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The Alien Tort Statute and How Individuals "Violate" International Law

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I. INTRODUCTION

Recent attempts to use the Alien Tort Statute[1] (Statute) in litigation against foreign citizens[2] and against United States citizens[3] have required international lawyers to interpret the words "tort . . . committed in violation of the law of nations."[4] The theory underlying some of these attempts, if accepted, would effectively turn United States federal courts into courts of general international jurisdiction. Congress could hardly have intended such a remarkable result. This situation raises the question, however, of just what Congress did intend. The most likely answer is that Congress meant to grant federal jurisdiction over cases in which an individual has committed a tortious act in the United States which, if unredressed, would result in international legal responsibility on the part of the United States.

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1. 28 U.S.C. § 1350 (1982) provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

2. *E.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985); Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

3. *E.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985); Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1511 n.32 (D.C. Cir. 1984), *vacated*, 471 U.S. 1113 (1985).

4. *See supra* note 1.

II. THE PURPOSE OF THE FIRST CONGRESS

It is unlikely that the First Congress, which originally passed the Alien Tort Statute, had suits against nations in mind when it drafted the Statute. Congressmen of the time must have considered both foreign states[5] and the United States[6] to be immune from suit. Congress therefore somehow contemplated that individual defendants could be liable for torts committed in violation of the law of nations. How?

Congress may have enacted the Alien Tort Statute to extend federal jurisdiction to private rights under certain bodies of the law which were, but are no longer, governed by the law of nations. In 1789 the "law of nations" was widely viewed as including not only public international law, as it does today, but also such legal fields as the law merchant and maritime law.[7] While Congress may have originally intended the "tort . . . committed in violation of the law of nations" language to apply to private rights of action under the law merchant or maritime law as international bodies of law, subsequent developments have made clear that courts must base any private rights of action in these areas of the law on either state or federal domestic law. Thus, at least since the demise of *Swift v. Tyson*,[8] there has been no federal common law, much less international law, generally governing commercial rights and obligations.[9] In addition, at least since *The Lottawanna*,[10] maritime law, though derived from international law and constituting uniform federal

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5. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). *But see* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), in which the Second Circuit—relying on secondary authority—recently held that international law has now evolved to the point that "sovereigns are not immune from suit for their violations of international law." This conclusion is questionable at best.

The purpose of foreign sovereign immunity is to avoid the international friction caused by allowing the courts of one state to sit in judgment on the governmental actions of another. While this policy may be relatively weak when minor domestic law torts are involved, the policy applies most strongly when one state is asserted to have violated the public international law rights of another. Such cases are best resolved at the international diplomatic level. *See* Rogers, *A Fresh Look at Agency "Discretion,"* 57 TUL. L. REV. 776, 827-30 (1983).

6. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 425 (argument of the U.S. Attorney General), 429-48 (Iredell, J., dissenting), 468-69 (Cushing, J., concurring), 478 (Jay, C.J., concurring) (1793).

7. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 1), 101 U. PA. L. REV. 26, 27-29 (1952).

8. 41 U.S. (16 Pet.) 1 (1842); *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

9. Dickinson, *The Law of Nations as Part of the National Law of the United States* (pt. 2), 101 U. PA. L. REV. 792, 795-803 (1952).

10. 88 U.S. (21 Wall.) 558, 572 (1874).

law, is applied in United States courts as domestic law, subject to legislative and even judicial modification within the United States.[11] If Congress originally intended the Alien Tort Statute to provide jurisdiction for private rights of action founded in bodies of the law of nations other than public international law, such as maritime law and the law merchant, the statute could have been meaningful when passed, although today the statute would extend jurisdiction to a class of cases which simply no longer exists.

