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Stephen W. Yale-Loehr
Cornell Law Schol, SWY1@cornell.edu

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THE EXHAUSTION OF LOCAL REMEDIES RULE AND FORUM NON CONVENIENS IN INTERNATIONAL LITIGATION IN U.S. COURTS

A plaintiff may, after forum shopping, decide to bring suit in a foreign rather than a local forum.¹ If the foreign forum is improper, however, the court may utilize one of two doctrines to dismiss the case back to the local forum: forum non conveniens, developed in various countries' laws,² or exhaustion of local remedies, an international law doctrine.³ Both doctrines may be relevant, however, when national courts apply international law standards to the merits of a particular controversy.⁴ While the two

1. For example, a plaintiff may suspect a local forum to be biased against its claim, or unduly dominated by the executive branch. The plaintiff may feel that the foreign forum offers greater procedural rights, or grants higher damage awards. *See, e.g.,* MacShannon v. Rockware Glass, Ltd., [1978] A.C. 795, 814. The statute of limitations may also be a factor.

2. *See* notes 82-109 *infra* and accompanying text. Forum non conveniens has been defined as "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere." Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929).

3. *See* notes 40-81 *infra* and accompanying text. Discussion of the doctrine here concentrates on exhaustion of judicial rather than legislative or administrative remedies. For cases discussing the doctrine, *see, for example,* Interhandel Case, [1959] I.C.J. 6, 26-29 (Third Preliminary Objections); Case of Certain Norwegian Loans, [1957] I.C.J. 9, 97-99; The Panevezys-Saldutiskis Railway Case, [1939] P.C.I.J., ser. A/B, No. 76. An extensive body of literature also exists. *See, e.g.,* C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 95-102 (1928); A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 403-55 (1938); C. LAW, *THE LOCAL REMEDIES RULE IN INTERNATIONAL LAW* (1961) (also contains an exhaustive bibliography); 2 LORD MCNAIR, *INTERNATIONAL LAW OPINIONS* 312-13 (1956); Amerasinghe, *The Exhaustion of Procedural Remedies in the Same Court*, 12 INT'L & COMP. L.Q. 1285 (1963); Fawcett, *The Exhaustion of Local Remedies: Substance or Procedure?*, [1954] BRIT. Y.B. INT'L L. 452; Iluyomade, *Dual Claim and the Exhaustion of Local Remedies Rule in International Law*, 10 VAND. J. TRANSNAT'L L. 83 (1977); Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389 (1964). The local remedies rule does not apply when the international claim is based on a direct injury to a state itself. A. FREEMAN, *supra*, at 404.

4. One commentator characterizes these types of cases as situations in which national tribunals exercise "international jurisdiction." Brownlie, *The Individual Before Tribunals Exercising International Jurisdiction*, 11 INT'L & COMP. L.Q. 701, 702 (1962). For a description of the circumstances enabling a national court to apply international law, *see* text accompanying notes 13-39 *infra*. *See* Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VA. J. INT'L L. 9, 12-17 (1970). For limits on the types of cases in which the two doctrines overlap, *see* notes 110-20 *infra* and accompanying text.

rules are similar in many respects, the policy reasons behind each differ.⁵ Given the upsurge of interest in human rights,⁶ international covenants adopting the principle of individual petition,⁷ and the increased invocation of statutes such as 28 U.S.C. § 1350,⁸ which allows individuals to sue for international law violations, conflict between the two doctrines is likely to occur.⁹ *Filartiga v. Pena*¹⁰ illustrates the potential conflict between the theories. Two Paraguayan residents have sued another Paraguayan under 28 U.S.C. § 1350, a little-used statute granting aliens the right to sue in federal district court for torts committed in violation of international law.¹¹ The defendant moved to dismiss the action on a forum non conveniens motion, but an exhaustion of local remedies defense is also plausible.¹²

5. For the policies underlying forum non conveniens, see text accompanying note 82 *infra*. For the purposes of the local remedies rule, see text accompanying notes 46-52 *infra*.

6. See, e.g., L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS v (1973).

7. See examples cited in Higgins, *Conceptual Thinking About the Individual in International Law*, 24 N.Y.L. SCH. L. REV. 11, 17 (1978).

8. 28 U.S.C. § 1350 (1976) provides that "[t]he 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." Shepard's lists only 37 federal decisions citing section 1350 and its predecessors in the 190 years since the statute's enactment in 1789 (through issue dated May 1980). See also Note, *The Law of Nations in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. § 1350*, 1 B.C. INT'L & COMP. L.J. 71 (1977); Annot., 34 A.L.R. Fed. 388 (1977).

9. It should be noted that to date, no U.S. cases have discussed the two doctrines simultaneously. Future conflicts will most likely arise in § 1350 cases. See notes 13-39 *infra* and accompanying text. Forum non conveniens has been asserted in two § 1350 cases: the issue was not reached in *Dreyfus v. Von Finck*, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976), because of a lack of the subject matter prerequisite; the second case is currently on appeal. *Filartiga v. Pena*, No. 79-6090 (E.D.N.Y. May 18, 1979) (action dismissed), *appeal docketed*, (2d Cir. June 4, 1979). The domestic remedies issue has not been addressed in any section 1350 case.

10. *Id.*

11. The tort alleged in *Filartiga* is wrongful death by torture. Plaintiffs (decedent's father and sister) allege that defendant's acts violated both customary international law and international treaties and conventions. Brief for Plaintiffs-Appellants at 23, *Filartiga v. Pena*, No. 79-6090 (E.D.N.Y. May 18, 1979) (action dismissed), *appeal docketed*, (2d Cir. June 4, 1979) [hereinafter cited as Appellants' Brief]; Joint Appendix to *Filartiga v. Pena*, No. 79-6090 (E.D.N.Y. May 18, 1979) (action dismissed), *appeal docketed*, (2d Cir. June 4, 1979), at 4 [hereinafter cited as Joint Appendix] (both documents on file at *Cornell International Law Journal*). Plaintiffs originally filed criminal murder charges against the defendant Pena in a Paraguayan court, but the Paraguayan courts have stalled the action for three years. Appellants' Brief, *supra*, at 6-7; Joint Appendix, *supra*, at 7. Pena fled Paraguay and was residing illegally in Brooklyn when plaintiffs discovered him. Suit was brought in the Eastern District of New York. Joint Appendix, *supra*, at 7, 18. The district court dismissed the action for lack of subject matter jurisdiction, feeling bound by Second Circuit decisions that narrowly interpreted the scope of international law. *Id.* at 107-08.

12. Appellants' Brief, *supra* note 11, at 3; Joint Appendix, *supra* note 11, at 47. The district court did not address the forum non conveniens issue because of its ruling that plaintiffs lacked the subject matter jurisdictional prerequisite. See note 11 *supra*. If the Second Circuit

This Note examines the relationship between the two rules, concentrating on U.S. law, and attempts to resolve conflicts between them in a principled manner. First, the Note presents a brief overview of an individual's ability to sue for international law violations in domestic courts. Then, it sketches the respective characteristics of the exhaustion of domestic remedies requirement and forum non conveniens. Finally, the Note describes areas of conflict and proposes a modest solution.

I

ABILITY OF INDIVIDUALS TO SUE FOR
INTERNATIONAL LAW VIOLATIONS IN
NATIONAL COURTS: AN
OVERVIEW

A person's or corporation's ability to sue for international law violations in domestic courts depends upon authority conferred by one of three sources: treaties,¹³ constitutions,¹⁴ or specific statutory enactments. Because individuals wishing to sue on international law claims in American courts rarely invoke treaties or the Constitution,¹⁵ however, discussion is limited to authority for such suits granted by the U.S. Code.

reverses and remands, however, the issue might be relevant. Defendant might also raise an exhaustion of local remedies defense on remand. See text accompanying notes 45-57 *infra*.

