevant part, that--"No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment." OAS Treaty Series No. 36, supra, at 2.

Covenant on Civil and Political Rights^{25/} and The European Convention for the Protection of Human Rights and Fundamental Freedoms.^{26/} In addition, the Geneva Conventions of 1949 forbid torture in international or domestic conflicts and declare it to be a "grave breach" of the conventions.^{27/} This uniform treaty condemnation of torture provides a strong indication that the proscription of torture has entered into customary international law.^{28/}

25/ Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." General Assembly Resolution 2200 (XXI)A, supra.

26/ Article 3: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 221.

27/ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, Articles 3, 13, 129, 130.

28/ These treaty provisions, in conjunction with other evidence, are persuasive of the existence of an international norm that is binding as a matter of customary law on all nations, not merely those that are parties to the treaties. A, D'Amato, The Concept of Custom in International Law 103, 124-128 (1971).

The United States has signed both the American Convention on Human Rights and the International Covenant on Civil and Political Rights, and those instruments await the advice and consent of the Senate. See Four Treaties Pertaining to Human Rights, supra. Only European countries are entitled to be parties to the third treaty.

We do not suggest that every provision of these treaties states a binding rule of customary international law. Where reservations have been attached by a significant number of nations to specific provisions or where disagreement with provisions is cited as the ground for a nation's refusal to become a party, the near-unanimity required for the adoption of a rule into customary international law may be lacking.^{29/} No such disagreement has been expressed about the provisions forbidding torture.

A court also must distinguish between provisions that reflect principles that are considered desirable but incapable of immediate realization and those provisions that codify fundamental human rights. Illustrative of the former category are the declarations in the International Covenant on Economic, Social and Cultural Rights that individuals are entitled to

29/ For instance, Article 20 of the International Covenant on Civil and Political Rights prohibits "advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence * * *." Four Treaties Pertaining to Human Rights, supra, at 29. This provision conflicts with principles of free speech that are central to the political values of many democracies. A number of nations, including the United Kingdom, Sweden, Denmark, Norway, and Finland, expressed reservations to Article 20 upon ratifying the Covenant. Multilateral Treaties in Respect of Which the Secretary General Performs Depository Functions, UN Doc. ST/LEG/Ser. D/12 108, 112, 114 (1978). President Carter has proposed a similar reservation in connection with United States ratification. Four Treaties Pertaining to Human Rights, supra, at XI-XII.

favorable working conditions and to social security.^{30/} In proposing that the Senate ratify that treaty, the President observed:

Some of the standards established under these articles may not readily be translated into legally enforceable rights, while others are in accord with United States policy, but have not yet been fully achieved. It is accordingly important to make clear that these provisions are understood to be goals whose realization will be sought rather than obligations requiring immediate implementation. [31/]

The President further recommended that the Senate express its understanding that these and like provisions "described goals to be achieved progressively rather than through immediate implementation."^{32/} The Covenant itself casts these principles in this light.^{33/} In contrast, because torture is universally condemned and incompatible with accepted concepts of human behavior, the protection against torture must be considered a fundamental human right.

^{30/} International Covenant on Economic, Social, and Cultural Rights, Articles 7, 9. Four Treaties Pertaining to Human Rights, supra, at 15-16.

^{31/} Four Treaties Pertaining to Human Rights, supra, at X.

^{32/} Id. at IX.

^{33/} International Covenant on Economic, Social, and Cultural Rights, Article 2(1), Four Treaties Pertaining to Human Rights, supra, at 14.

International custom also evidences a universal condemnation of torture. While some nations still practice torture, it appears that no state asserts a right to torture its nationals. Rather, nations accused of torture unanimously deny the accusation and make no attempt to justify its use.^{34/} That conduct evidences an awareness that torture is universally condemned. This universal condemnation is made explicit in The Universal Declaration of Human Rights, which declares that "No one shall be subjected to torture * * *."^{35/} That principle has been reiterated in a number of unanimous UN resolutions, including the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UN Declaration on Torture").^{36/}

^{34/} See, e.g., Affidavit of Richard Anderson Falk (A. 62); Affidavit of Thomas M. Franck (A. 64). In exchanges between United States embassies and all foreign states with which the United States maintains relations, it has been the Department of State's general experience that no government has asserted a right to torture its own nationals. Where reports of such torture elicit some credence, a state usually responds by denial or, less frequently, by asserting that the conduct was unauthorized or constituted rough treatment short of torture. The Department's Country Reports on Human Rights, supra, reports no assertion by any nation that torture is justified.

^{35/} General Assembly Resolution 217(III)A (December 10, 1948), Art. 5.

^{36/} General Assembly Resolution 3452(XXX) (December 9, 1975). Article 2 of the Declaration provides:

Any act of torture or other
cruel, inhuman or degrading treat-
ment or punishment is an offence to

(continued)

The UN Declaration on Torture not only confirms that international custom outlaws torture, but also supplies a precise definition of the conduct proscribed. The UN Declaration on Torture defines torture as--

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he has committed or is suspected of having

36/ (continued)

human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

Article 3 provides:

No State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment. Exceptional circumstances such as a state of war or a threat of war, internal political instability or any other public emergency may not be invoked as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners. [37/]

This definition provides guidance to any court that may be required to determine whether particular conduct violates the proscription of torture in customary international law.

Analysis of general principles of law also discloses consistent condemnation of torture in national constitutions and legislation. Torture is specifically forbidden in the constitutions of over 40 nations.^{38/} The constitutions of over 15 addi-

37/ General Assembly Resolution 3452 (XXX) (December 9, 1975), Annex, Art. 1 (1). The United Nations Human Rights Commission is now drafting a Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That draft Convention would require each party to make torture criminally punishable within its jurisdiction. It contains a very similar definition of torture (E/CN.4/1367, Annex at 1):

For the purpose of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

38/ 48 Revue Internationale de Droit Penal Nos. 3 and 4, at 208 (1977) Paraguay is one such nation.

tional nations contain implicit prohibitions against torture.^{39/}
Eighteen states have incorporated the Universal Declaration of Human Rights in their constitutions and therefore have accepted the prohibition against torture contained in Article 5 of the Declaration.^{40/}

Condemnation of torture is reflected in both constitutional and statutory law in the United States. Conduct falling within the definition of torture in the UN Declaration on Torture would be a criminal offense under 18 U.S.C. 242 and civilly actionable under 42 U.S.C. 1983 or under the United States Constitution. Moreover, with certain exceptions, federal statutes bar assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights", specifically including "torture."^{41/} These statutes evidence the United States' acceptance of the international norm condemning torture and reflect the fact that the norm is certain enough to be cognizable by federal courts.

Finally, judicial decisions and the commentary of experts confirm that official torture violates international law. As shown in Part I-B, these authorities recognize the modern emergence of human rights norms in customary international law. Plaintiffs have submitted the affidavits of four American scholars confirming

^{39/} Id. at 208-209.

^{40/} Id. at 211.

^{41/} 22 U.S.C. 2304(a)(2), (d); 22 U.S.C. 2151.

that the proscription of torture is such a norm.^{42/} And published commentary is to the same effect.^{43/} In these circumstances, the conclusion that international law prohibits torture is inescapable.

II

OFFICIAL TORTURE IS A TORT AND GIVES RISE TO A JUDICIALLY ENFORCEABLE REMEDY

Not every violation of international law is a tort within the meaning of Section 1350. However, some such violations are judicially cognizable as torts. A corollary to the traditional view that the law of nations dealt primarily with the relationship among nations rather than individuals was the doctrine that generally only states, not individuals, could seek to enforce rules of international law. Sabbatino, supra, 376 U.S. at 422-423. Just as the traditional view no longer reflects the state of customary international law, neither does the latter doctrine.

Indeed, it has long been established that in certain situations, individuals may sue to enforce their rights under international law. For example, when a ship is seized on the high seas in violation of international law, the owner of the ship may sue to recover the ship as well as seek damages. The Paquete Habana, supra. Similarly, when there has been an assault on a foreign ambassador in violation of international law, domestic courts may properly furnish a remedy. Cf. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (1784).

^{42/} Affidavit of Richard Anderson Falk (A. 61-62); Affidavit of Thomas M. Franck (A. 63-64); Affidavit of Richard B. Lillich (A. 65-70); Affidavit of Myres S. MacDougal (A. 71).

^{43/} O'Boyle, Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom, 71 Am.J. Int'l L. 674, 687-688 (1977).

The more recently evolved international law of human rights similarly endows individuals with the right to invoke international law, in a competent forum and under appropriate circumstances. The highly respected Constitutional Court of Germany has recognized this right of individuals. The court declared that, although "contemporary generally recognized principles of international law include only a few legal rules that directly create rights and duties of private individuals by virtue of the international law itself," an area in which they do create such rights and duties is "the sphere of the minimum standard for the protection of human rights."^{44/}

As a result, in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts. As the Supreme Court said in The Paquete Habana, supra, 175 U.S. at 700:

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.

^{44/} In Matter of the Republic of the Philippines, 46 BVerfGE 342, 362 (2 BvM 1/76, December 13, 1977) (translated from the German by Stefan A. Riesenfeld); see also Borovsky v. Commissioner of Immigration, Judgment of September 28, 1951 (S.Ct. Philippines), summarized in [1951] United Nations Yearbook on Human Rights 287-288; Chirskoff v. Commissioner of Immigration, Judgment of October 26, 1951 (S.Ct. Philippines), summarized in id. at 288-289; Judgment of Court of First Instance of Courtrai (Belgium) of June 10, 1954, summarized in [1954] United Nations Yearbook on Human Rights 21 (courts relied on Universal Declaration of Human Rights in ordering release from detention).

Because foreign officials are among the prospective defendants in suits alleging violations of fundamental human rights, such suits unquestionably implicate foreign policy considerations. But not every case or controversy which touches foreign relations lies beyond judicial cognizance. Baker v. Carr, 369 U.S. 186, 211 (1962). Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government. See Sabbatino, supra, 376 U.S. at 423, 430 n. 34.

This does not mean that Section 1350 appoints the United States courts as Commissions to evaluate the human rights performance of foreign nations. Cf. Sabbatino, supra, 376 U.S. at 423. The courts are properly confined to determining whether an individual has suffered a denial of rights guaranteed him as an individual by customary international law. Accordingly, before entertaining a suit alleging a violation of human rights, a court must first conclude that there is a consensus in the international community that the right is protected and that there is a widely shared understanding of the scope of this protection. Sabbatino, supra, 376 U.S. at 428, 430 n. 34. When these conditions have been satisfied, there is little danger that judicial enforcement will impair our foreign policy efforts. To the contrary, a refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of

our nation's commitment to the protection of human rights. As we have shown in Part I-C, official torture is both clearly defined and universally condemned. Therefore, private enforcement is entirely appropriate.^{45/}

From what we have said, it should be clear that a court is not at liberty to enforce its own views of policy under the guise of interpreting the requirements of international law. On the other hand, as the Supreme Court stated in Sabbatino, supra, 376 U.S. at 428:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.

^{45/} There are few decisions which base judgments against torturers directly on customary international law. But this attests to the longstanding condemnation of torture under municipal law and the more recent evolution of international human rights law. Courts have, nonetheless, invoked customary international law along with municipal and treaty law in cases involving torture. Ireland v. United Kingdom, Judgment of January 18, 1978 (European Ct. of Human Rights) summarized in [1978] Y.B. Eur. Conv. on Human Rights 602 (Council of Europe) (UN Declaration of Torture relied on in interpreting the European Convention of Human Rights); Auditeur Militaire v. Krumkamp, Pasicrisie Belge, 1950.3.37 (February 8, 1950) (Belgian Conseil de guerre de Brabant), summarized in 46 Am.J. Int'l L. 162-163 (1952) (Article 5 of Universal Declaration of Human Rights, which prohibits torture and cruel treatment, cited as authority that under customary international law the defendant accused of war crimes was not free to use torture).

In this case, not only is there a consensus in the international community that official torture is unlawful, but Paraguay's Constitution expressly prohibits official torture^{46/} and Paraguayan law recognizes a tort action as an appropriate remedy.^{47/} The compatibility of international law and Paraguayan law significantly reduces the likelihood that court enforcement would cause undesirable international consequences and is therefore an additional reason to permit private enforcement.

Because international law and Paraguayan law both prohibit torture, this Court need not decide whether considerations of comity or a proper construction of Section 1350 might require a different result if, despite the nearly universal condemnation implicit in the existence of a rule of customary international law, the jurisdiction with the most immediate interest in the controversy did not prohibit torture. Similarly, this case does not present any questions concerning whether international law, Paraguayan law or federal common law will govern other aspects

46/ Article 45 of the Paraguayan Constitution.

47/ A. 51-53, 80.

of this lawsuit. The only question presented is whether official torture is a "tort * * * committed in violation of the law of nations * * *."^{48/} Because the district court erred in concluding that it is not, its judgment should be reversed and the case remanded for further proceedings.^{49/}

^{48/} Because the lower court dismissed for lack of jurisdiction, it did not decide whether the case should be dismissed on the ground of forum non conveniens. Although we agree with plaintiffs that this question should be addressed by the district court first, we note that when the parties and the conduct alleged in the complaint have as little contact with the United States as they have here, abstention is generally appropriate. Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); Lauritzen v. Larsen, 345 U.S. 571 (1953). Plaintiffs assert that abstention is inappropriate because a tort suit in Paraguay would be a sham. For reasons of comity among nations, however, such an assertion should not be accepted absent a very clear and persuasive showing. In determining whether abstention is appropriate, the court should also consider the fact that the defendant has been deported. Compare United States v. Castillo, 615 F.2d 878, 882 (9th Cir. 1980).

^{49/} Defendant erroneously suggests (Br. 4-16) that Section 1350 is unconstitutional in conferring jurisdiction on federal courts to entertain tort actions under the law of nations. Customary international law is federal law, to be enunciated authoritatively by the federal courts. Sabbatino, supra, 376 U.S. at 425; see The Paquete Habana, supra, 175 U.S. at 700. An action for tort under international law is therefore a case "arising under * * * the laws of the United States" within Article III of the Constitution. See Note, Federal Common Law and Article III: A Jurisdictional Approach to Erie, 74 Yale L.J. 325, 331-336 (1964).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

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ADDENDUM

1. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663(XXIV)C (July 31, 1957) and 2076(LXII) (May 13, 1977).
2. Declaration of the Rights of the Child, General Assembly Resolution 1386(XIV) (November 20, 1959).
3. Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514(XV) (December 14, 1960).
4. United Nations Declaration on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 1904(XVIII) (November 20, 1963).
5. Declaration on the Elimination of Discrimination Against Women, General Assembly Resolution 2263(XXII) (November 7, 1967).
6. Declaration on Territorial Asylum, General Assembly Resolution 2312(XXII) (December 14, 1967).
7. The Proclamation of Tehran, unanimously proclaimed by the International Conference on Human Rights at Tehran, May 13, 1968, (convened pursuant to General Assembly Resolutions 2081(XX) (December 20, 1965), 2217(XXI)C (December 19, 1966) and 2339(XXII) (December 18, 1967), Final Act of the International Conference on Human Rights, Tehran, Iran, May 13, 1968, Human Rights: A Compilation of International Instruments of the United Nations (1973) ST/HR/1 (Pub. Sales No. E.73.XIV.2).
8. Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, General Assembly Resolution 3074(XXVIII) (December 3, 1973).
9. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly Resolution 3318(XXIX) (December 14, 1974).
10. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 3452(XXX) (December 9, 1975).

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No. 87-1372

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC, PETITIONER

v.

AMERADA HESS SHIPPING CORPORATION, ET AL.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
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QUESTION PRESENTED

The United States will address the following question:

Whether a federal district court has jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, over a suit brought by a foreign corporation against a foreign state for a tort allegedly committed on the high seas in violation of international law, where the foreign state is immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act of 1976 (FSIA).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1372

ARGENTINE REPUBLIC, PETITIONER

v.

