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## The Loneliness of the Long Distance Statute, The Alien Tort Claims Act, 28 U.S.C. § 1350

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# Comments

## THE LONELINESS OF THE LONG DISTANCE STATUTE, THE ALIEN TORT CLAIMS ACT, 28 U.S.C. § 1350

Section 1350 of Title 28 of the United States Code<sup>1</sup> grants to the federal district courts subject matter jurisdiction<sup>2</sup> over civil actions brought by an alien for a tort committed in violation of the law of nations or a treaty of the United States. Although the wording of the statute has remained almost unchanged since its first enactment in 1789,<sup>3</sup> very few reported decisions have interpreted section 1350.<sup>4</sup> In just three of these decisions did a court retain jurisdiction of a claim brought under section 1350 or one of its predecessors.<sup>5</sup> The scanty case law interpreting section

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<sup>1</sup> 28 U.S.C. § 1350 (1976). Section 1350 states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

<sup>2</sup> Subject matter jurisdiction in the federal courts is based on the character of the parties, on the nature of the controversy, or on both. *See United States v. California*, 328 F.2d 729, 734 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964). Section 1350 is an example of a jurisdictional statute based both on the character of the parties and on the nature of the controversy, because § 1350 requires that the plaintiff be an alien and that the controversy involve a tort committed in violation of international law. *Id.* Section 1350 grants jurisdiction without regard to the amount in controversy requirement of the diversity and federal question statutes, 28 U.S.C. §§ 1331, 1332. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549-50 n.17 (1972).

<sup>3</sup> The original version of § 1350 was passed by the first Congress in the Judiciary Act of 1789. 1 Stat. 73, 77 (1789). When federal statutes were codified in 1876, the original version of § 1350 was modified slightly and reenacted. 18 No. 1 Stat. 94, 96 (1875). Section 1350 was also modified and reenacted in two later recodifications. 36 Stat. 1087, 1093 (1911); 62 Stat. 869, 934 (1948). The most notable change in the statute was the elimination of language which stated that the grant of federal jurisdiction was to be concurrent with the jurisdiction of the states. *Compare* 1 Stat. 73, 77 (1789) *with* 18 No. 1 Stat. 94, 96 (1875). Because of the elimination of the concurrent jurisdiction language, some commentators have stated that § 1350 operates as an exclusive grant of jurisdiction, depriving the states of jurisdiction over claims falling within the terms of § 1350. *E.g.*, F. DAWSON & I. HEAD, *INTERNATIONAL LAW NATIONAL TRIBUNALS AND THE RIGHTS OF ALIENS* 128 (1971). *See also* *Chapalain Compagnie v. Standard Oil Co. (Indiana)*, 467 F. Supp. 181, 182 (N.D. Ill. 1978) (counsel argued 28 U.S.C. § 1441 removal improper because federal court did not have exclusive jurisdiction under 28 U.S.C. § 1331 and § 1350). However, the elimination of the concurrent jurisdiction language cannot support the contention that § 1350 is exclusive. The rule of construction is that the federal courts have exclusive jurisdiction only where it is explicitly reserved by statute. L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 206 (1972) [hereinafter cited as HENKIN]. No case law exists which supports the contention that § 1350 is a grant of exclusive jurisdiction.

<sup>4</sup> *See* Annot., 34 A.L.R. FED. 388, 391 (1977).

<sup>5</sup> *See Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. No. 1,607 (D.S.C. 1795).

1350 has not clearly delineated the meaning of and the relationship between the terms "tort" and "law of nations."<sup>6</sup> The cases interpreting section 1350 have not fully analyzed the proper choice of law to establish whether a tort has been committed,<sup>7</sup> nor have these cases determined how the doctrine of *forum non conveniens* should be applied to section 1350 claims.<sup>8</sup>

Section 1350 does not create a federal cause of action,<sup>9</sup> but grants jurisdiction to the federal district courts over a special category of tort claims.<sup>10</sup> Whether or not the acts alleged constitute a tort will be decided according to the law selected by the applicable choice of law principles.<sup>11</sup> The basis for federal jurisdiction is a violation of customary international law or a United States treaty.<sup>12</sup> Section 1350 subject matter jurisdiction is properly established when the plaintiff, an alien, presents a colorable tort claim, so long as the commission of the tort involved a violation of customary international law or a United States treaty.<sup>13</sup>

A section 1350 analysis in which the tort and the international violation are separately considered, is consistent with the three reported decisions in which a court retained jurisdiction over a section 1350 claim.<sup>14</sup> In

*See also* O'Reilly De Camara v. Brooke, 209 U.S. 45 (1908) (unlawful confiscation of alien property by a United States officer may be within the scope of § 1350 predecessor); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (wrongful retention of custody of Vietnamese children may be tort in violation of law of nations); 26 Op. Att'y Gen. 250 (1907) (§ 1350 predecessor provides United States forum for Mexicans harmed by American company's diversion of the Rio Grande in violation of a treaty).

<sup>6</sup> See text accompanying notes 32-37, 46, & 66-69 *infra*.

<sup>7</sup> See text accompanying notes 84-92 *infra*.

<sup>8</sup> See text accompanying notes 93-99 *infra*.

<sup>9</sup> Dreyfus v. Von Finck, 534 F.2d 24, 28 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

<sup>10</sup> See, e.g., Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978). See also text accompanying notes 15-31 *infra*. The *Levi* court assumed that the custody of Vietnamese children by American foster parents could be of a tortious character and examined Michigan, Vietnamese, and international law to determine if that custody was actually wrongful.

