International Criminal Law Cases and Materials

SECOND EDITION

The late Edward M. Wise
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INTERNATIONAL CRIMINAL LAW

CASES AND MATERIALS

Second Edition

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To –

Sandra F. Van Burkleo

&

Cheryl L. Segal

&

Amelia H. Boss

PREFACE

This book contains a collection of cases, materials, notes, and questions concerning international criminal law. It is designed for use as a teaching tool, not as a reference work, although it does try to provide an overview of most of the topics that fall within the scope of international criminal law. Apart from the occasional citations on specific points that occur throughout, we have included at the end of the book a short list of general reference works to serve as a preliminary guide for further reading.

We have tried to keep the book short, as casebooks go, and to make it useable both by teachers who want to emphasize the increasingly important transnational dimension of U.S. criminal law and by those who want to explore the increasingly important use of criminal sanctions to enforce norms of international law. These two developments are interrelated and it is more and more difficult, in any event, to keep them separate.

The book is divided into four parts. The first part contains a brief introduction to the field of international criminal law, the question of what crimes are international crimes, and a chapter on the general jurisdictional principles, of both national and international law, that govern efforts to extend U.S. criminal law to foreign crimes and foreign criminals. The second part contains materials dealing with the specific application of those principles in cases involving the Foreign Corrupt Practices Act, antitrust and securities regulation, export controls, computer crimes, narcotics and money laundering, piracy and terrorism, and torture. The third part deals with procedural aspects of trying such cases in the U.S. courts and covers the extraterritorial application of the U.S. Constitution, immunities from jurisdiction, mutual assistance in criminal cases, extradition, alternatives to extradition, prisoner transfer treaties, recognition of foreign criminal judgments, and the bearing of international human rights instruments on criminal procedure. The fourth and final part of the book deals with the prosecution of international crimes, including the Nuremberg and Tokyo precedents, the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, and the Rome Statute for the International Criminal Court, and the substantive law of the international crimes of aggression, genocide, crimes against humanity, and conventional war crimes.

Our main focus, at least in the first three parts, is on relatively recent decisions of the United States courts and the effect of contemporary globalization on U.S. criminal law. We have tried, above all, to convey a sense of the "international flavor" that is developing in federal prosecutions.* As a

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* For a preliminary sketch, *see* Ellen S. Podgor, Essay, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997).

result of this particular focus, some topics have been slighted that might figure more prominently in a longer, more comprehensive work on international criminal law.

Our basic aim has been to construct a set of teaching materials that will provide students with a grounding in the transnational issues likely to arise in federal criminal cases and also in the law that has been produced as a consequence of international efforts to impose criminal responsibility on the perpetrators of human rights atrocities.

This book tries to provide a picture of the present state of a rapidly expanding and changing field. Events no doubt will quickly overtake much of what we present. We only hope that, in the meanwhile, teachers and students will be persuaded through using this book to regard international criminal law as an exciting field, worthy of their continuing attention as it grows and develops, as it inevitably will, in new directions.

We thank the American Law Institute for permission to reprint sections from the Restatement (Third) of the Foreign Relations Law of the United States, © 1987, The American Law Institute; and other copyright holders including the Virginia Journal of International Law, Jack L. Goldsmith & Eric Posner (quotation on p. 28); the American Society of International Law (excerpt on p. 370 from 94 AJIL 535-36 (2000), © The American Society of International Law); the Academy of Political Science (excerpt on pp. 639-40 from the Political Science Quarterly, 1947); and Alfred P. Rubin (quotation on p. 789).

Since the writing of the first edition, Edward Wise passed away. In the first edition he acknowledged the support provided for work on this book by both the Law School and the Humanities Center of Wayne State University. He specifically thanked Dean Joan Mahoney and the Director of the Humanities Center, Professor Walter F. Edwards. He also stated that it would be remiss in not acknowledging the significant influence of Gerhard O. W. Mueller, who first introduced him to the problems of international criminal law, defined in the most comprehensive possible fashion, decades ago.*

Ellen S. Podgor expresses appreciation to Georgia State University College of Law for their continual support in the writing of both the first and second edition of this book. She also thanks from the first edition the students of Georgia State University College of Law, University of Georgia School of Law, and the students from the Temple Tel - Aviv and Rome Summer Abroad Programs who used portions of these materials prior to their publication. She specifically thanks her former Librarian Rhea Ballard-Thrower and present Librarian Elizabeth Adelman. She also thanks Associate Dean Anne Emanuel,

* *See* Edward M. Wise, *Gerhard O. W. Mueller and the Foundations of International Criminal Law*, *in* CRIMINAL SCIENCE IN A GLOBAL SOCIETY: ESSAYS IN HONOR OF GERHARD O. W. MUELLER 45 (Edward M. Wise ed., 1994).

Professor Janice Griffith, Interim Dean Steven Kaminshine, Associate Dean Paul Kurtz, Professor Molly O'Brien, and Professor David Shipley, who provided support or comments to the first and/or the second edition of this book. She also thanks Christine Nwakamma for her secretarial assistance. To Edward Wise she expresses everlasting thanks for everything he taught this writer during the writing of the first edition of this book.

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Ellen S. Podgor
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INTRODUCTION

§ 1.01 The Scope of International Criminal Law

What is meant by "international criminal law"? In a broad sense, the subject covers all of the problems lying in the area where criminal law and international law overlap and interact. It is a field that has undergone an enormous expansion in recent years. This expansion is a result both of (a) increasing "globalization" of criminal conduct and consequently of national criminal law, and (b) increasing reliance on criminal sanctions to enforce norms of international law, especially norms of international human rights and humanitarian law.

International criminal law can be subdivided, in a rough and ready way, into three main sets of topics. These three topics are: [A] International Aspects of National Criminal Law, [B] Criminal Aspects of International Law: International Standards of Justice, and [C] Criminal Aspects of International Law: International Criminal Law *Sricto Senso*. The term "international criminal law" sometimes has been used to refer to one or another of these three sets of topics standing alone. Thus, in an early essay on "International Criminal Law," Sir John Fischer Williams thought that only the third of these topics had "an interest for the international lawyer." SIR JOHN FISCHER WILLIAMS, CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS 232, 244 (1929). It is more usually understood nowadays in its broad sense to designate a field that includes all three. (The following discussion of these three subfields is based, in part, on Edward M. Wise, *Terrorism and the Problems of an International Criminal Law*, 19 CONN. L. REV. 799, 801-08 (1987).)

[A] International Aspects of National Criminal Law

The first set of topics comprising international criminal law includes at its core questions concerning the extent to which national courts are permitted to assume jurisdiction over extraterritorial crime, the choice of the applicable law (usually the forum's) in cases involving such crimes, and the recognition of foreign penal judgments. These are all questions about how the courts of one country should act in criminal cases involving a foreign component. They are the counterpart on the criminal side of the questions dealt with in civil cases under the heading "conflict of laws" or "private international law." Taken together, they constitute international criminal law more or less in the original meaning of the term.

The term "international law" (indeed, the word "international") was coined by Jeremy Bentham in the 1780s to describe what older usage called the "law of nations"; the term "private international law" was invented by Joseph Story

in 1834. An equivalent of the term "international criminal law" appeared in German in 1862. Similar cognates came into use in other European languages (but not English) during the 1870s, to designate the branch of law concerned with topics such as jurisdiction, choice of law, and the effect of foreign judgments in criminal cases.

