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THE ALIEN TORT STATUTE AND THE JUDICIARY ACT OF 1789: A BADGE OF HONOR

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The Alien Tort Statute, originally enacted as section 9 of the Judiciary Act of 1789, grants the district courts original jurisdiction over “any civil action by an alien for a tort only, committed in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.”¹ In 1980 the United States Court of Appeals for the Second Circuit breathed new life into these little-used and somewhat mysterious provisions. The case was *Filartiga v. Pena-Irala*,² in which a Paraguayan family brought suit against a former Paraguayan police chief for the torture and death of one of its members. The court upheld federal jurisdiction under the Alien Tort Statute. Finding state torture to be a violation of “modern international law,” it pronounced itself willing to enforce this law even as between aliens whenever personal jurisdiction could be obtained over the defendant.³

Scholars and human rights lawyers hailed *Filartiga* for lending judicial weight to President Carter’s human rights policy and opening up a new field of human rights litigation.⁴ Subsequent attempts to expand the *Filartiga* holding to violations of international law other than torture—from terrorism by the Palestine Liberation Organization⁵ to the Soviet downing of

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¹ As originally enacted, the Statute provided that the district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 77 (currently, with some changes, 28 U.S.C. §1350 (1982)) [hereinafter Statute]. Subsequent changes and revisions of this language were dictated by the varying approaches to the demarcation of instances of exclusive federal jurisdiction, first by consolidating all such instances in one section (revision of 1878), and subsequently by making express provision for exclusive jurisdiction in each individual section (revision of 1948). The term “civil action” was substituted in 1948 in conformity with Rule 2 of the Federal Rules of Civil Procedure. H.R. REP. NO. 308, 80th Cong., 1st Sess., app. at 124 (1947) (reviser’s notes).

² 630 F.2d 876 (2d Cir. 1980) (Kaufman, J.).

³ *Id.* at 885, 887. Although the acts alleged were committed in Paraguay 3 years earlier, defendant Peña-Irala was living illegally in Brooklyn when the suit was filed.

⁴ See, e.g., Symposium, 4 HOUS. J. INT’L L. 1 (1981); *Federal Jurisdiction, Human Rights, and the Law of Nations: Essays on Filartiga v. Pena-Irala*, 11 GA. J. INT’L & COMP. L. 305 (1981); Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT’L L.J. 53 (1981); Lillich, *The Role of Domestic Courts in Enforcing International Human Rights Law*, 74 ASIL PROC. 20 (1980).

⁵ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). Plaintiffs brought suit under the Alien Tort Statute against the Palestinian

Korean Air Lines Flight 007⁶—proved less successful. A similar fate befell efforts to obtain section 1350 jurisdiction over defendants other than individuals—from nonstate actors to states themselves.⁷ The Second Circuit took a dramatic step in this direction in September 1987 with its decision in *Amerada Hess Shipping Corp. v. Argentine Republic*, finding that the Statute conferred jurisdiction over an action against Argentina—a foreign sovereign in its sovereign capacity—for the bombing of a Liberian tanker during the Falklands/Malvinas war.⁸ But the Supreme Court wasted no time in setting the record straight. It unanimously reversed the decision (9-0) in an opinion handed down on January 23, 1989, leaving no doubt that suits against foreign sovereigns are to be exclusively governed by the Foreign Sovereign Immunities Act.⁹

On the other hand, cases brought on essentially the same set of facts as *Filartiga*—actions by a torture victim against the torturer or the torturer's superior officer where the defendant was within the personal jurisdiction of the court—have generally succeeded. In the words of a California district court recently confronted with one of these cases, "There appears to be a growing consensus that §1350 provides a cause of action for certain 'international common law torts.'" ¹⁰

Liberation Organization (PLO), among others, for damages resulting from a notorious terrorist attack on Israeli buses on the Haifa highway. The D.C. Circuit panel upheld the district court's dismissal for lack of jurisdiction, but on three different bases. Judge Edwards upheld *Filartiga*, but only as to "torture perpetrated by a . . . recognized state or one of its officials acting under color of state law," not a nonstate actor such as the PLO. 726 F.2d at 792. Judge Bork attacked *Filartiga* itself on the theory that the jurisdictional grant of the Alien Tort Statute applied only where plaintiff had an independent or statutory cause of action. Finally, Judge Robb summarily dispatched the case as nonjusticiable under the political question doctrine.

⁶ *In re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83-0345 (D.D.C. Sept. 1, 1985). Other notable cases in this category include *Greenham Women Against Cruise Missiles v. Reagan*, 591 F.Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 755 F.2d 34 (2d Cir. 1985) (action seeking injunction against deployment of U.S. cruise missiles near British town); and *Sanchez-Espinoza v. Reagan*, 568 F.Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (action by Nicaraguan citizens seeking damages for torts committed by U.S.-financed "contras"). For a detailed summary of every case invoking the Alien Tort Statute since *Filartiga*, see Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 5 n.17 (1985).

⁷ See concurrence by Judge Edwards in *Tel-Oren*, 726 F.2d at 791 (international law prohibition against state terrorism does not extend to nonstate actors), and 776 n.1 (jurisdiction over Libya under the Alien Tort Statute barred by the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§1330, 1602-1611 (1982) [hereinafter FSIA]). However, in *Von Dardel v. USSR*, 623 F.Supp. 246 (D.D.C. 1985) (action alleging Soviet kidnapping and possibly murder of Swedish diplomat Raoul Wallenberg), the court simultaneously found jurisdiction under *both* the Alien Tort Statute and the FSIA.

⁸ 830 F.2d 421 (2d Cir. 1987).

⁹ *Amerada Hess Shipping Corp. v. Argentine Republic*, 57 U.S.L.W. 4121 (U.S. Jan. 24, 1989) (Alien Tort Statute does not grant jurisdiction over foreign sovereigns independently of the FSIA).

¹⁰ *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1539 (N.D. Cal. 1987) (action by two Argentine torture victims against a former Argentine general). In support of this conclusion, the court

Today, however, *Filartiga* itself is under attack—from the U.S. Government. In the original *Filartiga* appeal to the Second Circuit, the Carter administration filed an amicus brief strongly supporting jurisdiction under the Alien Tort Statute.¹¹ Eight years later, under the Reagan administration, the Government reversed course. In October 1987, the Justice Department filed an amicus brief in *Trajano v. Marcos*, an action brought by Philippine citizens alleging torture and wrongful death against former Philippine President Ferdinand Marcos and his associates that is currently pending in the Ninth Circuit.¹² It effectively renounces the Carter administrations' position and outlines a much narrower interpretation of the Alien Tort Statute, one that would exclude cases between aliens for human rights violations committed outside the United States.¹³ Thus, now more than ever, as Judge Edwards pleaded in *Tel-Oren*, this is "an area of the law that cries out for clarification by the Supreme Court."¹⁴

The current debate over the meaning and scope of the Statute is being waged on historical turf. What did the First Congress have in mind? An original intent argument may seem particularly attractive because the Statute virtually lay fallow for 200 years. Or perhaps scholars and advocates are simply responding to judicial complaints about the inadequacy of the historical record.¹⁵ In any event, battle has been joined on this ground, giving rise to a new paper chase through the legislative history of the First Judiciary Act, the constitutional debates, the Founders' papers and the proceedings of the Continental Congress. The resulting detective work has been impressive. In the end, however, definitive proof of the intended purpose and scope of the Alien Tort Statute is impossible. More interesting, and ultimately more relevant, is a reconstruction of the general context in which the Statute was passed: the Framers' understanding of the law of nations and their general attitude toward compliance with the obligations it imposed.

The first part of this article examines existing theories of the Statute and finds them lacking. They help explain Article III of the Constitution, and certain other provisions of the First Judiciary Act, but not section 9. Part II advances an alternative explanation, reweaving some elements of existing theories against a very different backdrop. In essence, the argument is that

cited *Filartiga*; *Tel-Oren* (Edwards, J., concurring); *Guinto v. Marcos*, 654 F.Supp. 276 (S.D. Cal. 1986); *Von Dardel v. USSR*, 623 F.Supp. 246 (D.D.C. 1985); and *Siderman v. Republic of Argentina*, No. CV 82-1772-RMT (MCx) (C.D. Cal. Sept. 28, 1984). *But see Tel-Oren*, 726 F.2d at 798 (Bork, J., concurring) (arguing that Alien Tort Statute covers only a limited class of 18th-century torts).

¹¹ Memorandum for the United States as *Amicus Curiae*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 ILM 585 (1984).

¹² Brief for the United States of America as *Amicus Curiae*, *Trajano v. Marcos*, No. 86-0297 (D. Haw. July 18, 1986), *appeal docketed*, No. 86-2448 (9th Cir. Aug. 20, 1986) [hereinafter *Trajano* amicus brief].

¹³ This position is discussed in greater detail in the text at notes 121-24 *infra*.

¹⁴ 726 F.2d at 775.

¹⁵ Judge Bork observed in *Tel-Oren*: "Historical research has not as yet disclosed what section 1350 was intended to accomplish." 726 F.2d at 812.

the Alien Tort Statute was a straightforward response to what the Framers understood to be their duty under the law of nations. Part III explores their reasons for seeking to comply with this duty. Their motives derived not only from a negative calculation of the immediate national security consequences if they did not comply, but also from a positive conception of conduct befitting a civilized nation. As a general principle, "duty" embodied the constraints imposed by concepts of national honor and virtue. The Framers understood duty and national self-interest to be conceptually distinct—at least in the short term. Both were equally legitimate and important factors in shaping foreign and, indeed, domestic policy.

Part IV analyzes the implications of this historical debate for the contemporary interpretation and application of the Alien Tort Statute. The Justice Department's current theory, at least as outlined in its amicus brief in the *Trajano* case, emphasizes the direct *accountability* of the United States to offended foreign sovereigns under international law. The Statute was supposedly intended to afford private redress to an injured citizen of such a sovereign—but only where the United States had a specific international legal obligation to protect that citizen. This reasoning is consistent with a narrow focus on national security. The theory advanced here, by contrast, assumes the Framers' understanding of a more general obligation to help redress certain violations of international law as such, regardless of where they may have occurred or the identity of the victim. This obligation flowed not to other states individually, but to the *community* of civilized nations as a collective and mutually beneficial entity.

This insight into the spirit of the Statute offers a frame of reference for courts seeking to determine its scope in situations the Framers could not possibly have anticipated. Foreign policy considerations, such as potentially roiling relations with another state, are not necessarily determinative. They must be weighed against more abstract values, emblems of a particular historical tradition and set of national aspirations. In an era in which the principal constraints on this nation's behavior are self-imposed, the Founders' credo is a timely reminder of a broader definition of the national interest and a more enlightened understanding of the sources of power. As part of this tradition, in its small way, the Alien Tort Statute is a source of pride, a badge of honor.

I. THE ALIEN TORT STATUTE AND NATIONAL SECURITY

All the existing theories about the historical origins of the Statute essentially depict it as part of the protective armor designed to shield a young and vulnerable nation in a dangerous and unpredictable world. The scholars and judges who have addressed the issue offer variations on this theme in terms of precisely what threat the Statute was designed to avert. Yet, although these differences give rise to larger divergences about the intended scope and open-endedness of the Statute, the purported distinctions ultimately collapse under the weight of a common set of unexplored assumptions about 18th-century political culture. This section groups the theories thematically, analyzing and critiquing them on their own terms.