<sup>11</sup> The usual choice of law rule mandates that the law of the place of the wrong be applied, but the law of the forum and international law are also possible choices. See text accompanying notes 84-92 *infra*. Other possible choices include the law of the domicile or nationality of any of the parties and in maritime cases, the law of the flag. See *Lauritzen v. Larsen*, 345 U.S. 571, 584, 586-87 (1952).

<sup>12</sup> Section 1350 is an example of a statute basing federal jurisdiction on the existence of a federal question. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 n.17 (1972).

<sup>13</sup> See text accompanying notes 37-54 *infra*.

<sup>14</sup> In analyzing § 1350 claims, some cases have not distinguished the requirement of a tort from the requirement of an international violation. The exact holding of these cases is difficult to determine. See, e.g., O'Reilly De Camara v. Brooke, 209 U.S. 45 (1908) (actions of United States officer not tort or not violation of the law of nations if ratified by legislative and executive branches); *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (nuclear testing not tort or not violation of international law). As this article went to print, the Second Circuit handed down its decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The Second Circuit found that allegations of wrongful death by torture established a violation of the international law of human rights and could invoke § 1350 jurisdiction. *Id.* at 884. The court's opinion deals mainly with the issue of whether torture is proscribed by international custom, but the opinion also

*Bolchos v. Darrel*,<sup>15</sup> decided in 1795, a French ship took a Spanish ship as prize and brought it into a South Carolina port.<sup>16</sup> Several slaves captured with the prize ship belonged to a Spaniard, but were mortgaged to a British citizen.<sup>17</sup> An agent of the British mortgagee seized the slaves in South Carolina.<sup>18</sup> The French captor brought suit for their return in the District Court of South Carolina.<sup>19</sup> The court held that its subject matter jurisdiction was founded in admiralty or, in the alternative, on the 1789 predecessor of section 1350.<sup>20</sup> The French plaintiff asserted a violation of a treaty between France and the United States.<sup>21</sup> According to the treaty, property found on board a vessel of an enemy of either the United States or France was forfeit to the captor, even if the property belonged to a neutral.<sup>22</sup> The treaty provided the proper rule for determination of ownership, and domestic law apparently established the existence of a tortious taking.<sup>23</sup> The court's reasoning suggests that federal jurisdiction was based on the ownership rules provided by the treaty, while the relief was granted for a tort under domestic law, not international or treaty law.

Separate analyses of the tort and international law violation were made in *Abdul-Rahman Omar Adra v. Clift*<sup>24</sup> to support its finding of section 1350 jurisdiction. The defendant, an Iraqi citizen, was the former wife of the Lebanese plaintiff.<sup>25</sup> The plaintiff brought suit in the Maryland District Court for custody of his daughter, also a Lebanese national.<sup>26</sup> Relying on American tort principles, the court reasoned that the mother's retention of custody of the daughter was a tortious act, if she

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concludes that Paraguayan law might be the proper law to decide the substantive merits of the alleged tort on remand in the district court. *Id.* at 889. The court's opinion shows a clear perception that allegations of an international violation and a tort require separate analyses in a § 1350 case.

<sup>15</sup> 3 F. Cas. No. 1,607, p. 810 (D.S.C. 1795).

<sup>16</sup> *Id.* at 810.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* See note 3 *supra*.

<sup>21</sup> The *Bolchos* court did not cite the treaty it relied on, but the court was referring to Article 14 of the Treaty of Amity and Commerce, February 6, 1778, United States-France, 8 Stat. 20, *annulled* July 7, 1798, 1 Stat. 578 ch. 67.

<sup>22</sup> 3 F. Cas. No. 1,607 at 811. The treaty between France and the United States relied on by the *Bolchos* court reversed the usual international custom which protected the property of friendly nationals found aboard enemy vessels taken prize. *Id.* The *Bolchos* court did not state when the ship was taken prize, but France was at war with both England and Spain from early 1793 through 1795 when the case was decided. Since the mortgagee and mortgagor were British and Spanish respectively, it is difficult to see how either could be a neutral with respect to the French captor. If neither was neutral, then the French plaintiff should have won under either the treaty or the international custom.

<sup>23</sup> The *Bolchos* court did not discuss any choice of law issues, but may have assumed that the seizure of the slaves was tortious. Presumably the court was relying on its understanding of South Carolina law to hold the seizure tortious. *Id.*

<sup>24</sup> 195 F. Supp. 857 (D. Md. 1961).

<sup>25</sup> *Id.* at 859.

<sup>26</sup> *Id.*

was not the parent entitled to custody.<sup>27</sup> The *Adra* court concluded that her action was wrongful, because the father was entitled to custody under Lebanese law.<sup>28</sup> The retention of custody by the mother did not violate any substantive provision of international or treaty law.<sup>29</sup> Nevertheless, because she had obtained and used an Iraqi passport which concealed her child's name and nationality, the court found that the mother had violated international law.<sup>30</sup> The court held that the tortious retention of custody and the improper use of the passport established federal jurisdiction under section 1350.<sup>31</sup>

If the tort and the international violation are to be analyzed separately, a determination of the proper relationship between the two is also necessary. According to the wording of section 1350, the relationship between the international violation and the tort is that the tort must be "committed" in violation of international law.<sup>32</sup> The *Adra* court found that relationship satisfied where the violation of international law was the means by which the tort was committed.<sup>33</sup> The passport falsifications were the means by which the mother evaded the father and kept custody of the child.<sup>34</sup> In *Bolchos*, the relationship was more direct, because the treaty established ownership for the purpose of determining that the seizure of the slaves was wrongful.<sup>35</sup> The case law has not explored all possible relationships which might satisfy the requirement of section 1350 that the tort be "committed" in violation of international law. *Bolchos* and *Adra* suggest that section 1350 merely requires the existence of a substantial connection between the two elements.<sup>36</sup>

<sup>27</sup> *Id.* at 862 (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 103 (2nd ed. 1955); RESTATEMENT OF TORTS § 700 (1934)). The *Adra* court noted that although the plaintiff sought injunctive relief and not damages, the act could be considered a tort. 195 F. Supp. at 863.

