

THE ALIEN TORT STATUTE AND THE FOUNDING
OF THE CONSTITUTION

At this time of celebration of the bicentennial anniversary of the Constitution, students of international law might have a special interest in reexamining the allegedly obscure origin of the Alien Tort Statute for the light it throws on how the new nation worked out a role for international law in foreign relations. The Alien Tort Statute, part of the Judiciary Act of 1789, originally provided that "the district court . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."¹ In referring to that statute in a 1975 case, Judge Friendly said it was "a kind of legal Lohengrin; . . . no one seems to know whence it came."² It is true that no capsule summary of legislative history can be found explaining the origin of the Alien Tort Statute, but that is far from saying that the Founding Fathers let it slip in inadvertently.

It is not my purpose here to give a detailed legislative history of the Alien Tort Statute, but rather to recount in general terms what my investigation of that history has revealed. Inasmuch as invocation of the statute is becoming more frequent in human rights litigation in American courts,³ there is no doubt that scholarly analyses of the legislative history will be forthcoming in the near future to complement an important recent study of the subject by Professor William Casto.⁴

In examining the record it should be recalled that the delegates at the Constitutional Convention assumed that if a particular issue "on the table" did not get into the Constitution, it would not necessarily be abandoned. Rather, the Founding Fathers negotiated a wide range of issues that we might characterize as belonging to the "organic laws" of the new nation. Some of these organic laws were so basic that they would find their way eventually into the draft of the Constitution proper. Others, somewhat less important, would be enacted by the First Congress as part of the structural statutory law of the new nation. The Founding Fathers were thus able to negotiate both *whether* a particular principle would govern the nation and *where* that principle would be located. The Committee on Style had a signifi-

¹ Judiciary Act of 1789, ch. 20, §9, 1 Stat. 73, 77 (1789) (currently, with minor changes, 28 U.S.C. §1350 (1982)).

² *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

³ See T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW* 136 (1987). An important decision applying the Alien Tort Statute, though not on a human rights issue, was handed down after this editorial was drafted. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), reprinted in 26 ILM 1375 (1987), summarized *infra* at p. 126.

⁴ Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986). My basic disagreement with Professor Casto lies in his characterization of the Alien Tort Statute as jurisdictional only, and not providing a statutory cause of action. *Id.* at 479. My position to the contrary is suggested in D'Amato, *Judge Bork's Concept of the Law of Nations Is Seriously Mistaken*, 79 AJIL 92, 100-04 (1985).

cant role in this process, successfully arguing that the Constitution should not be an overly lengthy document.⁵

The Founding Fathers showed flexibility and comprehensiveness in including the term "law of nations" both in the new Constitution and in the organic legislation of 1789. The general idea was that crimes against the law of nations needed to be put into the Constitution proper so as to allow Congress to preempt any state legislation to the contrary, whereas jurisdiction over torts against the law of nations—where there was no preemptive need—was inserted into the organic legislation. Thus, Congress was given the power in section 8 of Article I of the Constitution to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."⁶ On the other hand, torts in violation of the law of nations were relegated to the First Judiciary Act. Here it was clearly recognized that it was not as important to preempt state initiatives, for as long as an alien could *choose* to sue in a federal court, there was no harm done if *concurrent* jurisdiction over the same tort was available in state court. Hence the original language of the Alien Tort Statute, above quoted.

Why did the Founding Fathers believe it important to have the Alien Tort Statute be part of the nation's organic legislation? While there were many specific incidents whose remedy the Framers may have had in mind—as ably recounted by Professor Casto⁷—the overriding purpose was to maintain a rigorous neutrality in the face of the warring European powers. The United States was still weak militarily, compared to England, France and Spain. Many years would be needed before the new nation could stand firm against any aggressive threat from abroad. During the formative years of buildup, it was imperative that no excuse, no *casus belli*, be given to a foreign power.

It is somewhat difficult today for us to appreciate the mind-set of the Framers in regard to this overriding question of national security, because we tend to think that wars in that era were launched for reasons of national aggrandizement and conquest. We also think that the situation is entirely different today in the nuclear and television age. The fear of nuclear war has put a damper on any enthusiasm for wars of national aggrandizement, and television has vividly portrayed situations involving abuse of our nationals or our interests abroad. The major foreign-policy turning points of both the Carter and the Reagan administrations involved American hostages taken by, or at the behest of, Iran. As the plight of these hostages appeared on nightly television, we thought that our national outrage over and concern about individual persons must be a hallmark of heightened

⁵ The United States, therefore, ended up with a brief Constitution and a lengthy set of organic laws. Some countries (e.g., France) have just the organic legislation, which operates in the aggregate as a Constitution, while others (e.g., South Korea) have a very lengthy Constitution that contains all of the "organic" legislation.

⁶ Interestingly, the Framers meant by "define" not our current usage, which suggests the idea of "inventing," but rather the old, broader usage, which emphasized the idea of "articulating" or "recognizing." See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–62 (1820) ("piracy" is sufficiently defined under the law of nations as to need no further definition by Congress).