The Denial of Justice Theory

Virtually every commentator on the Statute has tied it to the Framers' desire to avoid embroiling the nation in conflicts with foreign states arising from U.S. mistreatment of foreign citizens.¹⁶ One potential cause for offense was the denial of justice to an alien party to a suit in the United States. The Federalists thought this danger to be particularly great in state courts, because state judges were less likely to be sensitive to national concerns than their federal counterparts. In its most basic form, the denial of justice theory argues that the Alien Tort Statute minimized this eventuality by providing at least some aliens with access to federal court.

The standard reference in support of this theory is Alexander Hamilton's statement in *The Federalist* (No. 80):

The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. *As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.* This is not less essential to the preservation of the public faith, than to the security of the public tranquillity.¹⁷

Professor D'Amato has recently relied on this passage to explain the Alien Tort Statute as "an important part of a national security interest in 1789,"¹⁸ and as a still valid consideration arguing for the broadest possible construction of the Statute today.¹⁹

Hamilton, however, was not arguing for the Alien Tort Statute. He was expounding the logic of Article III of the Constitution, specifically the alienage provision of the Diversity Clause.²⁰ To his mind, the great virtue of

¹⁶ See, e.g., D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AJIL 62 (1988); Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 489-98 (1986); Dickinson, *The Law of Nations Is Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 44-45 (1952); Randall, *supra* note 6, at 19-22; and Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47 (1988). Judge Edwards also adopted this rationale, at least in part, in his opinion in *Tel-Oren*, 726 F.2d at 783.

Among the recent spate of articles on the Statute, Professor Casto's, in particular, includes a prodigious amount of research. This article is already much cited and is likely to remain the definitive historical study for the foreseeable future. I have relied heavily on the materials Casto has unearthed. Although I disagree with many of his conclusions, I am indebted to him, as is anyone working in this field, for having plowed so much of the ground.

¹⁷ THE FEDERALIST NO. 80, at 500-01 (A. Hamilton) (B. Wright ed. 1961) (emphasis added).

¹⁸ D'Amato, *supra* note 16, at 64-65.

¹⁹ *Id.* at 67; see also Randall, *supra* note 6, at 21-22; Dickinson, *supra* note 16, at 44-45; and Casto, *supra* note 16, at 521-22.

²⁰ According to the structure of the paper, Hamilton first set out six categories of cases to which "[i]t seems scarcely to admit of controversy[] that the judiciary authority of the Union ought to extend." THE FEDERALIST, *supra* note 17, No. 80, at 499. The passage cited above comes in the fourth category, cases involving the "PEACE of the CONFEDERACY." *Id.* at 500. He

this provision was that it envisioned a scheme in which *all* cases involving foreigners could be handled by the federal judiciary.²¹ The corollary provision in the First Judiciary Act was not section 9 but section 11, conferring diversity and alienage jurisdiction on the newly created federal circuit courts.

Yet section 11 did not fully implement the Federalists' scheme. Aliens could be assured of access to federal courts only when suing for more than \$500. This requirement reflected a necessary compromise with the Anti-Federalists, many of whom had opposed the Diversity Clause in the constitutional debates and regarded the alienage provision as a particular affront to the integrity of state courts.²² From Hamilton's point of view, it was a significant defeat. Five hundred dollars was a considerable sum; as Professor Casto points out, tort damages in the colonial period almost never reached that amount.²³ Plenty of opportunities thus remained for state courts to embroil the nation in international controversy by denying justice to an alien.

Given this compromise, a more sophisticated variation of the denial of justice theory presents the Alien Tort Statute as a second-best alternative. Proponents argue that Hamilton articulated an implicit fallback position, which they point to as the direct precursor of the Statute.²⁴ In the same *Federalist* paper on Article III, he commented on a possible distinction between "cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States."²⁵ In the remainder of this passage, Hamilton argued against such a division, primarily because of "the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other."²⁶ But it is easy to hypothesize that the drafters of the First Judiciary Act, unable to implement his recommendation in full, tried to use the alien tort provision in section 9 to draw precisely this distinction.²⁷

then shows how each of the provisions of Article III falls within one or more of these categories. "[C]ases between a State and the citizens thereof, and foreign States, citizens, or subjects . . . have been already explained to belong to the fourth of the enumerated classes . . ." *Id.* at 505.

²¹ Or at least all cases between a foreigner and a citizen. See *infra* notes 37 and 51, and text at notes 47-51 and 62-64.

²² George Mason succinctly expressed the states' indignation at the Virginia ratifying convention: "Cannot we trust the state courts with disputes between a Frenchman, or an Englishman, and a citizen; or with disputes between two Frenchmen? This is disgraceful: it will annihilate your state judiciary; it will prostrate your legislature." 3 ELLIOT'S DEBATES 527 (2d ed. 1836), quoted in F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 8 n.15 (1928).

²³ Casto, *supra* note 16, at 497 n.168.

²⁴ See sources cited *supra* note 19. Judge Edwards also makes this point explicitly in his opinion in *Tel-Oren*, 726 F.2d at 784.

²⁵ THE FEDERALIST, *supra* note 17, NO. 80, at 501.

²⁶ *Id.* He also thought it "at least problematical" that even in a case arising under municipal law, an "unjust sentence against a foreigner" might be "an aggression upon his sovereign." *Id.*

²⁷ See *Tel-Oren*, 726 F.2d at 784 (Edwards, J.) ("it would have been logical to place under federal jurisdiction at least the local actions most likely to create international tension").

Notwithstanding this apparent correlation, the provision was at best a sop toward Hamilton's overriding concern: the consequences of a denial of justice to an alien. To begin with, the danger of a denial of justice would have arisen in any case in which an alien was a party; yet the alien tort provision offered access to federal courts only where aliens were plaintiffs.²⁸ Similarly, the majority of the cases Hamilton had in mind regarding treaties and the laws of nations would have been commercial cases;²⁹ but, again, the alien tort provision excluded all such cases, restricting federal jurisdiction to only a small number of relatively unusual offenses.³⁰

Above all, the provision did not cover the one category of cases arguably "arising upon" a treaty of the United States in which state courts were known to be routinely denying justice to foreign citizens. Article IV of the 1783 Definitive Treaty of Peace with Great Britain³¹ provided that "Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full value in Sterling Money of all bona fide Debts heretofore contracted."³² Frequent state violations of this provision had created continuing friction with Great Britain, providing the British Government with an excuse to escape its own obligations under the Treaty.³³ Yet despite the potential threat to the nation's security from a former hostile power, and despite the knowledge that the amount-in-controversy requirement would bar circuit court jurisdiction over most of these cases,³⁴ the Federalists made

²⁸ In fact, at least with respect to cases involving official foreign emissaries, the First Congress apparently concluded that the danger arising from a potential denial of justice was greatest when they were *defendants*. Section 9 of the First Judiciary Act granted the district courts *exclusive* jurisdiction over all cases *against* foreign consuls; section 13 similarly made Supreme Court jurisdiction *exclusive* over cases *against* ambassadors and other public ministers, but optional where such parties were plaintiffs. *See infra* note 87.

²⁹ Eighteenth-century lawyers understood the law of nations to encompass public international law, the law merchant and maritime law. *See* Casto, *supra* note 16, at 505 (citing James Wilson's lectures on law in 1790 and 1791).

³⁰ *See* discussion in text at notes 39–40 *infra*.

³¹ Sept. 3, 1783, 8 Stat. 80, TS No. 109.

³² *Id.* Judge John Gibbons, tracing the history of state sovereign immunity, makes a compelling argument that the Framers and the First Congress anticipated direct suits against the *states* for violations of this and other articles of the Definitive Peace Treaty. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1899–1920 (1983). If so, the immediate issue in these cases would have been state contravention of the Treaty, matching Hamilton's description of cases "arising upon" a treaty or the law of nations. If not, the typical case would have been a private action by a British creditor against an American debtor for recovery of a debt, in which the defendant would have raised a state law sequestering or somehow invalidating the debt as a defense. Plaintiff could then assert the illegality of such a law under the Treaty. Although modern lawyers will automatically object that this scenario would not qualify as a case "arising upon" (or "under") the Treaty, the Supreme Court's decision to that effect was over a century away. *See* *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908) (a federal question raised solely as a defense is not one "arising under a law of the United States" for purposes of jurisdiction under 28 U.S.C. §1331).

³³ F. MARK, *INDEPENDENCE ON TRIAL* 5–15 (1973); *see also* S. BEMIS, *JAY'S TREATY: A STUDY IN COMMERCE AND DIPLOMACY* 132–34 (2d ed. 1962); Casto, *supra* note 16, at 493 n.147, 507–08.

³⁴ *See* S. BEMIS, *supra* note 33, at 436; Randall, *supra* note 6, at 30–31; Casto, *supra* note 16, at 497 n.167; D'Amato, *supra* note 16, at 65 n.12.

no apparent attempt to bring them within the ambit of the Alien Tort Statute.³⁵ On the contrary, Casto and Randall both argue that the restriction “for a tort only” was designed to *exclude* these cases from the Statute.³⁶

Finally, scholars intent on depicting the alien tort provision as essentially a *sub rosa* extension of the alienage jurisdiction fail to note that it stands on a completely different constitutional footing. Its basis under Article III could not have been the alienage clause; even the Justice Department agrees that the First Congress intended the provision to extend to cases between two aliens as well as between an alien and a citizen.³⁷ It can thus be constitutionally justified only as an exercise of the federal question jurisdiction.³⁸ In

³⁵ Of course, state court jurisdiction under the Constitution, as opposed to the Articles of Confederation, was subject to the Supremacy Clause, U.S. CONST. Art. VI, cl. 2, and to Supreme Court review. Judiciary Act of 1789, §25, 1 Stat. 73, 85 (1789). The Supreme Court held unequivocally in 1795 that the Framers had intended the Supremacy Clause to encompass the Definitive Treaty with Great Britain, and thus to ensure its application by state courts. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236–37, 277 (1795). However, although a fair construction of “no lawful impediment” in Article IV would have prevented a state court from giving effect to a state law sequestering debts or making U.S. currency acceptable for their payment, the Treaty could not affect the application of ordinary contract law to the specific facts of individual cases. Considerable room thus remained for state court bias in favor of Americans.

³⁶ Casto, *supra* note 16, at 507–08; Randall, *supra* note 6, at 28–31.

An alternative theory might link the Alien Tort Statute to Articles V and VI of the Definitive Peace Treaty, *supra* note 31, committing the federal Government to “recommend” to the states restitution of confiscated British or Loyalist property and prohibiting future confiscations. However, although logically persuasive, this explanation similarly fails on the historical record. Charles Warren cites evidence that the \$500 amount-in-controversy restriction on the circuit court jurisdiction was designed to keep confiscation suits in state courts. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 78 (1923). Further, in an exchange of notes with British Ambassador George Hammond in 1792, Secretary of State Jefferson devoted four pages to a detailed refutation of continuing British accusations of Treaty violations with respect to confiscated property. Memorandum from Thomas Jefferson to George Hammond (May 29, 1792), reprinted in 1 AMERICAN STATE PAPERS: 1 FOREIGN RELATIONS 201, 202–06 (1832). Jefferson never mentioned the prospect of recourse to federal court under the Alien Tort Statute. Nor, apparently, did any British landholder ever try to sue under this provision. See Randall, *supra* note 6 (reviewing every case ever brought under the Statute).

