

CHAPTER ELEVEN: INTERNATIONAL LAW IN U.S. COURTS

Pages 261-290

A. Monism and Dualism

Introduction. Suppose we wanted to find out whether rules of international law are more cited by courts as the rules of decision in international courts (such as the World Court, the European Court of Human Rights or the Inter-American Court of Human Rights) or in the domestic courts of the nations of the world, what would be the result of the survey? No one has undertaken such a survey, but any international lawyer will estimate that over 99% of the cases that turn on rules of international law are filed in domestic courts. This may even be a conservative estimate; it could go as high as 99.9%.

In this Coursebook we have already seen numerous examples of international-law cases in U.S. courts. We have also read several leading cases of the World Court. These cases, important for their impact upon international law, nevertheless are not representative of the *proportion* of international-law cases that arise. There are more World Court cases in this Coursebook than the true proportion of real-world cases. For the fact is that most international law cases arise in domestic courts.

Some writers--perhaps those who know a great deal about the domestic cases of their own countries and not as much about international law--have come up with a theory that has been termed "Dualism." This theory is that international law only exists as it is manifested in domestic courts. It follows that if there are approximately 190 nations in the world today, there are approximately 190 versions of international law. The Dualists believe that international law changes as we go from one state to another. This is a consequence of their belief that the only "real" law is the law of any given nation. Only to the extent that a nation's law reflects "international law," will these writers accept its existence.

The great theorist of jurisprudence Hans Kelsen dismissed the Dualist theory as nonsense.¹ If international law exists at all, Kelsen argued, it cannot be superseded by any domestic law. A nation cannot enact laws that contradict international law and thereby avoid their legal responsibility to other nations.

An example of Kelsen's view (the theory of "Monism") is the Alvarez abduction case that we have read in the chapter on International Criminal Law. The Supreme Court of the United States held that the abduction of Dr. Alvarez-Machain did not violate the U.S.-Mexico Extradition Treaty. Certainly the Supreme Court's decision is "good law" internally in the United States. But just as certainly, it cannot bind Mexico. The Supreme Court of the United States has no jurisdiction over Mexico. If the Mexican government regards the Alvarez abduction as violating the U.S.-Mexico Extradition Treaty, no holding of the U.S. Supreme Court can force the Mexican government to change its mind (just as no holding of the Supreme Court of Mexico can force the United States government to change *its* view of the matter). In fact, the government of Mexico did not change its mind as a result of the Supreme Court's decision. Perhaps the reasoning of the Supreme Court might have convinced the government of Mexico. But also, perhaps, the reasoning was not very persuasive. The Supreme Court's decision had no legal effect upon the validity of Mexico's claim under international law that its Extradition treaty with the United States was violated by the United States. Mexico would be free, in any international forum, to sue the United States for damages. Or, Mexico might ask the United States for reparations on the diplomatic level. Apparently Mexico extracted valuable concessions from the United States following the Supreme Court's decision in the Alvarez Case. (See *Anthology*, p. 408.)

Under Kelsen's theory of Monism, international law is supreme over the domestic laws of all nations. Of course, Kelsen is not saying that we have a world government under law. He is only saying that, whenever there is a rule of international law, it supersedes any domestic rule that is inconsistent with it. Nor is Kelsen saying that the international rule necessarily supersedes the domestic rule in domestic courts. Surely it is possible--indeed, likely--that a state may regard its domestic laws as superior to international rules. Indeed, the Alvarez Case is an example of this. As far as internal U.S. law is concerned, the Supreme Court's decision in the Alvarez case is final. In other words, for domestic-law purposes, the United States did not violate the U.S.-Mexico Extradition Treaty. But Kelsen's point is that this only works for internal U.S. law. It cannot work for international law. On the international plane, whether or not the abduction of Dr. Alvarez violated the U.S.-Mexico Treaty is an issue for international legal resolution. Neither the domestic courts of the United States nor the domestic courts of Mexico, acting unilaterally, can definitively resolve this international law issue.

Hence, under Kelsen's theory, if a nation enacts a domestic law that is inconsistent with a rule of international law, and if that nation's courts proceed to apply the domestic rule instead of the international rule, then--as far as international law is concerned--that nation has violated international law. The violation is entirely on the

international level; it does not affect the internal law of the violating nation.

If Kelsen is right--if Dualism is nonsense--why has it attracted occasional support, and why does it keep coming back? Perhaps Dualists simply do not believe that international law exists, and they have adopted a cumbersome way of saying so. But a more likely explanation was given back in 1940 by Edwin Borchard:

International law exerts a command upon law-abiding States not to depart from its precepts. The domestic instruments that the State employs to perform its international obligations are a matter of indifference to international law. It may employ a statute or an administrative official or judicial control. It may directly incorporate international law into the local system, or it may incorporate only treaties and not customary law.

The American courts, like the English, are said to consider international law part of the law of the land. And this is true, for international law will in principle be enforced directly in municipal courts provided there is not statute *contra*. Where there is a statute which conflicts with international law, the courts must perforce give effect to the statute. . . . But this merely indicates that the municipal economy or administration is arranged so that the enforcement of the international obligation is vested not in the courts but in a different department. This phenomenon has led to the inference [i.e., the theory of Dualism] that the municipal law prevails over a contrary rule of international law. But this merely means that the courts have no local authority to give effect to international law *when it conflicts with municipal statute*, but that such function is vested in this country in the Secretary of State, who is the agent of the American people for the enforcement of international law.²

In other words, Borchard believes that Dualists are so overwhelmed by the decisions of the Judicial Branch of the government (decisions that often choose domestic law over international law) that they lose sight of the fact that the Executive Branch of the government has to pay the price for the international-law violation. It is clear that the Executive Branch cannot cite the decision *of its own national court* as an excuse to get out of its international responsibility to another country! As Borchard says in another part of his essay, if local laws are in violation of international rules the nation itself "will be bound either to make restitution or to pay damages through arbitration or diplomacy."

It is clear that with so many international law decisions being made by domestic courts, a number of those decisions will be plainly contrary to the applicable rules of international law and will thus engage the nation's responsibility on the international level. What can a nation do to minimize the risk that its own courts will decide cases contrary to the rules of international law?

They could adopt the Federal Republic of Germany's solution. Article 25 of Germany's Constitution reads as follows:

Article 25

The general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.

Of course, many nations are not willing to go this far. Most nations still cling to an exaggerated notion of sovereignty; they are fearful about letting rules of international law tell their own courts what to do. Recently, however, nations seem to be moving toward the German model, toward direct incorporation of rules of international law in their domestic legal system. Some of the republics that have emerged from the break-up of the Soviet Union exemplify this trend.

What about the United States? To what extent do its courts apply rules of international law? The answer is complex--as perhaps befits a "nation of lawyers."

Does the United States Constitution contain any clause like that of Article 25 of the German Constitution? There is one relatively unfamiliar portion of a clause that is at least second cousin to Article 25. Let us pause to examine it, not for its present-day substantive significance, because it doesn't have much of that, but for what it tells us about how a new nation relates to the rules of international law which form the context of its birth.

In 1789, the United States adopted its Constitution, which provides in Article VI:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . .

This is the famous Supremacy Clause; what tends to be overlooked about it is the phrase "all Treaties made, or which shall be made, under the Authority of the United States." What could the Constitution be referring to when it talks about "Treaties made"? If the Constitution is the founding instrument of the United States, then the Supremacy Clause should have simply referred to all treaties which shall thereafter be made. Were there treaties already in existence, binding upon the United States, when the Constitution came into being?

The answer is obviously yes. The United States declared its independence in 1776. Between that time, and the time of the adoption of the Constitution in 1789, the United States existed for sixteen years, some of which time was

governed by the Articles of Confederation. Treaties were made in the name of the United States in that sixteen-year period. When the framers drafted the new Constitution, they wanted to be sure that no negative inference could be drawn as to the validity of the treaties (primarily treaties of peace) previously made by the United States. Indeed, the United States wished to retain the benefit of those treaties, and not give foreign powers any excuse to argue that all bets were off. Since treaties made prior to the 1789 could not have been made "in pursuance of the Constitution," the continuing vitality of those treaties was reaffirmed by the phrase "all Treaties made. . .under the Authority of the United States."

What if an Article in one of those treaties made prior to 1789 was inconsistent with the Constitution? What would prevail--the treaty or the Constitution? Article VI supplies a clear answer: the treaty prevails. In this respect, the phrase about "all Treaties made" is a good second cousin to Article 25 of the German Constitution, for all treaties made prior to 1789 supersede any American law to the contrary, even a law contained in the Constitution itself!

Are any of those pre-1789 treaties still in force today? In fact, many of the old peace treaties retain their force, because they dealt with title to territory. The boundary between the original thirteen colonies and Canada is still in effect, and traces back to the treaties of peace following the American Revolution. In addition, various words and phrases in the pre-1789 treaties have been repeated verbatim in subsequent treaties of friendship, commerce, and navigation. While the old treaties themselves have been supplanted by new ones, where the terms remain the same there is good reason to look back at the old meaning of the terms as understood by the parties in the pre-1789 period. In this sense, too, the old treaties retain some present-day vitality.

The much harder question of American Constitutional law is: what happens if treaties made subsequent to 1789 contain provisions that contradict the Constitution? Is it possible for the United States government to negotiate a treaty with a foreign country that results in giving the United States government powers, under the treaty, that it would not have under the Constitution? This question came up in the famous case of *Missouri v. Holland*, 252 U.S. 416 (1920). Justice Holmes' opinion in that case was stirring as a matter of prose style but lacking somewhat in clarity. It was not at all clear, after the Supreme Court issued its judgment, that the question in the case was answered: whether a treaty provision could give the federal government more powers under Article 10 of the Constitution than it would have had in the absence of the treaty. No treaty ever entered into by the United States has had a provision in it that on its face was contrary to the Constitution, so the precise question under the Supremacy Clause whether a treaty must be made "pursuant" to the Constitution has not yet been litigated. But in *Reid v. Covert*, 354 U.S. 1 (1957), Justice Black, writing for the majority, seems to have answered the question:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.

