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Re-examining the Act of State Doctrine: An Integrated Conflicts Analysis

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I. INTRODUCTION

The Supreme Court does not often decide cases on the status of international law in United States courts. Instead, such issues generally have been played out in the lower federal courts and the pages of academic journals. No issue has suffered more from the lack of Supreme Court precedent than the act of state doctrine, a judge-made prudential rule that prevents United States courts from sitting in judgment on the official acts of foreign sovereigns. Consequently, when the Supreme Court issued a unanimous opinion dealing with the act of state doctrine in *W.S. Kirkpatrick v. Environmental Tectonics, Inc.*,[1] international lawyers, long confounded by the doctrine's complexity, had reason to hope for definitive guidance.

Unfortunately, this guidance was not forthcoming. In a short, curt opinion by Justice Scalia, the Court held that act of state functions as a special "rule of decision," requiring courts faced with challenges to the official acts of sovereign governments to apply the law of the foreign state as the rule of decision. Further, the Court held, the government's acts must be presumed valid under that law.[2] This Article is an attempt to understand what this holding means in cases where the foreign government is alleged to have violated international law. I will argue that, after *Kirkpatrick*, the act of state doctrine cannot be understood in any coherent fashion. Framing act of state as a "special" choice of law rule cannot be squared with the normal choice of law analysis a court would perform in the absence of the doctrine. The choice of law approach assumes that the public policy of the forum, a component of most conflicts analyses, means one thing in the normal analysis and another at the act of state stage. Moreover, the choice of law framework appears to contradict those exceptions to

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1. 493 U.S. 400 (1990).

2. *Id.* at 705, 707.

the doctrine which are precisely concerned with state acts in violation of international law.

Kirkpatrick is especially disturbing given recent trends in human rights litigation. Since the Second Circuit's ground-breaking 1980 decision in *Filartiga v. Pena-Irala*,[3] the most dynamic adjudication of international law in U.S. courts has occurred under the alien tort statute, a little-used provision of the First Judiciary Act of 1789.[4] *Filartiga* establishes that the alien tort statute permits citizens of foreign states to bring claims in U.S. courts against officials of their national governments for violations of fundamental human rights. In establishing the alien tort statute as a vehicle for human rights litigation, *Filartiga* and its progeny promise to make good on Justice Powell's observation, made in the 1971 case of *First National City Bank v. Banco Nacional de Cuba*, that "[u]ntil international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law."[5]

However, sustaining subject-matter jurisdiction under the statute is only the first step in realizing this vision. Courts must next confront the question of which law applies to the merits of human rights claims; it is at this point that the act of state doctrine is raised as a defense and that the confusion of *Kirkpatrick* threatens to eclipse the clear role accorded international law at the jurisdictional stage. If act of state defenses succeed in alien tort cases, and international law is not selected as the rule of decision, Justice Powell's vision will indeed have failed. For here we have a statute explicitly requiring a violation of international law as a jurisdictional prerequisite. If the choice of law theory used by federal courts in such cases cannot surmount *Kirkpatrick* and choose international law, there is little chance courts will do so when their jurisdictional base makes no mention of that law.

Filartiga-type alien tort claims, then, are the crucial measure of *Kirkpatrick*'s impact on the influence of international law in U.S. courts. This Article first attempts to understand *Kirkpatrick* itself. Part II explains the ambiguities in act of state law which existed prior to *Kirkpatrick* and which that case attempted to ameliorate. Parts III and IV explore the choice of law analysis which *Kirkpatrick* assumes would

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3. 630 F.2d 876 (2d Cir. 1980).

4. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77, *codified at* 28 U.S.C. § 1350 (1982). The statute provides: "The 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."

5. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 775 (1971) ("*Citibank*") (Powell, J., concurring).

precede invocation of the act of state doctrine. Here, the contradictions of the holding become apparent. In light of these problems, I propose in Part V that the policies represented by act of state and its relevant exceptions be freed of the cumbersome *Kirkpatrick* framework and recast in a comprehensive choice of law analysis. As when formulating any rule of federal common law, the first goal of this analysis should be to give effect to relevant federal policies. In Part VI I return to the alien tort statute and conclude that its authors in the first Congress intended for international law to serve as the rule of decision in actions under the statute. Unhindered by the *Kirkpatrick* framework it is clear that this congressional intent must control any act of state analysis.

II. THE LEGAL LANDSCAPE PRIOR TO KIRKPATRICK

Before analyzing the *Kirkpatrick* decision, it is necessary to understand three crucial areas of the act of state doctrine which courts have left unclear. Relevant precedent has never definitively enumerated what policies justify the doctrine, explained how the doctrine functions, or identified the possible exceptions to the doctrine.

A. Policies Justifying the Doctrine

1. Act of State as Originally Conceived

The act of state doctrine first surfaced in the late nineteenth century during the reign of positivism and its territorial conception of judicial power.[6] During this era, rights were believed to derive largely from the prerogatives and power of the sovereign.[7] Coupled with the Westphalian conception of inherent state equality,[8] positivism placed a territorial limit on the enforcement of laws. As Professor Beale—an enthusiastic positivist and Reporter for the *Restatement (First) of Conflict of Laws*—claimed: "Within his own territory the jurisdiction of the sovereign is exclusive . . . . On the other hand, a sovereign has in general no power or jurisdiction outside his own territory; and he can confer upon his legislature no greater power than he himself possesses."[9]

The inherent equality of states circumscribed the reach of international law. Rules of conduct were "based on the common consent of individual states" and so governed only disputes between and among

6. *See generally* Daniel C.K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397, 404–12 (1987).

7. EDGAR BODENHEIMER, JURISPRUDENCE 94–95 (rev. ed. 1974).

8. For a comprehensive discussion of the Westphalian legal order, see Leo Gross, *The Peace of Westphalia: 1648–1948*, 42 AM. J. INT'L L. 20 (1948).

9. Joseph H. Beale, *Jurisdiction of a Sovereign State*, 36 HARV. L. REV. 241, 245 (1923).

states.[10] An ironclad conception of sovereignty, arising out of the delicate balance of power among the competing European states, meant that no authority could gainsay the right of nation-states to structure their societies as they saw fit.[11] While the government of an individual suffering injury at the hands of a foreign state official might assert a claim for compensation on the individual's behalf,[12] if an individual was injured by an official of his *own* government he had no remedy under international law.[13]

Underhill v. Hernandez,[14] the Supreme Court's first significant act of state decision, reflected the legal theories of the positivist era.[15] In *Underhill*, a U.S. citizen claimed that he had been detained against his will by a Venezuelan general and forced to perform hard labor.[16] Chief Justice Fuller affirmed the dismissal of Underhill's claims, explaining (in what is arguably *dicta*):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[17]

Two subsequent Supreme Court cases, arising out of expropriations by the Mexican revolutionary government, restated *Underhill*'s concern

10. 1 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 19 (H. Lauterpacht ed., 8th ed. 1955).

11. THOMAS J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 115 (1895); MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 94–99 (1961).

12. United States v. Diekelman, 92 U.S. 520, 524 (1875) ("a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government.").

13. LOUIS B. SOHN & THOMAS BUERGENTHAL, THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 23–136 (1973); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irela*, 22 HARV. INT'L L.J. 53, 65 (1981). Professor Sohn has identified several older examples of international protection provided to persons suffering domestic persecution. The examples, however, were exceptions to the general rule respecting the rights of sovereignty within territorial bounds. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 4–6 (1982).

14. 168 U.S. 250 (1897). The most detailed discussion of the facts in *Underhill* appears in the lower court opinion. Underhill v. Hernandez, 65 F. 577 (2d Cir. 1897).

15. Although its positivist underpinnings have long been discredited, and its precedential value eroded by four recent Supreme Court decisions, *Underhill* is still cited and quoted in virtually every act of state decision. In the *Sabbatino* case, Justice Harlan referred to *Underhill* as the "classic American statement of the act of state doctrine." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964). This sentence echoes throughout the subsequent case law.

16. 65 F. 577 (2d Cir. 1895) at 578.

17. 168 U.S. at 252.

with maintaining comity between nations. In *Ricaud v. American Metal Company*[18] the Court reworked *Underhill* into a more familiar choice of law analysis and held that "the acts of another [nation] done within its own territory . . . must be accepted by our courts as a rule for their decision."[19] In *Oetjen v. Central Leather Co.*[20] the Court described this rule as resting "at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would certainly 'imperil the amicable relations between governments and vex the peace of nations.'"[21] In sum, the Court's decisions during the positivist era conferred on sovereign acts a conclusive presumption of validity. Like the notion of vested rights in positivist thinking, this presumption retained its force regardless of the forum in which the sovereign act was challenged.[22]

2. The Doctrine as Modified by *Sabbatino* and Its Progeny: From External Deference to Internal Deference

In *Banco Nacional de Cuba v. Sabbatino*[23] the Supreme Court all but disclaimed its reasoning in *Underhill*. The *Sabbatino* Court's act of state inquiry turned not on whether upholding the plaintiff's claim would infringe the sovereignty of other nations but on whether the Court would encroach upon Executive Branch prerogatives in foreign policy-making.[24] *Sabbatino* arose out of the nationalization of a Cuban corporation, owned by U.S. citizens, in the wake of President Eisenhower's restriction of Cuban sugar imports.[25] The district court found the nationalization decree to be both retaliatory and discriminatory, and consequently a violation of established international norms. Such il-

18. 246 U.S. 304 (1918).
19. *Id.* at 309.
20. 246 U.S. 297 (1918).
21. *Id.* at 304.
22. Slater v. Mexican National Railroad Co., 194 U.S. 120, 126 (1904) (Holmes, J.) ("[b]ut as the only source of this [legal] obligation is the law of the place of the act, it follows that law determines not merely the existence of the obligation but equally determines its extent" [citation omitted]) *See also* EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS 13–14 (1982) (discussing vested-rights theory).
23. 376 U.S. 398 (1964).
24. *Sabbatino*'s departure from *Underhill* is obscured somewhat by Justice Harlan's statement that "[n]one of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*." *Id.* This passage, however, can be read as merely descriptive of *Oetjen*, *Ricaud*, and other early cases which are cited immediately following the quoted sentence, and not as normative. Harlan, in fact, describes the doctrine several pages later as not being "compelled . . . by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill*, *supra*; *American Banana*, *supra*; *Oetjen*, *supra*." *Id.* at 421.
25. *Id.* at 401.

legal acts, it held, were not subject to the act of state doctrine.[26] The Second Circuit affirmed but based its ruling on a different theory—the so-called *Bernstein* exception to the act of state doctrine.[27] *Bernstein* provides that when the Executive Branch gives assurances that a lawsuit challenging an act of state will not interfere with the nation's foreign policy, the doctrine will not bar further adjudication.[28]

The Supreme Court reversed. It held that the act of state doctrine was compelled neither by international law[29] nor by gratuitous gestures of comity on the part of the United States.[30] Rather, the Court described the doctrine as having "constitutional underpinnings" that called into question "the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[31] This new rationale required courts to look not outward but inward. Courts were to invoke the doctrine to ensure "the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs."[32] The act of state doctrine, the Court held, expressed "the strong sense of the judicial branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[33]

A judicial pronouncement that the Cuban expropriation decree violated international law would constitute just such a hindrance.