³⁷ *Trajano* amicus brief, *supra* note 12, at 11. Professor Casto attempts to circumvent this difficulty by arguing that at least some of the drafters of the First Judiciary Act understood the alienage clause in Article III to confer jurisdiction over suits between aliens. Given the actual language of the provision and the contemporary jurisprudence, this is a very slender reed. See text at notes 48–51 and 62–63 *infra*.

³⁸ Although no other Article III alternative exists, this proposition is nevertheless highly contentious. It assumes that the Article III category of “cases or controversies arising under . . . the laws of the United States” included cases arising under the law of nations. This is the view of the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §111(2) (1987) [hereinafter RESTATEMENT (THIRD)]; see also Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1560 (1984). However, the historical record on this point is at best inconclusive; the Framers deleted “the law of nations” from an earlier draft of Article III. See *id.* n.22.

The Justice Department suggests that the Alien Tort Statute is constitutional only with respect to cases arising under the law of nations as subsequently enacted by Congress. See *Trajano* amicus brief, *supra* note 12, at 12, 25. Article I, §8 gives Congress the power to define and punish offenses against the law of nations. But cases arising under laws passed in exercise of

retrospect, then, Hamilton's arguments in favor of alienage jurisdiction seem even further off the mark.

In sum, it is implausible that the primary purpose of the Alien Tort Statute was to avert the denial of justice to aliens. The broad sweep of this explanation simply does not fit with the precise and narrow wording of the Statute. While Hamilton and his cohorts no doubt approved of any provision facilitating aliens' access to federal courts, the origins of this specific provision almost certainly lie elsewhere.

The "Ambassador Protection Plan"

A more detailed historical explanation of the Alien Tort Statute effectively presents it as a form of national insurance designed to protect the rights of foreign ambassadors. According to this theory, a "tort . . . in violation of the law of nations" refers to Blackstone's enumeration of a specialized category of offenses in which international law directly regulated individual conduct. Blackstone listed three such offenses: violation of safe-conducts or passports, infringement of the rights of ambassadors and piracy.³⁹

Judge Bork, concurring in *Tel-Oren v. Libyan Arab Republic*, relies on this history as an argument for limiting the Alien Tort Statute to its 18th-century terms, allowing suit only for Blackstone's three offenses.⁴⁰ He focuses particularly on the need to protect ambassadors, referring to an incident in 18th-century Britain in which English creditors manhandled the Russian ambassador. Against this background, "it may be that the First Congress, sensitive to the international ramifications of denying ambassadors redress, enacted section 1350 to give ambassadors the option of bringing tort actions in federal courts as well as in state courts."⁴¹

In his interpretation of the Statute, Professor Casto also draws on both Blackstone and a particular concern for the rights of ambassadors. He argues that the immediate catalyst was an attack in 1784 by the Chevalier de Longchamps, an itinerant French nobleman, on a fellow countryman, Consul General Marbois, in Philadelphia. Pennsylvania eventually prosecuted the offender. The Pennsylvania Supreme Court, in turn, convicted him of a crime in violation of the law of nations, which it held to be part of state law.⁴²

this power would no longer be arising under the law of nations, but rather under domestic laws. It seems odd to identify such a category of cases by reference to a "violation of the law of nations." Further, there is absolutely no evidence that the First Congress intended the alien tort provision to be so limited.

This debate raises questions about the Framers' view of the relationship between international and domestic law that are far beyond the scope of this article. Suffice it to say here that the 200-year-old presumption that the Alien Tort Statute is indeed constitutional compels a new look at Article III.

³⁹ W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 881 (G. Chase 4th ed. 1923).

⁴⁰ 726 F.2d at 813. See *supra* note 5. ⁴¹ 726 F.2d at 815.

⁴² *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (1784).

But justice was not swift enough to prevent an international furor, leading many prominent Federalists to decry their impotence to redress the insult via the Continental Congress.⁴³

In light of this incident and a subsequent offense to Ambassador Van Berckel of the Netherlands, through an attack on a member of his household, Casto agrees with Judge Bork that the primary purpose of the Statute was probably to protect foreign ambassadors.⁴⁴ However, he argues that "section 1350 should be construed as liberally as possible."⁴⁵ He bases this assertion on the apparent breadth of the language of the Statute, concluding:

This choice of an open-ended statute to vest the federal courts with federal jurisdiction to try repetitions of the Marbois and Van Berckel incidents indicates an intent to create a broad original jurisdiction. The infringement of the rights of an ambassador was simply the paradigm for all foreseeable and unforeseeable violations by individuals of the law of nations.⁴⁶

Casto also makes the first serious attempt to interpret the Statute in relation to the provisions and legislative history of the First Judiciary Act as a whole. Before addressing his argument, however, it is helpful to review those elements of the jurisdictional provisions of the Act encompassing cases potentially involving foreigners or arising under the law of nations.

Section 9 (the district courts):

- jurisdiction, exclusive of the state courts, over minor crimes "cognizable under the authority of the United States";
- exclusive original jurisdiction over admiralty and maritime causes and of seizures under the law of the United States;
- concurrent jurisdiction with both the state and circuit courts "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States";
- jurisdiction, exclusive of the state courts, over all suits against consuls or vice-consuls.

Section 11 (the circuit courts):

- alienage jurisdiction over all civil suits, concurrent with the state courts and subject to a \$500 amount-in-controversy requirement;
- exclusive jurisdiction over all crimes and offenses "cognizable under the authority of the United States," except where otherwise specified, and including concurrent jurisdiction over crimes cognizable by the district courts.

Section 13 (the Supreme Court):

- exclusive jurisdiction over all cases against ambassadors and other public ministers or their domestics;

⁴³ Casto documents extensive discussion of the Marbois affair in correspondence between the nation's most prominent statesmen. Casto, *supra* note 16, at 492 n.143.

⁴⁴ *Id.* at 499.

⁴⁵ *Id.* at 472.

⁴⁶ *Id.* at 500.

- original, but not exclusive, jurisdiction over all suits brought by ambassadors or other public ministers, or in which a consul or vice-consul is a party.

Professor Casto notes that the net effect of these provisions was to vest all federal courts “with original jurisdiction over aliens’ claims for torts committed in violation of the law of nations.”⁴⁷ He begins with the grant of jurisdiction to the Supreme Court, which would have permitted trial of a “repetition of the notorious affronts to Mr. Marbois and Ambassador Van Berckel . . . as a civil tort.” He interprets the designation of this jurisdiction as “original, but not exclusive,” as an “express link to the jurisdiction of the circuit and district courts.”⁴⁸

The circuit courts, in turn, had jurisdiction over tort suits brought by ambassadors under the alienage provision, since an ambassador was certain to be an alien. Although Casto recognizes the broader general purpose of the alienage jurisdiction, he posits that the drafters nevertheless consciously ensured the inclusion of suits between aliens potentially resulting from an incident like the Marbois affair. His support for this argument is the section 11 language extending jurisdiction to any case “in which an alien is a party,” in contrast to the constitutional grant of jurisdiction over cases “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”⁴⁹ Whereas the Senate amended a similarly broad description of diversity jurisdiction in the draft bill⁵⁰ to conform to the Constitution, it left the alienage language unchanged.⁵¹

Despite these efforts, the \$500 amount-in-controversy requirement remained a serious obstacle to many of these suits. According to Casto, however, this is precisely the explanation for the Alien Tort Statute. He argues that the drafters “filled this jurisdictional gap” by conferring alien tort jurisdiction on the district courts.⁵²

Both the Bork and Casto theories miss their mark. The desire to protect foreign ambassadors helps explain various provisions of Article III of the Constitution, as well as the scope of federal criminal and Supreme Court jurisdiction in the First Judiciary Act. But it does not explain the Alien Tort Statute.

In none of the historical incidents cited by Bork and Casto did the injured ambassadors ever attempt to bring a *civil* suit against the wrongdoer. Attacks on a foreign emissary or a member of his household were *crimes* at international law. Blackstone defines this special category of offenses in exactly these terms: those that can “be the object of the criminal law of any

⁴⁷ *Id.* at 496.

⁴⁸ *Id.*

⁴⁹ U.S. CONST. Art. III, §2, cl. 1.

⁵⁰ The draft granted jurisdiction over all suits where “a foreigner or citizen of another state than that in which the suit is brought is a party.” This language would have extended the diversity jurisdiction to suits between citizens of the same state, as long as the suit was filed in a federal court of another state. *See* Casto, *supra* note 16, at 497–98.

⁵¹ *Id.* at 498. *See also* F. FRANKFURTER & J. LANDIS, *supra* note 22, at 8 n.15 (the alienage grant in the First Judiciary Act was “broader than that of the Constitution”).

⁵² Casto, *supra* note 16, at 497.

particular state."⁵³ And what concerned the Continental Congress was whether Pennsylvania would define the attack on Marbois as a crime and punish the criminal.⁵⁴ The question whether Marbois would have an action for damages against de Longchamps never arose.

When a genuine national government emerged, the Framers' response to the Marbois and Van Berckel incidents was to take control over the definition and prosecution of crimes at international law. They began with Article I, section 8 of the Constitution, giving Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." The First Congress, in turn, gave both the district and the circuit courts jurisdiction over "crimes and offences cognizable under the authority of the United States."⁵⁵ Indeed, as Charles Warren discovered in his landmark research on the history of the Act, the Senate deliberately amended the draft version of this language in sections 9 and 11 to include common law crimes and crimes under the law of nations.⁵⁶

The Framers recognized the importance of ensuring federal jurisdiction over civil suits involving ambassadors. But their concern was not limited to tort suits arising from assaults in violation of the law of nations. On the contrary, they appear to have understood, as a general proposition, that any case involving the direct representative of a foreign sovereign should be handled with care. Article III of the Constitution mentions "Ambassadors, other public Ministers and Consuls" twice: section 2(1) ensures that cases affecting such persons shall come within the national judicial power, and section 2(2) specifically provides that the Supreme Court shall have original jurisdiction over such cases.

Following suit, the drafters of the First Judiciary Act gave the Supreme Court

exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.⁵⁷

⁵³ W. BLACKSTONE, *supra* note 39, at 880.

⁵⁴ De Longchamps was convicted of "a crime against the whole world," for which he was sentenced to over 2 years in prison and fined 100 French crowns. 1 U.S. (1 Dall.) at 116, 118. Similarly, the offender in the Van Berckel affair was sentenced to 3 months in jail. *Casto*, *supra* note 16, at 494. The criminal status of the offense emerges even more clearly from the British incident relied on by Judge Bork. The Russian Tsar reportedly demanded that certain creditors who had "roughed up" the Russian ambassador be put to death. The Crown did not comply with this request, but did agree to change the applicable law to permit more severe punishment for such an offense than had previously been authorized. *Tel-Oren*, 726 F.2d at 815.

⁵⁵ Section 11, 1 Stat. 73, 78 (1789). Section 9 contains the same language, although the provision is then limited by a restriction concerning the severity of punishment. 1 Stat. at 76.

⁵⁶ Warren, *supra* note 36, at 73, 77. The draft bill provided in both sections for jurisdiction over "all crimes and offences that shall be cognizable under the authority of the United States and defined by the laws of the same." *Id.* (emphasis added). The Senate deleted this final modifying clause.

⁵⁷ 1 Stat. at 80.

In short, all foreign plenipotentiaries worth worrying about were provided for by name, quite liberally at that. They could bring any type of action, under state, federal or international law, with no amount-in-controversy requirement—all in a setting befitting their honored status.