In other words, a treaty made under the "Authority of the United States" as provided in the Supremacy Clause must be made pursuant to the Constitution. We might therefore interpret Justice Black's language as saying that any treaty containing a provision in violation of the Constitution would simply be void. It would be void at least as to that provision because that provision could not have been made under the authority of the United States.

Does *Reid v. Covert* support the Dualist theory? Clearly the Supreme Court cannot invalidate a provision in a treaty as far as another party to the treaty is concerned, any more than the Supreme Court could have settled the abduction question in the Alvarez case as far as Mexico was concerned. Why, then, does the Dualist theory continue to pop up from time to time? The following reading assignment may throw light on this question. It is a debate between a Dualist (Phillip Trimble) and a Monist (Anthony D'Amato).

Reading Assignment: *International Law Anthology*, pp. 400-10.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. What does Phillip Trimble mean by "domesticating" international law?
2. What advantages does Trimble find in domesticating international law? As to each one, do you agree that it is an advantage?
3. Does domesticating international law increase its legitimacy in the United States? Why?
4. Do you see problems with reliance on treaties for universally applicable international norms? Doesn't that bring us back to a system based entirely on consent?
5. Does Trimble feel that giving international law greater legitimacy (by domesticating it) could be enough to overcome the tendency of states simply to act in their own self-interest? Or is that what states do anyway?

6. How is self-interest defined? Is it part of a state's self interest to behave in accordance with international norms?

7. Does the domestication of international law give us any new enforcement mechanisms? Does it take any away?

8. How can international law work as a default rule in cases involving a conflict of laws problem according to Trimble? According to D'Amato? Which view of international law do you find more helpful in a conflict-of-laws case?

9. What is the main problem with the practical application of Trimble's thesis according to D'Amato?

10. How does the *Alvarez* case weigh in on the Monism-Dualism debate? Does D'Amato's reasoning persuade you? Does Trimble rebut D'Amato?

B. Conventional International Law

Introduction. If the United States is party to a treaty, the provisions in the treaty--under the Supremacy Clause of the Constitution--are the supreme law of the land. We have already examined a number of cases in earlier Chapters where treaties have furnished the applicable rules of decision for U.S. courts. This was true of the extradition cases we read in Chapter 6 on International Criminal Law, as well as the Alvarez abduction case in the same Chapter (where the Supreme Court held that the treaty, had it been applicable, would have been the rule of decision in the case--but, as the Court construed the treaty, it was not applicable.) You might want to go back and reread these cases for what they say about applying treaties in domestic law contexts.

The really difficult problem in American law is whether a provision in a treaty is "self-executing"--that is, whether it is directly applicable in a domestic case, or whether it is "non-self-executing," that is, whether it is inapplicable in a domestic case because Congress has not passed the necessary implementing legislation to make it applicable.

Asakura v. City of Seattle
In the Supreme Court of the United States
265 U.S. 332 (1924)

Mr. Justice BUTLER delivered the opinion of the Court.

Plaintiff in error is a subject of the emperor of Japan, and since 1904 has resided in Seattle, Wash. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker, and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provides "that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the superior court of King county, Wash., against the city, its comptroller, and chief of police, to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the empire of Japan, proclaimed April 5, 1911 (37 Stat. 1504); violates the Constitution of the state of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about \$5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The superior court granted the relief prayed. On appeal, the Supreme Court of the state held the ordinance valid and reversed the decree. The case is here on writ of error.

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions:

Article I

The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

The citizens or subjects of each shall receive, in the territories of the other, the most constant protection and security of their persons and property.

A treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." Constitution, art. 6, § 2.

The treaty-making power of the United States is not limited by any express provision of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects

of negotiation between our government and other nations.³ The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the state of Washington. The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.⁴

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

It remains to be considered whether the business of pawnbroker is 'trade' within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.⁵ The language of the treaty is comprehensive. The phrase 'to carry on trade' is broad. That it is not to be given a restricted meaning is plain. The [other] clauses [of Article 1] all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word 'trade' as used in the treaty.

The ordinance violates the treaty. The question in the present case relates solely to Japanese subjects who have been admitted to this country. We do not pass upon the right of admission or the construction of the treaty in this respect, as that question is not before us and would require consideration of other matters with which it is not now necessary to deal. We need not consider other grounds upon which it is attacked.

Decree reversed.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Note that the Supreme Court applied the U.S.-Japan treaty directly to the case of a private litigant.
2. Was there a "non-self-executing" problem in the Asakura Case even though the Court did not address it? What would it be? Consider the next example, the Sei Fujii Case.

Sei Fujii v. State
In the Supreme Court of California
38 Cal.2d 718, 242 P.2d 617 (1952)

GIBSON, Chief Justice.

Plaintiff, an alien Japanese who is ineligible to citizenship under our naturalization laws, appeals from a judgment declaring that certain land purchased by him in 1948 had escheated to the state. There is no treaty between this county and Japan which confers upon plaintiff the right to own land, and the sole question presented on this appeal is the validity of the California alien land law.

[The California alien land law allows only aliens who are eligible to U.S. citizenship to acquire or inherit real estate in California.]

It is first contended that the land law has been invalidated and superseded by the provisions of the United Nations Charter pledging the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race. Plaintiff relies on statements in the preamble and in Articles 1, 55 and 56 of the Charter.⁶

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

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

It is not disputed that the charter is a treaty, and our federal Constitution provides that treaties made under the authority of the United States are part of the supreme law of the land and that the judges in every state are bound thereby. A treaty, however, does not automatically supersede local laws which are inconsistent with it unless the treaty provisions are self-executing. In the words of Chief Justice Marshall, a treaty is

to be regarded in courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the court.

Foster v. Neilson, 1829, 2 Pet. 253, 314 (1829).

In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. In order for a treaty provision to operate without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts.

It is clear that the provisions of the preamble and of Article 1 of the charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations "shall promote" and in Article 56 the member nations "pledge themselves to take joint and separate action." Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter.

The language used in Articles 55 and 56 is not the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals. In *Asakura v. City of Seattle*, 265 U.S. 332, 344, treaty provisions were enforced without implementing legislation where they prescribed in detail the rules governing rights and obligations of individuals or specifically provided that citizens of one nation shall have the same rights while in the other country as are enjoyed by that country's own citizens.

It is significant to note that when the framers of the charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention. For example:

Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

In *Curran v. City of New York*, 191 Misc. 229, 77 N.Y.S.2d 206, 212, these articles were treated as being self-executory.

The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations.

The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or

disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law.

The next question is whether the alien land law violates the due process and equal protection clauses of the Fourteenth Amendment. Plaintiff asserts, first, that the statutory classification of aliens on the basis of eligibility to citizenship is arbitrary for the reason that discrimination against an ineligible alien bears no reasonable relationship to promotion of the safety and welfare of the state. He points out that the land law distinguishes not between citizens and aliens, but between classes of aliens, and that persons eligible to citizenship are given all the rights of citizens regardless of whether they desire or intend to become naturalized. Secondly, he contends that the effect of the statute, as well as its purpose, is to discriminate against aliens solely on the basis of race and that such discrimination is arbitrary and unreasonable.

There can be no question that the rights to acquire, enjoy, own and dispose of property are among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment, and that the power of a state to regulate the use and ownership of land must be exercised subject to the controls and limitations of that amendment. The California act, in the absence of treaty, withholds all interests in real property from aliens who are ineligible to citizenship under federal naturalization laws, and the Nationality Code limits the right of naturalization to certain designated races or nationalities, excluding Japanese and a few racial groups comparatively small in numbers. 8 U.S.C.A. § 703. Congress, however, at least prior to 1924, saw fit to permit aliens who are ineligible for citizenship to enter and reside in the United States despite the fact that they could not become naturalized, and such aliens are entitled to the same protection as citizens from arbitrary discrimination. *Yick Wo v. Hopkins*, 118 U.S. 356. Accordingly, the statute cannot be sustained unless it can be shown that the public interest requires limitation of their rights to acquire and enjoy interests in real property.

The state asserts that the purpose of the alien land law is to restrict the use and ownership of land to persons who are loyal and have an interest in the welfare of the state. As we shall see later, this is not the true objective of the legislation, but even if it were there is no reasonable relationship between that asserted purpose and the classification on the basis of eligibility to citizenship. Just as eligibility to citizenship does not automatically engender loyalty or create an interest in the welfare of the country, so ineligibility does not establish a lack of loyalty or the absence of interest in the welfare of the country. Nor does it follow that a person has no stake in the economic and social fortune of a state merely because the federal law denies him the right to naturalization. His American-born children are citizens, and, having made his home here, he has a natural interest, identical with that of an eligible alien, in the strength and security of the country in which he makes a living for his family and educates his children.

It is generally recognized, however, that the real purpose of the legislation was the elimination of competition by alien Japanese in farming California land. The argument presented in favor of adoption of the act in the 1920 voters pamphlet stated that the statute's "primary purpose is to prohibit Orientals who cannot become American citizens from controlling our rich agricultural lands," that "Orientals, largely Japanese, are fast securing control of the richest irrigated lands in the state," and that "control of these rich lands means in time control of the products and control of the markets." A former attorney general of California declared that the basis of the alien land law legislation was "race undesirability" and that "It was the purpose of those who understood the situation to prohibit the enjoyment or possession of, or dominion over, the agricultural lands of the State by aliens ineligible to citizenship, in a practical way to prevent ruinous competition by the Oriental farmer against the American farmer." See Ferguson, *California Alien Land Law*, 35 Cal.L.Rev. 61, 68 (1947). Although the prevention of agricultural competition between residents of the state might be a proper legislative objective under some circumstances, arbitrary or unreasonable means may not be used to accomplish that result, and discrimination on the basis of race, whether by the terms of a statute or the manner of its administration, is obviously contrary to the Fourteenth Amendment.

The California alien land law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare. Accordingly, we hold that the alien land law is invalid as in violation of the Fourteenth Amendment.

