Repression of the Political Emigre–The Underground to International Law: A Proposal for Remedy

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Consider a society where persons of a certain class are targeted by foreign powers for murder, assault, and extortion. The domestic police forces rarely protect victims and occasionally even aid the foreign predator. Moreover, in this society the executive refuses to enforce statutes available to constrain this activity. The description could be a political fiction from an Orwellian pen. It is, however, reality for many political emigres residing in the United States.

The incidents of emigre repression in the United States are only one aspect of a more pervasive phenomenon that this article defines as the underground to international law. Although this phenomenon remains largely hidden from public view, and indeed must remain hidden to flourish, recent disclosures in the press[1] and courts[2] have revealed a certain pattern of violations of domestic and international law. Attacks on emigres have come in many forms. They have been part of a larger systematic program of suppression of political dissent, at home and abroad, such as the activities in the United States of SAVAK, the Iranian police of the government of the Shah.[3] Overseas attacks have included assassinations of exiled government officials such as the murders by Chilean agents of Orlando Letelier in the United States and Carlos Prat in Argentina.[4] A variety of forms of harassment

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1. *See* Washington Post, Aug. 9, 1979, § A, at 1, cols. 1, 4 (reporting on activities in United States of police and intelligence agencies of Iran, Philippines, Taiwan, Chile, Soviet Union, and Yugoslavia, documented in classified Senate staff report). The Columbia Broadcasting System's television show *60 Minutes* on March 2, 1980 reported on repression by Iranian agents of Iranian political dissidents living in France and the United States.

2. *See* United States v. Novo Sampol, No. 79-1541 (D.C. Cir. Sept. 15, 1980) (appeal of criminal conviction for assassination of former Chilean ambassador Orlando Letelier); Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).

3. *See* Washington Post, Aug. 9, 1979, § A, at 12, col. 1.

4. *See* United States v. Novo Sampol, No. 79-1541, slip op. at 2-4, 62 (D.C. Cir. Sept. 15, 1980).

have also occurred, including blackmail, surveillance, threats, and other intimidations of emigres[5] or their attorneys.[6]

In addition to its clear violation of domestic laws, the underground operates contrary to several international legal norms. It violates the fundamental principle of territorial sovereignty that restricts the reach of the police forces of one sovereign into the territorial jurisdiction of another.[7] In addition, this activity offends long standing recognition of rights of emigration.[8] Perhaps of greatest concern is its clear inconsistency with recently developed but now widely accepted human rights principles.[9]

The underground has been able to survive despite its contravention of legal norms, in part, because of its low visibility. Moreover, nations enjoy significant foreign relations and intelligence benefits from participation despite the legal prohibitions. Finally, the underground flourishes because the individuals adversely affected by it have no legal remedy against it.

This article proposes an avenue of redress for political emigres residing in the United States who are attacked by agents from their nation of citizenship. Part I describes the underground and the sacrifice of domestic and international legal values it has wrought. Part II argues that civil process in the federal courts provides the greatest promise for an effective remedy and that the remedy should be provided through the development of a federal common law of international tort. Part III discusses the problems and practicalities of litigation to implement the tort remedy.

I. The Problem and Need for a Remedy

The intimidation and injury of aliens residing in the United States by agents acting for foreign powers has come increasingly into public

5. The author represented a Philippine emigre family living in the United States whose son was imprisoned in the Philippines. The Marcos regime apparently sought to use the threat of harm to the son and other family members to obtain the assets of the family through commercial contracts. *See* Philippine News, Oct. 7-13, 1978, at 4, cols. 4-5 (copy on file with *Yale Law Journal*).

6. *See* Chicago Sun-Times, Oct. 15, 1979, at 8, col. 1 (Federal Bureau of Investigation supplied information to Polish intelligence service concerning personal affairs of attorneys representing dissident Polish emigres).

7. *See, e.g.*, The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATION OF INTERNATIONAL LAW 56-80, 135-72, 231-64 (1961).

8. *See* p. 86 *infra*.

9. *See* pp. 85-86 *infra*.

view. News articles and other media reports,[10] at least one federal prosecution,[11] and related civil litigation[12] have recounted numerous incidents of emigre repression. The most comprehensive record is contained in a secret staff report prepared for the Senate Foreign Relations Subcommittee on International Operations (Senate Report).[13] The various revelations, viewed comprehensively, reveal an extraordinary pattern of harassment, surveillance, blackmail, and threats of assassination carried out in the United States against individual aliens by foreign police and intelligence organizations, and by political and business agents of foreign regimes.[14]

The most notorious case, the assassination in Washington, D.C., of the former Ambassador from Chile, Orlando Letelier, by agents of the Chilean secret police,[15] represents only one extreme of the pattern of foreign agent repression of the emigre. The activity, considered as a whole, constitutes a clear confrontation between state practice and the requirements of legal order in the United States and in the world community.

A. *The Underground to International Law*

These revelations have exposed an underground of foreign agent activity. Although the full scope and particular practice of this underground activity is hidden from view, the public disclosures provide some understanding of this remarkable reality. The United States is only one participant among other nations.[16] The underground sometimes operates in a framework of explicit intelligence and police liaison agreements, but, characteristically, it operates through tacit understanding and forced acquiescence. The principal actors are police, intelligence personnel, and other political and business agents of the participating states. States allow these foreign agents to operate within their sovereign territorial jurisdiction because of the mutual benefits realized for their foreign intelligence and policing interests.[17]

10. *See* note 1 *supra.*
11. United States v. Novo Sampol, No. 79-1541 (D.C. Cir. Sept. 15, 1980).
12. Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980).
13. *See* Washington Post, Aug. 9, 1979, § A, at 1, col. 2. The report was made available to the author by columnist Jack Anderson and his associate Dale Van Atta, whom I thank for their assistance. Review of the original report confirms the accuracy of the Washington Post articles.
14. *See id.*
15. *See* United States v. Novo Sampol, No. 79-1541, slip op. at 2-4 (D.C. Cir. Sept. 15, 1980); J. DINGES & S. LANDAU, ASSASSINATION ON EMBASSY ROW (1980).
16. *See* Washington Post, Aug. 9, 1979, § A, at 1, col. 4.
17. *Id.* at cols. 1, 2, 4.

The record of foreign agent activity in the United States clearly reveals the official governmental support accorded the underground. The Senate Report and materials disclosed by Freedom of Information Act requests document the role of United States government agencies.[18] The executive has rarely enforced applicable criminal statutes.[19] The Federal Bureau of Investigation, at times, has avoided interfering with foreign agents and, in some cases, even cooperated with them.[20] Moreover, the Central Intelligence Agency (CIA) has had intelligence liaison agreements with certain foreign organizations. The Senate Report noted that on one occasion, the CIA provided intelligence information for targeting a prominent critic of the Shah for assassination.[21] Sometimes federal law enforcement has been stymied as a result of threats communicated from high officials of the predator government. Such threats apparently enabled SAVAK, the Iranian police of Shah Mohammad Reza Pahlavi, to harass and coerce Iranians living in the United States.[22] The quid pro quo for such inaction against SAVAK was protection of United States intelligence operations in Iran.[23]

This activity comprises an underground to international law[24] in

18. *See id.;* Memorandum from unidentified Federal Bureau of Investigation Special Agent to Special Agent in Charge, FBI Chicago Office (Jan. 12, 1971) (FBI passed information to Polish intelligence agency concerning Chicago attorney representing Polish emigres) (copy on file with *Yale Law Journal*).

19. Washington Post, Aug. 9, 1979, § A, at 13, cols. 2-6 (Senate staff report details activities of foreign agents in United States unhindered by domestic law enforcement efforts); *see* note 27 *infra* (foreign agents registration statutes).

20. Washington Post, Aug. 9, 1979, § A, at 12, cols. 3-6.

21. *Id.* at 12, col. 1.

22. *Id.*

23. *See id.* at 1, col. 1; *id.* at 12, col. 3.

24. Attacks on emigres have become so pervasive a feature of contemporary political struggle that in their most extreme manifestations they have occurred outside the underground, pursuant to official and public announcement of national policy. Colonel Muammar Qaddafi of Libya has called for "the physical liquidation of the enemies of the revolution abroad," announcing to the world that his agents are being sent to other countries to assassinate Libyan political emigres; there is substantial evidence that such assassinations and related intimidation have occurred. *See* The Times (London), June 14, 1980, at 1, col. 4; N.Y. Times, April 12, 1980, at 5, col. 4. Similarly, the former Iranian victims of SAVAK repression abroad, now themselves in power, have announced that they have sent execution squads abroad to kill Iranian political dissidents opposed to the present regime. The recent assassination in Washington of the former press attache to the Shah, and the attempted assassination in Paris of the former Prime Minister of Iran, indicate the results of this policy. *See* N.Y. Times, July 23, 1980, at 1, col. 5; International Herald Tribune, June 11, 1980, at 1, col. 1. These attacks, based on declared public policy, do not indicate rejection of, or diminishing importance of, the underground. The underground was simply not available to the present Iranian and Libyan regimes for attacks in England, France, and the United States, as it had been for the Shah of Iran as ally and benefactor of these countries. *Cf.* N. LEECH, C. OLIVER, & J. SWEENEY, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 264 (1973) (espionage can be considered "the underworld of international relations").

that police, intelligence, and political agents operate in patterns that mimic traditional international law. These patterns are based in custom, mutual interest, and international consensus, as are norms styled "international law."

Yet this customary system of international relations, as an "underground," differs critically from the customary relations that constitute international law. International law, unlike the underground system, is defined through the public processes in which state responsibility is asserted—diplomatic intervention, publicly stated opinions of law officers and text writers, international adjudication and arbitration, treaties, and conventions. International law depends upon sanctions arising from the calculus of political cost and advantage operating in the framework of public process.[25]

The underground system is divorced from the legitimating referent of public political consensus. Its uniqueness and its significance for the relations of states rest on the fact that it is an international relations underground, operating in stealth, subverting municipal norms and overt standards for relations between states. It is an insidious system because it requires sacrifice of domestic and international legal norms. The sacrifice occurs naturally, and until recent disclosures, it occurred without any embarrassment. The agencies and agents see self-justification in the national interests reflected by the underground system and in the presumed requirements of maintaining that system, whatever the cost to legal order and principle.

25. Public processes such as diplomatic protest are widely regarded as the primary vehicle for asserting human rights claims. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 431-34 (1964) (executive engages in diplomacy to assure that United States citizens harmed by foreign expropriation are compensated fairly); N. LEECH, C. OLIVER, & J. SWEENEY, *supra* note 24, at 573. Remedies other than diplomatic protest such as judicial proceedings are recognized, but they also exist in the public realm. *See* Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3935 (2d Cir. June 30, 1980) (federal courts available to adjudicate certain allegations of international law violations). More generally, the sources of law applied by international tribunals, such as international custom or convention, all require some element of publicity in application. *Cf.* STATUTE OF INTERNATIONAL COURT OF JUSTICE art. 38 (means for determining standards of international law).

There is, of course, an arena of non-public international dealings, in the form of secret negotiations and agreements, and espionage. Whether these give rise to enforceable rights or redressable wrongs in the international legal system is a subject of some dispute. Secret agreements, however, would seem to be unenforceable unless they were made public. *See* U.N. CHARTER art. 102 (all international treaties and agreements must be registered with Secretariat; party to unregistered agreement may not invoke such agreement before any United Nations organ). Espionage is often regarded a violation of territorial sovereignty, but states tend to disown captured spies thus avoiding any public confrontation. Rather, the customary remedies are regulation through domestic laws punishing spies, counterespionage, and counterattack in kind. *See* N. LEECH, C. OLIVER, & J. SWEENEY, *supra* note 24, at 264; Wright, *Espionage and the Doctrine of Non-Intervention in International Affairs*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3 (L. Stanger ed. 1972).

B. *A Sacrifice of Value*

The underground achieves protection for extraterritorial police and intelligence activities only at great cost. The thrust of foreign police powers into the United States clearly undermines domestic and international legal order.