AMERADA HESS SHIPPING CORPORATION, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

This case presents an important question regarding the scope of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602-1611. The FSIA prescribes the exclusive bases for asserting jurisdiction over a foreign state in the courts of the United States, consistent with what the Executive Branch and Congress found to be the prevailing and appropriate principles of international law and practice. The court of appeals' held in this case that the courts of the United States are open to tort suits by aliens (but not United States citizens) who seek damages for alleged violations of international law by foreign governments, even where the act or omission occurred outside the United States. That holding is inconsistent with the FSIA and international law, and it exposes the United States to reciprocal action by the courts of other Nations. For these reasons, this case implicates the foreign relations of the United States.

STATEMENT

1. Respondent United Carriers, Inc., a Liberian corporation, was the owner of a crude oil tanker named the Hercules. Respondent Amerada Hess Shipping Corporation, also a Liberian corporation, had chartered the Hercules to transport crude oil from Valdez, Alaska, around the southern tip of South America, to an oil refinery in the Virgin Islands. On May 25, 1982, the Hercules began a return voyage, without cargo, from the Virgin Islands to Valdez. At that time, Great Britain and Argentina were at war over the Falkland (Malvinas) Islands. On June 8, 1982, while the Hercules was on the high seas in the South Atlantic, and allegedly outside the "war zones" designated by Argentina and Great Britain,¹ it was attacked by Argentine military aircraft. The decks and hull of the ship were damaged, and an undetonated bomb lodged in her starboard side. Respondent United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb, and the ship therefore was scuttled off the coast of Brazil. Pet. App. 3a-4a, 27a-28a.

2. Respondents filed suit in the United States District Court for the Southern District of New York seeking money damages from petitioner Argentine Republic for the injuries they sustained as a result of the attack.² Respondents alleged that petitioner's attack on the neutral vessel violated established norms of international law, and they invoked the jurisdiction of the district court under the Alien Tort Statute, 28 U.S.C. 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only com-

¹ Our recitation of the district court's reference to "war zones" should not be understood as an endorsement of the view that a Nation has the unfettered right under international law to designate any area of the high seas as such a zone, into which a neutral ship enters only at its own risk. See R. Tucker, *The Law of War and Neutrality at Sea* 156 n.16, 301-303 (Naval War College 1955); International Military Tribunal, Nuremberg, *In Trial of Admiral Doenitz*, reprinted in W. Bishop, *International Law, Cases and Materials* 810-812 (1962).

² Respondent United Carriers sought \$10 million in damages for the loss of the ship, and respondent Amerada Hess sought \$1.9 million in damages for the loss of fuel that went down with the ship (Pet. App. 4a).

mitted in violation of the law of nations or a treaty of the United States." Pet. App. 28a, 36a, 38a, 39a, 41a.

The district court dismissed the complaint, holding that respondents' suits are barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).³ See Pet. App. 25a-35a. In enacting the FSIA, Congress rejected the rule of absolute immunity for foreign sovereigns that had been recognized since the earliest days of the Nation (see *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), and instead codified the "restrictive" theory of sovereign immunity that was followed by many other Nations and had been adopted by the Executive Branch in 1952 in the so-called Tate Letter. Under that theory, a foreign state is immune from suit based on its sovereign or public acts, but not its commercial or private acts. 28 U.S.C. 1602; see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8-9, 14 (1976); S. Rep. 94-1310, 94th Cong., 2d Sess. 9, 10 (1976).

In the district court's view, Congress was "emphatic" in its purpose that "the FSIA be the sole means of assessing claims of immunity" by a foreign state (Pet. App. 29a). The court found this congressional purpose "apparent" from the text of the Act, which provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter" (*ibid.* (quoting 28 U.S.C. 1604)), and from the legislative history (Pet. App. 29a). The court concluded that "[respondents'] claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA" (*id.* at 30a), because in order for a foreign state to be denied immunity from a suit sounding in tort, the FSIA "requires that the 'damage to or loss of property' occur in the United States" (*ibid.*, quoting 28 U.S.C. 1605(a)(5)); yet in this case, respondents "can claim no loss whatsoever occurring in the United States" (Pet. App. 30a).

The district court also rejected respondents' contention that the Alien Tort Statute "provides the basis for jurisdiction that

³ Pub. L. No. 94-583, 90 Stat. 2891, codified at 28 U.S.C. 1330, 1391(f), 1441(d) and 1602-1611.

the FSIA denies” (Pet. App. 31a). The court noted that “[n]o case law supports the assertion that a foreign sovereign state would not have enjoyed immunity in 1789,” when the Alien Tort Statute was enacted (*id.* at 31a-32a). But the court held that even if a foreign sovereign at one time might have been sued under the Alien Tort Statute, the FSIA now confers immunity on a foreign state unless the suit falls within one of the exceptions to immunity specified in the FSIA itself (*ibid.*).

3. a. A divided panel of the court of appeals reversed and remanded (Pet. App. 1a-21a). The court of appeals held that the district court has jurisdiction under the Alien Tort Statute (*id.* at 7a-10a), because the suit is brought by aliens (the respondent Liberian corporations), it sounds in tort (“the bombing of a ship without justification”), and it alleges a violation of international law (“attacking a neutral ship in international waters, without proper cause for suspicion or investigation”⁴) (*id.* at 7a-8a).

⁴ In finding that the alleged attack violated international law (see Pet. App. 5a-7a), the court of appeals relied, inter alia, on the Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, and the 1982 United Nations Convention on the Law of the Sea (Pet. App. 6a). Although the 1958 Convention codifies such long-recognized customary principles as the freedom of navigation on the high seas, it is oriented toward peacetime. So, too, is the 1982 Convention, which the United States has not signed and is not yet in force, but which the United States considers reflective of customary international law in its navigational provisions. While peacetime concepts and principles do not become wholly irrelevant in time of war, neither the 1958 nor the 1982 Convention was negotiated with a view toward wartime, and they do not in fact address the separate, specialized body of rules on the use of force at sea in time of war. (We have been informed by the Department of State that any contrary inference regarding the content of the 1958 Convention that might be drawn from the United States’ brief as amicus curiae in the court of appeals (at 10 n.5) is due to the inadvertent omission of the word “respectively” at the end of the first line of that note.) Sources of international law that are more relevant to the use of military force in time of war are addressed at note 27, *infra*. For examples of the distinction between the bodies of international law of the sea that govern peacetime and those that govern wartime, see C. Colombos, *The International Law of the Sea* (6th rev. ed. 1967), which is divided into Part I (The International Law of the Sea in Time of Peace) and Part II (The International Law of the Sea in Time of War); and Naval Warfare Publication 9, *The Commander’s Handbook on the Law of Naval Operations* (1987), which is similarly divided into Part I (Law of Peacetime Naval Operations) and Part II (Law of Naval Warfare).

The court acknowledged petitioner’s submission that the Alien Tort Statute provides jurisdiction only over suits against individuals, not sovereign states, since the United States recognized absolute immunity for foreign states when the Statute was enacted in Section 9 of the Judiciary Act of 1789, ch. 20, 1 Stat. 77. But the court found it unnecessary to decide whether a court could have exercised jurisdiction over this case in 1789. In the court’s view, the Alien Tort Statute “is no more than a jurisdictional grant based on international law,” and “[i]n construing the Alien Tort Statute, ‘courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today’ ” (Pet. App. 8a-9a, quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)). Accordingly, the court concluded that it “must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign” (Pet. App. 9a). Citing two law review articles, the court believed that under the “modern view,” sovereign states should not be accorded immunity from suit for their violations of international law (*ibid.*).

The court rejected Argentina’s contention that, regardless of whether the Alien Tort Statute once might have provided a basis for jurisdiction in a case such as this, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns (Pet. App. 10a-13a). The court acknowledged the force of the legislative history stating that the FSIA “ ‘sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity’ ” (*id.* at 11a, quoting H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976)), the Second Circuit’s own prior conclusion that the FSIA “ ‘insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act’ ” (Pet. App. 11a, quoting *O’Connell Machinery Co. v. M.V. “Americana”*, 734 F.2d 115, 116 (2d Cir.), cert. denied, 469 U.S. 1086 (1984)), and this Court’s “similar views” in *Verlinden* (Pet. App. 11a, citing 461 U.S. at 496-497). But the court chose not to follow those pronouncements here, because it believed that “Congress was not focusing on violations of international law when it enacted the FSIA” and therefore “did not intend to remove existing remedies in

United States courts [under the Alien Tort Statute] for violations of international law of the kind presented here” (Pet. App. 11a).⁵

b. Judge Kearse dissented (Pet. App. 18a-21a). Judge Kearse expressed skepticism that the Alien Tort Statute was “intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of ‘evolving standards of international law’ ” (*id.* at 19a). But however that may be, she concluded that the majority had improperly disregarded the “clearly restrictive provisions” of the FSIA, which were “ ‘intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns’ ” (*ibid.* (quoting H.R. Rep. 94-1487, at 12)).

SUMMARY OF ARGUMENT

A. The Foreign Sovereign Immunities Act of 1976 constitutes the exclusive basis for asserting jurisdiction over a foreign state and for determining whether it is immune from suit. This purpose is manifest in 28 U.S.C. 1602, which states that “[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 U.S.C. 1602-1611]”; in 28 U.S.C. 1604, which mandates that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter”; and in 28 U.S.C. 1330, which confers subject matter and personal jurisdiction on the district courts in suits against a “foreign state” only when the state is not entitled to immunity under 28 U.S.C. 1605-1607. None of the exceptions to immunity in Sections 1605-1607 applies here. The sole exception for suits sounding in tort, 28 U.S.C. 1605(a)(5), dispenses with immunity only for certain torts that occurred in the United States. Because the alleged attack by petitioner’s

⁵ The court also held that the actions of Argentina alleged by respondents were “sufficiently related” to the United States to fall within constitutional limitations on the exercise of personal jurisdiction over a foreign defendant (Pet. App. 14a-15a).

military forces occurred outside the United States, that exception is inapplicable and petitioner is “immune from the jurisdiction of the courts of the United States” (28 U.S.C. 1604), including any jurisdiction conferred by the Alien Tort Statute, 28 U.S.C. 1350.

B. The legislative history confirms that the FSIA “sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states”; that “Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states”; and that the FSIA “is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns.” H.R. Rep. 94-1487, at 12-13; S. Rep. 94-1310, at 11-12. This Court, in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), and the courts of appeals also have uniformly taken the view that the FSIA is the exclusive basis for resolving questions of jurisdiction and immunity in suits against a foreign state. In addition, the legislative history of the tort exception in Section 1605(a)(5) confirms that Congress intended to permit suits against a foreign state only for certain torts that occur in the United States. There is no indication that Congress intended the exception to apply to an attack by a foreign state’s military forces on the high seas in time of war.

C. The court of appeals’ rationale for finding jurisdiction over this suit under the Alien Tort Statute, outside the comprehensive framework of the FSIA, is seriously flawed. First, even if there once was a plausible basis for a suit such as this under the Alien Tort Statute prior to 1976 (which there was not), the text and legislative history of the FSIA make clear that it now prescribes the exclusive standards for exercising jurisdiction and determining claims of immunity in suits against foreign states. Second, the court of appeals was mistaken in its premise that Congress was not focusing on violations of international law when it enacted the FSIA (and that the FSIA therefore should not be construed to preclude the hypothetical “existing remedies” for such violations under the Alien Tort Statute): The FSIA contains an exception to the rule of immunity for certain cases involving property taken “in violation of international

law" (28 U.S.C. 1605(a)(3)), and Congress expressly rested the FSIA in part on its constitutional power to define offenses against the "Law of Nations" (U.S. Const. Art. I, § 8, Cl. 10). Third, to permit this suit to proceed would substantially depart from accepted principles of international law and thereby adversely affect the foreign relations of the United States and expose the United States to reciprocal action in other countries. Fourth, there is in any event no basis for the court of appeals' premise that the Alien Tort Statute was intended to provide a basis for a suit against a foreign sovereign in circumstances such as these prior to 1976, because foreign states enjoyed absolute immunity from the time the Alien Tort Statute was enacted in 1789 until 1952, and even after that time they would have been immune from suit based on a military attack on the high seas.

ARGUMENT

RESPONDENTS' SUITS ARE BARRED BY THE FOREIGN SOVEREIGN IMMUNITIES ACT, WHICH PRESCRIBES THE EXCLUSIVE GROUNDS FOR JURISDICTION AND RULES OF IMMUNITY IN SUITS AGAINST A FOREIGN STATE

The text, legislative history and consistent judicial interpretation of the FSIA make clear that it prescribes the exclusive standards for asserting jurisdiction over a foreign state and for determining when a foreign state is immune from suit in United States courts. The FSIA lifts a foreign state's immunity to suits sounding in tort only if they are based on certain acts or omissions occurring in the United States. The court of appeals' holding that the respondent Liberian corporations may invoke the jurisdiction of the United States courts to sue petitioner Argentine Republic for injuries allegedly sustained by their ship as a result of an attack by petitioner's military forces on the high seas in time of war constitutes a radical departure from the rules of sovereign immunity that are prescribed by the FSIA and international law. The proper way for respondents to seek compensation from petitioner is by requesting espousal of their claims by the Government of Liberia through diplomatic channels—the traditional avenue for resolving such claims.

A. THE TEXT AND STRUCTURE OF THE FSIA ESTABLISH THAT IT COMPREHENSIVELY GOVERNS QUESTIONS OF IMMUNITY AND JURISDICTION IN SUITS AGAINST FOREIGN STATES AND UNAMBIGUOUSLY BARS RESPONDENTS' SUITS

"It is well settled that 'the starting point for interpreting a statute is the language of the statute itself.'" *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, No. 86-473 (Dec. 1, 1987), slip op. 5 (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). That principle has particular force in this case, because the FSIA, as a statute whose purpose is "to prescribe and regulate a portion of the jurisdiction of the federal courts[,] * * * must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968); see also *Heckler v. Edwards*, 465 U.S. 870, 877 (1984). As we shall explain, the text and structure of the FSIA unambiguously foreclose this suit.

1. Section 4(a) of the FSIA added a new Chapter 97 to Title 28 of the United States Code, 28 U.S.C. 1602-1611, which is entitled the "Jurisdictional Immunities of Foreign States." The very fact that Congress devoted an entire chapter of the United States Code to this relatively narrow subject is weighty evidence that Congress did not intend to permit the courts to fashion rules of immunity in a common-law manner by relying on statutory provisions outside of Chapter 97 (such as the Alien Tort Statute) that are not even concerned with the jurisdictional immunities of foreign states. But Congress did not leave this preclusion to inference. In the first section of Chapter 97, which sets forth Congress's findings and declaration of purpose in enacting the FSIA, Congress expressed its determination that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602.

Consistent with this determination, Section 1604 establishes a universal rule that all foreign states are entitled to sovereign

immunity in the United States in all circumstances, save only as exceptions to that rule are set forth in the FSIA itself.⁶ Section 1604 provides that “[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of this Act[,] a foreign state *shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter*” (emphasis added). Section 1605 in turn specifies in detail the exceptions to this general rule of immunity, which apply to discrete categories of cases involving waivers of immunity, commercial activities, property in the United States, certain torts occurring in the United States, and maritime liens; Section 1606 prescribes the extent of a foreign state’s liability when it is not entitled to immunity; and Section 1607 permits certain counterclaims against a foreign state.⁷

⁶ The term “foreign state” is defined (except as used in Section 1608) to include a political subdivision and an agency or instrumentality of the state (28 U.S.C. 1603(a) and (b)).