13. In the Danzig Railway Officials Case, [1928] P.C.I.J., ser. B, No. 15, the Permanent Court of International Justice stated: "[I]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts." *Id.* at 17-18. The Court held that an agreement between Danzig and Poland regulating employment conditions of officials taken into the Polish railway service granted Danzig railway officials a right of action for purely pecuniary claims in Danzig courts against the Polish Railway Administration. *Id.* at 26. See also *Steiner & Gross v. Polish State*, 4 Ann. Dig. 291 (Upper Silesian Arb. Trib. 1928), which held that article 4(2) of the German-Polish Convention of May 15, 1922, conferred jurisdiction upon the Upper Silesian Arbitral Tribunal to hear claims by individuals against States. Individuals could advance claims based on articles 299, 300, and 365 of the Versailles Treaty, held a German court. 1 FONTES JURIS GENTIUM, ser. A, sec. 2, no. 398, at 21-22 (V. Burus ed. 1931). The Hague Convention of 1905 has been held to confer individual rights upon Russian nationals before Dutch courts. *Wirbelaver v. de Handelsvennootschap onder de firma Lippmann Rosenthal en Co.*, 4 Ann. Dig. 59, 60 (D. Ct. of the Netherlands 1925). These examples mark the exceptions rather than the rule, however. See Brownlie, *The Place of the Individual in International Law*, 50 VA. L. REV. 435, 440 (1964) ("[i]n general, treaties do not create direct rights and obligations for private individuals. . .").

14. The U.S. Constitution grants Congress the power "[t]o define and punish . . . Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. In addition, the constitutions of the German Federal Republic, Italy, Korea, and the Philippines incorporate the generally accepted principles of international law into their domestic courts. See H. BRIGGS, *THE LAW OF NATIONS* 58-59 (1952).

15. No cases interpreting U.S. CONST. art. I, § 8, cl. 10 have discussed an individual's right to sue under the law of nations. Moreover, federal courts have held that only self-executing treaties grant individuals the power to enforce treaty rights. *Dreyfus v. Von Finck*, 534 F.2d

Thirteen sections of the U.S. Code presently incorporate the "law of nations."¹⁶ Discussion of the phrase, however, has been limited to cases arising under 28 U.S.C. § 1350.¹⁷ Of thirty-seven cases mentioning section 1350, only two decisions sustained jurisdiction.¹⁸ This limitation of the statute's application may be due to a shift from natural law theory to positivism in international law.

No legislative history exists for section 9 of the Judiciary Act of 1789, the predecessor of section 1350.¹⁹ "Natural law" philosophy, however, was prevalent in Europe at the time.²⁰ Emmerich de Vattel, a leading scholar of the period, argued that individuals retained certain fundamental rights against their sovereign, and thus could sue under international law.²¹ While the influence of natural law theory on the statute's authors is unknown, the language of section 1350 suggests that Americans adopted the right of individuals to sue for international law violations.²² Other indirect evidence leads to the same conclusion. For example, Representative John Vining of Delaware argued in support of the Judiciary Act and section 1350's predecessor:

[h]e wished . . . to see justice so equally distributed, as that every citizen of the United States should be fairly dealt by, and so impartially administered, that every subject or citizen of the world, whether foreigner or alien, friend or foe, should be alike satisfied; by this means, the doors of justice would be thrown wide open, emigration would be encouraged from all countries into your own, and, in short, the United States of America would be made not only an asylum of liberty, but a sanctuary of justice.²³

24, 30 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976). Few treaties have been accorded that status. *See generally* Evans, *Self-Executing Treaties in the United States of America*, [1953] BRIT. Y.B. INT'L L. 178.

16. 18 U.S.C. §§ 756, 957, 967, 1651, 2274, 3058, 3185 (1976); 22 U.S.C. §§ 406, 462 (1976); 28 U.S.C. §§ 1350, 2241 (1976); 33 U.S.C. §§ 384, 385 (1976).

17. 28 U.S.C. § 1350 (1976). *See* note 11 *supra*.

18. *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607). The most recent case is currently on appeal to the Second Circuit. *Filartiga v. Pena*, No. 79-6090 (E.D.N.Y. May 18, 1979) (action dismissed), *appeal docketed*, (2d Cir. June 4, 1979).

19. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 67 (codified at 28 U.S.C. § 1350 (1976)). In *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975), the Second Circuit stated: "[Section 1350] 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."

20. Note, *supra* note 8, at 73-75.

21. *See generally* DE VATTEL, *THE LAW OF NATIONS* (rev. ed. London 1797).

22. Note, *supra* note 8, at 75-76. *See also* Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 48 (1952).

23. 1 ANNALS OF CONGRESS 821 (Gales & Seaton eds. 1834). *See* Dickinson, *supra* note 22, at 44-46.

Given this context, one commentator argues that "it seems clear . . . that the drafters of the Judiciary Act contemplated the use of the federal courts by individuals to enforce rights arising under international law."²⁴

Just six years after its enactment, an individual successfully sued another individual under section 9 of the Judiciary Act. The court in *Bolchos v. Darrel*²⁵ found subject matter jurisdiction under the United States-France treaty, and restored to plaintiff his captured slaves.²⁶ The defendant did not raise, and the court felt no need to discuss, any argument that an individual could not sue for international law violations.

Positivism, however, triumphed over natural law theory as the dominant legal philosophy in the nineteenth and early twentieth centuries.²⁷ The positivists asserted that only states are subjects of international law. Thus, individuals have no rights, except indirectly, through a state's discretionary decision to take up a national's claim.²⁸ Modern federal courts interpreting section 1350 have tended toward a positivist view, thus restricting the statute's applicability. The general rule now is that:

[A] violation of the law of nations arises only when there has been "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*."²⁹

This definition effectively imposes a two-tier jurisdictional prerequisite on section 1350 actions: actionable conduct must both constitute a tort involving an alien and violate a state's rights under international law. Furthermore, an individual cannot sue his own state under the section.³⁰ Only fortuitous facts can surmount such an onerous burden.

24. See Note, *supra* note 8, at 76.

25. 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

26. *Id.*

27. A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 232 (1954); Svarlien, *International Law and the Individual*, 4 J. PUB. L. 138, 140 (1955).

28. See W.P. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 23-44 (1966) (and authorities therein cited); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 175 (1965); Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438, 439-44 (1947); Lillich, *supra* note 4, at 12-18; Note, *supra* note 8, at 77-78.

29. *IIT v. Vencap*, 519 F.2d at 1015 (quoting *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963)). See also *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324, 328 (E.D. Pa. 1966); *Damaskinos v. Societa Navigacion Interamericana, S.A.*, Pan., 255 F. Supp. 919, 923 (S.D.N.Y. 1966).

30. *Dreyfus v. Von Finck*, 534 F.2d at 31 (dictum) ("violations of international law do not occur when the aggrieved parties are nationals of the acting state."). This rationale accords with a positivist perspective. If individuals cannot sue in international law except through their states, a fortiori, individuals have no rights to sue their own states. See text at note 28 *supra*.

It is not surprising, therefore, that only one decision in modern times has held conduct actionable under section 1350. In *Abdul-Rahman Omar Adra v. Clift*,³¹ plaintiff alleged that his former wife had moved to the United States to prevent him from taking lawful custody of their daughter under Moslem law. He further alleged that his ex-wife had concealed their daughter's name and Lebanese nationality by including the child in his ex-wife's Iraqi passport.³² The District Court for the District of Maryland held that the defendant's refusal to deliver the daughter to her father constituted a tort,³³ and that the mother's actions violated international law by denying Lebanon the right "to control the issuance of passports to its nationals."³⁴ Only the coincidental combination of the falsified passport with the alleged tort enabled the plaintiff to overcome the twin jurisdictional barriers erected by the court.

In considering section 1350 actions, U.S. courts should abandon their present strangling definitions of the "law of nations." Such interpretations ignore the statute's original intent.³⁵ Moreover, the clear language of section 1350 grants aliens the right to sue other individuals or states for international law violations. In addition, the trend of international law appears to be shifting in that direction, albeit slowly. A few modern commentators have argued for a readoption of this position.³⁶ Further, witness the renaissance interest in natural law theory generally,³⁷ the incorporation of the principle of individual petition in international covenants,³⁸ and case law

31. 195 F. Supp. 857 (D. Md. 1961).

32. *Id.* at 860-62.

33. *Id.* at 862-63. The court's interpretation of "tort" for § 1350 purposes does not seem to accord with the statutory language. Any harm to the plaintiff arose "not from a violation of his rights under the law of nations, but rather under local 'norms' if at all." Note, *supra* note 8, at 81. Subsequent decisions have recognized this distinction and required that the tort itself violate international law. See, e.g., *Dreyfus v. Von Finck*, 534 F.2d at 30 (seizure of property not a tort that violates international law); *IIT v. Vencap*, 519 F.2d at 1015 (stealing not part of the law of nations); *Abiodun v. Martin Oil Service, Inc.*, 475 F.2d at 145 (fraud not violative of international law). This requirement represents a more accurate interpretation of section 1350's language, but creates an even more difficult barrier for potential plaintiffs.