In subsequent years, continental jurists debated the exact nature of the relationship between international criminal law, so defined, and private international law. Earlier writers, from the fourteenth century on, had treated questions arising in connection with divergent criminal laws as a problem of conflict of laws. Story devoted a chapter of his treatise on the conflict of laws to "penal laws and offenses," although it was only six pages in length and dealt mainly with whether foreign penal law could be "enforced" in the United States. (He thought not.) JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). Yet he also thought of private international law as a "branch of public law." For nineteenth-century continental jurists preoccupied with the "scientific" or systematic arrangement of the law, private international law was a part of private law, criminal law was a part of public law, and the division between private and public law was too sharply drawn to permit anything connected with public law to be treated as part of private international law. Since international criminal law, as first conceived, was primarily a matter of national dispositions regarding the power and competence of a particular country's criminal courts, neither could it be classified as part of public international law. Assertions of power over events taking place abroad might ultimately be subject to limiting principles derived from international law; but the more immediate concern was with the antecedent question of what national law provided that judges should do in cases involving foreign crime. Since national rules regarding such questions did not seem to fit under any other legal rubric, they came, by a process of elimination, to be regarded as occupying a field of their own, which was designated "international criminal law." Some scholars rejected the view that this new field was wholly separate from private international law. Nonetheless, that it was separate came to be the commonly held view in Europe, and implicitly in the United States where, absent standard texts on the subject, international criminal law largely fell into a kind of legal limbo.

International criminal law in its original sense also can be regarded as including, by extension, on the one hand, exceptions from criminal jurisdiction, such as diplomatic immunity and asylum, and, on the other, forms of transnational cooperation, such as extradition, that enable states to circumvent the ordinary restrictions on their power to enforce criminal law outside their own borders. These subjects do not fit exactly within international criminal law as originally defined. Immunities from jurisdiction derive, in large part, from principles of public international law, whereas international criminal law was supposed to be primarily a matter of a state's own rules governing the exercise of its power to punish foreign crimes and crimes committed by foreigners. Extradition, likewise, is not so much a matter of national rules governing the exercise of penal powers, as it is a matter of international obligation, or at least

an "international legal transaction" falling rather more clearly within the realm of international law.

Yet it is hard, once one starts talking about a state's jurisdiction over foreigners and foreign crime, to avoid questions of immunity and extradition and other forms of international cooperation in criminal matters. These are connected topics that almost naturally have to be discussed together. There are other instances as well in which it seems inadequate to insist on a crisp distinction between national and international law; hence the tendency to attenuate the distinction and to speak instead about "transnational law." In dealing with problems of criminal law that cut across national boundaries, it is particularly difficult to keep questions of national and international law apart. As a result, international criminal law, practically from the beginning, has been treated as including virtually the whole gamut of problems connected with transnational aspects and applications of domestic systems of criminal law.

[B] Criminal Aspects of Public International Law: International Standards of Criminal Justice

A second distinct group of topics that also has been designated as "international criminal law" concerns international standards of criminal justice, that is, principles or rules of public international law that impose obligations on states with respect to the content of their domestic criminal law. International standards may require states to respect the rights of persons accused or suspected of crime, or to prosecute and punish certain so-called "international offenses." Both kinds of standards appear in the older body of international law on state responsibility for injury to aliens. More recently, guarantees for persons accused of crime generally have been cast in the form of treaty provisions and other instruments (especially those adopted by the United Nations General Assembly) on human rights; indeed, a large part of contemporary law on the international protection of human rights is directed at setting standards of performance for domestic criminal procedure. A significant part of the United Nations program located in Vienna that deals with crime prevention and criminal justice has been devoted to standard-setting. *See* ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM: FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION (1994). Likewise, obligations to prosecute specific types of offenders through the medium of local criminal law have tended to be imposed more and more by general conventions ("suppression conventions") – those dealing, for instance with piracy, the slave trade, traffic in narcotics, war crimes, genocide, torture, hijacking of aircraft, crimes against diplomats and other "internationally protected" persons, hostage-taking and other forms of terrorism, transnational organized crime, traffic in persons, and corruption. By virtue of these treaty obligations, states are required to cooperate in specified ways in suppressing certain kinds of conduct supposedly reprehended by the world at large. The conduct on the part of individuals which states are required to

suppress is not necessarily itself a violation of international law; these so-called "international crimes" or "offenses of international concern" generally are tried by national courts applying national law which has been enacted in order to implement a state's international obligations. But they are prosecuted in conformity with international rules stipulating that persons who commit these offenses should be tried and punished.

This second group of topics, unlike the first, falls largely within the domain of public international law. A part of it – the part concerned with holding states to observe certain basic procedural safeguards in administering criminal justice – usually is assigned to the separate subfield of international human rights law. The other part – the part concerned with international rules requiring states to cooperate in suppressing certain international offenses – sometimes is referred to simply as international criminal law. The effort to suppress such offenses may give rise, in turn, to questions of jurisdiction, extradition, and other forms of interstate cooperation. Indeed, contemporary treaties requiring states to suppress particular offenses typically contain provisions regarding mutual legal assistance, jurisdiction and extradition and mandate that any state in whose territory an offender is found must itself exercise jurisdiction over the offense if it does not extradite to another state which is prepared to prosecute. In this respect, the topics comprising international criminal law, in the sense of a law of international offenses, have definite functional ties to, and more and more overlap with, the topics comprising international criminal law in its original sense of a body of rules concerned with the transnational applications of domestic criminal law. Nonetheless, these are two conceptually distinct sets of topics, or at least have different starting points: the one is concerned with what have been called the "criminal aspects of international law," the other with "international aspects of national criminal law."

[C] Criminal Aspects of Public International Law: International Criminal Law *Stricto Sensu*

A third group of topics concerns questions of international criminal law in the "strict," "true," "proper," or "material" sense of the term. At one time it was possible to argue that international criminal law "in the material sense of the word" does not exist. *See* Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263 (1950), *reprinted in* GERHARD O. W. MUELLER & EDWARD M. WISE, INTERNATIONAL CRIMINAL LAW 3 (1965). That is a much less plausible argument today. Since the end of the Second World War, with the recognition that individuals can have both international rights and duties [*see* chap. 16], "there has been an increasing trend towards the expansion of individual responsibility directly established under international law." 1 OPPENHEIM'S INTERNATIONAL LAW 506 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992). But exactly what should be included under this heading remains controversial.

In its strictest possible sense, international criminal law would refer to the law applicable in an international criminal court having the power to impose specifically penal sanctions on offenders. Until recently, international criminal law in this sense seemed to be, for the most part, despite the Nuremberg and Tokyo precedents [*see* chap. 18], a purely hypothetical body of law, to be applied by an even more hypothetical court. However, with the creation of *ad hoc* tribunals for the trial of international offenses committed in the former Yugoslavia and in Rwanda [*see* chap. 19], and with the treaty establishing the permanent International Criminal Court in force since July 1, 2002 [*see* chap. 20], this body of law has begun to look much less hypothetical. It is now generally agreed that there are certain offenses – such as genocide, crimes against humanity, and war crimes – which are directly proscribed by international law; that international law itself imposes criminal responsibility on those who commit these crimes; and that individuals who commit them are potentially triable not only before national courts but also before an international tribunal having jurisdiction over these offenses.

For the most part, these so-called "crimes under international law" (for which rules of international law are said to impose criminal liability directly on individuals) also constitute what have been called "offenses of international concern" (as to which rules of international law impose an obligation on states to prosecute and punish those who commit such offenses). In this respect, the two categories overlap. But they are not coextensive. Not all "offenses of international concern" are "crimes under international law." Yet the categories are not set in stone and depend upon the development of state practice. While states are bound, for instance, by a network of contemporary international treaties to cooperate in repressing certain forms of terrorism and narcotics trafficking, whether terrorism or narcotics trafficking are or should be offenses triable before an international criminal court is a question about which there has been considerable debate. A substantial minority of those participating in the 1998 Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court wanted to include such crimes within the jurisdiction of the Court. Consensus could not be obtained to include these crimes in the Statute of the Court. Resolution E adopted by the Conference nevertheless describes terrorist acts as "serious crimes of concern to the international community" and asserts that "international trafficking of illicit drugs is a very serious crime, sometimes destabilizing the political and economic order in States." Accordingly, the Resolution recommends that a Review Conference on the Statute, the first of which will take place in 2009, should "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court." Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex, U.N. Doc. A/CONF. 183/13, Vol. I at 71-72.