<sup>28</sup> 195 F. Supp. at 863. Lebanese and Moslem law entitled the male parent to custody of a daughter when she reached nine years of age. *Id.* at 860.

<sup>29</sup> *See id.* at 862-63.

<sup>30</sup> *Id.* at 864. The *Adra* court stated that the passport violations were made wrongful not only by international law, but by United States and Lebanese law as well. *Id.* at 861, 864-65. The court cited no direct authority for the proposition that an individual's misuse of a passport violates the law of nations. Probably it does not. The point, however, is that the court treated the international law question separately from the tort question. As the court recognized, in some circumstances individuals can violate the law of nations. *See* note 58 *infra*.

<sup>31</sup> 195 F. Supp. at 862-65.

<sup>32</sup> *See* note 1 *supra*.

<sup>33</sup> 195 F. Supp. at 864-65.

<sup>34</sup> *Id.* at 861-62.

<sup>35</sup> *See* text accompanying note 23 *supra*.

<sup>36</sup> An opinion of the Attorney General contended that § 1350 jurisdiction could be invoked against an American company which diverted the channel of the Rio Grande. The diversion was prohibited by a treaty with Mexico and caused injury to Mexican citizens. The broad language of the Attorney General's opinion may indicate that a violation of a treaty by a private party can establish both the international violation and the tort required by § 1350, if injury is caused by the violation. The treaty violation becomes an element

To properly analyze a section 1350 claim a court must inquire whether a tort occurred and also whether a violation of the law of nations or a United States treaty occurred in the commission of the tort. As used in section 1350, "law of nations" means customary international law.<sup>37</sup> International customs are created when nations subscribe to particular usages or practices<sup>38</sup> in the belief that their adherence to such usages or practices is obligatory.<sup>39</sup> The actions of nations are both the source of and strongest evidence for the existence of a particular international custom.<sup>40</sup> Official statements and assertions of governments may also evidence customs,<sup>41</sup> as may the decisions of municipal and international courts,<sup>42</sup> and the writings of publicists and commentators.<sup>43</sup> Treaties, especially multilateral

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constituting the tort. See 26 Op. Att'y Gen. 250 (1907). See also *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). (decided as this article went to print) (wrongful death by torture violates international law). *Filartiga* suggests that the tortious act may not only be substantially connected to the international violation, but may actually be the international violation. See note 75 *infra*.

<sup>37</sup> *Lopes v. Reederei Richard Schroeder*, 225 F. Supp. 292 (E.D. Pa. 1963). The *Lopes* court held that negligence and unseaworthiness causing injury to a sailor do not violate the law of nations in a § 1350 claim. *Id.* at 295, 297. The court stated that a § 1350 violation of the law of nations occurs when individuals violate a custom affecting the relationship between states or between an individual and a state, if the custom is used by states for their common good or for dealings among themselves. *Id.* at 297. See also *Filartiga v. Pena-Irala*, 630 F.2d 876, 888, (2d Cir. 1980).

<sup>38</sup> See *The Paquete Habana*, 175 U.S. 677 (1900). *The Paquete Habana* Court found that the immunity of fishing vessels was an ancient usage among civilized nations which gradually ripened into a rule of international law. *Id.* at 695-96. A nation is not bound by a custom if during the process of the custom's formation, that nation objects to the recognition of the practice as law. See, e.g., *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. 116, 131 (customary rule inapplicable to Norway which always opposed it). Article 38 of the Statute of the International Court of Justice authorizes the Court to apply "international custom as evidence of a practice accepted as law," but it is arguable that the practices of nations are properly evidence of custom. The distinction may only be a matter of semantics substituting the word 'custom' for the word 'practice'. See C. PARRY, *THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW* 56 (1965) [hereinafter cited as PARRY].

<sup>39</sup> See, e.g., *Case Concerning Right of Passage Over Indian Territory (Merits)*, [1960] I.C.J. 6. Portugal argued that Great Britain and India had always agreed to the passage of Portuguese armed forces over Indian territory and that a custom was formed thereby. The International Court disagreed because nothing in the record indicated that Great Britain or India treated the grant of permission as obligatory. *Id.* at 40-41. See also *North Sea Continental Shelf Cases*, [1969] I.C.J. 3, 44-45; *Case Concerning Right of Passage over Indian Territory (Merits)* [1960] I.C.J. 6, 42-43. Diplomatic ceremonies and protocol are usually based on custom, but do not create legal norms because the customs are adhered to as a courtesy, not from a sense of legal duty. See *North Sea Continental Shelf Cases*, [1969] I.C.J. 3, 44.

<sup>40</sup> M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 32 (3d ed. 1971) [hereinafter cited as AKEHURST]; PARRY, *supra* note 38, at 62-65. Only action or inaction of states can create practice. Practice in turn creates customary international rules when the actions are done with the conviction of obligation. PARRY, *supra* note 38, at 63-64.