The fact that the Alien Tort Statute also refers to violation of "a Treaty of the United States,"[12] however, suggests that Congress intended to include violations of public international law, that is, violations of the legal obligations of one state to another. If so, how can the action of an individual result in the violation of such an obligation? The most obvious answer is where an individual is acting as an agent of the state. States act through their officers, and any violation of a state's obligations is necessarily an act or omission of at least one human being. This possibility gives rise to the sovereign immunity problem again, however. An official acting on behalf of a government would be immune from suit unless his action was ultra vires or outside the scope of his duties; but in such a case he would no longer be the agent of the government. As Judge (now Justice) Scalia reasoned:

> It would make a mockery of the doctrine of sovereign immunity if federal courts were authorized to sanction or enjoin, by judgments nominally against present or former Executive officers, actions that are, *concededly and as a jurisdictional necessity*, official actions of the United States.[13]

It is possible, however, for actions of nonagents to result in violations of the international law obligations of a state. First, actions by officers of

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11. *See* Dickinson, *supra* note 9, at 803-16.

12. *See supra* note 1.

13. Sanchez-Espinoza v. Reagan, 770 F.2d 202, 207 (D.C. Cir. 1985) (emphasis in original). Of course, the Supreme Court has used a fiction to avoid this problem in suits against officers of States of the Union under the fourteenth amendment. State action is required as part of any allegation that the fourteenth amendment has been violated, but sovereign immunity does not prevent suit on the theory that unconstitutional actions by State officers are ultra vires. *Ex parte* Young, 209 U.S. 123, 159-60 (1908). The Supreme Court has recognized this as a fiction necessary to promote the supremacy of federal law. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 105 (1984). It is unlikely that the First Congress intended a similar fiction for nonconstitutional rights. *See Pennhurst*, 465 U.S. at 116 (fiction not extended for suits alleging violations of state laws). The *Sanchez-Espinoza* court rejected such a fiction for suits against United States officers but reserved judgment with respect to officers of foreign governments. 770 F.2d at 207 n.5.

political subdivisions result in international responsibility.[14] In addition, actions of purely private individuals may result in international responsibility. Suppose a private mob lynched an alien without the governmental protection owed under international law.[15] Or suppose a diplomat, entitled to protection from private attacks by the receiving state, is inadequately protected.[16] In such cases the actions of private individuals can *result* in international responsibility. Of course, it is the omissions of officials upon which the responsibility of the state is theoretically based, but it is fair to say that the individual's action was "in violation of international law."

In contrast, to say that commission of an "international" crime, for instance piracy, is "in violation of international law" makes no sense. Committing the crime does not result in a violation of one state's obligations to another.[17] Indeed, the High Seas Convention limits the definition of piracy to acts "for private ends by the crew or the passengers of a private ship."[18] Unlike an attack on a diplomat, the act of piracy, without more, results in no international responsibility. The relevance of piracy to international law is instead that an exercise of jurisdiction over the pirate (or the pirate ship), which international law does not otherwise permit, is permitted.[19] Accordingly, no international law violation occurs to which the definition of piracy is relevant, unless piracy is ab-

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14. *See* de Aréchaga, *International Responsibility*, in MANUAL OF PUBLIC INTERNATIONAL LAW § 9.13 (M. Sorensen ed. 1968).

15. *See* 6 J. MOORE, DIGEST OF INTERNATIONAL LAW § 1026, at 837 (1906).

16. *See* Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, *reprinted in* 74 AM. J. INT'L L. 746, 768-69 (1980).

17. This idea is hardly new. Professor Lenoir, for instance, explained over fifty years ago,

> Piracy is an offense against the municipal law; international law enters into the matter condemning the practice and permitting the states to exercise jurisdiction over piratical acts.

Lenoir, *Piracy Cases in the Supreme Court*, 25 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 532, 552 (1934-35).

18. Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962), art. 15 [hereinafter High Seas Convention].

19. *See id.*, art. 22; 2 J. MOORE, DIGEST OF INTERNATIONAL LAW § 311, at 967-68 (1906); 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 203, at 681 (1941); 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 6, at 649. As Professor Lenoir stated,

> International law may grant to any and every nation the right to take jurisdiction over crimes committed upon the high seas, but only to that extent can international law envisage the crime of piracy.