By contrast, the alien tort provision in section 9 conditioned the jurisdiction of the lowly district courts on a set of rather stringent pleading requirements. If the point was to ensure that an ambassador could sue in federal court beyond the nation's capital, why restrict this freedom only to a particular class of tort cases?⁵⁸ Conversely, why designate privileged plaintiffs—ambassador, public minister, consul—when enumerating the powers of the Supreme Court, yet use the generic term “alien” when vesting the district courts with the same jurisdiction?⁵⁹

Further, Casto's theory of the interrelationship of the three major jurisdictional grants in the First Judiciary Act, while ingenious, does not quite cohere. To begin with, the nonexclusivity of Supreme Court jurisdiction in cases in which ambassadors and other public ministers were plaintiffs almost certainly referred to state as well as other federal courts.⁶⁰ And if it was intended as a link to the district court jurisdiction, logic would dictate a reciprocal reference in section 9. Yet, although the alien tort provision explicitly provided concurrent jurisdiction with the circuit and state courts, it made no mention of the Supreme Court. This omission suggests, directly contrary to the Casto theory, that the provision may have been designed to cover all torts in violation of the law of nations *other* than those committed against ambassadors or other public ministers.⁶¹

The middle link in Casto's hypothetical chain is even weaker. How could the authors of the First Judiciary Act have believed that section 11 could constitutionally extend to suits between two aliens? Casto claims that the principal drafter of the Act, Oliver Ellsworth, understood the Constitution itself to grant such jurisdiction.⁶² But he thereby undercuts his own argument concerning the Senate's amendment of the diversity grant to conform to the Constitution while leaving the broader alienage language untouched.⁶³ If Ellsworth read the Constitution to grant jurisdiction over cases

⁵⁸ This restriction makes even less sense in view of a contrary *expansion* of the Supreme Court jurisdiction between the draft bill and the final act. The draft gave the Supreme Court nonexclusive jurisdiction over all “suits for trespasses” brought by ambassadors. Congress broadened this provision to include “all suits.” Casto, *supra* note 16, at 496, 498.

⁵⁹ The choice of this more general term also contrasts with the specific provision several clauses later for jurisdiction over all cases against consuls or vice-consuls. 1 Stat. at 79; *see* p. 470 *supra*.

⁶⁰ Understood in this context, the Supreme Court jurisdiction simply followed the general pattern of insisting on federal jurisdiction where aliens or out-of-state citizens were defendants, but giving them their choice of forums as plaintiffs. *See* text at notes 84–88 *infra*.

⁶¹ Casto attempts to circumvent this difficulty with the argument that Oliver Ellsworth “understood the plan of the Constitution as vesting the Congress with plenary power over the lower courts' jurisdiction but no power over the Supreme Court's original jurisdiction.” Casto, *supra* note 16, at 498 n.169. But surely a provision making the jurisdiction of the *district* courts concurrent with the constitutionally authorized original jurisdiction of the Supreme Court could not be construed as *altering* this original jurisdiction in any way.

⁶² Casto, *supra* note 16, at 515.

⁶³ *See* text at notes 49–51 *supra*.

between two aliens, then he would have understood the grant of jurisdiction in the draft bill over any case "in which an alien is a party" as already conforming to the Constitution. No inference can be drawn from Congress's failure to modify it.

More generally, given the clarity of the constitutional language, this entire line of argument strains credulity. Chief Justice Marshall certainly had no doubts on this score. When an alien plaintiff did attempt to bring suit against another alien in the circuit courts in 1809, he dispatched the case in one sentence: "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."⁶⁴

It is equally plausible, albeit equally unsupported, to speculate that the drafters formulated the language of section 11 in contradistinction to section 9. The alien tort provision limited cases involving aliens to cases brought by alien *plaintiffs*. By contrast, the circuit court jurisdiction over alien cases extended equally to any cases in which aliens were *defendants*. It extended to any case "in which an alien is a party"—plaintiff or defendant. The Constitution nevertheless made it plain that a citizen had to be on the other side.

In any event, regardless of the origins of this apparently wayward phrase, if the First Congress understood the language of the Constitution as clearly as Chief Justice Marshall, it understood full well that the circuit courts could not have entertained a repeat of the *Marbois* case. Thus, the attempt to link the various provisions of the First Judiciary Act on this basis must fail.

* * * *

Regardless of their specific deficiencies, in the final analysis all these theories are subject to a more fundamental critique. The scantiness of the historical record breeds an understandable desire to link the alien tort provision to some other provision of the First Judiciary Act with clearer origins. But as a matter of statutory construction, this approach risks what Laurence Tribe calls, with respect to the Constitution, "reading by *hyper-integration*."⁶⁵ He cautions against "approaching the Constitution in ways that ignore the no less important fact that the whole contains distinct parts."⁶⁶

In this particular instance, "hyper-integration" shortchanges the Framers. The imposition of a deliberate and carefully articulated scheme linking three quite distinct jurisdictional provisions reduces a rich and complex set of attitudes and motives to a single-minded concern with national security. It retrospectively endows the Framers with an essentially Hobbesian view of international relations: an incipient war of all against all, in which national defense must be the first and only priority.

⁶⁴ *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).

⁶⁵ Tribe, *On Reading the Constitution*, in 9 THE TANNER LECTURES ON HUMAN VALUES 3, 19 (1988).

⁶⁶ *Id.* at 20.

The narrowness of this vision emerges when the ambassador protection theory is properly understood as just a refined version of the denial of justice theory. Professor Casto argues that the First Congress regarded a violation of ambassadorial rights as simply a “paradigm for all foreseeable and unforeseeable violations by individuals of the law of nations.”⁶⁷ In fact, such an offense was much more likely to have been regarded as the paradigmatic illustration of the threat to national security resulting from denial of justice to an alien. When the alien in question was the designated representative of a foreign sovereign, the danger of embroiling the nation in international conflict through judicial incompetence was at its peak. The special sensitivity of such cases put them in a class by themselves—a class worthy, in Hamilton’s phrase, of “the highest judicatory of the nation.”⁶⁸

The language and textual location of the Alien Tort Statute suggest a different set of motives and concerns, with a more positive bias. That these should exist does not *negate* the existence of the first set. Quite the contrary; as will be argued below, the Founders understood them to be complementary. They emerge from a more enlightened and nuanced view of the world as a society of nations, with rights and responsibilities distinct from strictly bilateral obligations.

II. THE ALIEN TORT STATUTE AND NATIONAL DUTY

The Alien Tort Statute was a direct response to what the Founders understood to be the nation’s *duty* to propagate and enforce those international law rules that directly regulated individual conduct.⁶⁹ According to Blackstone:

[O]ffences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war But where the individuals of any state violate this general law, it is then the interest as well as the duty of the government, under which they live, to animadvert upon them with a becoming severity that the peace of the world may be maintained.⁷⁰

⁶⁷ See text at note 46 *supra*.

⁶⁸ THE FEDERALIST, *supra* note 17, NO. 81, at 511. Hamilton’s analysis entirely confirms this line of argument. To quote the passage in full:

Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well as for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation.

Id. at 510–11.

⁶⁹ W. BLACKSTONE, *supra* note 39, at 881. It will be evident from the preceding section that Professor Casto also seeks to explain the Statute in terms of individual violations of international law. However, he arrives at this conclusion by a rather different route. The significance of the differences between his theory and the approach advanced here is discussed in part IV *infra*.

⁷⁰ *Id.*

“Animadversion” could be accomplished by enacting a criminal statute or granting a common law cause of action. Actual *enforcement* of these universal prohibitions, however, required provision of a forum in which the state could prosecute or an individual victim could sue. Given the federal structure of the newly constituted United States, the Government could only assure the availability of such a forum by establishing federal jurisdiction over pertinent crimes and civil suits.

Individuals and the Law of Nations

As Blackstone makes clear, the bulk of what today would be called “public international law” regulated the conduct of states as monolithic entities in their relations with other states. An undertaking to abide by this law required only a commitment by the governmental authorities responsible for the conduct of the nation’s foreign policy. In a limited number of instances, however, the smooth functioning of the international system required the explicit protection or proscription of individual activity. In these cases, the obligation of each individual government extended beyond a simple undertaking on its own behalf. It had to communicate the relevant international norms to its citizens and all others within its jurisdiction and ensure that violators would be punished.

The Continental Congress sought to meet this obligation 3 years before the Marbois affair, although it was effectively hamstrung by its lack of anything more than hortatory power over the states. In a resolution passed in 1781, it urged the state legislatures to “provide expeditious, exemplary and adequate punishment” for a number of specific offenses “against the law of nations.”⁷¹ Those listed included the standard roster: violation of safe-conducts and “infractions of the immunities of ambassadors and other public ministers,” as well as “infractions of treaties and conventions to which the United States are a party.”

According to the resolution, however, these offenses were “only those . . . which are most obvious.” Thus, after proscribing these by name, the Continental Congress further exhorted the states to establish tribunals with power to decide on additional “offences . . . not contained in the foregoing enumeration.” In conclusion, it resolved: “That it be farther recommended [to the states] to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.”⁷² This recom-

⁷¹ 21 J. CONT. CONG. 1136–37 (1781). See Casto, *supra* note 16, at 490–91, 495 and 499. Professor Casto deserves great credit for making the connection between this resolution and the Alien Tort Statute. Professor Henkin had previously cited it, but only as general evidence of the Framers’ desire to comply with the law of nations. Henkin, *supra* note 38, at 1557 n.8.

⁷² 21 J. CONT. CONG., *supra* note 71, at 1137. The second clause of this provision is relatively easy to explain. The committee report preceding the resolution observed:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

Id. at 1136. The Congress accordingly urged states to authorize suits by the United States to recover from the tort-feasor any such amounts expended.

mendation appears to be the direct precursor of the alien tort provision in the First Judiciary Act. The context of the resolution clarifies both the underlying purpose of this provision and the specificity of its language.

Above and Beyond the Call of Duty

The spirit of the 1781 resolution is expansive. The Continental Congress had manifested a similar resolve several years earlier, by asking the President to assure the French Minister Plenipotentiary that the newly constituted United States would cause "the law of nations to be most strictly observed."⁷³ First, the recommended authorization of tort suits exceeds the scope of the duty outlined by Blackstone, who refers only to criminal sanctions.⁷⁴ This was an entirely logical addition, implicitly recognizing that justice under the law of nations could require making the victim whole as well as punishing the transgressor.

In addition, the inducing clause preceding the final two paragraphs of the 1781 resolution emphasized the impossibility of defining all crimes under the law of nations and their respective punishments in advance. Notwithstanding this difficulty, on no condition was any such offense to go unpunished. The solution envisioned by the Continental Congress was a tribunal specifically empowered to "decide on offences against the law of nations[] not contained under the foregoing enumeration." Thus, even while acknowledging the dynamism and complexity of international law, the Continental Congress sought to ensure that courts in the United States would be able to enforce its tenets as they evolved.

The Constitution and the First Judiciary Act together enacted all of the recommendations in the 1781 resolution. The Constitution conferred the power to define and punish offenses against the law of nations upon Congress. Congress, in turn, exercised this power, defining as crimes the major offenses enumerated in the 1781 resolution.⁷⁵ It also authorized the newly created federal courts to pronounce on additional offenses as they arose; as noted above, both the district and the circuit courts obtained jurisdiction over statutory and common law crimes in violation of the law of nations.⁷⁶

Congress took the same approach regarding the recommended authorization of "suits . . . for damages by the party injured." The inclusion of the alien tort provision in the jurisdictional grant to the district courts ensured

⁷³ 14 J. CONT. CONG. 635 (1779), quoted in Henkin, *supra* note 38, at 1557 n.8.

