Washington and Lee University School of Law

Washington and Lee University School of Law Scholarly Commons

Scholarly Articles | Faculty Scholarship

4-1988

Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts

Frederic L. Kirgis
Washington and Lee University School of Law, kirgisr@wlu.edu

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlufac

Part of the International Law Commons

Recommended Citation

Frederic L. Kirgis, *Alien Tort Claims, Sovereign Immunity and International Law in U.S. Courts*, 82 Am. J. Int'l L. 323 (1988).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

HEINONLINE

Citation: 82 Am. J. Int'l L. 321 1988

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Tue Sep 9 12:51:58 2014

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0002-9300

PERSONAL RECOLLECTIONS

My father's interest in international law dated, at least, from the time he took Professor Reeves's course in the subject while an undergraduate at the University of Michigan in 1928. Following his retirement from the Law School, he taught that same course to undergraduate political science students in 1980 and 1981. He said that some of them wondered about a professor who was teaching a course over 50 years after taking it! Nevertheless, the course was popular and the students enjoyed the enthusiasm with which he approached each class. My father taught almost every year after his mandatory retirement from the Law School in 1976; his last teaching was a seminar on treaties and the law of the sea in the winter of 1986. Since that time he had been working on the revision of his casebook—a task he did not finish.

He came to Ann Arbor in 1915, as a boy of 9, when his father was appointed Librarian of the University of Michigan. The university was always the center of his life and, despite a number of years spent on the East Coast, he always considered Ann Arbor to be his home. My early memories include the university football games, hikes and picnics in the university arboretum, and foreign students coming to our home to visit and discuss international law. My parents had met while both were lawyers in the Department of State in Washington, D.C., during World War II. My mother, Mary S. Bishop, shared his interest in international law and his love of the outdoors and travel. I have many happy memories of the months we spent living in Rome in 1957–1958 and again in 1965, and of trips through France, Holland, England and Scandinavia. My father enjoyed seeking out Roman ruins and picnic sites by the sea, climbing mountains, and seeing old friends, and he had a special liking for the paintings of Raphael and Rembrandt. Last summer he completed his goal of eventually visiting all 50 states; we spent a glorious month together in Alaska, the last one, seeing glaciers and plentiful wildlife.

As I hear now from many of his former students and colleagues, scattered throughout the world, I am learning more of his devotion to teaching. He really loved to teach, whether it was leading bird hikes and stargazing with his Boy Scouts, helping me with algebra and Latin, or explaining the fine points of a treaty to a law student. As many know, his office at the Law School was piled high with books and papers, but he could lay his hands on the appropriate ones at once! He savored life, and I rejoice in the fact that he was able to be active and involved to the very end.

ELIZABETH S. BISHOP*

ALIEN TORT CLAIMS, SOVEREIGN IMMUNITY AND INTERNATIONAL LAW IN U.S. COURTS

A neutral merchant vessel, carrying no contraband, is attacked and damaged on the high seas by Argentine aircraft during the Falklands/Malvinas

* East Lansing, Michigan.

war, in violation of customary international law. Although the vessel is owned by a Liberian company and is registered in Liberia, its ultimate ownership is American and it is engaged in U.S. maritime commerce. As a practical matter, diplomatic remedies are unavailable, and the pursuit of a remedy within the attacking state's judicial system appears to be futile. When presented with the opportunity to provide a remedy, an American court—understandably—will be sorely tempted to do so. In *Amerada Hess Shipping Corp. v. Argentine Republic,*[1] a panel of the U.S. Court of Appeals for the Second Circuit yielded to the temptation.

In *Amerada Hess*, the court assumed the facts to be as set forth above.[2] The court found the aerial attack to be in violation of customary international law. Although it did not discuss this point with much erudition, its conclusion was correct on the assumed facts.[3]

The plaintiffs asserted federal jurisdiction under the Alien Tort Claims Act.[4] It gives federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The American-controlled Liberian corporate plaintiffs were aliens, and they were the alleged victims of a tort committed in violation of the law of nations. That is all the court had to find to satisfy the federal subject-matter jurisdictional requirements of the Alien Tort Claims Act.[5] Instead, the court went on to discuss sovereign immunity as an aspect of federal jurisdiction under that Act. This led it astray.

"The modern view," according to the court, "is that sovereigns are not immune from suit for their violations of international law."[6] The court

[1] 830 F.2d 421 (2d Cir. 1987), *reprinted in* 26 ILM 1375 (1987), *petition for cert. filed,* 56 U.S.L.W. 3592 (U.S. Mar. 1, 1988) (No. 87-1372).