⁷ Section 1604 provides that the general rule of immunity it prescribes is “[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the FSIA] * * *.” This exception has no relevance here. It applies only if the international agreement addresses amenability to suit and directly conflicts with the immunity provisions of the FSIA (H.R. Rep. 94-1487, at 10, 17-18; S. Rep. 94-1310, at 6, 17). Respondents cite (Br. in Opp. 2-3) Articles 5 and 7 of the Geneva Convention on the High Seas, Apr. 29, 1958 (see note 4, *supra*) and Articles I and IV of the Pan-American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1990, 1991. However, those Conventions merely establish certain substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not purport to create a private right of action to recover compensation, and thus are not self-executing in this respect (cf. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *Head Money Cases*, 112 U.S. 580, 598-599 (1884)), and they do not address the question of one sovereign state’s immunity to the jurisdiction of the courts of another sovereign state. Moreover, although the United States is a party to both conventions, Argentina is merely a signatory. Section 1604 was not intended to dispense with the immunity of a foreign state based on an “agreement” to which it is not a party. Respondents also err in relying (Br. in Opp. 3-4) on Article I of the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, United States-Liberia, 54 Stat. 1740, which, inter alia, provides that the nationals of each party “shall

Sections 1604 to 1607 thus prescribe what Section 1602 presages: a comprehensive, self-contained statutory scheme for determining when a foreign state is entitled to sovereign immunity. Compare *United States v. Fausto*, No. 86-595 (Jan. 25, 1988), slip op. 4-8, 14. If none of the exceptions in Sections 1605 to 1607 is applicable, then the “foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” (28 U.S.C. 1604). This language is unequivocal. Cf. *Honig v. Doe*, No. 86-728 (Jan. 20, 1988), slip op. 16. Accordingly, if a plaintiff attempts to invoke the jurisdiction of a federal district court under the Alien Tort Statute (or any other jurisdictional provision) in order to sue a foreign state, Section 1604 expressly renders the foreign state “immune” from that “jurisdiction” unless one of the exceptions in the FSIA itself applies.

It is clear in this case that 28 U.S.C. 1604 renders petitioner Argentine Republic immune from the jurisdiction of the district court, because, as that court held (Pet. App. 30a-31a), none of the exceptions to the general rule of immunity applies. There is only one exception in the FSIA that permits suits sounding in tort, and that exception is limited to actions “in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property *occurring in the United States* and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment” (28 U.S.C. 1605(a)(5) (emphasis added)). As the courts construing Section 1605(a)(5) have consistently recognized,⁸ the legislative history

enjoy freedom of access to the courts of justice of the other on conforming to the local laws * * *.” There is no violation of that treaty by the United States here, because the FSIA is one of the “local laws” to which respondents must conform in bringing suit.

⁸ See *Gulf Arab Media-Arab American Film Co. v. Faisal Foundation*, 811 F.2d 1260, 1261, amended, 832 F.2d 132 (9th Cir. 1987); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-1525 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-843 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); cf.

makes clear that in order for this exception to apply, the negligent or wrongful act or omission that caused the injury, as well as the injury itself, must have occurred in the United States. See *Verlinden*, 461 U.S. at 488 n.11 (referring to 28 U.S.C. 1605(a)(5) as providing an exception "for certain non-commercial torts within the United States").⁹ In no instance could the tort exception to immunity apply where both the act or omission and the injury occurred outside the United States. Section 1605(a)(5) therefore has no application here, because the alleged attack upon and injury to respondents' ship occurred outside the United States — on the high seas, in the South Atlantic.

Olsen v. Government of Mexico, 729 F.2d 641, 645-646 (9th Cir.), cert. denied, 469 U.S. 917 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 588-590 & n.10 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984).

⁹ The committee reports state that the tort exception applies only if the act or omission of the foreign state or its officer or employee "occur[red] within the jurisdiction of the United States" (H.R. Rep. 94-1487, at 21; S. Rep. 94-1310, at 20). That also was the contemporaneous view of the responsible Executive Branch officials, who were instrumental in drafting the FSIA. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 34 (1973) [hereinafter *1973 Hearing*] (letter from the Attorney General and the Secretary of State) (the exception permits suits for injuries "occasioned by the tortious act in the United States of a foreign state"); *id.* at 42 (the exception applies if the "negligent or wrongful act * * * took place in the United States"); *id.* at 21 (statement of acting Legal Adviser Brower) (same); *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) [hereinafter *1976 Hearings*] (remarks of Legal Adviser Leigh) (exception for "torts that occur in the United States").

This interpretation is also consistent with the parallel exception in the European Convention on State Immunity, which entered into force on June 11, 1976, while Congress was considering the FSIA, and which was regarded as generally consistent with the FSIA. See *1976 Hearings* 37. Article 11 of that Convention provides that a contracting state shall not be immune to actions seeking redress for injury to the person or damage to tangible property "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum" (U.N. Leg. Series, *Materials on Jurisdictional Immunities of States and Their Property* 159 (1982)).

Moreover, the FSIA excludes from the tort exception "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused." 28 U.S.C. 1605(a)(5)(A). This exclusion has been described as preserving a foreign state's immunity for "acts or omissions of a fundamentally governmental nature." *Olsen v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984); see also *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921-923 & n.4 (D.C. Cir. 1987); *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1026-1027 (9th Cir. 1987). It may be difficult in some circumstances to locate the precise dividing line between the kinds of torts for which a foreign state is not entitled to immunity under Section 1605(a)(5) and the acts of a foreign state for which sovereign immunity is preserved by Section 1605(a)(5)(A). In this case, however, we think it clear that an attack by the military forces of one foreign state on a ship registered under the laws of another foreign state that occurred on the high seas in time of war should be regarded by a court of the United States as "discretionary" and of a "fundamentally governmental nature" for purposes of 28 U.S.C. 1605(a)(5)(A). See also pages 18-20, *infra*.

For the foregoing reasons, petitioner is "immune from the jurisdiction of the courts of the United States and of the States" with regard to claims based upon the alleged attack by petitioner's military forces on respondents' ship. 28 U.S.C. 1604.

2. The conclusion that the FSIA is exclusive and that a plaintiff cannot circumvent its carefully drawn limitations by bringing a suit under another jurisdictional statute (such as the Alien Tort Statute) also is evident from the special grant of subject matter jurisdiction in 28 U.S.C. 1330. That provision was added to the Judicial Code by Section 2(a) of the FSIA and is entitled "Actions against foreign states." Section 1330(a) provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of *any* nonjury civil action against a foreign state * * * as to *any* claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or

under any applicable international agreement” (emphasis added). Congress’s intention to address the question of jurisdiction over suits against foreign states in a comprehensive manner is evident from the fact that Section 1330 draws within the ambit of its concern “any” action against a foreign state with respect to “any” claim for relief, but only permits the district courts to exercise jurisdiction over such actions and claims if the foreign state is not entitled to immunity under 28 U.S.C. 1605-1607.¹⁰

Indeed, precisely because of the all-encompassing scope of the new 28 U.S.C. 1330(a) as regards cases in which a foreign state is a *defendant*, Section 3 of the FSIA amended the diversity statute to delete the references to suits to which a “foreign state” is a party (as either a plaintiff or defendant) (see 28 U.S.C. (1970 ed.) 1332(a)(2) and (3)) and added a new paragraph (4) that preserves a distinct head of diversity jurisdiction over suits involving a foreign state only where it is the *plaintiff* (90 Stat. 2891; see 28 U.S.C. 1332(a)(4)). As the House Report explained, “[s]ince jurisdiction in actions *against* foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous” (H.R. Rep. 94-1487, at 14 (emphasis added); accord, S. Rep. 94-1310, at 13 (emphasis added)). There is no reason to believe that Congress intended Section 1330 to be any less “comprehensive[]” in cases involving an alleged violation of the law of nations, or that the Alien Tort Statute would be any less “superfluous” than the diversity statute in those circumstances. Moreover, as a result of the deletion of the references to a “foreign state” in 28 U.S.C. (1970 ed.) 1332(a)(2) and (3), it is clear that a federal court would not have diversity jurisdiction over a suit by a United States citizen against a foreign state based on the attack alleged in this case. It is implausible to suppose that Congress nevertheless intended to permit an alien to bring such a suit under 28 U.S.C. 1350, despite the more attenuated nexus of the suit to the United States.

¹⁰ Although the FSIA contemplates that a suit may be brought against a foreign sovereign in state court, the FSIA guarantees the defendant the right to remove the suit to federal court (28 U.S.C. 1441(d); see *Verlinden*, 461 U.S. at 489).

Sections 1330(a) and 1604 therefore are complementary: Section 1330(a) confers jurisdiction on the district courts whenever the foreign state is *not* entitled to immunity, and Section 1604 bars the district courts from exercising jurisdiction wherever the foreign state *is* entitled to immunity. In this manner, the two provisions occupy the entire fields of foreign sovereign immunity and subject matter jurisdiction over suits against foreign states.¹¹ There is no room in this framework for a court to fashion its own standards of foreign sovereign immunity that depart from those in the FSIA or to exercise subject matter jurisdiction in a suit against a foreign state where jurisdiction does not lie under 28 U.S.C. 1330(a). Accordingly, “[t]he plain meaning of the statute decides the issue presented” (*FERC v. Martin Exploration Management Co.*, No. 87-363 (May 31, 1988), slip op. 3 (quoting *Bethesda Hospital Ass’n v. Bowen*, No. 86-1764 (Apr. 4, 1988), slip op. 4)) and requires dismissal of respondents’ suits.

B. THE LEGISLATIVE HISTORY AND CONSISTENT JUDICIAL INTERPRETATION OF THE FSIA STRONGLY REINFORCE THE PLAIN MEANING OF ITS TEXT AND STRUCTURE

1. a. The legislative history of the FSIA overwhelmingly supports the bar to suit that is mandated by the text and structure of the Act. The House and Senate Reports both stress that the FSIA “sets forth the *sole and exclusive standards* to be used

¹¹ Subsection (b) of 28 U.S.C. 1330 provides that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under [28 U.S.C. 1608].” Thus, personal jurisdiction, like subject matter jurisdiction, exists only if one of the exceptions to foreign sovereign immunity in Sections 1605-1607 is applicable (*Verlinden*, 461 U.S. at 485, 489 & n.14). Enforcement of these statutory limitations would render it unnecessary to address petitioner’s other objections (Br. 34-48) to the exercise of personal jurisdiction in this case. See H.R. Rep. 94-1487, at 13. This meticulous attention to questions of personal jurisdiction and service of process, as well as venue (28 U.S.C. 1391(f)), removal (28 U.S.C. 1441(d)), and attachment and execution (28 U.S.C. 1609-1611), underscores Congress’s intention to enact a comprehensive statutory scheme.

in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States" (H.R. Rep. 94-1487, at 12 (emphasis added); S. Rep. 94-1310, at 11 (emphasis added)). Both Reports also stress that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states," which is essential because disparate treatment "may have adverse foreign relations consequences" (H.R. Rep. 94-1487, at 12-13; S. Rep. 94-1310, at 12).¹²

Consistent with this "exclusive" and "comprehensive" scope Congress intended for the FSIA, the Reports make clear that the FSIA "is intended to preempt any *other* State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities" (H.R. Rep. 94-1487, at 12 (emphasis added); S. Rep. 94-1310, at 11 (emphasis added)). Thus, even if we assume that the reference to the "law of nations" in the Alien Tort Statute might once have been a source of authority for a court to draw on its own assessment of international law in order to determine whether a foreign state should be accorded immunity to a suit under that Statute, the legislative history confirms that Congress "intended [the FSIA]

¹² The contemporaneous interpretation and implementation of the FSIA by the Department of State also reflects the view that its provisions are exclusive. As required by the section of the FSIA governing service of process, 28 U.S.C. 1608(a), the Department of State promulgated regulations in 1977 (42 Fed. Reg. 6367), which are still in effect (22 C.F.R. Pt. 93), to define the content of the notice of suit that the plaintiff must serve on the foreign state under the Act. Paragraph nine of the required notice states:

Questions relating to state immunities and to the jurisdiction of the United States courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611 of Title 28, United States Code (Pub. L. No. 94-583; 90 Stat. 2891).

Respondents included the quoted paragraph in their notices of suit in this case, but then attempted to qualify it by asserting that "the Foreign Sovereign Immunities Act of 1976 is inapplicable to the action described herein, which arises under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1982)" (Pet. App. 38a, 41a). Petitioners thus sought to take advantage of the special procedures under the FSIA for service of process upon and obtaining personal jurisdiction over a foreign state, while ignoring its rules of immunity and limitations on jurisdiction.

to preempt" that "Federal law" insofar as determinations of immunity are concerned. See pages 23-24 *infra*. This preemptive intent is also reflected in statements that the purpose of the FSIA was to "codify" what Congress deemed to be the proper principles of foreign sovereign immunity (H.R. Rep. 94-1487, at 7; S. Rep. 94-1310, at 7; 1973 *Hearing* 32-33, 39), with the understanding that Congress itself would carve out any additional exceptions that might be indicated by future developments in international law and the practice of other nations (*id.* at 32). Similar points were stressed throughout the legislative history.¹³

¹³ See S. Rep. 94-1310, at 1 (the FSIA "define[s] the jurisdiction of United States courts in suits against foreign states, [and] the circumstances in which foreign states are immune from suit"); *id.* at 8 (the purpose of the FSIA "is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity"); *ibid.* (prior to enactment of the FSIA, there were no "comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state" and no "firm standards as to when a foreign state may validly assert the defense of sovereign immunity"); *id.* at 12 (the FSIA "set[s] forth comprehensive rules governing sovereign immunity" and "prescribes * * * the jurisdiction of U.S. district courts in cases involving foreign states"); *id.* at 14 (the FSIA "sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states"). Accord H.R. Rep. 94-1487, at 1, 6, 7, 14. See also 1976 *Hearings* 58 (statement by a representative of the American Bar Association's International Law Section) ("The bill defines comprehensively the criteria that American courts will apply in determining when a foreign state is subject to suit.").

A passage in the section-by-section analysis submitted with the bill in 1973 stated that the proposed 28 U.S.C. 1330 was not intended to supplant specialized jurisdictional regimes, such as those established by 28 U.S.C. 1333, dealing with admiralty, maritime and prize cases, and by 28 U.S.C. 1338, dealing with patent and copyright cases. 1973 *Hearing* 47; 119 Cong. Rec. 2219 (1973). The 1976 House Report, however, states that the prior section-by-section analysis was superseded by the analysis of the 1976 bill (see H.R. Rep. 94-1487, at 12), which does not contain a similar suggestion that jurisdictional regimes outside of 28 U.S.C. 1330 might remain applicable to suits against foreign states (see H.R. Rep. 94-1487, at 12-14). That omission is attributable to the fact that 28 U.S.C. 1605(b), which was not contained in the 1973 version of the bill that was the subject of the superseded section-by-section analysis (see 1973 *Hearing* 5-6), provides that a foreign state is not immune from an in personam suit in admiralty to enforce a maritime lien against a vessel or cargo.

b. Moreover, the legislative history shows that when Congress enacted the FSIA, it specifically addressed the question of what torts should subject a foreign state to the jurisdiction of the United States courts and chose *not* to exempt from immunity those acts or omissions that occur outside the United States. See pages 11-12, *supra*. In addition, the legislative history confirms Congress's understanding that the FSIA was intended to codify the restrictive theory of sovereign immunity, under which "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*)" (H.R. Rep. 94-1487, at 7; S. Rep. 94-1310, at 9; see also 122 Cong. Rec. 33532 (1976) (remarks of Rep. Danielson)). In other words, the rule of immunity was intended to apply, in general terms, "to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform" (H.R. Rep. 94-1487, at 14; S. Rep. 94-1310, at 14) and therefore "are governed by private law" (1976 *Hearings* 30).¹⁴ Although there may be some question as to how the "public act"/"private act" distinction identified in the legislative history applies in the specific context of tort claims, it is con-

This provision was intended to replace the prior practice of proceeding in rem in admiralty suits involving a foreign state by arresting or attaching its vessel or cargo. See 28 U.S.C. 1609; H.R. Rep. 94-1487, at 21-22; S. Rep. 94-1310, at 21-22; 1976 *Hearings* 74-75, 97-98; *Castillo v. Shipping Corp. of India*, 606 F. Supp. 497, 502-503 (S.D.N.Y. 1985); *China Nat'l Chem. Import & Export Corp. v. M/V Lago Hualaihue*, 504 F. Supp. 684, 689-690 & n.1 (D. Md. 1981). The legislative history states that a plaintiff may also bring an admiralty claim under Section 1605(a) (H.R. Rep. 94-1487, at 21-22; S. Rep. 94-1310, at 21-22). Although the FSIA does not contain a comparable provision specifically addressing patent, copyright and trademark suits, such suits may be considered under the commercial activity exceptions in 28 U.S.C. 1605(a), where applicable. See Morris, *Sovereign Immunity: The Exception for Intellectual or Industrial Property*, 19 Vand. J. Transnat'l L. 83, 94 (1986).

