prevail over both their State Aboriginal Heritages Act and the wishes of the Development Commission and Aboriginal communities," (pp. 68-69) Federal Heritages legislation will be necessary to resolve differences between mining development companies and state governments on one hand, and aboriginal communities on the other. Labor intends to draw upon Section 51 of the Constitution: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(XXVI) The people of any race for whom it is deemed necessary to make special laws;
(XXXI) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."

Theoretically, therefore, the acquisition of property on "just terms" by the Commonwealth for any constitutional purpose is possible, and it is said that this purpose also includes that of making laws with respect to Aboriginals. It is interesting to note, however, that the proponents of this scheme distinguish between "just" compensation and full monetary compensation, and argue that the former does not necessarily lead to the latter. The controversy continues in Australia as in any nation with strategic natural resources located within land populated or claimed by indigenous people.

It remains to be seen how these complex issues are to be resolved and, ultimately, whether the reminders of the aboriginal Dream time will have to be sacrificed to 20th century realities.

Redress for Violations of International Law in Federal Courts

C. ROBERT BARKER

In a recent opinion, *Filartiga v. Peña-Irala,*[1] Judge Irving R. Kaufman of the Second Circuit allowed a hearing in a tort action stemming from the death-by-torture of a political dissident's son in Paraguay. The logic used in this case raises questions about the extent of the remedies available in United States courts for violations of international law. Under this opinion, courts may now redress

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1. No. 79-6090 (2d Cir. June 30, 1980) reported in 19 INT'L LEGAL MATS. 999 (1980) (hereafter referred to as *Filartiga*). See also Kaufman, "A Legal Remedy for International Torture?" in the *New York Times Magazine* (Nov. 9, 1980).

"violations of the law of nations or treaties"[2] if an appropriate remedy exists. The question to be asked is whether the courts must now apply remedies for violations of international law wherever such remedies exist; or whether they will be free to ignore international law, as they have in the past, unless forced to comply by Executive action.

In *Filartiga,* the court found a remedy in a seldom-used section of the Judiciary Act of 1789, in which Congress specifically authorized the courts to redress torts committed against aliens in violation of international law.[3] If *Filartiga* stands for the proposition that individuals have rights under international law which may be redressed in American courts according to statutory remedies, may violations of those rights be redressed according to non-statutory remedies? This note will argue that, under *Filartiga* and its predecessors, violations of treaties or of international law in the specific area of accumulating evidence for use in United States courts should be redressed by excluding the evidence (or the person in the case of a kidnapping) from the jurisdiction of the court. Such exclusion has long been the accepted remedy for a seizure in violation of the Constitution.[4] As the law of nations is a fundamental part of the Constitution,[5] it is not a large step to conclude that if violations of international law or of treaties may be redressed in American courts, then seizures in violation of that law may also be redressed through the application of the exclusionary rule.

In *Filartiga,* Paraguayan police officials tortured to death Joelito Filartiga, the seventeen year-old son of political dissident Dr. Joel Filartiga. The inspector-general of Asunciòn's police department, Americo Norberto Peña-Irala, woke Joelito's sister Dorothy in the middle of the night on March 29, 1976, to show her the mutilated body of her brother and to warn her father to cease his political activities. Dr. Filartiga later initiated a criminal action in Paraguay against Peña and the police department. This action was suspended after the attorney pressing the suit was arrested, shackled to a wall, and threatened with death.[6]

In July 1978, Peña entered the United States on a visitor's visa and settled in Brooklyn. Dolly Filartiga, now living in Washington, D.C. with her father, learned of his presence in the United States and reported him to the Immigration and Naturalization Service, which ordered Peña deported in April 1979. In the meantime, Dolly served Peña with a summons and a civil complaint for the

2. Alien Tort Statute, 28 U.S.C. § 1350, 1 STAT. 77 (1789). For the purposes of this note, I will use the term "law of nations" as meaning "international law."
3. *Id.* For a contrary result, see Dreyfus v. von Finck, 534 F.2d 24 (2d Cir. 1976). There the court refused to apply the "law of nations" because it was not "self-executing."
4. *See* Welsh and Schranck, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 MINN. L. REV. 251 (1974).
5. The Paquete Habana, 175 U.S. 677, 700 (1900).
6. 19 INT'L LEGAL MATS. 967-68 (1980).

wrongful death of Joelito. The case sought compensatory and punitive damages of $10 million.[7]

