U.S. TORT SUITS BY ALIENS BASED ON INTERNATIONAL LAW

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In 1980, the United States Court of Appeals for the Second Circuit (New York) reversed an unreported decision of District Court Judge Eugene Nickerson in the case of *Filartiga* v. *Peña-Irala,* and held that the Federal Courts had jurisdiction for a civil claim against a Paraguayan police official brought by the Paraguayan father and sister of a 17 year-old Paraguayan boy tortured to death in Paraguay.[1] Personal jurisdiction over the defendant had been achieved when the police official was discovered in New York City and served with the necessary papers by the claimants.

The jurisdictional statute at play was a clause of §9 of the Act of 24 September 1789, "An Act to Establish the Judicial Courts of the United States."[2] The clause states:

> That the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.

The Court of Appeals concluded that the quoted language was applicable to the injury caused to the claimants. The decision was immediately seen as a major precedent for the view that torture, and perhaps some other violations of "human rights," are violations of "international law"; that no other rules in the international legal order inhibited the direct application of those rules of international law to the private parties in their private dispute.

There can be little doubt that normal American rules of jurisdiction permit aliens to bring tort actions in courts of the United States with regard to injuries done them by the acts of other aliens abroad. Where justice can reasonably be

1. *Filartiga* v. *Peña-Irala,* 630 F.2d 876 (2d Cir. 1980) (Kaufman, J.).
2. 1 Stat. 73 at 76-77. The Act is usually referred to as the "Federal Judiciary Act," although it has little to do with the "judiciary." It is sometimes referred to a bit more accurately as the "Federal Judicature Act." The quoted part of §9 is nowadays usually called, with a bit of puffing, the "Alien Tort Claims Act."

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done in the American courts, and jurisdiction over the person of the defendant and the subject matter of the suit exist in the court before which the defendant is haled, that jurisdiction is normally exercised. Where the court decides it cannot do justice, normal conflict of laws rules, like *forum non conveniens*, allow for the case to be dismissed without prejudice to foreign proceedings in a court nearer to the witnesses and other evidence. The issue in the *Filartiga* case was not whether an American court could hear the complaint and determine if substantial justice could be done within its territorial jurisdiction; it was whether under the American federal system, a federal court could hear a case that would normally have been a matter for state courts only.

Whichever American court took the case, the choice-of-law rules of the forum would decide the issue of which body of law should be applied to the dispute: United States law; the law of Paraguay, the place of the incident and the nationality of the defendant purporting to act in an official capacity; international law; or some other legal order. But the issue here was reversed. It was impossible to decide if the federal court had jurisdiction without first deciding that international law was the governing legal order. In order for a federal court to have jurisdiction under the Judicature Act, with no claim under a treaty being involved, the alien plaintiff had to convince the court that the "tort" which formed the gravamen of the action was "in violation of the law of nations."

The arguments which convinced the Court of Appeals of the Second Circuit were in the main recitations of various United Nations General Assembly Resolutions condemning torture, *dicta* at Nuremberg relating to "crimes" (not "torts"), and treaties or treaty drafts which, for one reason or another, fell short of providing binding rules for the case, such as a draft treaty requiring states to make torture a crime within their municipal legal orders, but not directly making it a crime under "international law" or the "law of nations." In my opinion, these arguments fundamentally mistook the distribution of legal powers within the current international legal order, essentially misread the Judicature Act, and created a framework for national assertions of tort jurisdiction that the United States itself would strongly protest if used by other states against American defendants.

Rather than analyze exhaustively all the issues, I propose simply to state affirmatively the legal considerations that lead to these conclusions, and leave to others the business of weighing these arguments against the firm assertions of other legal scholars that their intellectual structuring of legal relationships better fits the facts and the legal order. This paper thus will not be balanced, but is an attempt to correct an imbalance already amply reflected in the literature.[3]

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3. The literature resulting from the case is too vast to be summarized, and I doubt my ability to state fairly, outside of the framework of the case itself, the opinions and assumptions with which I think I disagree. A major article coming to conclusions similar to mine but with much greater reluctance, relying greatly on propositions of law which I believe to be founded on mere moral judgments, and ignoring the impact of the development of choice-of-law theory on the *jus gentium* concepts that lie at the base of the Judicature Act, is Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," 83 *A.J.I.L.* 461 (1989). I presume that Professor Burley would disagree with all this, so I suppose that we bring different unstated

On the face of it, there is a problem. It is not at all clear that the "international law" which can be interpreted to forbid "torture" applies at all to individuals as distinct from states. The allegations in the *Filartiga* case involve not acts of the Paraguayan government, which in fact does have legislation that purports to forbid torture by policemen, but acts of the individual police official alleged to have exceeded his public authority when he tortured young Filartiga. The complaint would have to assert a denial of justice by Paraguay in failing to apply its own law in the ways envisaged by the cited documents.