Lenoir, *supra* note 17, at 542.

sent, and a state nonetheless exercises criminal jurisdiction.[20]

Custom or treaties have recognized other crimes, such as slave trading,[21] war crimes[22] and airplane hijacking,[23] to be, like piracy, "universal," but what this means is that a state may try someone for such crimes without the nexus otherwise required between the defendant and the trying state.[24] The United States Constitution empowers Congress to define and punish such crimes, and the Constitution does so in explicit terms: "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of

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20. For instance, in *The Virginius*, 2 J. MOORE, DIGEST OF INTERNATIONAL LAW § 311, at 967-68 (1906), Spanish authorities court-martialed and executed six Americans in Cuba in 1873. The Americans had been passengers on a ship containing arms and ammunition for an insurgency in Cuba. The United States maintained that the Americans' actions did not amount to piracy as defined under the law of nations. The United States was, therefore, able to obtain an $80,000 indemnity from the Spanish government.

Under customary international law states may exercise criminal jurisdiction when the crime occurred within the state's territory (territoriality principle), when the criminal is a national of the state exercising jurisdiction (nationality principle), when the crime was against the governmental functions of the state exercising jurisdiction, e.g., counterfeiting money (protective principle), or when the crime is one against mankind in general, e.g., piracy or war crimes (universality principle). RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 10-19 (1965); Empson, *The Application of Criminal Law to Offenses Committed Outside the Jurisdiction*, 6 AM. CRIM. L.Q. 32 (1967); Feller, *Jurisdiction Over Offenses with a Foreign Element*, in 2 INTERNATIONAL CRIMINAL LAW 5, 17-34 (M. Bassiouni & V. Nanda eds. 1973); [Harvard] Research in International Law, *Introductory Comment, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 443, 445 (Supp. 1935) [hereinafter Harvard Research]; Sarkar, *The Proper Law of Crime in International Law*, in INTERNATIONAL CRIMINAL LAW 50, 50-76 (G. Mueller & E. Wise eds. 1965); Note, *Extraterritorial Jurisdiction and Jurisdiction Following Forcible Abduction: A New Israeli Precedent in International Law*, 72 MICH. L. REV. 1087, 1089-1103 (1974).

American criminal courts impose these limits under the canon of construction that if possible, courts should interpret statutes, including criminal statutes, to be consistent with the international legal obligations of the United States. *E.g.*, United States v. Marino-Garcia, 679 F.2d 1373, 1380 (11th Cir. 1982); United States v. Columba-Colella, 604 F.2d 356, 360 (5th Cir. 1979).

21. Harvard Research, *supra* note 20, at 569-70.

22. UNITED NATIONS WAR CRIMES COMM., 15 LAW REP. OF WAR CRIMES TRIALS 26 (1949). *See also* Attorney General v. Eichmann, 36 I.L.R. 277, 298-304 (Supreme Court of Israel sitting as a Court of Criminal Appeal, 1962); Carnegie, *Jurisdiction over Violations of the Laws and Customs of War*, 39 BRIT. Y.B. INT'L L. 402 (1963).

23. Convention on the Suppression of Unlawful Seizure of Aircraft (Hague Convention), Dec. 16, 1970, arts. 1-2, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105.

24. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335 (1925).

Nations."[25] It is also reasonable that Congress should incorporate the international law definition of piracy in its criminal statute.[26] But this does not imply that the act of piracy amounts to a violation of the law of nations, since no public international responsibility occurs unless the United States tries a foreigner for a crime committed abroad, with an insufficient United States nexus, and a universal crime is *not* alleged.

To give another example, the issue in the famous *Lotus* case[27] was not whether the French merchant officer violated international law by neglecting to supervise his ship, but whether Turkey violated international law by instituting criminal proceedings against the officer in Turkey. If we change the facts so that a French citizen committed acts of piracy instead of neglect against the Turkish vessel, and he was being tried instead by Greece, the issue would be whether Greece would violate international law by instituting criminal proceedings against the Frenchman. The answer would be "no" under the principles of international law relating to piracy, but this does not mean that the Frenchman's actions "violated international law" any more than the actions of the French ship officer in *Lotus*.

The difference between universal crimes and individual actions resulting in violations of international law is, therefore, not one of degree—like points on a spectrum—but one of kind—like apples and oranges. Recognizing the difference helps to analyze the two alternative interpretations of the Alien Tort Statute that Judge Edwards suggested in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*.[28] Adopting his interpretation of *Filartiga v. Pena-Irala*,[29] Judge Edwards argued that the Alien Tort Statute "provides a right to sue for alleged

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25. U.S. CONST. art. I, § 8, cl. 10.