34. *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. at 864-65.

35. See text at notes 22-24 *supra*.

36. See, e.g., W.P. GORMLEY, *supra* note 28, at 30; Note, *supra* note 8, at 82-86.

37. See, e.g., F. RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* (1975); Svarlien, *supra* note 27, at 140; Tucker, *Has the Individual Become the Subject of International Law?*, 34 U. CIN. L. REV. 340, 349 (1965).

38. W.P. GORMLEY, *supra* note 28, discusses numerous examples: the Central American Court of Justice, *id.* at 33; the Anglo-German Mixed Arbitral Tribunals, *id.* at 37-38; the U.N. Commission of Human Rights, *id.* at 51-52; the European Convention on Human Rights, *id.* at 76-82; the European Commission of Human Rights, *id.* at 92-107; the European Coal and Steel Community Treaty, *id.* at 148-56; and the European Economic Community Tribunal, *id.* at 168-77.

developing that right.³⁹ A clear opportunity exists for federal courts to broaden an individual's ability to allege international tort violations under section 1350.

II

THE EXHAUSTION OF LOCAL REMEDIES RULE

A. APPLICATION OF THE RULE TO SECTION 1350 SUITS

The International Court of Justice has noted that "the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."⁴⁰ In the *Ambatielos* Case,⁴¹ the arbitrators formulated the rule as follows:

[The local remedies rule] means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies. . . .⁴²

The exhaustion of local remedies doctrine evolved under a positivist interpretation of international law.⁴³ Consequently, the policy reasons for the rule focus on cases involving state *X* suing state *Y* for an injury inflicted on state *X*'s national by state *Y*. Most definitions of the local remedies doctrine explicitly frame the rule in those terms.⁴⁴ With the recent development of individual rights in international law,⁴⁵ the question arises whether the local remedies requirement should also apply to an individual alleging an international law violation against either his own state or another individual. Though no U.S. court has discussed the domestic remedies requirement in deciding a case brought under 28 U.S.C. § 1350, the requirement should apply to such suits as well.

First, the policy reasons for the rule apply to individual suits. Among the reasons cited as justification for the traditional domestic remedies rule are the following:

39. See cases cited in W.P. GORMLEY, *supra* note 28, at 58 nn.54, 112-14, 148-58, 160-64, 168-77.

40. *Interhandel Case*, [1959] I.C.J. 6, 27.

States may also agree to waive the rule. See, e.g., *General Claims Convention*, Sept. 8, 1923, United States-Mexico, art. V, 43 Stat. 1730, T.S. No. 678. See also *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 209 (1965).

41. *Ambatielos Claim (Greece v. United Kingdom)*, 23 I.L.R. 306 (Arb. Comm. 1956).

42. *Id.* at 334.

43. See note 28 *supra* and accompanying text.

44. See, e.g., C. LAW, *supra* note 3, at 37; *Iluyomade*, *supra* note 3, at 83-84.

45. See notes 37-39 *supra* and accompanying text.

1. "[T]he local remedies rule reconciles national autonomy with international co-operation in the sense that each state accepts, in broad lines, the judicial remedies provided by other states, and yet this acceptance does not deny the importance of proper international settlement of a dispute and the international standard of justice."⁴⁶
2. The rule may relieve international tribunals of excessive litigation burdens.⁴⁷
3. The rule saves both the complainant and respondent the heavy expenses of an initial international adjudication.⁴⁸
4. The rule benefits the respondent by avoiding the undue publicity of an international proceeding that may exacerbate the problem and aggravate international relations.⁴⁹
5. National courts, familiar with local conditions and possessing easy access to witnesses, can usually settle disputes more expeditiously and conveniently than international tribunals.⁵⁰
6. The rule avoids unnecessary multiplication of small claims brought by states invoking the doctrine of diplomatic protection.⁵¹
7. The rule allows the defendant an opportunity to amend the wrong.⁵²

46. C. LAW, *supra* note 3, at 19. See C. EAGLETON, *supra* note 3, at 100; A. FREEMAN, *supra* note 3, at 417.

47. Amerasinghe, *supra* note 3, at 1288. To illustrate the problem, individuals registered a total of 8,448 individual applications with the European Commission of Human Rights between 1955 and 1978. The Commission received 644 individual applications in 1972 alone. EUROPEAN COMMISSION OF HUMAN RIGHTS, STOCK-TAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 137 (1979). This reason, however, does not apply to the underutilized International Court of Justice.

48. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, Comment a (1965); Amerasinghe, *supra* note 3, at 1289.

49. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, Comment a (1965); Amerasinghe, *supra* note 3, at 1289; Mummery, *supra* note 3, at 391.

50. See E. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 817 (1928); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206, Comment a (1965).

51. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 403 (1966). The doctrine of diplomatic protection limits a state's treatment of aliens by providing that a state, on behalf of its national, may sue another state for a violation of international law inflicted upon the individual by the other state. See J. BRIERLY, THE LAW OF NATIONS 276, 283-84 (6th ed. 1963).

52. Interhandel Case, [1959] I.C.J. at 27; Norwegian Loans Case, [1957] I.C.J. at 97; Finnish Vessels Case (Finland v. Great Britain), 3 R. Int'l Arb. Awards 1484, 1502 (1934); A. FREEMAN, *supra* note 3, at 416; Trindade, *Denial of Justice and Its Relationship to Exhaustion of Local Remedies in International Law*, 53 PHILIPPINE L.J. 404, 417 (1978); Editorial Comment, 28 AM. J. INT'L L. 718, 729-36 (1934).

Some of the same rationales behind the local remedies requirement also underlie the forum non conveniens doctrine. See notes 47 & 50 *supra* and accompanying text. For discussion of the factors courts consider in forum non conveniens analysis, see text accompanying notes 83-109 *infra*; for discussion of the two policies' similarities, see notes 126-27 *infra* and accompanying text.

These policies, though couched in terms of an international forum, are just as important in the context of a section 1350 suit. If, as urged above,⁵³ federal courts follow the statute's original intent and broaden an individual's ability to sue other individuals, the doctrine provides necessary safeguards. Recognition of the exhaustion of local remedies requirement will prevent vexatious litigation in which the United States has little or no interest. By accepting the rule, the United States will recognize the remedies of the other state. Further, without the rule in section 1350 cases, relations between the United States and the other state may become strained, while, with the rule, the state has the opportunity to correct the problem with a minimum of international interference. Because the policy reasons apply, so should the rule.

Second, an analogy can be drawn to the European Convention on Human Rights, especially in the area of suits by individuals against states. The Convention allows individual petitions against any party to the Convention, including an individual's own state.⁵⁴ However, the Convention still requires exhaustion of local remedies.⁵⁵ One commentator noted that

53. See text accompanying notes 35-39 *supra*.

54. Article 25(1) provides: "The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention. . . ." Convention for the Protection of Human Rights and Fundamental Freedoms, *reprinted in* COUNCIL OF EUROPE, EUR. CONV. ON HUMAN RIGHTS: COLLECTED TEXTS 1-18 (9th ed. 1974) [hereinafter cited without cross reference as COLLECTED TEXTS].

The European Convention provides for creation of a commission and court to implement its guarantees. *Id.* arts. 19-26, COLLECTED TEXTS at 6-8. Complaints are sent first to the Commission, *id.* arts. 24 & 27, COLLECTED TEXTS at 8, which attempts to arbitrate an amicable settlement. If no such settlement occurs, the Commission may determine whether there has been a breach of the Convention, and report its findings to the Committee of Ministers of the Council of Europe together with its recommendations. *Id.* art. 31, COLLECTED TEXTS at 9. The Committee can then legally bind parties to the Convention through its decisions. *Id.* art. 32, COLLECTED TEXTS at 9. The Commission may file a complaint with the European Court of Human Rights. *Id.* art. 48, COLLECTED TEXTS at 11.

55. Art. 26 requires that as to individual applications, "[t]he Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law." European Convention, *supra* note 54, art. 8, COLLECTED TEXTS at 8.

For discussion of art. 26, see R. BEDDARD, HUMAN RIGHTS AND EUROPE 60-72 (1973); J. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 288-304 (1969). For cases arising under the European Convention that discuss the local remedies rule, see, for example, *Donnelly v. United Kingdom*, 4 DECISIONS AND REPORTS 4, 87 (Eur. Comm. of Human Rights 1976) (final decision on admissibility) [hereinafter cited as 4 DECISIONS AND REP.]; *Greek Case*, [1969] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS 194 (Eur. Comm. of Human Rights).