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26. Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375, 386 (S.D.N.Y. 1961).

27. Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845, 858–59 (2d Cir. 1962).

28. *See infra* text accompanying notes 74–76. The court based its ruling on two letters from the Office of the Legal Adviser to the State Department which it read to give such assurances. *Sabbatino*, 307 F.2d at 858–59.

29. 376 U.S. at 421.

30. *Id.* ("While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.") *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3rd Cir. 1979) (noting the Court's recent "shift in focus from the notions of sovereignty and the dignity of independent nations").

31. 376 U.S. at 423. Justice Harlan's opinion can be read as recognizing that to base act of state even on a flexible comity rationale—one that attempted to gauge the degree of offense to a foreign government on a case-by-case basis—would lead a court to make the very sort of political judgments that the doctrine was designed to avoid. A court in such an instance would need to assess the state of relations between the United States and the foreign government, make predictions based on past behavior, and judge whether each nation's policy on the subject matter of the lawsuit should be measured by its written laws or by its course of conduct.

32. *Id.* at 427–28. Note that Harlan does not refer to the relationship between the Judiciary and the Executive Branch but rather the Judiciary and the "political branches of the Government." Harlan clearly has both the Executive *and* the Legislative Branches in mind here, implying that judicial conflict with a stated congressional policy on foreign affairs might compromise separation of the branches just as would a conflict with the Executive. A claimant under the Alien Tort Statute might use this passage as a basis for arguing that judicial use of the act of state doctrine to dismiss a claim brought under the statute would contravene a Congressional policy, manifest in the statute itself, to allow the claimant's class of plaintiffs a judicial remedy.

33. *Id.* at 423.

Justice Harlan reviewed international opinion on the legality of confiscatory expropriations and found "few if any issues in international law today on which opinion seems to be so divided."[34] In this circumstance, he held, negotiation by the Executive Branch rather than "piecemeal dispositions" through litigation would best serve the nation's foreign policy interests.[35]

The Supreme Court reaffirmed *Sabbatino* and its retreat from territorial positivism in two subsequent decisions. In *First National City Bank v. Banco Nacional de Cuba*[36] Justice Rehnquist, speaking for himself and Justices Burger and White, held that the act of state doctrine rested "primarily on the basis that juridical review of acts of state of a foreign power could embarrass the conduct of foreign relations by the political branches of the government" and urged adoption of the *Bernstein* exception.[37]

In *Alfred Dunhill of London, Inc. v. Cuba*[38] the Court continued its departure from the comity rationale:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations.[39]

In *Dunhill* the Court also made its first comprehensive effort to define which acts are "sovereign" and thus amenable to the act of state doctrine. It held that a sovereign act is "the public act of those with authority to exercise sovereign powers and . . . entitled to respect before our courts."[40] A four justice plurality declined to apply the act of state doctrine "to acts committed by foreign sovereigns in the course of their purely commercial operations."[41]

3. Implications of the *Sabbatino* Reformulation

If the Court has now replaced the comity rationale with separation of powers concerns, we might expect act of state decisions to follow

34. *Id.* at 428.
35. *Id.* at 432.
36. 406 U.S. 759 (1971).
37. *Id.* at 765. For a discussion of the *Bernstein* exception, *see infra* notes 74–76 and accompanying text. Justice Rehnquist also described the doctrine's "roots" as lying "in the notion of comity between independent nations." *Citibank*, 406 U.S. at 765. Yet, as support for the passage quoted in the text announcing a separation of powers rationale, he cited *Underhill* and *Oetjen*.
38. 425 U.S. 682 (1976).
39. *Id.* at 697.
40. *Id.* at 694.
41. *Id.* at 706, 695.

one of two paths. First, a court could undertake its own investigation into how a judgment against a foreign official might affect U.S. policy toward the official's government. If the court concluded that little interference was likely then it would find the doctrine inapplicable.[42] In *Sabbatino*, for example, the Court remarked that the doctrine would be of little relevance if the government in question were no longer in power.[43] Second, a court might solicit an opinion on a case directly from the Executive Branch. Presumably, the court would then give dispositive weight to a statement that the case should not go forward. This option in essence describes the *Bernstein* exception.

Only Justice Powell, in his *Citibank* concurrence, has followed the first route and made an independent judgment as to how a finding of liability would affect foreign policy.[44] The full Court has never adopted the *Bernstein* rationale either, and when a three justice plurality attempted to do so in the *Citibank* case, each of the concurring and dissenting justices disagreed.[45] Justice Douglas remarked that deferring to an executive opinion would render the Court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."[46] It is unclear, therefore, how courts are expected to gauge (1) the degree of interference caused by a finding of liability; and (2) whether any given level of interference is sufficient to justify invoking the act of state doctrine.

B. How the Doctrine Functions

Pre-*Kirkpatrick* cases provided two separate explanations for how the act of state doctrine actually functioned. The doctrine served either as a form of abstention or as a choice of law rule.[47] The abstention view is implicit in *Underhill*'s declaration that U.S. courts "will not sit in judgment" on the acts of foreign sovereigns. Such a refusal to entertain a claim, regardless of the law applied to review it, implies that a

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42. *Sabbatino*, 376 U.S. at 428 ("the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.").

43. *Id.*

44. 406 U.S. at 773 (Powell, J., concurring).

45. *Id.* at 773 (Douglas, J., concurring); *id.* (Powell, J., concurring); *id.* at 777 (Brennan, J., joined by Stewart, J., Marshall, J., and Blackmun, J., dissenting).

46. *Id.* at 773 (Douglas, J., concurring).

47. Joseph Dellapenna, in a recent and comprehensive survey of the doctrine, argues that the doctrine functions as a rule of repose:

> Rather than requiring or permitting a court to refuse to hear a case, the doctrine actually functions as a rule of special deference to specific exertions of state power similar in effect to a judgment by a court in that the state decision (an "act" if you will) precludes fresh inquiry into issues decided by that decision.

Joseph W. Dellapenna, *Deciphering the Act of State Doctrine*, 35 VILL. L. REV. 1, 46 (1990). Because Dellapenna'a theory is decidedly a minority position, I do not consider it further in this brief discussion.

category of cases are removed from judicial competence. A variation of this view is Justice Brennan's argument that challenges to foreign acts of state should be treated as political questions under *Baker v. Carr*.[48] Joseph Dellapenna points to two aspects of the doctrine which support the abstention view.[49] First, cases following *Underhill* often use phrases such as "refrain from examining" or "refrain from sitting in judgment" which suggest that courts are not competent to hear a class of cases. Dellapenna's second point is that dismissal on act of state grounds usually occurs without a discussion of the merits or a stipulation that further proceedings in third countries are thereby barred. Both suggest that the court has refused to consider the case from the very outset.[50]

The choice of law view adopted by *Kirkpatrick* appeared briefly in earlier Supreme Court decisions but was never explained in detail.[51] The most explicit foreshadowing appeared in *Ricaud*, where the Court held that seizure of property by the revolutionary Mexican government "must be accepted by courts as a rule for their decision."[52] It remanded the case for a determination of title to the property according to "the result of the action taken by the military government in Mexico."[53] In a statement which could be taken as a repudiation of the abstention view, the Court described its actions as "not a surrender or abandonment of jurisdiction but . . . an exercise of it."[54] The choice of law view, therefore, contemplated a judgment on the merits which is presumably both preclusive in effect and enforceable where valid.[55]

The abstention and choice of law theories, exceptions aside, imply quite different views of how international law functions in U.S. courts.

48. 369 U.S. 186, 210–12 (1962); *see Citibank*, 406 U.S. at 787–89 (Brennan, J., dissenting); *see also id.* at 776 (Powell, J., concurring).

49. Dellapenna, *supra* note 47, at 32–34.

50. For cases expressing the abstention view, see *Dunhill*, 425 U.S. at 697; *Citibank*, 406 U.S. at 775–76 (Powell, J., concurring); Republic of the Philippines v. Marcos, 806 F.2d 344, 357–60 (2d Cir. 1986) *cert. denied*, 481 U.S. 1048 (1987); Reidel v. Bancam, 792 F.2d 587, 592 (6th Cir. 1986); Callejo v. Bancomer, 764 F.2d 1101, 1113 (5th Cir. 1985); Ramirez-Arellano v. Weinberger, 745 F.2d 1500, 1533–34 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985); Int'l Ass'n of Machinists v. OPEC, 649 F. 2d 1354, 1358-59 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1292 (3rd Cir. 1979); Hunt v. Mobil Oil Co., 550 F.2d 68, 74 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977). *See also* Richard Lillich, *A Pyrrhic Victory at Foley Square: The Second Circuit and Sabbatino*, 8 VILL. L. REV. 155, 156 (1963) (describing the doctrine as a "principle of judicial self-restraint and deference to the role of the executive or political branch of the government in the field of foreign affairs" (*quoting* COMMITTEE ON THE JURIDICAL ASPECTS OF NATIONALIZATION AND FOREIGN PROPERTY, AMERICAN BRANCH, INTERNATIONAL LAW ASSOCIATION, REPORT ON THE ACT OF STATE DOCTRINE 3 (Brussels Conference, 1962)).

51. *Dunhill*, 425 U.S. at 705 n.18; *Citibank*, 406 U.S. at 763; *Sabbatino*, 376 U.S. at 418, 438.

52. *Ricaud*, 246 U.S. at 309.

53. *Id.*

54. *Id.*

55. Dellapenna, *supra* note 47, at 45.

The abstention view assumes that an act of state dismissal is not a judgment on the merits.[56] In cases where a plaintiff alleges a violation of an international norm, a court which abstains expresses no view on the status of the norm in the hierarchy of available rules of decision. It holds simply that our courts are not the appropriate fora in which to challenge the acts of coequal sovereigns. The choice of law view, by contrast, not only rejects international law as an appropriate rule of decision (thus suggesting that forum policy elevates other considerations above fidelity to international norms) but also permits the U.S. judicial system to be used as a means of enforcing an act which violates international law.[57]

C. Exceptions to the Doctrine

Several exceptions to the doctrine purport to give effect to principles of international law. The Supreme Court first referred to these exceptions in *Sabbatino*, perhaps because this was the first act of state decision involving violations of international law. The Court has never based a decision squarely upon an act of state exception, although the exceptions appear frequently in lower court decisions and are often championed by academic commentators. By and large the exceptions permit courts to discard the predictable but often unpalatable results of *Underhill*'s rigid territoriality. For alien tort plaintiffs the exceptions are perhaps the only way of avoiding a dismissal on act of state grounds.[58]

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56. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 cmt. f (1987) [hereinafter "RESTATEMENT (THIRD) OF FOREIGN RELATIONS"]:

> [t]he fact that pursuant to the act of state doctrine the validity of an act of a foreign state was not examined and was given effect by a court in the United States is not dispositive in proceedings brought elsewhere as to the validity of the act either under international law or under applicable municipal law.