26. *See* 18 U.S.C. § 1651. As the United States Attorney General successfully argued in 1820,

> [T]here is no defect in the definition of piracy, by the authorities to which we are referred [i.e., the law of nations] by this act. The definition given by them is certain, consistent, and unanimous; and pirates, being *hostes humani generis, are punishable in the tribunals of all nations.* All nations are engaged in a league against them, for the mutual defence and safety of all. This renders it the more fit and proper, that there should be a uniform rule as to the definition of the crime, which can only be drawn from the law of nations, as the only code universally known and recognised by the people of all countries.

United States v. Smith, 18 U.S. (5 Wheat.) 153, 156 (1820) (argument of the Attorney General) (some emphasis added).

27. S.S. "Lotus," (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 9, at 26 (Sept. 7).

28. 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

29. 630 F.2d 876 (2d Cir. 1980).

violations of the law of nations."[30]

But how far can we take this? Suppose Japan and Korea by custom have agreed to permit their citizens to compete economically on equal terms in the territory of the other.[31] If a city official in Korea refuses a pawnshop license to a Japanese citizen, and the Korean official later takes a vacation in the United States, should the Japanese citizen be able to sue the Korean in United States court? It is inconceivable that the First Congress intended to extend United States federal jurisdiction (not to mention a substantive right of action) to correct such entirely foreign activity.[32]

Implicitly recognizing this difficulty, Judge Edwards would limit his first Alien Tort Statute formulation to cases where the defendant is *hostis humanis generis*—an enemy of all mankind.[33] He relies upon piracy and slave trading as offenses that "held a special place in the law of nations: their perpetrators, dubbed enemies of all mankind, were susceptible to prosecution by any nation capturing them."[34] But we have seen that because committing a "universal" or "international" crime permits any nation to prosecute without violation of international law, it does not follow that such a crime constitutes a violation of international law itself. There is, therefore, no sense in interpreting the notion "committed in violation of the law of nations" as somehow limited to international crimes. International crimes are not simply violations of public international law that are particularly egregious. They are not necessarily violations of public international law at all, but rather, instances where prosecution does not violate such law.

Thus, Judge Edwards' first formulation of the meaning of the Alien

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30. 726 F.2d at 780. Judge Edwards relied on an opinion of the United States Attorney General to the effect that the Alien Tort Statute provides not only a forum but also "a right of action." But the 1907 statement of the Attorney General, 26 Op. Att'y Gen. 250, 252 (1907), that "existing statutes provide a right of action and a forum" precedes a citation not only to what is now 28 U.S.C. § 1350, but also the diversity jurisdiction statute, now 28 U.S.C. § 1332. The diversity jurisdiction statute clearly provides no substantive cause of action, and one cannot read the Opinion of the Attorney General to find a private right of action in § 1350 any more than in § 1332.

31. *See* Asakura v. City of Seattle, 265 U.S. 332 (1924). The international legal obligation at issue in *Asakura* was a treaty obligation, but there is no reason that a court could not derive such an obligation from custom. In any event, the binding nature of a treaty is established by virtue of customary law, and the law of nations requires, therefore, compliance with a treaty.

32. Even if it were conceivable, it is curious that Congress would extend such protection just to aliens.

33. 726 F.2d at 781.

34. *Id.*

Tort Statute cannot be correct. It is absurdly broad unless one interprets the term "committed in violation of the law of nations" as limited to a category of cases—crimes—defined by international law for entirely different purposes. The categories rarely even overlap,[35] and the First Congress can hardly have contemplated such a limit.