¹⁴ See also 1976 *Hearings* 24 (statement of Legal Adviser Leigh) (the FSIA assures that American citizens "are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would"); see also *id.* at 31, 36 (remarks of Bruno Ristau) ("private-law activities"); *id.* at 31 ("private-law dispute").

sistent with the general thrust of that distinction that Congress's principal purpose in fashioning the tort exception in 28 U.S.C. 1605(a)(5) was to lift a foreign sovereign's immunity with respect to injuries caused by traffic accidents and similar acts in the United States (H.R. Rep. 94-1487, at 9, 20-21; S. Rep. 94-1310, at 10, 20-21; 1976 *Hearings* 27, 58; 1973 *Hearing* 42). Such conduct is the sort in which private persons engage and for which they may be sued under domestic tort law.

By contrast, there is no suggestion whatever in the legislative history that the tort exception in 28 U.S.C. 1605(a)(5) was intended to subject a foreign state to the jurisdiction of United States courts for injuries allegedly sustained as a result of an armed attack by its military forces outside the United States in time of war.¹⁵ That is not conduct "which private persons normally perform" (H.R. Rep. 94-1487, at 14; S. Rep. 94-1310, at 14) or that is addressed by the domestic tort law of the United States governing private conduct; it is, rather, governed by customary international law and conventions that specifically address the actions of sovereign states in time of war. See notes 4, *supra*, and 27, *infra*. See also 28 U.S.C. 1606 ("the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances"); *Feres v. United States*, 340 U.S. 135, 141-142 (1950); *United States v. Johnson*, No. 85-2039 (May 18, 1987), slip op. 9-10.

Moreover, when the FSIA was passed, acts of a nation's armed forces were regarded as classic examples of what were termed sovereign or "public acts," for which one nation was entitled to immunity in the courts of another nation, as the Second Circuit itself previously recognized in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (1964), cert. denied, 381 U.S. 934 (1965). In fact, during the 1976 *Hearings*, a representative of the maritime bar observed that "acts concerning the Armed Forces" would not fall within the exceptions to the general rule of immunity under

¹⁵ This case of course does not present any occasion to consider the extent, if any, of a foreign state's immunity for intentional or negligent acts or omissions by its military forces committed in the United States, in either a combatant or noncombatant role.

the FSIA (1976 Hearings 95, citing *Victory Transport*).¹⁶ It therefore is especially implausible to suppose that Congress intended the tort exception in 28 U.S.C. 1605(a)(5) to abrogate a foreign state's immunity from the jurisdiction of United States courts in a suit seeking damages for a military attack on a ship on the high seas in time of war.¹⁷ The court of appeals' holding that respondents nevertheless may prosecute such suits under the Alien Tort Statute therefore is utterly incompatible with the balance Congress struck in the FSIA.¹⁸

2. Consistent with the text and legislative history of the FSIA, this Court made clear in *Verlinden* that the FSIA "contains a comprehensive set of legal standards governing claims of

¹⁶ See also 1976 Hearings 93 (until mid-century, United States courts applied the absolute rule of immunity "to shield foreign sovereigns from liability not only for public acts, such as the navigation of warships, but also for commercial activities, such as the operation of state-owned merchant vessels"); *id.* at 95-96 (emphasis added) (the FSIA "removes the defense for most tort suits arising here, which would include among other cases, automobile accidents involving diplomatic personnel and collisions involving State-owned merchant vessels or even foreign warships in U.S. territorial waters").

¹⁷ The sensitivity of military affairs in the context of foreign sovereign immunity is reflected in 28 U.S.C. 1611(b)(2), which preserves a foreign state's immunity from attachment or execution even of property in the United States, if the property is "of a military character" or "under the control of a military authority or defense agency," and if it "is, or is intended to be, used in connection with a military activity." This immunity is firmly rooted in international law (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 144; *United States v. Thierichens*, 243 F. 419, 420-421 (E.D. Pa. 1917); Geneva Convention on the High Seas, Art. 8, 13 U.S.T. 2315; I L. Oppenheim, *International Law* § 450 (1955); Delupis, *Foreign Warships and Immunity for Espionage*, 78 Am. J. Int'l L. 53, 56-57, 74-75 (1984)), and it was included in the FSIA to "avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act" (H.R. Rep. 94-1487, at 31; S. Rep. 94-1310, at 31).

¹⁸ This conclusion is supported by a brief exchange during the hearings regarding the *Mayaguez* incident, which involved the seizure by Cambodian forces of an American merchant vessel (see U.S. Dep't of State, *Digest of United States Practice in International Law* 777-782 (1975)). Representative Jordan inquired whether that incident would have been affected by the FSIA if it had been in effect. Legal Adviser Leigh responded that "there's nothing in this bill which would have been applicable to that situation—nothing" (1976 Hearings 53-54).

immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" (461 U.S. at 488), and that "if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States" (*id.* at 497). The Court explained (*id.* at 493-494 (emphasis added; footnote omitted)):

The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.

This understanding of the statutory scheme pervades the opinion in *Verlinden*.¹⁹ See also *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983). The court of appeals' conclusion that respondents may sue petitioner under the Alien Tort Statute without regard to rules of immunity and limitations on subject matter jurisdiction in the FSIA therefore cannot be reconciled with *Verlinden*.

The other courts of appeals likewise have taken the position that the FSIA contains the exclusive standards for resolving claims of sovereign immunity by foreign states.²⁰ In fact, as the

¹⁹ See 461 U.S. at 489 ("if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction"); *id.* at 493 (the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States"); *id.* at 495 n.22 (quoting H.R. Rep. 94-1487, at 12 ("the Act's purpose is to set forth 'comprehensive rules governing sovereign immunity'")); *id.* at 496 (same); *ibid.* ("the jurisdictional provisions of the Act are simply one part of this comprehensive scheme"); *id.* at 496-497 ("The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state.").

²⁰ See, e.g., *MacArthur Area Citizens Ass'n*, 809 F.2d at 919; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986), cert. denied, No. 86-909 (Mar. 9, 1987); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Yugoexport, Inc. v. Thai*

panel below acknowledged (Pet. App. 11a), the Second Circuit had adhered to that view prior to its decision in this case. See, e.g., *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d at 116. Similarly, other courts of appeals have held that the jurisdictional provisions in 28 U.S.C. 1330(a) are exclusive and cannot be circumvented by resort to other jurisdictional provisions, such as the federal-question and diversity statutes, 28 U.S.C. 1331 and 1332.²¹ In particular, the District of Columbia Circuit held in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), that the FSIA barred the district court from exercising jurisdiction over a tort suit against a foreign sovereign based on conduct that occurred outside the United States, even though the plaintiffs invoked the district court's jurisdiction under the Alien Tort Statute. See 726 F.2d at 776 n.1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). See also *In re Korean Air Lines Disaster of Sept. 1, 1983*, No. 83-0345 (D.D.C. Aug. 2, 1985), slip op. 10-11; *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (C.D. Cal. Mar. 7, 1985).

C. THE COURT OF APPEALS' RATIONALE FOR CIRCUMVENTING PETITIONER'S IMMUNITY FROM THE JURISDICTION OF UNITED STATES COURTS UNDER THE FSIA IS WITHOUT MERIT

The court of appeals acknowledged that the legislative history of the FSIA, this Court's decision in *Verlinden*, and its own prior decision in *O'Connell* all support the view that the FSIA is "the sole basis for United States jurisdiction over foreign sovereigns" (Pet. App. 11a). The court concluded, however,

Airways Int'l, Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1101 (1985); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985).

²¹ *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420-422 (5th Cir. 1982); *REX v. CIA. Pervana de Vapores, S.A.*, 660 F.2d 61, 64-65 (3d Cir. 1981), cert. denied, 456 U.S. 926 (1982); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-876 (2d Cir. 1981); see also *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987).

that because the FSIA provides exceptions to sovereign immunity primarily for commercial disputes, "Congress was not focusing on violations of international law when it enacted the FSIA" (*ibid.*) and that the FSIA therefore should not be construed to bar what the court viewed as "existing remedies" under the Alien Tort Statute based on alleged violations of international law (*ibid.*). Indeed, the court believed that to construe the FSIA to bar such suits would conflict with international law (*id.* at 10a). This reasoning is wrong in every respect.

1. It is irrelevant for present purposes whether an alien might have been permitted to bring an action against a foreign state under the Alien Tort Statute *prior* to 1976, based on the actions of its military forces outside the United States in time of war. For even if there once was a plausible basis for such a suit — which there was not (see pages 25-27, *infra*) — the text and legislative history of the FSIA make clear that ever *since* 1976, the FSIA has been the exclusive basis for exercising jurisdiction over (and for determining the immunity of) foreign states. See 28 U.S.C. 1602 (emphasis added) ("Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles of this chapter."). Compare *Block v. North Dakota*, 461 U.S. 273, 284-285 (1983); *United States v. Mottaz*, 476 U.S. 834, 846-847 (1986).

2. The court of appeals sought to avoid this jurisdictional preclusion by resorting to the premise that Congress, in enacting the FSIA, did not focus on acts by a foreign state that violate international law, and that the FSIA therefore should be construed to permit suits seeking redress for such acts under other jurisdictional regimes (Pet. App. 11a). Even if the court of appeals' view of Congress's focus were correct, the lack of specific discussion of one subpart of a subject in the legislative history is no basis for excluding that subpart from the coverage of a statute that is both written and described in its legislative history in all-embracing terms. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 159 n.18 (1983); *GTE Sylvania*, 447 U.S. at 110-111. But in fact, the court of appeals was wrong in believing that Congress did not have violations of international law in mind when it enacted the

FSIA. The FSIA contains an express exception to the rule of foreign sovereign immunity where the suit involves rights in property that were taken "in violation of international law" (28 U.S.C. 1605(a)(3)). This provision for certain suits based on violations of international law indicates that other such suits that are not expressly permitted are barred. *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982).

Moreover, the Alien Tort Statute, which respondents invoke, vests the district courts with jurisdiction over actions brought by an alien for a tort committed in violation of the "law of nations" or a treaty of the United States. As this Court observed in *Verlinden* (461 U.S. at 493 n.19), however, when Congress enacted the FSIA, it relied in part on its power under the Constitution to define offenses against the "Law of Nations" (Art. I, § 8, Cl. 10). See H.R. Rep. 94-1487, at 12; S. Rep. 94-1310, at 12. The comprehensive statutory scheme under the FSIA therefore applies in full force to all suits brought against a foreign state alleging a violation of the "law of nations" and necessarily forecloses the fashioning of different jurisdictional and immunity rules in a suit for a violation of the "law of nations" under 28 U.S.C. 1350.

3. The court of appeals also was wrong in believing that the FSIA must be construed to permit this suit under the Alien Tort Statute in order to avoid placing the United States out of step with prevailing principles of international law. The limitation of the tort exception in 28 U.S.C. 1605(a)(5) to suits based on acts or omissions occurring within the territorial jurisdiction of the United States was consistent with international law and practice when it was enacted (see note 9, *supra*), and it remains so today. See U.N. Gen. Assembly, *Report of the International Law Commission on the Work of its Thirty-Sixth Working Session* 155-158 (1984); U.N. Leg. Series, *Materials on Jurisdictional Immunities of States and Their Property* 8, 30, 37, 43, 159 (1982); *McKeel v. Islamic Republic of Iran*, 722 F.2d at 588. That limitation is designed to minimize unnecessary friction between nations by permitting a foreign state to be sued in the forum state only in those circumstances in which it would be liable under the *lex loci delicti commissi*, and thereby confining the application of the forum state's substantive rules of conduct

to matters occurring within its territorial jurisdiction.²² Thus, it is the decision of the court of appeals, not the statutory standards of immunity under the FSIA, that is out of step with principles of international law.²³

4. In any event, the court of appeals was seriously mistaken in its basic premise that the Alien Tort Statute furnished "existing remedies" against a foreign state in 1976 for conduct such as that at issue here, and that Congress therefore must have

²² The *Report* cited in the text discusses Article 14 of a draft convention on the immunity of states, which provides that a state may not invoke immunity from the jurisdiction of the forum State with respect to proceedings relating to compensation for death or injury to the person or damage to or loss of tangible property "if the act or omission * * * occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in the territory at the time of the act or omission." *Report* at 155. The Commentary explains that "[t]he basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality" (*Report* at 158), and it sets forth some of the practical considerations supporting the exception as so limited: (i) "[s]ince the act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed"; (ii) "[t]he injured individual would have been without recourse to justice had the State been entitled to invoke its jurisdictional immunity"; and (iii) "the physical injury to the person or the damage to tangible property * * * appears to be confined principally to insurable risks," and the rule of nonimmunity therefore "will preclude the possibility of the insurance company hiding behind the cloak of State immunity and evading its liability to the injured individuals" (*Report* at 156). Significantly, moreover, the commentary explains that as a result of the requirement that the author of the act or omission have been present in the forum State, "cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of armed conflict, which constitute clear violations of the territory of a neighboring State under public international law, are excluded from the areas covered by article 14" (*Report* at 157).

²³ The extent to which the court of appeals departed from established principles of sovereign immunity is further underscored by the fact that the United States would be immune from suit in its own courts based on conduct such as that alleged here, because the Federal Tort Claims Act bars a suit based on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. 2680(j)). It is implausible to suppose that Congress nevertheless intended to subject a foreign nation to suit in the courts of the United States based on identical conduct. See also 10 U.S.C. 2734(a) and (b)(3).

meant to preserve those remedies when it enacted the FSIA. The court of appeals pointed to no evidence that the Alien Tort Statute was intended to abrogate the sovereign immunity of a foreign state.²⁴ As the district court pointed out (Pet. App. 32a), that Statute makes no mention of a foreign state as a possible defendant. Moreover, the First Congress, which enacted the Alien Tort Statute in 1789, clearly would not have contemplated that a foreign state would be subject to suit under that Statute, because the prevailing view of international law at the time, as reflected in this Court's decision in *The Schooner Exchange*, was that a foreign state was absolutely immune from the jurisdiction of the courts of another state.

Indeed, until 1952, the United States continued to take the position that a foreign state was entitled to immunity from all suits in the courts of another state without its consent. *Verlinden*, 461 U.S. at 486-487. Even after 1952, when the United States adopted the view that a foreign state could be sued for acts of a commercial or private nature, the Executive Branch continued to take the position that a foreign state was, under all circumstances, entitled to immunity for its sovereign or public acts (*id.* at 487)—which, as noted above, unquestionably included the use of armed force on the high seas in time of war. See pages 19-20, *supra*. In light of this practice, it is not surprising that the court of appeals did not cite a single case decided prior to the enactment of the FSIA in which a court of the United States exercised jurisdiction under the Alien Tort Statute (or any other jurisdictional provision) over a suit against a foreign state based on the commission of a public or sovereign act that allegedly violated international law. Nor are we aware of any such case.²⁵ See Kirgis, *Alien Tort Claims*,

²⁴ Cf. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 207 (D.C. Cir. 1985); *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (both holding that the Alien Tort Statute does not waive the sovereign immunity of the United States to a suit by an alien).