Neither the text of the *Restatement* nor its official comments explicitly adopt the abstention view, although it would seem to follow logically from the quoted passage. The Reporters' Notes adopt the choice of law view, although this is certainly a reflection of the views of the Chief Reporter, Louis Henkin. *See id.* Reporters' Note 1.

57. Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68, 85–87 (1985) (arguing that act of state functions to implement another state's illegal act and is itself a violation of international law).

58. Act of state has become a favorite defense of alien tort defendants because of the appealing paradox it presents in such cases: the very pleading criteria necessary to support jurisdiction in a *Filartiga*-type action—an act of a foreign official committed in the course of his regular duties—also triggers application of the act of state doctrine. Forti v. Suarez-Mason, 672 F.Supp. 1531, 1546 (N.D.Ca. 1987) (*Forti I*) ("since violations of the law of nations virtually all involve acts practiced, encouraged or condoned by states, defendant's argument [for applying act of state] would in effect preclude litigation under § 1350 for 'tort[s] . . . committed in violation of the law of nations.'" (citing *Filartiga*, 577 F.Supp. 860, 862)); *see* Blum & Steinhardt, *supra* note 13, at 108; Michael C. Small, Note, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and Separation of Powers*, 74 GEO. L.J. 163, 185 (1985).

1. The Consensus Exception

Under the consensus exception, act of state is inapplicable where the plaintiff alleges violation of a norm supported by broad agreement in the international community. According to the *Restatement (Third) of Foreign Relations*:

> A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise actionable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.[59]

This exception derives from *Sabbatino*'s attempt to avoid an "inflexible and all-encompassing" approach to act of state.[60] Justice Harlan identified the institutional competence of courts to pass on issues affecting foreign policy as one important variable in the determination of whether to apply the act of state doctrine.[61] Judicial expertise is at its lowest ebb (and, consequently, the executive's at its highest) where the international community and the United States are not in accord on a particular rule. Conversely, the Judiciary is most suited to adjudicate a claim based on an uncontroversial rule:

> It should be apparent that the greater the degree of *codification or consensus* concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[62]

The consensus exception offers special appeal in alien tort actions. To sustain jurisdiction under the statute a plaintiff must invoke a well-established international rule condemning the defendant's conduct.[63] If such unanimity in the international community is sufficient to establish subject-matter jurisdiction, it would also seem sufficient to serve as the consensus required by the *Restatement (Third)* and

59. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 56, § 443 cmt. c.
60. *Sabbatino*, 376 U.S. at 428.
61. *Id.* at 423.
62. *Id.* at 428 (emphasis added).
63. *Filartiga*, 630 F.2d at 881 (norm in question must "command the general assent of civilized nations").

Sabbatino.[64] Thus, the district court on remand in *Filartiga* rejected an act of state defense, explaining that human rights law is "clear and uncontroversial."[65] An alien tort plaintiff who survived the jurisdictional hurdle would seem certain to prevail.[66]

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64. Blum & Steinhardt, *supra* note 13, at 109 ("[o]nce the court determines that the § 1350 tort is in violation of the law of nations and thus sustains subject matter jurisdiction, the interests served by non-review on the basis of the act of state doctrine correspondingly diminish.").

65. Filartiga v. Pena-Irala, 577 F.Supp. 860, 862 (E.D.N.Y. 1984). Additional case law on the consensus exception is scarce. *See, e.g.*, Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989) (international consensus condemning murder militates against invoking act of state), *cert. dism'd*, 1990 U.S. LEXIS 3863 (1990); International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1361 (9th Cir. 1981) (no international consensus condemning conspiracies in restraint of trade; exception held inapplicable), *cert. denied*, 454 U.S. 1163 (1982). The consensus exception, however, is frequently favored by commentators. *See, e.g.*, Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 491 n.133 (1989); Blum & Steinhardt, *supra* note 13, at 108–9; Debra A. Harvey, *Comment, The Alien Tort Statute: International Human Rights Watchdog or Simply "Historical Trivia"?*, 21 J. MARSHALL L. REV. 341, 355 (1988); Ronald G. Haron, Recent Development, 27 VA. J. INT'L L. 433, 440–41 (1987); Small, *supra* note 58, at 188; Laura Wishik, Recent Development, *Separation of Powers and Adjudication of Human Rights Claims Under the Alien Tort Claims Act*, 60 WASH. L. REV. 697, 704–05 (1985).

66. The consensus exception becomes significantly more complex if Justice Harlan's formulation is used rather than the *Restatement*'s. According to the *Restatement* formulation, the "consensus" required to invoke the exception is that degree of international agreement which would suffice to establish a customary rule of international law. The *Restatement* view is echoed in *Filartiga*, where Judge Kaufman found an international rule condemning official state torture grounded upon the "general assent of civilized nations." 630 F.2d at 880–81 (quoting The Paquete Habana, 175 U.S. 677, 694 (1900)). By contrast, Judge Kaufman cited the compensation norm at issue in *Sabbatino* as subject to "sharply conflicting views" in the international community, a disagreement which precluded the establishment of a "settled rule of international law." 630 F.2d at 881.

Yet the "consensus" which Justice Harlan would require to trigger the exception was more than that sufficient to establish simple "illegality" of a given action under international law. In a footnote he explained that in setting forth the division of opinion on expropriations "we do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals." 376 U.S. at 428 n.26. Cases in which "consensus as to standards is greater and which do not represent a battleground for conflicting ideologies" might be appropriate for domestic adjudication. *Id.* at 430 n.34. In the absence of such a super-consensus, the act of state doctrine would apply "even if international law ha[d] been violated." *Id.* at 431. Thus, even if it were *"patently clear* that this particular expropriation was in violation of international law," Justice Harlan held, "it would still be unwise for the Courts to so determine." *Id.* at 433 (emphasis added).

The danger of Justice Harlan's formulation is that it makes contrary state practice suddenly relevant to the act of state question when it is almost entirely irrelevant to the jurisdictional question of whether human rights norms exist. Violations of human rights are widespread and critics contend that such counter-normative practice simply confirms the impossibility of regulating domestic conduct within a Westphalian legal order. Mark Lane, *Mass Killings by Governments: Lawful in World Legal Order*, 12 N.Y.U. J. INT'L L. & POL. 239 (1979); Mark Lane, *Demanding Human Rights: A Change in the World Legal Order*, 6 HOFSTRA L. REV. 269 (1978); J.S. Watson, *Legal Theory, Efficacy, and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L. F. 609. Proponents of such norms, by far the majority, must necessarily respond that widespread violations of human rights do not vitiate the status of human rights norms as binding law. This is true, they argue, because the violating states virtually never justify their acts as legally permissible. RESTATEMENT (THIRD) OF FOREIGN RELATIONS,

2. The "Private Act" Exception

Under the private act exception, a court will not apply the act of state doctrine if the plaintiff complains about conduct which the court does not recognize as the official act of a sovereign government. In *Dunhill*, a four justice plurality declined to invoke the act of state doctrine because it found insufficient evidence of a 'public act of those with authority to exercise sovereign powers."[67] In *Sharon v. Time, Inc.*[68] the Court held that the *Dunhill* plurality opinion required "a fairly stringent degree of formality" in proving that acts represented "official attempts to implement public policy."[69] The *Sharon* Court held that when a state official steps outside the scope of his authority, his acts are not "designed to give effect to a State's public interests" and thus cannot serve as a basis for invoking the act of state doctrine.[70]

The *Sharon* court's description of the private act exception is akin to the legal fiction developed by U.S. courts to circumvent the Eleventh Amendment to the United States Constitution. According to this legal fiction, a court may deem state officials stripped of their agency relationship to the state when they act contrary to its written laws.[71] Consequently, court judgments imposing liability do not offend anyone. The plaintiff can proceed with a claim under international law; the foreign state, now distanced from its renegade official, suffers no affront to its sovereignty, and the Executive retains sole authority

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supra note 56, § 702, reporters' note 1. This fragile argument is the linchpin of human rights law's claim to legitimacy. Thus, the danger of Harlan's "consensus-plus" standard—which takes widespread violations to indicate *lack* of consensus (as he understands it)—is that it would permit a court predisposed to positivist criticisms of human rights law to seize on evidence of violations to find the consensus exception inapplicable and dismiss a claim. Such a court could accomplish at the act of state stage what it could not at the jurisdictional stage.

67. *Dunhill*, 425 U.S. at 694.

68. 599 F.Supp. 538 (S.D.N.Y. 1984).

69. *Id.* at 544.

70. *Id. Sharon* was a libel action by a former Israeli Defense Minister against *Time* magazine alleging that a story linking Sharon to a massacre in Lebanon during the 1982 Israeli invasion was false. *Id.* at 542. The magazine raised an act of state defense, arguing that "trial of this action will require the jury to render judgment as to numerous acts of the States of Israel and Lebanon." *Id.* at 544. The district court disagreed:

> Although actions by military officers are often considered acts of state, they are acts of state only because they are officially authorized. The actions of an official acting outside the scope of his authority as an agent of the state are simply not acts of state. In no sense are such acts designed to give effect to a State's public interests.

Id. (citations omitted).

71. *See, e.g.*, Ex Parte Young, 209 U.S. 123 (1908); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913); Edelman v. Jordan, 415 U.S. 651 (1974). Such acts will still be considered "state action," however, for purposes of sustaining jurisdiction under the Fourteenth Amendment. CHARLES A. WRIGHT, LAW OF FEDERAL COURTS 290 (4th ed. 1983). To follow through on the analogy, foreign officials would be deemed to have acted in their official capacities for purposes of making their conduct susceptible to international law, but for act of state purposes, the claim would be "one which does not effect the state in its sovereign or governmental capacity." Ex Parte Young, 209 U.S. at 159.

to conduct relations with the foreign state *qua* state. Only the defendant suffers, and he has presumably violated both his own state's laws and international law.

The *Dunhill* plurality opinion and *Sharon* embody differing variations on the private act theme. The justices in *Dunhill* determined that commercial activities are by their nature private and that regardless of demonstrable connections between the commercial enterprise and the sovereign, commercial acts are not those of a state official.[72] *Sharon*, by contrast, describes acts which *are* generally viewed as sovereign in nature but which in the particular instance do not represent the public policy of the state. For example, a policeman's interrogation of a suspect is generally viewed as a sovereign act, but the use of torture in the course of an interrogation may exceed the limits imposed by a particular state's laws. This was essentially Judge Kaufman's logic in *Filartiga*: an act of torture directly contrary to the laws of Paraguay and subsequently unratified by the Paraguayan government, he argued, "could hardly be characterized as an act of state."[73]

3. The *Bernstein* Exception

Under the *Bernstein* exception, a court will decline to invoke the act of state doctrine if it receives written assurances from the Executive Branch that full adjudication of a claim will not interfere with executive foreign policy-making.[74] Although no Supreme Court majority has adopted this exception,[75] its logic is compelling. The *Bernstein* exception addresses the central presumption underlying the modern doctrine—that judicial pronouncements on foreign policy may interfere with the Executive's diplomatic efforts—and rebuts it with tangible evidence. Indeed, compared to the other exceptions to the doc-

72. *Dunhill*, 425 U.S. at 702–06.