Much current writing on the scope and nature of international criminal law tends to collapse the distinction between these two types of international crimes – those for which international law does and those for which it does not impose

direct criminal liability on individuals. Both types of offenses are said to have a "common denominator," namely, "the preservation of certain interests which represent commonly shared values in the world community." M. Cherif Bassiouni, *Introduction to Symposium on the Teaching of International Criminal Law*, 1 TOURO J. TRANSNAT'L L. 129, 130 (1988). International criminal law is assumed to be ideally, although not entirely in practice, a more or less coherent system founded on a combination of some or all of the following premises: (1) Certain conduct is so reprehended by the world at large that it can be considered to amount to an international crime. (2) An authentic guide to the kind of conduct that amounts to an international crime is a multilateral treaty requiring its repression. (3) Conduct condemned in a widely ratified multilateral treaty also can be regarded as a violation of customary international law. (4) Individuals who engage in such conduct violate international law. (5) In prosecuting individuals who commit international crimes, states enforce international law as organs of the international community. (6) These crimes are the concern of all states. (7) All states therefore have "universal jurisdiction" to prosecute those who commit these crimes. (8) All states, indeed, are bound to prosecute or at least to assist in bringing to justice those who commit these crimes. *See* M. CHERIF BASSIOUNI & EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 49-50 (1995). In this view, the existing body of international rules requiring states to prosecute various kinds of criminal conduct already constitutes a body of international criminal law properly so-called; whether it is enforced "directly" before an international tribunal or "indirectly" before national courts depends partly on questions of convenience, partly on contingent political factors. For a listing of recent treatises in international criminal law see the Selected References at SR-1.

Some writers use terms such as "transnational crime" and "transnational criminal law" to describe the crimes described here as "offenses of international concern" and the regimes developed, especially by the so-called suppression conventions, to deal with them. *See* Neil Boister, *"Transnational Criminal Law"?* 14 EUROP. J. INT'L L. 953 (2003); Roger S. Clark, *Countering Transnational and International Crime: Defining the Agenda*, in CRIME SANS FRONTIERES: INTERNATIONAL AND EUROPEAN LEGAL APPROACHES 20 (Peter J. Cullen & William C. Gilmore eds., 1998) (Hume Papers on Public Policy, Vol. 6, Nos. 1 & 2).

§ 1.02 The Sources of International Criminal Law

International criminal law is an amalgam of rules and principles drawn from both national and international law. In national legal systems, legal rules and principles are identified and validated by reference to formal "sources of law" such as the constitution, statutes, case law, etc. What are the equivalent "sources" of international law rules?

THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986)

§ 102 SOURCES OF INTERNATIONAL LAW

(1) A rule of international law is one that has been accepted as such by the international community of states
(a) in the form of customary law;
(b) by international agreement; or
(c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.

See also Article 38 of the Statute of the International Court of Justice, reproduced in footnote 8 in *Filartiga v. Pena-Irala*, *infra*.

THE CASE OF THE S.S. LOTUS (FRANCE v. TURKEY)

Permanent Court of International Justice
P.C.I.J., Ser. A, No. 10 (1927)

. . . . On August 2nd, 1926, just before midnight, a collision occurred between the French mail steamer *Lotus*, proceeding to Constantinople, and the Turkish collier *Boz-Kourt*, between five and six nautical miles to the north of Cape Sigri (Mitylene). The *Boz-Kourt*, which was cut in two, sank, and eight Turkish nationals who were on board perished. After having done everything possible to succour the shipwrecked persons, of whom ten were able to be saved, the *Lotus* continued on its course to Constantinople, where it arrived on August 3rd.

At the time of the collision, the officer of the watch on board the *Lotus* was Monsieur Demons, a French citizen, lieutenant in the merchant service and first officer of the ship, whilst the movements of the *Boz-Kourt* were directed by its captain, Hassan Bey, who was one of those saved from the wreck.

As early as August 3rd the Turkish police proceeded to hold an enquiry into the collision on board the *Lotus*; and on the following day, August 4th, the captain of the *Lotus* handed in his master's report at the French Consulate-General, transmitting a copy to the harbour master.

On August 5th, Lieutenant Demons was requested by the Turkish authorities to go ashore to give evidence. The examination, the length of which incidentally resulted in delaying the departure of the *Lotus*, led to the placing under arrest of Lieutenant Demons – without previous notice being given to the French Consul-General – and Hassan Bey, amongst others. This arrest, which has been characterized by the Turkish agent as arrest pending trial (*arrestation préventive*), was effected in order to ensure that the criminal prosecution instituted against the two officers, on a charge of manslaughter, by the Public Prosecutor of Stamboul, on the complaint of the families of the victims of the collision should follow its normal course.

The case was first heard by the Criminal Court of Stamboul on August 28th. On that occasion, Lieutenant Demons submitted that the Turkish Courts had no jurisdiction; the Court, however, overruled his objection. When the proceedings were resumed on September 11th, Lieutenant Demons demanded his release on bail; this request was complied with on September 13th, the bail being fixed at 6,000 Turkish pounds.

On September 15th, the Criminal Court delivered its judgment. . . . [I]t sentenced Lieutenant Demons to eighty days' imprisonment and a fine of twenty-two pounds, Hassan Bey being sentenced to a slightly more severe penalty. . . .

[The French government protested the action of the Turkish authorities in subjecting Lieutenant Demons to prosecution. It contended that only the state under whose flag a vessel sails has jurisdiction under international law to prosecute persons on board that vessel for actions leading to a collision on the high seas. France and Turkey were both parties to the Convention of Lausanne of July 24, 1923; under Article 15 of that Convention "all questions of jurisdiction shall, as between Turkey and other contracting Powers, be decided in accordance with the principles of international law." By a special agreement (a *"compromis"*), the French and Turkish governments submitted to the Permanent Court of International Justice two questions: (1) whether Turkey had, contrary to Article 15 of the Convention of Lausanne, acted in conflict with the principles of international law – and, if so, what principles – when it instituted criminal proceedings against M. Demons; and (2) should the reply to (1) be in the affirmative, what pecuniary reparation, if any, was due to M. Demons.]

I

. . . . The prosecution was instituted in pursuance of Turkish legislation. The special agreement does not indicate what clause or clauses of that legislation apply. No document has been submitted to the Court indicating on what article

of the Turkish Penal Code the prosecution was based; the French Government, however, declares that the Criminal Court claimed jurisdiction under Article 6 of the Turkish Penal Code, and far from denying this statement, Turkey, in submissions of her Counter-Case, contends that that article is in conformity with the principles of international law. It does not appear from the proceedings whether the prosecution was instituted solely on the basis of that article.

Article 6 of the Turkish Penal Code, Law No. 765 of March 1st, 1926 (Official Gazette No. 320 of March 13th, 1926), runs as follows:

> Any foreigner who, apart from the cases contemplated by Article 4, commits an offense abroad to the prejudice of Turkey or of a Turkish subject, for which offence Turkish law prescribes a penalty involving loss of freedom for a minimum period of not less than one year, shall be punished in accordance with the Turkish Penal Code provided that he is arrested in Turkey. The penalty shall however be reduced by one third and instead of the death penalty, twenty years of penal servitude shall be awarded.
>
> Nevertheless, in such cases, the prosecution will only be instituted at the request of the Minister of Justice or on the complaint of the injured Party." . . . .

Even if the Court must hold that the Turkish authorities had seen fit to base the prosecution of Lieutenant Demons upon the above-mentioned Article 6, the question submitted to the Court is not whether that article is compatible with the principles of international law; it is more general. The Court is asked to state whether or not the principles of international law prevent Turkey from instituting criminal proceedings against Lieutenant Demons under Turkish law. Neither the conformity of Article 6 in itself with the principles of international law nor the application of that article by the Turkish authorities constitutes the point at issue; it is the very fact of the institution of proceedings which is held by France to be contrary to those principles. . . .