Although the Filartigas' pleadings cited the United Nations Charter, the United Nations Declaration Against Torture, the Universal Declaration on Human Rights and other relevant documents of international law, the court found jurisdiction under the Alien Tort Statute, a dusty law enacted by the first Congress.[8] Judge Kaufman concluded that the federal courts had always been competent to adjudicate private rights recognized by international law. Indeed, the court cites publicists, as well as the records of the Constitutional Convention, to show that the Framers intended to "cause infractions of treaties, or of the law of nations, to be punished."[9]

An initial problem presented by *Filartiga* is whether torture could be considered an infraction of the law of nations. Kaufman researched the question well before coming to his conclusion that the rule against torture commanded the "general assent of civilized nations."[10] Undoubtedly, scholars of international law will spare no ink on the correctness *vel non* of this holding. However, this part of the opinion is unimportant to our analysis in light of *United States v. Lira*[11] and *United States v. Toscanino*[12] which indicate that Kaufman's conclusion does not represent a revoluntionary step in the development of international human rights law.

What is novel about the case is Judge Kaufman's opinion that, even in the absence of specific authorization by Congress, the courts are bound to apply international law.[13] This decision provides for redress of violations even if no statutory remedy exists. A strict interpretation of this ruling would compel a responsible judiciary to act in accord with international law. This would apply particularly in cases where a ruling contrary to international law might embarrass the American Government or violate international law.

Although this reasoning appears to be clear and persuasive, U.S. courts have accepted jurisdiction in the past despite the protests of the aggrieved governments. In *United States v. Toscanino,*[14] for example, agents allegedly acting on behalf of the United States Drug Enforcement Agency kidnapped Toscanino from Uruguay and drove him to Brazil where he endured three weeks of inter-

7. *Id.* at 971.
8. *See* note 2, *supra.* This section of the Judiciary Act of 1789 had only been used twice before this case. Bolchos v. Darrell, 3 Fed. Cas. 810 (D.S.C. 1795); Adra v. Obst, 195 F. Supp. 857 (D.Md. 1961).
9. 1 Farrand, *Records of the Federal Convention* 19 (Rev. Ed. 1937) (notes of James Madison), cited in 19 INT'L LEGAL MATS. 976 (1980). *See also* THE FEDERALIST, Nos. 3 and 4.
10. 19 INT'L LEGAL MATS.
11. 515 F.2d 68 (2d Cir. 1975). *See especially* Judge Oakes' concurring opinion.
12. 500 F.2d 267 (2d Cir. 1974).
13. 19 INT'L LEGAL MATS. 977 (1980).
14. 500 F.2d 267 (2d Cir. 1974).

rogation accompanied by physical torture. He was then drugged and put on a plane to the United States where he was arrested.[15] The appeals court ignored the protests of Uruguay and Toscanino was eventually convicted after failing to demonstrate the involvement of United States officials in his kidnapping and torture. The district court ignored both the torture itself and two treaties with Uruguay, when it convicted Toscanino on remand.

Other federal courts not dealing with the emotionally-charged issue of torture raised by *Toscanino* and *Filartiga,* have ignored the prescriptions of international law in the interest of pursuing specific policy goals. *United States v. Conroy*[16] is a recent example of such a policy-oriented decision. In that case, a Coast Guard cutter entered into the territorial waters of Haiti in pursuit of an American vessel carrying marijuana. The defendants claimed that the evidence against them should have been excluded because, *inter alia,* the Coast Guard had violated the 1958 Convention on the High Seas.[17] The Court said the Convention had not been violated, but held that even if the seizure had violated the Convention, it would make no difference. "Redress for improper seizures in foreign waters is due not to the owner or to the crew of the vessel involved, but to the foreign government whose territory has been infringed upon by the action."[18]

The *Conroy* court showed a lack of concern for the implications of its ruling in the realm of international law. Redress is not owed exclusively to a government after a violation of international law. An individual may also have rights flowing from international law or from a treaty.[19] Furthermore, this logic ignores the fact that a refusal to accept jurisdiction will prevent an international incident from arising, thus avoiding the need for any redress.