<sup>41</sup> AKEHURST, *supra* note 40, at 32.

<sup>42</sup> A. SHEIKH, *INTERNATIONAL LAW AND NATIONAL BEHAVIOUR* 66-67 (1974) [hereinafter cited as SHEIKH].

<sup>43</sup> AKEHURST, *supra* note 40, at 32; SHEIKH, *supra* note 42, at 67-68. Other evidences or

treaties and conventions, and agreements promulgated through international organizations are sometimes declarative of pre-existing international custom or serve as the source of a rule which passes into custom.<sup>44</sup>

The normal usage of the term "law of nations" includes both treaty law and customary international law.<sup>45</sup> Since section 1350 places the terms "law of nations" and "treaties of the United States" in the disjunctive, the statute's use of the term "law of nations" excludes treaty law.<sup>46</sup> Instead, section 1350 makes express provision for jurisdiction in the case of the violation of a United States treaty.<sup>47</sup> Because of this express provision, section 1350 implicitly rejects the use of treaties to which the United States is not a party.<sup>48</sup> Case law has not established whether international agreements to which the United States is a party, but which cannot be characterized as treaties in the Constitutional sense,<sup>49</sup> should be given the same effect as a treaty for the purpose of establishing section 1350 jurisdiction.<sup>50</sup> Such agreements, however, should be given effect to the extent that they have the same municipal legal force as a treaty would.<sup>51</sup>

Because section 1350 rejects the use of international agreements to which the United States is not a party, the statute reflects a policy of founding jurisdiction only upon violations of international law that is

sources of custom include digests of international and state practice, codifications of customary law in treaties, acts of international organizations, and general principles of law. AKEHURST, *supra* note 40, at 39-45; PARRY, *supra* note 38, at 67-91; SHEIKH, *supra* note 42, at 68-69.

<sup>44</sup> AKEHURST, *supra* note 40, at 33.

<sup>45</sup> The usual use of the term 'law of nations' or international law includes treaties as a basic source of law. See SHEIKH, *supra* note 42, at 62-66.

<sup>46</sup> See note 1 *supra*. Because § 1350 mentions both the law of nations and United States treaties in the disjunctive, it follows that under § 1350 treaties are not a part of the law of nations. The only treaties mentioned by § 1350 are United States treaties. See note 1 *supra*. Therefore no treaty or international agreement may be a basis for § 1350 jurisdiction unless the United States is a party.

<sup>47</sup> See note 1 *supra*. The violation of a United States treaty formed the basis for § 1350 jurisdiction in *Bolchos v. Darrel*, 3 F. Cas. No. 1,607, p. 810 (1795).

<sup>48</sup> See notes 1 & 46 *supra*.

<sup>49</sup> A treaty in the Constitutional sense is a treaty entered into by the President with the advice and consent of two-thirds of the Senate. U.S. CONST. art. II, § 2, cl. 2.

<sup>50</sup> See *Reid v. Covert*, 354 U.S. 1 (1957). In *Reid* an executive agreement in effect between Great Britain and the United States was held subject to Constitutional guarantees. *Id.* at 15-19. Executive agreements are international agreements made by the President without the advice and consent of the Senate. See generally Lissitzyn, THE LEGAL STATUS OF EXECUTIVE AGREEMENTS ON AIR TRANSPORTATION, 17 J. AIR L. & COM. 436, 438-44 (1950). Congressional-executive agreements are made by the President as authorized or approved by both houses of Congress. See HENKIN, *supra* note 3, at 173-76.

<sup>51</sup> An executive agreement may have the same legal force as a treaty, see, e.g., *United States v. Pink*, 315 U.S. 203 (1942), if the President is acting within the powers granted him by the Constitution. Such powers include those of the commander in chief, nomination of ambassadors and consuls, etc. These powers are construed broadly to provide a basis for the making of executive agreements. See RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 121 (1965) [hereinafter cited as RESTATEMENT]. See also RESTATEMENT, *supra*, §§ 119, 120.

binding on the United States.<sup>52</sup> If this is the policy of section 1350, then international customs which are not binding on the United States should not form the basis of section 1350 jurisdiction. Such non-binding customs would include regional customs outside North America<sup>53</sup> and customs to which the United States has consistently objected.<sup>54</sup> The result is that section 1350 jurisdiction should be founded only upon violations of customs or international agreements with the municipal legal force of a treaty to which the United States is a party. Therefore, in adjudicating section 1350 claims, the federal district courts should be concerned only with international law in which the United States has a direct interest.

When the original version of section 1350 was passed the theoretical underpinnings of international law were different from those underlying modern international law.<sup>55</sup> The theory most familiar to the First Congress was the natural law theory which postulated that individuals, as well as nations, are endowed by nature with inherent rights.<sup>56</sup> Section 1350 is consistent with natural law theory because the statute contemplates the right of an individual to enforce international law in the district courts.<sup>57</sup> Recent international developments in the field of human rights indicate that natural law theory may still have some validity,<sup>58</sup> but

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<sup>52</sup> In some circumstances a treaty to which the United States is not a party may be binding upon the United States. If a treaty has become the source of a custom, if a third party nation has accepted obligations in a treaty, or if a treaty is accorded a legislative effect by consent of the international community, it may be binding on nonparties. *See generally* Case of the Free Zones of Upper Savoy and the District of Gex, [1932] P.C.I.J., ser. A/B, No. 46; BRIERLY, *THE LAW OF NATIONS* 326-27 (6th ed. 1963).