But if the action were a disguised claim against Paraguay for the denial of justice in not making a Paraguayan court available to the plaintiffs, or in intimidating their attorney or otherwise denying justice, that claim could be espoused in the usual way by a state with "standing." In this case there probably is none, since the plaintiffs were Paraguayan nationals at all pertinent times and Paraguay cannot very well espouse a claim against itself. Absent a state with standing, the plaintiff normally is simply denied further recourse, as happened to the unfortunate Nottebohm when the International Court of Justice held that Liechtenstein lacked standing to espouse his claim against Guatemala in 1955.[4] Occasionally, and with sympathetic victims like the Filartigas,[5] the case becomes a matter of international concern through other pressures, such as political decisions growing out of third-country (including United States) human rights and constituent concerns. Various non-governmental organizations can exert whatever moral influence they have in whatever forums are open to them. For example, Amnesty International's activities are not dependent on the formal rules of standing expressed in the international legal order by the maxim *res inter alios acta* ("thing done among others") because Amnesty International does not purport to present legal claims.

But the action was not presented against Paraguay. It was presented against a Paraguayan police official allegedly committing a tort regardless of the presence or absence of judicial recourse in Paraguay. But was his "tort" a violation of the law of nations?

However sympathetic the tort case might be when brought by the upstanding family of a victim of torture, it must be remembered that the action was not brought for "torture." It was brought for "wrongful death." The "international law" regarding torture, if there is any, is not clearly relevant to a "wrongful death" action.

"Wrongful death" actions are wholly statutory in the United States; in the absence of statute, the ancient, "universal" reason-based Anglo-American common law applicable to torts does not provide for a claim based on "wrongful

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(possibly unstatable) assumptions of law to bear on the issues.

4. The Nottebohm Case (*Liechtenstein* v. *Guatemala*) [1955] *I.C.J. Rep.* 4.

5. Nottebohm was not a sympathetic victim in 1955. As a German national until the start of World War II, when he received Liechtenstein nationality, he signed his letters "Heil Hitler." On the other hand, Nottebohm's real sympathies are unknown, and to rest a legal decision on the personality quirks of a victim of allegedly abusive action by the authorities of a state of which he was not a national — to refuse to hear the case — hardly seems consistent with the notion of "human rights."

death." There is also a question of "survivorship." Even if a common law "assault" or "battery" tort action could have been brought by the boy who was tortured to death, it is not clear that absent a statute, his surviving relatives could bring the action.[6] Thus, the "tort only in violation of the law of nations" seems to involve in this case a "tort" which would not have been triable under United States common law. The evidence that such a "tort" is a violation of "the law of nations" must rest then either on (a) a general principle of law, applicable by analogy to the international legal order, that torture is a "crime" and the notion that all "crimes" are necessarily "torts" also, or on (b) direct evidence that "torture" of a near relative is "wrongful death produced by torture," and such a wrongful death is a "tort in violation of the law of nations."

There is no substance to either position.

The twist of American tort law that makes a tort out of any violation of a statute seems to be based on the idea that violating a statute is at least "negligence," a position that has no application in the international legal order where there is no statutory basis for any criminal actions. Nor are there any cases cited in the usual sources holding "war crimes" or "piracy" (the usual categories of international law "crime") also to be tortious, although assault or the conversion of private property by a "pirate" might be tortious under the law of the place to which the "pirate" brings the loot to which he has no title. Indeed, the closest to direct evidence on the point in modern times goes entirely the other way, as attempts to collect damages from convicted Nazi war criminals and their heirs and corporate agents for their atrocities were rejected as not well founded in law by the governments of both West Germany and East Germany.[7] It is doubtful that United States courts today would hear a holocaust victim's descendant bringing a claim against united Germany or some individual death camp official (like John Demjanjuk) for the "torts" committed then, despite international consensus that there is no temporal limitation on trying as criminals the perpetrators of those horrors (as Demjanjuk was tried by Israel in 1993).