For application of the local remedies requirement to the Inter-American Commission on Human Rights, see case excerpts in L. SOHN & T. BUERGENTHAL, *supra* note 6, at 1341-42, 1347-54. See also E.S.C. Res. 1503, 48 U.N. ESCOR, Supp. (No. 1A) U.N. Doc. E/4832/

“the rule of exhaustion of domestic remedies is a large and necessary limitation on the competence of the Convention bodies to deal with alleged breaches. . . . [I]t can hardly be imagined that the principle of individual petition would have been accepted without [the requirement].”⁵⁶ The reasons for this continued requirement appear clear—all of the traditional rationales supporting the concept of a domestic remedies rule when one state sues another state on behalf of an individual apply with equal vigor to individuals suing states directly.⁵⁷

B. EXCEPTIONS TO THE LOCAL REMEDIES RULE

1. *Traditional Exceptions*

Traditionally, a court will waive the local remedies rule if the plaintiff proves a lack of effective remedies in the particular case.⁵⁸ To determine the effectiveness of the remedy, courts consider the following factors:

Add.1 (1970) (Human Rights Commission may investigate alleged human rights violations only if “[a]ll available means at the national level have been resorted to and exhausted.”), reprinted in L. SOHN & T. BUERGENTHAL, *supra* note 6, at 841-43.

56. J. FAWCETT, *supra* note 54, at 288.

57. See text at notes 46-52 *supra*.

58. “[I]n accordance with the generally recognised principles of international law, the exhaustion of a domestic remedy is nevertheless not required if the applicant party can prove that in the particular circumstances such remedy will probably prove ineffectual or inadequate.” Application No. 299/57, Greece v. United Kingdom (Second Cyprus Case), [1958-1959] Y.B. EUR. CONV. ON HUMAN RIGHTS 186, 192-94 (Eur. Comm. of Human Rights) (decision on admissibility of October 12, 1957). See Judge Lauterpacht’s comment in the Norwegian Loans Case, [1957] I.C.J. at 39 (“[International tribunals] have refused to act upon [the requirement of exhaustion of local remedies] in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it.”) (separate opinion).

Courts vary in the standard they apply to determine ineffectiveness. Some opinions adopt a strict approach, requiring that a claimant prove that the local remedy in question is “*obviously futile*” to escape operation on the rule. Finnish Vessels Case (Finland v. Great Britain), 3 R. Int’l Arb. Awards 1484, 1504 (emphasis added). The *Finnish Vessels* arbitrator relied on Borchard for the distinction between futile and “*obviously futile*.” Borchard states:

In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts, a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.

E. BORCHARD, *supra* note 50, at 823-24 (footnotes omitted). See also Panevezys-Saldutiskis Ry. Case, [1939] P.C.I.J., ser. A/B, at 18-19; X v. Gov’t of Sweden, (Application No. 434/58), [1958-1959] Y.B. EUR. CONV. ON HUMAN RIGHTS 354, 374 (Eur. Comm. of Human Rights); Mummery, *supra* note 3, at 398-400.

Other authorities follow a more flexible approach. See, e.g., Panevezys-Saldutiskis Ry. Case, [1939] P.C.I.J., ser. A/B, at 48 (“In each case account is to be taken of the circumstances surrounding the means of redress.”) (Hudson, J., dissenting); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208(a) (1965).

undue delay,⁵⁹ the presence of bias in local courts,⁶⁰ and repetition of the same wrong.⁶¹

Besides ineffectiveness of local remedies, waiver of the requirement may occur in certain other situations. For example, where no domestic remedy for the alleged wrong exists (*e.g.*, the alleged act violates international, but not local law), the rule does not apply.⁶² Similarly, a prior determination by the highest court of the state on substantially identical claims voids application of the rule.⁶³ Finally, where the claimant's state asserts a separate claim on its own behalf for direct injury to it arising out of the same wrongful conduct, the individual is excused from pursuing local remedies.⁶⁴

2. "Administrative Practice" Exception

The European Commission of Human Rights has developed an "administrative practice" exception to the local remedies rule in torture cases.⁶⁵ If an applicant can prove both a substantial number of acts of torture indicating a general practice, and official tolerance by high ranking state officials,⁶⁶ and the respondent state then fails to demonstrate the actual effectiveness of local remedies, the Commission will waive the local remedies requirement.⁶⁷ The European Court of Human Rights adopted

59. *El Oro Mining & Ry. Co., Ltd. (Great Britain v. Mexico)*, 5 R. Int'l Arb. Awards 191, 198 (1931) (delay of nine years held to waive local remedies requirement).

60. *See Brown Case (United States v. Great Britain)*, 6 R. Int'l Arb. Awards 120, 129 (1923) (domestic remedies not required when executive branch dominates judiciary). *See also C. LAW*, *supra* note 3, at 68; *Amerasinghe*, *supra* note 3, at 1313.

61. *See C. LAW*, *supra* note 3, at 70-71.

62. *See Fawcett*, *supra* note 3, at 455.

63. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208(b) (1965).

64. *Id.* § 208(c).

65. Article 3 of the European Convention on Human Rights prohibits torture and degrading treatment or punishment. European Convention, *supra* note 54, art. 3, COLLECTED TEXTS at 3. Article 26 requires exhaustion of local remedies for individual applications. *See* note 55 *supra*. The Commission formulated the "administrative practices" exception to article 26 out of a concern that, where a practice of torture or ill treatment exists, local remedies "would tend to be rendered ineffective by the difficulty of securing probative evidence, and administrative enquiries would either not be instituted, or, if they were, would be likely to be half-hearted and incomplete." *Greek Case*, [1969] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS at 194. *See Ireland v. United Kingdom*, [1976] Y.B. EUR. CONV. ON HUMAN RIGHTS 512, 754 (Eur. Comm. of Human Rights) (*citing Greek Case*, [1969] 2 Y.B. EUR. CONV. ON HUMAN RIGHTS at 195-96).

66. In evaluating the "tolerance" prong of its test, the Commission focuses on the local judiciary's effectiveness in providing remedies. *See, e.g., Donnelly v. United Kingdom*, 4 DECISIONS AND REP., *supra* note 55, at 87. *See also* notes 69-73 *infra* and accompanying text.

67. For discussion of the confusion surrounding the Commission's test, see Boyle & Han-nun, *The Donnelly Case, Administrative Practice and Domestic Remedies Under the European Convention: One Step Forward and Two Steps Back*, 71 AM. J. INT'L L. 316 (1977); McGovern, *The Local Remedies Rule and Administrative Practices in the European Convention on Human*

this concept, but seems to require only proof of repetition of acts to exempt an applicant.⁶⁸

The Commission's two-tier test seems more reasonable. Proof of numerous acts of torture does not necessarily indicate that courts will be unwilling to compensate victims, or that high level officials tolerate the practice. *Donnelly v. United Kingdom*⁶⁹ provides a good example. In *Donnelly*, seven individuals complained to the European Commission of Human Rights that the police or members of the British Army tortured each of the seven, in violation of Article 3 of the European Convention, and that this ill-treatment was part of an administrative practice that permitted and encouraged brutality.⁷⁰ The Commission, however, found that the legal machinery for providing compensation had operated effectively for four of the seven applicants,⁷¹ and that plaintiffs had failed to demonstrate that the Northern Ireland judiciary *generally* was ineffective in policing alleged violations. Statistics support the Commission's latter conclusion.⁷² Thus, even accepting *arguendo* the applicants' contention that (1) repeated ill-treatment of terrorist suspects occurred, and (2) immediate supervisors of those responsible tolerated the ill-treatment, the Commission declared their application inadmissible for nonexhaustion of local remedies.⁷³ Both the

Rights, 24 INT'L & COMP. L.Q. 119 (1975); O'Boyle, *Torture and Emergency Powers Under the European Convention on Human Rights: Ireland v. The United Kingdom*, 71 AM. J. INT'L L. 674, 691 (1977).

For an example of a case where the state successfully met its burden of demonstrating the actual effectiveness of local remedies, see *Donnelly v. United Kingdom*, 4 DECISIONS AND REP., *supra* note 55, at 4.