⁷ Casto, *supra* note 4.

sensitivity in our era to human rights and of the empathic power of the media.

The fact is that two or three centuries ago, the plight of individual citizens in foreign countries, and not territorial ambitions, was the major excuse for war. The masses of people then were pretty much like the masses today; they reacted far more to stories of maltreatment of their fellow citizens, even when the stories were largely through word of mouth and rudimentary pamphlets, than they did to the plottings of kings and princes for national expansion. The public was quite cynical about the latter; the pursuit of conquest usually meant privation, the possible disastrous loss of the war, or even in victory the enhancement of the kings and princes with no discernible benefits to the people. As a general matter, kings and princes had a hard time raising armies, because armies in those days were voluntary organizations. The best way to raise an army was to whip up public sentiment against a foreign country, and public sentiment was most easily aroused when stories could be spread of insults to ambassadors abroad or denials of justice to fellow citizens traveling abroad. An insult to the nation's honor that could be felt in sympathy by every citizen was much more effective in mobilizing the troops than were appeals for conquest.⁸

The most influential international law writer of the time, Emmerich de Vattel, referred specifically to "denial of justice" to aliens abroad as a justification for wars of reprisal launched by the alien's home nation.⁹ Accordingly, Alexander Hamilton wrote in *The Federalist*:

As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.¹⁰

One way the Constitution reflected this concern was by providing in Article III for the extension of judicial power to cases and controversies "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" (the "Diversity Clause"). To make sure that tort claims based on violations of the law of nations were cognizable in federal courts, regardless

⁸ I even suspect that a major factor in the victory of the colonies over Great Britain was the fact that King George lacked specific stories to tell of colonists' maltreatment of British officials, and hence had to rely on less visceral appeals based on the loss of tax revenue from the colonies. As a result, Britain did not commit the resources to the American Revolution that it could have committed had there been a more persuasive national excuse for mobilizing armies and transporting them across the Atlantic. If I am correct in this assessment, then the revolution was won largely because American leaders in those days accurately perceived the need to couch their demands for independence in terms of political usurpation, while successfully avoiding and for the most part prohibiting what today would be called "terrorism" against British officials or British subjects.

⁹ 3 E. DE VATTEL, *THE LAW OF NATIONS*, bk. II, ch. XVIII, §350, at 230-31 (Carnegie ed. trans. Fenwick 1916) (1758 ed.). The Supreme Court continues to use Vattel as the authoritative source of what the "law of nations" meant to the Founding Fathers. See *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

¹⁰ *THE FEDERALIST* NO. 80, at 517 (A. Hamilton) (Sesquicentennial Ed. E. M. Earle introd.).

of jurisdictional amount (there was originally a \$500 limitation in diversity cases), the Alien Tort Statute was designated to be part of the First Judiciary Act by the negotiators at the Constitutional Convention. Insofar as the Alien Tort Statute derives its power from the Diversity Clause, it allows an alien plaintiff to sue American citizens. But it is also possible under the statute for an alien plaintiff to sue an alien defendant (if the case involves other sufficient jurisdictional contacts with the United States). This power derives from the second way that the Constitution reflected Hamilton's concern—by the “Arising Under” clause of Article III, which extends federal judicial power to all cases “arising under [the] Constitution, the Laws of the United States, and Treaties made . . . under their Authority.”¹¹

It is not difficult to read between the lines of Alexander Hamilton's statement. He was obviously afraid of what state courts might do in cases involving foreigners. State courts assuredly had jurisdiction, if they wanted it, over cases concerning the citizens of other countries, and could have dealt (as they can deal today) with torts against international law. But state courts in 1787 were notoriously biased against foreigners.¹² The result in state court could be the occasion of the very thing Hamilton feared most—the denial of justice to an alien. Hence, federal courts, with judges more insulated against state passions and more aware of the importance of maintaining neutrality for the new nation, were given direct jurisdictional authorization over cases brought by aliens alleging torts in violation of the law of nations.

Thus, the Alien Tort Statute was an important part of a national security interest in 1789. Acutely recognizing that denials of justice could provide a major excuse for a European power to launch a full-scale attack on our nation, the Founding Fathers made sure that any such provocation could be nipped in the bud by the impartial processes of federal courts. From today's vantage point, we can only say that their idea succeeded admirably. The reason the Alien Tort Statute is comparatively obscure today is that it worked.

A final question that can be raised is why the Framers did not simply divest all courts, federal and state, of jurisdiction over these potentially

¹¹ So far as I am aware, this specific argument—that the Alien Tort Statute allows suits between alien parties because of the “Arising Under” clause—has not yet been made in an American court. However, it would seem to follow from the Supreme Court's reasoning in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491–97 (1983) (“Arising Under” clause validates an action by an alien against a foreign nation under the Foreign Sovereign Immunities Act), coupled with *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law . . .”).