There is some likelihood that the United States would reject in principle the internal application of the "tort" rules sought here to be applied to a foreign official. In *Nixon* v. *Fitzgerald*, the Supreme Court narrowly upheld the absolute immunity of a former president from a civil action growing out of an apparent abuse of power.[8] In the *Filartiga* case, the international legal order would seem to require the application of logic similar to that applied by the Supreme Court majority in the *Nixon* case. The court's expression of concern over the distribution of legal powers under the U.S. Constitution and suggestions regarding the political remedies for abuse in the *Nixon* case would be reflected in an equivalent concern for the distribution of legal powers between states in the international legal order and the political remedies for abuse available in that order. The possibility that the separation of powers is even more distinct and

6. See 4 *A.L.I.*, "Restatement of the Law of Torts," Sec. 900 and comment on Clause (a) at 529-530 (1939).

7. See Benjamin Ferencz, *Less than Slaves* (Cambridge: Harvard University Press, 1979).

8. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 102 S.Ct. 2690 (1982).

complex in the international legal order than in the U.S. Constitutional order, and the remedies for abuse more difficult to set in motion, is surely not an argument for ignoring them. Rather, it is an argument for treading even more warily than when entering U.S. Constitutional ground.

The possibility that some abuses of power by lower level officials might form the basis for a tort action in American law seems a very weak basis for assuming that in the case of torture, a foreign official acting under color of governmental authority abroad falls within the scope of the exception. The exception stated in *Harlow* v. *Fitzgerald* relates to conduct which violates "clearly established statutory or constitutional rights."[9] The exception seems inapplicable to the *Filartiga* situation since there is at least serious doubt that, in the absence of a treaty, any rights in international law go directly to individuals. To the extent a state may be vicariously injured through injury to its national, acts by a government official against nationals of his own country within the territory of that country cannot be said to violate the equivalent of "clearly established statutory or constitutional rights" in the international legal order. This is true regardless of the rights of the injured individual in his municipal legal order or some foreign municipal legal order.

There is an even more serious American problem in supporting an "international tort" law applicable to government officials — piercing the "sovereignty" veil. The issue is not whether there had been a tort or the defendant was somehow immune from the normal action of American conflict of laws rules applicable in normal tort cases: The question was whether even under evolving international legal standards, there could have been a "tort [only] in violation of the law of nations" within the sense of the Judicature Act of 1789 as its fundamental conceptions evolved. The answer to the question is clearly negative.

The Act refers not to a tort in violation of "international law," but to a tort in violation of "the law of nations." At the time the U.S. Constitution was written, the leading text on law familiar to the framers was Blackstone, *Commentaries on the Laws of England* (1769). To Blackstone, the principal parts of the "law of nations" were not those rules governing sovereigns in their relations with each other, but those rules of natural law which were, or should have been, identical in all states:

> Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurance, bottomry, and others of a similar nature; the law merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, to shipwrecks,

9. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The decision was 8-1, with the majority upholding a qualified immunity for senior members of the president's staff, and Chief Justice Burger in dissent arguing for absolute immunity. It is not clear why Justice Burger's opinion was considered a dissent rather than a concurring opinion, since all nine Justices agreed that the claim should be dismissed.

> to hostages, and ransom bills, there is no other rule of decision but this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.[10]

"Offenses against the law of nations" are defined by Blackstone to include only acts made criminal by the municipal laws of all states reflecting a moral "natural law." Torts, even those arising from the law merchant or maritime law, are not such "offenses." Offenses against the law of nations, to Blackstone, included only violations of safe conduct,[11] infringement of the rights of ambassadors,[12] and "piracy."[13] With regard to the first two of these "crimes," Blackstone felt that a state's failure to align its criminal processes to the overarching natural law could result in war, but he did not suggest that one state could compensate for the default of another by extending its own criminal jurisdiction to cover the acts of the foreigners abroad. With regard to piracy, Blackstone considered English admiralty courts' enforcement jurisdiction as extending to English vessels and perhaps foreign vessels in any navigable waters. However, no English court could enforce even universal rules violated wholly within foreign territory or by foreigners within a vessel flying a foreign flag and not reaching a second vessel or otherwise coming within English legal interest.[14]

Within the United States, it seems clear that this part of §9 of the Judicature Act was felt to apply to permit security of property regardless of American criminal law — the key point was that a crime had to be proven by testimony of live witnesses, while a civil claim in tort could be successful if supported by the mere preponderance of the evidence.[15] This accounts for the word "only" after "tort" in the Act; criminal actions were governed by different rules.