III

The Court, having to consider whether there are any rules of international law which may have been violated by the prosecution in pursuance of Turkish law of Lieutenant Demons, is confronted in the first place by a question of principle which, in the written and oral arguments of the two Parties, has proved to be a fundamental one. The French Government contends that the Turkish courts, in order to have jurisdiction, should be able to point to some title to jurisdiction recognized by international law in favour of Turkey. On the other hand, the Turkish Government takes the view that Article 15 allows Turkey jurisdiction whenever such jurisdiction does not come into conflict with a principle of international law.

The latter view seems to be conformity with the special agreement itself, No. 1 of which asks the Court to say whether Turkey has acted contrary to the principles of international law and, if so, what principles. According to the special agreement, therefore, it is not a question of stating principles which would permit Turkey to take criminal proceedings, but of formulating the principles, if any, which might have been violated by such proceedings.

This way of stating the question is also dictated by the very nature and existing conditions of international law.... International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of commons aims. Restrictions upon the independence of States cannot therefore be presumed.

Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable....

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty.

It follows from the foregoing that the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorizing her to exercise jurisdiction, is opposed to the generally accepted international law to which Article 15 of the Convention of Lausanne refers. Having regard to the terms of Article 15 and to the construction which the Court

has just placed upon it, this contention would apply in regard to civil as well as to criminal cases, and would be applicable on conditions of absolute reciprocity as between Turkey and the other contracting Parties; in practice, it would therefore in many cases result in paralyzing the action of the courts, owing to the impossibility of citing a universally accepted rule on which to support the exercise of their jurisdiction.

Nevertheless, it has to be seen whether the foregoing considerations really apply as regards criminal jurisdiction or whether this jurisdiction is governed by a different principle; this might be the outcome of the close connection which for a long time existed between the conception of supreme criminal jurisdiction and that of a State, and also by the especial importance of criminal jurisdiction from the point of view of the individual.

Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offenses committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty. . . .

This situation may be considered from two different standpoints corresponding to the points of view respectively taken up by the Parties. According to one of these standpoints, the principle of freedom, in virtue of which each State may regulate its legislation at its discretion, provided that in so doing it does not come in conflict with a restriction imposed by international law, would also apply as regards law governing the scope of jurisdiction in criminal cases. According to the other standpoint, the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers; the exceptions in question, which include for instance extraterritorial jurisdiction over nationals and over crimes directed against public safety, would therefore rest on special permissive rules forming part of international law.

Adopting, for the purposes of the argument, the standpoint of the latter of these two systems, it must be recognized that, in the absence of a treaty provision, its correctness depends upon whether there is a custom having the force of law establishing it. The same is true as regards the applicability of this system – assuming it to have been recognized as sound – in the particular case. It follows that, even from this point of view, before ascertaining whether there may be a rule of international law expressly allowing Turkey to prosecute a foreigner for an offense committed by him outside Turkey, it is necessary to begin by establishing both that the system is well-founded and that it is applicable in the particular case. Now, in order to establish the first of these points, one must, as has just been seen, prove the existence of a principle of international law restricting the discretion of States as regards criminal

legislation.

Consequently, whichever of the two systems described above be adopted, the same result will be arrived at in this particular case; the necessity of ascertaining whether or not under international law there is a principle which would have prohibited Turkey, in the circumstances of the case before the Court, from prosecuting Lieutenant Demons. . . .

The Court therefore must, in any event, ascertain whether or not there exists a rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts to a situation uniting the circumstances of the present case. . . .

IV

. . . . The arguments advanced by the French Government, other than those considered above, are, in substance, the three following:

(1) International law does not allow a state to take proceedings with regard to offenses committed by foreigners abroad, simply by reason of the nationality of the victim; and such is the situation in the present case because the offense must be regarded as having been committed on board the French vessel.

(2) International law recognizes the exclusive jurisdiction of the State whose flag is flown as regards everything which occurs on board a ship on the high seas.

(3) Lastly, this principle is especially applicable in a collision case. . . .

As has already been observed, the characteristic features of the situation of fact are as follows: there has been a collision on the high seas between two vessels flying different flags, on one of which was one of the persons alleged to be guilty of the offense, whilst the victims were on board the other.

This being so, the Court does not think it is necessary to consider the contention that a State cannot punish offenses committed abroad by a foreigner simply by reason of the nationality of the victim. For this contention only relates to the case where nationality of the victim is the only criterion on which the criminal jurisdiction of the state is based. Even if that argument were correct generally speaking – and in regard to this the Court reserves its opinion – it could only be used in the present case if international law forbade Turkey to take into consideration the fact that the offense produced its effects on the Turkish vessel and consequently in a place assimilated to Turkish territory in which the application of Turkish criminal law cannot be challenged, even in regard to offenses committed there by foreigners. But no such rule of international law exists. No argument has come to the knowledge of the Court from which it could be deduced that States recognize themselves to be under an obligation towards each other only to have regard to the place where the author

of the offense happens to be at the time of the offense. On the contrary, it is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there. French courts have, in regard to a variety of situations, given decisions sanctioning this way of interpreting the territorial principle. Again, the Court does not know of any cases in which governments have protested against the fact that the criminal law of some country contained a rule to this effect or that the courts of a country construed their criminal law in this sense. Consequently, once it is admitted that the effects of the offense were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offense was on board the French ship. Since, as has already been observed, the special agreement does not deal with the provision of Turkish law under which the prosecution was instituted, but only with the question whether the prosecution should be regarded as contrary to the principles of international law, there is no reason preventing the Court from confining itself to observing that, in this case, a prosecution may also be justified from the point of view of the so-called territorial principle. . . .

The second argument put forward by the French Government is the principle that the State who flag is flown has exclusive jurisdiction over everything which occurs on board a merchant ship on the high seas.

It is certainly true that – apart from special cases which are defined by international law – vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them. Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.

But it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory, but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel upon the high seas must be regarded as if it occurred

on the territory of the State whose flag the ship flies. If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting, accordingly, the delinquent.

This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown. The French Government has endeavored to prove the existence of such a rule, having recourse for this purpose to the teachings of publicists, to decisions of municipal and international tribunals, and especially to conventions which, whilst creating exceptions to the principle of the freedom of the seas by permitting the war and police vessels of a State to exercise a more or less extensive control over the merchant vessels of another State, reserve jurisdiction to the courts of the country whose flag is flown by the vessel proceeded against.

In the Court's opinion the existence of such a rule has not been conclusively proved. . . . In the first place, as regards teachings of publicists, and apart from the question as to what their value may be from the point of view of establishing the existence of a rule of customary law, it is no doubt true that all or nearly all writers teach that ships on the high seas are subject exclusively to the jurisdiction of the State whose flag they fly. But the important point is the significance attached by them to this principle; now it does not appear that in general, writers bestow upon this principle a scope differing from or wider than that explained above and which is equivalent to saying that the jurisdiction of a State over vessels on the high seas is the same in extent as its jurisdiction in its own territory. On the other hand, there is no lack of writers who, upon a close study of the special question whether a State can prosecute for offenses committed on board a foreign ship on the high seas, definitely come to the conclusion that such offenses must be regarded as if they had been committed in the territory of the State whose flag the ship flies, and that consequently the general rules of each legal system in regard to offenses committed abroad are applicable.

In regard to precedents, it should first be observed that, leaving aside the collision cases which will be alluded to later, none of them relates to offenses affecting two ships flying the flags of different countries, and consequently they are not of much importance in the case before the Court. . . .

On the other hand, there is no lack of cases in which a State has claimed a right to prosecute for an offense, committed on board a foreign vessel, which it regarded as punishable under its legislation. . . .

The cases in which the exclusive jurisdiction of the State whose flag was flown has been recognized would seem rather to have been cases in which the foreign State was interested only by reason of the nationality of the victim, and in which, according to the legislation of that State itself or the practice of its courts, that ground was not regarded as sufficient to authorize prosecution for an offense committed abroad by a foreigner.