<sup>53</sup> Regional customs are customary legal norms binding a geographic region, rather than the entire international community. Similarly, local customs are those which arise from continued practice between a few nations. *See generally* Case Concerning Right of Passage Over Indian Territory (Merits), [1960] I.C.J. 6, 39-43.

<sup>54</sup> A nation can "opt out" of an international custom by objecting to it during its formation. *See* Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, 131.

<sup>55</sup> *See generally* Note, *The Law of Nations in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. § 1350*, 1 B.C. INT'L & COMP. L.J. 71 (1977) [hereinafter cited as *Tort Claims by Aliens*].

<sup>56</sup> Natural law theory found expression in the self-evident truths and inalienable rights of the Declaration of Independence. Natural law theory sought to derive legal norms from basic metaphysical theory. *See* J. JONES, *HISTORICAL INTRODUCTION TO THE THEORY OF LAW* 104-06, 108-10, 118-19 (reprinted 1969). Natural law theory was based on the belief that universally acceptable principles of right and wrong were inherent in the nature of things. *Tort Claims by Aliens*, *supra* note 55, at 73.

<sup>57</sup> *Tort Claims by Aliens*, *supra* note 55, at 88.

<sup>58</sup> *E.g.*, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, entered into force Oct. 21, 1950, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Charter of the International Military Tribunal (Nuremberg) (Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis) signed Aug. 8, 1948, 59 Stat. 1546; Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, entered into force Jan. 12, 1951, 78 U.N.T.S. 277; International Covenant on Civil and Political Rights, adopted Dec. 16, 1966, entered into force Mar. 23, 1976, G.A. RES. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel,



in most other areas of international law, positivism has superseded natural law theory.<sup>59</sup> Because the thesis of positivism is that international law pertains only to the relationships between nations and that individual rights exist only derivatively through the agency of the individual's own government,<sup>60</sup> positive law theory may conflict with the legislative intent behind section 1350.

In *Dreyfus v. Von Finck*,<sup>61</sup> the Second Circuit refused to exercise section 1350 jurisdiction in part because the court espoused positive law theory. In *Dreyfus*, a Swiss citizen brought suit in the Southern District of New York against a West German citizen.<sup>62</sup> The Swiss plaintiff, a Jew, alleged that he had been forced to sell his banking firm to the defendant for inadequate consideration in 1938 in Nazi Germany.<sup>63</sup> The district court did not find section 1350 jurisdiction and the Second Circuit affirmed, holding, in part, that the law of nations could not confer a private right of action upon an individual.<sup>64</sup> The Second Circuit, applying positive law theory, reasoned that customary international law deals only with relationships among nations, not private parties, and therefore that customary international law is not self-executing.<sup>65</sup>

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Inhuman or Degrading Treatment or Punishment, adopted Dec. 19, 1975, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975). Such agreements and declarations indicate a growing consensus that individuals have inalienable rights which should be recognized by sovereign nations. Compare 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 362-69 (2d Ed. 1912) with 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 636-42 (8th ed. 1955) (H. Lauterpacht's revision), reprinted in L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1-8 (1973). Oppenheim contended that the law of nations concerns only nations and not individuals. The rights of individuals were guaranteed by municipal law, with each nation responsible for conforming its municipal law to the requirements of international law. Therefore, according to Oppenheim, individuals were not the subject of international law, but the object of it. *Id.* at 3. Lauterpacht's revision of Oppenheim states that, in general, individuals are the object of international law, but that individuals are also the direct subject of international law in an increasing number of situations particularly in the field of human rights. *Id.* at 6. Torture has been held a violation of the international law of human rights and a basis for § 1350 jurisdiction in the recently decided case of *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

<sup>59</sup> *Tort Claims by Aliens*, *supra* note 55, at 77.

<sup>60</sup> See *id.* at 77-78; M. KOROWICZ, INTRODUCTION TO INTERNATIONAL LAW 51 (1959).

<sup>61</sup> 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 825 (1976).

<sup>62</sup> *Id.* at 26.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 29-31. The *Dreyfus* court may have been influenced by a number of issues which were not expressly ruled upon. The plaintiff had already been compensated under the terms of a judicially approved settlement in 1951. *Id.* at 26. The delay of twenty years between the 1951 settlement and the bringing of a lawsuit in the United States could have given rise to the defense of laches. *Id.* at 27 n.5. Because the plaintiff and defendant were European citizens and the acts complained of occurred in Germany, the case could probably have been dismissed on grounds of *forum non conveniens*. See text accompanying notes 94-99 *infra*. Whether or not these issues actually had some influence on the *Dreyfus* holding is only speculation, but may explain the court's weak reasoning. See text accompanying notes 66-69 & 82-83 *infra*.

<sup>65</sup> *Id.* at 30-31; *Tort Claims by Aliens*, *supra* note 55, at 78. The Second Circuit overruled *Dreyfus v. Von Finck* in part as this article went to print. See *Filartiga v. Pena-Irala*,

An international legal norm is self-executing when it applies not only between sovereign nations, but also in municipal law as a source of legal rights enforceable by private parties.<sup>66</sup> The *Dreyfus* court failed to realize that section 1350 usually will not require the existence of a self-executing custom or treaty to establish jurisdiction. Since the claim brought under section 1350 is for a tort,<sup>67</sup> it is the tort which must be self-executing. Municipal law gives individuals redress when torts are committed; therefore tort law is self-executing by definition.<sup>68</sup> Self-execution will be an issue only when the plaintiff cannot establish the existence of a tort under any applicable municipal law, and therefore relies solely on international law.<sup>69</sup>