In the light of this very brief survey of the tip of the iceberg,[16] it is possible to

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10. 4 Blackstone, *Commentaries on the Laws of England*, ch. 5, at 67 (American Edition, Worcester, Mass., 1790).
11. This has an ancient history in England and is irrelevant to the current discussion. See, e.g., the "safe conduct" made available to foreign merchants at the beginning of war. It traces back to *Magna Carta* (1215). See 14 Edw. III st. 2 cap. 2 (1340), reciting that history and expanding on it.
12. See the Act 7 Anne ch. 12 (1708) and *The Case of Andrew Artemonowitz Mattueoff, Ambassador of Muscovy*, QB, 8 Anne (1710), 10 Mod. 4, 88 Eng. Rep. (Full Reprint) 598.
13. Blackstone, *op.cit* note 10 *supra*, 68.
14. Blackstone is not wholly consistent or clear in this. For a fuller analysis of English views at the end of the 18th century, see Alfred P. Rubin, *The Law of Piracy* (Newport, RI: Naval War College Press, 1988), 108-113.
15. See 1 Op. Atty. Gen. 33 (1841); 1 Op. Atty. Gen. 58 (1852), opinion dated 6 July 1795.
16. For a fuller survey of the literature, see Casto, "The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations," 18 *Conn. L. Rev.* 467 (1986). Like Professor Burley, I disagree with many of Professor Casto's conclusions. See *op.cit* note 3 *supra*, esp. 465 note 16. Both Professor Casto and Professor Burley seem to ignore the evolution of the concept of "law of nations" as "Conflict of Laws" theory (especially in its "choice-of-law" phase, which was systematized by Justice Story in 1834) became part of the general legal mindset. Joseph Story, *Commentaries on the Conflict of Laws . . .* (Boston, 1834); see Alfred P. Rubin, "Private and Pubic History; Private and Public Law," 82 *Am. Soc. of Int'l L. Proc.*: 30-36 (1988). After the systematization of Conflict of Laws, §9 of the Judicature Act dropped almost completely out of use until revived in the *Filartiga* litigation. Neither Professor Casto nor Professor Burley seems to have

suggest that the objects of §9 of the Judicature Act of 1789 were threefold: (1) to avoid the United States becoming a thieves' market for property stolen outside the criminal jurisdiction of the United States; (2) to provide a remedy for the victims of "piracy" or other takings within the criminal jurisdiction of admiralty where the common law rules regarding evidence and confrontation of witnesses made a successful criminal prosecution unlikely; and (3) to provide for uniformity of rules among the various states at the option of the alien plaintiff, when it was conceived that the universal private "law of nations" required the availability of such uniformity. It is noteworthy in this last regard that American admiralty jurisdiction is located exclusively in the federal courts under Article III §2 Clause 3 of the Constitution, expanding on the reservation to the Congress of the power to make rules "for deciding, in all cases, what captures on land or water shall be legal" under the Articles of Confederation of 1781, Article IX §1. The federal courts' competence in admiralty cases is also contained in §9 of the Judicature Act.

The evolving interpretations of this provision focused on the external reach of American jurisdiction regarding admiralty and "piracy" cases. Justices Bushrod Washington and Joseph Story took an expansive view based on the territorial reach of admiralty to all navigable waters, even those within a foreign harbor; Justice William Johnson, Chief Justice Marshall and others took a narrower view, restricting American jurisdiction to cases in which some specific American interest was involved and according jurisdiction to the judicial arm of the United States only in those cases in which the offense was properly within the overall prescriptive jurisdiction of the United States under normal rules of the international legal order. Marshall won, despite the more expansive language used by Story in a few cases.[17] A full appreciation of the struggle between Marshall, limiting the jurisdiction of the U.S. courts to that prescribed by the Congress based on the rules of the international legal order, and Story, declaring the jurisdiction of United States courts to be coextensive with the entire legal order based on principles of natural law without regard to national jurisdiction, is far too complex to describe or analyze in this space. But historically, with the victory of Marshall's view in the U.S. Supreme Court, the alien tort part of §9 of the Judicature Act dropped out of use; this eroded the notion that "the law of nations," in the sense of some uniform private law, was part of "international law," in the sense of the law between sovereigns.[18] When the Permanent Court

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noted that, or, if noted, to have linked the desuetude of §9 to evolving conceptions of law that made it insupportable.