Judge Edwards' alternative formulation of the meaning of the Alien Tort Statute, in contrast, fits well the idea that an individual action is "committed in violation of the law of nations" when it may directly result in international responsibility. He suggests that the statute "may be read to enable an alien to bring a common law tort action in federal court without worrying about jurisdictional amount or diversity, as long as a violation of international law is also alleged."[36] The obvious intent of the First Congress in passing the Judiciary Act of 1789 was to allocate jurisdiction between state and federal courts. It made sense to put cases affecting the international legal responsibility of the nation in the federal courts, if they would otherwise be tried in state courts:

> [If the court] appears to condone the original wrongful act, under the law of nations the United States would become responsible for the failure of its courts and be answerable not to the injured alien but to his home state. A private act, committed by an individual against an individual, might thereby escalate into an international confrontation.[37]

The Alien Tort Statute might apply if, for instance, a local sheriff incarcerated an alien overnight in violation of customary international law or treaty, and the alien sued the official in his individual capacity for false imprisonment under state law. Another example, perhaps easier to contemplate in 1789,[38] would be if an individual assaulted a foreign am-

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35. Physical attack on diplomats may be an example of an action that results in international responsibility, as well as an example of a universal crime. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Phila. O. & T. 1784); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (New York Convention), Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532. But other recognized universal crimes like piracy and slave trading presuppose private activity. Other suggested violations of the public international law of human rights, such as murder of individuals (*see* 726 F.2d at 781), are not universal crimes when committed by private persons. Thus, for Judge Edwards to doubt that non-official torture is a universal crime, 726 F.2d at 795, is perfectly consistent with the Second Circuit's acceptance of the view of the United States government in *Filartiga* that official torture is a violation of customary international law. 630 F.2d at 884.

36. 726 F.2d at 782.

37. *Id.* at 783.

38. *See* Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111, 116 (Phila. O. & T. 1784).

bassador, and the ambassador sued in tort for the assault under state law. Such cases could affect adversely the interests of the federal government in its conduct of foreign affairs. If the jurisdictional amount requirement could not be met, diversity jurisdiction would be unavailable. A state court, less attuned to the international implications of the state law tort suit, might not adequately protect the federal interest. The Alien Tort Statute would solve this problem if interpreted to place jurisdiction in the federal courts to adjudicate the state tort claim.

The logic of this interpretation suggests its limits. If we assume that Congress wanted to protect the international relations of the federal government, it was sensible to extend federal court jurisdiction only to individual actions which might result in international responsibility on the part of the United States. The words of the statute, "committed in violation of the law of nations or a treaty *of the United States*," suggest this limit. Clearly Congress was concerned with the international law obligations of the United States and not of other countries.

Second, the fact that the statute provides jurisdiction only when suit is brought "by an alien" suggests strongly that the tort must occur within the territorial jurisdiction of the United States.[39] "Alien" presumably means a non-United States national. But a non-United States national is only an "alien" when he or she is away from his or her state of nationality. A Frenchman is an "alien" in the United States, but a native in France.

Thus, one can logically interpret the Alien Tort Statute to grant federal jurisdiction when an individual commits a tortious act in the United States which, if unredressed, would result in international legal responsibility on the part of the United States. Whether the act is a crime subject to universal jurisdiction is irrelevant.

Judge Edwards suggested different limitations on his alternative theory. In his view, the statute should be

> construed to cover actions by aliens for domestic torts that occur in the territory of the United States and injure "substantial rights" under inter-

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39. *But see* Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 59-69 (1985).

A 1795 Opinion of the United States Attorney General also appears inconsistent with this limitation. 1 Op. Att'y Gen. 57 (1795). The Attorney General stated that victims of acts of hostility committed by American citizens in the British Colony of Sierra Leone had a remedy under the Alien Tort Statute. 1 Op. Att'y Gen. at 59. This opinion is fully consistent with the other suggested limitation, however, that the Alien Tort Statute is limited to cases involving the international responsibility of the United States. The Attorney General relied, in fact, upon a treaty of amity between Britain and the United States.