[2] The case came up after the district court had granted the defendant's motion to dismiss for lack of jurisdiction. Thus, the court of appeals accepted the plaintiffs' allegations as true. The stated facts are essentially as reported at the time of the alleged attack. *See* N.Y. Times, June 9, 1982, at A23, col. 1.

[3] *See* UN CHARTER art. 2(4); Convention on the High Seas, Apr. 29, 1958, Arts. 2, 6, 450 UNTS 82, 13 UST 2312, TIAS No. 5200; Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Arts. 87, 92, UN Doc. A/CONF.62/122, *reprinted in* UNITED NATIONS, THE LAW OF THE SEA: UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, UN Sales No. E.83.V.5 (1983), and 21 ILM 1261 (1982). *See also* note 19 *infra*. The court relied on Articles 22 and 23 of the Convention on the High Seas.

[4] 28 U.S.C. §1350 (1982).

[5] It would not necessarily be all the court would have to find in order to establish the constitutionality of the Alien Tort Claims Act, as applied to these facts. *Amerada Hess* probably would be within the federal judicial power (Article III of the Constitution) only if it were a case "arising under . . . the Laws of the United States, and Treaties made, or which shall be made, under their Authority." (No attempt was made, apparently, to bring it within the admiralty and maritime jurisdiction.) For international customary or treaty law to be within the quoted language, it would have to be self-executing or embodied in a federal statute. Specific human rights norms—such as the norm against torture—should be held self-executing, but it is less clear that the norms involved in *Amerada Hess* would be (or that they are somehow incorporated by reference in §1350). The court in *Amerada Hess* did not address the constitutional issue.

[6] 830 F.2d at 425, *reprinted in* 26 ILM at 1380. For this, the court relied on Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine,* 23 VA. J. INT'L L. 191, 221–32 (1983); Bazyler, *Litigating the International Law of Human Rights: A "How to" Approach,* 7 WHITTIER L. REV. 713, 733–34 (1985).

discussed this view in terms that failed to differentiate between (1) "immunity" from international responsibility, which of course does not exist when a state violates international law, and (2) immunity from the jurisdiction of the domestic courts of other states. Nothing it said demonstrated the absence of the latter type of immunity, at least in modern times.[7]

Still dealing with the Alien Tort Claims Act, the court then confused the sovereign immunity defense with an argument made by the Nuremberg defendants. The Nuremberg argument, which the court in *Amerada Hess* identified as a sovereign immunity defense, was that governmental officials, acting for the state, are protected from personal responsibility under international law. The international tribunal at Nuremberg rejected that argument in the case of crimes against international law.[8] It has nothing to do with the immunity or nonimmunity of the Argentine Government in a civil action in a domestic court of another nation. The question is not simply whether Argentina violated international law, but whether a domestic court outside Argentina has the authority to summon the Argentine Government to appear and answer for its conduct.

The court might have been spared entry into these thickets if the Foreign Sovereign Immunities Act (FSIA)[9] had not juxtaposed sovereign immunity with federal jurisdiction. The two are analytically distinct, but the FSIA requires a plaintiff relying on its jurisdictional section[10]—a separate jurisdictional grant from that in the Alien Tort Claims Act—to get past a defendant's claim of sovereign immunity at the jurisdictional stage. The court in *Amerada Hess* did not rely on the FSIA for its subject matter jurisdiction. Nevertheless, since the defendant raised the sovereign immunity issue, the court might have thought that, as it is relevant to subject matter jurisdiction under the FSIA, it would be relevant even under the Alien Tort Claims Act.

Having mistakenly discussed sovereign immunity in the context of the Alien Tort Claims Act, the court next turned to the FSIA itself. Somehow, the majority of the panel became convinced that the focus of the FSIA is limited to commercial situations,[11] leaving the immunity *vel non* of noncommercial sovereign acts to some other body of law (i.e., the Alien Tort Claims

[7] Some commentators have argued that, historically, sovereign immunity did not apply to a foreign sovereign accused of committing acts in violation of international law. *See* A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 201–04 (1987); Paust, *supra* note 6, at 238–41. The commentators and the court in *Amerada Hess* have cited The Santissima Trinidad, 20 U.S. (7 Wheat.) 283 (1822), for this proposition. That case involved a claim against goods unlawfully taken as prize by a foreign public vessel, but not in the possession of the foreign sovereign. Instead, the goods were in the possession of a private bailee. The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), applied sovereign immunity to preclude private libelants from asserting that a public vessel in the possession of the French navy had been taken from them in violation of international law. Thus, sovereign immunity seems firmly established historically, even in cases involving an alleged violation of international law.