17. See *U.S.* v. *Wiltberger*, 5 Wheaton (18 U.S.) 76 (1820) and the property adjudication over slaves in *The Antelope*, 10 Wheaton (23 U.S.) 66 (1825), in which Marshall wrote the unanimous opinion for the Supreme Court, apparently including Story and overruling Story's denunciation of the slave trade three years earlier. Story sat as admiralty judge in a District Court case that could not be appealed to the Supreme Court when, apparently inconsistently and possibly to avoid an appeal that might overturn his view of the law, he awarded the captured slave ship to the representative of the slave trader. *U.S.* v. *La Jeune Eugenie*, 26 Fed. Cas. 832 , No. 15,551 (D. Mass.)(1822). See Alfred P. Rubin, *op.cit supra* note 14, at 148.

18. "Law of nations" was a direct translation of the Latin *jus gentium*, which referred to the rules of private law common to all civilized societies and enforced by courts of the Roman Empire. See

of International Justice was established in 1920 as part of the great reordering of international society following World War I, the part of the historical "law of nations" relevant to "international law" was reduced to a matter of "general principles of law recognized by civilized nations."[19] There it remains.

From this point of view, the approach taken in the *Filartiga* case is a revival of a failed position, in practice abandoned for sound jurisprudential reasons, but now argued to be expanded to cover acts wholly within the jurisdiction of a foreign sovereign. This is obviously an expansion of natural law beyond what even Story had asserted in his detestation of piracy and slavery.[20] There has been no evolution of the law towards the *Filartiga* rule. Based on a misunderstanding of language clear enough in historical context, the *Filartiga* rule appears as a vast expansion of rules of national jurisdiction to prescribe and to enforce that had been rejected in the early days of American nationhood.

In these circumstances, the implications of the *Filartiga* case, particularly those that seem to free American courts from the rules of prescriptive jurisdiction normally applicable to all states in protection of the equal powers of all sovereigns to govern relations among their own nationals in their own territory, must be viewed with some concern by Americans as well as foreigners. If there is now conceived to be an "international law" that allows all states to apply their

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Francis de Zulueta (trans. and notes), *The Institutes of Gaius* (Oxford 1946), I.1 at 2 (Latin), 3 (English). Gaius's text was probably completed shortly after 161 AD. Barry Nicholas, *Introduction to Roman Law* (Oxford 1962, corrected edition 1969), 36. The phrase is elaborated in the great compilations under Justinian in the 6th century AD. See, e.g., Thomas Collett Sandars (intro., trans. and notes), *The Institutes of Justinian* (London: Longmans, Green and Co., 1922) (7th ed., reprinted Westport, Conn.: Greenwood Press, 1970), I.1.4: "[P]rivate law . . . is composed of three elements, and consists of precepts belonging to natural law, to the law of nations, and to the civil law [*Dicendum est igitur de jure privato, quod tripertitum est; collectum est enim ex naturalibus praeceptis aut gentium aut civilibus*]." Skipping over jurisprudential elaborations through 1500 years, the great shift from conceptions of relations between states as identical in principle with relations among bodies corporate of a single legal order analogous to private law, to Westphalian notions of the international legal order as a different sort of system, really begins about the same time as the drafting of the U.S. Constitution. The seminal work was probably Jeremy Bentham, *Principles of Morals and Legislation* (first written before 1780, first published in 1789, revised edition 1823). Jeremy Bentham, *A Fragment on Government and An Introduction to the Principles of Morals and Legislation* (Oxford: Basil Blackwell, 1948), vii. See XVII §2 para. 25 and note 1 at 426: "The word *international*, it must be acknowledged, is a new one. . . . It is calculated to express . . . the branch of law which goes commonly under the name of the law of nations: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence"[emphasis *sic*]. The phrase "international law" first appears in the United States Supreme Court in some 1815 prize cases (Story joined the court in 1811). It was routinely used in Bentham's sense by the 1820s. The reasons why a "communitarian" model of the international legal order, implicit in *jus gentium* theory, failed as the implications of the Westphalian constitution forced themselves on the behavior of statesmen, are normally ignored by contemporary jurists urging a return to a model in which their consciences control legally the policies of statesmen with real constituencies to worry about. In some current writings, that return is wrongly regarded as original and "progressive development."