In relation to domestic legal order, the harassment, blackmail, and assaults perpetrated by agents in the underground violate widely recognized personal rights protected by state tort law.[26] In addition, these agents often violate criminal statutes, including murder laws and federal foreign agent registration requirements.[27]

The cooperation of United States officials with the underground operatives also may violate constitutional rights. Alienage does not deprive a person of the protection of the Constitution.[28] Tolerance by

26. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 28-62 (4th ed. 1971) (torts of intentional interference with the person).

27. The Foreign Agents Registration Act, 22 U.S.C. §§ 611-621 (1976), prohibits any person from acting as the agent of a foreign principal unless he has registered with the Attorney General. Section 951 of title 18 of the United States Code requires that non-diplomats who act within the United States as agents of a foreign government register with the Secretary of State. 18 U.S.C. § 951 (1976). Section 851 of title 50 of the United States Code requires that certain persons who have received instruction or assignment in espionage or counterespionage register with the Attorney General. 50 U.S.C. § 851 (1976).

28. Graham v. Richardson, 403 U.S. 365 (1971) (state distinction based on alienage is suspect classification under Fourteenth Amendment). *But see* Foley v. Connelie, 435 U.S. 291 (1978) (upholding New York State's exclusion of aliens from police force).

Although the Supreme Court has sharply restricted state regulation on the basis of alienage, it has accorded the federal government broad powers over aliens. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67, 84 (1976) (upholding statute imposing more severe Medicaid eligibility requirements on aliens than non-aliens; distinguishing *Graham v. Richardson, supra,* on ground that Constitution commits alien regulation to political branches of federal government); Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government,* 1977 SUP. CT. REV. 275, 295-318 (Court has invalidated state discrimination against aliens but often gives only perfunctory review to federal controls on alien exclusion, deportation, and naturalization). Judicial deference to the political branches is often explained by reference to the political question doctrine. *See, e.g.*, Mathews v. Diaz, 426 U.S. at 81-82 (policy towards aliens interwoven with contemporaneous policies concerning foreign relations and war powers); Rosberg, *supra,* at 324 (complex issues unamenable to judicial resolution inherent in formation of immigration policy require judicial deference in alien regulation matters); *cf.* Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing political question doctrine).

Nonetheless, both the Supreme Court and commentators have affirmed that the Constitution does protect alien rights. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 101-03 (1976) (Civil Service Commission regulation barring noncitizens from employment in federal competitive civil service deprives resident aliens of liberty without due process); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) (Fifth Amendment due process clause limits government authority to seize non-enemy, alien property); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 252-54 (1972) (Constitution does not suggest individual rights implicating foreign affairs differ from rights touching exercise of other government powers). Control of emigre repression does not present many of the judicially unmanageable policy concerns that prompt judicial deference to executive and congressional regulation of immigration policy. *See* pp. 89-94 *infra.*

United States government officials of foreign agents' attacks on emigres appears to violate the due process clause of the Fifth Amendment.[29] More commonly, First Amendment rights are impaired because the foreign operatives typically seek to chill public discussion in the United States.[30] Underground activities often stifle criticism of foreign governments, especially of those with highly questionable human rights records.[31] In addition to the obvious civil liberties dangers, great political dangers inhere in such repression as evidenced by the failure in the United States to appreciate the revolutionary potential in Iran, partially because SAVAK choked off the expression of dissident Iranians in the United States.[32]

In addition to undermining domestic American legal order, the underground threatens international legal norms. The intrusion of foreign police powers across national frontiers often offends the principle of territorial sovereignty.[33] The underground operation of agents of one nation within the borders of another clearly violates this fundamental principle of international law.[34] Although on some occasions this intervention occurs with the permission of the host state, frequently underground agents act without such prior consent. Both situations are illustrated by the activities of Iranian government agents in the United States. Before the fall of the Shah, the United States acquiesced in SAVAK operations[35] but now it asserts opposition to the current government's operations.[36] In both situations, however, a violation

29. Aliens clearly enjoy some protections under the Fifth Amendment. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 101-03 (1976); Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931). Of course, the Fifth Amendment does not operate directly on the agents of a foreign sovereign, particularly if those agents act without the knowledge or consent of American officials. Constitutional concerns arise when the United States government gives the foreign agents permission to act against aliens in the United States. Although not all activity directed against aliens would infringe the rights guaranteed by the due process clause because no deprivation of life, liberty, or property occurred, the more extreme forms of emigre repression would seem to qualify.

30. As in the case of Fifth Amendment protections, an alien could avail himself of the First Amendment only by showing sufficient nexus between the foreign operatives and the United States government. In addition, the courts would likely require less of a justification by the federal government for participating in the chilling of alien rights of expression than demanded when citizen rights are infringed. Even if a technical First Amendment violation does not occur, repression of emigre speech presents the same dangers the First Amendment protects against.

31. *See* Washington Post, Aug. 9, 1979, § A, at 13, cols. 3-7.

32. *See id.*

33. *See* note 7 *supra.*

34. *See* Attorney-General of Israel v. Eichman, 36 I.L.R. 5 (District Court of Jerusalem, Israel, 1968) (abduction by citizens of Israel of alien residing in Argentina violated Argentinian sovereignty).

35. *See* Washington Post, Aug. 9, 1979, § A, at 12, col. 1.

36. N.Y. Times, July 23, 1980, at 1, col. 5 (investigation of assassination of former Iranian press attache in Washington, D.C.).

of territorial sovereignty has arguably occurred. The fact that agencies of one nation approve tacitly of foreign agent repression of emigres cannot automatically waive territorial sovereignty. Such approval is not given through the ordinary, constitutional channels that legitimate any exercise of sovereign authority. It is not a legal "waiver," but an attempt to avoid the public process of justification crucial to international law. Recognizing the surreptitious agreements or tacit understandings between police agencies as effectively waiving territorial sovereignty would seriously undermine the international legal order, which depends upon sanctions calculated from the political costs arising from public assertions of responsibility. The surreptitious agreements and tacit understandings are in fact part of the underground system and the illicit trade that flourishes through avoidance of public scrutiny or justification.

The impact of the underground can also be perceived as violative of individual rights under international law. The subject of alien rights has developed as an important category of international law articulated in a large body of international agreements, judicial analysis, and formal exposition.[37] In the traditional positivist formulation, only states, and not individuals, are subjects of international law[38] and alien rights therefore may not exist in adverse relationship to the state of nationality.[39] Contemporary international legal doctrine, however, has challenged this traditional formulation. There is now a substantial body of literature and several international human rights declarations rejecting the older doctrine and arguing that individuals as such have become the subject of international law and that individual rights are therefore a matter of independent and ultimate

37. *See, e.g.*, P. JESSUP, A MODERN LAW OF NATIONS 94-122 (1948) (state responsibility for injury to aliens); N. LEECH, C. OLIVER, & J. SWEENEY, *supra* note 24, at 572-606 (same); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 164-214 (1965) (same).

38. *E.g.*, 1 L. OPPENHEIM, INTERNATIONAL LAW 18-19 (1905) ("[S]tates solely and exclusively are the subjects of International Law."); *id.* at 344 (individuals are objects, not subjects, of international law).

39. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 171(b)-(c), 174, 175 (1965) (in absence of special circumstances alien may not invoke claim against state of citizenship).

The precise scope of remedies available in international law to persons against their state of citizenship is uncertain. As recently as 1975, a panel of the Second Circuit Court of Appeals declared that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976). Another panel of the same court recently criticized this statement as "clearly out of tune with the current usage and practice of international law." Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3929 (2d Cir. June 30, 1980). The *Filartiga* panel, however, cautioned that the scope of rights available against the state of citizenship "will be a subject for continuing refinement and elaboration." *Id.* at 3930.

value under international law.[40] This is particularly so with respect to the political emigre. Although there is no consensus on any "right of asylum" that requires a state originally to grant asylum,[41] the "right of emigration" has been widely affirmed, most prominently through Article 14 of the Universal Declaration of Human Rights, which provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."[42] Article 14 also constitutes the preamble to the Declaration on Territorial Asylum approved by the General Assembly of the United Nations on December 14, 1967.[43] This international doctrine embodies not only an individual right of emigration, but also a correspondent duty of the state that grants asylum to protect the emigre against the overweening claims of the pursuing state of nationality.[44]

Despite these apparent violations, the international underground flourishes. States have great incentives to participate in the illegal activity both to destroy political dissent and to facilitate foreign intelligence gathering. Moreover, legal mechanisms to terminate the underground activity are lacking. Even as strong a statement of emigre rights as Article 14 of the Declaration of Human Rights does not provide a corresponding remedy for the individual emigre under national or international legal procedures. Although individual alien rights can be identified as independent values under international law, available remedies generally reflect the traditional positivist view of international law.[45] In the absence of special treaties, or international procedures established by the agreement of states, international law is remedial only for states, not individuals, and responsibility of a state under international law for injury to an alien can be invoked

40. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); P. JESSUP, *supra* note 37, at 68-93; McDougal, Lasswell, & Chen, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 YALE L.J. 900 (1974).

41. *See* 2 A. GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 79-131 (1972) (state practice of granting asylum widespread, but insufficient to identify as emerging customary rule).

42. G.A. Res. 217, U.N. Doc. A/810, at 74 (1948).

43. G.A. Res. 2312, 22 U.N. GAOR, Supp. (No. 16) 81, U.N. Doc. A/6716 (1967).

44. The parameters of the right "to enjoy" asylum are unsettled. The right can be traced back to Vattel, who asserted that states having granted asylum did have some affirmative obligation to aid the emigre. *See* E. VATTEL, THE LAW OF NATIONS 95-96 (1760, translated from the French, 1st ed. 1758). Today, even in the absence of a clear statement in the Declaration on the meaning of "enjoy," other United Nations declarations, such as the Universal Declaration of Human Rights, impose some obligation on states to protect resident aliens. *See* Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); *cf.* Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3926 (2d Cir. June 30, 1980) (United Nations declarations specify obligations of members).

45. *See* N. LEECH, C. OLIVER, & J. SWEENEY, *supra* note 24, at 573 (diplomatic protest remains major vehicle for asserting human rights claims).

only by the state of which the alien is a national.[46] An individual alien generally lacks the procedural capacity to assert rights before international tribunals.[47] Traditionally, recourse for the alien seeking vindication of rights under international law is to have the state of which he is a national bring his claim before an international adjudicative forum or for the state of nationality to press the alien's claim through diplomatic channels.[48] Attack on the emigre by the state of nationality therefore negates the essential dynamic of alien remedy under international law. The operation of the underground renders the traditional procedure for the assertion of alien rights not only useless, but ironic.

Nor is it likely that the emigre can expect assistance from the state of residence. When the host state surreptitiously accepts the presence of foreign agents, that same state will not protest the subsequent acts of those agents against resident aliens. Even when the agents are unwelcome, the need for maintaining amicable relations with their sovereign may restrict the ability of the host state to respond to their illegal activities. In the United States, for example, neither Congress nor the President has acted forcefully and comprehensively against the underground. The Senate Report specifically criticized the President's failure to use available alien agent registration statutes to regulate the underground.[49] Such abstinence in this special zone of tension between individual liberty and state authority is not aberrational. It can be understood as a product of the ongoing insecurities of international relations. The roles of the executive and Congress have been dictated generally by concern to avoid risk of harm to the foreign intelligence and foreign relations interests of the United States.

Only in the most extreme cases, when the underground manifests itself in a form so offensive as to cause domestic and international outrage, is the host state likely to act. Even then, however, the response is likely to be belated and inadequate. For example, when agents of the Chilean secret police murdered former ambassador Orlando

46. *See id.;* W. BISHOP, INTERNATIONAL LAW 267-69 (2d ed. 1962); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 174, 175 (1965).

The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 19, 25, 213 U.N.T.S. 221, establishes a Commission on Human Rights, which individuals may petition to remedy human rights violations.