The judgment is reversed.

SCHAUER, Justice (dissenting and concurring).

This case today is probably not of such immediately grave importance to the citizens of California, and to the United States as a nation, as it would have been prior to the events of the period between December 7, 1941, and

August 14, 1945. The long planned occupation and conquest of California by Japan has been at least for the foreseeable future averted. That nation, finally defeated at horrible cost to the United States and to other freedom-loving peoples of the world, as well as to itself, is now building a new government. It is to be hoped that this new government may in time prove its right to, and thereupon be welcomed in, the family of nations as a champion of peace and good will and a defender against aggressors, their stealth, their devices, their cunning and their violence. It is indeed to be fervently hoped that the people of this late enemy nation, though perhaps unwillingly rescued from totalitarianism, may espouse the principles of democracy, and of forthrightness, honesty, reason and gentleness for their own government and in their dealings with all. But the validity of a law should be decided on facts as they existed at the time of its enactment, not on social theories or expectation for the future, or speculation that the United States Supreme Court may eventually change its ruling on a constitutional issue. Justice is pictured as being blind but not in the posture of an ostrich.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Many human rights conventions today are "pledge-type" conventions. States party to the conventions agree to use their best efforts, or to promote, or to enact legislation, in accordance with the treaty provisions. For a good example, see the Convention on the Rights of the Child, in Chapter 12 of this *Coursebook*, and note in particular Questions 1 and 2 directly proceeding the text of that Convention.

2. Was the California Supreme Court clearly right that Articles 55 and 56 of the UN Charter are provable on their face to be non-self-executing?

3. Instead of a provision in a treaty to the effect that a state party shall pass legislation, suppose there is a provision in a treaty whereby a state party agrees *not* to pass a certain kind of statute. Can a *negative* provision of this kind be non-self-executing? Why? Why not? Consider the following passage from a decision of the Kentucky Court of Appeals:

Commonwealth v. Hawes
Kentucky Court of Appeals
76 Ky. (13 Bush.) 697, 702-03 (1878)

When it is provided by treaty that certain acts shall not be done, or that certain limitations or restrictions shall not be disregarded or exceeded by the contracting parties, the compact does not need to be supplemented by legislative or executive action, to authorize the courts of justice to decline to override those limitations or to exceed the prescribed restrictions, for the palpable and all-sufficient reason, that to do so would be not only to violate the public faith, but to transgress the "supreme law of the land."

C. Customary International Law

The Paquete Habana
The Supreme Court of the United States
175 U.S. 677 (1900)

Mr. Justice Gray delivered the opinion of the court:

These are two appeals from decrees of the district court of the United States for the southern district of Florida condemning two fishing vessels and their cargoes as prize of war.

Each vessel was a fishing smack, running in and out of Havana, and regularly engaged in fishing on the coast of Cuba; sailed under the Spanish flag; was owned by a Spanish subject of Cuban birth, living in the city of Havana; was commanded by a subject of Spain, also residing in Havana; and her master and crew had no interest in the vessel, but were entitled to shares, amounting in all to two thirds, of her catch, the other third belonging to her owner. Her cargo consisted of fresh fish, caught by her crew from the sea, put on board as they were caught, and kept and sold alive. Until stopped by the blockading squadron she had no knowledge of the existence of the war or of any blockade. She had no arms or ammunition on board, and made an attempt to run the blockade after she knew of its existence, nor any resistance at the time of the capture.

The Paquete Habana was a sloop, 43 feet long on the keel, and of 25 tons burden, and had a crew of three Cubans, including the master, who had a fishing license from the Spanish government, and no other commission or license. She left Havana March 25, 1898; sailed along the coast of Cuba to Cape San Antonio, at the western end of the island, and there fished for twenty-five days, lying between the reefs off the cape, within the territorial waters of Spain; and then started back for Havana, with a cargo of about 40 quintals of live fish. On April 25, 1898, about 2

miles off Mariel, and 11 miles from Havana, she was captured by the United States gunboat Castine.

The Lola was a schooner, 51 feet long on the keel, and of 35 tons burden, and had a crew of six Cubans, including the master, and no commission or license. She left Havana April 11, 1898, and proceeded to Campeachy sound, off Yucatan, fished there eight days, and started back for Havana with a cargo of about 10,000 pounds of live fish. On April 26, 1898, near Havana, she was stopped by the United States steamship Cincinnati, and was warned not to go into Havana, but was told that she would be allowed to land at Bahia Honda. She then changed her course, and put for Bahia Honda, but on the next morning, when near that port, was captured by the United States steamship Dolphin.

Both the fishing vessels were brought by their captors into Key West. A libel for the condemnation of each vessel and her cargo as prize of war was there filed on April 27, 1898; a claim was interposed by her master on behalf of himself and the other members of the crew, and of her owner; evidence was taken, showing the facts above stated; and on May 30, 1898, a final decree of condemnation and sale was entered, "the court not being satisfied that as a matter of law, without any ordinance, treaty, or proclamation, fishing vessels of this class are exempt from seizure."

Each vessel was thereupon sold by auction; the Paquete Habana for the sum of \$490; and the Lola for the sum of \$800. There was no other evidence in the record of the value of either vessel or of her cargo.

We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.

By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.

This doctrine, however, has been earnestly contested at the bar; and no complete collection of the instances illustrating it is to be found, so far as we are aware, in a single published work although many are referred to and discussed by the writers on international law. It is therefore worth the while to trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world.

The earliest acts of any government on the subject, mentioned in the books, either emanated from, or were approved by, a King of England.

In 1403 and 1406 Henry IV issued orders to his admirals and other officers, entitled "Concerning Safety for Fishermen--*De Securitate pro Piscatoribus*." By an order of October 26, 1403, reciting that it was made pursuant to a treaty between himself and the King of France; and for the greater safety of the fishermen of either country, and so that they could be, and carry on their industry, the more safely on the sea, and deal with each other in peace; and that the French King had consented that English fishermen should be treated likewise; it was ordained that French fishermen might, during the then pending season for the herring fishery, safely fish for herrings and all other fish, from the harbor of Gravelines and the island of Thanet to the mouth of the Seine and the harbor of Hautoune. And by an order of October 5, 1406, he took into his safe conduct and under his special protection, guardianship, and defense, all and singular the fishermen of France, Flanders, and Brittany, with their fishing vessels and boats, everywhere on the sea, through and within his dominions, jurisdictions, and territories, in regard to their fishery, while sailing, coming, and going, and, at their pleasure, freely and lawfully fishing, delaying, or proceeding, and returning homeward with their catch of fish, without any molestation or hindrance whatever; and also their fish, nets, and other property and goods soever; and it was therefore ordered that such fishermen should not be interfered with, provided they should comport themselves well and properly, and should not, by color of these presents, do or attempt, or presume to do or attempt, anything that could prejudice the King, or his Kingdom of England, or his subjects.

The treaty made October 2, 1521, between the Emperor Charles V and Francis I of France, through their ambassadors, recited that a great and fierce war had arisen between them, because of which there had been, both by land and by sea, frequent depredations and incursions on either side, to the grave detriment and intolerable injury of the innocent subjects of each; and that a suitable time for the herring fishery was at hand, and, by reason of the sea being beset by the enemy, the fishermen did not dare to go out, whereby the subject of their industry, bestowed by heaven to allay the hunger of the poor, would wholly fail for the year, unless it were otherwise provided. And it was therefore agreed that the subjects of each sovereign, fishing in the sea, or exercising the calling of fishermen, could and might, until the end of the next January, without incurring any attack, depredation, molestation, trouble, or hindrance soever, safely and freely, everywhere in the sea, take herrings and every other kind of fish, the existing war by land and sea notwithstanding; and, further, that during the time aforesaid no subject of either sovereign

should commit, or attempt or presume to commit, any depredation, force, violence, molestation, or vexation to or upon such fishermen or their vessels, supplies, equipments, nets, and fish, or other goods soever truly appertaining to fishing. The treaty was made at Calais, then an English possession. It recites that the ambassadors of the two sovereigns met there at the earnest request of Henry VIII and with his countenance, and in the presence of Cardinal Wolsey, his chancellor and representative. And towards the end of the treaty it is agreed that the said King and his said representative, "by whose means the treaty stands concluded, shall be conservators of the agreements therein, as if thereto by both parties elected and chosen."⁷

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁸

Wheaton places among the principal sources of international law "text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles." Wheaton, *International Law* § 15 (8th ed.)

No international jurist of the present day has a wider or more deserved reputation than Calvo, who, though writing in French, is a citizen of the Argentine Republic, employed in its diplomatic service abroad. In the fifth edition of his great work on international law, published in 1896, he observes, in § 2366, that the international authority of decisions in particular cases by the prize courts of France, of England, and of the United States is lessened by the fact that the principles on which they are based are largely derived from the internal legislation of each country; and yet the peculiar character of maritime wars, with other considerations, gives to prize jurisprudence a force and importance reaching beyond the limits of the country in which it has prevailed. He therefore proposes here to group together a number of particular cases proper to serve as precedents for the solution of grave questions of maritime law in regard to the capture of private property as prize of war. Immediately, in § 2367, he goes on to say: "Notwithstanding the hardships to which maritime wars subject private property, notwithstanding the extent of the recognized rights of belligerents, there are generally exempted, from seizure and capture, fishing vessels." In the next section he adds: "This exception is perfectly justiciable,—*Cette exception est parfaitement justiciable*,"—that is to say, belonging to judicial jurisdiction or cognizance. Calvo then quotes Ortolan's description of the nature of the coast-fishing industry; and proceeds to refer, in detail, to some of the French precedents, to the acts of the French and English governments in the times of Louis XVI and of the French Revolution, to the position of the United States in the war with Mexico, and of France in later wars, and to the action of British cruisers in the Crimean war. And he concludes his discussion of the subject, in § 2373, by affirming the exemption of the coast fishery, and pointing out the distinction in this regard between the coast fishery and what he calls the great fishery, for cod, whales, or seals, as follows: "The privilege of exemption from capture, which is generally acquired by fishing vessels plying their industry near the coasts, is not extended in any country to ships employed on the high sea in what is called the great fishery, such as that for the cod, for the whale or the sperm whale, or for the seal or sea calf. These ships are, in effect, considered as devoted to operations which are at once commercial and industrial."