⁷⁴ Blackstone does explain that it is "incumbent upon the nation injured . . . to demand satisfaction and justice to be done on the offender." W. BLACKSTONE, *supra* note 39, at 881. The reference to "satisfaction" could certainly be construed to mean compensation to the victim. On the other hand, he begins his entire discussion of these particular offenses by distinguishing between the law of nations governing "civil transactions and questions of property between the subjects of different states" and the "narrow compass" within which offenses against this law of nations "can . . . be the object of the criminal law of any particular state." *Id.* at 880. In the subsequent paragraphs, he repeatedly describes these offenses as crimes.

⁷⁵ Act for the Punishment of certain Crimes against the United States, ch. IX, §§25-28, 1 Stat. 112, 117-19 (1790) (legislating criminal sanctions for affronts to ambassadors and other public ministers and for violations of safe-conducts and passports).

⁷⁶ This was true in the *conception* of the First Judiciary Act, at least according to Charles Warren. See *supra* note 56 and accompanying text.

the availability of a forum for such actions but left it to the courts to elaborate the law. Although the federal judiciary soon lost this power with respect to crimes,⁷⁷ its authority with respect to torts remained unchallenged until today.⁷⁸

The actual language of the alien tort provision reinforces this interpretation, while simultaneously reflecting the struggle between the Federalists and the Anti-Federalists that characterized the entire First Judiciary Act. As originally enacted, it gave the district courts "cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."⁷⁹ Each phrase is instructive.

"*The district courts.*" The choice of the federal judiciary as the repository of jurisdiction over crimes and their corollary torts under the law of nations was entirely natural. The aim was to guarantee the availability of criminal and civil remedies against individual violators of international law. Although the state courts were courts of general jurisdiction, open to ordinary tort cases, they might not recognize and apply the law of nations. The Supreme Court of Pennsylvania unquestionably did its duty in the *Marbois* case, sentencing the offender particularly harshly because he was guilty of "an atrocious violation of the law of nations."⁸⁰ But Congress could not be sure that other states would follow suit.⁸¹ It was safer to vest at least one set of federal courts with explicit jurisdiction over these cases, in the knowledge that the federal judiciary could be counted on to enforce the law of nations as a national obligation.

The choice of the district courts in particular had the additional advantage of making it even easier for injured aliens to sue, because the district courts were more numerous and geographically dispersed than the circuit courts.⁸²

"*Where an alien sues.*" This restriction is entirely consistent with the notion of the Statute as a fulfillment of a duty under the law of nations. As noted, Blackstone formulated this duty as a duty of sanction: to criminalize and punish certain acts. The converse was a duty of protection: to safeguard certain individuals such as ambassadors and safe-conduct holders. From this perspective, the only persons to whom the United States could conceivably owe such a duty under the law of nations or a particular treaty were aliens.

The U.S. Government clearly had a duty to protect its own citizens from one another or from foreigners within its territory, or even on the high seas.

⁷⁷ *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), limited the federal criminal jurisdiction to statutory crimes. Henceforth, only Congress and the state courts could divine and pronounce on new crimes emerging under the law of nations.

⁷⁸ See *Trajano* amicus brief, *supra* note 12, at 20.

⁷⁹ 1 Stat. at 77.

⁸⁰ 1 U.S. (1 Dall.) at 117.

⁸¹ The committee report preceding the 1781 resolution simply observed that "the scheme of criminal justice in the several states does not sufficiently comprehend offences against the law of nations." 21 J. CONT. CONG., *supra* note 71, at 1136. Professor Casto also cites correspondence among leading Federalists after the *Marbois* affair discussing the extent to which it could be certain that the states would adopt the law of nations. Casto, *supra* note 16, at 492 n.142.

⁸² Judge Edwards made this point in his opinion in *Tel-Oren*. 726 F.2d at 786.

But this obligation flowed from domestic law, from the implicit contract between the Government and the citizenry. *Foreign* governments had a duty under international law to protect U.S. citizens from injury by their own subjects, but to fulfill this duty they had to authorize criminal and civil suits against offenders in *their* courts.⁸³ Thus, the “injured party” referred to in the 1781 resolution, the individual victim of a violation of international law to whom the United States could have recognized an obligation to provide justice and satisfaction, could only be an alien.

“*For a tort only.*” A tort is the civil analogue to a crime. Eighteenth-century lawyers understood it to mean a delictual rather than a contractual wrong.⁸⁴

“*In violation of the law of nations or a treaty of the United States.*” Of the three specific crimes enumerated in the 1781 resolution, two were established violations of the law of nations and the third covered all “infractions of treaties and conventions to which the United States are a party.”

“*Concurrent with the courts of the several states, or the circuit courts.*” The provision of concurrent jurisdiction with the circuit courts simply indicated that this specialized grant to the district courts was in no way intended to displace the general alienage jurisdiction. If an alien were proceeding against a citizen in a suit for over \$500 in damages that had resulted from a tort in violation of international law, he or she could also bring suit in the circuit courts.

As for the state courts, although the Federalists’ preference would probably have been to bar them from any say over this class of cases,⁸⁵ allowing concurrent jurisdiction was a relatively small concession. The implicit com-

⁸³ It is true that with a universal offense such as piracy, the logical corollary of the duty to impose a sanction would be a duty to protect seafarers the world over—citizens and foreigners alike. However, the 1781 resolution did not include piracy in its list of specific offenses, perhaps because pirates were already subject to universal criminal jurisdiction as *hostis humani generis*, enemies of all mankind. See Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785 (1988). More generally, however, 18th-century international lawyers simply could not have imagined that the law of nations would impose a positive obligation on a government with respect to its own citizens. See pp. 490–91 *infra*.

⁸⁴ Blackstone offered the following characterization:

Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts* or wrongs. . . . Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words, and the like.

W. BLACKSTONE, *supra* note 39, at 673 (emphasis in original).

⁸⁵ From a purist Federalist standpoint, the purpose of committing all power over foreign affairs to the national government was to guarantee a uniform approach untainted by parochial interests. See, e.g., THE FEDERALIST, *supra* note 17, NO. 3, at 98–99 (J. Jay) (particularly commending the Framers for their wisdom in committing questions concerning treaties and the law of nations “to the jurisdiction and judgment of courts appointed by and responsible only to one national government”). Concurrent jurisdiction with the state courts would only reintroduce the specter of conflicting decisions and insufficient attention to the national interest. On the other hand, the specific motive behind this provision—to ensure a forum for the redress of these wrongs—may have outweighed this general concern. See text following note 89 *infra*.

promise with the Anti-Federalists was the same as with the circuit court jurisdiction:⁸⁶ exclusive federal *criminal* jurisdiction and optional *civil* jurisdiction (to the extent Congress chose to vest the federal courts with either jurisdiction to begin with). The operative principle in civil cases was to give the putatively disfavored litigant—either an alien or an out-of-state party—a *choice* of forums.⁸⁷ In general cases worth more than \$500, alien or out-of-state *plaintiffs* could exercise this choice at the outset; alien or out-of-state *defendants* had the option of removal.⁸⁸ Alien plaintiffs alleging a tort in violation of the law of nations had the same option.⁸⁹

Concurrent jurisdiction over these cases with both state and other federal courts was thus consistent with the overall framework established in the First Judiciary Act for litigation involving aliens. Yet this entire analysis is actually somewhat beside the point. To the extent the alien tort provision was the Framers' response to what they understood to be a specific duty under the law of nations, they would have been focusing less on the identity of the parties and more on the nature of the offense at issue. Having accomplished its objective of providing a judicial forum for individual victims of international law torts, Congress would have had little reason to preclude alternative forums by divesting the state courts of such jurisdiction if they chose to exercise it.

⁸⁶ On the basis of *The Federalist*, it appears that the Framers also anticipated that diversity and alienage cases would be the exclusive province of the federal courts. See *THE FEDERALIST*, *supra* note 17, NO. 80, at 501–02 (“in order to the inviolable maintenance [*sic*] of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens”).

⁸⁷ The exceptions to this scheme were admiralty and maritime jurisdiction, jurisdiction over maritime and all other seizures under the laws of the United States, and all suits against consuls and vice-consuls. As Hamilton pointed out, not even the most ardent Anti-Federalist opposed federal admiralty jurisdiction. *Id.* at 502. The reason, according to Frankfurter and Landis, was that “maritime commerce was then the jugular vein of the Thirteen States.” F. FRANKFURTER & J. LANDIS, *supra* note 22, at 7. Interstate and foreign trade, they thought, could flourish only under a uniform body of law.

The exception for suits against consuls and vice-consuls parallels the exclusivity given the Supreme Court in cases against ambassadors and other public ministers. The risk of offending a foreign sovereign by rendering an unjust verdict against one of its representatives may have been thought to increase if that representative were forced into court as a defendant. In addition, however, cases *against* foreign officials automatically triggered a host of diplomatic immunities that the federal judiciary was presumably better equipped to sort out.

⁸⁸ Section 12 of the First Judiciary Act gave alien and out-of-state defendants in all cases brought in state court for more than \$500 the option of removal to the nearest circuit court. 1 Stat. at 79.

⁸⁹ Alien defendants in these cases would not have had this choice unless the amount in controversy exceeded \$500, making the case eligible for the general diversity jurisdiction and concomitant removal provision. But this restriction would only take effect in a case between two aliens for a few hundred dollars, in which the injured alien had deliberately chosen state court. Further, the defendant alien could on no account have been a foreign ambassador, other public minister, consul or vice-consul, since cases against all these figures could only be brought in federal court.

III. DUTY AND HONOR

Why would the Founders have been so ready to comply with a particular duty they conceived as being imposed by the law of nations? The first and most obvious answer is fear of the consequences if they did not comply: the same fear of foreign conflict that permeates the denial of justice and the ambassador protection theories. As the numerous quotations from *The Federalist* attest, any contact with a foreign power was seemingly linked to the danger of war.⁹⁰ Moreover, failure to punish crimes and torts in violation of international law unquestionably did have security implications. Blackstone explained that it was “the interest as well as the duty” of states to proscribe this category of offenses because their own efforts to “observe these universal rules” would be meaningless “if private subjects were at liberty to break them at their own discretion, and involve the two states in a war.”⁹¹

On the other hand, the criminalization of these offenses should have largely addressed this concern. The national Government could always appease a foreign sovereign by prosecuting or even extraditing an offender. The residual danger resulting from the failure to compensate individual victims was no greater than the risk of denying justice to any alien.⁹² After all, this risk failed to persuade the Anti-Federalists of the need for federal jurisdiction over ordinary tort and contract cases involving aliens. Further, the most celebrated potential plaintiffs in this category—ambassadors—already had access to federal court. In short, if national security concerns were the only consideration, the compromise struck between the Federalists and the Anti-Federalists should have applied equally to torts in violation of international law. They should have remained in state court unless the amount in controversy exceeded \$500.

A second reason for “taking duties seriously” in accordance with the law of nations may have been to assure foreign merchants that universal norms and standards of justice would apply even in the hinterland.⁹³ In explaining

⁹⁰ Hamilton even justified federal maritime jurisdiction on this ground: “maritime causes . . . so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.” *THE FEDERALIST*, *supra* note 17, NO. 80, at 502.

⁹¹ W. BLACKSTONE, *supra* note 39, at 881.