²⁵ Aside from the decision in this case, the only other case in which jurisdiction was exercised over a foreign state under the Alien Tort Statute was decided long after the FSIA was enacted. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985). However, the district court's reliance on the Alien Tort Statute was an alternative holding made in the context of a default judgment, and the court did not address the question

Sovereign Immunity and International Law, 82 Am. J. Int'l L. 323, 325 n.7, 326 (1988); *I Congreso del Partido*, [1981] 2 All E. R. 1064, 1078. There accordingly is no basis for attributing to Congress a supposed intention to preserve such "existing remedies" under the Alien Tort Statute when it enacted the FSIA. Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-382 (1982).²⁶

whether the exclusive jurisdictional and immunity provisions of the FSIA foreclosed the exercise of jurisdiction under the Alien Tort Statute.

²⁶ Quite aside from the unique bar of sovereign immunity where a foreign state is the defendant, there is some reason to doubt that the First Congress conceived of the Alien Tort Statute as authorizing the courts of the United States to recognize and entertain a cause of action by an alien against any defendant based on a violation of the law of nations that was committed outside the United States by persons who have no nexus to the United States or its nationals. Compare *Lauritzen v. Larsen*, 345 U.S. 571, 577-579, 592-593 (1953). Rather, Congress appears to have been primarily concerned with affording a forum for those seeking redress for violations of the law of nations for which the United States might, as a practical matter, be held accountable, and which therefore might involve the United States in an international controversy if redress was not afforded. Such violations would principally include those committed in the United States (e.g., the celebrated incident of an assault on the French Minister, discussed in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Term. 1784); compare 18 U.S.C. 112), and, perhaps, certain violations committed outside the United States but by persons subject to its jurisdiction. Under this construction, however, an assault by a British citizen on the French Minister in Great Britain (or an attack on the high seas by the military forces of one foreign nation upon a ship registered under the laws of another foreign nation), while perhaps a violation of the "law of nations" in a general sense, would not give rise to a cause of action cognizable in the courts of the United States under the Alien Tort Statute, because the incident would not normally be subject to the laws of the United States and would not give rise to any international responsibility on the part of the United States.

This interpretation of the Alien Tort Statute finds support in the origins of the constitutional provision that confers on Congress the power to "define and punish Offences against the Law of Nations" (Art. I, § 8, Cl. 10). This provision was adopted in response to the lack of power by the Continental Congress to punish offenses against the law of nations, and thereby to prevent incidents involving the States or their people from embroiling this Nation with foreign nations. See *Tel-Oren*, 726 F.2d at 783-784 (Edwards, J., concurring); *The Federalist* No. 3 (Jay), at 43-44 (Rossiter ed. 1961); *id.* No. 42 (Madison), at 265; cf. *id.* No. 80 (Hamilton), at 476; *Boos v. Barry*, No. 86-803 (Mar. 22,

5. The decision of the court of appeals could have a substantial adverse impact on the foreign relations of the United States. The United States does not condone violations of international law, and the United States takes the position that petitioner Argentine Republic should take responsibility for any such violations that it committed in its territory or on the high seas during the war with Great Britain. But sensitive foreign policy concerns are implicated by the court of appeals' holding that the courts of the United States may assume responsibility for determining whether such a violation occurred and for awarding damages against petitioner if they find a violation.²⁷

1988), slip op. 9. This interpretation also is supported by the text of 28 U.S.C. 1350 itself, which confers jurisdiction over suits based on a tort "committed in violation of * * * a treaty of the United States" (emphasis added). The quoted language suggests that a suit will lie only where there is an alleged violation of an international obligation undertaken by the United States. See Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 Vand. J. Transnat'l L. 47, 54-55 (1988).

Moreover, because the Alien Tort Statute (like the federal-question statute) is only jurisdictional in nature, it does not create a cause of action. In the absence of an Act of Congress that extends the substantive law of the United States to wrongs committed by one alien against another outside the United States and creates a private cause of action for a violation, a court would be required to "imply" a cause of action under whatever general principles of international law it believed should govern that conduct. Such an approach would present sensitive questions of foreign relations and the proper role of Article III courts (see *Tel-Oren*, 726 F.2d at 801-808 (Bork, J. concurring))—especially where, as here, the defendant is a foreign state. The Second Circuit took a far broader view of the Alien Tort Statute in *Filartiga*, upon which that court relied in this case (Pet. App. 8a-9a). However, whatever the soundness of *Filartiga* (see U.S. Amicus Br. 13-14 n.11 (pet. stage)), that case was decided in 1980; it therefore could have given Congress no reason to believe, when it passed the FSIA in 1976, that an alien could even sue an individual defendant (much less a foreign state) under that Statute based on conduct occurring outside the United States and having no nexus to this country or its nationals.

²⁷ The difficulties are illustrated by this case. Substantive principles regarding the use of military force against civilians in time of war are governed by such instruments as the Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (the Hague Convention IV) (36 Stat. 2277); the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (6 U.S.T. 1949); and the Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22,

The decision below not only has the extraordinary effect of requiring petitioner to answer to the courts of a neutral third party regarding its conduct during a time of war. It also threatens to turn the courts of the United States into tribunals in which aliens generally (but not United States citizens) may seek redress against foreign governments for conduct that has no substantial nexus to the United States. As this Court observed in *Verlinden*, "Congress was aware of the concern that 'our courts [might be] turned into small "international courts of claims[.]" . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.' " 461 U.S. at 490, quoting 1976 *Hearings* 31. And as this Court further observed, "Congress protected against that danger * * * by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. 1605" (461 U.S. at 490). The court of appeals failed to respect those substantive limitations here. In addition, because the decision below creates jurisdiction where none was intended by Congress when it enacted the FSIA, it may cause foreign states to take reciprocal measures by opening their courts to suits against the United States alleging violations of "international law" occurring anywhere in the world. Compare *Boos v. Barry*, slip op. 10-11.²⁸ These consequences will be avoided if

1930 (London Nov. 6, 1936) (*Documents on the Laws of War* 147-150, 153-155 (1982)). Although Article 3 of the Hague Convention provides that a belligerent party that violates regulations concerning the conduct of war "shall, if the case demands, be liable to pay compensation" (36 Stat. 2290), that provision and the Geneva Convention have been held not to be self-executing and therefore not to give rise to a private right of action against individual defendants. *Huynh Thi Anh v. Levi*, 586 F.2d 625, 629 (6th Cir. 1978); *Dreyfus v. Von Finck*, 534 F.2d 24, 29-30 (2d Cir.), cert. denied, 429 U.S. 835 (1976); *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985). *A fortiori*, those instruments would not give rise to a private right of action against a state party, especially in a foreign forum. The court of appeals' recognition of an identical cause of action under the Alien Tort Statute allows an alien (but not a United States citizen) to circumvent this limitation.

²⁸ See *Foreign Sovereign Immunities Act: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 17, 19, 30-31, 41, 51 (1987); note 17, *supra*.

the Court interprets the FSIA in the manner required by its text and legislative history.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the court of appeals with instructions to affirm the judgment of the district court dismissing respondents' suits for lack of subject matter and personal jurisdiction.

Respectfully submitted.

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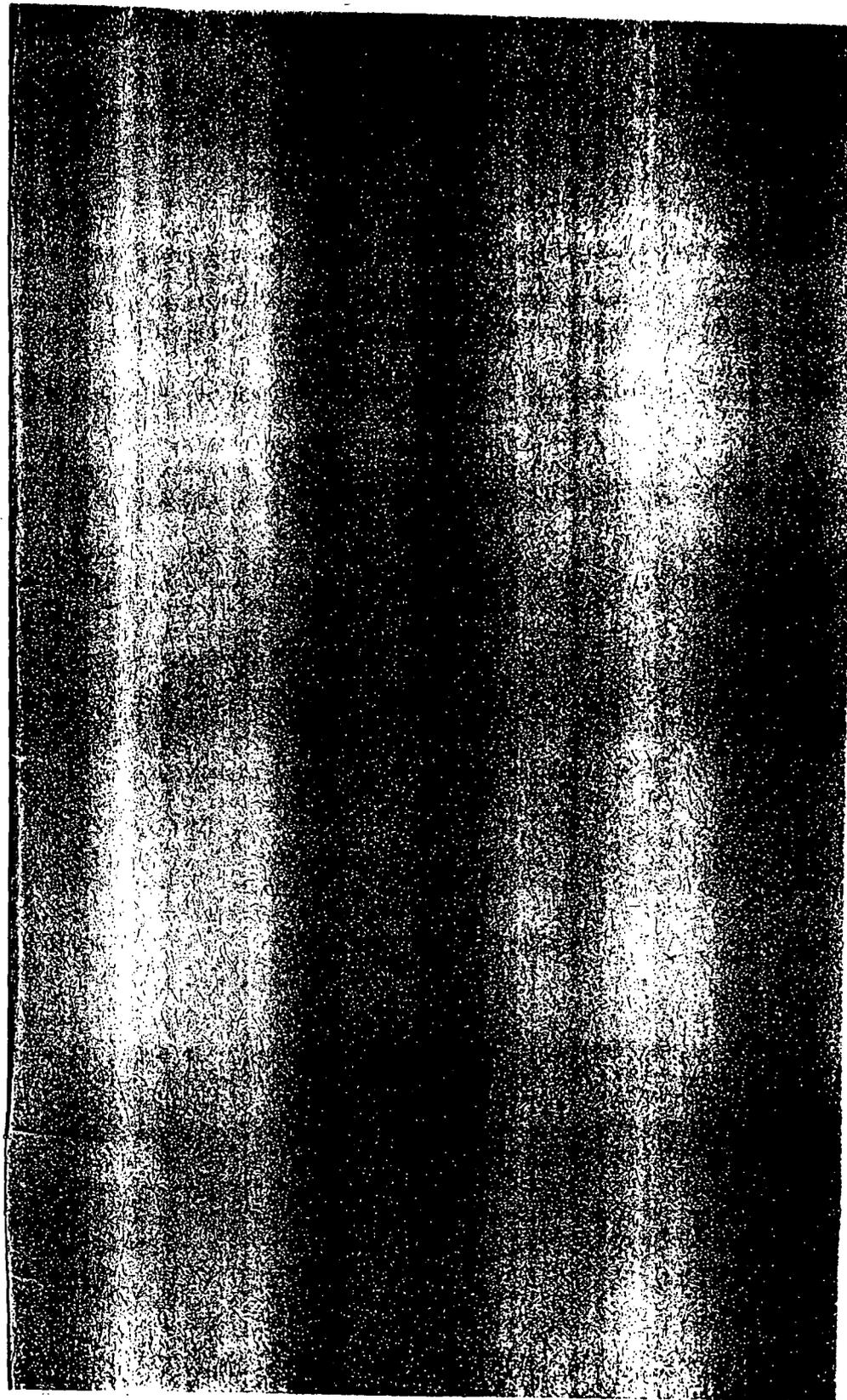
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Nos. 86-2448, 86-2449, 86-2496, 86-15039
87-1706, 87-1707

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AGAPITA TRAJANO, ET AL., PLAINTIFFS-APPELLANTS
v.
FERDINAND E. MARCOS, ET AL., DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF HAWAII AND THE
NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-2448, 86-2449, 86-2496, 86-15039
87-1706, 87-1707

AGAPITA TRAJANO, ET AL., PETITIONERS-APPELLANTS

v.

FERRDINAND E. MARCOS, ET AL., DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF HAWAII AND THE
NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES
OF AMERICA AS AMICUS CURIAE

This brief is filed in response to the Court's order of July 16, 1987 inviting the Department of Justice to express the views of the United States as amicus curiae in this case. 1/

1/ The Court's Order requested the government to address the following issues:

1. Do allegations of wrongful death, wrongful arrest or torture committed by a foreign governmental official against a foreign national in a foreign nation plead a cause of action cognizable in the United States District Court under 28 U.S.C. § 1350?
2. May the federal courts hear these consolidated cases, despite the "act of state" doctrine, either because wrongful death, wrongful arrest or torture cannot be "acts of state" as a matter of law, or because the "balance of relevant considerations" favors a hearing? See Banco

(Continued)

STATEMENT OF THE CASE

Plaintiffs (with two apparent exceptions) are all aliens, resident either in the United States or in the Philippines. Defendants are also all aliens. ^{2/} Plaintiffs brought suit against defendants in the United States District Courts for the District of Hawaii (Trajano, Hilao, Sison) and the Northern District of California (Ortigas, Clemente), claiming that they (or their relatives) were unlawfully arrested, imprisoned, tortured and, in some cases, killed in the Philippines at defendants' direction. Plaintiffs contended that defendants' actions violated United States law, international law, and/or Philippine domestic law. Plaintiffs based jurisdiction upon the federal question statute (28 U.S.C. 1331), the alien diversity statute (28 U.S.C. 1332(a)(2)) and the Alien Tort Statute (28 U.S.C. 1350).

Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

3. Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States? See Republic of the Philippines v. Marcos, Nos. 86-6091, 86-6093, slip op. at 32 (9th Cir. June 4, 1987).

^{2/} In addition to former President Marcos, the defendants include General Fabian Ver, a cousin of defendant Marcos and former Chief of Staff of the Philippine Armed Forces, and Imee Marcos-Manotoc, President Marcos' daughter and National Chairman of the Kabataag Baranggay. Trajano Compl. ¶¶ 5-7, ER A2-A3; Sison Compl. ¶¶ 6-7, ER A3; Hilao Compl. ¶¶ 10-11, ER A5; Clemente Compl. ¶ 3, ER 16.

Defendants moved to dismiss the complaints on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction, forum non conveniens, head of state immunity, insufficient service of process, statute of limitations, and the act of state and political question doctrines. Appellees' Brief, at 9. On July 18, 1986, the United States District Court for the District of Hawaii (Fong, J.) granted defendants' motions in Trajano, Hilao & Sison, concluding that: (1) plaintiffs' lacked a private cause of action insofar as they invoked 28 U.S.C. 1331; (2) jurisdiction did not lie under 28 U.S.C. 1332 because there was not complete diversity between plaintiffs and defendants; and (3) even assuming jurisdiction was present under 28 U.S.C. 1350, the act of state doctrine rendered the cases non-justiciable. Trajano ER A18-A33; Hilao ER A18-A31; Sison ER A25-A41. On January 22, 1987, the District Court for the Northern District of California (Williams, J.) granted defendants' motion in Ortigas and Clemente, largely agreeing with Judge Fong's reasoning. Ortigas & Clemente ER 72-76.

SUMMARY OF ARGUMENT

I. 28 U.S.C. 1350 does not give the district courts subject matter jurisdiction over a suit by a foreign national plaintiff against a foreign government official based on acts occurring in a foreign country.

Appellees argue that the constitutional basis of Section 1350 is the Alien Diversity Clause of Article III, which extends the "judicial Power" to controversies "between a State, or the

Citizens thereof, and foreign States, Citizens or Subjects," and that therefore Section 1350 confers jurisdiction only where the defendant is a citizen of the United States. We agree that if the Alien Diversity Clause were the sole constitutional basis for Section 1350, that conclusion would follow: the statute requires an alien plaintiff, and the Constitution would therefore require a United States citizen defendant. However, contemporaneous history suggests that Congress intended Section 1350 to reach some torts between aliens, which the statute may constitutionally do if it is based in part on the clause of Article III that extends the judicial power to cases "arising under th[e] Constitution, the Laws of the United States, and Treaties made * * * under their Authority."