73. *Filartiga*, 630 F.2d at 889.

74. The exception derives from Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954). Although *Bernstein* predates *Sabbatino*, the relevance of its holding was greatly magnified by *Sabbatino*'s firm grounding of act of state in separation of powers principles.

75. In *Citibank*, Justices Douglas and Brennan objected that the *Bernstein* exception represents an abdication of the judicial function in favor of purely political decisions. *Citibank*, 406 U.S. at 773 (Douglas, J., concurring); *id.* at 790–93 (Brennan, J., dissenting). Yet a *Bernstein* letter is simply the most efficient way for a court to gauge the Executive's position. A court is no less beholden to the Executive when it performs the same function, only less efficiently, by ascertaining executive policy through its own independent investigation. The Douglas/Brennan objection thus proves too much, since judicial opposition to following executive positions on foreign policy is fundamentally incompatible with an act of state doctrine based in separation-of-powers concerns. Taken seriously, the objection challenges the very existence of the doctrine as described by *Sabbatino* and its progeny. Brennan himself avoids this difficulty by sidestepping the entire act of state debate, contending instead that act of state is simply a specific application of the political question doctrine. *Id.* at 787–88.

trine discussed by courts and commentators, receipt of a *Bernstein* letter is not really an "exception" at all. It is instead a prior determination that the doctrine should not be invoked because one of its *prima facie* components is missing.[76]

III. ACT OF STATE AS A CHOICE OF LAW RULE

A. The Kirkpatrick Decision

The Supreme Court's decision in *Kirkpatrick* is primarily relevant to the second of the three issues just reviewed—whether act of state functions as an abstention or a choice of law rule. As we will see, however, the Court's adoption of the choice of law approach requires us to think quite differently about the act of state doctrine as a whole and so implicates the doctrine's rationale and exceptions as well.

Kirkpatrick was an action by an unsuccessful U.S. bidder, W.S. Kirkpatrick, on a construction contract with the Nigerian government. The American company which was awarded the contract had arranged for bribes to be paid to Nigerian officials, acts for which the company was later prosecuted under the Foreign Corrupt Practices Act.[77] The defendants—an officer of the successful bidder and a Nigerian citizen who served as its middleman—argued that in order to prevail Kirkpatrick had to prove that Nigerian officials received payments in violation of Nigerian law. Only after such proof was offered could the court conclude that the contract was invalid.[78]

Writing for a unanimous Supreme Court, Justice Scalia disagreed with the defendant's argument and held act of state inapplicable because none of the claims called into question the validity of an official act of the Nigerian government.[79] The legality of the contract was not at issue. In explaining this view Justice Scalia provided the Supreme Court's clearest statement of how the act of state doctrine functions as a choice of law rule:

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76. This article will not consider the *Bernstein* exception further for the reason that its application in any given case is largely out of the hands of courts. Because it depends on the solicitude of the Executive, *Bernstein* provides no consistent theory of how act of state *should* function in cases involving a breach of international law. Moreover, plaintiffs will likely be frustrated in attempting to convince the State Department to issue a *Bernstein* letter, which it has done with decreasing frequency in recent years. Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 369 (1986).

77. 493 U.S. at 402 (citing 15 U.S.C. §§ 78dd-1 to 78dd-2).

78. *Id.* at 406.

79. "Nothing in the present suit requires the court to declare invalid, and thus ineffective as 'a rule of decision for the court of this country' the official act of a foreign sovereign." *Id.* at 405 (quoting *Ricaud*, 246 U.S. at 310).

> [T]he act of state doctrine is not some vague doctrine of abstention but a "*principle of decision* binding on federal and state courts alike" [quoting *Sabbatino*, 376 U.S. at 427]. As we said in *Ricaud*, "the act within its own borders of one sovereign state becomes a rule of decision for the courts of this country . . . ." The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case because the validity of no foreign sovereign is at issue.[80]

B. How Act of State Functions as a Choice of Law Rule

In an oft-cited 1967 article, Professor Louis Henkin described act of state as a "special rule modifying the ordinary rules of conflict of laws."[81] Professor Henkin's view has become the standard account of act of state so conceived[82] and finds support, albeit in somewhat cryptic passages, throughout the Supreme Court's pre-*Kirkpatrick* decisions.[83] Henkin's view, therefore, probably best explains how Justice Scalia intended the doctrine to function.

The Henkin approach is a methodological exposition of how act of state interacts with the normal choice of law process. As an example, take a case in which a defendant's acts are alleged to violate international law. In such a case, the act of state doctrine will inevitably be raised as a defense. The Henkin view begins with the assumption that the court would, separate and apart from its act of state discussion, engage in a conflicts analysis to choose the appropriate rule of decision. It further assumes that in such an analysis the court would follow a traditional, territorially-based choice of law theory such as appears in the *Restatement (First) of Conflict of Laws*.[84] The rules of decision arguably applicable to the claim would be the law of the defendant's home state, the law of the forum, or international law.

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80. *Id.* at 406, 409–10.

81. Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175, 178 (1967).

82. *See* Dellapenna, *supra* note 47, at 41 n.221 (collecting citations to scholarly comments adopting the Henkin perspective).

83. *See Dunhill*, 425 U.S. at 705 n.18; *Citibank*, 406 U.S. at 763; *Sabbatino*, 376 U.S. at 438; *Ricaud*, 246 U.S. at 309.

84. *See* Dellapenna, *supra* note 47, at 42; Monroe Leigh & Michael David Sandler, *Dunhill: Toward a Reconsideration of Sabbatino*, 16 VA. J. INT'L L. 685, 713–14 (1976).

In tort cases[85] the *Restatement (First) of Conflict of Laws* follows the principle of *lex loci delictus*: the "law of the place of the wrong" determines whether a person has sustained a legal injury.[86] Accordingly, the law of the foreign state would be chosen. That law could take a number of approaches: it could deem the official's acts legal, it could deem them illegal, or, as appears to have been the case in *Filartiga*, it could find that the official received approval for acts from his superiors despite their illegality under statute. In a normal conflicts analysis, the court would first determine the substance of the foreign law and then decide whether the defendant had violated its terms. The Henkin view assumes that the court would not find a violation.

Traditional conflicts principles, however, provide courts with an "escape hatch" to avoid the enforcement of laws which violate a deep-seated policy of the forum, characterized by Judge Cardozo as "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonweal."[87] In place of foreign law, therefore, courts could substitute the law of the forum.[88] The "fundamental principle" relevant to this discussion is the condemnation of violations of international law. The court could not uphold a foreign law which sanctioned the defendant's acts if those acts

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85. In contracts cases the *Restatement* also takes a territorial approach, applying the law of the place of contracting to issues related to creation of the contract and the law of the place of performance to issues concerned with performance. RESTATEMENT OF THE LAW OF CONFLICT OF LAWS ("RESTATEMENT (FIRST) OF CONFLICT OF LAWS") §§ 332, 358 (1934). Since I am concerned here with acts alleged to be in violation of international law, and the international law merchant has long faded into history, I restrict my analysis to tort claims.

86. *Id.* § 378.

87. Loucks v. Standard Oil Co., 120 N.E. 198, 202 (1918). The New York Court of Appeals later described the public policy exception as preventing "the approval of a transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense." Intercontinental Hotels Corporation v. Golden, 203 N.E.2d 210, 212 (N.Y. 1964). New Jersey courts have followed the *Loucks* standard. *See* Carter v. Sandberg, 458 A.2d 924, 926 (N.J. 1983). Illinois courts describe the exception as concerned with policies "contrary to pure morals or abstract justice, or . . . [where] the enforcement would be of evil example and harmful to its own people." Champagnie v. Q.E. O'Neill Construction Co., 395 N.E.2d 990, 992 (Ill. 1979). *See generally* Jeffrey Jackson, *No Place Like Home: Public Policy and Prudent Practice in the Conflict of Laws*, 90 W. VA. L. REV. 1195 (1988); Holly Sprague, Note, *Choice of Law: "A Fond Farewell" to Comity and Public Policy*, 74 CAL. L. REV. 1447 (1986); Gary J. Simson, *The Public Policy Doctrine in Choice of Law: A Reconsideration of Old Themes*, 1974 WASH. U. L.Q. 391; Conrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

88. *See, e.g.*, Union Trust v. Grossman, 245 U.S. 412, 416 (1918) (Holmes, J.). Because a forum's policy on a particular issue is derived primarily from its statutes and judicial decisions, *Champagnie*, 395 N.E. 2d at 993; *Intercontinental Hotels*, 203 N.E. 2d at 212, the policy and the rule of decision applicable to the case at hand will be one and the same. For example, a state policy against gambling contracts is also a rule of decision making such contracts unenforceable. *See* Resorts International, Inc. v. Zonis, 577 F.Supp. 876 (N.D. Ill. 1984).

violated international law.[89] On this basis it would reject foreign law as the rule of decision and substitute international law (as incorporated into U.S. law), or, pursuant to the *Erie* doctrine, the law of the state in which the court sits.[90] Either one of these rules would hold the defendant liable.

The court's next step would be to consider the defendant's act of state defense. *Kirkpatrick* held that "the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."[91] The only rule of decision that could validate the internationally illegal acts of a foreign official would be the law of his own state, under the aegis of which he was purporting to act. The act of state doctrine thus precludes courts from resorting to the escape hatch of public policy and requires them to adhere to their initial choice of foreign domestic law. Because the defendant's acts must be "deemed valid," moreover, the doctrine further precludes actual adjudication under foreign domestic law and instead presumes their legality thereunder.

Finally, a court must consider any exceptions to the doctrine. If an exception proves relevant and, in a court's view, outweighs the reasons for invoking act of state in the first place, then the court would retreat from its selection of foreign domestic law. Presumably, it would return to the rule of decision previously selected when forum policy trumped the *lex loci* rule.[92]

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89. *See* Kirgis, *Act of State Exceptions and Choice of Law*, 44 U. COLO. L. REV. 173, 180 (1967) ("the traditional public policy exception, with its inward focus on the prevailing values of the forum, would provide a tempting path for a domestic court to take in avoidance of the foreign law.").

90. State law is mentioned here merely because it is an available option for a federal court seeking to apply "forum" law. In *Sabbatino*, however, the Court probably precluded this option by holding that issues concerning American relations with other nations must be governed exclusively by federal law:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the court did not have rules like the act of state doctrine in mind when it decided *Erie R.R. Co. v. Tompkins*.

376 U.S. at 425.

91. 493 U.S. at 409.