> national law, . . ., or for universal crimes, . . ., or for torts committed by American citizens abroad, where redress in American courts might preclude international repercussions.[40]

I have already discussed the irrelevance of whether an action is a "universal crime." In addition, the problem with these limits, as Judge Bork's concurrence explained, is that they bear little relation to the words or probable purpose of the act:

> Aside from the unguided policy judgments which these definitions require, and whatever else may be said of them, it is clear that these limitations are in no way prescribed, or even suggested, by the language of section 1350. Rather, they are imposed upon that language for reasons indistinguishable from ordinary legislative prudence.[41]

This is basically the only criticism Judge Bork had of Judge Edwards' alternative theory. When one substitutes the limits suggested previously, which the language of section 1350 clearly does suggest, for the limits Judge Edwards suggested, however, his "alternative interpretation" becomes immune from Judge Bork's extensive separation of powers considerations.[42]

One should note that the above analysis is not inconsistent with the ideas that (1) individuals have rights under public international law, (2) public international law may regulate a state's treatment of its own citizens (human rights law), or (3) the content of public international law, as referred to in the Alien Tort Statute, has expanded and developed since 1789.

First, saying that international crimes are not violations of international law is relevant only to the question of who has duties under public international law, and not who has rights. A state may have an obligation not to treat an individual, an alien for instance, in a certain way. We can say that the individual has rights under international law, or we can use the traditional fiction that the individual's state has rights "in respect of" the individual. But either way, it is a state that has the obligation, and any individual obligation under public international law, by definition, results from an obligation of the state.[43]

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40. 726 F.2d at 788.

41. *Id.* at 821.

42. *See id.* at 801-08, 810-22.

43. This is true even in the case of war crimes tried by international tribunals. In his criticism of Judge Bork's *Tel-Oren* opinion, Professor D'Amato appeared not to recognize the distinction when he stated:

> The argument that nearly all rules of international law are addressed to states and not individuals is another way of saying that individuals are not members of

Second, it is perfectly consistent to hypothesize the development of human rights law without deeming universal crimes to be violations of international law. Conceptually, if a state can owe international obligations to aliens or to foreign states in respect of aliens, it can similarly owe international obligations to its own citizens, or to foreign states in respect of its own citizens.[44] Whether the development of such customary human rights law has actually occurred is another question.[45] Such a development is analytically distinct, however, from the "universal crime" issue of whether a state can try persons for certain offenses without violating that state's international obligations.

Third, the very fact that the development of human rights law is possible demonstrates that the notion of international crimes not being violations of international law is fully consistent with the possibility that the law of nations referred to in the Alien Tort Statute can expand and develop. Of course, the terms of the statute limit its application to suits by aliens, so it cannot apply to suits involving United States international obligations to its own citizens, but certainly nothing prevents the development of additional international law protections for aliens.

In conclusion, the Alien Tort Statute is far from meaningless, although Congress obviously did not intend it to turn United States federal courts into courts for the resolution of international law assertions against other foreign nations. An understanding of the difference between international crimes and violations of international law strongly supports a modified version of Judge Edwards' alternative interpretation of the Alien Tort Statute.

III. SEPARATION OF POWERS CONCERNS

It may be appropriate to anticipate the counterarguments of those who urge a much broader reading of the Alien Tort Statute. Professor Anthony D'Amato, for instance, has criticized Judge Bork's concurrence

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the class of litigants that may appropriately invoke the power of the court . . . . D'Amato, *Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L L. 92, 98 (1985). Many rules concerning states obviously protect individuals (e.g., customary law protecting aliens), and there is no logical inconsistency with permitting the individual to invoke such protection in a particular forum. In other words, it is perfectly consistent to say that international law rules are addressed to states but that individuals may be members of a class of litigants that can rely upon such law for certain purposes in court.

44. *See* D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1147-48 (1982).

45. *See* Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609.

in *Tel-Oren*.[46] Judge Bork argued in *Tel-Oren* that the Alien Tort Statute should be given a limited interpretation because of the same separation of powers concerns that underlie the political question and act of state doctrines.[47] These arguments are simply not necessary to support a limited reading of the Alien Tort Statute. The language and context of the Alien Tort Statute support its interpretation as a grant of federal jurisdiction to certain suits that could otherwise be brought in state court. There is no separation of powers issue at all, but rather a federalism issue. In other words, the Alien Tort Statute, like the rest of the Judiciary Act of 1789, allocates power between the federal courts and the state courts, not between the federal courts and the federal executive. As indicated,[48] none of Judge Bork's separation of powers concerns are adversely affected by permitting suits that otherwise could be brought in state court to be brought in federal court.