Section 1350 does not, however, by any means reach all torts between aliens in violation of international law. The statute is limited by its terms to torts "committed in violation of the law of nations or a treaty of the United States"; when this phrase is read in light of the history of the statute, we think it clear that the statute does not reach every tortious violation of a treaty to which the United States is a party, or of a doctrine of international law, but only those violations that contravene treaties and international law insofar as they create rights and obligations that form a part of the law of the United States.

The "Law of Nations" Clause of Article I of the Constitution, which gives Congress the power to "define and

punish" offenses against the "Law of Nations," (Art. I, § 8, Cl. 10), reflects the assumption that the "law of nations" constitutes part of the law of this Nation only insofar as this Nation has, in one manner or another, assumed responsibility for its enforcement. For example, an important part of the law of nations is the protection of ambassadors: a federal statute embodying that principle expressly protects foreign ambassadors against tortious assaults while they are in the United States (18 U.S.C. 112); but neither that statute nor any other provision of U.S. law protects all ambassadors against all assaults anywhere in the world, even though the "law of nations" could be said to prohibit any such assault. Similarly, while many of the acts alleged in these cases are abhorrent, and while acts of these kinds (including torture) have been said to violate the law of nations, they do not violate the laws of this Nation when it is in no way involved: United States law does not protect foreign nationals against harsh treatment at the hands of officials of their own country.

II. Even if the statutory grant of jurisdiction in 28 U.S.C. 1350 did reach this case, plaintiffs' suits would have to be dismissed because they do not have a cause of action arising under federal law. First, Section 1350 itself is purely jurisdictional and does not create a cause of action. Second, the acts alleged do not violate any law or treaty of the United States that creates rights enforceable by private litigants in

American courts. Third, although the acts alleged violate international norms of behavior and may constitute violations of the law of nations by those involved, that alone does not create a cause of action under federal law where the acts did not in any way involve the United States, its territory or its citizens.

III. The complaints in these cases should be dismissed for the reasons stated above, without reaching the question whether the "act of state" doctrine would require dismissal. That doctrine says that a court in the United States may not adjudicate the validity or legality of the act of a foreign sovereign committed within its own territory, at least in the absence of sufficient countervailing reasons for the court to intrude. The difficult question in this case -- one on which past cases provide only limited guidance -- is whether the acts alleged should be thought to constitute acts of the sovereign for this purpose. That question is complicated by defendant Marcos's position as a former head of the government on the one hand, and the very barbarousness of certain of the alleged acts on the other. We do not think the court should reach that difficult question in a case where it may be unnecessary to do so. Rather, if the court does not affirm the dismissal of these cases on the ground that the district courts are without statutory jurisdiction or that plaintiffs do not have a cause of action, we suggest that the cases should be remanded to the district courts to consider the possible application of other doctrines, such as

forum non conveniens, political question, and abstention.

ARGUMENT

I. THE DISTRICT COURTS DO NOT HAVE JURISDICTION
UNDER 28 U.S.C. 1350 OVER A SUIT BY ONE ALIEN
AGAINST ANOTHER FOR A TORT COMMITTED IN A
FOREIGN COUNTRY

Federal courts are courts of limited jurisdiction. The district courts have jurisdiction of these cases only if they fall within the scope of the jurisdictional grant from Congress, which in turn must be within the scope of the judicial power that may be conferred on the federal courts under Article III of the Constitution. In this case, the jurisdictional statute upon which appellants principally rely, and the statute upon which the court invited the United States to express its views, is the Alien Tort Statute, now codified at 28 U.S.C. 1350. ^{3/} That statute was first enacted as part of the Judiciary Act of 1789, ^{4/} but it was almost never invoked during the ensuing 180

^{3/} Jurisdiction does not lie under the alien diversity statute, 28 U.S.C. 1332(a)(2) and (3), because of the absence of complete diversity. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975); 13B C. Wright, A. Miller & E. Cooper, Federal Practice And Procedure § 3604, at 384-85 (2d ed. 1984); 1 J. Moore, et al., Moore's Federal Practice ¶ 0.75 [1.-2], at 709.5-709.7 (1986). The district courts properly rejected 28 U.S.C. 1331 as a basis of jurisdiction on the ground that appellants do not have a cause of action arising under federal law. See pages 20-31, infra.

^{4/} Act of Sept. 24, 1789, § 9, 1 Stat. 77. The present form of the statute, 28 U.S.C. 1350, provides as follows:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of

(Continued)

years, which alone suggests that it should not, at this late date, be given the expansive interpretation plaintiffs urge. In any event, an examination of the Alien Tort Statute in light of its two possible constitutional bases, and of contemporaneous evidence of the purposes it was intended to serve, demonstrates that it does not reach these cases.

A. The District Courts Do Not Have Jurisdiction Of These Cases If Section 1350 Is Based On The Alien Diversity Clause Of Article III

Appellees argue that the constitutional basis of Section 1350 is the Alien Diversity Clause of Article III, which extends the judicial power to controversies "between a State, or the citizens thereof, and foreign States, Citizens or Subjects." Art. III, § 2, Cl. 1. If appellees are correct, then the district courts are without jurisdiction in these cases, because Section 1350 requires that the plaintiff be an alien and in these cases the defendants are aliens as well, and therefore are not of diverse citizenship.

Appellees rely (Br. 55-64) on the parallels between the "alien diversity" and "alien tort" provisions of the Judiciary Act of 1789 and the evidence of the Framers' concern that the United States might become embroiled in an international incident if it failed to provide a fair forum for an alien seeking redress against a United States citizen. ^{5/} That background does suggest

nations or a treaty of the United States.

^{5/} See also Casto, The Federal Courts' Protective Jurisdiction (Continued)

that one purpose of the Alien Tort Statute was to be a "small claims" subset of "alien diversity" jurisdiction, giving aliens who sue in diversity cases involving tortious violations of international law a federal forum without regard to the \$500 amount in controversy requirement that would otherwise apply. 6/

In our view, however, the Alien Tort Statute, which does not in terms require diversity of citizenship, does not rest solely on the Alien Diversity Clause of the Constitution, but may extend to certain cases "arising under" federal law even when there is no diversity. Elsewhere in the Constitution, in the "Law of Nations" Clause of Article I, Congress was explicitly given the power, which the national government lacked under the Articles of Confederation, "[t]o define and punish * * * Offences against the Law of Nations." Art. I, § 8, Cl. 10. This suggests that the use of the identical phrase "law of nations" in the contemporaneously enacted Alien Tort Statute was intended to give the federal courts subject matter jurisdiction insofar as a cause of action is afforded by federal law of the United States enacted

Over Torts Committed In Violation Of The Law of Nations, 18 Conn. L. Rev. 467, 497-98 & nn. 166-168 (1986) [hereinafter Casto].

6/ The language "for a tort only" was enacted to make clear that the other aspects of the "law of nations" as then understood (such as the "law of merchants") were not imported wholesale into federal jurisdiction. See Randall, Federal Jurisdiction Over International Law Claims: Inquiries Into The Alien Tort Statute, 18 N.Y.U.J. Int'l. Law & Politics 1, 28-31 (1985) [hereinafter Randall]. See also Dickinson, The Law Of Nations As Part Of The National Law Of The United States, 101 U. Pa. L. Rev. 26, 26-27 (1952); Dickinson, The Law Of Nations As Part Of The National Law Of The United States, II, 101 U. Pa. L. Rev. 792 (1953).

pursuant to the Law of Nation Clause in order to "define and punish" violations of the law of nations that are the responsibility of the United States. 7/

As we explain below (see pages 15-18, infra), the purpose of vesting power in Congress to "define and punish * * * Offences against the Law of Nations" was to enable it to prevent the United States from becoming embroiled in a war or other dispute with a foreign nation that might be offended by a breach of the law of nations attributable to the United States or an individual under its jurisdiction. The individuals for whom the United States might be held responsible in this sense include not only United States citizens but also aliens who commit wrongs while physically present in the United States.

Indeed, both the Law of Nations Clause and the Alien Tort Statute were adopted against the backdrop of the 1784 Marbois affair. In that incident, the Chevalier de Longchamps, an alien, committed an assault and battery in Philadelphia upon the

7/ A statute enacted pursuant to the Law of Nations Clause can derive from a principle of international law a set of rights and obligations that form part of the federal law of the United States. We do not mean to suggest that principles of international law may not be applied in United States courts unless they have first been affirmatively enacted into law by Congress. In some instances, a court may, where it is contemplated by or consistent with the Act of Congress conferring jurisdiction, borrow principles of international law as a federal rule of decision in a case otherwise properly pending before it. We do argue below (see pages 24-27, infra), however, that the courts may not undertake that function in the context of these cases without firm encouragement or guidance from Congress.

Secretary of the French legation (Mr. Marbois), also an alien. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 120 (Pa. Oyer & Terminer 1784). This affair was described by contemporaries as a violation of the "law of nations," with which Congress was virtually powerless to deal under the Articles of the Confederation. Casto, supra, at 491-493. Indeed, "[t]he Marbois affair was a national sensation that attracted the concern of virtually every public figure in America" (id. at 492 & n.143). In light of this background, we believe it likely that Congress intended to encompass within Section 1350 certain suits between aliens -- at least where, as in the Marbois case, the acts at issue occurred within the legislative jurisdiction of the United States and under circumstances in which the United States might be viewed as responsible under international law. Because the Marbois incident itself would not have fallen within the jurisdictional reach of the Alien Tort Statute if that statute rests solely on the Alien Diversity Clause of Article III, we do not believe the Statute should be so construed. 8/

8/ The commentators have generally concluded that Section 1350 rests on the Federal Question Clause of Article III. See, e.g., 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3585, at 328-329 (1984); 1 J. Moore, et al., 1 Moore's Federal Practice ¶ 0.84, at 735 n.2 (2d ed. 1986); Casto, supra, at 471 n.27, 510-511; Randall, supra, at 52-59.

B. The District Courts Do Not Have Jurisdiction
Of These Cases If Section 1350 Is Based On The
Federal Question Clause Of Article III

Even if Section 1350 is based in part on Article III's extension of the judicial power to cases arising under federal law, so that alien diversity is not required, the instant cases do not fall within that statutory grant of jurisdiction. Congress intended in Section 1350 to confer jurisdiction over torts committed "in violation of the law of nations or a treaty of the United States" only insofar as the law of nations principle or the treaty provision is a part of federal law of the United States that regulates the alleged conduct and affords a cause of action. Compare Merrell Dow Pharmaceuticals Inc. v. Thompson, No. 85-619 (S.Ct. July 7, 1986). There is no evidence that Congress intended to grant the district courts jurisdiction over nondiversity cases such as the present ones, where the subject matter and the parties are foreign to the United States and are not governed by "the Laws of the United States."

1. To the extent that the Alien Tort Statute does not rest on alien diversity, it must rest on the power of Congress to vest the inferior federal courts with jurisdiction over cases "arising under * * * the Laws of the United States, and Treaties made * * * under their Authority." Art. III, § 2, Cl. 1. Section 1350 provides that the district courts shall have jurisdiction over any civil action by an alien for a tort "committed in violation of the law of nations or a treaty of the United

States." Appellants contend that the alleged acts of the defendants in the Philippines that are the subject of these cases violated the "law of nations" as expressed in various international declarations addressing the subject of human rights. See pages 22-24, 28-31, infra. But the Alien Tort Statute was not intended to confer jurisdiction on the courts of the United States to adjudicate any alleged violations of the "law of nations" that occur anywhere in the world, without regard to their nexus to the United States.

For example, an assault on a foreign ambassador may involve a violation of the law of nations. 9/ To ensure that the United States would adhere to this principle, the First Congress, pursuant to its power to "define and punish * * * Offenses against the Law of Nations," provided that an assault on a foreign ambassador within the United States was a criminal offense under the laws of the United States, 10/ and it remains

9/ In the Eighteenth Century, it was thought that such an assault, even by a private citizen, in and of itself violated the law of nations. See Respublica v. De Longchamps, supra. Today, nations are obligated under international law to take "all appropriate steps to prevent any attack" on such a person (Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, Art. 29) and to make such attacks unlawful (Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 28 U.S.T. 1978, TIAS 8532, Art. 2); but an assault by a private citizen would not, taken alone, violate the United States' obligations under these Conventions.

10/ See Act of Apr. 30, 1790, § 28, 1 Stat. 118:

[I]f any person shall violate any safe-conduct or
(Continued)

so today. See 18 U.S.C. 112. We may assume for present purposes that a foreign ambassador injured by such an assault in the United States also could bring a civil cause of action under 28 U.S.C. 1350 against the tortfeasor to recover for the injuries sustained.

By contrast, an assault by a French citizen upon the British Ambassador in France -- while also properly considered a violation of the law of nations in a general sense -- would not be a criminal offense under the laws of the United States. We believe that a civil suit based on such conduct likewise would not be within the jurisdictional reach of 28 U.S.C. 1350, because it would not have been committed in violation of the "law of nations" insofar as it constitutes a part of the substantive law of the United States: U.S. law does not protect the British Ambassador against acts of French citizens in France. 11/

passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.

11/ The proposition that the principles of the law of nations must be incorporated into domestic law, whether by the legislature or the courts, in order to be enforced in the courts of a particular nation, was recognized by Blackstone. He referred to "the principal offences against the law of nations, as animadverted on as such by the municipal laws of England, [as] of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy." 4 W. Blackstone, Commentaries *68, 72.

Similarly, although the conduct alleged in these cases is abhorrent and, in some respects (e.g., torture), may be said to violate the law of nations in a general sense, that conduct does not violate the laws of the United States that give domestic content to the law of nations, because those laws, even where they incorporate international law, do not govern acts committed by one alien against another alien within the territory of their own country. See L. Henkin, *Foreign Affairs and the Constitution* 223-24 (1972). Compare United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630-634 (1818); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196-198 (1820).

2. The background of the Alien Tort Statute supports the conclusion that it does not grant jurisdiction over such suits. That background indicates that the Statute's scope is limited to torts (amounting to violations of either a treaty or the law of nations) committed by citizens of the United States or other persons subject to its jurisdiction, under circumstances in which the United States might be held accountable to the offended nation. 12/ These would principally include violations occurring within the United States and perhaps certain other violations, such as piracy on the high seas, committed outside of the United States but within the reach of its laws. 13/ Such torts would

12/ Compare Restatement (Second) of Foreign Relations Law of the United States § 183 (1965).

13/ Compare O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908);
(Continued)

not, however, include violations, such as those claimed in these cases, committed by officials of a foreign sovereign within its territory and against its own nationals -- a context in which the United States bears no responsibility under the law of nations for either preventing the conduct or affording redress. Cf. 1 Op. A.G. 68, 70 (1797); Lauritzen v. Larsen, 345 U.S. 571, 577-578, 592-593 (1953).

Prior to the adoption of the Constitution, the national government was without power to punish or otherwise provide for the redress of violations of the law of nations within the United States. The Continental Congress could only pass resolutions urging the States to enact criminal laws punishing violations of the law of nations (such as violations of safe conduct or infringements of the rights of ambassadors) and "authoris[ing] suits to be instituted for damages by the party injured." 21 J. Cont. Cong. 1136-1137 (1781). See also 27 J. Cont. Cong. 478-479, 502-504, 564-565 (1784); 29 J. Cont. Cong. 655 (1785); 34 J. Cont. Cong. 109-111 (1788). The Framers of the Constitution concluded that such matters should not be left to the States, and they included among Congress's enumerated powers the power "To define and punish Piracies and Felonies committed on the High

Moxon v. The Fanny, 17 Fed. Cas. 942, 947-948 (D. Pa. 1793); 26 Op. A.G. 250 (1907) (discussed at note 17, *infra*); cf. Bolchos v. Darrel, 3 Fed. Cas. 810 (D.S.C. 1795); 1 Op. A.G. 57 (1795); 1 Op. A.G. 68 (1797). See Casto, *supra*, at 483-484; Tel-Oren, 726 F.2d 774, 783-784 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985).