[8] Judgment of the International Military Tribunal at Nuremberg, Oct. 1, 1946, 41 AJIL 172, 220–21 (1947) [hereinafter Nuremberg Judgment].

[9] 28 U.S.C. §§1330, 1602–1611 (1982).

[10] 28 U.S.C. §1330.

[11] The majority did recognize one exception, in §1605(a)(5) (torts causing harm in the United States). That exception, of course, did not apply to the facts in the case.

Act, if an alien alleges a violation of international tort law). According to the majority, "Congress was not focusing on violations of international law when it enacted the FSIA."[12] Thus, Argentina's noncommercial, unlawful attack on the Liberian vessel would not be covered by the FSIA.

This is clearly incorrect. Section 1604 of the FSIA says that, subject to certain international agreements, "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." Those exceptions deal primarily, but not exclusively, with commercial matters. One of them, not mentioned by the majority of the panel, deals expressly with expropriations in violation of international law.[13] Thus, Congress did focus on international law violations, and permitted an exception from immunity for certain ones—not including attacks on neutral vessels. The residual immunity of section 1604 would apply. Its subordination to certain international agreements relates to agreements delineating immunities in domestic courts, not to agreements rendering unlawful such conduct as the bombing of a merchant vessel on the high seas.

The court compounded its error on sovereign immunity by suggesting that international law would *preclude* immunity in this situation. It then said, "Since Congress did not express a clear intent to contradict the immunity rules of international law,"[14] the FSIA would not "preempt" the Alien Tort Claims Act. International law probably requires immunity, rather than precluding it, in this situation, in the absence of a waiver by the sovereign defendant. This conclusion is indicated by state practice, as reflected in the work of the International Law Commission on the jurisdictional immunities of states and their property.[15] The Commission's draft articles immunize public acts, without distinguishing acts that violate international law from those that do not.

As much as one might wish that sovereign immunity were precluded in domestic courts for foreign governments' acts in violation of international norms of civilized behavior, it simply is not so as a matter of international or statutory law. The wish may even be misguided as a matter of policy. Federal judges in the United States typically are not experts in international law.[16] Nor are their law clerks. When they deal with international law

[12] 830 F.2d at 426, *reprinted in* 26 ILM at 1381. Judge Kearse entered a forceful dissent on this point.

[13] 28 U.S.C. §1605(a)(3). Although expropriations usually are of property used for commercial purposes, the acts of expropriation are not commercial acts.

[14] 830 F.2d at 427, *reprinted in* 26 ILM at 1382–83.

[15] *See especially* Report of the International Law Commission on the work of its thirty-second session, UN Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 1, 137–57, UN Doc. A/CN.4/SER.A/1980/Add.1. In its commentary to draft Article 6 on jurisdictional immunities, the Commission reviewed state practice and concluded that, "in the general practice of States as evidence of customary law, there is little doubt that a general rule of State immunity has been firmly established as a norm of customary international law." *Id.* at 149. The Commission has recognized a number of exceptions, but they do not encompass the *Amerada Hess* situation.

[16] It is increasingly evident that federal judges should be given training in basic international law, and in the relationship between international and domestic law. To the extent that the

questions, they are dealing with an unfamiliar system shaped by unfamiliar sources and mechanisms. They bring to the task their legal training and the assimilation of values prevalent in a militarily powerful, politically stable capitalist nation. They are not always presented with international law violations as clear as the one alleged in *Amerada Hess*. It is far from certain that they will make fully supportable, nonparochial judgments on international law issues that will determine whether or not a foreign sovereign is subject to their assertion of adjudicative power.[17]

The court's wishful thinking in *Amerada Hess* extended even to its assertion of personal jurisdiction over Argentina. Finding the constitutional requirements for personal jurisdiction satisfied, the court said:

> We note at the outset that certain universal offenses, like piracy and genocide are offenses against the law of nations wherever they occur. . . . The allegations here probably fall within this class of offense. Since, under international law, a state may punish these offenses even when they occur outside the state's territory, it has been argued that such occurrences always have sufficient "effects" within the United States to satisfy due process.[18]

It is debatable whether an attack on a merchant vessel in wartime should be equated with genocide or piracy. Perhaps so, since it could be a war crime.[19] But the real problem here is the confusion between jurisdiction to prescribe and jurisdiction to adjudicate. To say that certain offenses are "universal" is to say that any nation may prescribe rules prohibiting them and may enforce those rules if it catches the offenders. It says nothing about jurisdiction to adjudicate the matter when the alleged offender is not otherwise before the domestic court or subject to its process.[20]

The court did say that it need not decide the "universal jurisdiction" question in this case; hence, its declaration on the matter was dictum. One hopes it will not be taken at face value.