68. The Court has collapsed the Commission's two-tier test by presuming official tolerance once the Court finds an "accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount . . . to a pattern or system. . . ." *Ireland v. United Kingdom*, Judgment, European Court of Human Rights, reprinted in 17 INT'L LEGAL MATERIALS 680, 701 (1978). See also Klayman, *The Definition of Torture in International Law*, 51 TEMPLE L.Q. 449, 510 (1978).

69. 4 DECISIONS AND REP., *supra* note 55, at 4.

70. *Id.* at 24.

71. *Id.* at 77.

72. *Id.* at 48. For example, between August 9, 1971 and September 30, 1978, 798 tort actions alleging assaults by the security forces were commenced in Northern Ireland, of which 222 cases were settled out of court for damages totalling £420,000. *Id.*

73. The Commission expressly distinguished tolerance by immediate supervisors from that authorized at high levels of government. Only the latter satisfies the second factor:

[I]t has not been established that any ill-treatment which the present applicants may have suffered was condoned or tolerated by persons in authority other than those directly involved with the applicants at the relevant times. . . . The fact that ill-treatment may be tolerated, at the middle or lower levels of the chain of command, for example at the level of an officer in charge of a police station of [*sic*] military post, does not in the opinion of the Commission necessarily mean that the state concerned has failed to take the required steps to comply with its substantive obligations under Art. 3 of the Convention. Existing remedies which provide redress for the individual

Court's and the Commission's tests are adequate for cases involving countries in which a small ruling order controls both the torturers and judiciary. For nations with genuine separation of powers, however, the Commission's formula more often achieves a just result.

The "administrative practice" exception might profitably be extended to other fundamental human rights areas. Although commentators argue over the scope of "fundamental human rights,"⁷⁴ rights such as racial equality and the political equality of women, already effectuated by international conventions, arguably constitute basic human values.⁷⁵ Suppose, for example, that article 34 of the Statute of the International Court of Justice were amended to include the right of individual petition,⁷⁶ and a black South African leader subsequently brought charges against his own government before the World Court, alleging a breach of article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination, condemning apartheid.⁷⁷ Suppose further that the applicant produced evidence that the South African government endorses apartheid at all levels, including the judiciary, and practices it against all blacks. Aside from the question whether a nonparty to such a convention may nevertheless be held to that convention's standards through customary international law,⁷⁸ no sound policy exists to justify forcing the South Afri-

victims of ill-treatment are not therefore necessarily rendered inadequate in such a situation.

Id. at 84-85. Four applicants accepted out-of-court settlements ranging from £300 to £6,000. The Commission denied those four applications on the ground that they had received compensation in satisfaction of their claims. *Id.* at 87. See also Boyle & Hannum, *supra* note 67, at 319.

74. See, e.g., McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387 (1974); McDougal, Laswell & Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L J. 237 (1969).

75. See Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135 (U.S. accession, Apr. 8, 1976); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (U.S. signature, Sept. 28, 1966) [hereinafter cited as Convention on Racial Discrimination]. See also W.P. GORMLEY, *supra* note 28, at 24.

76. Article 34 presently provides in pertinent part that "[o]nly states may be parties in cases before the Court." Statute of the International Court of Justice, art. 34, 59 Stat 1055, T.S. No. 993 (1945).

77. Article 3 provides: "States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction." Convention on Racial Discrimination, *supra* note 75, art. 3 (emphasis in original).

78. The Hague Conventions on rules of land warfare are considered to be binding on non-parties. I. BROWNLIE, *supra* note 51, at 10,500. One commentator has asserted that the International Covenant on Civil and Political Rights may bind non-signatories who are members of the United Nations, because of the Covenant's dual status as both convention and U.N. resolution. Bassiouni, *An Appraisal of Torture in International Law and Practice: The Need for an*

can to pursue local remedies. In this situation, a sensible solution would be to apply the European Commission's test and allow, as a rebuttable presumption, waiver of the local remedies rule.

Assuming expansion of the "administrative practice" exception from torture to other fundamental human rights, the Commission's two-prong test provides more realistic limitations than the European Court's test. Suppose a racial minority leader sued the U.S. government in an international tribunal that allowed individual petition, alleging a violation of article 2(a) of the Convention on Racial Discrimination.⁷⁹ If the European Court's "single factor test" were adopted, the international court might well waive the domestic remedies requirement merely upon a showing of a series of discriminatory acts practiced against members of racial minorities in their public lives.⁸⁰ Numerous cases exist, however, demonstrating the willingness of U.S. courts to intervene in this area.⁸¹ Because U.S. courts would allow the plaintiff an adequate remedy, no reason exists to waive the local remedies rule in this situation.

III

FORUM NON CONVENIENS

Four general purposes underlie the forum non conveniens doctrine: (1) to discourage vexatious litigation; (2) to best serve the convenience of the parties; (3) to serve the court's convenience; and (4) to serve "the ends of justice."⁸² To implement these goals, the U.S. Supreme Court considers the

International Convention for the Prevention and Suppression of Torture, 48 REVUE INTERNATIONALE DE DROIT PENAL 68 (1977). For an extensive analysis along these lines as to torture, see Klayman, note 68 *supra*. This argument may be particularly forceful for racial discrimination, since over 100 nations have adhered to the Convention on Racial Discrimination, note 75 *supra*. *Status of International Conventions in the Field of Human Rights in Respect of Which the Secretary-General Performs Depositary Sanctions*, U.N. Doc. A/33/143 (1978). See generally C. PARRY, *THE SOURCES AND EVIDENCE OF INTERNATIONAL LAW* (1965).

79. Article 2(a) provides that "[e]very State Party undertakes not to engage in any act or practice of racial discrimination against persons, groups or persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation." Convention on Racial Discrimination, *supra* note 75, art. 2(a).

80. The plaintiff would, of course, have to clear the same significant hurdles as in the South African hypothetical, text accompanying notes 76-78 *supra*, even to reach the waiver question.

81. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Harrison v. NAACP*, 360 U.S. 167 (1959); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1954); Annot., 6 L. Ed. 2d 1302 (1962); Annot., 130 A.L.R. 1512 (1941).

82. For American cases discussing these purposes, see *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); *Hoffman v. Goberman*, 420 F.2d 423, 426 (3rd Cir. 1970); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3rd Cir.), *cert. denied*, 385 U.S. 945 (1966).

English decisions have traditionally focused on serving justice. See, e.g., *St. Pierre v. South American Stores (Gath and Chaves) Ltd.*, [1936] 1 K.B. 382, 398 ("In order to justify a stay

following factors when deciding whether to dismiss a case on forum non conveniens: (1) the private interest of the litigant; (2) relative ease of access to sources of proof; (3) availability and cost of witnesses; (4) the enforceability of judgment; (5) procedural barriers to a fair trial; (6) administrative convenience for the court; and (7) possible difficulties in applying law foreign to the forum.⁸³ A recent decision by the English House of Lords discusses similar factors.⁸⁴ Actual application of these factors, and attainment of these goals, however, varies both domestically and internationally.

First, in suits involving some international aspect, American courts vary in their emphasis on one or another of these goals.⁸⁵ For example, in *Hoffman v. Goberman*,⁸⁶ the Third Circuit relied on only two purposes: "the ultimate inquiry is whether the retention of jurisdiction by the district court would fairly serve the convenience of the parties and the ends of justice."⁸⁷ To implement these goals, the court set forth a two-prong test for a successful forum non conveniens motion, but both alternatives stressed convenience, not justice.⁸⁸ A decision four years earlier by the same court,

. . . the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him . . . and . . . the stay must not cause an injustice to the plaintiff."); *Logan v. Bank of Scotland* (No. 2), [1906] 1 K.B. 141; *Peruvian Guano Co. v. Bockwoldt*, 23 Ch. D. 225 (1892); *McHenry v. Lewis*, 21 Ch. D. 202, 22 Ch. D. 397 (C.A. 1891). In a recent decision, however, the House of Lords has expanded consideration of the doctrine to include all four purposes. See *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, 812-14.

Scottish courts emphasize the "justice" goal underlying the forum non conveniens doctrine. See, e.g., *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français"*, [1926] Sess. Cas. (H.L.) 13, 22 ("The object . . . is to find that *forum* which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that *forum* is more likely to secure those ends.") (emphasis in original); *Clements v. Macaulay*, 44 Sess. Cas. (3d Ser.) 583 (1866). See generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 CAL. L. REV. 380, 387-89 (1947); Blair, note 2 *supra*.

83. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

84. *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, 812-14, 829.