⁹² Blackstone outlined the path from courtroom to battlefield:

[T]he nation injured . . . first . . . demand[s] satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject’s crime, and draws upon his community the calamities of foreign war.

Id.

⁹³ I am indebted to Gregory H. Fox, a practicing attorney in Boston, for first suggesting this possibility. It comports with Madison’s well-known remark in the Virginia convention: “We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us.” 3 *ELLIOT’S DEBATES*, *supra* note 22, at 583. Here again, this concern is routinely cited in explanation of the alienage clause. *See, e.g.*, P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER’S*

the importance of criminalizing the violation of safe-conducts or passports, Blackstone argued:

And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law: and, more especially, as it is one of the articles of *magna charta*, that foreign merchants should be entitled to safe-conduct and security throughout the kingdom: there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe-conduct.⁹⁴

Such reasoning may well have seemed particularly persuasive to the Framers, many of whom were northern merchants whose livelihoods depended substantially on foreign trade. The Alien Tort Statute would have sent a signal to resident and visiting aliens that they could conduct business as usual, protected by a familiar and authoritative body of law.⁹⁵

These two reasons for compliance with an international duty are more or less prudential, in the sense that they can be directly connected with immediate and relatively concrete national interests like trade and security. But something else was also at work. The Framers sought to uphold the law of nations as a moral imperative—a matter of national honor. Before exploring the intellectual underpinnings of this attitude, it is worth listening to what they said:⁹⁶

THE FEDERAL COURTS AND THE FEDERAL SYSTEM 17 (2d ed. 1973). Yet, unlike denial of justice concerns, it also offers a positive rationale that is akin to the positive vision of why states should comply with the law of nations. *See infra* p. 487.

⁹⁴ W. BLACKSTONE, *supra* note 39, at 881.

⁹⁵ The language of the 1781 resolution offers further support for this possibility, urging the states to proscribe “the commission of acts of hostility against such as are in amity, league, or truce with the United States, or who are *within the same*, under a general implied safe conduct.” 21 J. CONT. CONG., *supra* note 71, at 1136 (emphasis added).

⁹⁶ In addition to those quoted in the text and note 99 *infra*, see James Wilson and the Pennsylvania Attorney General arguing for the prosecution in the *de Longchamps* case: “The necessity of sustaining the law of nations, of protecting and securing the persons and privileges of Ambassadors; . . . and the effect which the decision of this case must have upon the honor of *Pennsylvania*, and the safety of her Citizens abroad, were stated at length” 1 U.S. (1 Dall.) at 113 (emphasis in original). The Pennsylvania Supreme Court adopted this view, deftly integrating it with Blackstone. Admonishing the defendant prior to pronouncing sentence, the court explained:

[I]t is now the interest as well as duty of the government, to animadvert upon your conduct with a becoming severity,—such a severity as may tend to reform yourself, to deter others from the commission of the like crime, preserve the honor of the State, and maintain peace with our great and good Ally, and the whole world.

Id. at 117. Further, Thomas Jefferson wrote in a letter to Thomas Pinckney, dated May 7, 1793: “Where [our treaties] are silent, the general principles of the law of nations[] must give the rule . . . as [those principles] have been liberalized in latter times by the refinement of manners and morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation.” 6 THE WRITINGS OF THOMAS JEFFERSON 243 (P. Ford ed. 1895); *cf.* Blackstone on the adoption of the law of nations by the law of England:

[T]hose acts of parliament which have from time to time been made to enforce this universal law . . . are not to be considered as introductive of any new rule, but merely as

- Chief Justice John Jay, delivering a charge to the grand jury in the trial of Gideon Henfield in 1793:

The peace, prosperity, and reputation of the United States, will always greatly depend on their fidelity to their engagements; and every virtuous citizen . . . will concur in observing and executing them with honour and good faith; and that, whether they be made with nations respectable and important, or with nations weak and inconsiderable, our obligation to keep our faith results from our having pledged it . . .

As to the laws of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in peace and war. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which spring from the relation of nation to nation, have devolved upon us.⁹⁷

- Chief Justice John Marshall, enunciating the doctrine of absolute sovereign immunity in 1812:

A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.⁹⁸

- The Continental Congress, in the very same resolution of 1781 discussed above, asserting that

public faith and safety requir[e] that punishment should be co-extensive with such crimes.⁹⁹

“Honor,” “reputation,” “faith,” “character”: these are less tangible concerns than the pursuit of national security or prosperity. Modern ears

declaratory of the old fundamental constitutions of the kingdom: without which it must cease to be a part of the civilized world.

W. BLACKSTONE, *supra* note 39, at 880.

⁹⁷ Trial of Gideon Henfield (C.C.D. Pa. 1793), *reprinted in* F. WHARTON, STATE TRIALS 49, 52–53 (1849).

⁹⁸ *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

⁹⁹ 21 J. CONT. CONG., *supra* note 71, at 1137. Blackstone also refers to the “public faith.” He explains that violations of either an express or an implied safe-conduct are “breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another.” W. BLACKSTONE, *supra* note 39, at 881.

Similarly, Hamilton, defending the 1793 Proclamation of Neutrality:

Faith and Justice between nations are virtues of a nature sacred and unequivocal. They cannot be too strongly inculcated nor too highly respected. Their obligations are definite and positive their utility unquestionable: they relate to objects, which with probity and sincerity generally admit of being brought within clear and intelligible rules.

Pacificus, No. 4, in 15 HAMILTON PAPERS 82, 84 (Syrett & Cooke eds. 1969). Again, defending Article 10 of the 1794 Jay Treaty, which prohibited the sequestration of British debts as a means of reprisal, he argued: “I derive the vindication of the article from a higher source; from the natural or necessary law of nations, from the eternal principles of morality and good faith.” *The Defense*, No. 20, in 19 *id.* at 329, 342 (1973).

are accustomed to discounting them as nothing more than the cadences of old-fashioned rhetoric, but the Framers took the underlying concepts very seriously. Several themes emerge from even this cursory survey.¹⁰⁰

First, compliance with the law of nations was a fundamental concomitant of nationhood. The United States could only take its place in the community of nations if it was prepared to play by the rules governing its fellow sovereigns.¹⁰¹ Further, the international community was limited to the company of “civilized” nations. A fundamental attribute of this cherished status was recognizing and complying with an organized system of rights and duties.

Second, the nation’s obligation to comply with a particular legal duty in a given instance was supplemented by a moral duty. Individual statesmen disagreed over the actual substance of this moral duty, depending on the degree of anthropomorphism they subscribed to in their outlook on the world. Jefferson, for instance, did not distinguish between men and nations, holding that the moral duties incumbent on individuals in a state of nature

accompany them into a state of society and the aggregate of the duties of all the individuals composing the society constitutes the duties of that society towards any other; so that between society and society the same moral duties exist as did between the individuals composing them while in an unassociated state, their maker not having released them from those duties on their forming themselves into a nation. Compacts then between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts.¹⁰²

Honor, therefore, and reputation, and character, were the same—and of the same importance—for nations as for men.

Alexander Hamilton, on the other hand, discerned a difference, following the lead of no less an authority than the great Swiss publicist Emmerich de Vattel. Professor Daniel Lang, in an extremely interesting study of foreign policy in the early Republic, traces the overwhelming influence of

¹⁰⁰ The examples given could be multiplied indefinitely. They reflect the intellectual categories of the time. Robert Keohane, a leading political scientist at Harvard, has researched the politics of treaty compliance during this period and has similarly identified reputation as a major factor encouraging compliance. He also concludes, however, that whereas the concept of reputation in contemporary political science is essentially instrumental—hypothesizing that governments will prize a reputation for honoring existing commitments to the extent that they need to rely on it in persuading future partners to enter into new international agreements—the 18th-century equivalent also incorporated domestic political and moral culture. R. Keohane, *Reciprocity, Reputation, and Compliance with International Commitments* 35, 41–42 (unpublished paper presented at the 1988 Annual Meeting of the American Political Science Association, Sept. 1–4, 1988). As he further observes, “[N]ew ideas do occasionally percolate into the political system, and leaders’ values and senses of honor also differ.” *Id.* at 40. A more rigorous methodological approach to this subject should yield important insights for international lawyers.

¹⁰¹ See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.) (“The United States, by taking a place among the nations of the earth, [became] amenable to the law of nations”); and Henkin, *supra* note 38, at 1556 (“A different conception sees the law of nations as coming into our law not by ‘inheritance’ but by implication from our independence, by virtue of international statehood”).

¹⁰² *Opinion on the French Treaties*, 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 219, 220.

Vattel's *The Law of Nations*¹⁰³ on the Framers' conception of the nation's rights and duties at international law.¹⁰⁴ He summarizes the Vattelian project as adapting the classical law of nations to its new subjects, nation-states. Vattel's starting point, quite to the contrary of Jefferson's, was that although both men and states were subject to the law of nature, the differences between them led to differences in its application.¹⁰⁵ Vattel drew on these differences in elaborating his theory of state obligations under the law of nations. It followed, as Hamilton was later to argue concerning the role of gratitude in international relations, that

the rule of morality is in this respect not exactly the same between Nations as between individuals. The duty of making its own welfare the guide of its actions is much stronger upon the former than upon the latter; in proportion to the greater magnitude and importance of national compared with individual happiness, to the greater permanency of the effects of national than of individual conduct.¹⁰⁶

As Lang shows, these differences over the origins and extent of the moral versus the legal duty incumbent upon states played themselves out in the acrimonious debate over the Neutrality Proclamation and the Jay Treaty, with Hamilton and co-Federalists such as John Quincy Adams on one side, and Jefferson and Madison on the other. Both sets of protagonists formulated their arguments in terms of constitutionality, legal duty, moral duty and prudential interests.¹⁰⁷ For present purposes, however, the most salient aspect of this dispute is the indisputable recognition on both sides that "duty"—meaning both legal and moral duty¹⁰⁸—encapsulated an independent set of motives and constraints in the formulation of national policy. The leitmotif here is the recurring phrase "duty *and* interest."¹⁰⁹

¹⁰³ E. DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* (J. Chitty trans. 1844) (6th ed.).

¹⁰⁴ D. LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC* (1985).

¹⁰⁵ Vattel believed that the law of nature applied equally to nations as to men, but that it generated only one set of international legal obligations: the "necessary" law of nations. This he supplemented with the "voluntary" law of nations: a more limited set of obligations taking into account the differences between men and nations. Nations are externally bound only by this "voluntary" law. E. DE VATTEL, *supra* note 103, *Preliminaries*, §60; see D. LANG, *supra* note 104, at 23–25. As Lang points out, James Wilson borrowed these concepts wholesale in his celebrated lectures on law at the College of Pennsylvania in 1790–91, observing that the different nature of states required "a proportional difference in the application of the law of nature." *Id.* at 22.

¹⁰⁶ *Pacificus*, No. 4, 15 HAMILTON PAPERS, *supra* note 99, at 85–86; see D. LANG, *supra* note 104, at 24, 105.

¹⁰⁷ See D. LANG, *supra* note 104, at 92, 100 and 132.

¹⁰⁸ See *id.* at 100.