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article

of commerce.

This rule of international law is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.

To this subject in more than one aspect are singularly applicable the words uttered by Mr. Justice Strong, speaking for this court:

Undoubtedly no single nation can change the law of the sea. The law is of universal obligation and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which, when generally accepted, became of universal obligation. This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws; but it is recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact, we think, we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The Scotia, 14 Wall. 170, 187, 188.

[Both the Paquete Habana and the Lola were] of a moderate size, such as is not unusual in coast fishing smacks, and were regularly engaged in fishing on the coast of Cuba. The crew of each were few in number, had no interest in the vessel, and received, in return for their toil and enterprise, two thirds of her catch, the other third going to her owner by way of compensation for her use. Each vessel went out from Havana to her fishing ground, and was captured when returning along the coast of Cuba. The cargo of each consisted of fresh fish, caught by her crew from the sea, and kept alive on board. Although one of the vessels extended her fishing trip across the Yucatan channel and fished on the coast of Yucatan, we cannot doubt that each was engaged in the coast fishery, and not in a commercial adventure, within the rule of international law.

The two vessels and their cargoes were condemned by the district court as prize of war; the vessels were sold under its decrees; and it does not appear what became of the fresh fish of which their cargoes consisted.

Upon the facts proved in either case, it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause; and it is therefore, in each case, ordered, that the decree of the District Court be reversed, and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with damages and costs.⁹

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan and Mr. Justice McKenna, dissenting:

It cannot be maintained "that modern usage constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power." That position was disallowed in *Brown v. United States*, 8 Cranch, 110, 128, and Chief Justice Marshall said:

This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. The rule is in its nature flexible. It is subject to infinite modification. It is not an immutable rule of law, but depends on political considerations which may continually vary.

The question in that case related to the confiscation of the property of the enemy on land within our own territory, and it was held that property so situated could not be confiscated without an act of Congress. The Chief Justice continued:

Commercial nations in the situation of the United States have always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy property in our country?--is a question rather of policy than of law. The rule which we apply to the property of our enemy will be applied by him to the property of our citizens. Like all other questions of policy, it is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for the consideration of the legislature, not of the executive or judiciary.

This case involves the capture of enemy's property on the sea, and executive action, and if the position that the alleged rule *proprio vigore* limits the sovereign power in war be rejected, then I understand the contention to be that, by reason of the existence of the rule, the proclamation of April 26 must be read as if it contained the exemption in

terms, or the exemption must be allowed because the capture of fishing vessels of this class was not specifically authorized.

[These two vessels] were of twenty-five and thirty-five tons burden respectively. They carried large tanks, in which the fish taken were kept alive. They were owned by citizens of Havana, and the owners and the masters and crew were to be compensated by shares of the catch. One of them had been two hundred miles from Havana, off Cape San Antonio, for twenty-five days, and the other for eight days off the coast of Yucatan. They belonged, in short, to the class of fishing or coasting vessels of from five to twenty tons burden, and from twenty tons upwards, which, when licensed or enrolled as prescribed by the Revised Statutes are declared to be vessels of the United States, and the shares of whose men, when the vessels are employed in fishing, are regulated by statute. They were engaged in what were substantially commercial ventures, and the mere fact that the fish were kept alive by contrivances for that purpose--a practice of considerable antiquity--did not render them any the less an article of trade than if they had been brought in cured.

I do not think that, under the circumstances, the considerations which have operated to mitigate the evils of war in respect of individual harvesters of the soil can properly be invoked on behalf of these hired vessels, as being the implements of like harvesters of the sea.

In my judgment, the rule is that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.

Filartiga v. Pena-Irala
United States Court of Appeals, Second Circuit.
630 F.2d 876 (1980)

[Please reread this case, which was reproduced above in Chapter 7.]

Filartiga v. Pena-Irala
United States District Court, Eastern District of New York
577 F.Supp. 860 (1984)

NICKERSON, District Judge.

Plaintiffs, Dolly M.E. and Dr. Joel Filartiga, citizens of Paraguay, brought this action against defendant Pena, also a Paraguayan citizen, and the former Inspector General of Police of Asuncion. They alleged that Pena tortured and murdered Joelito Filartiga, the seventeen year old brother and son, respectively, of plaintiffs, in retaliation for Dr. Filartiga's opposition to President Alfredo Stroessner's government. Plaintiffs invoked jurisdiction under, among other provisions, 28 U.S.C. § 1350, giving the district court "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."

This court followed what it deemed binding precedents and dismissed for lack of jurisdiction. The Court of Appeals reversed and remanded.

Following remand Pena took no further part in the action. This court granted a default and referred the question of damages to Magistrate John L. Caden for a report. The Magistrate, after a hearing, recommended damages of \$200,000 for Dr. Joel Filartiga and \$175,000 for Dolly Filartiga. Plaintiffs filed objections to the report, and the matter is now here for determination.

Before addressing damages the court considers two matters urged before but not decided by the Court of Appeals. Both go to whether the court should decline to exercise jurisdiction.

The first is whether the court should abstain in deference to the so-called act of state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). Were the government of Paraguay concerned that a judgment by the court as to the propriety of Pena's conduct would so offend that government as to affect adversely its relations with the United States, presumably Paraguay would have had the means so to advise the court. As the Court of Appeals noted, Paraguay has not ratified Pena's acts, and this alone is sufficient to show that they were not acts of state.

Pena argued here on the original motion and in the Court of Appeals that this court should decline to proceed because Paraguay and not the United States is the convenient forum. Pena's default now casts doubt on the good faith of this contention. Its merits depend on whether the courts of Paraguay are not only more convenient than this court but as available and prepared to do justice. Pena submitted nothing to cast doubt on plaintiffs' evidence showing that further resort to Paraguayan courts would be futile. This court will therefore retain jurisdiction.

The Court of Appeals decided only that Section 1350 gave jurisdiction. We must now face the issue left open by the Court of Appeals, namely, the nature of the "action" over which the section affords jurisdiction. Does the

``tort" to which the statute refers mean a wrong ``in violation of the law of nations" or merely a wrong actionable under the law of the appropriate sovereign state? The latter construction would make the violation of international law pertinent only to afford jurisdiction. The court would then, in accordance with traditional conflict of laws principles, apply the substantive law of Paraguay. If the ``tort" to which the statute refers is the violation of international law, the court must look to that body of law to determine what substantive principles to apply.

The word ``tort" has historically meant simply ``wrong" or ``the opposite of right," so-called, according to Lord Coke, because it is ``wrested" or ``crooked," being contrary to that which is ``right" and ``straight". Sir Edward Coke on Littleton 158b. There was nothing about the contemporary usage of the word in 1789, when Section 1350 was adopted, to suggest that it should be read to encompass wrongs defined as such by a national state but not by international law. Even before the adoption of the Constitution piracy was defined as a crime by the law of nations. As late as 1819 Congress passed legislation, now 18 U.S.C. § 1651, providing for punishment of ``the crime of piracy, as defined by the law of nations." 3 Stat. 510 (1819). Congress would hardly have supposed when it enacted Section 1350 that a ``crime," but not the comparable ``tort," was definable by the law of nations. Nor is there any legislative history of the section to suggest such a limitation.

Accordingly, there is no basis for adopting a narrow interpretation of Section 1350 inviting frustration of the purposes of international law by individual states that enact immunities for government personnel or other such exemptions or limitations. The court concludes that it should determine the substantive principles to be applied by looking to international law, which, as the Court of Appeals stated, ``became a part of the common law of the United States upon the adoption of the Constitution." *See also The Paquete Habana*, 175 U.S. 677, 700 (1900).

The international law described by the Court of Appeals does not ordain detailed remedies but sets forth norms. But plainly international ``law" does not consist of mere benevolent yearnings never to be given effect. The international law prohibiting torture established the standard and referred to the national states the task of enforcing it. By enacting Section 1350 Congress entrusted that task to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law.

In order to take the international condemnation of torture seriously this court must adopt a remedy appropriate to the ends and reflective of the nature of the condemnation. Torture is viewed with universal abhorrence; the prohibition of torture by international consensus and express international accords is clear and unambiguous. We are dealing not with an ordinary case of assault and battery. If the courts of the United States are to adhere to the consensus of the community of humankind, any remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe.

The common law of the United States includes, of course, the principles collected under the rubric of conflict of laws. For the most part in international matters those principles have been concerned with the relevant policies of the interested national states, and with ``the needs" of the ``international systems." Restatement (Second) of Conflict of Laws § 6(2) (1971). The chief function of international choice-of-law rules has been said to be to further harmonious relations and commercial intercourse between states.

However, where the nations of the world have adopted a norm in terms so formal and unambiguous as to make it international ``law," the interests of the global community transcend those of any one state. That does not mean that traditional choice-of-law principles are irrelevant. Clearly the court should consider the interests of Paraguay to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States.

In this case the torture and death of Joelito occurred in Paraguay. The plaintiffs and Pena are Paraguayan and lived in Paraguay when the torture took place, although Dolly Filartiga has applied for permanent asylum in the United States. It was in Paraguay that plaintiffs suffered the claimed injuries, with the exception of the emotional trauma which followed Dolly Filartiga to this country. The parties' relationships with each other and with Joelito were centered in Paraguay.

Moreover, the written Paraguayan law prohibits torture. The Constitution of Paraguay, art. 50. The Paraguayan Penal Code, art. 337, provides that homicide by torture is punishable by a imprisonment for 15 to 20 years. Paraguay is a signatory to the American Convention on Human Rights, which proscribes the use of torture. Paraguayan law purports to allow recovery for wrongful death, including specific pecuniary damages, ``moral damage," and court costs and attorney's fees. Thus, the pertinent formal Paraguayan law is ascertainable.