If the plaintiff can demonstrate that an "international tort" has been committed, section 1350 jurisdiction may be invoked because the same facts will establish both the tort and the international violation required by the statute.<sup>70</sup> An international tort might be based on either a treaty or an international custom. For a tort to exist under a treaty, the treaty must be self-executing to establish a private right to enforce the treaty's provisions.<sup>71</sup> Whether a treaty is self-executing is a matter of interpretation based on the intent of the parties, usually as discerned from the face of the treaty documents.<sup>72</sup> A tort may also exist under a treaty which is not self-executing, but only if the treaty has been executed by municipal

630 F.2d 876 (2d Cir. 1980). The *Filartiga* court characterized as erroneous dictum the *Dreyfus* statement that international law is not violated when the parties are nationals of the acting state. *Id.* at 884. In *Filartiga* the Second Circuit held that the wrongful death of a Paraguayan citizen by torture perpetrated by a Paraguayan police official in Paraguay violated the law of nations and supported § 1350 federal jurisdiction. *Id.* at 887.

<sup>66</sup> The issue of self-execution is not normally considered in the context of customary international law; instead it is a part of the field of treaty interpretation. See RESTATEMENT, *supra* note 51, § 154. Normally an international agreement which manifests an intention that its provisions become effective without the passage of effectuating legislation will be considered self-executing so as to create justiciable rights in private persons. See generally *id.*

<sup>67</sup> See text accompanying note 10 *supra*. Section 1350 jurisdiction may not be invoked by a claim for the proceeds of a life insurance policy, because such a claim is a contract action, not a tort. *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324, 328 (D. Pa. 1966).

<sup>68</sup> See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1 (4th ed. 1971) [hereinafter cited as PROSSER].

<sup>69</sup> See note 66 *supra*.

<sup>70</sup> See note 36 *supra*.

<sup>71</sup> Treaties normally have direct effect only upon states, not individuals. The express or implied terms of a treaty, however, can impose duties or confer rights directly upon individuals. L. OPPENHEIM, 1 INTERNATIONAL LAW § 520 (8th ed. 1955) [hereinafter cited as OPPENHEIM]; see *Benjamins v. British European Airways*, 572 F.2d 913, 916-19 (2d Cir. 1978), cert. denied, 439 U.S. 1114 (1979) (Warsaw Convention creates private right of action for airplane crash victims); *Canadian Transport Co. v. United States*, 430 F. Supp. 1168, 1171-72 (D.D.C. 1977) (Maritime Traffic Convention creates no private right of action for vessels excluded from United States ports); *Upper Lakes Shipping, Ltd. v. International Longshoremen's Ass'n*, 33 F.R.D. 348, 350 (S.D.N.Y. 1963) (sole private remedy under free passage treaty is express provision for private claims to International Joint Commission).

<sup>72</sup> RESTATEMENT, *supra* note 51, § 154.

legislation creating private enforcement rights.<sup>73</sup>

Because international custom deals primarily with acts by states, the acts of private parties will not normally be classified as tortious by international custom.<sup>74</sup> No section 1350 cases have attempted to define a customary international tort.<sup>75</sup> In *The Paquete Habana*,<sup>76</sup> however, the Supreme Court awarded damages to the owners of fishing vessels which had been taken prize in violation of international custom.<sup>77</sup> Customary international law forbade the seizure of unarmed coastal fishing vessels not involved in the hostilities.<sup>78</sup>

Although the case was brought under admiralty jurisdiction rather than section 1350,<sup>79</sup> *The Paquete Habana* is relevant to section 1350 actions because the Court granted relief to individuals for a violation of international custom. By implication, therefore, that custom can be considered self-executing.<sup>80</sup> The wrongful seizure can be classified as a tort because it is a "civil wrong, other than breach of contract" and may be analogized to a wrongful taking or conversion under domestic tort law.<sup>81</sup> The relief granted was in the nature of tort damages. Arguably then, in a factual situation similar to that presented by *The Paquete Habana*, a customary international tort exists for the purpose of section 1350 jurisdiction. It should be noted, however, that the responsible party in *The Paquete Habana* was not a private individual, but the U.S. government.

The Second Circuit in *Dreyfus* did not consider *The Paquete Habana* when it concluded that customary international law is not self-executing; nor do the cases cited in *Dreyfus* support such a conclusion.<sup>82</sup> Those cases

<sup>73</sup> OFFENHEIM, *supra* note 71, § 520.

<sup>74</sup> The International Law Commission's Draft Articles on State Responsibility, U.N. Doc. A/34/194 (1979), 18 INT'L LEGAL MATERIALS 1568 (1979), address internationally wrongful acts of states, including torts. *See id.* art. 19. The draft articles illustrate the emphasis of custom on state action, but they do not necessarily rule out the development of international tort law concerning the conduct of individuals.

<sup>75</sup> A case recently decided in the Second Circuit, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), could be interpreted to establish the existence of a tort under international law. The plaintiffs, relatives of the deceased, brought a wrongful death action for the torture and murder of Joelito Filartiga by the defendant acting in his capacity as a police official in Paraguay. *Id.* at 878. The court held that torture violates the international law of human rights and that torture therefore could support § 1350 jurisdiction. *Id.* at 884. Since wrongful death appears to be a tort under both the laws of Paraguay and New York, where the action was brought, a more reasonable interpretation of *Filartiga* is that the alleged act of torture was both a tort under municipal law and a violation of the law of nations. *See also* note 58 *supra*.

<sup>76</sup> 175 U.S. 677 (1900).