85. See generally Note, *The Convenient Forum Abroad Revisited: A Decade of Development of the Doctrine of Forum Non Conveniens in International Litigation in the Federal Courts*, 17 VA. J. INT'L L. 755, 764-77 (1977).

86. 420 F.2d 423 (3d Cir. 1970).

87. *Id.* at 426 (footnote omitted).

88. The court's test required that, for a successful forum non conveniens motion, [t]here must be a clear showing of facts which either (1) establish such oppression and vexation of a defendant as to be out of all proportion to the plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

Id. at 426-27 (footnote omitted). For a confusing, disjunctive interpretation of this test, see *Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber*, 513 F.2d 667, 671-73 (9th Cir. 1975). See Note, *supra* note 85, at 765.

however, emphasized “serv[ing] the ends of justice.”⁸⁹ Numerous other decisions also incorporate this purpose, often to the exclusion of the other goals.⁹⁰ Convenience to the court is a further complicating factor. As docket congestion increases, this goal may well become more important.⁹¹

In this maze of indeterminate balancing of qualitative values, federal courts often do not explicitly acknowledge a critical factor—citizenship of the litigants. In *Swift & Company Packers v. Compania Colombiana del Caribe, S.A.*, the Supreme Court stated that “[a]pplication of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners.”⁹² The Court implied that it would grant *forum non conveniens* motions less freely when an American citizen is a party to the case.⁹³ Lower court decisions show that this implication may actually be the rule. Prior to 1970, there were “no reported cases . . . in which an American plaintiff, suing in his own right, was actually relegated to a court in a foreign country” through a successful *forum non conveniens* motion.⁹⁴

89. “The issue of convenience aside, the more important question is whether the relinquishment of jurisdiction would best serve the ends of justice.” *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966). The court denied a *forum non conveniens* motion because it would force the libelants into “a foreign forum in which the procedural remedies are far less conducive to the fair administration of justice than those available under [U.S.] admiralty rules.” *Id.*

90. *See, e.g.*, *The Belgenland*, 114 U.S. 355, 367 (1885) (admiralty courts are to exercise jurisdiction of cases between foreigners “unless special circumstances exist to show that justice would be better subserved by declining it.”); *Poseidion Schiffahrt, G.M.B.H. v. M/S Netuno*, 474 F.2d 203, 204 (5th Cir. 1973), *vacating* 335 F. Supp. 684 (S.D. Ga. 1972) (“The standard for a federal court to use in determining whether to exercise its jurisdiction in an *in rem* libel involving foreign vessels . . . is, therefore, that the court should exercise its jurisdiction unless the defendant can establish that to do so would work an injustice.”); *Zouras v. Menelaus Shipping Co.*, 336 F.2d 209, 211 (1st Cir. 1964) (“[T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.”) (citation omitted); *Motor Distributors v. Olaf Pedersen’s Rederi A/S*, 239 F.2d 463, 465 (5th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957) (“[T]he rule is . . . that jurisdiction should be taken unless to do so would work an injustice.”); *Fillippou v. Italia Societa Per Azioni di Navizione*, 254 F. Supp. 162, 163 (D. Mass. 1966) (“[J]ustice may as well be done by remitting the plaintiff to a more appropriate forum.”); *Flota Maritima Browning de Cuba, S.A. v. The Ciudad de la Habana*, 181 F. Supp. 301, 311 (D. Md. 1960) (“[I]t is very doubtful whether Libellant can hope to receive justice in Cuba. That is the dominant factor to be considered.”). These decisions indicate that even for courts adopting a “justice” standard for their *forum non conveniens* determinations, variation exists as to whether to apply this test impartially, or to skew it by assuming that justice requires the exercise of jurisdiction in the present forum.

91. Note, *supra* note 85, at 766. *See also* *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 453 (D. Del. 1978) (“Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin.”).

92. 339 U.S. 684, 697 (1950).

93. *See id.* at 697-98. *See also* *Isbrandtsen Co. v. Lloyd Brasileiro Patrimonio Nacional*, 85 F. Supp. 70 (E.D.N.Y. 1949).

94. 7 TEX. INT’L L.J. 513, 514 (1972) (footnotes omitted). The author of Note, *supra* note 85, remarked that the commentator in 7 TEX. INT’L L.J., *supra*, “qualified this statement with

While a few recent decisions have eroded this absolute position⁹⁵ (further compounding confusion surrounding application of the doctrine), federal courts will normally deny a forum non conveniens motion asserted against a U.S. plaintiff.⁹⁶ Even where an American defendant has requested transfer to an alternate forum, federal courts have denied the motion in about half the cases.⁹⁷ Conversely, in over half the cases between aliens or foreign corporations, U.S. courts have granted forum non conveniens dismissals.⁹⁸

Other than the parties' citizenship, analysis of U.S. federal courts' decisions reveals no guiding principles by which to evaluate forum non conveniens determinations. Courts often merely state their holdings with little or no analysis.⁹⁹ The fairness factors courts cite have not been applied with uniformity. Thirty-five years ago, one commentator remarked that the

the phrase 'outside of admiralty,' but cited no admiralty case in which a U.S. plaintiff had been subject to a [forum non conveniens] dismissal in favor of a foreign forum." Note, *supra* note 85, at 799 n.150.

95. See *Mizokami Bros. v. Baychem Corp.*, 556 F.2d 975 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Texaco Trinidad, Inc. v. Astro Exito Navegacion, S.A.*, 437 F. Supp. 331 (S.D.N.Y. 1977); *Bernuth Lembcke Co. v. Siemens A.G.*, [1976] Am. Mar. Cas. 2175 (S.D.N.Y.), *vacated as moot*, No. 76-7512 (2d Cir. Nov. 19, 1976); *Mohr v. Allen*, 407 F. Supp. 483 (S.D.N.Y. 1976); *Packard Instrument Co. v. Beckman Instruments, Inc.*, 346 F. Supp. 408 (N.D. Ill. 1972). See Note, *supra* note 85, at 782-90 for discussion of these cases and the recent trend.

96. Note, *supra* note 85, at 781. See also *Hoffman v. Goberman*, 420 F.2d 423, 428 (3d Cir. 1970) (federal courts will follow an American plaintiff's election of a forum unless "persuasive evidence" exists that "the retention of jurisdiction will result in manifest injustice to the defendant") (footnote omitted); *Mobil Tankers Co. v. Mene Grande Oil Co.*, 363 F.2d 611, 614 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966). See generally Annot., 10 A.L.R. Fed. 352, 397-411, 433-36 (1972).

97. This figure is compiled from cases presented in Annot., 10 A.L.R. Fed. 352, 408-11, 433-36 (1972) and Note, *supra* note 85, at 778-79. See, e.g., *Escalante v. Fernandez*, No. 77-1624-Civ. (S.D. Fla. Sept. 23, 1977); *Kearney v. Savannah Foods & Indus., Inc.*, 350 F. Supp. 85 (S.D. Ga. 1972); *Alegria v. Grand Bassa Tankers, Inc.*, 337 F. Supp. 401 (S.D.N.Y. 1971); *Fiorenza v. United States Steel Int'l, Ltd.*, 311 F. Supp. 117 (S.D.N.Y. 1969); *Argyll Shipping Co. v. Hanover Ins. Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968) (one U.S. and seven Japanese defendants); *Karakatsanis v. Conquestador Cia. Nav., S.A.*, 247 F. Supp. 423 (S.D.N.Y. 1965); *Lascaratos v. S/T Olympic Flame*, 227 F. Supp. 161 (E.D. Pa. 1964); *Pavlou v. Ocean Traders Marine Corp.*, 211 F. Supp. 320 (S.D.N.Y. 1962); *Burie v. Overseas Navigation Corp.*, 205 F. Supp. 182 (S.D.N.Y. 1962), *aff'd mem.*, 323 F.2d 873 (2d Cir. 1963), *cert. denied*, 377 U.S. 904 (1964); *Harrison v. United Fruit Co.*, 141 F. Supp. 35 (S.D.N.Y. 1956); *Linea de Vapores Garcia, S.A. v. The President Polk*, 89 F. Supp. 952 (E.D.N.Y. 1950).

98. See Note, *supra* note 85, at 764-77; Annot., 10 A.L.R. Fed. 352, 411-31 (1972). See also Note, *The Convenient Forum Abroad*, 20 STAN. L. REV. 57 (1967).