92. *Sabbatino* contains no explicit discussion of the choice of law issue but does hint at this multi-tiered approach. *Banco Nacional* urged the court to apply forum law to the transaction. Justice Harlan responded that this was precisely what act of state was designed to avoid, since the doctrine concerns *"the limits for determining the validity of an otherwise applicable rule of law."* 376 U.S. at 438 (emphasis added). The suggestion here is that an initial conflicts analysis would have "otherwise" chosen Cuban law as the rule of decision but that its "validity" would be open to question, a question to be foreclosed by the act of state doctrine. Working backwards, such a question could only be raised by another rule of decision, namely the forum policy which the respondents urged the Court to apply. But because act of state also "reflects the desirability of presuming the relevant transaction valid," *id.*, the Court could not apply the forum rule. Since Justice Harlan spends much of the opinion discussing relevant principles of international law,

IV. THE FAILINGS OF THE CHOICE OF LAW VIEW

Unfortunately the Henkin view simply does not stand up to scrutiny. At each turn, the step-by-step approach just outlined reveals numerous inconsistencies. In light of these problems, a proponent of *Kirkpatrick* might attempt to salvage act of state as a choice of law rule by abandoning the traditional *lex loci* framework and setting the doctrine against a backdrop of modern conflicts theories. Yet, these theories have problems of their own. In this section I take a closer look at act of state as it would function by reference to traditional and modern conflicts theories.

A. The Traditional Approach

Initially, one might ask why federal courts would even resort to outmoded territorialist conflicts principles. One answer would be that they are compelled to do so by the *Erie* doctrine: if the state in which they sit follows the *lex loci* approach then they must as well.[93] However, not only have most states abandoned *lex loci* in favor of more flexible modern theories,[94] but there is also a problem of federalism. Given *Sabbatino*'s holding that act of state is a question of federal law, applying the *Erie* rule would require the federal courts to undertake the anomalous task of shaping a doctrine of federal law to fit a preexisting framework established by state law. Maintaining only a residuum of federal control over the choice of law process would hardly fit with the Supreme Court's broad view that "[t]he problems surrounding the act of state doctrine are . . . intrinsically federal."[95]

Alternatively, one might take the view that even in diversity cases the *Erie* rule is inapplicable because all issues related to act of state, including those arising in the initial conflicts analysis, are reserved to

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one may assume further that the forum policy arguably applicable would be the international norms concerning expropriation.

Stated another way, Justice Harlan could only suggest a need for "limits" on a challenge to Cuban law if some other substantive rule created such a challenge. Under the *lex loci* approach that other rule would be forum policy. Further, if act of state presumes the transaction to be "valid," and Cuban law is the only rule according to which it is necessarily valid, then act of state must function to reject the challenge offered by forum policy and reinstate the validation offered by Cuban law.

93. *See* Klaxon Co. v. Stentor Electric Manuf. Co., 313 U.S. 487, 496 (1941).

94. *See* Herma Hill Kay, *Theory Into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 582 (1983) (only 16 states and Washington, D.C. still follow *lex loci*; of these, only nine have explicitly rejected modern conflicts theories).

95. Sabbatino, 376 U.S. at 427.

the federal government.[96] In that case the federal courts would have discretion to fashion a common law of conflicts in order to further the federal interest at hand.[97] If this is the case, then the willingness of federal courts to adopt *lex loci* as a rule of federal law would turn entirely on whether it furthers the interests implicit in the various stages of the analysis, i.e., the interests in the policy of the forum used to trump the initial choice of foreign domestic law, in act of state itself, and in the various exceptions to the doctrine. Given the problems with *lex loci* we are about to consider,[98] it seems unlikely that courts would select this cumbersome mode of analysis to advance the federal interest.

1. Initial Choice of Foreign Domestic Law

As the first step in its traditional conflicts analysis, a court in our scenario chooses the law of the defendant's home state. Presumably the court would then evaluate the legality of the defendant's acts under that law. Yet, for reasons of international comity, federal courts have long refused to hold foreign officials liable for violations of their own law.[99] In *Sabbatino*, for example, the Supreme Court rejected an argument that U.S. courts should not enforce the Cuban confiscation decree because it failed to comply with the requirements of Cuban law. The Court held that, in order to avoid causing offense, "one

96. *See generally* Peter Westen & Jeffrey Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980). The force of this argument is strengthened by the fact that many of the concerns traditionally associated with act of state would also be considered in the court's initial conflicts analysis. *See infra* text accompanying notes 132–140. A neat separation of state and federal law issues is difficult if not impossible. According to this analysis, the entire process would implicate issues of exclusive federal interest (those concerning foreign affairs) and therefore be considered a matter of federal law. *See* Yvonne Marcuse, *International Choice of Law: A Proposal for a New "Enclave" of Federal Common Law*, 5 FORDHAM INT'L L.J. 319, 323 (1982).

97. *See* Paul Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957).

98. *See infra* text accompanying notes 99–105.

99. West v. Multibanco Comermex. S.A., 807 F.2d 820, 828 (9th Cir. 1987) ("[t]he evaluation by one sovereign of foreign officers' compliance with their own laws would, at least in the absence of the foreign sovereign's consent, intrude upon that state's coequal status"), *cert. denied*, 482 U.S. 906 (1987); Bernstein v. van Heyghen Freres S.A., 163 F.2d 246, 249 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438, 444 (2nd Cir. 1940) ("[i]t should make no difference whether the foreign act is, under local law, partially or wholly, technically or fundamentally illegal . . . . So long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws"); Bandes v. Harlow & Jones Inc., 570 F.Supp. 955, 961 (S.D.N.Y. 1983), *rev'd on other grounds*, 852 F.2d 661 (2d Cir. 1988). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 56, § 443 cmt. d ("[t]hus, courts in the United States will not entertain challenges to the validity or lawfulness of a taking by a foreign state on the ground that it was contrary to the state's own constitution or laws, or that a law on a decree had not been properly enacted.").

nation must recognize the act of the sovereign power of another, so long as it has jurisdiction under international law, even if it is improper according to the internal law of the latter state."[100]

The Court will therefore ignore the substance of foreign law and avoid such questions as whether the defendant exceeded his legal authority to act; whether the foreign state would accord him immunity for his conduct; and whether the law provides a civil remedy for the type of conduct at issue. As explained more fully below, the defendant cannot be held liable if his state's law serves as the rule of decision.[101]

Nevertheless, an alternative analysis exists for a U.S. court purporting to apply the law of a foreign state. While the applicable "law" could consist of the state's own rules it could also be a relevant principle of international law.[102] As in the United States, the foreign state's law could be deemed to incorporate international norms,[103] or those norms could apply of their own force as superior to any contrary domestic principle.[104] Alternatively, courts of the foreign state might adhere to a rule of construction "which obliges them to interpret laws whenever possible so as not to conflict with international law."[105]

The precise approach will vary from state to state, and some may grant no weight at all to international law. For states in which international law would be applied as a rule of decision, however, the U.S. court would no longer be acting so presumptuously as to enforce another state's internal laws against its own officials. The rule applied would be a universal one, binding on all states equally. The categorical prohibition on liability outlined above would therefore not apply.

2. The Public Policy Escape Hatch

In order to reach the next step of our analysis, we must assume that the court has applied foreign domestic law without reference to international principles. As discussed, the court could not hold the defen-

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100. 376 U.S. at 415 n.17.

101. *See infra* text accompanying notes 118–121.

102. Courts frequently obscure this reasoning by obsessively quoting *Underhill*. In *dicta*, the *Underhill* court indirectly addressed how international law should affect the applicability of the act of state doctrine. Yet, the claims at issue in *Underhill* did not involve actual violations of international law. *See infra* note 225. In fact, American courts throughout the nineteenth century frequently inquired into the consistency of sovereign acts with the law of nations. *See, e.g.*, Rose v. Himley, 8 U.S. (4 Cranch) 240, 276–77 (1808); The Nereide, 13 U.S. (9 Cranch) 388, 422–23 (1815); Hilton v. Guyot, 159 U.S. 113, 163 (1895).

103. *See* The Paquete Habana, 175 U.S. 677 (1900).

104. *See* Dale S. Collinson, *Sabbatino: The Treatment of International Law in American Courts*, 3 COLUM. J. TRANSNAT'L L. 27, 38–39 (1964) ("that international law can be applied as a part of—or, alternatively, as a law superior to—the internal law of the acting state, is a sound possibility as a matter of conflict of laws theory.").

105. Michael Zander, *The Act of State Doctrine*, 53 AM J. INT'L L. 826, 841 (1959).

dant liable under that law.[106] Faced with the prospect of sanctioning a violation of international law, the court will then invoke the public policy of the forum, which we must presume finds such violations offensive.

In light of the other policies which will come into play later in our analysis,[107] it is important to emphasize that the threshold for "offensiveness" here is quite high.[108] Both the federal courts, which discuss public policy as an exception to the full faith and credit requirement, and state courts, which do so as part of their traditional conflicts rules, repeatedly have held that mere disagreement with foreign law is insufficient. The law in question must be "obnoxious" to the interests of the forum.[109] In the international community, where diversity of national cultures is vigorously protected,[110] a finding of *illegitimate* diversity will be rare.[111] Given that resort to public policy is such an unusual step, one might assume that the court's conflicts analysis would end upon a finding that such policy has been offended.

In the next section, however, we will see that contrary to this assumption, the *Kirkpatrick* view assumes the existence of policies which trump those invoked by the escape hatch.[112] At this juncture two additional problems are evident. First, in traditional conflicts law the public policy exception arguably functioned only to decline enforcement of foreign causes of action, not to strike *defenses* grounded

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106. *See supra* text accompanying notes 99–100.

107. *See infra* text accompanying notes 122–125.

108. The *Restatement (First) of Conflict of Laws* noted that the application of its provision for a public policy escape hatch is "extremely limited." RESTATEMENT (FIRST) OF CONFLICT OF LAWS, *supra* note 85, § 612 cmt. c. "A mere difference between the laws of the two states will not render the enforcement of a cause of action created in one state contrary to the public policy of the other." *Id.*

109. Bradford Electric Light Co., Inc. v. Clapper, 286 U.S. 145, 162 (1932) (Brandeis, J.).

110. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1971) ("[e]very state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State"); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. 6014 (1966) ("in fulfillment of the principle of self-determination [states may] . . . freely determine their political status and freely pursue their economic, social and cultural development"); Pact of the League of Arab States, March 22, 1945, art. 8, 70 U.N.T.S. 237 ("Every member State of the League shall respect the form of government obtaining in the States of the League and shall recognize the form of government obtaining as one of the rights of those states, and shall pledge itself not to take any action tending to change that form."); Charter of the Organization of American States, April 19, 1948, art. 16, 119 U.N.T.S. 3, 12 ("No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantage of any kind.").