<sup>77</sup> *Id.* at 686, 714. Since both vessels had already been sold, the Court ordered compensatory damages. *Id.* at 714, 721.

<sup>78</sup> *Id.* at 686. The Court discussed the development of this custom in detail. *Id.* at 686-713.

<sup>79</sup> *Id.* at 680-81.

<sup>80</sup> *See* text accompanying note 66 *supra*.

<sup>81</sup> *See* PROSSER, *supra* note 68, at 2, 76-97.

<sup>82</sup> *See* *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1966) (no

found that no violations of international law were presented by the facts. For example, one of the cited cases held that neither unseaworthiness of a vessel nor negligence causing injury to a crew member was proscribed by any rule of customary international law and therefore that section 1350 jurisdiction could not be invoked.<sup>83</sup>

The First Congress did not specify what law should be applied to section 1350 allegations to determine whether a tort has been committed.<sup>84</sup> This issue must be resolved according to applicable choice law principles.<sup>85</sup> The possible choices in a section 1350 case include federal or state law, the law of a foreign nation, or international law.<sup>86</sup> Courts should find guidance in the principles applicable to maritime or admiralty jurisdiction. Maritime jurisdiction, like section 1350 jurisdiction, often involves foreign parties, occurrences, and laws; and therefore maritime choice of law rules have been developed to ensure international comity.<sup>87</sup> The considerations evaluated in maritime cases which are applicable to section 1350 claims include the nationalities and domiciles of the parties, the expectations of the parties, the place of the alleged occurrences, and the law of the forum.<sup>88</sup>

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violation of international law when American company refuses to pay insurance beneficiary residing behind Iron Curtain); *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (nuclear tests not violation of international law).

<sup>83</sup> *Damaskinos v. Societa Navigacion InterAmericana, S.A. Pan.*, 255 F. Supp. 919 (S.D.N.Y. 1966). In *Damaskinos* a Greek seaman fell through an open hatch on a Liberian ship owned by Greeks through a Panamanian company. The accident occurred off the New Jersey coast. *Id.* at 922.

<sup>84</sup> The First Congress' use of the term "tort" probably does not conflict with the modern understanding of the term. The activities classified as tortious in 1789 are substantially similar to those circumscribed by modern tort law. The eighteenth century tort law included assault, battery, trespass *vi et armis* and on the case, slander and libel, false imprisonment, trespass, nuisance, and damage to or taking of personal property. See W. BLACKSTONE, COMMENTARIES ON THE LAW, *passim* at Book III. All of these torts are still recognized in modern tort law in one form or another. See PROSSER, *supra* note 68, *passim*. Trespass *vi et armis* and on the case were precursors of negligence. See Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 363-67 (1951). Blackstone's COMMENTARIES have particular significance for § 1350 since the chief draftsman of the Judiciary Act of 1789, which included § 1350's original version, is known to have relied on the COMMENTARIES to defend the Judiciary bill in the Senate debates. W. MACLAY, SKETCHES OF DEBATES IN THE FIRST SENATE 90-92 (1880, reprinted 1969). The COMMENTARIES may serve as a source of legislative history for § 1350 in the absence of direct legislative history for the statute. The COMMENTARIES were the most authoritative general legal authority in American in 1789. See D. LOCKMILLER, SIR WILLIAM BLACKSTONE 169-83 (1970).

<sup>85</sup> Where the Congress does not specify the jurisdictional limitations of a statute, the courts will apply conflict of laws reasoning to determine the territorial reach of the statute. See *Lauritzen v. Larsen*, 345 U.S. 571, 576-79 & 579 n.7 (1953).

<sup>86</sup> See note 11 *supra*.

<sup>87</sup> *Lauritzen v. Larsen*, 345 U.S. 571, 581-82 (1953). In a recently decided case the Second Circuit has recommended the application of the *Lauritzen* choice of law analysis to § 1350 cases. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1950); note 100 *infra*.

<sup>88</sup> See *Lauritzen v. Larsen*, 345 U.S. 571, 583-91 (1953); note 100 *infra*.

The law of the place of the wrong is the usual choice of law in tort cases.<sup>89</sup> The law of the forum, however, may be applied to acts occurring outside the forum where strong policies of and contacts with the forum are involved.<sup>90</sup> For instance, the interest of a state in its resident children is so strong that it may apply its own law to determine custody, rather than that of a foreign nation from which the child allegedly has been taken wrongfully.<sup>91</sup>

The initial choice of law issue in a section 1350 case is which jurisdiction's laws should define the tort. The determination of this issue, however, only resolves the question of the district court's jurisdiction over the claim. The same choice of law need not be selected for the merits of the claim or the suitability of the relief sought, because the choice of law considerations may differ when the outcome of the case, rather than the location of the litigation, is being determined.<sup>92</sup>

Choice of law issues are also significant to the doctrine of *forum non conveniens* because the difficulty of ascertaining and applying foreign law is a consideration in the *forum non conveniens* analysis.<sup>93</sup> The doctrine of *forum non conveniens* permits a court to refuse the exercise of its properly invoked jurisdiction under certain conditions.<sup>94</sup> The court will evaluate such considerations as the hardships imposed on the parties by reason of the forum selected, the availability of witnesses and evidence in the

<sup>89</sup> See RESTATEMENT OF CONFLICT OF LAWS § 378 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145, 146 (1971) [hereinafter cited as RESTATEMENT (SECOND) CONFLICTS]. Under the RESTATEMENT (SECOND) CONFLICTS the relative interests and policies of the forum are balanced against the expectations of the parties, as well as the interests and policies of the state or nation where the tort took place. The law of the place where the tort occurred is the preferred law unless the analysis of competing interests directs otherwise. See generally Reese, *Choice of Law in Torts and Contracts and Directions for the Future*, 16 COLUM. J. TRANSNAT'L L. 1 (1977).