All these factors make it appropriate to look first to Paraguayan law in determining the remedy for the violation of international law. It might be objected that, despite Paraguay's official ban on torture, the ``law" of that country is what it does in fact, Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 461 (1897), and torture persists throughout the country. Amnesty International Report on Torture 214-16 (1975).

Where a nation's pronouncements form part of the consensus establishing an international law, however, it does not lie in the mouth of a citizen of that nation, though it professes one thing and does another, to claim that his country did not mean what it said. In concert with the other nations of the world Paraguay prohibited torture and thereby reaped the benefits the condemnation brought with it. Paraguayan citizens may not pretend that no such condemnation exists. If there be hypocrisy, we can only say with La Rochefoucauld that "hypocrisy is the homage which vice pays to virtue."

To the extent that Pena might have expected that Paraguay would not hold him responsible for his official acts, that was not a "justified" expectation so as to make unfair the application to him of the written law of Paraguay.

Plaintiffs claim punitive damages, and the Magistrate recommended they be denied on the ground that they are not recoverable under the Paraguayan Civil Code. While compensable "moral" injuries under that code include emotional pain and suffering, loss of companionship and disruption of family life, plaintiffs' expert agrees that the code does not provide for what United States courts would call punitive damages. Paraguayan law, in determining the intensity and duration of the suffering and the consequent "moral" damages, takes into account the heinous nature of the tort. However, such damages are not justified by the desire to punish the defendant. They are designed to compensate for the greater pain caused by the atrocious nature of the act.

Yet because, as the record establishes, Paraguay will not undertake to prosecute Pena for his acts, the objective of the international law making torture punishable as a crime can only be vindicated by imposing punitive damages.

It is true, as plaintiffs concede, that damages designated punitive have rarely been awarded by international tribunals. As explained in Marjorie Whiteman, *Damages in International Law* 716-17 (1937), the international law of damages has developed chiefly in the resolution of claims by one state on behalf of its nationals against the other state, and the failure to assess exemplary damages as such against a respondent government may be explained by the absence of malice or *mala mens* on the part of an impersonal government. Here Pena and not Paraguay is the defendant. There is no question of punishing a sovereign state or of attempting to hold the people of that state liable for a governmental act in which they played no part.

Moreover, there is some precedent for the award of punitive damages in tort even against a national government. In *I'm Alone (Canada v. United States)*, U.N.Rep.Int.Arb. Awards, vol. 3, at 1609, the American and Canadian claims Commissioners recommended, in addition to compensatory damages, payment of \$25,000 by the United States to Canada for intentionally sinking a Canadian ship.

Where the defendant is an individual, the same diplomatic considerations that prompt reluctance to impose punitive damages are not present. The Supreme Court in *dicta* has recognized that punishment is an appropriate objective under the law of nations, saying in *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 41 (1826), that "an attack from revenge and malignity, from gross abuse of power, and a settled purpose of mischief . . . may be punished by all the penalties which the law of nations can properly administer."

This court concludes that it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture.

In concluding that the plaintiffs were entitled only to damages recoverable under Paraguayan law, the Magistrate recommended they be awarded \$150,000 each as compensation for emotional pain and suffering, loss of companionship and disruption of family life. He also suggested that Dolly Filartiga receive \$25,000 for her future medical expenses for treatment of her psychiatric impairment and that Dr. Filartiga receive \$50,000 for past expenses related to funeral and medical expenses and to lost income. The Magistrate recommended against an award of punitive damages and of \$10,364 in expenses incurred in connection with this action. Plaintiffs object only to these last recommendations.

The court finds no reason to reject the opinion of the plaintiffs' expert that the expenses incurred by them in prosecuting this action are compensable under Paraguayan law. The United States policy against forum shopping does not warrant a denial. Plaintiffs could get no redress in Paraguay and sued Pena where they found him.

The record in this case shows that torture and death are bound to recur unless deterred. This court concludes that an award of punitive damages of no less than \$5,000,000 to each plaintiff is appropriate to reflect adherence to the world community's proscription of torture and to attempt to deter its practice.

Judgment may be entered for plaintiff Dolly M.E. Filartiga in the amount of \$5,175,000 and for plaintiff Joel Filartiga in the amount of \$5,210,364, a total judgment of \$10,385,364. So ordered.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. Do the foregoing cases put to rest the oft-heard charge that international law is a law between states and not between persons?

2. How did the courts in the foregoing cases bring down the rules of international law from the inter-state level to the level of litigation between private litigants? Do you agree with the reasoning of the courts in this regard?

3. The dissenting opinion in *The Paquete Habana* states that the authority of the President, acting through the coast guard, supersedes any rule of international law. Did the majority opinion face this precise question, or did it simply find that the President had not authorized the capture of the fishing vessels? If the majority opinion found the latter, how realistic is the rule that the President must specifically authorize all the things that the army, navy, and marines might do in the course of a war?

4. Suppose the President had specifically authorized the capture of the fishing vessels. Wouldn't his authorization be illegal because it is in violation of international law? Can the President of the United States violate international law? Should the President of the United States violate international law? These questions are being debated strenuously today, and lawyers on both sides of the issue are rereading *The Paquete Habana* with great care (and often, it may be added, disagreeing violently in their interpretation!)

D. Suing Foreign Governments

The Foreign Sovereign Immunities Act
of 1976
Title 28, United States Code

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter--

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel

been privately owned and possessed a suit in rem might have been maintained.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Verlinden B.V. v. Central Bank of Nigeria
In the Supreme Court of the United States
461 U.S. 480 (1983)

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the Foreign Sovereign Immunities Act of 1976, by authorizing a foreign plaintiff to sue a foreign state in a United States District Court on a non-federal cause of action, violates Article III of the Constitution.

On April 21, 1975, the Federal Republic of Nigeria and petitioner Verlinden B.V., a Dutch corporation with its principal offices in Amsterdam, The Netherlands, entered into a contract providing for the purchase of 240,000 metric tons of cement by Nigeria. The parties agreed that the contract would be governed by the laws of The Netherlands and that disputes would be resolved by arbitration before the International Chamber of Commerce, Paris, France.

The contract provided that the Nigerian government was to establish an irrevocable, confirmed letter of credit for the total purchase price through Slavenburg's Bank in Amsterdam. According to petitioner's amended complaint, however, respondent Central Bank of Nigeria, an instrumentality of Nigeria, improperly established an unconfirmed letter of credit payable through Morgan Guaranty Trust Company in New York.

In August 1975, Verlinden subcontracted with a Liechtenstein corporation, Interbuco, to purchase the cement needed to fulfill the contract. Meanwhile, the ports of Nigeria had become clogged with hundreds of ships carrying cement, sent by numerous other cement suppliers with whom Nigeria also had entered contracts. In mid-September, Central Bank unilaterally directed its correspondent banks, including Morgan Guaranty, to adopt a series of amendments to all letters of credit issued in connection with the cement contracts. Central Bank also directly notified the suppliers that payment would be made only for those shipments approved by Central Bank two months before their arrival in Nigerian waters.

Verlinden then sued Central Bank in United States District Court for the Southern District of New York, alleging that Central Bank's actions constituted an anticipatory breach of the letter of credit. Verlinden alleged jurisdiction under the Foreign Sovereign Immunities Act.

For more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country. In *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 3 L.Ed. 287 (1812), Chief Justice Marshall concluded that, while the jurisdiction of a nation within its own territory "is susceptible of no limitation not imposed by itself," the United States had impliedly waived jurisdiction over certain activities of foreign sovereigns. Although the narrow holding of *The Schooner Exchange* was only that the courts of the United States lack jurisdiction over an armed ship of a foreign state found in our port, that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.

As *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, this Court consistently has deferred to the decisions of the political branches--in particular, those of the Executive Branch--on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.

Until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns. But in the so-called Tate Letter, the State Department announced its adoption of the "restrictive" theory of foreign sovereign immunity. Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.

In 1976, Congress passed the Foreign Sovereign Immunities Act in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process," H.R.Rep. No. 94-1487, p. 7 (1976). To accomplish these objectives, the Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities.

For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity. A foreign state is normally immune from the jurisdiction of federal and state courts (§ 1604), subject to a set of exceptions specified in §§ 1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, § 1605(a)(2). When one of these or the other specified exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," § 1606.

The Act expressly provides that its standards control in "the courts of the United States and of the States," § 1604, and thus clearly contemplates that such suits may be brought in either federal or state courts. If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter jurisdiction; but if the claim does not fall within one of the exceptions, federal courts lack subject matter jurisdiction. In such a case, the foreign state is also ensured immunity from the jurisdiction of state courts by § 1604.

The statute grants jurisdiction over "any non-jury civil action against a foreign state . . . with respect to which the foreign state is not entitled to immunity," 28 U.S.C. § 1330(a). The Act contains no indication of any limitation based on the citizenship of the plaintiff.

This Court's cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution. Within Article III of the Constitution, we find two sources authorizing the grant of jurisdiction in the Foreign Sovereign Immunities Act: the diversity clause and the "arising under" clause. The diversity clause, which provides that the judicial power extends to controversies between "a State, or the Citizens thereof, and foreign States," covers actions by citizens of states. Yet diversity jurisdiction is not sufficiently broad to support a grant of jurisdiction over actions by foreign plaintiffs, since a foreign plaintiff is not "a State, or [a] Citize[n] thereof." We conclude, however, that the "arising under" clause of Article III provides an appropriate basis for the statutory grant of subject matter jurisdiction to actions by foreign plaintiffs under the Act.

By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.

To promote these federal interests, Congress exercised its Article I powers by enacting a statute comprehensively regulating the amenability of foreign nations to suit in the United States. The statute must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies--and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction.

A conclusion that the grant of jurisdiction in the Foreign Sovereign Immunities Act is consistent with the Constitution does not end the case. An action must not only satisfy Article III but must also be supported by a statutory grant of subject matter jurisdiction. As we have made clear, deciding whether statutory subject matter jurisdiction exists under the Foreign Sovereign Immunities Act entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies.