111. Simson, *supra* note 87, at 408–12.

112. *See infra* text accompanying notes 117–121.

in foreign law. The best known articulation of this distinction is Justice Brandeis' opinion in *Bradford Electric Light Co. v. Clapper*:

> A State may, on occasion, decline to enforce a foreign cause of action. In doing so, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But to refuse to give effect to a substantive defense under the applicable law of another state, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.[113]

Justice Brandeis' argument becomes even stronger if our case were to involve two aliens, as in *Filartiga*-type claims. In such cases the forum (the United States) is neutral as between the two parties. Its only interest is in avoiding the use of its courts to serve as vehicles to enforce policies it finds distasteful. It has no interest in preventing the defendant from successfully asserting his defense elsewhere—the practical result of striking that defense on public policy grounds and issuing a judgment on the merits of the plaintiff's claims.[114]

The Brandeis distinction follows the logic of territorial conflicts theory, which gave rise to the public policy escape hatch in the first place. When a plaintiff's claim is rejected on public policy grounds, the court is not affecting his ability to enforce rights which vested where the acts occurred; the plaintiff is simply being told to exercise those rights in another forum. When the court strikes a defense, however, it strips the defendant of the ability to claim rights which presumably vested in the same manner as the plaintiff's. A territorial conflicts theory cannot sanction this uneven result.

The second problem with invoking public policy in this case is that contacts with the forum may be lacking. Paulsen and Sovern have observed that "[t]he overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection."[115] If the plaintiff in our case is a U.S. citizen claiming injury by a foreign official or entity this

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113. 286 U.S. at 160. Brandeis' distinction is also implicit in the *Restatement (First) of Conflict of Laws*, published two years after *Clapper*, which speaks only of a public-policy bar against "actions." RESTATEMENT (FIRST) OF CONFLICT OF LAWS, *supra* note 85, § 612. *But see* Arthur Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 YALE L.J. 1027, 1033–34 (1940) (arguing that *Clapper* awards defendants "a more favorable position in matters of public policy").

114. RUSSELL WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 85 (3d ed. 1986) ("[i]n no event should a neutral forum invoke its own public policy to affect the result on the merits as it would, for example if it denied effect to a defense based on obnoxious foreign law"); Paulsen & Sovern, *supra* note 87, at 1012.

115. Paulsen & Sovern, *supra* note 87, at 981; *see also* Nussbaum, *supra* note 113, at 1031–32.

problem is mitigated. In *Filartiga*-type actions, however, none of the relevant acts will have occurred in the forum. The force of this argument will vary depending upon which contacts the court finds significant; the court, for example, may find significance in the plaintiff's after-acquired domicile in the forum.[116] In that case the court may be less reluctant to invoke forum policy. The general point is that one may not assume, without close examination of the relevant contacts in each case, that a court would in fact find its public policy offended. If the case law of the *Restatement (First) of Conflict of Laws* era is to be the guide, a claim involving *no* significant contacts with the forum would be unlikely to merit application of the public policy escape hatch. For some courts, this may describe *Filartiga*-type alien tort claims.

3. The Act of State Doctrine

Under the Henkin view, the act of state doctrine functions to preclude use of the public policy escape hatch. At first glance the plaintiff in our case appears to fare quite well. *Sabbatino* and *Kirkpatrick* invoked act of state to avoid interference with executive foreign policy-making, but even before reaching that point the court already would have exited via the public policy escape hatch, a step not possible without executive approval of both the substance of that policy and its enforcement against the particular defendant.[117] Executive oppo-

116. *Id.* (discussing domicile as contact leading forum to apply the public policy escape hatch).

117. Executive agreement on the substance of the policy would follow from the doctrine's limited applicability to rules of decision that are profoundly repugnant to the forum's sensibilities. *See e.g.*, Oscanyan v. Arms Co., 103 U.S. 261, 277 (1881) ("A contract to bribe or corruptly influence officers of a foreign government will not be enforced in the courts of this country . . . [because of] the inherent viciousness of the transaction, its repugnance to our morality, and the pernicious effect which its enforcement by our courts would have upon our people"); Paulsen & Sovern, *supra* note 87, at 980 ([o]ur courts properly should deny effect to a foreign contract of slavery or an agreement to subvert the integrity of the governmental processes of a friendly foreign government. In a world in which despotic governments exist, our courts should not become the handmaidens of tyrants.") A policy in which only one (or perhaps two) branches of the federal government concurred would hardly fit within these unequivocal formulations.

The same requirement of unanimity explains why executive opposition to invoking forum policy in a *particular* case would preclude resort to the escape hatch. If the Executive stated that a certain claim would better be resolved diplomatically than through litigation, it would be stating its opposition to the use of forum policy in that case. A court that nevertheless invoked the escape hatch would, for that specific case, be defying the Executive's wishes in precisely the same degree as if the Executive had declared its general opposition to the substance of the policy. Thus, for litigants in any given case who claim violation of international norms, an executive declaration that their claims would embarrass its relations with the defendant's government is functionally indistinguishable from a declaration that the United States did not support the enforcement of those norms generally. In both instances a court could not apply an established forum policy to the facts before it.

sition to either aspect of the policy would mean that the policy was not important enough to override the court's initial choice of foreign domestic law. Accordingly, if the Executive approves both the policy and its use in particular litigation, a court could not invoke act of state based on interference with executive prerogatives. Therefore, no separation of powers issues would be implicated by permitting the claim to proceed.

Perhaps after *Kirkpatrick*'s explicit designation of act of state as a choice of law rule this analysis will carry the day with courts which follow a traditional conflicts analysis. If pre-*Kirkpatrick* decisions are any guide, however, courts which view act of state as a conflicts rule do not consider forum policy at all. From an implicit determination that the *lex loci* principle governs, they proceed directly to conclude that acts committed by foreign officials on their own soil are valid *per se*.[118] These courts fail to understand that without a consideration of forum policy, *lex loci* and act of state reach identical results: the application of foreign domestic law. Act of state analysis thus becomes superfluous.[119] Remarkable as it may seem for courts to gloss over this problem, the lack of scrutiny is an inevitable result of the Supreme Court's failure to prescribe *how* executive policy is to be ascertained and what *level* of interference is necessary to trigger act of state.[120]

Once act of state is invoked, *Kirkpatrick* mandates that the defendants' acts be "deemed valid."[121] Courts are thus precluded from inquiring whether courts of the defendant's state would apply norms of international law as the rule of decision. Thus, even if the foreign state's law and the forum's law both dictate that international norms should serve as the rule of decision, *Kirkpatrick* still mandates dismissal on act of state grounds.

4. The Consensus and Private Act Exceptions Reexamined

a. The Consensus Exception

The consensus exception provides that act of state is inapplicable if a rule of law has widespread support in the international community.[122]

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118. *E.g.*, *Citibank*, 406 U.S. at 763; *Sabbatino*, 376 U.S. at 418; *Randall v. Aramco*, 778 F.2d at 1146, 1153 (5th Cir. 1985); *Sharon v. Time*, 599 F.Supp. at 546; *Nat'l Am. Corp.*, 448 F.Supp. at 640 n.30. *Kirkpatrick* itself makes no mention of forum policy.

119. One might object that act of state takes the additional step of presuming the defendant's acts valid, regardless of the substance of the foreign state's law. However, in the scheme of *lex loci*, an initial finding that a defendant's acts are legal under his nation's law is essential. If the acts were held illegal, there would be no "repugnant" result necessitating reversal as against public policy. In turn, there would be no need to invoke act of state to override public policy.

120. *See supra* text accompanying notes 42–46.

121. 493 U.S. at 409.

122. *See supra* text accompanying notes 59–66.

The exception reassures the court that in following a particular international norm, it will not (or should not) offend the defendant's government or the international community at large; the court will not be enforcing a parochial U.S. conception of what international law *should* be, but an established standard by which the defendant's government is itself bound.

The consensus exception, however, is a far weaker justification for applying international law than the public policy escape hatch. The exception holds that no relevant actor will be offended if the defendant is held liable. By contrast, under a forum-policy analysis, the failure to enforce international norms is profoundly repugnant to the national conscience. Yet in the *lex loci* scheme, this vastly stronger argument for applying forum policy is overridden by the act of state doctrine. The *lex loci* analysis thus becomes illogical: it makes little sense that international law should prevail under the consensus exception but not when there are even stronger reasons, embodied in the forum policy, for applying the same law. If respect for international norms justifies the consensus exception, then a court's analysis should end once forum policy displaces *lex loci*.[123]

Both *Sabbatino* and *Kirkpatrick* make clear that the concern underlying act of state is not that foreign governments might take offense at a claim going forward. Rather, act of state is designed to prevent judicial interference with executive prerogatives in foreign policy. If such separation of power concerns are sufficient to defeat a strong forum policy on international law, they should not give way to the weak policy on international law embodied in the consensus exception. Indeed, the term "exception" seems almost inappropriate here. The consensus approach, by tying act of state to international law, ignores such issues as the delicacy of relations between the United States and the defendant's government, executive attempts to resolve the issue diplomatically, and executive approval or disapproval of the litigation.[124] These purely domestic issues simply cannot be resolved by ascertaining the views of the international community on a particular point.

Courts might conceivably harmonize international consensus and separation of powers concerns by presuming that the executive *always*

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123. We noted above that one option for a court following the *lex loci* rule would be to view the "law" of the foreign state as reflecting, incorporating or conforming to international norms. *See supra* text accompanying notes 102–105. The internal logic of the Henkin view does not permit such an option. Yet if a court were to follow the consensus exception, it would duplicate the results obtained by a foreign court which looks to international law. The reasons for not following this route in the first instance are thus highly suspect.

124. *See* Cecil J. Olmstead, *Jurisdiction (The Third Restatement of Foreign Relations Law of the United States)*, 14 YALE J. INT'L L. 468, 482 (1989).

approves of litigation which seeks to enforce widely accepted international rules. A majority on the Supreme Court, however, was unwilling to accept *explicit* executive statements on *individual cases*.[125] It is therefore unlikely that the Court would accept speculative presumptions concerning executive policy for an *entire class* of cases.

b. The Private Act Exception

The private act exception has been formulated in two different ways. The first, exemplified by the *Dunhill* plurality opinion, deems certain acts (such as commercial transactions) private by their very nature. The second, represented by *Sharon* and the Eleventh Amendment to the United States Constitution, involves acts which are generally viewed as sovereign but which, in particular instances, transgress national policies or written laws.[126] Judge Kaufman used this second approach *Filartiga*, stating that acts "unratified" by a foreign government are not "official" for act of state purposes.

The problem with the *Dunhill* approach in our case is that the acts of private persons[127] are not subject to international law.[128] In the Henkin approach, applying the private act exception returns the court to application of the law embodied in the public policy of the forum, which in our case is international law. Yet the court cannot simultaneously consider our defendant a private actor and subject him to liability under international law.

In *Filartiga*-type human rights cases, the *Sharon*/Eleventh Amendment model of temporary private status seems more promising. According to this view, a state official who engages in unauthorized or illegal conduct would be subject to the court's jurisdiction because he could not have engaged in the forbidden conduct but for the power conferred on him by state authority.[129] For jurisdictional purposes,

125. In *Citibank*, only Justices Rehnquist, Burger, and White voted to adopt the *Bernstein* exception. 406 U.S. at 765.