99. See, e.g., *Kapatsos v. M/V Barlby*, 238 F. Supp. 654, 655 (E.D. La. 1965) (justice best served by dismissal); *Transcontinental Commodities, Inc. v. Italnavi Societa di Navigazione per Azioni-Genova*, 175 F. Supp. 406, 409 (S.D.N.Y. 1959) (court dismissed forum non conveniens motion in one sentence); *Gonzales v. Dampskolsk Dania A.S. The Danvig*, 108 F. Supp. 908, 909 (S.D.N.Y. 1952) (justice not necessarily best served by dismissal; defendant's motion denied); *Lunde v. Skibs A.S. Herstein*, 103 F. Supp. 446, 447 (S.D.N.Y. 1952) (court dismissed claims for maintenance and cure on forum non conveniens motion in two

admiralty courts' application of forum non conveniens "has been much like that of the proverbial Topsy,"¹⁰⁰ and decried the paucity of reasoned analysis.¹⁰¹ The intervening years, with their increase of international litigation, have only seen analysis of the doctrine whirl more confusedly than ever.¹⁰²

Second, although some European law contains analogues to forum non conveniens,¹⁰³ the concept varies among nations.¹⁰⁴ This inconsistency will lead to dissimilar results on a motion for the court's discretionary dismissal of a case, depending on the country the plaintiff sues in and the nationalities of the litigants. For example, if an English citizen sued a citizen of state *X* in an English court, dismissal to state *X* would be unlikely because English courts impose a heavy burden on the defendant to establish that injustice would result from trial in English courts.¹⁰⁵ In addition, English courts traditionally prefer English plaintiffs.¹⁰⁶ By contrast, American courts tend to grant forum non conveniens dismissals in cases between aliens.¹⁰⁷ Thus, a U.S. court deciding the same hypothetical case under 28 U.S.C. § 1350 might well subject the English plaintiff to a foreign forum.

This incentive to forum shop among nations adds to the previously mentioned problems of confused application of the forum non conveniens doctrine within a country.¹⁰⁸ The former problem appears even more difficult to resolve than the latter. Combined, these factors argue against the

sentences); *Linea de Vapores Garcia, S.A. v. The President Polk*, 89 F. Supp. 952 (E.D.N.Y. 1950) (court denied forum non conveniens motion with a one sentence convenience argument).

100. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12, 19 (1949).

101. *Id.* at 47.

102. See Note, *supra* note 85, at 791.

103. The origins of the doctrine are obscure. Barrett, *supra* note 82, at 386 & n.34. The concept appears limited to Europe and the United States, however. 56 HARV. L. REV. 1162 (1943).

104. For a discussion of Scottish law, see note 82 *supra*. See also Comment, *Foreign Collisions and Forum Conveniens*, 22 INT'L & COMP. L.Q. 748, 752-53 (1973).

The term forum non conveniens is unknown in English law, and the House of Lords has stated in a recent case that the relevant English law has developed differently from comparable Scottish and American law. *The Atlantic Star*, [1974] A.C. 436, 454, 456, 464. While traditionally, English courts refused to stay proceedings to a foreign forum unless the action's continuance in England would work an "oppressive or vexatious" injustice upon the defendant, see note 82 *supra*, a 1978 House of Lords decision indicated a more liberal attitude toward allowing stays to foreign fora. *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795. The court, however, refused to adopt the Scottish concept of forum non conveniens wholesale into English law. *Id.* at 811, 817.

105. See note 82 *supra*.

106. See, e.g., Lord Keith's consideration in *MacShannon* of the plaintiff's place of residence, implying a greater tendency to continue an action when the plaintiff is an English citizen and therefore in a "natural" forum. [1978] A.C. at 829.

107. See note 98 *supra* and accompanying text.

108. See notes 99-102 *supra* and accompanying text.

use of the forum non conveniens doctrine in cases involving international claims.¹⁰⁹

IV

CONFLICTS BETWEEN DOMESTIC REMEDIES AND FORUM NON CONVENIENS IN SECTION 1350 ACTIONS

A. CATEGORIES OF CONFLICTS

The rules of forum non conveniens and exhaustion of local remedies may conflict in a section 1350 action in two circumstances.¹¹⁰ First, an alien might sue a government in federal court for an alleged tort violation of international law.¹¹¹ If the U.S. Government is the defendant, conflict between the two doctrines is unlikely. The federal court hearing the action is the most convenient forum, and its remedies are the local remedies. Where a foreign government is the defendant, the act of state doctrine,¹¹² the Foreign Sovereign Immunities Act,¹¹³ and lack of a sufficient connection with the U.S. forum under *Shaffer v. Heitner*¹¹⁴ would all normally

109. See text accompanying notes 122-36 *infra*.

One judge has argued that the entire forum non conveniens concept should be reexamined in light of: (1) escalating claims versus relatively inexpensive travel costs to fly witnesses to the forum, wherever located; (2) the growth of multinational subsidiaries; and (3) the trend toward handling international cases primarily by deposition, especially in admiralty. *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 & nn.2-3 (2d Cir. 1975) (Oakes, J., dissenting).

110. Conflict between the two doctrines might theoretically arise in two other situations: a state suing a state, or a state suing an individual. Only alien individual or corporate plaintiffs have jurisdiction under section 1350, however. Thus, the statute automatically preempts consideration of cases involving a foreign state as plaintiff.

111. An example of this situation would be a hypothetical variation of *Filartiga*, discussed at notes 11-12 *supra* and accompanying text, whereby the plaintiffs sued the Paraguayan government instead of a private individual. See also *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958) (action brought under 28 U.S.C. § 1350 by both American citizens and non-resident aliens to enjoin U.S. Government from detonating nuclear weapons in the Marshall Islands), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960).

112. The act of state doctrine assumes that domestic courts are unsuitable tribunals to resolve international conflicts and states that judicial deference will be accorded to an act of state taken by a recognized foreign government within its own territory, even though the foreign government's act may violate customary international law. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); See also Comment, *The Act of State Doctrine: International Consensus and Public Policy Considerations*, 8 N.Y.U. J. INT'L L. & POL. 283 (1975).

113. 28 U.S.C.A. §§ 1602-1611 (West Supp. 1980). The Act grants foreign states immunity from jurisdiction in U.S. courts, with certain limited exceptions (primarily concerning a government's commercial activities).

114. 433 U.S. 186 (1977). The Court rejected attachment of property as the sole basis for quasi in rem jurisdiction and adopted the "minimum contacts" test of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). 433 U.S. at 212. Thus, attaching a foreign government's U.S. assets would not necessarily enable a plaintiff to obtain jurisdiction over the foreign government.

justify dismissal of the case and thus pretermitt consideration of either forum non conveniens or the local remedies requirement.¹¹⁵

The two doctrines are most likely to collide in the second category of cases—one individual suing a corporation or individual in a domestic court on an international law claim. Consider *Filartiga*.¹¹⁶ Because federal courts lacked a principled analysis, defendant's forum non conveniens motion to dismiss may be granted or denied, depending on the factors emphasized. Consideration of the procedural and substantive barriers to a fair trial in Paraguay argues for continuation of the action in the United States.¹¹⁷ A majority of the other *Gulf Oil* factors, however, point toward dismissal to Paraguay. Access to sources of proof and availability of witnesses are both easier in Paraguay, that state has an interest in deciding localized controversies at home, and dismissal is more convenient for the U.S. court.¹¹⁸ Finally, as a practical matter, federal courts have granted forum non conveniens dismissals in over half the reported cases between aliens.¹¹⁹ The Eastern District of New York, on remand, may well decide similarly.

Conversely, if the court decided to apply exhaustion of local remedies analysis it would retain the action in the United States. Proof of bias in the Paraguayan courts through executive branch domination establishes ineffective local remedies and consequent waiver of the normal requirement.¹²⁰ Thus, the analysis under the two doctrines indicates contrary results.

B. A MODEST PROPOSAL

All legal systems contain two primary yet somewhat inconsistent

115. The Second Circuit indicated in dictum in *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976), that an individual could never sue his own state for a violation of international law. If followed by other courts, this category of potential conflict between forum non conveniens and the domestic remedies requirement would be eliminated. The court's statement, while following the classic view of international law, violates the original intent of section 1350 and should be abandoned. *See* text accompanying notes 28-29 & 35-39 *supra*.

116. No. 79-6090 (E.D.N.Y. May 18, 1979) (action dismissed), *appeal docketed*, (2d Cir. June 4, 1979) For the facts of the case, see notes 11-12 *supra* and accompanying text.