In the present case, the District Court, after satisfying itself as to the constitutionality of the Act, held that the present action does not fall within any specified exception. The Court of Appeals, reaching a contrary conclusion as to jurisdiction under the Constitution, did not find it necessary to address this statutory question. Accordingly, on remand the Court of Appeals must consider whether jurisdiction exists under the Act itself. If the Court of Appeals agrees with the District Court on that issue, the case will be at an end. If, on the other hand, the Court of Appeals concludes that jurisdiction does exist under the statute, the action may then be remanded to the District Court for

further proceedings.
It is so ordered.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. Isn't it obvious why both the district court and the court of appeals in *Verlinden* had found that there was no jurisdiction? The plaintiff was incorporated in The Netherlands. The defendant was the foreign state of Nigeria. And the cause of action arose somewhere off the Nigerian coast. But the Supreme Court reversed, and by a 9-0 vote! Surely something new has been added by the Foreign Sovereign Immunities Act of 1976 ("FSIA"). Or did the Supreme Court misread the FSIA?

2. *Verlinden* is a commercial case. The FSIA seems to talk primarily about commercial transactions. Is there any room within the FSIA to sue a foreign state in a U.S. court for a human-rights violation? Scott and Vivian Nelson did so, in the Eleventh Circuit Court of Appeals. Directly following the decision of the Eleventh Circuit is the Supreme Court's reversal of that decision. (For additional facts of the torture of Scott Nelson, see pp. 315-20 in the *Anthology*.)

Nelson v. Saudi Arabia
In the Court of Appeals for the Eleventh Circuit
923 F.2d 1528 (1991)

RE, Chief Judge:

Plaintiffs-appellants, Scott and Vivian Nelson, appeal from a judgment of the United States District Court for the Southern District of Florida, dismissing their claim against defendants-appellees, Saudi Arabia, King Faisal Specialist Hospital, and Royspec, for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976.

Scott Nelson was hired, in the United States, as a monitoring systems engineer for the King Faisal Specialist Hospital (the Hospital) in Riyadh, Saudi Arabia. Nelson alleged that, in the course of performing his duties under his employment contract with the Hospital, he was detained and tortured by agents of the Saudi government in Saudi Arabia in retaliation for reporting safety violations at the Hospital.

Nelson brought suit for his injuries against Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the government of Saudi Arabia (collectively Saudi Arabia). Nelson alleged subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976 (the FSIA). The district court concluded that Nelson's claims were not based upon the commercial activities of Saudi Arabia carried on in the United States, as required by the FSIA, and granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction.

On appeal, Nelson contends that the district court erred in granting Saudi Arabia's motion to dismiss. Nelson asserts that, since his detention and torture were based upon his recruitment and hiring in the United States by an agent of the Saudi government, the district court has subject matter jurisdiction under the FSIA.

The question presented is whether the district court erred in determining that it does not have subject matter jurisdiction under the FSIA. More specifically, did the court have jurisdiction in this action for damages for the detention and torture of Nelson by agents of the Saudi government, in Saudi Arabia, in retaliation for Nelson's conduct during his employment in Saudi Arabia in a position for which he was recruited and hired in the United States by an agent of the Saudi government.

Since we conclude that Nelson's detention and torture were based upon the recruitment and hiring of Nelson in the United States by an agent of the Saudi government, and that the recruitment and hiring was a commercial activity of Saudi Arabia, we hold that the district court has subject matter jurisdiction under the FSIA. Accordingly, we reverse the judgment of the district court.

In 1983, Scott Nelson, while in the United States, saw a printed advertisement recruiting employees for the King Faisal Specialist Hospital (the Hospital), in Riyadh, Saudi Arabia. The recruitment was conducted by the Hospital Corporation of America (HCA), an independent corporation which, in 1973, had contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the hospital.

After submitting an application, Nelson was interviewed in Saudi Arabia by two officials of the Hospital. Subsequently, he returned to the United States, and entered into a contract of employment with the Hospital as a monitoring systems engineer. The contract was signed in Miami, Florida, in November, 1983.

Nelson commenced employment at the Hospital on December 7, 1983. As stated in the Hospital's job description for monitoring systems engineer, Nelson was "[r]esponsible for the development and expansion of electronic monitoring and control systems capabilities." He was also responsible for recommending "modifications

of existing equipment and the purchase and installation of new equipment."

Nelson alleges that, on March 20, 1984, in the course of his duties at the Hospital, he discovered certain safety hazards, and reported these safety hazards to an investigative commission of the Saudi government. Nelson states that, on September 27, 1984, he was summoned to the Hospital's security office by agents or employees of the Hospital. He alleges that, from the security office, he was moved to a jail cell where he was "shackled, tortured and beaten" by agents or employees of the Saudi government. Nelson states that he was imprisoned for 39 days, during which time he was never informed of any charges against him, nor was he ever accused of a crime. He further states that his wife was told by a Saudi government official that he could be released if she provided sexual favors.

Nelson and his wife, Vivian Nelson, sued Saudi Arabia, the Hospital, and Royspec, a corporation owned and controlled by the Saudi government which acts as a purchasing agent for the Hospital. Nelson sought compensatory and punitive damages under 16 counts, and asserted that the district court had subject matter jurisdiction under the Foreign Sovereign Immunities Act of 1976, codified at 28 U.S.C. §§ 1602-1611. Saudi Arabia moved for dismissal for lack of subject matter jurisdiction.

The district court concluded that "the link between the recruitment activities and the Defendants is not sufficient to establish 'substantial contact' with the United States," within the meaning of 28 U.S.C. § 1603(e). The district court also noted that "even if the court had determined that [the Hospital] and Saudi Arabia had carried on commercial activities having substantial contact with the United States through the indirect recruitment activities, the court would be unable to find a nexus between those activities and Nelson's complaint." Accordingly, the district court granted Saudi Arabia's motion to dismiss for lack of subject matter jurisdiction, thereby dismissing the action against all defendants.

In *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 136 (1812), the Supreme Court adopted the common law doctrine of foreign sovereign immunity. As noted in *The Schooner Exchange*, the doctrine of foreign sovereign immunity rests on principles of comity between nations. See *id.* at 135-36. See also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

On the question of foreign sovereign immunity, the Supreme Court has generally deferred to the decisions or recommendations of the Executive Branch of government. The doctrine of foreign sovereign immunity is closely related to the act of state doctrine. As articulated in *Underhill v. Hernandez*, 168 U.S. 250 (1897), under the act of state doctrine:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Neither the doctrine of foreign sovereign immunity nor the act of state doctrine are as widely applied now as in the past. The present restrictive attitude in the application of the act of state doctrine is reflected in Justice Scalia's opinion in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990). In *Kirkpatrick* the plaintiff, an American corporation that unsuccessfully bid on a public works contract in Nigeria, sued the defendant, an American corporation that was the successful bidder on the contract. The plaintiff brought suit for damages, and contended that the defendant, which had pled guilty to violations of the Foreign Corrupt Practices Act of 1977, had paid bribes to Nigerian officials in order to obtain the contract. The defendant moved to dismiss, contending that the suit was barred by the act of state doctrine. The district court granted the motion to dismiss. The Court of Appeals for the Third Circuit, however, reversed, and the Supreme Court granted the defendant's writ of certiorari.

The Supreme Court noted that, in prior opinions, several Justices had suggested an exception to the act of state doctrine for commercial transactions. The Court stated that, apart from any exceptions, the act of state doctrine does not apply in *Kirkpatrick*, since "[n]othing in the present suit requires the court to declare invalid, and thus ineffective as 'a rule of decision for the courts of this country,' the official act of a foreign sovereign."

The present application of the doctrine of foreign sovereign immunity was significantly influenced by the shift or change in United States policy announced in the May 19, 1952 letter from the Acting Legal Adviser of the Department of State to the Acting Attorney General. After referring to the classical or "absolute" theory of sovereign immunity, the letter stated that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." 26 Dep't St. Bulletin 984, 985 (1952) (quoting Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman (May 19, 1952)).

The restrictive theory of sovereign immunity which was embraced by the 1952 policy grants immunity to a foreign sovereign only for acts characterized as "public" and not as to those deemed "private." According to the modern theory, a state may be held liable in the courts of another nation if "it engages in an industrial, commercial,

financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act." Article 11, Draft Convention on Competence of Courts in Regard to Foreign States, quoted in *Re, Judicial Developments in Sovereign Immunity and Foreign Confiscations*, 1 N.Y.L.Forum 160, 167 (1955).

In the Restatement, it is stated that under the act of state doctrine the courts of the United States "will generally refrain from . . . sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there." Restatement (Third) of Foreign Relations § 443(1) (1987). It has been noted, however, that the effect of the Restatement "has been to present the act of state doctrine as broader in scope, more general in application, more preclusive of international law, and less susceptible of limitation than is warranted by governing authority." Leigh, *Sabbatino's Silver Anniversary and the Restatement: No Cause for Celebration*, 24 Int'l Law. 1, 13-14 (1990).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (the FSIA). According to the Report of the Judiciary Committee of the House of Representatives, the FSIA was enacted "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R.Rep. No. 1487, 94th Cong., 2d Sess. 6. The House Report also notes that the FSIA was intended to codify the principle of international law that a sovereign state is entitled to immunity only for *jure imperii*, its public acts, but not for *jure gestionis*, its commercial or private acts.

The FSIA provides that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state." Under the FSIA, a "commercial activity carried on in the United States by a foreign state" is defined as a "commercial activity carried on by such state and having substantial contact with the United States."

In this case, Nelson contends that the district court has subject matter jurisdiction under the first clause of section 1605(a)(2), since "the action is based upon a commercial activity carried on in the United States by the foreign state." More specifically, Nelson states that "[t]he arbitrary prolonged detention and the physical torture of Mr. Nelson . . . is based directly upon the recruitment activity carried on in the United States by agents of Saudi Arabia."