¹² Indeed, the very jurisdictional limitation of \$500 operated to drive contract claims of British subjects against American citizens that were for less than \$500 into state courts. The \$500 limitation thus represented a compromise between the supporters of the national Government who wanted, at least in the larger cases, to ensure the implementation of the Definitive Treaty of Peace concluding the Revolutionary War (“Creditors on either Side shall meet with no lawful Impediment to the Recovery of the full value in Sterling Money of all bona fide Debts heretofore contracted”) and the state-minded delegates who wanted to force British creditors into hostile state courts. Definitive Treaty of Peace, Sept. 3, 1783, United States–Great Britain, 8 Stat. 80, TS No. 104; see *Casto*, *supra* note 4, at 507–08.

war-inciting cases involving foreigners, and instead settle the cases politically in the executive branch of the national Government. Indeed, in suggesting that the Alien Tort Statute raises problems of constitutionality in regard to separation of powers, Judge Bork has indicated his strong preference for executive resolution of cases having foreign-policy implications.¹³ Under the Reagan administration in particular, we have seen a thrust toward the political resolution of conflicts involving foreign interests and away from their judicial resolution—in the areas of extradition, extraterritorial application of U.S. law, act of state and sovereign immunity regarding denial of human rights. Why is it that the Founding Fathers did not opt for political instead of judicial control over such matters?

A little-known historical incident may illuminate this question. In 1794 a French fleet descended upon the British colony of Sierra Leone on the African coast. Led by an American slave trader who had a grudge against the colony, the French ransacked and plundered it for 2 weeks.¹⁴ The British ambassador protested to the Government of the United States about the conduct of the American slaver and several other American citizens who had accompanied him in the attack. If the United States attempted to pay reparations to Great Britain, France surely would have been angered and might have been provoked into military hostilities against the United States. On the other hand, if the United States failed to do anything, Great Britain would have regarded the failure as a denial of justice. Fortunately, the Founding Fathers had foreseen this very dilemma a half-dozen years earlier when they enacted the Alien Tort Statute. Accordingly, the United States Government turned the matter over to Attorney General Bradford, who wrote a legal opinion addressed to the British minister plenipotentiary. The Attorney General explained:

[T]here can be no doubt that the company [the Sierra Leone company] or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States; . . . such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose . . .¹⁵

Here, then, was the remedy. By providing for an impartial system of federal courts that had jurisdiction over such controversies, the new Government could shun political entanglements and no-win situations. The “law of nations” would serve as an impartial standard, acceptable to all nations, and torts committed by American citizens in violation of that law would be redressed through its application by federal courts. The fact that there is no further record of the incident (at least as far as I have been able to find) is a

¹³ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 440 U.S. 1003 (1985). Given Judge Bork’s reputation for insisting on the original intent of the Framers, it is rather interesting to find him saying in this case that the Framers did not understand separation of powers.

¹⁴ For details of the incident, see C. FYFE, *A HISTORY OF SIERRA LEONE* 59–61 (1962).

¹⁵ 1 Op. Att’y Gen. 57, 59 (1795).

good indication that Great Britain was satisfied with the Attorney General's opinion.

The imperative security interests that animated Alexander Hamilton and Attorney General Bradford are fortunately not as scary today. The military power of the United States today is such that insults and denials of justice to foreign nations will not jeopardize our existence. Nevertheless, the perception that we will deal fairly and impartially with cases having foreign implications, and not make political bargaining chips out of them, is still significant in terms of our national ideals, which include a free economic market, basic political freedoms for all people and willingness to submit to the rule of law.

ANTHONY D'AMATO

TAKING TREATIES SERIOUSLY

Treaties are the bones and sinew of the global body politic, making it possible for states to move from talk through compromise to solemn commitment. They are also its moral fiber, the evidence that governments and people have pledged their "full faith and credit" to one another.

This makes it all the more disturbing that the United States seems increasingly content to be perceived by other nations as indifferent to its most solemn treaty obligations. By refusing to pay our agreed assessed share of the United Nations budget, we have violated Article 17(2) of the UN Charter, the preeminent global treaty. By closing the Palestine Liberation Organization's observer mission to the United Nations, we will be violating the spirit and the consistent practice, if not the literal letter, of Article 4, section 11(5) of the Headquarters Agreement that we signed and ratified as a concomitant of establishing the United Nations in New York. That provision obliges the host country to impose no "impediments to transit to or from the headquarters district of . . . persons invited to the headquarters district by the United Nations." Successive U.S. administrations have read this as guaranteeing a right of establishment sufficient to allow the accessing delegation to function effectively. Our own Secretary of State has deplored such actual or potential violations, to no notable effect on Congress.

True, Article 1, section 8 of the Constitution of the United States, by assigning the "power of the purse" to the legislative branch, has mandated a sharing of all subject matter responsibility, even for the conduct of foreign relations. But the Constitution, in Article 2, section 2, has also established an orderly procedure by which Congress—through the Senate's advice and consent power—participates in pledging America's word to other nations. It is both morally and politically reprehensible for Congress to tell the world that America's word is no longer to be trusted.

Here we are, blaming the Russians for alleged violations of the ABM Treaty while displaying cavalier indifference to our own gross violations of treaties that the rest of the world takes seriously. Here we are, insisting on