Accordingly, much of the criticism of Judge Bork's opinion would simply miss the mark if directed toward the natural interpretation of the Alien Tort Statute suggested here. For instance, Judge Bork's opinion has been criticized as precluding any application of the Alien Tort Statute to an alien suing for a tort.[49] As explained above, the Alien Tort Statute applies to a clearly defined, if somewhat limited, class of cases.[50]

Advocates of a broader interpretation, however, might not only reject Judge Bork's separation of powers argument, but might also argue the opposite—that is, public policy affirmatively supports the general principle that the judiciary should determine international law issues. One might, perhaps uncharitably, call this a mixture of powers principle. Of course, even if this remarkable idea were accepted, it would not mean that Congress intended the Alien Tort Statute to further such a policy. The 1789 Judiciary Act, of which the Alien Tort Statute was a part, allocated jurisdiction between state and federal courts, and Congress can hardly have intended it to expand judicial power vis-á-vis the executive.

In any event, one can easily deal with the policy argument on the merits. Determining international law issues means, in effect, determining whether the United States or a foreign state has violated international law. Such a determination affects, at least indirectly, the conduct of foreign affairs.

If a court states that the United States executive has violated interna-

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46. D'Amato, *supra* note 43.
47. 726 F.2d at 801-08, 810-22.
48. *See supra* text accompanying note 42.
49. D'Amato, *supra* note 43, at 98.
50. *See supra* text accompanying note 38.

tional law, other nations may have difficulty knowing who speaks for the United States. In addition, since countries must comply with international law as a part of the conduct of foreign relations in general, the reasons for allocating the conduct of foreign relations to the President support giving the political branches the final word as to how the United States will comply with international law. To protect the interests, indeed the survival, of the nation, the government must be able to act in the international arena with speed, often with secrecy, and with the benefit of sophisticated, broad-based, often secret, information. It is unwise to have courts—without the benefit of a full comprehension of the factors leading to the decision in question—make the final determination of the international legality of the actions of the United States.

Thus, on behalf of the unanimous Supreme Court of the United States, Justice Oliver Wendell Holmes, in interpreting the Alien Tort Statute, stated that "it is impossible for the courts to declare an act a tort of that kind [i.e., in violation of the law of nations] when the Executive, Congress and the treaty-making power all have adopted the act."[51] The political branches, in other words, have the final say as to whether the United States has violated international law.

If a United States court holds that a foreign nation, on the other hand, has violated international law, there is again the potential problem that the United States is not speaking with one voice. As Justice Harlan explained in great detail in the *Sabbatino* case, when the courts decide controversial issues of international law, "whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided."[52] The Supreme Court has relied on the constitutional policy that the nation speak with one voice not only in its exposition of the Act of State Doctrine in *Sabbatino*, but also in applying the political question doctrine[53] and in interpreting the foreign commerce clause[54] and the export-import clause.[55]

The policy of having the United States speak with one voice in foreign affairs does not mean that courts may never apply international law. On the contrary, in certain types of cases a determination of international law is highly relevant. First, courts should—if possible—interpret statutes as consistent with international law.[56] Second, where federal courts

51. O'Reilly De Camara v. Brooke, 209 U.S. 45, 52 (1908).
52. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433 (1964).
53. Baker v. Carr, 369 U.S. 186, 217 (1962).
54. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 452-53 (1979).
55. Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734, 752-53 (1978).
56. *See supra* note 20. Some courts have also used international law to inform consti-

have jurisdiction over a dispute between parties but neither the legislative nor the executive branch has provided a substantive basis for resolving the dispute, international law is an appropriate source of law.[57] Third, Congress may incorporate customary international law by statutory reference.[58] Each of these possibilities is consistent with the idea that the United States speak with one voice in foreign affairs, if only for the reason that in each case Congress can legislate substantively to the contrary if it wishes.

Of course with the Alien Tort Statute, Congress has incorporated customary international law by reference; the question is, in order to do what? Considerations of "speaking with one voice" are fully consistent with interpreting the Alien Tort Statute to incorporate international law for purposes of allocating state and federal court jurisdiction. The policy is arguably not consistent with interpreting the Alien Tort Statute to permit litigation, for instance, of alien claims based on violations of the international law obligations of third states. At the very least we can be sure, however, that there is no mixture of powers policy that affirmatively supports general commitment of customary international law issues to the courts.