Finally, as regards conventions expressly reserving jurisdiction exclusively to the State whose flag is flown, it is not absolutely certain that this stipulation is to be regarded as expressing a general principle of law rather than as corresponding to the extraordinary jurisdiction which these conventions confer on the state-owned ships of a particular country in respect of ships of another country on the high seas. Apart from that, it should be observed that these conventions relate to matters of a particular kind, closely connected with the policing of the seas, such as the slave trade, damage to submarine cables, fisheries, etc., and not to common-law offenses. Above all it should be pointed out that the offenses contemplated by the conventions in question only concern a single ship; it is impossible therefore to make any deduction from them in regard to matters which concern two ships and consequently the jurisdiction of two different States. . . . The Court therefore has arrived at the conclusion that the second argument put forward by the French Government does not, any more than the first, establish the existence of a rule of international law prohibiting Turkey from prosecuting Lieutenant Demons.

It only remains to examine the third argument advanced by the French Government and to ascertain whether a rule specially applying to collision cases has grown up, according to which criminal proceedings regarding such cases come exclusively within the jurisdiction of the State whose flag is flown. . . . In this connection, the Agent of the French Government has drawn the Court's attention to the fact that questions of jurisdiction in collision cases, which frequently arise before civil courts, are but rarely encountered in the practice of criminal courts. He deduces from this that, in practice, prosecutions only occur before the courts of the State whose flag is flown and that that circumstance is proof of a tacit consent on the part of States and, consequently, shows positive international law in collision cases.

In the Court's opinion, this conclusion is not warranted. Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty. On the other hand, as will presently be seen, there are other circumstances calculated to show that the contrary is true.

So far as the Court is aware there are no decisions of international tribunals in this matter; but some decisions of municipal courts have been cited. Without pausing to consider the value to be attributed to the judgments of municipal courts in connection with the establishment of the existence of a rule of international law, it will suffice to observe that the decisions sometimes support one view and sometimes the other. . . . [A]s municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French Government.

On the other hand, the Court feels called upon to lay stress upon the fact that it does not appear that the States concerned have objected to criminal proceedings in respect of collision cases before the courts of a country other than that the flag of which was flown, or that they have made protests: their conduct does not appear to have differed appreciably from that observed by them in all cases of concurrent jurisdiction. This fact is directly opposed to the existence of a tacit consent on the part of States to the exclusive jurisdiction of the State whose flag is flown. . . .

The conclusion at which the Court has therefore arrived is that there is no rule of international law in regard to collision cases to the effect that criminal proceedings are exclusively within the jurisdiction of the State whose flag is flown. . . .

The offense for which Lieutenant Demons appears to have been prosecuted was an act – of negligence or imprudence – having its origin on board the *Lotus*, whilst its effects made themselves felt on board the *Boz-Kourt*. These two elements are, legally, entirely inseparable so much so that their separation renders the offense non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction. . . .

. . . . It must therefore be held that there is no principle of international law, within the meaning of Article 15 of the Convention of Lausanne of July 24th, 1923, which precludes the institution of the criminal proceedings under consideration. Consequently, Turkey, by instituting, in virtue of the discretion which international law leaves to every sovereign state, the criminal proceedings in question, has not, in the absence of such principles, acted in a manner contrary to the principles of international law within the meaning of the special agreement. . . .

V

Having thus answered the first question submitted by the special agreement in the negative, the Court need not consider the second question, regarding the pecuniary reparation which might have been due to Lieutenant Demons. . . .

NOTES AND QUESTIONS

(1) The *Lotus* court was evenly divided, 6–6; it was the president's double vote, in accordance with the Court's rule in the case of a tie, that resulted in judgment for Turkey. The judges who joined in the opinion of the court were the president, Max Huber (Switzerland), Bustamante (Cuba), Oda (Japan), Anzilotti (Italy), Pessôa (Brazil), and Feïzi-Daïm Bey, the Turkish national judge. Judges Loder (Netherlands), Lord Finlay (Great Britain), Weiss (France), Altamira (Spain), Nyholm (Denmark), and Moore (United States) all delivered separate dissenting opinions. Judge Moore evidently agreed with the six-person "majority" that the burden was on France and that it had not carried it in respect of the effects theory and the exclusivity of the flag state. He did, however, state that the criminal proceedings:

> so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with the following principles of international law:
>
> (1) that the jurisdiction of a State over the national territory is exclusive;
>
> (2) that foreigners visiting a country are subject to the local law, and must look to the courts of that country for their judicial protection;
>
> (3) that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any wise subject.

He also stated that his:

> dissent was based solely on the connection of the pending case with Article 6 of the Turkish Penal Code. In the judgment of the Court that there is no rule of international law by virtue of which the penal cognizance of a collision at sea, resulting in the loss of life, belongs exclusively to the country of the ship by or by means of which the wrong was done, I concur, thus making for the judgment on that question, as submitted by the *compromis*, a definitely ascertained majority of seven to five.

The other five judges, in varying degrees, disagreed with the basic premise that it was for France to establish why Turkey might not act, rather than for Turkey to show why it might. Lord Finlay stated:

> The question is put in the *compromis* with perfect fairness as between the two countries and the attempt to torture it into meaning that France must produce a rule forbidding what Turkey did arises from a misconception. The question is whether the principles of international law authorize what Turkey did in this matter.

(2) The *Lotus* case was decided by the Permanent Court of International Justice, which was created in 1921. It was the predecessor of the present International Court of Justice (ICJ), established in 1945 as "the principal judicial organ of the United Nations" (ICJ Statute, art. 1). Only states may be parties before this court. It has no jurisdiction over individuals and therefore no criminal jurisdiction. But, as in the *Lotus* case, disputes before the ICJ may raise questions of international criminal law involving the respective rights or obligations of the states which are parties to the dispute. In addition, the court can render advisory opinions at the request of the General Assembly, Security Council, and other authorized organs of the United Nations. These too may touch on questions of international criminal law. *See, e.g., Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 I.C.J. 15.

(3) The judgment in the *Lotus* case is said to epitomize an "extreme positivism" in international law. "Positivism" has various meanings; in an international law context it usually refers to the proposition that international law depends on the consent of states and is to be determined by looking at what states have agreed to be the law. Is that an adequate and workable view of the nature of international law? What are the alternatives? What precisely is the "source" of the principle enunciated in the *Lotus* opinion that "restrictions on the independence of states cannot be presumed"? How far was this principle really determinative of the result in the *Lotus* case?

(4) How far is the *Lotus* decision good law today? Its specific result has been "reversed" by several multilateral treaties. For instance, Article 11(1) of the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T 2312, 450 U.N.T.S. 82, provides:

> In the event of collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

Identical language appears in Article 97 of the Law of the Sea Convention, Dec. 10, 1982, U.N. Doc. A/CONF. 62/122, *reprinted in* 21 I.L.M. 1261 (1982).

What about the "positivistic" premises of the judgment? How far do those have any residual validity today? This question is pervasive in modern international criminal law and is often an underlying factor in many of the

latter discussions in this book. In the Advisory Proceedings in the International Court of Justice on *The Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. Rep. 226, some of the nuclear powers, including France, relied on *The Lotus* for the proposition that they might use nuclear weapons since there was no specific rule against doing so. One of your authors chided the French, suggesting that they had it right about the general issue in 1927; they should now be showing by what authorization of international law they invoked the potential power to destroy us all:

> Surely, speaking as we are today, about the alleged sovereign right to engage in actions that could destroy the planet, we might fairly ask whether it is "authorized" by international law. A moribund and controversial decision about two colliding vessels on the high seas is a very weak base on which to defend the raw power to destroy our Spaceship Earth.

ROGER S. CLARK & MADELEINE SANN, THE CASE AGAINST THE BOMB: MARSHALL ISLANDS, SAMOA AND SOLOMON ISLANDS BEFORE THE INTERNATIONAL COURT OF JUSTICE IN ADVISORY PROCEEDINGS ON THE LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS 226 (Roger S. Clark, Counsel for Samoa) (1996). The Court ultimately finessed the *Lotus* issue by noting that:

> the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law. . . . Hence . . . the questions of burden of proof . . . are without particular significance for the disposition of the issues before the Court.