The reasoning used in these cases incorrectly implies that the courts must take jurisdiction over the thing or person seized, even if the act of taking jurisdiction in itself constitutes a violation of international law. By accepting jurisdiction in *Toscanino,* the court forced a violation of Uruguayan territorial sovereignty; the *dicta* of *Conroy* suggest that courts may do as they please as long as the Executive apologizes for their actions and the *ultra vires* actions of overzealous officers.[20]

If the international obligations of a nation direct it to respect the territorial sovereignty of other nations, should not the courts uphold these obligations? If the national government has no right to seize the thing or person in the first

15. *Id.* at 268-69.
16. 589 F.2d 1258 (5th Cir. 1979) (hereafter referred to as *Conroy*).
17. 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. no. 5200.
18. 589 F.2d 1268 (5th Cir. 1979).
19. *See* discussion at note 34, *infra.*
20. 589 F.2d 1268 (5th Cir. 1979). *See also* Justice Marshall's oft-cited opinion in The Richmond, 13 U.S. (9 Cranch) 102 (1815).

place, the courts should recognize that they have no right to hear a complaint involving the person or thing.[21] Until the court accepts jurisdiction, the violation can be regarded as simply *ultra vires.* Once a court, a branch of the national government, decides to accept jurisdiction, the seizure becomes a national act in violation of international law. The courts are obliged to prevent these situations unless they are specifically authorized to accept jurisdiction by the appropriate branch of the federal government.[22]

Further, while international claims must be adjusted between governments,[23] it would be incorrect to assume that the courts therefore have license to create international legal problems which they can then leave for the Executive to settle. If the court had acted properly in *Toscanino,* it would have prevented international claims from arising by recognizing the duty of the federal courts to uphold obligations owed to other countries by the United States.[24] Courts, by following this rationale, would thus avoid any possibility of embarrassing the Executive. Rather than creating problems for the Executive to settle, courts should analyze the international legal effects of assuming jurisdiction in such cases. As Dickinson has written,

> To insist that the decision belongs to a higher forum, when the issue is submitted and the international wrong is conceded or clearly proved, is to abdicate a function which the court, particularly the court of a country in which international law and treaties are regarded as part of the law of the land, ought unhesitatingly to perform.[25]

While the reasoning in *Toscanino* and *Conroy* ignored the judicial responsibility of upholding international law through its acceptance of jurisdiction over evidence and over persons seized in violation of international law or treaties, another court has recently faced the issue more squarely. In *United States v. Postal,*[26] the court recognized the persuasiveness of arguments that courts should not sanction a violation of international law by accepting jurisdiction in cases involving violations of that law.[27] However, in a footnote, the court ruefully rejected the wisdom of these arguments, since they felt bound by

21. *See* Bernstein v. N.V. Nederlandsche-Ameriteaansche Stoomvaart-Meatschappij, 210 F.2d 375 (1949) (authorization by the Executive); The "Sabbatino" Amendment, 78 STAT. 1013, as amended in 22 U.S.C. § 2370(e) (authorization by legislature).
22. "The jurisdiction of the court is a branch of that which is possesed by the nation as an independent sovereign power." The Schooner Exhange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812).
23. The Richmond, 13 U.S. (9 Cranch) 102, 103 (1815).
24. *See* discussion of *Toscanino,* above.
25. Dickinson, "Jurisdiction Following Seizure or Arrest in Violation of International Law," 28 AM. J. INT'L L. 231, 236 (1934).
26. 589 F.2d 862 (5th Cir. 1979) (hereafter referred to as *Postal*).
27. Here, the Coast Guard seized a ship of Grand Cayman registry on the high seas.

the *Ker-Frisbie* rule,[28] which they interpreted as follows: "A defendant may not ordinarily assert the illegality of his obtention to defeat the court's jurisdiction over him."[29]

The *Postal* court addressed the issue, but did not satisfactorily resolve it. Not only did that court ignore the jurisdictional limitations imposed by international law, but it also misapplied the holding of *Ker.* In that case, where the defendant had been kidnapped from Lima, Peru and taken to Illinois, Ker had claimed that an extradition treaty between the United States and Peru gave him a "right of asylum."[30] The court held that Ker had no right of asylum and no rights flowing from the treaty because the treaty had not been violated.[31]

> But it is quite a different case when the plaintiff-in-error comes to this country in the manner in which he was brought here, clothed with no rights which a proceeding under the treaty could have given him, and *no duty which this country owes* to Peru or *to him under the treaty.*[32]

It seems clear from the language used here[33] that when a treaty is violated a person injured by that violation has "rights growing out of that treaty."[34] Far from contradicting *Ker,* Judge Kaufman's ruling extends this doctrine to hold that a person injured not only by a treaty violation, but also by a violation of international law, has a right of redress in American courts.