IV. CONCLUSION

Does any argument favor a broad interpretation of the Alien Tort Statute? If I had to make such an agreement, I suppose I would try to cloud the difference between universal crimes and violations of international law. One way to do this would be to focus on those crimes that are also violations of the obligations of one state to another. For instance, an attack on a diplomat may be both a violation of international law (i.e., failure to prevent or punish the attack may result in international responsibility by the territorial state to the sending state) and a universal crime (i.e., a third state could try the perpetrator).[59] The same argument could be made with respect to counterfeiting. Some states have asserted universal jurisdiction over the crime of counterfeiting,[60] although courts

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tutional interpretation. *E.g.*, Finzer v. Barry, 798 F.2d 1450 (D.C. Cir. 1986), *cert. granted sub nom.* Boss v. Barry, 55 U.S.L.W. 3569 (Feb. 23, 1987).

57. New Jersey v. Delaware, 291 U.S. 361 (1934); The Paquete Habana, 175 U.S. 677 (1900). *See also* Rogers, *Applying the International Law of Sovereign Immunity to the States of the Union*, 1981 DUKE L.J. 449.

58. *E.g.*, United States v. California, 381 U.S. 139 (1965); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).

59. *See supra* note 35.

60. Harvard Research, *supra* note 20, at 570. *See supra* note 20.

will, in most cases, classify the jurisdiction more accurately as protective.[61] The Supreme Court has held, however, that the United States has the obligation to suppress counterfeiting of foreign currency in the United States.[62] If so, one could say that the counterfeiter (a) committed an international crime, and (b) acted so as to result in a violation of the international obligations of the United States.

But this, again, is not to say that the existence of an international crime necessarily implies an individual action resulting in international law violations. There just happens to be overlap. Certainly crimes are not automatically violations of international law, unless perhaps states with a right to prosecute certain criminals necessarily also have a duty to prosecute such criminals. But there is no reason why this should be so. There is, for instance, no widely accepted obligation to prosecute pirates. Lauterpacht flatly states that the law of nations does not make it a duty "for every maritime state to punish all pirates,"[63] and the negotiators of the 1958 High Seas Convention rejected such a duty.[64]

While there may be some overlap, international crimes are distinct from individual actions that result in international law violations. An interpretation of the Alien Tort Statute that would result in United States court determinations of all international obligations of foreign states is impossibly broad. Trying to limit the statute to "crimes" is mix-

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61. That is, State A may try a nonnational who committed the crime outside of State A's territory, but only if the defendant is accused of counterfeiting the currency or instruments of State A. *See* Harvard Research, *supra* note 20, at 440; United States v. Pizzarusso, 388 F.2d 8 (2d Cir. 1968); Rocha v. United States, 288 F.2d 545 (9th Cir. 1961); International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, art. 9, 112 L.N.T.S. 371.

62. United States v. Arjona, 120 U.S. 479 (1887). The Court held that a federal statute could constitutionally criminalize the counterfeiting of banknotes of foreign states by virtue of the Congressional power to define and punish offenses against the law of nations, U.S. CONST. art. I, § 8, cl. 10. Currently, courts could justify the same result under the Commerce Clause or the foreign affairs power. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 323 n.26 (1972).

63. 1 H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW (8th ed. 1955); *see also* A. HERSHEY, ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 226 n.32 (1912).

64. The negotiators of the High Seas Convention rejected an Albanian-Czechoslovak proposal that articles 38 through 43 be replaced by a single article reading, "All States are bound to take proceedings against and to punish acts of piracy, as defined by present international law, and to co-operate to the fullest possible extent in the repression of piracy." *IV U.N. Conference on the Law of the Sea, Second Committee*, 11 U.N. GAOR Supp. (No. 9) at 78, 84, U.N. Doc. A/CONF.13/C.2/L.46 (1956), *reprinted in* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 661 (1968).

ing apples and oranges. A meaningful jurisdictional interpretation of the Alien Tort Statute is the logical alternative.