1996 I.C.J. Rep. at 239.

(5) *Lotus* is about jurisdiction. International law has numerous "bases" of jurisdiction, such as territoriality and nationality. Some of the bases (like the "passive personality" theory contained in Article 6 of the Turkish Penal Code) are controversial but subject to development in state practice. Notwithstanding his disavowal of nationality of the victim of a crime such as manslaughter as a basis of jurisdiction, Judge Moore suggested in his dissent that there was "universal jurisdiction" which any state might claim in the case of pirates. We explore issues of jurisdiction more fully in Chapter 3 and at many other points throughout this casebook. For the moment, note that the Court had no problem with the possibility that both Turkey and France might exercise jurisdiction over the hapless M. Demons. Jurisdiction was, as the Court says, "concurrent." Turkey had (at least) its "effects" theory; France had nationality and flag state theories. The state in possession had, perforce in this instance, priority. Should there be a hierarchy of jurisdictional theories?

§ 1.03 "New" Directions

FILARTIGA v. PENA-IRALA

United States Court of Appeals, Second Circuit
630 F.2d 876 (1980)

KAUFMAN, CIRCUIT JUDGE:

. . . . Implementing the constitutional mandate for national control over foreign relations, the First Congress established original district court jurisdiction over "all causes where an alien sues for a tort only [committed] in violation of the law of nations." Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789), codified at 28 U.S.C. § 1350. Construing this rarely-invoked provision, we hold 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. Accordingly, we reverse the judgment of the district court dismissing the complaint for want of federal jurisdiction.

I

The appellants, plaintiffs below, are citizens of the Republic of Paraguay. Dr. Joel Filartiga, a physician, describes himself as a longstanding opponent of the government of President Alfredo Stroessner, which has held power in Paraguay since 1954. His daughter, Dolly Filartiga, arrived in the United States in 1978 under a visitor's visa, and has since applied for permanent political asylum. The Filartigas brought this action in the Eastern District of New York against Americo Norberto Pena-Irala (Pena), also a citizen of Paraguay, for wrongfully causing the death of Dr. Filartiga's seventeen-year old son, Joelito. Because the district court dismissed the action for want of subject matter jurisdiction, we must accept as true the allegations contained in the Filartigas' complaint and affidavits for purposes of this appeal.

The appellants contend that on March 29, 1976, Joelito Filartiga was kidnapped and tortured to death by Pena, who was then Inspector General of Police in Asuncion, Paraguay. Later that day, the police brought Dolly Filartiga to Pena's home where she was confronted with the body of her brother, which evidenced marks of severe torture. As she fled, horrified, from the house, Pena followed after her shouting, "Here you have what you have been looking for for so long and what you deserve. Now shut up." The Filartigas claim that Joelito was tortured and killed in retaliation for his father's political activities and beliefs.

Shortly thereafter, Dr. Filartiga commenced a criminal action in the Paraguayan courts against Pena and the police for the murder of his son. As a

result, Dr. Filartiga's attorney was arrested and brought to police headquarters where, shackled to a wall, Pena threatened him with death. This attorney, it is alleged, has since been disbarred without just cause.

During the course of the Paraguayan criminal proceeding, which is apparently still pending after four years, another man, Hugo Duarte, confessed to the murder. Duarte, who was a member of the Pena household, claimed that he had discovered his wife and Joelito in flagrante delicto, and that the crime was one of passion. The Filartigas have submitted a photograph of Joelito's corpse showing injuries they believe refute this claim. Dolly Filartiga, moreover, has stated that she will offer evidence of three independent autopsies demonstrating that her brother's death "was the result of professional methods of torture." Despite his confession, Duarte, we are told, has never been convicted or sentenced in connection with the crime.

In July of 1978, Pena sold his house in Paraguay and entered the United States under a visitor's visa. He was accompanied by Juana Bautista Fernandez Villalba, who had lived with him in Paraguay. The couple remained in the United States beyond the term of their visas, and were living in Brooklyn, New York, when Dolly Filartiga, who was then living in Washington, D. C., learned of their presence. Acting on information provided by Dolly the Immigration and Naturalization Service arrested Pena and his companion, both of whom were subsequently ordered deported on April 5, 1979 following a hearing. They had then resided in the United States for more than nine months.

Almost immediately, Dolly caused Pena to be served with a summons and civil complaint at the Brooklyn Navy Yard, where he was being held pending deportation. The complaint alleged that Pena had wrongfully caused Joelito's death by torture and sought compensatory and punitive damages of $ 10,000,000. . . .

II

Appellants rest their principal argument in support of federal jurisdiction upon the Alien Tort Statute, 28 U.S.C. § 1350, which provides: "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." Since appellants do not contend that their action arises directly under a treaty of the United States, a threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations. In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.

The Supreme Court has enumerated the appropriate sources of international law. The law of nations "may be ascertained by consulting the works of jurists,

writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *United States v. Smith,* 18 U.S. (5 Wheat.) 153, 160-61(1820). . . . In *Smith*, a statute proscribing "the crime of piracy (on the high seas) as defined by the law of nations," was held sufficiently determinate in meaning to afford the basis for a death sentence. The *Smith* Court discovered among the works of Lord Bacon, Grotius, Bouchard and other commentators a genuine consensus that rendered the crime "sufficiently and constitutionally defined."

The Paquete Habana, 175 U.S. 677 (1900), reaffirmed that

> where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

Id. at 700. Modern international sources confirm the propriety of this approach.[8]

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[8] The Statute of the International Court of Justice, Arts. 38 & 59, June 26, 1945, 59 Stat. 1055, 1060 (1945) provides:

Art. 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Art. 59.

The decision of the Court has no binding force except between the parties and in respect of that particular case.

Habana is particularly instructive for present purposes, for it held that the traditional prohibition against seizure of an enemy's coastal fishing vessels during wartime, a standard that began as one of comity only, had ripened over the preceding century into "a settled rule of international law" by "the general assent of civilized nations." Thus it is clear that 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. . . .

The requirement that a rule command the "general assent of civilized nations" to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law. . . . [But] there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody.

The United Nations Charter (a treaty of the United States, see 59 Stat. 1033 (1945)) makes it clear that in this modern age a state's treatment of its own citizens is a matter of international concern. It provides:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinctions as to race, sex, language or religion.

Id. Art. 55. And further:

> All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Id. Art. 56.

While this broad mandate has been held not to be wholly self-executing, this observation alone does not end our inquiry. For although there is no universal agreement as to the precise extent of the "human rights and fundamental freedoms" guaranteed to all by the Charter, there is at present no dissent from the view that the guaranties include, at a bare minimum, the right to be free from torture. This prohibition has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217 (III)(A) (Dec. 10, 1948) which states, in the plainest of terms, "no one shall be subjected to torture." The General Assembly has declared that the Charter precepts embodied in this Universal Declaration "constitute basic principles of international law."

Particularly relevant is the Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452 (1975). The Declaration expressly prohibits any state from permitting the dastardly and

totally inhuman act of torture. Torture, in turn, is defined as "any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as . . . intimidating him or other persons." The Declaration goes on to provide that "[w]here it is proved that an act of torture or other cruel, inhuman or degrading treatment or punishment has been committed by or at the instigation of a public official, the victim shall be afforded redress and compensation, in accordance with national law." This Declaration, like the Declaration of Human Rights before it, was adopted without dissent by the General Assembly.

These U.N. declarations are significant because they specify with great precision the obligations of member nations under the Charter. Since their adoption, "[m]embers can no longer contend that they do not know what human rights they promised in the Charter to promote." Moreover, a U.N. Declaration is, according to one authoritative definition, "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated." Accordingly, it has been observed that the Universal Declaration of Human Rights "no longer fits into the dichotomy of 'binding treaty' against 'non-binding pronouncement,' but is rather an authoritative statement of the international community." Thus, a Declaration creates an expectation of adherence, and "insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States." Indeed, several commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law.