In order to conclude that there is subject matter jurisdiction under the first clause of section 1605(a)(2), the court must find that Saudi Arabia's recruitment and hiring of Nelson, in the United States, was a "commercial activity," within the meaning of the FSIA. The FSIA provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1988).

Citing *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C.Cir.1988), Saudi Arabia asserts that the mere recruitment of an employee in the United States is an insufficient contact on which to base subject matter jurisdiction under the FSIA. In *Zedan*, the plaintiff, while in the United States, received a phone call recruiting him to work on a project in Saudi Arabia for a company which was not an agency of the Saudi government. After the plaintiff had worked on the project for two different companies for approximately three years, the project was taken over by an agency of the Saudi government. Several months later, after completing his employment but without receiving total payment, the plaintiff returned to the United States. The plaintiff then sued Saudi Arabia, seeking money due him under his contract of employment. The district court granted Saudi Arabia's motion to dismiss.

On appeal, the Court of Appeals for the District of Columbia Circuit agreed that the district court lacked subject matter jurisdiction, and affirmed. In its jurisdictional analysis under the first clause of section 1605(a)(2), the court stated that the phone call recruiting the plaintiff was merely a "preliminary step" or a "precursor" to a commercial transaction. Hence, the court concluded that "[t]he link between a recruitment phone call in [the United States] and the [intervention of the Saudi government] two-and-one-half years and two employers later is, in our view, too attenuated to constitute a direct causal connection."

In the present case, however, it is clear from the record that the recruitment and hiring of Nelson, in the United States, was part of a process having "substantial contact with the United States." The recruitment was conducted by the Hospital Corporation of America (HCA), which in 1973 contracted with the Royal Cabinet of the Kingdom of Saudi Arabia to recruit employees for the Hospital. HCA, a corporation organized under the laws of the Grand Cayman Islands, is the wholly owned subsidiary of an American corporation. The contract created an agency relationship between HCA and Saudi Arabia. Under the contract, HCA was empowered to "recruit and employ administrative, nursing, technical, maintenance and all other personnel with full authority to initially set and subsequently adjust their salaries and other remuneration, to supervise such employees, and in its sole judgment, to terminate the employment of any such personnel." In addition, the contract expressly provides that all "employment

contracts will be between [Saudi Arabia] and the employee, but may be executed for [Saudi Arabia] by HCA as agent." The contract also states that "[a]ll expatriate personnel recruited must be acceptable to [Saudi Arabia] which acceptability shall be evidenced by issuance of an entrance visa."

On the facts presented we agree with Nelson that the recruitment and hiring in the United States constituted a "commercial activity" of Saudi Arabia, within the meaning of the FSIA. Nevertheless, in order to establish subject matter jurisdiction under the FSIA, the court must also conclude that the detention and torture of Nelson, in Saudi Arabia, were "based upon" Nelson's recruitment and hiring in the United States.

Judicial authority reveals that a claim is "based upon" the commercial activity of a foreign state when there is a "jurisdictional nexus" between the acts for which damages are sought, and the foreign sovereign's commercial activity.

This jurisdictional nexus requirement between the act complained of or grievance, and the commercial activity or business enterprise conducted by the foreign state is salutary and necessary to satisfy both the congressional policy of the FSIA and sound principles of comity. The nexus requirement implies a bond or link that connects the foreign state to the wrongful act for which it is sought to be held liable. It is comparable to the requirement that there be a causal connection in order to impose liability in the civil law of torts. The jurisdictional nexus requirement of the FSIA finds a domestic parallel in the requirement of a nexus in the application of long-arm statutes.

Saudi Arabia contends that the district court lacks subject matter jurisdiction under the FSIA since Nelson's claims "are based upon the governmental exercise of police power in a foreign country." Saudi Arabia asserts that "[t]he claims are based upon the acts of the Saudi police and prison officials -- 'governmental' acts beyond the reach of the commercial activity exception."

In support of its contention, Saudi Arabia cites *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir.1980). In *Arango*, the plaintiffs contended that they suffered injuries when their vacation tour, which was sponsored in part by the defendant, the national airline of the Dominican Republic, was terminated. The plaintiffs asserted that, because their names were on a list of undesirable aliens, upon their arrival in the Dominican Republic immigration officials denied them entry into the country, "man-handled" them, and "involuntarily re-routed" them to the United States. The plaintiffs sought damages under breach of contract and several tort claims, including false imprisonment and battery. The district court granted the defendant's motion to dismiss on all claims.

The Court of Appeals for the Fifth Circuit dismissed the appeal because, under Rule 54(b) of the Federal Rules of Civil Procedure, the order granting the defendant's motion to dismiss was not a final order. Notwithstanding its dismissal of the appeal on separate procedural grounds, the court of appeals discussed the applicable substantive law, and, "in the interest of expediency, proceed[ed] to offer [the district] court some guidance in its further handling of these issues." The court considered whether there was subject matter jurisdiction, under the first clause of section 1605(a)(2), for the claims of false imprisonment and battery. The court stated that in "man-handling" the plaintiffs during the denial of their entry into the country, the defendant "acted merely as an arm or agent of the Dominican government in carrying out this assigned role, and, as such, is entitled to the same immunity from any liability arising from that governmental function as would inure to the government, itself." The court, however, concluded that the defendant's actions which gave rise to the claims for breach of warranty and breach of contract were connected to the defendant's commercial activity. Hence, the district court would have had subject matter jurisdiction over these claims under section 1605(a)(2) of the FSIA.

In the case of Nelson, however, we find that the detention and torture of Nelson are so intertwined with his employment at the Hospital that they are "based upon" his recruitment and hiring, in the United States, for employment at the Hospital in Saudi Arabia. In his complaint, Nelson alleged that, in the course of his duties, he discovered safety hazards at the Hospital and that he reported these hazards to an investigative body of the Saudi government. Nelson further asserted that as a result of those actions, "[h]e was summoned ... by agents or employees of [the Hospital] to the [H]ospital's security office from which he was transported to a jail cell, shackled, tortured and beaten by agents or employees of SAUDI ARABIA."

Unlike the facts in *Arango*, in this case the actions of Saudi Arabia resulted from and were directly attributable to Nelson's employment. Furthermore, the Hospital's job description for monitoring systems engineer, the specific position for which Nelson was recruited and hired in the United States, including recommending modifications to existing equipment. The Hospital's job description also states that a monitoring systems engineer "[a]ssures compliance with safety regulations[,] and "[t]roubleshoots problems and implements corrective action." Hence, detecting and reporting safety violations at the Hospital was a required employment duty for the position for which Nelson was recruited and hired in the United States.

Saudi Arabia, however, asserts that the actions taken against Nelson were the result of Nelson's submission of a false diploma from the Massachusetts Institute of Technology in his application for employment. In making this

argument, Saudi Arabia in effect admits the nexus between Nelson's recruitment in Florida and his detention and torture in Saudi Arabia, and supports Nelson's claim of subject matter jurisdiction.

Finally, our holding is not based upon the act of state doctrine but on the interpretation and application of the FSIA. On the facts presented we hold that the district court erred in determining that it did not have subject matter jurisdiction.

Since we conclude that, on the facts presented, the recruitment and hiring of Nelson in the United States was a "commercial activity" of the Saudi government, and that Nelson's subsequent detention and torture were "based upon" Nelson's recruitment and hiring in the United States, the district court erred in determining that there was no subject matter jurisdiction under the FSIA. Accordingly, we REVERSE the judgment of the district court, and REMAND the case.

Saudi Arabia v. Nelson
In the Supreme Court of the United States
113 S.Ct. 1471 (1993)

Justice SOUTER delivered the opinion of the Court.

The Foreign Sovereign Immunities Act of 1976 entitles foreign states to immunity from the jurisdiction of courts in the United States, 28 U.S.C. § 1604, subject to certain enumerated exceptions. § 1605. One is that a foreign state shall not be immune in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." § 1605(a)(2). We hold that respondents' action alleging personal injury resulting from unlawful detention and torture by the Saudi Government is not "based upon a commercial activity" within the meaning of the Act, which consequently confers no jurisdiction over respondents' suit.

The Foreign Sovereign Immunities Act "provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 443 (1989). Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-489 (1983)

Only one such exception is said to apply here. The first clause of § 1605(a)(2) of the Act provides that a foreign state shall not be immune from the jurisdiction of United States courts in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." The Act defines such activity as "commercial activity carried on by such state and having substantial contact with the United States," § 1603(e), and provides that a commercial activity may be "either a regular course of commercial conduct or a particular commercial transaction or act," the "commercial character of [which] shall be determined by reference to" its "nature," rather than its "purpose." § 1603(d).

There is no dispute here that Saudi Arabia, the Hospital, and Royspec all qualify as "foreign state[s]" within the meaning of the Act. For there to be jurisdiction in this case, therefore, the Nelsons' action must be "based upon" some "commercial activity" by petitioners that had "substantial contact" with the United States within the meaning of the Act. Because we conclude that the suit is not based upon any commercial activity by petitioners, we need not reach the issue of substantial contact with the United States.

We begin our analysis by identifying the particular conduct on which the Nelsons' action is "based" for purposes of the Act. Although the Act contains no definition of the phrase "based upon," and the relatively sparse legislative history offers no assistance, guidance is hardly necessary. In denoting conduct that forms the "basis," or "foundation," for a claim, see *Black's Law Dictionary* 151 (6th ed. 1990) (defining "base"); *Random House Dictionary* 172 (2d ed. 1987) (same); Webster's *Third New International Dictionary* 180, 181 (1976) (defining "base" and "based"), the phrase is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.

What the natural meaning of the phrase "based upon" suggests, the context confirms. Section 1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit "is based . . . upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action "is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.¹⁰

In this case, the Nelsons have alleged that petitioners recruited Scott Nelson for work at the Hospital, signed an employment contract with him, and subsequently employed him. While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. The Nelsons have not, after all, alleged breach of contract, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.