¹⁰⁹ As noted above, Blackstone coupled these two in his original explication of why nations should criminalize offenses against the law of nations. See text at note 91 *supra*. The Pennsylvania Supreme Court adopted precisely the same formulation in explaining the importance of punishing the luckless de Longchamps. See *supra* note 96. The nation's policymakers followed suit. Washington's 1793 proclamation of neutrality in the war between France and Britain, for instance, declared that "the duty and interest of the United States require, that they should

Pushed to its logical conclusion, of course, the distinction collapsed—in the sense that compliance with duty was shown ultimately to be in all states', as in all individuals', interests. The result could not be otherwise in a system where natural law was derived from the principles of universal reason.¹¹⁰ Indeed, Lang argues that Vattel's great goal was to justify the balance of power system that had emerged in Europe after the Thirty Years' War, "not simply in terms of necessity or expedience, but in terms of right."¹¹¹ Vattel's success in this endeavor led to the "identity of morality and policy" that the Framers "repeated time and again."¹¹²

In the final analysis, then, the contemporary dichotomy between a deontological value structure and a consequentialist calculus did not hold in 1789. Virtue *was* its own reward; at the same time, a system in which all states were virtuous would be a much better place for the United States.

This is the teaching in Washington's Farewell Address. He enjoined his countrymen to

[o]bserve good faith and justice toward all nations. Cultivate peace and harmony with all. Religion and morality enjoin this conduct. And can it be that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period a great nation to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence. Who can doubt that in the course of time and things the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a nation with its virtue?¹¹³

with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent Powers." DOCUMENTS OF AMERICAN HISTORY 163 (H. Commager ed. 1963). Likewise Jefferson, who bemoaned Spanish misdeeds along the Mississippi some years later with a slightly different turn of phrase: "We ought still to hope that time and a more correct estimate, of interests as well as of character, will produce the justice we are bound to expect." Draft of Fifth Annual Message to the Congress, Dec. 3, 1805, 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 96, at 391.

The very duality of this phrase suggests that duty was more than a rhetorical disguise for less palatable motives; the Framers were clearly not afraid to argue from interest where it played a role.

¹¹⁰ The great Dutch jurist, Hugo Grotius, paved the way for Vattel in the 17th century by deriving the principles of natural law from reason rather than divine authority.

¹¹¹ D. LANG, *supra* note 104, at 10. Lang illustrates in the first chapters of his book how Vattel accomplished this feat by "combin[ing] the universalism and categories of the just-war tradition with aspects of modern natural rights theory derived from Hobbes and praise for the balance of power system, making a new synthesis." *Id.* Although Vattel's distinction between the law of nature as applied to states and individuals essentially laid the foundations for 19th-century positivism, Lang argues that Vattel himself understood states to be bound by a higher morality than their own will. *Id.* at 22–25.

¹¹² *Id.* at 1. Duncan Kennedy also argues that 18th-century lawyers did not perceive any conflict between law and morality in their domestic jurisprudence. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1725 (1976). See generally Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). The apparent parallel is enticing, and certainly worth further study.

¹¹³ DOCUMENTS OF AMERICAN HISTORY, *supra* note 109, at 173; cf. E. DE VATTEL, *supra* note 103, bk. II, ch. 1, §1: "And why should we not hope to find, among those who are at the

Any apparent conflict resulted only from the confusion of short-term with long-term interest, from seeking immediate gain for a particular state without regard to the implications for the entire international system.¹¹⁴

All this may seem a long way from the Alien Tort Statute. Yet current theories of the Statute completely overlook this broader dimension of the Framers' understanding. For instance, the denial of justice theory implicitly posits that the danger of war is an immediate, bilateral danger. If a U.S. court somehow mistreated the citizen of a foreign sovereign, that sovereign could justifiably respond with a declaration of war.¹¹⁵ National authorities should accordingly be punctilious in their performance of direct obligations to foreign governments and their citizens.

Within the broader framework outlined above, however, it is apparent that the Framers also saw war as a *systemic* danger. If all nations chose to ignore their duties under the law of nations, the entire international system would dissolve into chaos. Conversely, compliance with the law of nations had a strong positive component. Collective compliance by all nations would assure a world safe for trade and travel, rich in the exchange of goods and ideas, conducive to both national and human progress. Honor, as a shared concept motivating such compliance, was a check on the abuse of power.¹¹⁶ It was thus a pillar of a beneficial and lasting international order.

The Alien Tort Statute is best seen as an expression of this positive conception. The drafters of the First Judiciary Act, like the Continental Congress in 1781, went beyond Blackstone's injunction and authorized civil as well as criminal suits against offenders. Individuals who flouted international law would find no quarter in the United States. Even if they escaped criminal prosecution, they would be amenable to suit to compensate their

head of affairs, some wise individuals who are convinced of this great truth, that virtue is, even for sovereigns and political bodies, the most certain road to prosperity and happiness?"

¹¹⁴ As Lang points out, the omnipresent threat to the balance of power system was that a great power might seek short-term advantage without regard to the long-term community interest. He explains that "[t]his possibility was one reason why Vattel argued more strongly from duty than from interest. He fervently hoped that when such situations arose states would refrain from seeking immediate advantage in favor of a more far-sighted policy of general stability." D. LANG, *supra* note 104, at 46.

¹¹⁵ The apparent predominance of this type of explanation in *The Federalist* most likely reflects the essential mission of its authors. They were trying to persuade a skeptical audience of the value of the Constitution. The avoidance of wars resulting from casual or even inadvertent slights to foreign sovereigns was an effective rallying cry for the centralization of federal power, and hence an effective selling point. In short, the reasons put forward in defense or explanation of various constitutional provisions may reflect an advocate's estimate of their popular appeal as much as the true motivations of the Framers. See Wright, *Introduction*, THE FEDERALIST, *supra* note 17, at 77-86 (contrasting the authors' deliberate appeal to their readers' self-interest with the more passionate, principled approach of Tom Paine's *Common Sense*).

¹¹⁶ In the defense of Article 10 of the Jay Treaty quoted above, Hamilton relied extensively on a 1793 report to the British King concerning a Silesian debt sequestered by the King of Prussia. He particularly emphasized the following passage: "A private man lends money to a Prince upon an engagement of honor, because a prince cannot be compelled like other men in an adversary way by a Court of Justice." *The Defense*, No. 20, *supra* note 99, at 343 (emphasis in original).

victims for the damage inflicted. By effectively publishing this message in the First Judiciary Act, the Framers visibly discharged the duty of the nation, and, in some small measure, enhanced its reputation.

IV. THE CONTEMPORARY DEBATE

Careful historical and textual analysis reveals a coherent jurisdictional scheme in which the Alien Tort Statute, far from being a mysterious stranger,¹¹⁷ played a limited, but comprehensible, part. Yet even a thorough understanding of the drafters' intent, the scope of the provision as drafted, and the historical context does not provide an automatic answer to the correct interpretation of the Statute today. Its drafters could have envisioned its application in suits brought by aliens against U.S. citizens for torts committed either within the United States or abroad,¹¹⁸ suits between aliens for a tort committed on U.S. soil¹¹⁹ and suits between aliens for a tort committed on the high seas.¹²⁰ They might have imagined an attempt to invoke the Statute as the basis for jurisdiction over a foreign sovereign but would have dismissed it out of hand. Yet they could not have anticipated a case like *Filartiga*: a suit between an alien and an official of his own government for a tort committed within that government's domestic jurisdiction. That is the question confronting federal courts today.

Within this contemporary debate, the differences among the various theories purporting to explain the Alien Tort Statute begin to loom large. Even those, like Professor Casto's, that seek to justify a broad contemporary application of the Statute, founder on their own account of the Framers' motives. By contrast, understanding the Statute as fulfilling a more general duty under the law of nations evokes a positive spirit supporting an expansive reading of its letter. This thesis also suggests a general attitude toward international law that is equally applicable today—independently of the original intent of the Statute itself.

¹¹⁷ Cf. *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (Friendly, J.) ("This old but little used section is a kind of legal Lohengrin; . . . no one seems to know whence it came").

¹¹⁸ In 1794 an American citizen led a French privateer fleet in a mission to ransack the British colony of Sierra Leone. When the British ambassador protested to the U.S. Government in Washington, the U.S. Attorney General concluded that the attack violated the Treaty of Amity with Britain, and thus that the victims had a civil remedy against the American leader under the Alien Tort Statute. 1 Op. Att'y Gen. 57, 58 (1795); see also Casto, *supra* note 16, at 502–04. The First Congress could well have foreseen the likelihood of such breaches of neutrality or amity treaties by Americans abroad.

¹¹⁹ The Marbois affair certainly would have brought this possibility to mind. And more plebeian instances of this type of incident, involving protected aliens other than ambassadors, could also have been anticipated: the violation by a resident Englishman of a safe-conduct given a Frenchman as an ally of the United States, or an attack by a French Catholic on a Dutch Protestant in violation of a treaty of amity and commerce guaranteeing Dutch nationals freedom of worship. See Casto, *supra* note 16, at 507 (explaining how a tort might arise in violation of a treaty of the United States). The United States would have been obliged to safeguard these rights against violation by anyone resident on U.S. territory—citizen and alien alike—either by prosecuting the offender, or, if it so chose, by allowing the victim to sue directly.

¹²⁰ Piracy, while not included in the enumeration of potential crimes or torts in the 1781 resolution, was certainly not excluded by the language of the Alien Tort Statute.

The Voice of Prudence

The denial of justice theory and certainly the protection of foreign emissaries theory emphasize the potentially negative political implications of any legal encounter with the citizen or representative of a foreign sovereign. The Marbois affair, the Federalists' anxious reaction to the international scandal it triggered, the urge to avoid any offense to a foreign sovereign that might warrant armed retribution against a weak and scattered country—all paint the Statute as part of a concerted effort to prevent a judicial misstep from becoming a foreign policy imbroglio. But if the animus of the Statute was simply to stay out of trouble, its authors could not have intended it to apply to any situation in which failure to act by the United States would not incur a direct penalty under the law of nations, in the sense of justifying retaliation by a foreign sovereign.

The attack on *Filartiga* in the Justice Department's amicus brief in *Trajano v. Marcos*¹²¹ exemplifies this line of argument. Its interpretation of the Alien Tort Statute rests on the concept of accountability. The brief highlights the Marbois affair, citing Professor Casto's research, as the "background" of the Statute.¹²² According to the Justice Department:

That background indicates that the Statute's scope is limited to torts (amounting to violations of either a treaty or the law of nations) committed by citizens of the United States or other persons subject to its jurisdiction, *under circumstances in which the United States might be held accountable to the offended nation.*¹²³

It follows that the Statute cannot now be read to include international law violations "committed by officials of a foreign sovereign within its territory and against its own nationals—a context in which the United States bears no responsibility under the law of nations for either preventing the conduct or affording redress."¹²⁴

Such a narrow concept of accountability does both the United States and the international community a disservice. It offers a definition of the national interest that is cramped and circumspect, ignoring the heritage and ideals that constitute this nation. And it reflects a view of the international system that is no greater than the sum of its parts: a cumulation of bilateral relationships between individual members. Duty and interest point in another direction.

A Bolder Vision

The theory of the Statute advanced in this article draws on a more expansive and positive view of its origins as a guide to its modern application. The First Congress voluntarily chose to allow the district courts to decide whether and how the United States should fulfill a particular set of obliga-

¹²¹ See *supra* note 12 and accompanying text.

¹²² *Trajano* amicus brief, *supra* note 12, at 10–11, 15. The brief also marshals all the standard quotations from *The Federalist*, including Hamilton's explanation for the alienage clause: "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *Id.* at 17 n.14 (the rest of this passage is quoted in the text at note 17 *supra*).

¹²³ *Id.* at 15 (emphasis added).