47. *See* STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 34 ("Only states may be parties in cases before the Court.") Some international agreements, however, specifically grant standing to private individuals. *See* note 46 *supra.*

48. *See* N. LEECH, C. OLIVER, & J. SWEENEY, *supra* note 24, at 573 (in eighteenth and nineteenth centuries, diplomatic protection primary method of protecting alien rights).

49. *Cf.* Washington Post, Aug. 9, 1979, § A, at 13, cols. 2-6 (Senate staff report details activities of foreign agents in United States unhindered by domestic law enforcement efforts).

Letelier by planting a bomb on his automobile and exploding it in the streets of the nation's capital,[50] there followed federal criminal prosecutions and convictions,[51] and the State Department announced sanctions against Chile for its failure to cooperate with requests of the United States government for the extradition of three implicated Chilean officials.[52] Yet the sanctions announced were either not carried out or served only to formalize existing United States policy. United States officials have been quoted as describing the announcement of the sanctions as a "bluff."[53]

Repression of the political emigre thus presents a unique contemporary picture in which the individual and his presumed rights under national and international law are sacrificed before an unusual combination of political powers. The individual emigre is truly alone—assaulted by the state of citizenship, abandoned by the state of residence, outside the protection of either state, and the victim of both.

II. The Rationale for a Statute-Based Federal Common Law of International Tort

Because the underground maintains its vitality by promoting the foreign relations and intelligence interests of participating states, any proposal for a remedy that does not account for these interests would be unrealistic and ineffective. The remedial challenge, therefore, is to constrain the underground within a framework that serves the interests of human rights and legal order while not unduly prejudicing foreign relations interests.

A. *The Least Vulnerable Branch*

It is clear that in the United States, neither the executive nor the Congress can be expected to provide a direct and comprehensive attack on the underground. These political branches have often sought to further intelligence and police functions at the cost of alien rights and will most likely continue to do so.

Although agents of the underground have operated secure from challenge by the political branches, they have shown some vulnerability

50. *See* United States v. Novo Sampol, No. 79-1541, slip op. at 2-7 (D.C. Cir. Sept. 15, 1980).

51. *Id.*

52. *See* 80 DEP'T STATE BULL. 65 (1980) (sanctions imposed on Chile for failure to extradite, announced Nov. 30, 1979).

53. Krause, *U.S. Bluff in Letelier Case Bolsters Pinochet in Chile,* Washington Post, Jan. 2, 1980, § A, at 1, col. 1.

to civil process. The threat of civil suit by political emigres against the Marcos regime of the Philippines apparently induced payments to the prospective plaintiffs.[54] The damage action filed in the Letelier affair further indicates the possibility of battling the underground independently of the executive.[55]

These initial forays against the underground demonstrate that civil process may provide an effective recourse for the emigre. Unlike the executive or Congress, the courts can resist and have resisted efforts of the underground to subvert legal norms.

The courts are the branch least vulnerable to the underground. A partial explanation may be that the executive and Congress are more prone to sacrifice the interests of the alien to considerations of foreign relations and foreign intelligence. However, adjudication may include related distortions, such as bias against an alien plaintiff or bias in favor of supporting a regime perceived as friendly to the United States. The critical reason the judicial branch is least vulnerable is its fundamental incompatibility with the essential nature of the underground. The civil order function of the judicial branch, unlike that of the Congress or the executive, is initiated by the choice of the individual alien, and proceeds through a necessarily public process. These are qualities of civil process antithetical to the very essence of the underground.

B. *Emigre Adjudication, Foreign Relations, and the Foreign Intelligence Function*

The attributes making the judiciary the branch least vulnerable to the underground are also a source of comparative strength allowing it to constrain the underground in ways the political branches cannot. Executive protection of the underground to further foreign policy interests suggests, however, an exclusive executive prerogative in relation to the underground.[56] Executive inaction may be a sign that courts should refuse to interfere with the underground except to provide a forum for occasional Justice Department prosecutions.

54. The author represented a Philippine emigre family living in the United States whose son was imprisoned in the Philippines. The Marcos regime made payments to the family allegedly in response to the threat of suit to remedy a contract default. If not removed, the defaults would have been the basis for alleging that the regime used the son's imprisonment to extort property from the family. *See* Philippine News, Oct. 7-13, 1978, at 4, cols. 4-5 (copy on file with *Yale Law Journal*).

55. *See* Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980) (decision); Letelier v. Republic of Chile, No. 78-1477 (D.D.C. Nov. 5, 1980) ($4.9 million damages awarded to plaintiffs).

56. *See* C & S Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

1. *Limits on Foreign Relations Interests and Executive Power*

It is important to recognize, however, that values of human rights and legal order do prescribe limits to foreign relations and foreign intelligence interests under United States law. This is confirmed in areas of extraterritorial regulation, such as application of the antitrust laws or the securities laws, where United States domestic regulatory interests may take precedence despite an adverse impact on international relationships of the United States.[57] The point is also evident in cases where protections of the Bill of Rights have been found controlling despite opposing claims of national security.[58] In addition, foreign affairs legislation sometimes reflects human rights limits on the foreign relations interest. Particularly relevant is legislation specifically protecting emigre rights. The Jackson-Vanik Amendments to the Trade Act of 1974,[59] conditioning trade with the Soviet Union on its granting freedom of emigration, are one obvious example. Considering the substantial sacrifice of value resulting from the operation of the underground, there may be acceptable justification for some degree of impairment of executive power and of foreign relations and foreign intelligence interests in order to protect the emigre.

It is also important to recognize that the lack of control over the underground does not necessarily serve the foreign relations of the United States, and action against the underground therefore is not necessarily adverse to the foreign relations interest. The international relations of the United States are being significantly altered independent of any policy process of the United States, and the excesses of the underground create a constant potential for the embarrassment of United States agencies and damage to the United States in its international relations. One aspect, for instance, is the impact on relations between the United States and revolutionary movements once they achieve power, most recently illustrated by the breakdown of relations

57. *See* United States v. Aluminum Co. of America, 148 F.2d 416, 443 (1945) (extraterritorial application of United States laws); K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 39-52, 65-74 (1958) (foreign relations problems caused by extraterritorial application of antitrust laws).

58. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971) (First Amendment controls despite national security claim); Zweibon v. Mitchell, 516 F.2d 594, 624 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (judicial oversight necessary when foreign security interests affect constitutionally protected rights, especially when government actions are not authorized by Congress and are not subject to public scrutiny).

59. *See* 19 U.S.C.A. § 2432 (West Supp. 1980). Human rights provisions also have restricted the coverage of foreign security assistance and foreign economic aid legislation. *See* 22 U.S.C. § 2304 (1976), *as amended by* International Securities Assistance Act of 1978, Pub. L. No. 95-384, §§ 6(a)-(d)(1), 92 Stat. 730 (arms exports, security assistance, and foreign economic assistance tied to human rights observance).

between the United States and the Iranian regime of Ayatollah Ruhollah Khomeini. The Iranian Revolutionary Council has pointed specifically to the failure of the United States to control emigre repression as an important enduring source of ill will and distrust.[60] The Iranians naturally see the SAVAK terror that occurred within the territorial jurisdiction of the United States as wholly within the power of the United States to control. As the Iranian experience illustrates, the failure to discourage the offensive foreign agent activity has, as its natural corollary, the failure of the United States to adjust to the assumption of power by former political dissidents, and more generally, the failure to adjust to change in the international environment. Thus the foreign relations interest itself argues for some imposition of constraint on the underground.

2. *Judicial Competence and Foreign Relations*

The most important reasons for rejecting the suggestion of an exclusive executive prerogative are revealed through consideration of the role of the judicial branch in matters touching on foreign relations. The Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*[61] that judicial action on issues pertaining to foreign affairs requires an evaluation of the relative competence of the judiciary and the other branches.[62] Some remarks in the course of the *Sabbatino* opinion appear to suggest that the test for the courts is one-dimensional —that the more important the implications of an issue for the foreign relations of the United States, the less the justification for adjudication.[63] *Sabbatino,* however, seen in its entirety, provides a more sophisticated and pragmatic view of the role of adjudication in international affairs by framing the issue as "the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[64] *Sabbatino* goes well beyond consideration of the importance of foreign relations implications to the more comprehensive and fundamental question of whether the foreign policy implications of a given issue qualitatively argue in favor of political

60. *See A Mullah's View: "No Deal, Sir,"* TIME, Nov. 26, 1979, at 31 (leading member of Iranian Revolutionary Council condemns United States for allowing Shah's police to violate United States law and harass Iranian students residing here).

61. 376 U.S. 398, 428 (1964) (United States courts will not review propriety of Cuban government's expropriation of sugar within Cuba).

62. *See id.* at 423-28 (foreign relations implication does not automatically remove case from judicial review).

63. *See id.* at 428 ("[T]he less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.")

64. *Id.* at 423.

or judicial disposition. The Supreme Court explained that the choice between judicial involvement or abstention must be analyzed in terms of the traditional handling of a particular question, the susceptibility of the question to adjudication, and the consequences of such adjudication.[65]

In *Sabbatino,* analysis of relative competency resulted in a rule of self-denial for the courts in the form of the act of state doctrine, the doctrine whereby courts of one state refuse to examine the validity of the acts of another state done within its own territorial jurisdiction.[66] However, the same analysis applied to the matter of repression of the political emigre reveals a subject significantly better suited to adjudication than the act of state problem in *Sabbatino.* In the context of *Sabbatino,* adjudication of the merits meant by definition the questioning by a United States court of the legitimacy of the legislative act of a sovereign state undertaken within its own territorial jurisdiction. Because such questioning seriously risks affront to the foreign sovereign as a direct challenge to its status as sovereign and may well provide reason for political reprisal, the analysis of *Sabbatino* required a rule of deference.

Adjudication of civil liability for repression of the political emigre within the territorial jurisdiction of the United States, on the other hand, does not provide a foreign regime with an attractive basis to threaten or undertake reprisal through overt foreign policy. If the defendants are individuals, the offending government is most likely to deny responsibility for their actions, as did the government of Chile in the Letelier affair.[67] If the evidence overwhelmingly demonstrates a high degree of involvement by a foreign government, overt reprisal is nevertheless an unattractive option because there is no publicly justifiable claim of right to violate another state's internal order and territorial jurisdiction. There is surely risk of reprisal. But the foreign government cannot easily press its objection in public fora. It is notable in this regard that the public thrust of the Chilean regime's reaction to the prosecution of Chilean police agents by the United States

65. *See id.* at 423-37. The Court noted that *Sabbatino* presented an issue analogous to the political question doctrine enunciated in Baker v. Carr, 369 U.S. 186, 217 (1962). The *Baker* formulation highlights the Court's concern for considerations of the relative competency of the political and judicial branches when confronted with foreign affairs issues.

66. *See* 376 U.S. 398, 428, 436-37 (1964). The classic statement of the act of state doctrine appears in Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (every sovereign must respect independence of every other, and courts of one country will not judge acts of foreign government done within own territory).

67. *See* N.Y. Times, Mar. 11, 1978, at 5, col. 5 (Chile denies complicity in Letelier assassination).

Justice Department for the assassination by bombing of Orlando Letelier was not a denunciation of the United States legal process. Although refusing extradition requests, the Chilean regime announced support for investigation and prosecution.[68]

Thus the risk to foreign relations arising out of civil process to constrain the underground is not the broad risk of reprisal created by a United States court's evaluation of the public legislative or executive declarations of a foreign government, as in the act of state cases. The risk of adverse state reaction to civil liability for repression of the political emigre is a risk largely limited to effectuation in the clandestine corners of intelligence agencies and the secretive diplomatic encounter where the underground system works.

This specific competence of the judicial branch in the foreign relations context of repression of the emigre is also special in relation to the political branches. Even assuming executive willingness to undertake comprehensive law enforcement against the underground system, adjudication is relatively advantageous because it may constitute a lesser threat to the foreign relations and intelligence interest than executive action. Surely it is a far more difficult matter for the executive branch to explain to foreign representatives why the United States government is prosecuting their agents than to express regret about the filing of a civil lawsuit. When a civil litigation has been initiated, the explanation is at worst that the foreign agency has carelessly managed to make itself the object of a civil claimant in a United States court and that the United States government cannot control the choice of the civil claimant. It may be difficult for a foreign regime to appreciate the reality of separation of powers and consequent constraint on the executive's ability to control a United States court. But when a civil suit is filed, the foreign regime can be expected to understand the dynamic of the public domain. Civil adjudication is therefore less likely to induce the threat or actuality of reprisal than executive action.