Seas, and Offences against the Law of Nations." Art. I, § 8, Cl. 10. See The Federalist No. 3 (J. Jay), at 43 (Rossiter ed. 1961) ("Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner").

The Framers conferred this power on Congress in order to enable it to assure other nations that the United States would respect the law of nations. Thus, John Jay argued in The Federalist No. 3 that it was a matter "of high importance to the peace of America that she observe the laws of nations towards all these powers," and he concluded that this would be "more perfectly and punctually done by one national government" than by 13 separate States (id. at 43); see also id. at 44 ("the national government * * * will neither be induced to commit the wrong themselves, nor want power or inclination to prevent or punish its commission by others."). 14/ There is no evidence that the

14/ See also id. at 44 (emphasis in original) ("So far, therefore, as either designed or accidental violations of treaties and of the law of nations afford just causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the safety of the people."); The Federalist No. 42 (J. Madison), at 265 (The Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."); The Federalist No. 80 (Hamilton), at 476 (explaining the purpose of Article III jurisdiction over cases involving aliens, especially cases those arising under treaties or the law of nations: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing
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Framers were concerned with punishing violations of the law of nations committed by other nations (or their nationals) against their own citizens within their own territories. Because the Alien Tort Statute was passed only two years after the Constitution was adopted and implements the Law of Nations Clause of the Constitution, the statute likewise should not be construed to confer jurisdiction on the federal courts over suits brought by aliens to obtain redress for torts committed in a foreign country that have no nexus to the United States. 15/

3. The limitation upon the jurisdictional reach of Section 1350 that is suggested by the Law of Nations Clause of Article I is supported by the text of the statute. The reference to a tort "committed in violation of * * * a treaty of the United States" presumably means a tort committed in violation of a specific treaty obligation undertaken by the United States to afford protection to a class of persons that includes the alien plaintiff. It cannot reasonably be read to refer to a violation of a treaty obligation undertaken by another nation (particularly the nation of which the alien plaintiff is a citizen), even if

it.").

15/ Compare Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (acts of Congress ordinarily are construed to apply "only within the territorial jurisdiction of the United States"); Blackmer v. United States, 284 U.S. 421, 437 (1932) (same); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (same). See Restatement (Second) of Foreign Relations Law of the United States §§ 10-35 (1965); Restatement (Second) of Foreign Relations Law of the United States (Revised) §§ 402-03 (Tent. Draft No. 6, 1985); id., § 403 (Tent. Draft No. 7, 1986).

the United States also happens to be a party to the same treaty. This construction suggests that the "in violation of the law of nations" component of the statute should be read in the same manner -- namely, as limited to violations of United States obligations under the law of nations to afford protection to aliens against certain torts committed by United States citizens or other persons subject to its jurisdiction.

In fact, the final phrase in 28 U.S.C. 1350 ("of the United States") can reasonably be read to modify both "treat[ies]" and "the law of nations," so that the statute by its terms confers jurisdiction only over suits for a tort "committed in violation of the law of nations * * * of the United States" -- i.e., in violation of duties under the law of nations as accepted and applied by the United States in the regulation of its domestic affairs and the affairs of its people. Cf. Lauritzen v. Larsen, 345 U.S. at 578. But even if the text of Section 1350 might literally be read to cover suits between aliens arising out of incidents entirely within the jurisdiction of a foreign country, such a "surface literal meaning [of] a jurisdictional provision * * * would not be consistent with the "sense of the thing" and would confer upon [the] Court a jurisdiction beyond "what naturally and properly belongs to it."" Heckler v. Edwards, 465 U.S. 870, 879 (1984) quoting Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 94 (1960) (Frankfurter, J., dissenting) (quoting American Security & Trust Co. v. District of Columbia, 224 U.S. 491, 495 (1912) (Holmes, J.)). Section 1350 therefore

does not provide jurisdiction over plaintiffs' claims in the present cases.

II. PLAINTIFFS DO NOT HAVE A CAUSE OF ACTION ARISING UNDER FEDERAL LAW FOR THE ALLEGED VIOLATIONS OF THE LAW OF NATIONS IN THE PHILIPPINES

If the court should conclude, contrary to our submission in Point I, that the district courts have jurisdiction under 28 U.S.C. 1350, these cases nevertheless should be dismissed because plaintiffs do not have a cause of action conferred by United States federal law to recover damages for torts allegedly committed by the defendants in the Philippines. 16/

Section 1350 does not, in and of itself, create a cause of action. The statute is purely jurisdictional. See Casto, supra, at 478-480 (any suggestion to the contrary is "simply frivolous"). 17/ Analogous federal jurisdictional statutes

16/ It is irrelevant for present purposes whether plaintiffs might have causes of action under the laws of the Philippines (including any laws adopted by the Philippines Government that incorporate into Philippines law what that Government deems to be appropriate principles of international law). Even if Congress could under Article III extend the (non-diversity) jurisdiction of the federal courts to a case that would appear to be governed solely by the substantive law of a foreign country, the First Congress plainly did not do that in the Alien Tort Statute.

17/ A 1907 opinion by Attorney General Bonaparte stated that the Alien Tort Statute (along with the federal diversity statute) "provide a forum and a right of action." 26 Op. Atty. Gen. 250, 252-253 (1907). He did not elaborate upon or offer any basis for the latter point, which was not directly at issue, and, as noted above, federal jurisdictional statutes do not generally provide a cause of action. In addition, the conduct there at issue -- the diversion of water from the Rio Grande River by an irrigation company that injured downstream water users in Mexico -- occurred (Continued)

likewise do not create private rights of action. See e.g., Davis v. Passman, 442 U.S. 228, 236-244 (1979) (28 U.S.C. 1331); compare Handel v. Artukovic, 601 F. Supp. 1421, 1426-1427 (C.D. Cal. 1985). Indeed, in the case primarily relied upon by plaintiffs, the Second Circuit declined to construe Section 1350 as "granting new rights to aliens" (Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980)). 18/ See also Dreyfus v. Von

in the United States (not, as here, in a foreign country); it was alleged to have violated a specific prohibition in a treaty between the United States and Mexico (not, as here, more general principles of international law that have not been formally incorporated into domestic law by Act of Congress or treaty); and the suggested right of action -- a suit by one private party against another for wrongful diversion of water -- was familiar to domestic law (unlike the instant suits against former officials of a foreign government). Cf. County of Oneida v. Oneida Indian Nations, 470 U.S. 226, 234-236 (1985).

18/ In Filartiga, the Second Circuit held, in accordance with the United States' amicus submission, that "an act of torture committed by a state official against one held in detention violates * * * the law of nations" (630 F.2d at 880). The Second Circuit further held that federal jurisdiction could be exercised under Section 1350 over a suit brought by one Paraguayan national against another based on such torture in Paraguay. 630 F.2d at 884. In so ruling, the Second Circuit failed to consider whether plaintiffs had a private right of action, as such, under federal law. See id. at 887, 889. The United States, in its amicus submission, likewise did not address this issue in terms of whether the plaintiffs had an implied private right of action under federal law, but the United States did submit that the right under international law to be free from torture is "judicially enforceable" in a United States court. U.S. Mem. at 20-25. Although the United States adheres to the view it expressed in Filartiga that an act of torture committed under color of official authority violates principles of international law, on further consideration, we do not believe, for the reasons stated in the text herein, that the plaintiffs in Filartiga had a cause of action cognizable in federal court for a violation of those principles in Paraguay.

The United States' amicus submission in Filartiga also did
(Continued)

Finck, 534 F.2d 24,28 (2d Cir.), cert. denied, 429 U.S. 835 (1976). Plaintiffs cite no other federal statute that confers a private right of action in circumstances such as these. Nor, finally should this court "imply" a private right of action, cognizable in the courts of the United States under 28 U.S.C. 1350, in favor of foreign national plaintiffs against officials of their own country, either under a "treaty of the United States" or under the "law of nations" insofar as it forms a part of the law of the United States.

A. No Treaty Gives Plaintiffs A Private Right Of Action

Plaintiffs do not have a private right of action based on any provision of a United States treaty. Treaties are compacts

not specifically address the scope of a district court's jurisdiction under 28 U.S.C. 1350, as we have done in Point I of the brief. However, for the reasons stated in Point I, we disagree with the Second Circuit's view that 28 U.S.C. 1350 confers jurisdiction on the district courts over suits based on conduct that occurred in another country and involved only its nationals (and that therefore was not directly governed by the law of the United States), merely because the conduct allegedly violated general principles of the "law of nations" that purportedly applied in that other country. See 630 F.2d at 885-889. Even if Congress might constitutionally vest the federal courts with jurisdiction to entertain such suits (see Casto, supra, at 512-525; cf. Tel-Oren, 726 F.2d at 782-788 (Edwards, J. concurring)), there is no basis for believing that the First Congress contemplated such a novel and intrusive function for the United States courts when it enacted the Alien Tort Statute in 1789. The more recent Second Circuit ruling in Amerada Hess Shipping Corp. v. Argentine Republic, No. 86-7602, 7603 (Sept. 11, 1987), simply reiterated the Filartiga rationale that "[i]f an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction" (slip op. 5171); Amerada Hess therefore provides no additional support for jurisdiction here.

between nations that ordinarily do not confer judicially enforceable private rights in the absence of language clearly manifesting such an intent. Head Money Cases, 112 U.S. 580, 598-599 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). In any event, no treaty creates rights under United States law in favor of foreign nationals against officials of their own country acting within its territory.

The only formal treaty upon which plaintiffs rely is the United Nations Charter. The U.N. Charter provides that one of the "[p]urposes of the United Nations [is] * * * [t]o * * * promot[e] and encourag[e] respect for human rights and for fundamental freedoms." Art. 1, ¶ 3, 59 Stat. 1031, 1037. This general language, however, speaks to the member nations (see Art. 2, 59 Stat. 1037); it does not purport to create private rights of action (compare Cannon v. University of Chicago, 441 U.S. 677, 689-693 (1979)). And the courts have held that the U.N. Charter "do[es] not create rights enforceable by private litigants in American courts." Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373-375 & n.5 (7th Cir. 1985) (collecting authorities); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); People of Saipan v. Department of Interior, 502 F.2d 90, 101-103 (9th Cir. 1974) (Trask, J., concurring), 420 U.S. 1003 (1975); Sei Fujii v. State of California, 38 Cal.2d 718, 722-725, 242 P.2d 617, 620-622 (1952);

but see United States v. Tascannino, 500 F.2d 267, 277-279 (2d Cir. 1974).

The plaintiffs in these cases do not have an implied federal-law cause of action under the U.N. Charter for the additional reason that the acts of which they complain were not in violation of any obligations assumed by the United States when it became a party to the U.N. Charter. Adherence to the U.N. Charter did not extend the substantive law of the United States, including U.S. treaty obligations, into the territories of the other parties to the Charter. 19/ Nor can the Charter be construed to authorize or obligate a member to provide judicial redress for citizens of another member based on that member's violations of the Charter.

B. The Law Of Nations Does Not Give Plaintiffs A Private Right Of Action

Plaintiffs do not have a private right of action based on the "law of nations." None of the sources of international law cited by plaintiffs suggests a private right of action, let alone

19/ Plaintiffs also cite: (1) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Gen. Ass. Res. 39/46, U.N. GAOR Supp. (No. 51) (A/39/51) 197 (1975); (2) the American Convention on Human Rights, OAS Treaty Series No. 36, at 1, OAS Off. Rec. BEA/Ser. 4/V/II 23, Doc. 21, Rev. 2 (Eng. Ed. 1975); (3) the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, U.N. Gen. Ass. Res. 2200 (XXI) A, U.N. Doc. A/63/6 (Dec. 16, 1966). However, the United States is not a signatory to the first of these treaties and the Senate has not consented to the ratification of the other three; to the extent that they nevertheless form part of the law of nations, they are covered by the considerations in the next section.

one cognizable in the courts of a country that is a stranger to the conduct complained of.

1. Plaintiffs argue that a "court created," "common law" of private tort remedies for violations of international law would be analogous to a Bivens remedy for tortious conduct in violation of the United States Constitution. 20/ See Sison Br. 42-45. But the two situations are quite different. The United States Constitution applies of its own force, and without possibility of legislative amendment, to restrain the actions of governmental officials in the United States. By contrast, the law of nations applies to matters within the jurisdiction of the United States only insofar as it is accepted into the laws of the United States (either by Congress or by a court acting pursuant to legislative authorization), and its content and application are at all times subject to the control of Congress pursuant to its power to "define and punish * * * Offences against the Law of Nations" (Art. I, § 8, Cl. 10). 21/ Compare United States v. Stanley,

20/ See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

21/ Even under Bivens, a private right of action will not be found where there are "special factors counselling hesitation in the absence of affirmative action by Congress" (United States v. Stanley, No. 86-393 (S.Ct. June 25, 1987), slip op. 8-9; Bush v. Lucas, 462 U.S. 367, 374-380 (1983); Chappell v. Wallace, 462 U.S. 296, 298 (1983)). Especially where, as here, the United States courts are asked to perform the sensitive task of fashioning a damage remedy against officials of a foreign government, the primary role of the political Branches is a compelling factor counselling hesitation. See Tel-Oren, 726 F.2d at 801-808 (Bork, J., concurring); Casto, supra, at 482 ("A (Continued)

slip op. 9. Where Congress has enacted a law defining the law of nations in a particular setting, the question whether a private right of action should be recognized for a violation of the law of nations would presumably be controlled by Cort v. Ash, 422 U.S. 66 (1975), and its progeny. A private right of action will be recognized in those circumstances only if Congress affirmatively intended to confer one. See California v. Sierra Club, 451 U.S. 287, 293, 297 (1981); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377-378 (1982); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985).

In the instant cases, plaintiffs do not rely upon, or cite, any Act of Congress that "defines" any substantive principles of international law to be part of United States law that governs the treatment of prisoners even within the United States (compare 42 U.S.C. 1997a(a)) -- and that might be the starting point for implying a private right of action under a federal statute. Nor is there any Act of Congress that purports to confer any rights under United States law (whether drawn from principles of international law or otherwise) on foreign nationals imprisoned in their own country. Accordingly, there is no basis whatever to conclude that Congress intended to confer on anyone a private

unilateral judicial expansion of Bivens to the field of rights deemed by a court to be created by international law and treaties of the United States would stand the Constitution on its head."); compare Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208-209 (D.C. Cir. 1985).

right of action based on a violation of any such principles. 22/ If these suits had been brought by United States citizens, in prison in this country, against their United States jailors, and if the court concluded that the conditions of the plaintiffs' confinement did not constitute cruel or unusual punishment under the Eighth Amendment and did not otherwise violate any provisions of federal law, it seems obvious that a federal court would not be free to fashion a private damage remedy in favor of the prisoner plaintiffs based solely on alleged violations of principles of "international law." A fortiori, a court in the United States has no authority to fashion a damage remedy under "international law" against officials of a foreign government for actions taken within its borders against its own citizens.

2. The traditional role of the "law of nations" is not the creation of private rights. As the Supreme Court said in Sabbatino, 376 U.S. at 422-423:

22/ By contrast, the classic violations of the law of nations that were recognized when the Alien Tort Statute was enacted -- violations of safe conducts and passports, infringements of the rights of ambassadors, and piracy (see note 11, supra) -- were specifically made criminal offenses under the laws of the United States in 1790 (Act of Apr. 30, 1790, §§ 8-12, 25-28, 1 Stat. 113-115, 117-118), and they remain so today (18 U.S.C. 112, 1651-1661). Especially in light of the ancient lineage of these offenses against the law of nations, it may be that a private right of action, cognizable under 28 U.S.C. 1350, could properly be implied under the federal statutory provisions that proscribe such conduct within the jurisdiction of the United States. See Tel-Oren, 726 F.2d at 813-815 (Bork, J., concurring).