Turning to the act of torture, we have little difficulty discerning its universal renunciation in the modern usage and practice of nations. The international consensus surrounding torture has found expression in numerous international treaties and accords. *E. g.*, American Convention on Human Rights, Art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment"); International Covenant on Civil and Political Rights (Dec. 16, 1966) (identical language); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3 (semble). The substance of these international agreements is reflected in modern municipal, *i.e.* national law as well. Although torture was once a routine concomitant of criminal interrogations in many nations, during the modern and hopefully more enlightened era it has been universally renounced. According to one survey, torture is prohibited, expressly or implicitly, by the constitutions of over fifty-five nations, including both the United States and Paraguay. Our State Department reports a general recognition of this principle:

> 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.

We have been directed to no assertion by any contemporary state of a right to torture its own or another nation's citizens. Indeed, United States diplomatic contacts confirm the universal abhorrence with which torture is viewed:

> 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 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.

Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the works of jurists, we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens. . . . The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-a-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them. . . .

III

Appellee submits that even if the tort alleged is a violation of modern international law, federal jurisdiction may not be exercised consistent with the dictates of Article III of the Constitution. The claim is without merit. Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. Moreover, as part of an articulated scheme of federal control over external affairs, Congress provided, in the first Judiciary Act, § 9(b), 1 Stat. 73, 77 (1789), for federal jurisdiction over suits by aliens where principles of international law are in issue. The constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law.

. . . . A case properly "aris[es] under the . . . laws of the United States" for Article III purposes if grounded upon statutes enacted by Congress or upon the common law of the United States. . . . The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III.

During the eighteenth century, it was taken for granted on both sides of the Atlantic that the law of nations forms a part of the common law. 1 BLACKSTONE, COMMENTARIES 263-64 (1st ed. 1765-69); 4 *id.* at 67. Under the Articles of

Confederation, the Pennsylvania Court of Oyer and Terminer at Philadelphia, per McKean, Chief Justice, applied the law of nations to the criminal prosecution of the Chevalier de Longchamps for his assault upon the person of the French Consul-General to the United States, noting that "[t]his law, in its full extent, is a part of the law of this state . . . ." *Respublica v. DeLongchamps,* 1 U.S. (1 Dall.) 113, 119 (1784). Thus, a leading commentator has written:

> It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case. This doctrine was originally conceived and formulated in England in response to the demands of an expanding commerce and under the influence of theories widely accepted in the late sixteenth, the seventeenth and the eighteenth centuries. It was brought to America in the colonial years as part of the legal heritage from England. It was well understood by men of legal learning in America in the eighteenth century when the United Colonies broke away from England to unite effectively, a little later, in the United States of America.

Dickenson, *The Law of Nations as Part of the National Law of the United States,* 101 U. PA. L. REV. 26, 27 (1952).

Indeed, Dickenson goes on to demonstrate that one of the principal defects of the Confederation that our Constitution was intended to remedy was the central government's inability to "cause infractions of treaties or of the law of nations, to be punished." . . . .

As ratified, the judiciary article contained no express reference to cases arising under the law of nations. Indeed, the only express reference to that body of law is contained in Article I, sec. 8, cl. 10, which grants to the Congress the power to "define and punish . . . offenses against the law of nations." Appellees seize upon this circumstance and advance the proposition that the law of nations forms a part of the laws of the United States only to the extent that Congress has acted to define it. This extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress. A similar argument was offered to and rejected by the Supreme Court in *United States v. Smith, supra,* and we reject it today. As John Jay wrote in The Federalist No. 3, "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, whereas adjudications on the same points and questions in the thirteen states will not always accord or be consistent." Federal jurisdiction over cases involving international law is clear.

Thus, it was hardly a radical initiative for Chief Justice Marshall to state in *The Nereide,* 13 U.S. (9 Cranch) 388 (1815), that in the absence of a congressional enactment, United States courts are "bound by the law of nations, which is a part of the law of the land." These words were echoed in *The Paquete*

Habana, supra: "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."

The Filartigas urge that 28 U.S.C. § 1350 be treated as an exercise of Congress's power to define offenses against the law of nations. While such a reading is possible, we believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law. The statute nonetheless does inform our analysis of Article III, for we recognize that questions of jurisdiction "must be considered part of an organic growth part of an evolutionary process," and that the history of the judiciary article gives meaning to its pithy phrases. The Framers' overarching concern that control over international affairs be vested in the new national government to safeguard the standing of the United States among the nations of the world therefore reinforces the result we reach today. . . .

IV

. . . . In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture. Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun. Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become - like the pirate and slave trader before him - *hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

NOTES AND QUESTIONS

(1) Compare the decision in *Filartiga* with that in the *Lotus* case. To what extent do the two decisions rest on different understandings of the nature of customary international law? Consider the following statement:

> Every two hundred years, it seems, the jurisprudence of customary international law ("CIL") changes. Beginning in the seventeenth century, natural law was said to be the source of CIL. Beginning in the early nineteenth century, positivism was in the ascendency. The positivist view, according to which CIL results from the practice of nations acting out of a sense of legal obligation, was later endorsed by the United States Supreme Court in *The Paquete Habana*. Approximately two centuries after the rise of the positivist view, a new theory is beginning to take hold in some quarters. This theory derives norms of CIL in a loose way from treaties (ratified or not), U.N. General Assembly resolutions, international commissions, and academic commentary – but all colored by a moralism reminiscent of the natural law view. The Second Circuit's decision in *Filartiga v. Pena-Irala* is the most famous United States case to embrace this new understanding of CIL.

Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000). Consider that John Jay, the first Chief Justice of the United States, and Associate Justice Joseph Story tended to have a strong natural law streak in their writing; the fourth Chief Justice, John Marshall, was much more of a positivist. "Loose theories" hardly began in the twentieth century. In argument before the Supreme Court in an 1825 slave-trade case, songwriter Francis Scott Key, who was also one of the leading Baltimore and Washington lawyers of his day, argued as follows:

> The documents laid before the court will show the present state of the world's opinion and practice upon this subject, and will prove that the time is at hand, if it has not already arrived, when the slave-trade is not only forbidden by the concurrent voice of most nations, but is denounced and punished as a crime of the deepest dye. This is shown by the declarations contained in the treaties of Paris and Ghent; by the acts and conferences at congresses of Vienna, London and Aix-la-Chapelle; by the treaties between Great Britain and Spain and Portugal; by the negotiations between the United States and Great Britain; and by the reports of the committees of the house of commons, and the house of representatives in congress. We contend, then, that whatever was once the fact, this trade is now condemned by the general consent of nations, who have publicly and solemnly declared it to be unjust, inhuman and illegal. We insist, that absolute unanimity on the subject is unnecessary; that, as it was introduced, so may it be abolished, by general concurrence.

The Antelope 23 U.S. 66, 76-7 (argument of Francis Scott Key). Marshall and Story seem to have been on opposite sides of an evenly divided Court in that case on whether this argument would pass muster. *See* Roger S. Clark, *Steven Spielberg's* Amistad *and Other Things I have Thought About in the Past Forty Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery*, 30 RUTGERS. L.J. 371, 405 n. 105 (1999). The "new" approach, in which

principles deemed deserving of recognition as the positive law of the "international community" are assumed to have become the law, even in face of inconclusive or contrary practice, has been quite influential, particularly in the development of human rights and international criminal law. *See, e.g.,* G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993); J. SHAND WATSON, THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1999); Beth Stephens, *The Law of Our land: Customary International Law as Federal Law After Erie* 66 FORDHAM. L. REV. 393 (1997). Also consider the following:

> The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th century invention of internationalist law professors and human-rights advocates. See generally, Bradley & Goldsmith, [Customary International Law as Federal Common Law: A] Critique of the Modern Position, 110 Harv. L. Rev., at 831-837. The Framers would, I am confident, be appalled at the proposition that, for example, the American peoples' democratic adoption of the death penalty, see, *e.g.,* Tex. Penal Code Ann. § 12.31 (2003), could be judicially nullified because of the disapproving views of foreigners.

Scalia J., joined by Thomas J. and Rehnquist, C.J., concurring in part and concurring in the judgment in *Sosa v. Alvarez-Machain*, 542 U.S. _ (2004), slip op. at 12-13.