The court went on to decide that Argentina's actions, as alleged, were sufficiently related to the United States to permit suit in the U.S. District Court. The Second Circuit panel pointed to these factors:

---

judiciary acquires expertise in international law, the strength of the argument in the text diminishes.

[17] This objection loses some force when the violation of international law is clear, as it seems to have been in *Amerada Hess*. But judges in domestic courts are not well equipped to distinguish clear violations from unclear ones. This is true in the sovereign immunity context, as it is in the act of state context. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 433–35 (1964). Even in the *Amerada Hess* situation, the court relied on the wrong provisions of the Convention on the High Seas. *See* note 3 *supra*.

[18] 830 F.2d at 428, *reprinted in* 16 ILM at 1383 (citing Paust, *Draft Brief Concerning Claims to Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA*, 8 HOUSTON J. INT'L L. 49, 69–70 (1985)).

[19] *See* Nuremberg Judgment, *supra* note 8, at 304; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 607 (Y. Sandoz, Ch. Swinarski & B. Zimmermann eds. 1987).

[20] For the distinction between jurisdiction to prescribe and jurisdiction to adjudicate, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §401 (1988) [hereinafter RESTATEMENT (THIRD)]. *See also id.*, ch. 2, Introductory Note.

- the United States notified Argentina that the vessel would be passing through the South Atlantic on neutral business;
- the vessel was plying the United States domestic trade;
- Argentina was aware of the U.S. interest in protecting the freedom of the high seas;
- Argentina has benefited from the freedom of the seas;
- Argentina has the means to defend a suit in the United States;
- if the United States were to decline to exercise personal jurisdiction, substantive policies of international law would be undermined; and
- fairness weighs in favor of exercising jurisdiction, since the plaintiffs were unable even to obtain a hearing on their grievance in Argentina.

These factors, even in the aggregate, would not seem to satisfy the minimum contacts test.[21] Argentina's act had no connection with the United States, nor did the harm occur there. To use the words of the United States Supreme Court, it could not be said that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[22] Moreover, though the plaintiffs were U.S.-controlled, they were not U.S. nationals and their vessel was not registered in the United States. Instead, they chose Liberian nationality and registration, presumably to avoid the burdens of U.S. law. This diminishes the interest of the United States in providing a forum.[23]

Even if the normal Supreme Court standard for personal jurisdiction were met, it would not necessarily follow that there is jurisdiction to adjudicate in a case such as this. Transnational sensitivities are directly involved when the defendant is not only foreign, but a foreign government. Circumspection in extending the judicial long arm seems highly appropriate.[24]

It might be argued that the activities of the Argentine Embassy in the United States supply a sufficient governmental presence to render the Argentine Government (though not the embassy or its staff) amenable to a lawsuit arising out of its political activities elsewhere. But even if this argument is tenable, it does not get around the sovereign immunity defense.

The problem in *Amerada Hess* is not simply that the court made new law on sovereign immunity or on any of the jurisdictional matters, but that it did so by blurring distinctions that enable decision makers to identify relevant

[21] *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[22] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

[23] *Cf.* Asahi Metal Industry Co. v. Superior Court, 107 S.Ct. 1026, 1034 (1987).

[24] *See* Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 28–44 (1987) (arguing for heightened scrutiny of jurisdictional claims in international cases, even when the defendant is not the sovereign). *Cf.* RESTATEMENT (THIRD), *supra* note 20, §421 (which says that the exercise of jurisdiction to adjudicate must be "reasonable," without distinguishing between the requirements of constitutional law and of international law).

policies underlying the rules in question. Moreover, it did so by misconstruing a statutory rule of immunity embodied in the FSIA. One simply cannot usefully think about "immunity" (or nonimmunity) from international responsibility in the same terms as one thinks about immunity from the jurisdiction of courts of another state. One cannot usefully think about sovereign immunity without recognizing, as the background to the exceptions set forth by the FSIA, that it accepts the basic international rule of immunity for political acts. One cannot usefully think about jurisdiction to prescribe in the same terms as jurisdiction to adjudicate. And one cannot fruitfully think about jurisdiction to adjudicate, at least in the United States, without thinking about such things as minimum contacts with U.S. territory and the degree of U.S. interest in providing a forum.