On the other hand, civil litigation is more likely to lead to deterrence. The civil litigant seeks publicity that the executive would shun. The civil litigant initiates litigation at anytime, and for reasons independent of executive intention. Foreign agencies, therefore, are not able to rest easy on the basis of established executive policy of selective enforcement or non-enforcement of criminal statutes.

68. *See id.* (Chile to cooperate in investigation); N.Y. Times, Oct. 2, 1979, at 4, cols. 3-4 (Chile refuses to extradite officials indicted by United States government for Letelier assassination).

It also may be noted that civil litigation has the advantage in some situations of offering the foreign state an opportunity for accommodation of the civil complainant; in effect, responding to his claim on an individualized basis avoids the foreign policy context and the confrontation on general policy grounds that is characteristic of presentation of claims through the State Department. This may have actually occurred with respect to claims that were to be filed in the federal courts against the Marcos regime of the Philippines.[69]

The individualization of relief that is natural to civil process is indeed generally advantageous for remedy of emigre repression. Although, in the factual context of *Sabbatino,* the Supreme Court argued that civil claims affecting international relations often are not suited to disposition by individualized settlement or adjudication,[70] Justice Harlan's explanation for this position provides a counterpoint that highlights the relative advantages of individualized adjudication in the case of the emigre. Harlan stated that as to confiscations by a foreign regime undertaken within its own territory, adjudication could have only an "occasional impact,"[71] depending on the fortuitous circumstance of the property in question being brought into this country,[72] and that "[p]iecemeal dispositions . . . could seriously interfere with negotiations being carried on by the Executive Branch"[73] and could interfere with the executive's objective of achieving "general redress."[74]

Civil litigation challenging repression of the political emigre, in contrast, affords opportunity for remedy while executive action is stymied by conflict of interest. The intelligence interest discourages the achievement of general or even individualized diplomatic redress. Individualized judicial determination can have a deterrent effect through public reaction in the United States and abroad. Also, a consequence of adjudication may be pressure on the offending government from its own population to cease its violation of the internal order of another state.

In sum, analysis of the relative competency of the political branches and the judiciary to remedy repression of the political emigre reveals that, despite the adverse impact on the foreign relations interest potentially inherent in any such remedy, the judicial branch enjoys distinct advantages.

69. *See* note 54 *supra.*
70. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428-37 (1964).
71. *Id.* at 431.
72. *Id.*
73. *Id.* at 432.
74. *Id.* at 431.

C. *The Parameters of the Adjudicatory Process*

Recognizing that foreign relations interests do not preclude civil suits and that courts are competent to protect emigre rights only begins the task of defining the appropriate remedy. Further examination is required to determine the parameters of the adjudicatory process. Of particular importance is the issue of whether state or federal courts have jurisdiction over litigation arising from the underground. In addition, it is necessary to determine whether the substantive legal basis of the cause of action derives from international, federal, or state law, and whether it is based on statutes or the common law.

1. *Federal Preemption and the Need for Federal Law*

The commitment of questions involving foreign relations to the primary or exclusive authority of the federal government is well established. Many decisions by the Supreme Court in a variety of areas of international concern elaborate this commitment, particularly in cases involving alien rights and duties and the regulation of aliens.[75] It is a commitment well supported by the background[76] and language[77] of the Constitution. When the federal government has acted through congressional legislation, the Supreme Court has found that supplementary, consistent, or even identical state regulation is preempted because the federal government occupies the field.[78] The Court has held, moreover, that the Constitution itself excludes state intrusion into foreign affairs of the nation, even when the federal branches have not acted.[79]

The reasons that usually require federal preemption, such as the need for uniformity and the avoidance of the parochialism of state law,[80] apply with special force to the case of the political emigre. If the underground system is to be made subordinate to the constitutional order, the requirements of that order must be declared as national policy so that foreign powers are adequately instructed as to their conduct with and within the United States. Although it is not neces-

75. *See, e.g.*, Mathews v. Diaz, 426 U.S. 67 (1976) (upholding restrictions on Medicare coverage of aliens); Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (alien inheritance).

76. *See* THE FEDERALIST Nos. 3, 4, 5 (J. Jay) (role of federal government in foreign affairs); *id.* No. 42 (J. Madison) (same); *id.* No. 80 (A. Hamilton) (same).

77. *See* U.S. CONST. art. I, § 10 (limitations of state power in foreign affairs).

78. *See* Hines v. Davidowitz, 312 U.S. 52, 66-68 (1941) (comprehensive alien registration system precludes exercise of concurrent state authority).

79. Zschernig v. Miller, 389 U.S. 429 (1968).

80. *See* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1042-68 (1967) (discussion of reasons for preemption by federal government of issues related to foreign affairs).

sary to concede total and exclusive control to the executive branch for the nation to "speak with one voice in foreign affairs," it is at least necessary to concede to this sensible old metaphor that insofar as adjudicative process touches on the foreign relations of the United States, its forum and formulation should be federal.

Recognition of the appropriateness of a federal forum does not close the inquiry. The federal forum does not guarantee that the law applied will reflect the various national interests at stake. The rules of decision must be drawn from a source reflecting the national interest. The legal regime to be applied and the experience it contains should be suited to address repression of the emigre as a distinct public order problem of national and international dimension.[81]

Because *Erie Railroad Co. v. Tompkins*[82] precludes a federal common law of domestic tort, federal courts hearing alien repression cases would most likely rely on state tort laws.[83] It is often possible to characterize the injury suffered by the political emigre in terms of common law tort categories, but these embody the public order interests only of municipal law. For example, the threat which appears to be most often involved in the intimidation of the emigre—that if the emigre continues to criticize a foreign regime, harm will come to the emigre or to his family in the United States or abroad—is a threat which might awkwardly be fit within present conceptions of "intentional infliction of mental distress" or other municipal delicts.[84] However, tort concepts designed to serve exclusively municipal interests of public order and civil justice are essentially distorting when applied to injury

81. There is, on the other hand, no reason to seek, and good reason to reject, the objectives often cited to justify a preference for state law, such as the achievement of a variety of local experiments and solutions attuned to local conditions, or the operation of decentralized power centers. *See* Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 490-91 (1954); Note, *The Federal Common Law,* 82 HARV. L. REV. 1512 (1969).

This point applies to the formulation of international law as well as national law bearing on the foreign relations of the United States. In the course of the *Sabbatino* opinion, Justice Harlan referred to comments by Professor Philip C. Jessup written shortly after the *Erie* decision, arguing that *Erie* should not be applied to rules of international law. Harlan noted that Professor Jessup "recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine." 376 U.S. 398, 425 (1964) (footnote omitted); *see* Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied To International Law,* 33 AM. J. INT'L L. 740 (1939).

82. 304 U.S. 64 (1938).

83. The *Letelier* civil litigation relied on local tort law, which is federal because the action arose in the District of Columbia. *See* Letelier v. Republic of Chile, 488 F. Supp. 665, 666 (1980). It is likely, however, that if the assassination had occurred in a state, state law would have been applied.

84. Among the causes of action alleged in the *Letelier* case were assault and battery causing death and negligent transportation and detonation of explosives. *Id.* These delicts obscure the international implications of the tortious behavior.

arising from the underground.[85] Such categories fail to provide accurate identification of the injury involved, fail to include consideration of the national interest involved, and are not oriented to provide deterrence against the underground.

The absence of a recognized federal tort law not only undermines the purposes of assigning the emigre action to a federal rather than state forum, but also presents a serious bar to federal court jurisdiction. If the cause of action is for local tort, the plaintiff and the court must rely on the diversity jurisdiction. It has long been established, however, that the diversity jurisdiction of the federal courts cannot support an action by an alien plaintiff against an alien defendant.[86] Because this is the likely configuration of emigre suits, the availability of federal fora for those suits is seriously restricted.

Thus the formulation of a substantive federal law of emigre rights is essential if adjudication is to constrain the underground. Such a federal law is necessary for the civil remedy to account adequately for foreign relations interests, emigre rights, and the legitimacy of foreign agent activities in the United States. The federal law is also necessary, given the unavailability of diversity, to establish federal question jurisdiction.

2. *Federal Common Law and International Law*

Federal common law, as an acknowledged law-making capacity of the federal courts, offers potential both for achieving federal question jurisdiction and case-by-case articulation of rules of judicial decision affecting the foreign relations of the United States. The Supreme Court held in 1972, in *Illinois v. City of Milwaukee*,[87] that a case "arising under" federal common law is an Article III case "arising under the laws of the United States" and therefore is a federal question case within the original jurisdiction of the federal courts.[88] Seven years earlier *Sabbatino* had extended the scope of federal common law into the area of foreign relations concerns.[89]

In *Sabbatino*, Justice Harlan grounded the act of state doctrine on the existence of judge-created law in areas of federal interest.[90] Post-

85. In contrast to the local torts asserted in *Letelier*, plaintiffs also alleged the tort of assassination in violation of international law, and assault on an internationally protected person in violation of 18 U.S.C. § 112 (1976). *Id.* These causes of action would focus the attention of the court on some of the international aspects of the litigation.

86. *See, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809); Warren, *New Light on the History of the Judiciary Act of 1789*, 37 HARV. L. REV. 49, 79, 93 (1923).

87. 406 U.S. 91 (1972).

88. *Id.* at 98-101.

89. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

90. *Id.* at 426-28.

Sabbatino commentators were quick to focus on the fact that *Sabbatino* was a declaration of the power of the federal judiciary to develop federal common law in the area of foreign relations without the need to justify such judicial legislation in any apparent or presumptive authorization from the political branches, and that *Sabbatino* otherwise went beyond the previous categories of federally created common law.[91] The precise extent and direction of the new federal judicial territory was left uncharted in Harlan's opinion, and, despite the volumes of commentary concerning *Sabbatino,* there remains much uncertainty about its scope.[92] *Sabbatino,* taken in the extreme, may represent the assertion by the Supreme Court of a general common law jurisdiction of the federal courts in any area of federal interest. Whatever the wisdom or accuracy of so broad a view, *Sabbatino* at a minimum suggests the power of the federal courts to develop a federal common law of foreign relations that includes the importation into United States law of principles of international law.[93]

Justice Harlan apparently adopted the so-called "consensus view" for determining the developing international law norms to be applied in domestic courts.[94] He framed the Court's refusal to adjudge the

91. *See* Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 815-16 (1964); Moore, *Federalism and Foreign Relations,* 1965 DUKE L.J. 248, 273; Note, *Federal Common Law and Article III: A Jurisdictional Approach to* Erie, 74 YALE L.J. 325, 326-27 (1964) [hereinafter cited as *Jurisdictional Approach*]. Prior to *Sabbatino,* the development of the post-*Erie* federal common law, carving areas of federal interest away from *Erie*'s requirement that federal courts follow the common law of the states in which they sit, occurred within three general categories. One such category was comprised of cases concerning the construction or implementation of specific federal statutes, statutory regimes, or treaties. *See* Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943). *Clearfield* is generally regarded as the seminal opinion for development of the post-*Erie* federal common law based on congressional authorization, although the grounding of *Clearfield* in federal statute has been subject to question. *See* Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797, 828-32 (1957); Note, Clearfield: *Clouded Field of Federal Common Law,* 53 COLUM. L. REV. 991 (1953). A second category was comprised of cases involving the resolution by the federal courts of disputes between states. *See, e.g.,* Vermont v. New York, 417 U.S. 270 (1974); Arizona v. California, 373 U.S. 546, 597-98 (1963). The third category of "federal common law" cases concerned the development of a uniform law of admiralty carrying out the specific grant to the federal courts under Article III. *See, e.g.,* Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). *See generally* Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law,* 64 HARV. L. REV. 246 (1950).