126. *See supra* text accompanying notes 67–73.

127. Private persons are those that do not act on behalf of an entity with international legal personality.

128. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 60–69 (4th ed. 1990) (listing entities with international personality); *see also*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702, reporter's note 1 ("customary international law prohibits the particular human rights violations indicated [in the main text] *if the violations are state policy*" [emphasis added]).

129. In *Home Tel. & Tel.*, the Supreme Court made the same point in discussing liability of a state official under the Fourteenth Amendment:

> Under these circumstances it may not be doubted that where a state officer under an assertion of power from the State is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the

therefore, he would retain his official status. For purposes of determining liability he would be stripped of his official mantle and deprived of resort to an act of state defense.[130]

Unfortunately, even this refined view proves incompatible with the *lex loci* approach. The court has already been precluded at the outset of its analysis from inquiring into the legality of the defendant's conduct under his state's domestic law. If this were not the case and courts were permitted to apply foreign domestic law as a true rule of decision, (*i.e.*, with the outcome not predetermined), then they would do so when that law was first chosen by the *lex loci* rule. There would simply be no need to resort to an exception to the act of state doctrine to achieve the same result.

Accordingly, if the act of state doctrine is even to be reached in the Henkin analysis, the court must accept the validity of the defendant's acts under foreign law regardless of the law's actual content. This being the case, a court cannot proceed to declare an official's actions illegal under foreign law and thus "private" for purposes of creating an exception to the act of state doctrine. The essence of the private act exception is that domestic illegality equals liability. A perceptive court will conclude that if this is indeed the operative principle underlying the private act exception, then the exception simply duplicates *lex loci*.[131] If it does not, then the private act exception must fail.

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same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong.

Home Tel. & Tel., 227 U.S. at 288.

130. Of course, this is still fiction, but if the Supreme Court's construction of the Eleventh Amendment is to be the model, then it must simply be accepted that the Court "has often closed its eyes, quite deliberately, to the reality of whether a decree against an officer would operate against the government . . . ." CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 157 (1972).

131. There is also the practical problem of determining whether the conduct is in fact illegal. In essence, courts would be in the position of conducting a mini-trial of the foreign official under his nation's penal statutes. *See Filartiga*, 577 F.Supp. at 864 (remand opinion) (discussing illegality of torture under Paraguayan law). The defendant's claims in *Forti v. Suarez-Mason*, 672 F.Supp. 1531 (N.D.Cal. 1987) ("*Forti I*"), are illustrative. *Forti* was an alien tort action against a former Argentine general who allegedly oversaw and approved acts of torture against political dissidents. *Id.* at 1535–38. In support of an act of state defense, defendant Suarez-Mason asserted that the ruling military junta in Argentina had enacted a state of siege law at the time the acts took place which suspended all constitutional guarantees and directed the armed forces to "assume responsibility for preventing terrorist acts and suppressing terrorist groups." Defendant's Memorandum of Points and Authorities in Support of Motion to Dismiss at 3–4, *Forti I*, 672 F.Supp. 1531. The plaintiffs countered that Suarez-Mason's acts remained illegal even under the state of siege. Declaration of Alejandro M. Garro in Support of Opposition to Motion to Dismiss, *Forti I*, 672 F.Supp. 1531. The District Court ultimately sidestepped a choice between these competing views of Argentine law, 672 F.Supp. at 1546, but the difficulty inherent in the process is clear: in order to reject the act of state defense, how could the court avoid stepping into the shoes of an Argentine court interpreting its own laws and defining the limits of the Junta's authority?

B. Modern Conflicts Rules

Given the problems of reconciling act of state with a traditional conflicts analysis, it is possible that the *Kirkpatrick* court understood the doctrine as consistent with modern conflict theories. Act of state, however, seems incompatible with these theories as well. The confusion which results from attempting to fit act of state within modern conflicts theories stems from the theories' virtual elimination of the public policy escape hatch.[132] Two related trends are responsible for the demise of this intermediate step. First, modern conflicts rules no longer apply mechanistic tests such as the place of the wrong or the place of the contract to select a rule of decision.[133] As a result, forum courts never find themselves bound by foreign laws from which they need "escape." Second, contemporary theories incorporate the interests and policies of the forum into their initial conflicts analyses.[134] There is no need to add a second tier of analysis in which the court considers whether the law chosen by these factors would violate forum policy.[135]

Without the public policy escape hatch, modern theories cannot accommodate the act of state doctrine. Because the *Restatement* view has proven to be the most popular of the modern approaches,[136] I will use it as the model of modern conflicts theory. In tort actions, the *Restatement* provides that the local law of the state in which the injury occurred will govern, "unless, with respect to the particular issue, some other state has a more significant relationship" to the incident, as determined by a list of contacts and interests.[137] Included on that

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132. Under the traditional approach, the public policy escape hatch necessitates resort to act of state. Henkin, *supra* note 81, at 181 ("[i]nternational law could become relevant . . . in the courts of the United States . . . *only* if governing law made it relevant. For example, international law could come in through the 'side door' of public policy" [emphasis added]); Dellapenna, *supra* note 47, at 42 ("the doctrine simply precludes a court from applying certain ordinary escape devices like references to the forum's public policy"); *see also* Kirgis, *supra* note 89, at 173. Without it, under *lex loci*, the court would have chosen the law of the defendant's home state and rendered the doctrine superfluous.

133. Scoles & Hay, *supra* note 22, at 42 (discussing dissatisfaction with and abandonment of the fixed and thus mechanical rules of the *Restatement (First) of Conflict of Laws*). In addition to the "most significant relationship" analysis of the *Restatement (Second) of Conflict of Laws* § 145(1) (1969), other prevalent theories are also marked by a departure from rules based on categories of cases. Chief among these are Professor Leflar's choice-influencing considerations and Professor Currie's government interest analysis. Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).

134. *E.g.* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 6(2)(b) (1969); Leflar, *supra* note 133, at 282; Brainerd Currie, *Comments on* Babcock v. Jackson—*A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1233, 1237–38 (1963).

135. Sprague, *supra* note 87, at 1460 ("[t]he public policy exception is purely duplicative and therefore obsolete, because the 'public policies' employed defensively in earlier times are already an integral part of modern analysis . . . . ").

136. *See* Kay, *supra* note 94, at 556–57.

137. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 146 (1969).

list are "the relevant policies of the forum."[138] If the court were to find United States policy insufficient to justify displacement of the law of the foreign state, an act of state question would never arise since its goal, application of foreign law, would have been accomplished by the initial conflicts analysis.

If, on the other hand, the court concluded that United States policy on an issue of international law was sufficiently strong to displace local law, the issue then becomes how act of state contributes or adds to that result. The court could not compel dismissal for fear of embarrassing the Executive, since in the initial conflicts analysis, the court would have already concluded that the forum policy was less important than the need to enforce international norms. For the same reason, act of state could not compel dismissal for fear of embarrassing the defendant's government. Therefore, act of state, as a "super" forum policy which supersedes all other competing policies, becomes unnecessary since each of those policies are considered by the initial conflicts principles. Act of state as a separate doctrinal entity becomes necessary only if the conflicts analysis that precedes it inadequately assess the concerns of the forum.[139] The comprehensive *Restatement* test is wholly adequate in this regard.

In sum, under the *Restatement* approach, act of state must either remain an entity distinct from the normal conflicts process or the forum policy it represents must be folded into the normal conflicts analysis. In the first case, act of state wholly duplicates the consideration of forum policy in the initial conflicts analysis; in the second case, it retains no independent function. In both instances, act of state adds nothing of substance to a *Restatement* analysis.[140]

V. ACT OF STATE RECAST: THE INTEGRATED CHOICE OF LAW APPROACH

If the above analysis is correct, the two most promising aspects of the act of state doctrine, the consensus and private act exceptions, are

138. *Id.* § 6(2)(b).

139. Stated another way, there is no reason to view act of state as a reaction *to* forum policy rather than as an important expression *of* that policy.

140. Alternatively, one might argue that act of state functions as a "thumb on the scales" for the Restatement test and dictates the weight it should accord the interests of foreign governments and of the U.S. Executive in the course of interest balancing. According to this view, when a court "invokes" act of state, it performs a conflicts analysis which gives special weight to the factors embodied in the doctrine. Yet, it is unclear why courts should artificially emphasize or deemphasize certain policies of the Executive and Legislative Branches. Courts are well-equipped to discover the weight accorded these interests in the real world. For example, the United States submitted an *amicus* brief in *Filartiga* supporting jurisdiction under the alien tort statute. Such a statement of executive policy, or other evidence uncovered by a court in an independent investigation, should be preferred in a conflicts analysis over preconceived notions of interference with foreign policy-making.

incompatible with a traditional choice of law framework. The doctrine as a whole is incompatible with modern choice of law theories. In this section, I offer a proposal for saving the act of state doctrine by integrating the policies it embodies into a modern choice of law analysis.

I begin with the premise that the initial conflicts analysis in an act of state case would be a question of federal common law. As already discussed, the complex interplay between the initial analysis and act of state belies any attempt to designate the former as exclusively a matter of state law and the latter exclusively federal. More fundamentally, a federal court is probably not compelled by the *Erie* doctrine to follow state choice of law rules. Absent legislative intent to the contrary, the governing law in federal court is determined by the source of the right sued upon.[141] The plaintiff in our case claims a violation of rights under international rather than state law. The court's conflicts analysis, therefore, will involve an inquiry into international norms, which is a task for federal law, even in diversity cases.[142]

If the federal court in our case will perform a common law choice of law analysis as a matter of course, and if the act of state doctrine is also a product of federal common law, the court could vastly improve on the *Kirkpatrick* approach if it combined choice of law analysis and act of state into a single integrated conflicts test. Act of state would then cease to function as a separate doctrine. Its policies, along with those represented by the public policy escape hatch, the consensus exception, and the private act exception, would be incorporated into a modern conflicts analysis.

Lawmaking by federal courts is primarily an attempt to further federal government interests in areas where Congress has legislated to displace state law but has failed to provide explicit rules.[143] The first step in an integrated choice of law analysis, therefore, should determine whether Congress intended any particular rule of decision to apply.[144] Absent such intent, a federal court has substantial discretion to formulate "the best rule, based upon its own notions of policy and

141. Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540 n.1 (2d Cir. 1956); PAUL BATOR, DAVID J. MELTZER, PAUL J. MISHKIN, DAVID L. SHAPIRO, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 858 n.2 (3d ed. 1988).

142. Miree v. DeKalb County, 433 U.S. 25, 29 (1976) ("federal common law may govern even in diversity cases where a uniform national rule in necessary to further the interests of the Federal Government"); James A. Martin, *Constitutional Limitations on Choice of Law*, 61 CORNELL L. REV. 185, 199 (1976) (logical extension of *Sabbatino* "brings conflicts questions involving other countries under the umbrella of 'relations' and thus makes them a matter of federal law").