To criticize the court's reasoning and result in *Amerada Hess* is not necessarily to criticize the well-known *Filartiga* case,[25] also decided under the Alien Tort Claims Act. *Filartiga* involved a claim of torture, made against a Paraguayan police official. The Paraguayan Government was not joined as a defendant. Consequently, the significant issues did not concern sovereign immunity. Nevertheless, *Filartiga* did involve issues related to sovereign conduct, and the court did not acquit itself altogether satisfactorily in that connection.

In *Filartiga*, the court showed convincingly that customary international law prohibits torture. That is not the same, however, as showing that an individual who commits torture is personally responsible under customary international law.[26] A persuasive argument to this effect can be made if the perpetrator or instigator is a public official acting under color of state authority, and if the act otherwise fits within the accepted definition of torture[27]—despite the fact that the relevant international instruments focus on the duties of states rather than individuals. The reason is the same as in the case of war crimes: the acts not only are committed by individuals who abuse official positions of power, but also are universally condemned on humanitarian grounds. Unfortunately, the court in *Filartiga* made only the most fleeting reference to individual responsibility for torture under international law.[28]

The court in *Filartiga* thus reached a justifiable result,[29] but it missed an excellent opportunity to provide the full justification. This reminder of

[25] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[26] *See* D'Zurilla, *Individual Responsibility for Torture Under International Law*, 56 TULANE L. REV. 186 (1981).

[27] For a current definition, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1, GA Res. 39/46 (Dec. 10, 1984). A similar definition appears in the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX) (Dec. 9, 1975). Neither the Convention nor the declaration expressly provides that an individual violates international law by committing torture.

[28] 630 F.2d at 890. *Cf.* Carmichael v. United Technologies Corp., 835 F.2d 109, 113–14 (5th Cir. 1988).

[29] Notwithstanding Judge Bork's individual opinion to the contrary in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 798–823 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

the difficulties of federal judges in dealing with subtle or complex international law questions does not mean that they can or should avoid all international law issues. As long as they are circumspect in exerting their power directly over foreign governments (a circumspection dictated by the FSIA, but not observed in *Amerada Hess*) and are diffident about questioning the official acts of recognized foreign governments taken within their own territories (the province of the act of state doctrine, but not at issue in *Amerada Hess*),[30] they have a role to play in the development of international law.

The role is particularly useful in civil cases involving any of a rather short list of egregious and universally condemned human rights violations, so long as sovereign immunity, limits on jurisdiction to adjudicate and the act of state doctrine do not stand in the way. Regrettably, they will stand in the way in many cases. But not in all. The violations include those set forth in section 702 of the new *Restatement*.[31] They could also include the most widely condemned, clearly defined examples of terrorism, such as hostage taking,[32] as well as clearly defined war crimes.[33] The international norms prohibiting these human rights violations, whether in treaty or customary form, are intended to protect individuals and are sufficiently clear, precise and obligatory to be self-executing in civil actions brought in U.S. courts. The risk of judicial error on substantive international law issues in such cases is not as great as it is in cases involving hazier or more controversial norms.[34]

FREDERIC L. KIRGIS, JR.*

[30] It arguably was at issue in *Filartiga*, but the court managed to finesse the point. 630 F.2d at 889–90. *See also* Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544–47 (N.D. Cal. 1987).

[31] The list consists of genocide; slavery or slave trade; murder or causing the disappearance of individuals; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; systematic racial discrimination; and consistent patterns of gross violations of internationally recognized human rights. *See* RESTATEMENT (THIRD), *supra* note 20, §702. The section deals with violations committed as a matter of state policy; it does not address individual responsibility. Nevertheless, each of the listed offenses should entail individual responsibility under international law if the individual is acting under color of state authority.

For a case following the lead of *Filartiga* by applying the Alien Tort Claims Act to prolonged arbitrary detention by military personnel under the command of the defendant, a former general in Argentina, see Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D. Cal. 1987).

[32] *See* GA Res. 40/61 (Dec. 9, 1985) (referring to acts of terrorism as criminal); SC Res. 579 (Dec. 18, 1985) (referring to the taking of hostages and abductions as offenses of grave concern to the international community); both *reprinted in* 80 AJIL 435 (1986).

[33] *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Art. 147, 75 UNTS 287, 6 UST 3516, TIAS No. 3365; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 10, 1977, Arts. 11, 85(3), UN Doc. A/32/144, Ann. 1, *reprinted in* 16 ILM 1391 (1977).

[34] *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

* Of the Board of Editors.