92. Over one hundred law review articles and notes concerning *Sabbatino* have been printed since 1966. A bibliography of articles prior to 1966 is collected in THE AFTERMATH OF SABBATINO 225-28 (L. Tondel ed. 1965).

93. *See* Moore, *supra* note 91, at 273; *Jurisdictional Approach, supra* note 91, at 334-37. Other commentators have taken a much more restrictive view of the federal common law implications of *Sabbatino. See* Henkin, *supra* note 91, at 818-19.

94. Justice Harlan apparently followed the view first stated in Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique*

validity of the Cuban nationalization by noting "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens,"[95] also stating, however, that "the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . ."[96] *Sabbatino* does assert that where international opinion is not significantly divided the federal courts may properly adjudge a principle of international law as controlling, and thereby incorporate international law into United States law in that area.

Protection of the political emigre does not require the courts to act in areas of disputed international values such as the legal status of expropriation. The fundamental principle of territorial sovereignty could form the foundation of emigre suits. Unlike expropriation, the principle of territorial sovereignty and the concomitant rule limiting police jurisdiction to the territorial borders of the acting state are non-controversial.[97] This foundation would allow courts to develop substantive legal rules for adjudicating emigre claims within the limits established in *Sabbatino*. Rules concerning the right of the state of asylum to protect the emigre, the right of the emigre to enjoy asylum, and a consequent duty of the state of asylum to protect the emigre from the overreaching state of origin could be developed upon the firm base of territorial sovereignty without involving normative conflicts. Thus relying on the consensus view of their role in the international arena, domestic courts could articulate the normative basis of a remedy for the emigre.

Although *Sabbatino* is permissive in the formulation of federal common law, it does suggest caution. *Sabbatino* itself ultimately demonstrates judicial self-restraint and confirms the primacy of the political branches in foreign affairs. The possible application of international law appeared only as dictum in the decision,[98] while the court refused to evaluate a Cuban nationalization decree according to alleged stan-

of Banco Nacional de Cuba v. Sabbatino, 16 RUTGERS L. REV. 1 (1961). *See* Lillich, *The Proper Role of Domestic Courts in the International Legal Order,* 11 VA. J. INT'L L. 9, 32 (1970).

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

96. *Id.*

97. *See* p. 84 & note 7 *supra* (widespread consensus on norm of territorial sovereignty).

98. In refusing to evaluate the Cuban nationalization decree, the *Sabbatino* court stated "that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . ." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

dards of international law. *Sabbatino* by itself probably cannot provide great inspiration for those who dream of domestic courts as independent creators of international legal order. The caution and circumspection of Harlan's opinion are not the stuff of which such dreams are made. Furthermore, a federal court would hesitate to create a private right of action evaluating international conduct without a statutory invitation from the political branch. Judicial creation of private rights of action even unrelated to the judicially sensitive area of foreign relations have generally depended upon statutory foundation,[99] and *Sabbatino's* specific result of judicial abstention will reinforce this tendency. Moreover, international law, as it is applied by domestic courts, remains essentially in the positivist mold as a body of rules established by the practice of states, declarative of rights and duties of states, not individuals. Federal courts, with rare exception,[100] have refused to recognize the concept of private remedy for the violation of international law apart from legislative authorization through international agreement or internally through municipal legislation.[101] Thus development of a federal judicial remedy for the emigre would be difficult to achieve without an identifiable statutory basis.

3. *The Alien Tort Claims Act*

The Congress of the United States long ago enacted a statute which, at least according to its literal terms, provides the necessary jurisdiction. Section 9 of the first Judiciary Act,[102] now section 1350 of title 28, and sometimes labelled the "Alien Tort Claims Act" (Act), gives

99. *See* Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 285-89 (1963); Comment, *Private Rights of Action under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975).

An exception of potential importance is the judicial development of remedies implementing the Bill of Rights, as in an action arising from a Fourth Amendment violation. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). *See* Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532 (1972).

The plaintiffs in *Letelier* alleged a cause of action based upon 18 U.S.C. § 112 (1976) which penalizes actions harming internationally protected persons. Letelier v. Republic of Chile, 488 F. Supp. 665, 666 (1980). However, even if a private right of action could be based on this statute, it would not provide a general basis for emigre suits against the operation of the underground system because the usual victim does not enjoy the special status of "internationally protected person," a status that pertains primarily to representatives of foreign governments and international organizations. *See* 18 U.S.C. § 1116(b)(4)(B) (1976).

100. *See* Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3929-30 (2d Cir. June 30, 1980) (federal court has jurisdiction over action for alleged violation of international prohibition of torture).

101. *See, e.g.*, W. BISHOP, *supra* note 46, at 265-68; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 174, 175 (1965).

102. Judiciary Act, ch. 20, § 9, 1 Stat. 73 (1789) (current version at 28 U.S.C. § 1350 (1976)).

the federal 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."[103] As a grant of federal question jurisdiction under Article III, this Act makes possible a suit between an emigre plaintiff and alien defendant, thus overcoming the emigre's diversity problem. Moreover, under the terms of section 1350, the standards for assessing the conduct of foreign agents would be drawn not from the parochialism of municipal law, but from the public international consensus by which international law is defined. The Act directs the inquiry to consideration of the violation of public international norms—the essential offense of the underground system. The Alien Tort Claims Act thus satisfies the fundamental requirements for a jurisdiction within which the emigre can confront the underground.

Because the "law of nations" is its normative reference, the Act allows for recognition of emigre claims only when there is public international consensus. It would assure that repression of the political emigre would be focused as an international delict and, therefore, that adjudication that involves potential offense to a foreign government could be defended internationally by reference exclusively to international values. In other words, the Alien Tort Claims Act affords a model for emigre litigation that is remarkably well attuned to the consensus view of the role of adjudication in matters touching on foreign relations that was approved by the Supreme Court in *Sabbatino*.

It is likely that the federal courts will have the opportunity to decide whether the Alien Tort Claims Act provides remedy for the political emigre. Reference to the Act has appeared in at least two complaints against underground activities,[104] and the Act has recently been recognized by the Second Circuit as a tool for importing international human rights norms into domestic law, generally opening the way for private remedies for international law violations.[105]

There is reason to question, though, whether the Alien Tort Claims Act is adequate for challenging the underground. A law so old that

103. *Id.*

104. *See* Complaint, Letelier v. Central Nacional de Informaciones, Civ. No. 78-1477, at 1 (D.D.C., filed Aug. 2, 1978). The *Letelier* decision finding jurisdiction did not discuss the applicability of section 1350. *See* Letelier v. Republic of Chile, 488 F. Supp. 665 (D.D.C. 1980). Section 1350 may be rediscovered on appeal, however, if the defect of diversity is recognized. *See* note 54 *supra*.

105. *See* Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3935 (2d Cir. June 30, 1980) (Alien Tort Claims Act opens federal courts for adjudication of rights recognized by international law).

it was part of the first bill before the first Senate of the United States may well embody original intentions and subsequent colorations that take it outside the logic and promise of its literal terms.

The reported cases discussing section 1350 jurisdiction have never touched on the underground, and indeed have not ventured very far in specific application of the Act. For the most part, discussion of the Act has been characterized by mysterious reference to unknown origins, and an unwillingness to venture any innovative application. Judge Friendly recently summed up almost two hundred years of the judicial experience by observing, "[t]his old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, . . . no one seems to know whence it came."[106]

The statute has appeared in few more than a dozen reported cases.[107] It has been applied to create private rights in connection with specific treaty violations.[108] But it has been used successfully for jurisdiction for a tort committed in violation of the law of nations only twice. In *Filartiga v. Pena-Irala*,[109] the Court of Appeals for the Second Circuit found torture perpetrated abroad under color of official authority actionable under section 1350.[110] The second case, *Abdul-Rahman Omar Adra v. Clift*,[111] a child custody case, involved the international tort of taking a child from country to country by falsifying the child's nationality on the mother's passport.[112] In addition, one Attorney General's opinion discussing the statute indicated a link with principles of territorial sovereignty by suggesting that an international tort under the Act would arise from the changing of a channel of a river that functioned as a boundary between the United States and Mexico.[113] Finally, in another relatively recent case, *Nguyen Da Yen v. Kissinger*,[114] the Court of Appeals for the Ninth Circuit, though finding jurisdiction on other grounds, in dicta noted that Alien Tort Claims Act jurisdiction may be appropriate to hear alien human rights claims against state agencies for actions across national borders.[115]

The cases have stated a general standard for applying the Act. This "test" of section 1350 jurisdiction was first articulated by a federal

106. ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).
107. *See* Annot., 34 A.L.R. Fed. 388 (1977) (briefly summarizing case law).
108. *See* Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).
109. No. 79-6090 (2d Cir. 1980).
110. *Id.* slip op. at 3913.
111. 195 F. Supp. 857 (D. Md. 1961).
112. *Id.* at 864-65.
113. 26 Op. Att'y Gen. 250, 252 (1907).
114. 528 F.2d 1194 (9th Cir. 1975).
115. *Id.* at 1201 n.13.

district court in *Lopes v. Reederei Richard Schroder,*[116] and was later utilized by other courts, particularly the Second Circuit Court of Appeals.[117] The *Lopes* court said:

> [T]he phrase "in violation of the law of nations," . . . means, *inter alia,* at least a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se.*[118]

Although this standard remains indefinite, courts have interpreted the phrase "standards . . . used by . . . states for their common good and/or in dealings *inter se*" to require a finding of possible impact on the foreign relations of the United States.[119] This interpretation implies that the Alien Tort Claims Act requires a reversal of the usual judicial tendency. The likelihood of foreign policy implications becomes reason for activism of the federal courts rather than reason for judicial deference or exclusion.[120]

In *Abdul-Rahman Omar Adra,*[121] the court noted that a reason for upholding section 1350 jurisdiction is to provide a federal forum for an alien claim as an alternative to action in the state courts. The court stressed that "[t]he importance of foreign relations to our country today cautions federal courts to give weight to such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations."[122] In *Sabbatino,* the Supreme Court stated a similar view. The Supreme Court specifically referred to the Alien Tort Claims Act as support for its determination that the act of state doctrine was to be treated as a matter of federal law, citing section 1350 as among the statutory and constitutional provisions "reflecting a concern for uniformity in this country's dealings with for-

116. 225 F. Supp. 292 (E.D. Pa. 1963).

117. *See, e.g.,* Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978); ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). *See also* Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966).

118. 225 F. Supp. 292, 297 (E.D. Pa. 1963).

119. *See* Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978); Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324, 328 (E.D. Pa. 1966).

120. The aftermath of *Sabbatino* resolves any doubt concerning congressional authority to order the courts to adjudicate an issue despite potential foreign affairs impact. Congress enacted the Hickenlooper Amendment to require judicial resolution of the validity of confiscations according to principles of international law. *See* 22 U.S.C. § 2370(e)(2) (1976). The amendment was applied as controlling the ultimate result in *Sabbatino. See* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 972 (S.D.N.Y. 1965), *aff'd,* 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

121. Abdul Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961).

122. *Id.* at 865.

eign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions."[123]

In sum, courts considering the application of the Alien Tort Claims Act in recent times have determined that the Act provides jurisdiction where an alien claim importantly bears on the foreign relations of the United States because the alleged violation of standards for conduct between nations is involved requiring a federal forum. This interpretation was foreshadowed by statements of the framers of the Act and eighteenth century commentators on international law. These statements reflect the concern that recognition of alien claims is necessary to preserve the peaceful international relations of the United States.[124]

Commonly appearing in the treatises and the statements of the framers is the related concern that injury to an alien can constitute injury to the foreign state of which the alien is a citizen.[125] However, the presence of this concern does not confirm that the framers intended to protect the political emigre who suffers at the hands of agents of the state of nationality. Indeed, the more extreme view in which alien rights are tied exclusively to the pleasure of the state of citizenship would argue against interpretation of section 1350 to protect the emigre.