19. Statute of the Permanent Court of International Justice, Article 38(3). The identical language survives in the Statute of the present International Court of Justice as Article 38(1)(c). It has rarely been used as a source of law in a real case, although some judges and publicists would like to revive it. See Alfred P. Rubin, "Review Article: Meron, Human Rights and Humanitarian Norms as Customary Law," 31(2) *Harvard Int'l L. J.*: 685-694 (1990).
20. See his opinion in *La Jeune Eugenie*, cited at note 17 above.

versions of the prescriptions of value-based "natural law"[21] to foreigners acting within their own territory, the clearest rules that can be established by natural law reasoning today relate to "human rights" (as in *Filartiga*). But the "human rights" most clearly affirmed by that evidence relate not to "torture," but to racial discrimination. The "law," if it is "law," based on all the same sort of evidence presented to the tribunal in the *Filartiga* case, forbids apartheid.

Is it conceived that American corporate officials acting pursuant to American law in the United States would be subject to "international tort" claims for failing in the United States to abide by the rules relating to apartheid pronounced by the U.N. General Assembly and enforced by the courts of any country where an official of the firm might be served with legal process? Is it imagined that the world community will accept a strictly American interpretation of the scope of the "law of nations" to exclude those moral rules we prefer not to see enforced by foreign tribunals with regard to acts by Americans in the United States; that the line can be held to provide tort recovery for "torture" but not for the psychological injuries and practical physical results of apartheid? Or that apartheid would be defined by all courts of all countries to mean only the horrible practices of South Africa (now vastly diminished in that changing land, but still a factor) and not the more subtle racist practices illegal but still practiced occasionally in the United States and other countries? Is it really believed that foreign enforcement of such a "law" will speed the process in the United States of eliminating the vestiges of slavery here?

I would suggest that the position taken by the Second Circuit Court of Appeals is inconsistent with the legislative interest of the United States as seriously directed to the real questions of human rights, including the elimination of torture and apartheid, and is inconsistent with the international legal order.

It is also possible that the analysis presented above has application to broader attempts to expand American prescriptive and enforcement jurisdiction. It is possible to find underpinnings in the international legal order for the "act of state doctrine."[22] It is strongly suggested that these possibilities need further analysis, but that their essential soundness is supported by history, a long course of legal practice, practicality, and the policies best attuned to the interests of the United States.

Normally, the interests of the United States of most concern to the legal order deal with property; some people even regard certain property rights as "human rights."[23] There is neither time nor space to reanalyze pertinent leading Amer-

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21. "Natural law" is a complex notion, of which the weighing of moral values, virtue, is only one subset. For a simplified disaggregation of the concept, see Alfred P. Rubin, "Enforcing the Rules of International Law," 34(1) *Harv. Int'l L.J.*: 149-161 (1993); slightly revised version also in "Festskrift Till Jacob W.F. Sundberg," 267-283 (Stockholm: *Juristförlaget*, 1993).

22. I have suggested this in another context. See Alfred P. Rubin, "ABA Proposals to Amend the FSIA; A Pointed Dissent," 32 *Int'l Practitioner's Notebook* 17 (1985): 19.

23. See, e.g., The Universal Declaration of Human Rights, UN General Assembly Resolution 217 (III), 10 December 1948, Article 17.1: "Everyone has the right to own property alone as well as in association with others." This statement of principle is not supported in the 23 March 1976

ican cases[24] and statutes[25] relating to international protection (or not) of property rights from the point of view expressed above. But obviously the conception of the international legal order and its functioning as a constitutional order enforcing its distribution of powers by political pressures, much as the unwritten British Constitution or the incompletely written U.S. Constitution do, forces a reconsideration of Justice Harlan's conclusion in the majority opinion in the *Sabbatino* case,[26] that the absence of arbitral or judicial awards citing the "act of state doctrine" indicates a lack of international legal underpinnings. The international legal underpinnings for the doctrine are analogous to the equally undocumented American "constitutional" underpinnings which Justice Harlan, writing for the Supreme Court, found arising out of the basic relationships between branches of the American government in a system of separation of powers.