117. *See, e.g.*, *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) ("The court will weigh relative advantages and obstacles to fair trial."); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445, 455 (D. Del. 1978) (plaintiff represented by affidavit that Ecuador, the alternative forum, "is presently controlled by a military government which has 'assumed the power of the executive and legislative branches and rules by fiat,' 'has specifically retained the right to veto or intervene in any judicial matter which the Military Government deems to involve matters of national concern,' and 'has absolute power over all branches of government.'" (footnote omitted)).

118. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

119. *See* text accompanying note 98 *supra*.

120. *See* notes 66-67 *supra* and accompanying text.

goals—uniformity and fairness.¹²¹ Because the local remedies doctrine better accommodates both of these goals than does forum non conveniens, the former doctrine should be preferred over the latter when the two theories conflict.¹²² Forum non conveniens lacks uniformity in two senses.¹²³ By contrast, the local remedies rule developed as an international law doctrine, which means that it applies equally to all states. Courts and commentators agree on most aspects of the doctrine's implementation.¹²⁴ Because of this history, the domestic remedies rule would better promote uniformity than forum non conveniens.

The forum non conveniens doctrine explicitly balances several convenience and fairness factors in deciding upon the appropriateness of an alternative forum.¹²⁵ The local remedies rule, however, does not forsake fairness considerations in its application. The policies underlying the local remedies rule and its exceptions suggest considerations similar to forum non conveniens factors.¹²⁶ Moreover, the exhaustion of local remedies doctrine tacitly assumes that the state where the claim arose generally represents a fairer and more convenient forum in which to initially adjudicate the action than an international tribunal. If not, the doctrine provides the "ineffectiveness" and "administrative practice" exceptions.

Other independent considerations also favor exhaustion of local remedies analysis over forum non conveniens. One *Gulf Oil* factor—difficulty in applying law foreign to the forum¹²⁷—evaporates for international law issues. Both fora are equally qualified to decide the relevancy of international law in the particular case. As one commentator has remarked, "[t]he forum non conveniens approach may not be very useful for international law issues. . . . [A] single-minded approach might be more acceptable as applied to international law than to foreign law."¹²⁸

121. The Supreme Court has remarked that as to international law, various constitutional and statutory provisions (including 28 U.S.C. § 1350) reflect "a concern for uniformity in this country's dealings with foreign nations. . . ." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

122. For discussion of those rare cases where forum non conveniens analysis is a better tool to achieve these goals, see text accompanying notes 133-35 *infra*.

123. See text accompanying notes 82-109 *supra*.

124. Disagreement exists, however, concerning the standard to be used in determining ineffectiveness. See note 58 *supra*.

125. See text accompanying notes 83-90 *supra*. See also Blair, *supra* note 2, at 25-27 (unfairness in removing state's own citizen to foreign forum as one factor to consider).

126. See text accompanying notes 48, 50 & 58-61 *supra*. These exceptions indicate that the local remedies rule applies only when it is fair to do so.

127. See text accompanying note 83 *supra*.

128. Saltzburg, *Discovering and Applying Foreign and International Law in Domestic Tribunals: An Introduction to the Second Annual Sokol Colloquium*, 18 VA. J. INT'L L. 609, 615-16 (1978).

Finally, the local remedies rule embodies considerations of international comity that *forum non conveniens*, because of its development in domestic law, lacks. In its traditional context, the former doctrine reflects more sensitivity to maintaining stable international relations by explicitly recognizing a state's need to remedy international law violations committed within its borders without undue international repercussions.¹²⁹ Analysis under the latter doctrine, dependent upon the various factors different courts emphasize in their *forum non conveniens* analysis, achieves this goal only haphazardly. Such fortuities will occur even less frequently when a plaintiff brings suit in his own forum.¹³⁰

Under this proposed analysis, the federal courts should allow the *Filarigas* to continue their action in the United States. Other courts adopting an exhaustion of local remedies analysis would uniformly apply the traditional futility exception to the rule based on the Paraguayan government's domination over the judiciary.¹³¹ The fairness policies underlying the exceptions to the local remedies rule also indicate retention of federal jurisdiction,¹³² even though the U.S. court may be slightly inconvenienced by another case on its docket, and the defendant would much prefer the "safety" of Paraguayan courts. Cases may occur, however, in which *forum non conveniens* analysis would be the proper approach to follow. Those cases would be ones in which no act connecting the state, even under color of law, exists. For example, suppose a citizen of state *X* sues a citizen of state *Y* in federal district court under 28 U.S.C. § 1350, alleging a tort occurring in state *X*. All the defendant's supporting witnesses reside in state *Y*. No pertinent evidence appears to be in state *X*, and no state involvement is alleged. The defendant moves to dismiss the case on a *forum non conveniens* motion. What result? Without state involvement, many of the traditional policy reasons behind the local remedies requirement break down. Whatever the result, the court's decision will not affect international relations. Thus, fairness to the parties is the key concern. The local remedies rule considers these fairness goals, but only implicitly.¹³³ By contrast, American analysis of the *forum non conveniens* doctrine explicitly places these factors in the limelight of consideration.¹³⁴ Therefore, *forum non*

129. See text accompanying notes 49 & 52 *supra*.

130. For a discussion of U.S. courts' reluctance to subject a U.S. plaintiff to a foreign forum, see text accompanying notes 94-96 *supra*. See notes 104-06 *supra* and accompanying text for a similar pro-English plaintiff bias in English courts.

131. See, e.g., *Brown Case* (United States v. Great Britain), 6 R. Int'l Arb. Awards 120, 129 (1923).

132. See text accompanying note 126 *supra*.

133. See *id.*

134. See text accompanying notes 85-90 *supra*.

conveniens analysis appears preferable in resolving dismissal issues in such cases.¹³⁵

CONCLUSION

Domestic courts act as unofficial agents of both the political institutions of the particular state and the international legal order.¹³⁶ Additionally, all judicial systems strive to attain the goals of uniformity and fairness. These conflicting demands exert pressures upon domestic courts that may result in confusion and inconsistency in cases applying international law. A proper understanding of the forum non conveniens and exhaustion of local remedies rules will promote a policy-oriented approach to international claims in domestic courts. In most of these cases, courts will better achieve uniformity and fairness by abandoning forum non conveniens analysis. Exhaustion of local remedies, a true international law doctrine, offers a better judicial tool for the implementation of both national and international legal orders.

*Stephen W. Yale-Loehr**

135. A more uniform treatment of the fairness factors would enhance the effectiveness of this proposed approach. For discussion of the confusion in U.S. courts, see text accompanying notes 85-102 *supra*. Even given this confusion, however, U.S. courts' analysis, because it explicitly lists the appropriate factors, seems preferable over the turmoil in English courts. While the House of Lords' decision in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, indicates a more liberal attitude toward allowing stays to foreign fora, the Lordships varied in choice of criteria by which to determine when to stay an action. *See id.* at 812 (Lord Diplock considering relative expenses and convenience to the parties and witnesses); *id.* at 819-20 (Lord Salmon inconsistently urging both a test derived from a *court's* sense of justice (undefined) and a standard dependent upon a defendant's proof of injustice to *himself*); *id.* at 829 (Lord Keith, distinguishing cases where England is the "natural" forum from those where it is not). The profusion of proposed tests in *MacShannon* recalls the old Scottish proverb that "[m]any a mickle makes a muckle." *Id.* at 814 (Lord Diplock).

136. Lillich, *supra* note 4, at 47.

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As this Note went to press, the Second Circuit rendered its decision in *Filartiga v. Pena*, No. 79-6090 (2d Cir. June 30, 1980). In reversing the district court's dismissal, the court held that official torture violates the law of nations and, hence, satisfies the section 1350 jurisdictional prerequisite. *Id.*, slip op. at 3913, 3937. The court rejected its prior dictum that individuals cannot sue their own states under section 1350 as "clearly out of tune" with current practice. *Id.* at 3929. While accepting the basic test for determining violations of the law of nations, the court warned against static

interpretations of issues states may deem important to their interrelationships. *Id.* at 3938. The opinion's broad interpretation of section 1350 may signal a return to the statute's original intent. The Second Circuit did not reach the "critical question" of forum non conveniens, and defendant's motion on that issue will be heard on remand. *Id.* at 3941. As discussed in this Note, defendant Pena might also assert the defense of exhaustion of local remedies.