But this view is a significantly more positivistic perspective than probably dominated the thinking of the framers in the eighteenth century.[126] Certain influential treatise writers perceived the law of nations as involving relationships not only between state and state,

123. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964).

124. *See* THE FEDERALIST No. 80 (A. Hamilton) (federal judiciary ought to have jurisdiction over all cases in which foreign citizens are parties because denial or perversion of justice to foreign citizens may cause war).

125. *See* H. GROTIUS, THE RIGHT OF WAR AND PEACE 136-37 (1964) (1st ed. 1598); E. VATTEL, *supra* note 44, at 144-45 (whoever abuses citizen indirectly offends citizen's state; sovereign who refuses to punish offender becomes responsible for offense).

126. The later so-called positivist view of international law is exemplified by Oppenheim:

> Since the Law of Nations is based on the common consent of individual States, and not of individual human beings, States solely and exclusively are the subjects of International Law. This means that the Law of Nations is a law for the international conduct of States, and not of their citizens . . . . An individual human being . . . is never directly a subject of International Law.

1 L. OPPENHEIM, *supra* note 38, § 13, at 18-19. Oppenheim summarizes the positivist catechism, "But what is the real position of individuals in International Law, if they are not subjects thereof? The answer can only be that they are objects of the Law of Nations." *Id.* § 290, at 344.

Recent commentators have challenged the doctrine that human rights in international law are limited by the concepts of nationality and the subject-object dichotomy. *See, e.g.*, P. JESSUP, *supra* note 37, at 68; H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 6-12 (1st ed. 1950); McDougal, Lasswell, & Chen, *supra* note 40.

but also between the individual and the state. Grotius perceived the connection between individual rights and the law of nations as bearing on peaceful international relations. His argument that "the mutual tie of kinship among men" justified and frequently caused warfare to protect the rights of others illuminates the congressional perception that federal jurisdiction over alien claims would help preserve the "peace of nations."[127]

Emigre rights were viewed among the natural rights of man included within the law of nations. Vattel argued that the law of nature requires a right of emigration and protection of the emigre alien by the state granting asylum.[128] This is remarkable because Vattel strongly promoted the sovereignty and primacy of states in international law.[129] Yet even Vattel insisted on a right of emigration so strong as to give an individual a right to seek protection within the state of asylum against the state of nationality.[130]

The conclusions of Vattel and the other commentators thus indicate that Congress might have intended section 1350 to afford aliens protection apart from their state of nationality and to grant sanctuary in a federal forum against foreign interests.

Of course, the intention of the framers of this statute is neither certain nor dispositive of its interpretation. The meaning of the law of nations as applied in federal law is evolutionary[131] and the original intention, whatever it was, can only suggest the meaning to be given today. Contemporary experience, however, confirms the eighteenth century insight into the inevitable and profound connection between human rights and international relations. Violations of human rights are an obvious source and stimulus of international tension, and repression of the political emigre is potentially an extremely provocative aspect of contemporary violation of human rights. United States experience with Iran and Chile demonstrates that the tension occurs

127. *See* H. GROTIUS, *supra* note 125, at 504, 582.

128. *See* E. VATTEL, *supra* note 44, at 95-98.

129. *See id.* at 1-8 (states are free and equal sovereigns; law of nations pertains to relations of states).

130. *See id.* at 95-96 (circumstances in which citizen has right to emigrate; sources of rights; limited duty of other sovereigns to aid would-be emigre).

Vattel's endorsement of emigre rights is of added significance because many early American statesmen apparently consulted it as an authoritative source on the law of nations. Benjamin Franklin, for example, reported its use at the Continental Congress in 1775. *See* 2 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 64 (F. Wharton ed. 1889); F. RUDDY, INTERNATIONAL LAW IN THE ENLIGHTENMENT xiii (1975) (Vattel's *The Law of Nations* met with extraordinary success upon publication and was foremost guide to international law and practice).

131. *See* Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3921 (2d Cir. June 30, 1980) (courts must interpret law of nations not as it was in 1789, but as it exists today).

regardless of the ideologies involved. Both in the case of Iran, whose new government was alienated by American tolerance of repression,[132] and in the case of Chile, whose repressive regime objected to the extradition of its officials who hired assassins,[133] the pacific relations of states have suffered.

Furthermore, current trends in international law concerning the protection of human rights have certainly revitalized many of the concerns voiced by eighteenth century treatise writers. Individual rights have once again been recognized as the subject of protection of international law, even entitling persons to claims against the state of nationality.[134] Thus, whether viewed in the present light or that contemporaneous with its drafting, section 1350 should be read as a congressional authorization for the federal courts to provide protection for alien rights, even when conflicting with the objectives of the state of nationality.

4. *A Statute-Based, Federal Common Law of International Tort*

Defining the precise parameters of the international tort of emigre repression is well within the competency of the federal courts. They will decide when particular intimidation is sufficiently serious to constitute violation of the territorial jurisdiction of the United States and emigre rights. It should not be difficult to identify as clear violations the broad category of foreign agent activity that composes the core and primary substance of the underground. The delict can be defined essentially as occurring when the political emigre is threatened with or suffers damage to himself or family caused by the activities in the United States of foreign agents, particularly when perpetrated to stifle expression of political views. If threats are communicated only from abroad, or relate only to harm to family residing in the emigre's country of origin, the case is harder, and becomes occasion for the courts to articulate new conclusions concerning limitations on the extraterritorial application of United States law and the due process requirements of "minimum contacts."[135] This is a rather conventional

132. *See* note 60 *supra*.

133. *See* N.Y. Times, Oct. 2, 1979, at 4, cols. 3-4.

134. *See, e.g.*, Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3927-30 (2d Cir. June 30, 1980) ("international law confers fundamental rights upon all people vis-a-vis their own governments") (citing HOUSE COMM. ON FOREIGN AFFAIRS AND SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG., 2D SESS., DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS 1 (Comm. Print 1980) (international consensus that governments owe their citizens basic human rights protections)).

135. In Filartiga v. Pena-Irala, No. 79-6090, slip op. at 3939-41 (2d Cir. June 30, 1980), a panel of the Court of Appeals for the Second Circuit noted some of the problems of extraterritoriality in cases arising under the Alien Tort Claims Act. The court found

task for the federal courts.[136] Moreover, the activity that comprises the essential substance of the underground presents no such questions because the foreign agencies threatening and causing harm in the United States do so while physically present within the territory of the United States.

Providing a remedy for the political emigre also does not require of the federal courts any initiative or performance beyond their established capacities in the development of statute-based federal common law. Indeed, the federal courts are better equipped to develop a legal regime protective of the alien than they were to develop certain now-established areas of federal common law.

An instructive contrast is the federal common law enterprise that began with the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills.*[137] In the *Lincoln Mills* case the Court upheld section 301(a) of the Taft-Hartley Act[138] as a grant of jurisdiction to the federal courts to regulate the enforcement of collective bargaining agreements, finding in section 301(a) a mandate to fashion a federal common law of labor contract.[139] The opinion has been trenchantly

that Congress had conferred subject matter jurisdiction for violations of international law, such as torture resulting in death, even when the act occurred in a foreign state. *Id.* However, the court left open the question of whether the law of state of the occurrence or of the forum state controlled.

136. The extraterritorial application of United States law is generally tested by the occurrence of "conduct" or "effects" in the United States resulting from the prohibited activity. The application of the "conduct" and "effects" tests in areas such as securities regulation and antitrust indicates that the extraterritorial application of United States law to protect an emigre while resident in the United States from any of the intimidation that has been orchestrated from abroad could survive those tests, and the "minimum contacts" due process test of International Shoe Co. v. Washington, 326 U.S. 310 (1945), as well. *See* K. BREWSTER, *supra* note 57, at 65-74 (1958) (jurisdiction over foreign acts having effects in United States); Note, *American Adjudication of Transnational Securities Fraud,* 89 HARV. L. REV. 553 (1976); *Developments in the Extraterritorial Reach of United States Law,* 17 HARV. INT'L L.J. 313 (1976).

The due process test of *International Shoe* "requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In light of the violation of national and international legal principles involved in repression of the emigre, it would seem difficult to conclude that the assertion of in personam jurisdiction to protect the resident emigre from intimidation in the United States caused by threats of violence from abroad would offend "traditional notions of fair play and substantial justice."

137. 353 U.S. 448 (1957).

138. 29 U.S.C. § 185(a) (1976):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

139. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

criticized as presuming, without adequate foundation, that Congress intended to initiate an important shift in the relation of the states and the federal government, and to authorize the creation of a federal common law of labor contract in the context of enforcement of an arbitration agreement, where adjudication is a process of dubious value.[140] Moreover, the criticism is that the Court took this initiative in *Lincoln Mills* without being able to provide adequate direction for the federal courts as to the sources for the new federal common law of labor contract.[141]

Similar concerns do not apply to development of a federal common law of international tort to protect the emigre. No shift of function of state and federal government would be involved. State law does not address the problem of the underground as such. Also, there would be no conflict with an ongoing and vital process of dispute resolution, as the critics of *Lincoln Mills* argue is inherent in the imposition of adjudication on arbitration and collective bargaining.[142] Adjudication of emigre claims instead can fill a void where diplomacy ideally ought to function, but in fact does not.

Perhaps the most striking difference between the founding of federal common law in *Lincoln Mills* and the development of federal common law to protect the emigre relates to the available sources of law and the available legislative direction. Section 301(a) of the Taft-Hartley Act, although declaring the jurisdiction of the federal courts to hear claims concerning collective bargaining agreements, says nothing concerning whether state or federal law should apply. The Alien Tort Claims Act, in contrast, instructs the federal courts to fashion a federal common law by directing them to apply the "law of nations."

Application of the "law of nations" requires the evolutionary and ambulatory process of the common law because the law of nations originates in the ever-evolving consensus of states. The statute's reference to the "law of nations" bespeaks a firm tradition, epitomized by the classic declaration of Justice Gray in *The Paquete Habana*[143] that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction,

140. *See* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957). *See also* Wellington, *Labor and the Federal System*, 26 U. CHI. L. REV. 542, 556-61 (1959); Note, *supra* note 81, at 1531-35; Comment, *The Emergent Federal Common Law of Labor Contracts: A Survey of the Law under Section 301*, 28 U. CHI. L. REV. 707, 707-08 (1961).

141. *See* Bickel & Wellington, *supra* note 140, at 23-25.

142. *See id.*

143. 175 U.S. 677 (1900).

as often as questions of right depending upon it are duly presented for their determination."[144]

The Supreme Court has upheld the authority of the federal courts to use the process of the common law to incorporate international law as United States law even where there is reason for judicial restraint that would not pertain to the international tort of emigre repression. In *Ex parte Quirin*[145] and *United States v. Smith*,[146] the Court upheld statutes penalizing violations of international law. The Court found that even without any definition of "law of nations," the statutes provided sufficient notice to potential offenders.[147] The basis for the application and development of the law of nations by the federal courts is even stronger when Congress authorizes civil liability for violation of the law of nations, and due process rights of criminal defendants are not involved.

In comparative terms, indeed, the development of a federal common law of international tort to protect the emigre would be a relatively conservative development within the greater body of federal common law. Decisions such as *Lincoln Mills* demonstrate that the Supreme Court has launched the development of federal common law in areas of federal interest on very uncertain foundations with little guidance for the federal judicial system.[148] The task of the federal courts in articulating federal common law generally begins with much greater uncertainty than would burden the courts in articulating protection of the emigre from physical and mental abuse by foreign agents. As has been suggested above, this wrong is susceptible of delictual definition.[149]

Finally, it is clear that the existence of a statutory grant on which to base the development of a federal common law of international tort provides the courts with a solid bridge between national law and international law. The availability of the Alien Tort Claims Act makes it possible for the courts to build private rights on international norms without any impediment arising from the interstate nature of international law.[150]

144. *Id.* at 700.

145. 317 U.S. 1 (1942).

146. 18 U.S. (5 Wheat.) 153 (1820).

147. *See Ex parte* Quirin, 317 U.S. 1, 27-28 (1942); United States v. Smith, 18 U.S. (5 Wheat.) 153, 159-61 (1820).