<sup>90</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); Reese, *Dépeçage: A Common Phenomenon In Choice of Law*, 73 COLUM. L. REV. 58, 60-63 (1973) [hereinafter cited as Reese].

<sup>91</sup> *Huynh Thi Anh v. Levi*, 586 F.2d 625, 630 (6th Cir. 1978); *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 866-67 (D. Md. 1961).

<sup>92</sup> The application of the rules of different jurisdictions to resolve different issues in the same case is called *dépeçage*. See Reese, *supra* note 90, at 58-59. The considerations which determine whether *dépeçage* should be applied in a case include applying the rule of the jurisdiction with the greatest interest in each issue, effectuating the purposes of each rule applied, and serving the expectations of the parties. *Id.* at 60. In *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), a federal court relied on Lebanese law to hold that a mother had committed a tort which invoked § 1350 jurisdiction. *Id.* at 862-63. But the court applied the law of the child's domicile, Michigan, to hold that the child should remain with the mother and that the father was not entitled to the remedy of regaining custody of the child. *Id.* at 866-67. In a § 1350 case even the violation of non-self-executing international rules can invoke federal jurisdiction where municipal law may be applied to determine the substantive merits of the case. *E.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (decided as this article went to print).

<sup>93</sup> See, *e.g.*, *PapaGeorgiou v. Lloyds of London*, 436 F. Supp. 701, 703 (E.D. Pa. 1977).

<sup>94</sup> See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947).

forum selected, and the court's ability to enforce its judgment.<sup>95</sup>

The application of *forum non conveniens* to section 1350 cases should be similar to its admiralty application. In *Papa Georgiou v. Lloyds of London*,<sup>96</sup> a district court refused to exercise admiralty jurisdiction over a tort claim on *forum non conveniens* grounds.<sup>97</sup> The court noted that all the events had occurred in Greece, all nonparty affiants were nonresidents of the United States,<sup>98</sup> no relevant evidence existed in the United States, and translations of Greek court proceedings differed depending on the party offering the translation.<sup>99</sup> The court also found that because choice of law principles directed application of Greek law,<sup>100</sup> the difficulty of ascertaining that law supported *forum non conveniens* dismissal.<sup>101</sup> The same considerations of international comity, judicial economy, and convenience of the parties should apply to *forum non conveniens* decisions in section 1350 cases.

Often an alien will bring a section 1350 tort claim in a district court because personal jurisdiction over the defendant is obtainable only in the United States. When the tort involves a violation of customary international law or an international agreement of the United States, federal jurisdiction is appropriate because of the federal interest in foreign affairs.<sup>102</sup> To ensure the exercise of federal judicial power where Congress has authorized its exercise, district courts should insulate the analysis of

<sup>95</sup> *Id.* at 508. The ability of a federal court to enforce its judgment in a § 1350 tort claim will not ordinarily be at issue. The defendant must be present in the forum, have assets in the forum, or establish some other form of minimum contacts resulting in personal jurisdiction over the defendant which will enable the court to enforce its judgment. See *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). If the defendant flees beyond the court's jurisdiction and leaves no assets in reach of the forum, the court may properly consider its ability to enforce its judgment in an analysis of *forum non conveniens*.

<sup>96</sup> 436 F. Supp. 701 (E.D. Pa. 1977).

<sup>97</sup> The *PapaGeorgiou* plaintiffs alleged the existence of subject matter jurisdiction under § 1350, but because the district court found that it had admiralty jurisdiction, it did not rule on the allegation of § 1350 jurisdiction. *Id.* at 702.

<sup>98</sup> *Id.* at 701-02. The plaintiffs were Greek citizens and became residents of the United States after the torts allegedly occurred. *Id.* at 703.

<sup>99</sup> *Id.* at 702-03.

<sup>100</sup> The *PapaGeorgiou* court followed the choice-of-law analysis found in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *Lauritzen* held that, although the usual choice of law in maritime jurisdiction is the law of the flag, seven considerations should be evaluated in choosing the proper law: the place of the wrongful act, the law of the flag, the national allegiance or domicile of the plaintiff, the national allegiance of the ship owner, the place of the contract, if any, the accessibility of a foreign forum, and the law of the forum itself. See also *Tjonaman v. A/S Glittre*, 340 F.2d 290 (2d Cir.), *cert. denied*, 381 U.S. 925 (1965); note 87 *infra*. These considerations overlap the considerations utilized in evaluating the applicability of the doctrine of *forum non conveniens*. See text accompanying note 95 *supra*.

<sup>101</sup> 436 F. Supp. at 703-04.

<sup>102</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (decided as this article went to print). In *Filartiga* the Second Circuit stated that the foreign relations implications of a § 1350 case underscore "the wisdom of the First Congress in vesting jurisdiction of [§ 1350] claims in the federal courts . . . [because such cases] are fraught with implications for the nation as a whole . . . ." *Id.*

the technical requirements of section 1350 from their uneasiness with international affairs. A plaintiff can invoke section 1350 jurisdiction if he alleges the commission of a tort under a properly chosen law and if that tort is substantially connected to a violation of international law. Once invoked, section 1350 jurisdiction should be exercised unless the existence of a more suitable forum leads to a *forum non conveniens* dismissal.

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