From this point of view, the courts of the United States are bound by international law, just as the entire society of the United States is bound by international law whether it likes to be so bound or not. Cases directly applying rules of international law within the system are themselves applied by American choice-of-law rules that reflect the legislative will of American courts over the years to have some body of law to refer to in cases in which reference to the municipal law of the United States alone is not conceived to be "just." From this point of view, the "Sabbatino Amendment,"[27] requiring that the Congress's version of international law be applied in cases which should be governed by real international law, is likely to be ineffective in the long run to affect real international law or resolve many cases. The Foreign Sovereign Immunities Act of 1976[28] is likely to be increasingly narrowly construed by American courts to make it conform to the jurisdictional limits on the United States as a whole fixed by the international legal order, even when those limits are dimly if at all conceived by the courts themselves.[29]

International Covenants on Economic, Social and Cultural Rights or Civil and Political Rights (993 UNTS 3 and 999 UNTS 171). Whether property rights are "human rights" thus remains disputed; also whether, if they are "human rights," they are supported by positive international law or merely moral or other "natural law" models of the legal order; also, if some property rights are supported by positive international law, what limits that law can be said to place on states expropriating the property of their own nationals in their own territory. These are all matters about which learned commentators and statesmen disagree.

24. Such as *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 15(4) ILM 735 (1976).
25. The "Sabbatino Amendment," 22 U.S.C. §2370(e); the Foreign Sovereign Immunities Act of 1976, 22 U.S.C. §§1330, 1602 *et seq.*
26. Cited note 24 *supra.*
27. 22 U.S.C. §2370(e)(1), which refers to 22 U.S.C. §2370(e)(2) as if to a rule of "international law"; a supposed "rule" that the court had indicated was in fact hotly disputed.
28. Cited note 25 *supra.*
29. On the other hand, after much confusion and obvious reluctance to apply the Act, which brings foreign sovereigns before American courts when, in the opinion of United States judicial authorities the subject matter of the suit is more "commercial" than "sovereign" in "nature," the most recent opinion of the United States Supreme Court actually found jurisdiction in a case involving a government's refusal to pay on bonds which would have been uncollectible in the country that issued them (thus, presumably the non-payment was a reflection of legislative

Without minimizing in any way the need to adapt both the international legal order and rules promulgated under it to the changing structure of international society and its commercial needs, it can be concluded that the approach reflected in the *Filartiga* case and other recent extrusions of American prescriptions, in the guise of using American enforcement jurisdiction to apply to foreigners abroad rules of "international law" whose existence is doubtful in the light of the structure of the entire system, will be ineffective to end state-supported torture. American choice-of-law rules can certainly make foreign prescriptions applicable in those cases, and an honorable search for rules in the international legal order might be appropriate in some choice-of-law cases. But to be persuasive abroad, the asserted rule of the international legal order must truly be a rule of that order, not a rule attributed to that order by American judges or legislators in disregard of reciprocal effects and the law-making authority of our sovereign equals in that order. As illustrated in the evolution of South African policies under various moral and political, but not positive law, pressures, the "natural law" enforcement pressures of exposure, followed by public opprobrium and refusals to deal in commercial or treaty relations with people or governments whose values seem despicable, might well prove to be more effective than the tools of the positive law in changing the world.

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action by the competent arms of that government). *Argentina* v. *Weltover*, 112 S.Ct. 2160 (1992). The case was decided 9-0. The State Department and various Federal Courts of Appeals had taken what seems a different view: *De Sanchez* v. *Banco Central de Nicaragua* (Ct. App. 5th Cir.)(1985) briefed in 80 *A.J.I.L.* 658-661 (1986); *Jackson* v. *People's Republic of China* (Ct. App. 11th Cir.) (1986), reprinted in 25(6) *I.L.M.* 1466-1474 (1986). We shall have to wait and see if the Congress maintains its position as the legal complications that seem certain to ensue from the Supreme Court's interpretation of the legislation actually begin to make themselves felt. It is also possible that the Supreme Court in later cases will find Constitutional reasons to reinterpret the legislation or hold it invalid.

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