148. *See* Note, *supra* note 81, at 1532; *cf.* Friendly, *In Praise of* Erie—*and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964) (range of post-*Erie* development of federal common law).

149. *See* pp. 96-97 *supra*.

150. Some courts have failed to distinguish the limits on private rights enforceable under international law from the use of domestic legislation, such as the Alien Tort

Even within the strictures of positivism, the existence of a statutory grant renders tired cliches about the purely interstate nature of international law completely irrelevant. Congress, acting within the limits of its Article I power, can of course authorize a private right of action as a declaration of municipal law. Congress also can authorize the federal courts to apply common law. This is the import of the body of federal common law that Harlan pointed to in *Sabbatino*.[151] A civil remedy for the political emigre challenging conduct that violates norms of public international law is wholly compatible with the legislative and judicial power of the United States, for the conjunction of such power has generally functioned both in the development of federal common law and in the incorporation of international law into United States law.

III. The Reality of Emigre Litigation

The value of the international tort model as an instrument of protection for the emigre will be tested ultimately by lawyers meeting the conventional challenges of litigation. Of critical concern, therefore, is the adaptability of the international tort model to the requirements of a lawsuit.

Often the potential plaintiff will be reluctant to bring suit. The emigre may perceive the risk of retaliation to self, family, or associates as too great. However, emigre litigation most likely will proceed despite these inhibitions, particularly because of the protection public exposure will provide.

Most importantly, the critical measure of the success of the international tort model as the means for the imposition of substantial constraint on the underground will not be the number of lawsuits. The advancement of a minor number of lawsuits of major notoriety can achieve the objective of constraint. The *Letelier* litigation demonstrates that it is the nature of the emigre suit to generate public attention because of its political aspect.[152] Civil litigation and the

Claims Act, to incorporate international norms into domestic law. *See* Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976) (because law of nations is relative to states it is not self-executing and does not vest individuals with rights). Even from the positivist perspective, the existence of a statutory grant such as section 1350 provides the basis for deriving individual rights from international law.

151. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-27 (1964).

152. The *Letelier* litigation has been and continues to be the subject of frequent press stories. *See, e.g.*, Klement, *Foreign Victims Find U.S. Forums*, Nat'l L.J., Oct. 13, 1980, at 8, cols. 1-3 (Chilean government subject to suit for alleged participation in Letelier assassination); J. DINGES & S. LANDAU, *supra* note 15 (detailing Letelier assassination and aftermath).

exposure it entails is a clear and present risk run by the foreign agencies operating in the United States. The courts, providing civil relief on the international tort model, can "up the ante" for intimidation.

A. *The Problem of Proof*

The attorney who seeks a remedy for the political emigre will confront serious problems of proof. Because the injurious activities are clandestine and often carried out by organizations for which secrecy is a professional virtue, proof is naturally difficult to obtain.

The specific nature and extent of the problems of proof will depend largely upon what the courts delineate as the elements of the cause of action. Under the international tort model, when the foreign state or its agency is named as defendant, it should not be necessary to produce an individual defendant to demonstrate that injury has occurred as a result of efforts by a foreign government to stifle criticism or otherwise repress the emigre. Also, "a tort which violates the law of nations" could be established if individual defendants are available, even if it cannot be proven that they acted as agents for a foreign government. It would appear sufficient for individual liability that individuals, even on their own initiative, cause injury in their attempt to further foreign police interests. This may be sufficient for liability of the foreign government as well, particularly given the ample precedent under United States law for finding accountability where an agent has acted under "color of law" of a governmental authority, even if in violation of the law or instruction of that governmental authority.[153] Finally, it should not be necessary to prove that physical harm actually occurred to the emigre or to relatives or associates. There is nothing innovative about the notion that threat of harm is sufficient to constitute tortious injury.[154]

Plaintiffs can probably meet these burdens of proof, even if with some difficulty. The Senate Report chronicling repressive activities in the United States of numerous foreign intelligence organizations indicates that foreign agents leave tracks and "blow cover" notwithstanding the ongoing efforts of the executive branch to prevent disclosure.[155] Similar evidence can be found by those with an incentive to discover it.

153. *See, e.g.*, Adickes v. Kress & Co., 398 U.S. 144, 152 (1970); Monroe v. Pape, 365 U.S. 167, 172 (1961).

154. *See* W. PROSSER, *supra* note 26, at 37-41 (tort law protects interest in freedom from fear of harmful contact).

155. *See* Washington Post, Aug. 19, 1979, § A, at 1, col. 1.

B. *Sovereign Immunity*

Who will the emigre sue? The suit will name individual defendants if they can be found with assets in the United States and are not beneficiaries of diplomatic immunity.[156] The emigre suit is also likely to join as defendant the foreign state or its agency, both to achieve compensation and to deter future injury by maximizing embarrassment of the foreign predator. Thus the issue of sovereign immunity will commonly arise in emigre litigation.

The controlling law is the Foreign Sovereign Immunities Act of 1976.[157] That Act provides two exceptions to foreign sovereign immunity that could permit an emigre suit to proceed against the foreign state or its agency. One is the exception for an action based on "commercial activity" having a nexus with the United States.[158] Occasionally, the foreign predator acts through forms of commerce. For example, associates of President Marcos of the Philippines obtained the assets of Filipino emigres living in the United States at "bargain" prices under commercial contract induced by threats concerning the safety of family remaining in the Philippines.[159] The second exception to immunity is more generally applicable to the circumstances of emigre repression. This is the exception for noncommercial torts found in section 1605(a)(5).[160]

Congress surely did not consider political intimidation when it approved any section of the Foreign Sovereign Immunities Act. The legislative committee report provides a mundane explanation of the noncommercial torts exception: "[t]he purpose . . . is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided

156. Persons with diplomatic status have been the agents of intimidation. *See* Anderson, *Yugoslav Secret Agent Leaves U.S.*, Washington Post, Oct. 3, 1979, § B, at 17, col. 3 (activities of consul general of Yugoslav Consulate in San Francisco).

157. 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1976). Sovereign immunity in the United States is based on considerations of comity and fairness, and may be withdrawn by the courts or legislature accordingly. National City Bank v. Republic of China, 348 U.S. 356, 359 (1955); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 136-37, 143-44 (1812).

158. 28 U.S.C. § 1605(a)(2) (1976).

159. Butterfield, *Once-Powerful Families in the Philippines Lose Heavily Under Government Pressures*, N.Y. Times, Jan. 18, 1978, at 6, col. 1.

160. Under this exception a state or its agency is not immune:

> [I]n any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; . . . .

28 U.S.C. § 1605(a)(5) (1976).

by law."[161] However, the district court in the *Letelier* civil litigation nevertheless adopted a "plain meaning" approach and concluded that the language of section 1605(a)(5) and the legislative comment established an applicable exception to immunity.[162] The court also specifically rejected the view that the activity complained of should be analyzed in terms of the traditional distinction of "private act" (*jus gentionis*) and "public act" (*jus imperii*), as that distinction has been elaborated by the courts in pre-Foreign Sovereign Immunities Act adjudication.[163] The *Letelier* court found that the public-private act distinction had not been applied in the cases with any logical consistency, and that Congress intended the sovereign immunity legislation to be the exclusive standard in resolving sovereign immunity questions.[164]

The district court was undoubtedly correct in finding that the noncommercial tort exception is broad enough to allow relief for the political emigre. However, it failed to reach the policy issues that ultimately must be addressed for any satisfactory interpretation of the legislation. Indeed, in reaching its result the court would have been better advised to follow the traditional public-private act distinction. For notwithstanding the difficulties of this distinction, it is clear that sovereign immunity for a public act has never included immunity for an act of foreign police power extending into the forum state. Sovereign immunity applies only when "public act" means an act legitimated by public process, not when agencies of political power operate secretly and deliberately to violate the sovereignty of the forum state. The court failed to perceive the foreign agent activity as underground activity and therefore activity impossible to legitimate by public law doctrine such as sovereign immunity. By adopting a literalist approach to the Foreign Sovereign Immunities Act, the *Letelier* court did not consider the relevant domestic and international interests.[165]

Sovereign immunity may become the precise battleground for re-

161. H.R. REP. No. 1487, 94th Cong., 2d Sess. 21, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6620.

162. *See* Letelier v. Republic of Chile, 488 F. Supp. 665, 671-72 (D.D.C. 1980).

163. *See id.*

164. *See id.* at 672.

165. In declining to apply the exemption for harm arising from discretionary activities of a foreign sovereign, the court did touch upon some of the international law constraints on sovereign conduct. *See id.* at 673 (government has no discretion to plot assassination); *cf.* 28 U.S.C. § 1605(a)(5)(A) (1976) (exemption from liability for discretionary functions).

The *Letelier* case may be early indication that adjudication is moving towards an international tort concept. The *Letelier* court, however, abandoned the enterprise with considerable distance remaining, and never brought public international law principles into focus as the substantive and jurisdictional basis on which the complaint should have been sustained.

solving the issue of the relative competence of the political and judicial branches to respond to repression of the political emigre. Although Congress declared that the purpose of the Foreign Sovereign Immunities Act of 1976 was "to transfer the determination of sovereign immunity from the executive branch to the judicial branch,"[166] the executive will undoubtedly continue to communicate with the courts to raise immunity on extra-legal grounds in politically sensitive cases. Remarks made by the executive during the deliberations on the legislation are suggestive of future executive initiative of this kind.[167] Moreover, notwithstanding the reasons sovereign immunity determinations have now been relegated to the judicial branch, cases inevitably arise that appear to present a political crisis requiring political solution. In light of the judicial response to such cases prior to the passage of the Foreign Sovereign Immunities Act,[168] the courts may yet recognize an executive prerogative to stymie private remedy for a political emigre when the executive is willing to assert itself in favor of a grant of sovereign immunity.

The Supreme Court in effect provided just such a "safety valve" for the expression of executive interest in the context of Alien Tort Claims Act litigation. In *O'Reilly de Camara v. Brooke*,[169] the Court concluded that, because the Congress and the executive ratified the alleged tort, a "tort in violation of the law of nations" had not occurred.[170]

The provision of a safety valve for diplomatic initiative does not diminish the importance of adjudication for constraint of the underground. Rather, it recognizes that although the executive branch rarely constrains the underground through publicly recognized diplomatic processes, when important political considerations prompt the executive to act, the courts should step aside. By making civil process avail-

166. H.R. REP. No. 1487, *supra* note 161, at 7, [1976] U.S. CODE CONG. & AD. NEWS at 6606.

167. *See* Letter from the Legal Adviser of the State Department to the Attorney General (Nov. 2, 1976), *reprinted in* 75 DEP'T STATE BULL. 649-50 (1976) (State Department interested in construction of new statute and, should a court "misconstrue" statute, "may well have an interest in making its views on the legal issues known to an appellate court"). Executive expression on legal issues may provide the vehicle for future political intrusion by the executive branch. Justice White's concurrence in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 705-06 & n.18 (1976), though written shortly before passage of the Foreign Sovereign Immunities Act of 1976, nevertheless suggests the legitimacy of such a course for the executive by approving a balancing of executive foreign policy interests and private party compensation interests.

168. *See* Rich v. Naviera Vacuba, 197 F. Supp. 710, 718-26 (E.D. Va. 1961), *aff'd*, 295 F.2d 24 (4th Cir. 1961) (Department of State request for immunity given controlling force by court).

169. 209 U.S. 45 (1908).

170. *Id.* at 52.

able to vindicate emigre rights, courts will force the executive to assert publicly that certain cases require political control. Consequently, the executive will be compelled to work within legitimate processes and not in the subterranean chambers of the underground.

Justice Harlan noted, in the foreign confiscation context of *Sabbatino,* that forcing declaration of interest by the executive can in itself impair the political interest.[171] However, when the subject for negotiation is not foreign confiscation, but repression of the emigre, and involves possible executive complicity in conduct subversive of domestic and international legal order, a requirement that the executive declare its position before civil litigation can be stopped becomes constructive. Because the executive is motivated to cooperate in the illicit conduct, a check is necessary.