Ker anticipated *Filartiga* by holding that the courts of the United States were "bound to take notice" of the law of nations. While many interpret *Ker* to hold that a forcible abduction does not lead to a right of redress in an American

28. Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225 (1886); Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509 (1952). It is worthy of note that *Frisbie* involved an illegal seizure from one state which the court allowed because the Fourth Amendment did not then apply to states. The *Frisbie* holding has been fatally weakened by Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). *Ker* is best understood if read with United States v. Rauscher, 119 U.S. 407 (1886), decided the same day as *Ker.* There, the court held that if an extradition treaty provided for the return of a person to face trial, the person could only be tried for the crime for which he was extradited and "he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition." *Id.* at 424. What I shall call the *Ker-Rauscher* rule stems from the fact that the court based its opinion on the fact that the extradition treaty was "*the supreme law of the land, which the courts are bound to take judicial notice of,* and to enforce in any appropriate proceeding *the rights of persons growing out of that treaty.* . . ." *Id.* at 419 (emphasis added).
29. Although the United States tried to extradite Ker, by the time the official representative (a Pinkerton agent) arrived in Lima with the extradition papers, the city was under the control of occupying Chilean forces. *See* "Ker v. Illinois Revisited," 47 AM. J. INT'L L. 678 (1953).
30. 119 U.S. 441 (1886).
31. *See* Toscanino, *supra* at 276; Ford v. United States, 273 U.S. 593, 605-606, 47 S.Ct. 531, 535 (1927).
32. 119 U.S. 452 (emphasis added).
33. *See also* the language in *Rauscher* at note 28, *supra.*
34. *Id.*

court, this widely-accepted interpretation falls apart upon closer examination of the court's reasoning. The court deferred this question to the holding of the state court.[35] It did not say that a kidnap victim was without redress in federal courts, nor did it hold that there was no redress for violations of international law or treaties.

> However this may be, the decision of that question is as much within the province of the state court, as a question of common law, or the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.[36]

A final question in redressing violations of specific treaties is whether the treaty invoked is self-executing. While *Filartiga* glosses over the question of whether international law can be self-executing, the court in *Postal* considered this question central to the resolution of the case. The court did not deny that "self-executing treaties may act to deprive the United States, and hence its courts, of jurisdiction . . ."[37] The court concluded, however, that the 1958 Convention on the High Seas was not self-executing and that the court had jurisdiction.[38]

The *Postal* decision reflects a confused understanding of the separation of powers doctrine. Courts have always had powers independent of legislative acts. While the distinction between self-executing and non-self-executing treaties may be useful if the courts must impose a penalty under a treaty, the courts are always free to refuse to hear the case if they decide they have no jurisdiction. Such a decision requires no enabling legislation. Further, properly ratified treaties create international obligations for all three branches of the government:

> Unless the particular treaty contains a specific provision to the contrary, a treaty properly signed and ratified becomes a binding obligation at the time fixed by its own terms. The failure of the Congress to enact the necessary legislation to make possible the per-

35. Note that many publicists disagree with the Illinois court's decision. *See* de Schutter "Competence of the National Judiciary Power in Case the Accused Has Been Unlawfully Brought Within the National Frontiers," (1965) REVUE BELGE DE DROIT INTERNATIONAL
36. 119 U.S. 443. Note that the *Filartiga* opinion overrules this deference to state courts, holding that "with the founding of the 'more perfect Union' of 1789, the law of nations became preeminently a federal concern." 19 INT'L LEGAL MATS. 967 (1980).
37. *Postal* at 875, citing Cook v. United States, 288 U.S. 102, 53 S.Ct. 305 (1933) (The *Mazel Tov* Case) and Ford v. United States, *supra.*
38. *Id.* at 877-84.

> formance of a treaty which is not self-executing does not relieve the Government of its international obligations thereunder.[39]

Thus, even if Congress has not passed enabling legislation, the courts are under an obligation not to take jurisdiction over things or persons seized in violation of a treaty.

The *Filartiga* case raises many questions in international and constitutional law, only a few of which have been discussed here. The court, aided by a specific statute, did not have to face the harder question of the effect of international law on the jurisdiction of U.S. courts in the absence of a statute. Thus, this case may not serve as a definitive precedent. This does not negate the necessity, however, for courts to carefully consider the issues raised here to fully determine the obligations incumbent on them under international law or treaties. A rational application of the principles of deference in *Filartiga* may allow for the progression of international law in American courts as well as in the world community.

39. Memorandum from Attorney Advisor Diven to Legal Advisor Gross, *Definition of Self-Executing Treaty*, MS. Department of State, file 711.099/4-2248 (April 22, 1948) reprinted in 14 Whiteman, DIGEST OF INTERNATIONAL LAW 304 (1970).