¹²⁴ *Id.* at 16 (citations omitted).

tions at international law. In 1980 a district court held that these obligations extended to damage suits against alien torturers within U.S. territorial jurisdiction. It based its opinion not on prudential considerations, but on the substantive evolution of the law of nations.

The drafters of the First Judiciary Act could not have expected the alien tort provision to extend to a case like *Filartiga* because they could not have imagined *international law* extending so far. The problem was not simply a suit between two aliens from the same country in U.S. court. As the *Filartiga* court pointed out, Lord Mansfield had pronounced in 1774 on the validity of jurisdiction over a transitory tort action wherever the tort-feasor could be found.¹²⁵ But ordinary transitory torts were state court actions: disputes between private citizens arising under the domestic law of a particular state. The conceptual problem in 1789 would have been how a tort committed by a citizen of a foreign country on a fellow citizen within that country could ever amount to a violation of the law of nations.¹²⁶ That it may today, and that it is enforceable as such by a court of the United States, reflect significant advances in both international law and domestic remedial law.

The cornerstone of 20th-century human rights law is the recognition that the treatment by a state of its own citizens is a legitimate matter of international concern and thus of import to its fellow states. The Universal Declaration of Human Rights,¹²⁷ the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹²⁸ the American Convention on Human Rights¹²⁹ and the Final Act of the Conference on Security and Co-operation in Europe,¹³⁰ to name only a few, all establish a core category of basic human rights protected under international law. Consequently, as in the 18th century, individuals are once again entitled to explicit protection as subjects of international law.¹³¹ For the first time, however, they are protected against their own governments. What is proscribed under international law is not torture *per se*, but official torture; not physical and mental cruelty inflicted by private citizens on one another, but the same acts committed by representatives of the state.

¹²⁵ 630 F.2d at 885.

¹²⁶ See *La Jeune Eugenie*, 26 F.Cas. 832, 847 (D. Mass. 1822) (No. 15,551) (Story, J.):

If a nation were to violate as to its own subjects in its domestic regulation the clearest principles of public law, I do not know, that that law has ever held them amenable to the tribunals of other nations for such conduct. It would be inconsistent with the equality and sovereignty of nations, which admit no common superior.

See also Blum & Steinhardt, *supra* note 4, at 65.

¹²⁷ GA Res. 217A, UN Doc. A/810, at 71 (1948).

¹²⁸ Nov. 4, 1950, 213 UNTS 221.

¹²⁹ *Opened for signature* Nov. 22, 1969, reprinted in ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, OEA/Ser.L/V/II.71, doc. 6, rev.1 (1988), and 9 ILM 673 (1970).

¹³⁰ Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975).

¹³¹ See, e.g., Higgins, *Conceptual Thinking about the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11 (1978); Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61 (1984); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1 (1982); Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 425 (1979).

This limited extension of international law to the domestic sphere has meant not only the establishment of rights, but also the imposition of duties. Individuals have been held accountable under international law for crimes against their own countrymen. The Nuremberg Tribunal refused to exculpate civilian and military government officials from personal responsibility for crimes in violation of international law.¹³² Piercing the veil of sovereignty thus means seeing the state apparatus itself as an organization of men and women responsible for shaping and executing "state" action.

These advances carry implications that extend well beyond the threshold jurisdictional question under the Alien Tort Statute. The act of state doctrine, for instance, sure to be raised as a defense in virtually any suit brought under the Statute, ignites a chain reaction of potential contradictions.¹³³ A

¹³² Judgment of the International Military Tribunal at Nuremberg, Oct. 1, 1946, 41 AJIL 172 (1947). In a critical passage, the Tribunal concluded: "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *Id.* at 220-21.

While most frequently associated with the Nuremberg proceedings, this principle extends beyond the military or even the criminal context. It has most recently been codified in the 1984 United Nations Draft Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (Dec. 10, 1980), *draft reprinted in* 23 ILM 1027 (1984), *substantive changes noted in* 24 ILM 535 (1985). Article 2(3) of the Convention provides: "An order from a superior officer or a public authority may not be invoked as a justification of torture." 23 ILM at 1028.

¹³³ Prospective application of the doctrine in this context raises a three-way dilemma. Without formally addressing the issue, the *Filartiga* court nevertheless noted that defendant's act of torture was illegal under Paraguayan law and it speculated on the difficulty of characterizing such an act as an official act of state. 630 F.2d at 889. On the assumption or, more accurately, the fiction that the accused government official in such a suit committed such an illegal act in his or her private capacity, considerable support exists for nonapplication of the act of state doctrine.

True, a "private acts" exception to the doctrine has not been conclusively established. *See* RESTATEMENT (THIRD), *supra* note 38, §443 Reporters' Note 3. But here again the jurisprudence is confused. First is the public-private distinction, generally meaning an exception roughly equivalent to the restrictive theory of sovereign immunity for private *commercial* acts. In such cases, the state is acting in its official capacity, but is conducting activities traditionally confined to private citizens. Second is the distinction between official and unofficial acts, where a government official is acting either out of purely private motives or in ways that contravene his or her official responsibilities. This second distinction has been recognized from the outset of modern act of state jurisprudence, beginning with *Underhill v. Hernandez*, 168 U.S. 250 (1897), where the Supreme Court applied the doctrine to an act committed by a member of a provisional government. *Id.* at 252. The Court established that the defendant's act was effectively "official" by pointing to the absence of a finding by the jury "that the defendant was actuated by malice or any personal or private motive." *Id.* at 254.

On the other hand, in cases alleging human rights violations, the act in question must be official to qualify as a violation of international law and thus support jurisdiction under the Alien Tort Statute. International law does not prohibit one private citizen from torturing another. The *Filartiga* court squares this circle by resorting to the familiar U.S. concept of private suits against government officials charged with violating fundamental constitutional rights while acting under "color of law." 630 F.2d at 890 (citing, by analogy, *Ex parte Young*, 209 U.S. 123 (1908)); *see also* 42 U.S.C. §1983 (1982); *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

second problem is the source of the cause of action in cases under the Statute. If international law is back in the business of protecting and regulating individuals in their capacity as domestic citizens, does it give rise to a cause of action to enforce these rights and duties?¹³⁴

Whether or not a cause of action exists under international law itself, states are free to decide whether and how to apply and enforce international law as it bears on individual conduct.¹³⁵ Strictly speaking, the duty of the United States at international law extends no further than to refrain from violating the human rights of its own citizens. But this duty is a floor, not a ceiling. Acting through Congress and the federal judiciary, the U.S. Government can certainly permit individual victims to enforce international human rights law against individual defendants within the personal jurisdiction of U.S. courts.¹³⁶ The actual source of the cause of action would then be domestic law.¹³⁷

This solution leaves a loophole for governments brazen enough to admit to torture as an official policy. More likely, a defendant official might be able to prove a direct chain of command authorizing his acts. Such evidence would negate a "color of law" theory by showing the act to be a genuine act of state, thereby, at least under the act of state doctrine, effectively shielding the actor from ever having to answer for his acts. But this result would bring the doctrine directly into conflict with the Nuremberg principles, by which higher orders cannot excuse crimes against humanity. In essence, the act of state doctrine cannot be reconciled with the notion of individual accountability at international law.

There are several possible routes out of this maze. On a strictly doctrinal level, the best alternative is to revisit *Sabbatino*. Although the Supreme Court held that the act of state doctrine applied even in the face of an alleged violation of international law on the facts before it, it listed the following three factors as general criteria for consideration in deciding on the application of the doctrine in subsequent cases posing the same question: (1) "the degree of codification or consensus concerning a particular area of international law"; (2) the importance of "the implications of an [international law] issue . . . for our foreign relations"; and (3) whether "the government which perpetrated the challenged act of state is . . . still in existence." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964). Application of these criteria to the *Trajano* case argues for nonapplication of the doctrine. The international consensus against torture is virtually absolute; foreign governments are unlikely to decry, at least publicly, a civil suit against an alleged torturer; and the Marcos Government is no longer in existence.

A second approach would be to reexamine the entire theoretical basis for the doctrine in light of changing notions of sovereignty. According to the canonical formulation of the doctrine, "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill*, 168 U.S. at 252. Yet the entire international law of human rights is founded on the assumption that modern sovereignty is far more permeable, at least in some dimensions; that sovereign independence regarding treatment of domestic citizens is limited by the collective scrutiny, and ultimately the judgment, of fellow sovereigns.

¹³⁴ This question is sufficiently vexed to fuel an entirely separate debate. See generally *Tel-Oren*, 726 F.2d at 816; *Trajano* amicus brief, *supra* note 12, at 20; and *Casto*, *supra* note 16, at 473. The goal here is only to outline one possible framework for analysis.

¹³⁵ See RESTATEMENT (THIRD), *supra* note 38, §§906-07.

¹³⁶ A full exposition of whether the Alien Tort Statute should cover suits against foreign officials currently in office is beyond the scope of this article. Even a cursory analysis, however, suggests that such suits should not be allowed. A candid assessment of the internal conditions in a high number of the world's countries indicates that withdrawal of official immunity in these circumstances could bring diplomatic exchanges to a virtual halt.

¹³⁷ The analogy is *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403

Filartiga did not answer all these questions. It did, however, vindicate a vision of the United States at the forefront of efforts to strengthen the rule of law in international as well as domestic affairs.¹³⁸ This posture remains a matter of national honor, a source of justifiable national pride. It also accords with a broader concept of accountability to the international community as an obligation to a functioning society constituted under a common legal system, rather than as one owed simply to its individual member states.¹³⁹ Here again, duty ultimately reinforces interest. A fundamental premise of modern human rights law, based on the experience of the 1930s, is that internal repression breeds external insecurity. Thus, failure to secure minimum human rights standards will eventually jeopardize the international system and all its participants.

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Goals of this magnitude are clearly beyond the scope of the Alien Tort Statute. It was and is but a small part of a multifaceted scheme regulating the interaction of law and foreign relations. Although expanding it to cover cases against official torturers is indeed consistent with its letter and its spirit, such cases provide more symbol than substance in terms of actually advancing the cause of international human rights. Still, they will contribute in their own way to the moral and political standing of the United States as a champion of international law.

The larger significance of the Statute today is as a window on the past. It recalls an era in which national policymakers, charged with the leadership of a younger and much more vulnerable nation, nevertheless factored "honor" and "virtue" into their calculus of the national interest. Two hundred years later, that may be a tradition well worth remembering.

U.S. 388 (1971), where the Supreme Court implied a private right of action to enforce a constitutional right. Under the Alien Tort Statute, the source of the right remains international law, which, after all, "is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). But the precise scope and nature of the remedy is domestic law—specifically, judge-made federal common law. Absent a world government, international law itself must necessarily contemplate this result, recognizing that its enforcement below the state level will differ according to the domestic laws of its subject states. Precisely this understanding led Blackstone to exhort all governments to criminalize certain offenses against the law of nations as a matter of municipal law. *See* text at note 70 *supra*.

¹³⁸ *Cf.* Judge Kaufman's conclusion, 630 F.2d at 890: "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."

¹³⁹ This image of an international community is reemerging on many levels, fueled by factors ranging from the potential destruction of the ozone layer to millennial musings on our common humanity. On the jurisprudential plane, Professor Thomas Franck has recently reemphasized how an understanding of international society as a self-consciously regulated community—the way in which its member states perceive it—is critical to an understanding of the nature and function of international law. *See* Franck, *Legitimacy in the International System*, 82 AJIL 705, 754–55, 758–59 (1988).