Petitioners' tortious conduct itself fails to qualify as "commercial activity" within the meaning of the Act, although the Act is too obtuse to be of much help in reaching that conclusion. We have seen already that the Act defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). If this is a definition, it is one distinguished only by its diffidence; as we observed in our most recent case on the subject, it "leaves the critical term 'commercial' largely undefined." *Republic of Argentina v. Weltover, Inc.*, 112 S.Ct. 2160, 2165 (1992). We do not, however, have the option to throw up our hands. The term has to be given some interpretation, and congressional diffidence necessarily results in judicial responsibility to determine what a "commercial activity" is for purposes of the Act.

Under the restrictive, as opposed to the "absolute," theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*). A state engages in commercial activity under the restrictive theory where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts in the manner of a private player within the market.

Whether a state acts in the manner of a private party is a question of behavior, not motivation. The question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce.

The intentional conduct alleged here (the Saudi Government's wrongful arrest, imprisonment, and torture of Nelson) could not qualify as commercial under the restrictive theory. The conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature. See *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (CA5 1980). Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *Brit.Y.B.Int'l L.* 220, 225 (1952).

The Nelsons' action is not "based upon a commercial activity" within the meaning of the first clause of § 1605(a)(2) of the Act, and the judgment of the Court of Appeals is accordingly reversed.

Justice STEVENS, dissenting.

Under the Foreign Sovereign Immunities Act (FSIA), a foreign state is subject to the jurisdiction of American courts if two conditions are met: The action must be "based upon a commercial activity" and that activity must have a "substantial contact with the United States." These two conditions should be separately analyzed because they serve two different purposes. The former excludes commercial activity from the scope of the foreign sovereign's immunity from suit; the second identifies the contacts with the United States that support the assertion of jurisdiction over the defendant.

In this case, petitioner's operation of the hospital and its employment practices and disciplinary procedures are "commercial activities" within the meaning of the statute, and respondent's claim that he was punished for acts performed in the course of his employment was unquestionably "based upon" those activities. Thus, the first statutory condition is satisfied; petitioner is not entitled to immunity from the claims asserted by respondent.

I am also convinced that petitioner's commercial activities--whether defined as the regular course of conduct of operating a hospital or, more specifically, as the commercial transaction of engaging respondent as an employee with specific responsibilities in that enterprise--have sufficient contact with the United States to justify the exercise of federal jurisdiction. Petitioner Royspec [an agent for Saudi Arabia] maintains an office in Maryland and purchases hospital supplies and equipment in this country. For nearly two decades the Hospital's American agent has

maintained an office in the United States and regularly engaged in the recruitment of personnel in this country. Respondent himself was recruited in the United States and entered into his employment contract with the hospital in the United States. Before traveling to Saudi Arabia to assume his position at the hospital, respondent attended an orientation program in Tennessee. The position for which respondent was recruited and ultimately hired was that of a monitoring systems manager, a troubleshooter, and, taking respondent's allegations as true, it was precisely respondent's performance of those responsibilities that led to the hospital's retaliatory actions against him.

Whether the first clause of § 1605(a)(2) broadly authorizes "general" jurisdiction over foreign entities that engage in substantial commercial activity in this country, or, more narrowly, authorizes only "specific" jurisdiction over particular commercial claims that have a substantial contact with the United States, petitioners' contacts with the United States in this case are, in my view, plainly sufficient to subject petitioners to suit in this country on a claim arising out of its nonimmune commercial activity relating to respondent. If the same activities had been performed by a private business, I have no doubt jurisdiction would be upheld. And that, of course, should be a touchstone of our inquiry. When a foreign nation sheds its uniquely sovereign status and seeks out the benefits of the private marketplace, it must, like any private party, bear the burdens and responsibilities imposed by that marketplace. I would therefore affirm the judgment of the Court of Appeals.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. Note, in the Eleventh Circuit's decision in *Nelson*, the discussion of the Act of State Doctrine, especially as articulated in the most recent Supreme Court case on the subject, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, which the Eleventh Circuit opinion quotes in relevant part.¹¹

2. The Eleventh Circuit discussed the history of the "Tate Letter" and the restrictive theory of sovereign immunity. The court seemed to view sovereign immunity as an exception to general jurisdiction. Does the Supreme Court turn this presumption directly around? Doesn't the Supreme Court view sovereign immunity as the general rule, with only specified exceptions found in the FSIA? If so, does this difference help to explain the different results in the *Nelson* Case?

3. What is the "nexus" requirement? Is it a fair judicial construction of the "based upon" language of FSIA Sec. 1605(a)(2)?

4. Was the fact that Scott Nelson was recruited in the United States enough to support any action by him for tort against Saudi Arabia? Suppose on a day off, he attended a political rally in Saudi Arabia, got into a scuffle, was arrested, and tortured. Would he be able to sue Saudi Arabia under the FSIA under those facts? Would there be a proper nexus? What is the nexus in the actual case?

5. In an article in a newsletter of the American Bar Association commenting on the Supreme Court's decision in the *Nelson* case, Anthony D'Amato wrote:

Since I neither briefed nor argued the case for Mr. Nelson in the Supreme Court, I have no first-hand impression as to what the Court's majority may have had in mind. But it seems clear that the attorneys for the petitioner (Saudi Arabia) succeeded in convincing the Court that "police activity" was somehow the gravamen of Nelson's complaint. Justice Souter wrote that "a foreign state's exercise of the power of its police has long been understood... as peculiarly sovereign in nature." The Court held that this kind of activity cannot constitute commercial activity within the meaning of the FSIA.

There is considerable irony in the litigation strategy of the "police activity" claim. At the Eleventh Circuit, I argued that Mr. Nelson was more respectful of the sovereign sensibilities of Saudi Arabia than the attorneys for Saudi Arabia! Torture is a crime in Saudi Arabia; more than that, it is a grave sin under the Koran. We were making no claim that Nelson was tortured as an exercise of sovereign police power. Rather, I said (in reply to a question from the bench) that all we were claiming was that Nelson was tortured under color of law. I pointed out that it was the attorneys for Saudi Arabia who were taking a position in court that the government of Saudi Arabia would not ever take in public---that torturing Nelson was sovereign activity. Those attorneys for Saudi Arabia were directly attributing Nelson's torture to the sovereign, King Fahd.

Is this a persuasive argument? Should it have been asserted vigorously in the Supreme Court?

6. In the same ABA article, D'Amato wrote:

Except for the unusual nature of the international tort involved in the *Nelson* case, it was similar to longstanding federal circuit court decisions involving negligent injuries abroad on foreign-government airlines when the U.S. plaintiff purchases his or her round-trip ticket in the United States. A recent case confirming this rule is *Barkanic v. General Admin. of Civil Aviation*, 822 F.2d 11 (2d Cir.), cert. denied 108 S.Ct. 453 (1987). There the

decedents bought a round-trip ticket for travel to China from an agent of the Chinese airline in the United States, although they were not guaranteed passage on a particular domestic flight in China. In China their ticket for a flight from Nanjing to Beijing was changed to a different flight which then crashed en route. The Court found jurisdiction under 28 U.S.C. Sec. 1605(a)(2).

The analogy to the Nelson case can be strengthened if we suppose that the pilot en route to Beijing flew his plane into a prohibited military zone where the Chinese government was conducting war games, and the plane was shot down. Although war games are quintessentially "sovereign activities," that fact surely would not excuse the airline's tort liability.

Do you agree with this analogy?

7. Does the Supreme Court's decision in the Nelson case, like its decision in the Alvarez case (Chapter 6), reflect a "crabbed" view of international law? Do you agree with some observers that the operative fact seems to be the lack of international law training in the law school education of some of the Justices?

8. Do you agree with Justice Stevens' dissent? Would there be any way for the majority and the dissenter to resolve their views and come to a consensus decision? If so, how?

FOOTNOTES Chapter 11

1 See Hans Kelsen, *Principles of International Law* (1952).

2 Edwin Borchard, *The Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137, 143-45 (1940).

3 *Geofroy v. Riggs*, 133 U. S. 258, 266, 267; *In re Ross*, 140 U. S. 453, 463; *Missouri v. Holland*, 252 U. S. 416.

4 *Foster v. Neilson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580, 598; *Chew Heong v. United States*, 112 U. S. 536, 540; *Whitney v. Robertson*, 124 U. S. 190, 194; *Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272.

5 *Hauenstein v. Lynham*, 100 U. S. 483, 487; *Geofroy v. Riggs*, *supra*, 271; *Tucker v. Alexandroff*, 183 U. S. 424, 437.

6 [Editor's Note: Please refer to Chapter 14 in this *Anthology* for the full text of the United Nations Charter.]

7 [Editor's Note: The Supreme Court cites the provisions of many other ancient treaties in support of a rule of customary international law exempting fishing vessels from capture as prizes of war. For a discussion of the effect of treaty provisions on the content of customary law, see Chapter 8 of this *Coursebook* and pp. 94-101 in the *Anthology*.]

8 [Editor's Note: For a discussion, see Chapter 4 ("Writings of Publicists") at pp. 103-04 in the *Anthology*.]

9 The Court, on motion of the Solicitor General in behalf of the United States, and after argument of counsel thereon, and to secure the carrying out of the opinion and decree of this court according to their true meaning and intent, ordered that the decree be so modified as to direct that the damages to be allowed shall be compensatory only, and not punitive.

10 We do not mean to suggest that the first clause of § 1605(a)(2) necessarily requires that each and every element of a claim be commercial activity by a foreign state, and we do not address the case where a claim consists of both commercial and sovereign elements. We do conclude, however, that where a claim rests entirely upon activities sovereign in character, as here, jurisdiction will not exist under that clause regardless of any connection the sovereign acts may have with commercial activity.

11 Some casebooks in international law devote extensive coverage to the Act of State Doctrine. But the vitality of that doctrine, in the aftermath of *Kirkpatrick v. Environmental Tectonics*, appears considerable diminished. The FSIA, which the Supreme Court in *Verlinden* called "comprehensive," appears to be crowding out most of the older approaches to suing foreign governments in U.S. courts. Nevertheless, the Act of State Doctrine, as

well as the Alien Torts Statute, should never be totally discounted.