(2) What are the implications of the *Filartiga* decision, which was not a criminal case, for federal criminal law? Does it follow from Judge Kaufman's opinion that the federal courts could entertain *criminal* prosecutions for torture or other crimes in violation of international law, relying for jurisdiction on 18 U.S.C. § 3231, which provides: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States"? Like the Alien Tort Statute (also known as the Alien Tort Claims Act), 18 U.S.C. § 3231 derives from Section 9 of the Judiciary Act of 1789. If international law is part of the law of the United States, and if torture is prohibited by international law, why should torture not be considered a federal offense? In this connection, consider the relevance of the holding in *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), that federal jurisdiction does not extend to common law crimes, there libel of President and Congress.

Common law crimes (created by the courts) aside, does it follow from *Filartiga* that it would be "sufficient and constitutional" for *Congress* to give the federal courts blanket jurisdiction over any prosecution for "a crime committed in violation of the law of nations"? What about a statute giving the district courts jurisdiction over "the crime of torture committed in violation of international law"? How would such a statute differ from the piracy statute (codified at 18 U.S.C. § 1651) which, as *Filartiga* observes, was upheld in 1820 in *United States v. Smith*? In its entirety that statute now reads: "Whoever, on

the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." Is the piracy statute significantly different because it specifies a particular penalty for the crime? Suppose Congress were to enact that "Whoever commits the crime of torture as defined by international law, and is afterwards found in the United States, shall be imprisoned not more than 20 years"? Would this be "sufficient and constitutional"? In *Smith*, Justice Story's opinion for the majority is balanced by a strong dissent from Justice Livingston. As he saw it, Congress got its power here from Article I, Section 8, Clause 10 of the Constitution which empowers it to "define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." This it had not done. "[I]t is the duty of Congress to incorporate into their own statutes a definition *in terms*" (Livingston's emphasis) and not to refer the citizens to the laws of some foreign country or to the law of nations. One might imagine that the Founders conferred a power to "define" both so that the federal government might transform the international rules into rules of domestic law, and so that Congress could clarify (at least for the United States) what might be rather vague customary rules (even at some risk of getting out of line with other countries). Did Congress deliver on the first, but not the second? Consider the extent also to which the result in *Smith* may be undercut by the Supreme Court's later void for vagueness cases, such as *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Consider the discussion of Congressional power in Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM & MARY L. REV. 447 (2000). Stephens argues that "offenses" is used in a broad sense, permitting legislation not only of a criminal nature, but of a civil nature also.

(3) *Filartiga* was decided in 1980, four years before the U.N. General Assembly adopted the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [*see* chap. 10]. The Convention entered into force in 1987 and was ratified by the United States in 1994. In 1994, Congress did make torture committed in other countries a federal offense, defining the crime in terms taken more or less from the Torture Convention. *See* 18 U.S.C. §§ 2340–2340B. Earlier, in 1992, Congress enacted the Torture Victim Protection Act (codified at 28 U.S.C. § 1350 note), which placed on a statutory basis the civil cause of action for torture (and for extrajudicial killing) perpetrated "under actual or apparent authority, or color of law, of any foreign nation," and extended it to plaintiffs who are U.S. citizens. We will come back to these statutes in chapter 10. Cases in which victims seek civil redress under the Alien Tort Claims Act or the Torture Victim Protection Act may serve as a proxy for criminal prosecution and, insofar as they involve determining what international law prohibits, also have an influence on the development of international criminal law. A notable example is *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996), a civil suit alleging "various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture, and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war" (70 F.3d at 236-37); Judge Newman's

opinion in the case opens with the words: "Many Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."

SOSA v. ALVAREZ-MACHAIN

Supreme Court of the United States
542 U.S. __ (2004)

JUSTICE SOUTER delivered the opinion of the Court:

[Acting for the United States Drug Enforcement Agency, Sosa and other Mexicans had kidnaped Alvarez from his house in Mexico, held him overnight in a motel, then brought him by private plane to El Paso, Texas, where he was arrested by federal officers. After his acquittal in the U.S. criminal case, Alavarez returned to Mexico and sued both the United States and his captors.[a] The Supreme Court held that a claim would not lie against the United States because of the exception to the Federal Tort Claims Act concerning "[a]ny claim arising in a foreign country." Alvarez had succeeded in the lower courts on an Alien Tort Statute claim against Sosa and had been awarded $25,000 damages on summary judgment. The Court held unanimously that Sosa's claim for arbitrary arrest was not sufficiently established under international law for purpose of the Alien Tort Statute. The Court discussed the history of the Statute and continued:]

[One] inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors . . . , violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, "offences against this law [of nations] are principally incident to whole states or nations," and not individuals seeking relief in court. 4 Commentaries 68. . . .

[It added, in a part of the judgment in which Justice Souter was joined only by Stevens, O'Connor, Kennedy, Ginsburg, and Breyer JJ.]

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[a] *See* chapter 15 for the earlier proceedings concerning the effect of his abduction on the jurisdiction of the courts.-Eds.

We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and for this case it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under §1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when §1350 was enacted. See, *e.g.*, *United States* v. *Smith,* 5 Wheat. 153, 163–180, n. *a* (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filartiga*, *supra,* at 890 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); *Tel-Oren*, *supra*, at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms"); see also *In re Estate of Marcos Human Rights Litigation*, 25 F. 3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action[20] should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts[21]

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[20]A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 791–795 (CADC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* v. *Karadzic*, 70 F. 3d 232, 239–241 (CA2 1995) (sufficient consensus in 1996 that genocide by private actors violates international law).

[21]This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case. For example, the European Commission argues as amicus curiae that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals. See Brief for European Commission as Amicus Curiae 24, n. 54 (citing I. Brownlie, Principles of Public International Law 472–481 (6th ed. 2003)); cf. Torture Victim Protection Act of 1991, §2(b), 106 Stat. 73 (exhaustion requirement). We would certainly consider this requirement in an appropriate case.

Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. See In re South African Apartheid Litigation, 238 F. Supp. 2d

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

[After discussing various materials relied upon by Alvarez, the six members of the Court concluded:] It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and concurring in the judgment:

This Court seems incapable of admitting that some matters - *any* matters - are none of its business. . . . In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far and then - repeating the same formula the ambitious lower courts *themselves* have used - invites us to try again.

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonable ness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.

American law - the law made by the people's democratically elected representatives - does not recognize a category of activity that is so universally

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1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as Amici Curiae 7a, ¶3.2.1 (emphasis deleted). The United States has agreed. See Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003, reprinted in id., at 2a. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy. Cf. Republic of Austria v. Altmann, 541 U. S. ___, ___ (2004) (slip op., at 23–24) (discussing the State Department's use of statements of interest in cases involving the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1602 et seq.).

disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced.

JUSTICE BREYER concurring in part and concurring in the judgment:

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. See Restatement §404, and Comment *a;* International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000). That subset includes torture, genocide, crimes against humanity, and war crimes. See *id.*, at 5–8; see also, *e.g.*, *Prosecutor* v. *Furundzija*, Case No. IT–95– 17/1–T, ¶¶155–156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia since 1991, Dec. 10, 1998); *Attorney Gen. of Israel* v. *Eichmann*, 36 I. L. R. 277 (Sup. Ct. Israel 1962).

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement §404, Comment *b*. That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. . . . Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.

Taking these matters into account, as I believe courts should, I can find no similar procedural consensus supporting the exercise of jurisdiction in this case. That lack of consensus provides additional support for the Court's conclusion that the ATS does not recognize the claim at issue here—where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another.

NOTES AND QUESTIONS

(1) *Sosa* cites to Section 702 of The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES in noting that a, "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . . prolonged detention." Immunity problems aside, can someone picked up in Afghanistan or Iraq and held for months or years without being brought before a judge state a cause of action under the Alien Tort Statute?

(2) In footnote 21 of *Sosa* there is a discussion of "deference to the political branches." How far can the executive go in asserting positions without upsetting the balance of power? *See* Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).