It is unlikely that the executive will approach the courts to deny civil remedy to the political emigre. It is especially unlikely to do so without seeking to mollify the emigre. The unavoidable publicity attendant upon support of sovereign immunity within civil process constitutes an important disincentive. The reluctance of the executive, and indeed of the foreign state, to appear in alliance against the complaining emigre would be rarely overcome. The appearance of alliance is too close to the reality of the underground and its need for concealment. In general, the optimism expressed in the legislative committee report on the sovereign immunity legislation about the presumed advantages to be gained by judicial control would be vindicated more certainly in emigre litigation than perhaps any other area of litigation touching on foreign relations.[172] The foreign governments involved would be extremely restrained in appealing to or pressuring the executive, and the judiciary rarely if ever would be requested to assume the uncomfortable and unseemly position of bowing before the executive's assertion of sovereign immunity adverse to the emigre plaintiff.

C. *The Enforcement of Emigre Right*

The viability of the emigre suit will depend ultimately upon enforcement of its result. Despite availability of proof and avoidance of the bar of sovereign immunity, both motivation and success in the

171. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) (litigation may force government to take position that does not serve its diplomatic interests).

172. The report stated the hope that through passage of the Act, "[t]he Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity." H.R. REP. No. 1487, *supra* note 161, at 7, [1976] U.S. CODE CONG. & AD. NEWS at 6606.

emigre suit, as in any litigation, will be largely determined by the potential and reality of enforcement of the right that is recognized through civil process.

Enforcement of a money judgment does not present special difficulty if individual agents or organizations involved in repression of the emigre have assets in the United States. Such assets are more likely to be reachable and considerable when individuals or organizations are employed by a foreign government to use commercial activities established in the United States as "cover" to accomplish intimidation. Execution is also especially promising if business organizations operating in the United States, although not serving directly as agents of intimidation, have knowingly acted to assist the foreign agent activity. For example, under certain circumstances, United States banks may be liable for having helped finance contracts that their officers know have been secured by extortion.[173]

It should be noted that with respect to execution, sovereign immunity is again a consideration. When a defendant is named as the agent of a foreign state, that defendant typically will deny relationship to the foreign state if the denial can have any measure of credibility. But if the defendant normally operates as an agency of the foreign state, and cannot deny the relationship, then it will seek not only immunity from jurisdiction, but also immunity from execution.

It was a prevailing view in the United States prior to the passage of the Foreign Sovereign Immunities Act of 1976 that, notwithstanding the lack of jurisdictional immunity in a particular case, property of foreign states and their official agencies was absolutely immune from execution.[174] However, under the Foreign Sovereign Immunities Act, immunity from execution has now been qualified to conform generally to the provisions governing jurisdictional immunity. A foreign state as such retains immunity from execution on its property, except where the particular property "is or was used for the commercial activity upon which the claim is based."[175] The property of

173. Although courts apparently have not considered lender liability in such situations, a related case indicates the possibility of limited recovery in certain instances of extortion. *Cf.* Pan American Petroleum Corp. v. Long, 340 F.2d 211, 220-21 (5th Cir. 1964) (lender liable for conversion for funds received from sale of stolen oil). The most promising situation for recovery would arise when a lender gained control of extorted property, for example, through foreclosure on security for a loan. *See id.* In such circumstances knowledge on the part of bank officers would apparently be irrelevant. *See id.* at 220 & n.27.

174. *See* H.R. REP. No. 1487, *supra* note 161, at 27, [1976] U.S. CODE CONG. & AD. NEWS at 6626.

175. 28 U.S.C. § 1610(a)(2) (1976).

"agencies and instrumentalities"[176] of the foreign state, though, is substantially more vulnerable. Pursuant to section 1610(b) of the Foreign Sovereign Immunities Act, the property of an agency or instrumentality is subject to claims not only for commercial activity, but also for noncommercial tort if it is engaged in commercial activity in the United States.[177] Thus, execution is allowed whenever the exceptions to jurisdictional immunity provide the opportunity for emigre litigation, and this includes the most significant exception, the exception for noncommercial tort. Furthermore, execution against the property of an "agent or instrumentality" is allowed against any of its property, whether commercial or noncommercial, and whether or not used for the "activity upon which the claim is based."[178]

Maintaining the availability of property of a foreign state or an "agency or instrumentality" of a foreign state for execution may be problematic because the Foreign Sovereign Immunities Act effectively forecloses prejudgment attachment.[179] But given the continuing interest of foreign states and their commercial agencies in the United States marketplace, and the difficulty of removing assets,[180] prejudgment attachment is probably not critical to successful execution.[181]

Thus there is opportunity for actual dollar recovery in the emigre suit. However, to view damage recovery or, some form of equitable order,[182] as the complete measure of remedy for the emigre is to misperceive the value of a court's judgment against the underground. The appropriate analogy from domestic law is civil rights litigation or, more generally, litigation to remedy dignitary injury and injury to the personality, where a favorable judgment though expressed in

176. *See id.* § 1603(b) (defining agency or instrumentality of foreign state).

177. *See id.* § 1610(b).

178. *Id.* Although a foreign state cannot be liable for punitive damages, such damages are allowed against an agent or instrumentality of a foreign state. *See id.* § 1606.

179. *See* 28 U.S.C. § 1609 (1976); H.R. REP. No. 1487, *supra* note 161, at 26-27, [1976] U.S. CODE CONG. & AD. NEWS at 6625-26 (§ 1609 designed to eliminate necessity for prejudgment attachment, thus easing conduct of foreign affairs).

180. *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. 99 (1976) (statement of Michael Marks Cohen).

181. Removal would most likely be a problem, whether or not related to the emigre suit, where a general breakdown in relations with a foreign state has occurred. The schism between the United States and Iran, resulting in the need for a freeze on Iranian assets in the United States, provides a recent and dramatic example.

182. A court might grant an injunction where a certain person or organization is identified as responsible for continuing intimidation, and is subject to the contempt power. Penalty by fine could be utilized when the defendant does not enjoy diplomatic immunity and the Act does not limit execution on a judgment. *See* H.R. REP. No. 1487, *supra* note 161, at 22, [1976] U.S. CODE CONG. & AD. NEWS at 6620-21.

dollars may represent its greatest value to the litigant as a symbolic vindication and judicial declaration of applicable norms affecting future conduct. Judgment against the underground may have the greatest value as a spotlight on the underground, providing present safety and inducing withdrawal of the underground by amplifying the risk of continued exposure.

The emigre confronting the underground surely seeks such noneconomic objectives, quite apart from the pleasure of collection. The resources and motivation to bring forward the emigre claim generally arise out of the desire to rally round a dissident flag. The value of political achievement through civil process does not depend upon finding and collecting the property of foreign agents. The nonpecuniary reasons for seeking a money judgment are perhaps the reasons of greatest importance, because through such judgments the courts can articulate rules constraining the underground and, consequently, inspire other battles for emigre redress.

IV. Conclusion—A Question of Conviction

To appreciate fully the societal value of an emigre right to litigate against the underground requires a certain detachment from contemporary debate about the relation of domestic courts and international legal order. The debate is too ideological, too polarized to be instructive concerning the sinister reality of repression of the emigre. Advocates of domestic courts as the creators of international legal order tend to pursue their vision in metaphysical terms, offering elevated, self-enclosed "world order" systems.[183] "Realists" see any suggestion of a constructive role for domestic courts in fashioning international order as misguided interference in an arena belonging exclusively to politics and diplomacy.[184] The pragmatic and selective view that Harlan put forward in *Sabbatino* is disregarded, and neither side of the debate can be very responsive to the immediate need for a remedy for the unrecognized problem of emigre repression.

Outside the confines of this debate, the need to remedy foreign agent repression of the emigre continues and intensifies. The phenomenon of emigre repression has become a prominent and pervasive problem in part due to the ever-increasing internationalization of national political struggles. The continuing failure to address this

183. *See* M. McDougal, H. Lasswell, & L. Chen, Human Rights and World Public Order (1980).

184. *See* Lipson, *International Law*, in 8 F. Greenstein & N. Polsby, Handbook of Political Science 415-35 (1975).

foreign agent activity increasingly threatens national and international legal order.[185]

The international tort model provides a basis for remedy that can develop through the empirical dynamic of the common law, yet avoids the parochialism that is characteristically the failing of domestic adjudication as an instrument of international legal order. It avoids the problem of parochialism by relying upon international law as the source of standards for defining the delict. The international tort model is promising as a means to constrain the underground system because it rests on legal norms supported by international consensus. In addition, the international tort model allows for a remedy that is sensitive to foreign policy interests. Finally, it is a remedy that can be based on existing legislation, and it is compatible with the present American law of sovereign immunity.

Any reason to doubt that courts can restrain the underground system has less to do with legal questions than with questions about the political climate in the United States. Today there is a popular cry to "unleash the CIA" that Congress and the President have responded to.[186] To the extent that American political culture is dominated by the fears underlying this outcry, the need to leash the underground is likely to be ignored.

Constraining the underground is also difficult because the immediate beneficiary would be the alien. Common prejudice against the alien will bear on the availability of the remedy. Moreover, certain statements by the Supreme Court seem to suggest that accommodation of alien rights to the national political interest is unimportant, that, in fact, aliens' rights can be sacrificed by the political branches as they see fit.[187]

But such comments taken out of context are misleading. Even in

185. The most glaring examples of growing dangers of emigre repression are the Libyan and Iranian persecutions. *See* The Times (London), June 14, 1980, at 1, col. 4 (Libyan leader announces that agents sent to foreign states to assassinate political emigres); N.Y. Times, Apr. 12, 1980, at 5, col. 4 (same); *id.*, July 23, 1980, at 1, col. 5 (Iranian government claims credit for murder of former Shah's press attache living in United States). These episodes demonstrate that the repression is not confined to any particular political persuasion.

186. *See* 126 CONG. REC. H10,047-48 (daily ed. Sept. 30, 1980) (remarks of Rep. Weiss) (passage of Intelligence Authorization Act for fiscal year 1981 will facilitate CIA covert activities and reduce CIA accountability); *id.* at H10,064-65 (House passes Intelligence Authorization Act).

187. *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (responsibility for regulating relationship between United States and "alien visitors" committed to political branches); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (policy towards aliens interwoven with contemporaneous foreign relations policies and such matters exclusively entrusted to political branches).

the alien exclusion and deportation cases, the courts have acted to affirm individual rights. Alien constitutional rights also have been affirmed notwithstanding the interests of government.[188] Moreover, the Congress of the United States long ago declared that all persons have a natural right to expatriation and that denial or impairment of that right "is inconsistent with the fundamental principles of the Republic."[189] It is not necessary to concede to the underground the dangerous proposition that national security requires sacrifice of the emigre. It is a proposition implicitly rejected by a considerable body of legal doctrine constituted by United States law and public policy, and by related international principles protective of emigre rights.

The international tort model to remedy emigre repression is supported by this body of international and domestic legal doctrine. It can be developed in conjunction with the existing statutory grant of the Alien Tort Claims Act. Perhaps more importantly, however, recognition of the right of an alien to sue for a tort that violates international law would continue an enduring tradition in the jurisprudence of the United States. Emigre rights have been recognized as natural rights of fundamental value in both national and international legal development. The present sacrifice of the political emigre to the exigencies of the underground system is not only an inappropriate response to the police and intelligence interests of the United States. The sacrifice is a perverse reality for a nation with the origins and history of the United States. The perception that national peace and harmony depend on providing sanctuary for the political emigre is not an artifact from the eighteenth century. It is a fundamental insight that has been lost in the cynicism of contemporary political culture. Remedy for the political emigre is ultimately justified as a restoration of original character to national policy. It is an opportunity to rediscover that national security depends most of all on the quality and strength of national conviction.

188. *See* note 28 *supra.*

189. 15 Stat. 223-24 (1868); *see* 8 U.S.C. § 1481 (1976) (historical note) (resolution concerning natural right of expatriation).

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