The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.

See also Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980). While several documents on which appellants rely are of course concerned generally with the treatment of individuals, 23/ none purports to create a private damage remedy for a violation of the principles they declare 24/

23/ See J. Blum & R. Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 Harv. J. Int'l Law 53, 64-97 (1981).

24/ Some of these documents are merely aspirational and contain only precatory language. See Tel-Oren, 726 F.2d at 818 (Bork, J., concurring), discussing (1) Universal Declaration of Human Rights, U.N. Gen. Ass. Res. 217(A)(III) (Dec. 10, 1948), 3 U.N. GAOR, U.N. Doc. 1/777 (1948); (2) International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, U.N. Gen. Ass. Res. 2200(XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966); and (3) American Convention on Human Rights, OAS Treaty Series No. 36, at 1, OAS Off. Rec. BEA/Ser. 4/V/II 23, Doc. 21, Rev. 2 (Eng. Ed. 1975). The other documents cited by plaintiffs that appear to fall in this category are (4) American Declaration of the Rights and Duties of Man, Art. 26, OAS Doc. No. 21 (Rev. 2) 15 (1975), OEA Serv. L./V/II 23; (5) Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, U.N. Gen. Ass. Res. No. 2625 (XXV) (Oct. 24, 1970); and (6) Standard Minimum Rules for Treatment of Prisoners, U.N. Doc. E/3048 (1957).

Other of the documents cited by plaintiffs simply do not reflect, either explicitly or implicitly, an agreed-upon system of private "international tort" remedies: (1) U.N. Charter, 59 (Continued)

-- much less a remedy in the courts of a nation that is a stranger to the alleged wrong. 25/

For example, the most specific document cited by plaintiffs that addresses the subject of torture is the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Gen. Ass. Res. 39/46, U.N. GAOR Supp. (No. 51) (A/39/51) 197 (1975). As noted above (see note 19, supra), however, the United States is not a party to that Convention, which alone is a sufficient reason for a court in the United States to refrain from implying a private right of action to enforce its provisions. But even if the United States were a party to the Convention, it clearly would not provide an "international tort remedy" to the plaintiffs in these cases. First, the primary focus of the Convention is criminal (as

Stat. 1031; (2) U.N. Declaration Against Torture, Gen. Ass. Res. 3059, 28 U.N. GAOR Supp. (No. 30) 74, U.N. Doc. A/9030 (1973); (3) U.N. Declaration on the Protection of All Persons From Being Subject to Torture, Gen. Ass. Res. 3452, Annex, Art. 2, 30 U.N. GAOR Supp.. (No. 31) 91, U.N. Doc. A/10034 (1975); (4) U.N. Resolution on Disappeared Persons, U.N. Gen. Ass. Res. 33/173 (1978); (5) U.N. Resolution on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, U.N. Gen. Ass. Res. 35/178; and (6) U.N. Resolution on Code of Conduct for Law Enforcement Officials, U.N. Gen. Ass. Res. 35/170:

25/ See also Casto, supra at 475-76 ("Those who advocate the creation of a system of private tort remedies based solely on international law have adduced virtually no positive evidence supporting the existence of such a remedy."); Comment, Torture As A Tort In Violation of International Law: Filartiga v. Pena-Irala, 33 Stan. L. Rev. 353, 357-59 (1981) ("to interpret international human rights law to create a federal private right of action overstates the level of agreement among nations on remedies for human rights violations.").

distinguished from remedial) jurisdiction over acts of torture. Arts. 4 & 5. Second, although the Convention states that "[e]ach State Party shall insure in its legal system that the victim of an act of torture obtains redress and * * * fair and adequate compensation," that language pertains to matters under "national law" within the jurisdiction of the "State Party" in which the acts were committed; the language is quite inconsistent with any notion that a prisoner wronged in his own state should have redress in the courts of another. Art. 14; see also Art. 12 (State to ensure prompt investigation "whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."). Thus, to the extent the Convention is implicated here, it is directed to remedies that might be provided by the Government of the Philippines under its own law, not the fashioning of remedies by the courts of other nations under their laws (including the view embodied in the laws of those other nations regarding the appropriate principles of international law). 26/

26/ As Ambassador Richard Shifter stated after the Convention was adopted, "[i]n the final analysis * * *, it is the States members of the international community which are morally responsible for implementing the existing prohibition against torture and other forms of ill-treatment." Press Release, USUN 164-(84) (Dec. 10, 1984); U.N. Doc. A/39/PV. 93, at 12 (Dec. 12, 1984).

Similarly, the most specific of the U.N. General Assembly Resolutions cited by plaintiffs, the Declaration on the Protection of All Persons From Being Subject to Torture (see note 24, supra), declares torture and other cruel, inhuman or
(Continued)

In sum, there is no support in domestic or international law for the implication by a court in the United States of a private damage remedy against the present or former official of a foreign government for torts allegedly committed against its citizens within its own territory. If the courts of the United States are to assume that extraordinary responsibility, the authority to do so must be expressly conferred by Congress. Compare Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490-491 (1983). 27/

degrading treatment or punishment of prisoners to be "an offense to human dignity" worthy of "condemn[ation]" and suggests that "[e]ach State Party * * * ensure" legal remedies for such acts under "national law." This document obviously does not itself provide a private remedy where, as here, "national law" (the law of the United States) does not so provide. Nor does it contemplate that one nation will furnish a remedy for acts committed by or within the territory of another.

27/ Of course, in some contexts, where Congress has not passed a specific statute defining the law of nations applicable to a particular set of facts, a court, in a case otherwise properly pending before it, might fill this void by adopting relevant principles of international law as the most appropriate federal rule of decision. See, e.g., The Paquete Habana, 175 U.S. 677 (1900). But the Supreme Court has made clear that the courts may fashion "federal common law" only as a "'necessary expedient'" in a "'few and restricted' instances" (Milwaukee v. Illinois, 451 U.S. 304, 313-314 (1981)(citations omitted)). This limited authority of the federal courts to fashion substantive federal common law in order to fill interstices in federal statutory law plainly does not permit a court to fashion remedies for torts committed by aliens against aliens in a foreign country, where even federal statutory law does not ordinarily apply. This case is therefore quite different from Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), where the Court found a congressional intention that the federal courts fashion a body of federal law to govern the interpretation of collective bargaining agreements governing labor relations in the United States -- relations that were already pervasively regulated by substantive federal law.

III. THE COURT SHOULD NOT IN ANY EVENT RESOLVE THE APPLICABILITY OF THE ACT OF STATE DOCTRINE

In addition to inquiring whether the plaintiffs have a cause of action cognizable under 28 U.S.C. 1350, the court's July 16, 1987 order inviting the United States to file a brief poses two additional questions, both of which relate to the possible application of the act of state doctrine to these cases. We shall first address the latter of these remaining questions.

1. Question 3 inquires: "Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States? See Republic of the Philippines v. Marcos, Nos. 86-6091, 86-6093, slip op. at 32 (9th Cir. 1987)." It is the view of the Department of State that the entertainment of these suits would not embarrass the relations between the United States and the Government of the Philippines. Indeed, the Government of the Philippines has filed a brief amicus curiae arguing that these suits should be permitted to proceed in the district courts. 28/

At the page of the prior Marcos opinion cited in Question 3, the court stated that "[a]bsent express encouragement by the political branches of our government," it would be reluctant to embark upon an adjudication of the particular issues involved.

28/ The panel majority in Republic of the Philippines v. Marcos "wonder[ed] how the current Philippine government would react to a pronouncement by the courts of the United States that Mr. Marcos' actions were entirely legal and proper" (slip op. 30 n.14). In light of the amicus filings by the Government of the Philippines, we must assume that it understands the risk of an adverse judgment.

See Republic of the Philippines v. Marcos, slip op. 32. Since we do not believe that the district courts have jurisdiction or that plaintiffs have a cause of action under United States law (see pp. 7-31, supra), we are of course unable to give "express encouragement" to adjudication of these cases in federal court.

2. Question 2 posed by the July 16 order inquires: "May the federal courts hear these consolidated cases, despite the 'act of state' doctrine, either because wrongful death, wrongful arrest or torture cannot be 'acts of state' as a matter of law, or because the 'balance of relevant considerations' favors a hearing? See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)." The possible application of the act of state doctrine to these cases presents difficult questions. Because these cases are not cognizable under 28 U.S.C. 1350, we believe the court need not and should not seek to resolve the application of the act of state doctrine (or other doctrines that might warrant declining to adjudicate these cases), and we accordingly do not propose a definitive resolution of those issues here. However, we do offer the following comments:

a. The act of state doctrine is only one of several legal doctrines that might in appropriate circumstances warrant a United States court's declining to adjudicate a claim by foreign nationals against a former high official of their own government for acts committed in their own country. For example, the court in the prior Marcos case concluded that quite aside from the act

of state doctrine, 29/ the political question doctrine rendered it unlikely that the Republic of the Philippines would succeed on the merits of its claims (slip op. 37-40; cf. Tel-Oren, 726 F.2d at 801-803; id. at 823-827 (Robb, J., concurring)). A court also might consider the principle that the courts of one nation will not enforce the penal laws of another (see Sabbatino, 376 U.S. at 413-415); evidentiary privileges and official immunities recognized as a matter of foreign, international or United States law; and the appropriateness of dismissal on grounds of forum non conveniens (see Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), cert. denied, 469 U.S. 1108 (1985) 30/) or abstention (cf. Younger v. Harris, 401 U.S. 37 (1971); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)). We express no view here on the possible application of any of these doctrines to these cases or to others brought against Mr. Marcos.

29/ We read the prior Marcos decision to rest primarily on the predictive judgment, necessary in the context of a request for a preliminary injunction, that it was unlikely that plaintiffs would ultimately prevail on the merits. The court did not order the suit dismissed and did not purport to resolve all questions concerning the application of the act of state doctrine.

30/ See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 n.29(1981)) (the "need to apply foreign law" may "favor[] dismissal"); id. at 255 (United States courts are "fully justified" in distinguishing between "resident or citizen plaintiffs and foreign plaintiffs" with respect to the choice of forum); see also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195 (2d Cir. 1987).

In its opinion in the prior Marcos case, the court identified a number of factors that, in its view, made it especially difficult to determine that adjudication of Mr. Marcos's liability to his own country and its people is an appropriate undertaking for the courts of the United States: Mr. Marcos's former status as head of state and the asserted breadth of his "dictatorial" powers (slip op. 12, 26-27, 29, 37-38, 39-40); the political differences between the current Government of the Philippines and the Marcos regime (id. at 30-31); the possible intrusion by the courts into our relations with the Government of the Philippines and other aspects of foreign relations that are properly the concern of the political branches (id. at 32-36); the need for a United States court to pass on a former head of state's claim of immunity under the constitution of his nation (id. at 36-37); and the need to decide novel and difficult questions of Philippine law and international law concerning the scope and propriety of the exercise of powers under a regime of martial law (id. at 36-39).

We do not believe that these considerations should be given expression solely, or even principally, through the act of state doctrine. As we explain below, although the act of state doctrine responds to some of these concerns, that doctrine actually has limited and rather precise contours, and it ordinarily does not require the dismissal of a suit merely because the suit touches

upon foreign relations concerns. 31/

b. The classic formulation of the act of state doctrine was set forth in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Although this quotation from Underhill suggests that the doctrine is absolute, the Supreme Court in subsequent cases has declined to lay down an "inflexible and all-encompassing" rule (Sabbatino, 376 U.S. at 428). See First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976). There accordingly are several distinct questions that must be addressed in determining whether the act of state doctrine applies in a particular case:

First, the conduct at issue must be the act of the sovereign. Dunhill, 425 U.S. at 694-695. The conduct must have been a "public act," involving an exercise of sovereign authority. As this court observed in its prior Marcos decision, "not everything a public official does is an official act; to the extent Mr. Marcos engaged in actions as a private citizen, he is

31/ In Sabbatino, the effect of application of the act of state doctrine was not to require dismissal of the suit, but rather to apply the act of state as a rule of decision in the case.

subject to suit like anyone else." Republic of the Philippines v. Marcos, slip op. 26. When the government official involved is the former head of state and exercised allegedly dictatorial powers, this distinction may be difficult for a United States Court to draw.

Second, even if the conduct is attributable to the foreign government, it must be of the sort to which the act of state doctrine applies. In Dunhill, for example, four Justices concluded that the concept of an act of state does not apply to the repudiation by a foreign sovereign of an ordinary commercial debt. 425 U.S. at 695-706 (opinion of White, J.).

Third, even if the conduct was an act of state, that does not end the matter. In Sabbatino, the Court concluded that the expropriation at issue was an act of state whose validity would not be considered by United States courts, but it observed that "[t]he balance of relevant considerations" might permit a different result in other circumstances. 376 U.S. at 428.

c. The court asks in Question 2 of its July 16 order whether these suits can be entertained, despite the act of state doctrine, on the theory that "wrongful death, wrongful arrest or torture cannot be acts of state as a matter of law." In our view, characterizing the conduct at issue as "wrongful" does not necessarily remove it from the scope of the act of state doctrine; to the contrary, the very purpose of that doctrine is to prohibit a court of the United States from inquiring into

whether an official act was lawful. ^{32/} Cf. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 692-695 (1949). In Sabbatino, for example, it was alleged that the expropriation at issue was illegal as a matter of international law, but that did not render the expropriation any less an official act of the Cuban Government. Conversely, not every act undertaken by a public official under color of office is an "act of state." Determining whether the conduct alleged here constitutes acts of state would involve difficult evidentiary and other questions.

Question 2 posed by the court also inquires whether even if the conduct constitutes an act of state, the "balance of relevant considerations" (Sabbatino, 376 U.S. at 428) suggests that the suit should be entertained. Weighing in favor of a hearing in United States courts would be the fact that there may be a greater consensus among nations here than in Sabbatino that at least some of the conduct alleged (e.g., torture) violated international law. Compare 376 U.S. at 428. Weighing against such a hearing, however, would be the fact that the acts complained of in these cases were torts committed in a foreign country by some citizens of that country against other citizens of that country; unlike Sabbatino, First National City Bank, and

^{32/} Although there may be cases where the pleadings demonstrate the need to adjudicate the lawfulness of a foreign sovereign act, the burden is normally on the defendant to establish that the challenged conduct in fact involved an act of state. Republic of the Philippines v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986).

Dunhill, these cases involve no close relationship between the challenged conduct and any interests of the United States or its people as such: the defendants (and the then-Government of the Philippines) did not owe a duty to the United States as regards their observance of Philippine law or the principles of international law that may be deemed to have been applicable to the Philippines. It accordingly may be questioned whether the courts of the United States should be asked to hold the defendants accountable for alleged violations of Philippine law or international law (cf. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)) -- at least in the absence of an Act of Congress expressly authorizing the courts to undertake such a novel and sensitive task.

d. As can be seen, the act of state issues in this case are difficult and are closely related to the question whether a cause of action should be implied by the courts under the law of nations. See Tel-Oren, 726 F.2d at 801-808 (Bork, J., concurring). Because in our view the courts have no jurisdiction in these cases and the plaintiffs do not in any event have a cause of action under federal law, we urge the court not to reach the act of state issues in these cases at this time. Instead, if the court does not affirm the orders of dismissal on the ground that the district courts are without jurisdiction or that plaintiffs are without a cause of action, we suggest that the court vacate the judgments below and remand the cases to the

district courts for consideration of the possible applicability of other doctrines that may bear on their justiciability. Resolutions of those other issues might obviate or facilitate resolution of the act of state questions.

CONCLUSION

The judgments of the district courts should be affirmed.
Respectfully submitted.

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