143. Mishkin, *supra* note 141, at 800.

144. Barkanic v. General Admin. of CAAC, 923 F.2d 957, 959 (2d Cir. 1991) (court's task in case under Foreign Sovereign Immunities Act is to "infer from the statutory language a choice of law analysis that best effectuates Congress' overall intent"); *Liu*, 892 F.2d at 1426 (choice of law under Foreign Sovereign Immunities Act matter of Congressional intent).

upon whatever policies it finds implicit in the constitutional and statutory provisions it does have an obligation to follow."[145] Having once identified a federal interest, courts have freely applied a variety of substantive standards, including international law,[146] state law[147] and amalgams of various rules which collectively further the federal interest at hand.[148] The act of state doctrine is itself a product of the courts' search for a rule of decision that best reflects federal policies on international law and the internal distribution of power between the Judicial and the Executive Branches.[149]

The Supreme Court faces no barriers to recasting the act of state doctrine as a component of a modern conflicts theory if such recasting would do greater justice to federal policies than the *lex loci* approach. Admittedly, integration of the various federal policies would require a sharp departure from the doctrine as described in *Sabbatino*, *Kirkpatrick*, and other cases of the modern era. At the same time, the

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145. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 893 (1986) [citations omitted].

146. *E.g.*, New Jersey v. Delaware, 291 U.S. 361, 378–85 (1933) (division of river boundaries between states).

147. F.D.I.C. v. Jenkins, 888 F.2d 1537, 1545–46 (11th Cir. 1989); Great Southwest Life Ins. Co. v. Frazier, 860 F.2d 896, 899–900 (9th Cir. 1988); Orloff v. Allman, 819 F.2d 904, 909 (9th Cir. 1987).

148. *See, e.g.*, Filartiga v. Pena-Irala, 577 F.Supp. at 860, 863–64 (E.D.N.Y. 1984) (remand opinion).

The articulation of a wholly new substantive rule involves a more complex process than simply devising rules to choose *between* existing bodies of law. As set forth in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), creating new substantive rules requires a finding that the grant of federal jurisdiction also contains a "mandate to fashion a federal common law consistent with" legislation in that area. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 413 (1964). In the alien tort context, a new rule would be required at the remedial stage of the litigation, if at all. At the liability stage, international law provides clear standards of conduct which bind states and, by necessary extension, their agents. Whether and how individual victims should be compensated for such violations are issues not contemplated by international law, which generally leaves issues of enforcement to individual states. William R. Casto, *The Federal Courts, Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 475–76 (1986) ("[i]n *Filartiga* the United States Departments of State and Justice pooled their resources and apparently were unable to find a single instance in the entire world in which a court had recognized the existence of a private tort remedy for torture based solely upon international law"); Sohn, *Human Rights: Their Implementation and Supervision by the United Nations*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW 369, 369–72 (Theodore Meron ed. 1984); *see e.g.* Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. Res. 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975), Art. 11 (where act of torture has been committed by or at instigation of public official, victim shall be afforded redress and compensation "in accordance with national law").

These are issues, however, beyond the scope of this article. The act of state doctrine intervenes at the liability stage and functions to end the litigation by choosing a rule of decision which deems the defendant *not* liable. If this result is avoided by use of an integrated modern conflicts analysis which chooses the international law of human rights, a court will still not have advanced beyond the liability stage. While courts clearly have the authority to create a substantive law of remedies as a matter of federal common law, this issue is not analyzed here.

149. *Sabbatino*, 376 U.S. at 421–27.

Court would be giving substantially greater weight to the policies underlying the act of state doctrine, thus lending needed legitimacy to the process of explicating federal common law. Given that the consensus and private act exceptions carry the potential of offending both the government of another nation and the U.S. Executive, clarity of reasoning in this area is no small asset.

The method of integrating an act of state and an initial conflicts analysis would not necessarily follow the Second Restatement's "most significant relationship" test, which has been adopted by a number of federal courts.[150] The integrated approach requires only that courts free their analysis from the First Restatement's rigid territorialism and consider on their own merits the various policies and interests which appear throughout the Henkin approach. These policies and interests would include non-interference with the Executive, avoiding offense to the defendant's home state, fidelity to rules of international law, and justice to the parties involved. Having chosen the rule of decision, the court would then proceed to an adjudication on the merits under that law.[151]

VI. USE OF THE INTEGRATED CONFLICTS APPROACH IN CASES UNDER THE ALIEN TORT STATUTE

In recent years, the most dramatic clashes between principles of international law and the act of state doctrine have occurred in human rights claims brought under the alien tort statute. Superficially, the conflict seems intractable:

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150. *See* Schoenberg v. Exportadora de Sal., S.A. de C.V., 930 F.2d 777, 782 (9th Cir. 1991), which states categorically that "[f]ederal common law follows the approach of the Restatement (Second) of Conflict of Laws." For more hesitant analyses, *see* Harris v. Polskie Linie Lotnicze, 820 F.2d 1000, 1003 (9th Cir. 1987); Commercial Ins. Co. v. Pacific-Peru Constr. Corp., 558 F.2d 948, 952 (9th Cir. 1977).

151. One possible objection to the integrated approach is that by eliminating the act of state doctrine, the approach makes it possible for courts to hold foreign officials liable under the own laws. While this objection is well-taken, it applies only where an U.S. citizen sues a foreign official for acts not subject to international law. The objection does not apply to suits between two aliens for violations of foreign domestic law since the federal courts would lack subject-matter jurisdiction under the alien tort statute (no international law issue), the diversity statute (inapplicable to claims between two aliens) and the federal question provision (no international law creating a federal common law issue). Nor would the objection apply to *Filartiga*-type alien tort claims. As the next section will demonstrate, the statute's drafters intended international law to apply in such cases. *See infra* text accompanying notes 173–222. As for the one case in which liability under foreign domestic law is possible, one can only respond that a court in such a case is unlikely to find the balance of policies weighing in favor of holding a foreign official liable under his own law. The integrated approach does not alter the substance of policies now given effect by the Henkin view. It merely frees those policies from their territorialist straight jacket. If the dominant policy of the forum now forbids holding foreign officials in violation of their own laws, therefore, that policy would dominate analysis under the integrated approach as well.

> [I]n order for plaintiffs to assert jurisdiction under the Alien Tort Claims Act, they must allege that the tortious acts were official acts committed under color of law . . . This theory of recovery requires precisely the type of inquiry in which the federal courts have refused to engage under the Act of State doctrine.[152]

Courts and commentators have attempted to resolve this clash primarily through use of the consensus and private act exceptions. In this section, I examine how an integrated conflicts analysis functions in alien tort cases. The integrated approach suggests a relatively straightforward solution to this dilemma which the intricacies of act of state jurisprudence have obscured.

A. Recent Decisions Under the Alien Tort Statute

The alien tort statute has become a new and exciting vehicle for enforcing international norms in United States courts. Although enacted in 1789 as part of the First Judiciary Act, the statute attracted few litigants prior to 1980.[153] In that year, the Second Circuit handed down *Filartiga v. Pena-Irala* and breathed new life into the statute.[154]

Filartiga arose out of the political activities of Dr. Joel Filartiga, a Paraguayan national and a long-time opponent of President Alfredo Stroessner. In 1976, apparently in retaliation for Dr. Filartiga's opposition activities, his son was kidnapped and tortured to death by defendant Pena-Irala, then Chief of Police in Asuncion, Paraguay. In 1978 Dr. Filartiga's daughter emigrated to the United States and learned that Pena-Irala was in New York. Given this opportunity to obtain personal jurisdiction over Pena-Irala, the daughter filed suit in

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152. Guinto v. Marcos, 654 F.Supp. 276, 280 (S.D. Cal. 1986).

153. Prior to 1980, plaintiffs invoked the alien tort statute in only twenty-one reported decisions. These cases are compiled in Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (Part I), 473 (Part II), 4 n.15. Of these, jurisdiction under the statute was sustained in only two cases. *Id.* at 5. Those cases were *Adra v. Clift*, 195 F.Supp. 857 (D. Md. 1961), involving a child custody dispute between two Lebanese nationals, and *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795), an action for restitution of property aboard a Spanish vessel seized as a prize of war. In addition, in a 1907 advisory opinion, the Attorney General of the United States suggested that the statute could serve as remedy for Mexican nationals aggrieved by the diversion of a river within the United States. 26 Op. Att'y Gen. 250 (1907).

In the mid-1970s, panels of the Second Circuit twice held that the statute did not provide jurisdiction over claims between an alien and an official of his own government. ITT v. Vencap, 519 F.2d 1001 (2d Cir. 1975); Dreyfus v. von Finck, 534 F.2d 24, 31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

154. 630 F.2d 876 (2d Cir. 1980). Comprehensive discussions of *Filartiga* may be found in Burley, *supra* note 65, Blum & Steinhardt, *supra* note 13, Randall, *supra* note 153; Steven M. Schneebaum, *The Enforceability of Customary Norms of International Law*, 8 BROOKLYN J. INT'L L. 289 (1982); Andrew M. Soble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CAL. L. REV. 127 (1986).

the United States District Court on behalf of herself and her father, alleging subject-matter jurisdiction under the alien tort statute. The district court dismissed the complaint on the grounds that the statute did not provide jurisdiction in cases involving a government's treatment of its own nationals.[155]

The Second Circuit Court of Appeals reversed. It held as a threshold matter that a violation of international law must "command the 'general assent of civilized nations' to become binding on them all."[156] "Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."[157] However, the court held "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."[158] Using language which has since become a jurisdictional litmus test for other courts, Judge Kaufman held that the prohibition against torture is "clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."[159] The view that a violation of international law cannot occur when "the aggrieved parties are nationals of the acting state" is thus "clearly out of tune with the current usage and practice of international law [which] . . . confer[] fundamental rights upon all people vis-a-vis their own governments."[160] The court mentioned choice of law only briefly in *dicta*, suggesting that Paraguayan law might be an appropriate rule of decision.[161]

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155. 630 F.2d at 880.

156. *Id.* at 881 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

157. *Id.* at 881.

158. *Id.*

159. *Id.* at 884.

160. *Id.* at 884, 885.

161. *Id.* at 889. Judge Kaufman described the choice of law process as "primarily concerned with fairness" *id.*, and speculated that on remand "the district court may well decide that fairness requires it to apply Paraguayan law to the instant case." *Id.* at 889 n.25. The court continued its focus on Paraguayan law in a brief discussion of the act of state doctrine. While the issue was not properly preserved on appeal, Judge Kaufman noted "in passing . . . that we doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state." *Id.* at 889. The opinion contains no discussion of how the Paraguayan government might have "ratified" Pena-Irala's acts. Such a definition would have been useful, for the facts suggest that Pena-Irala acted at least with implicit government approval. The opinion notes that when Dr. Filartiga commenced a criminal action in Paraguay against Pena-Irala, his Paraguayan lawyer "was arrested and brought to police headquarters where, shackled to a wall, Pena-Irala threatened him with death. The attorney, it is alleged, has since been disbarred without just cause." *Id.* at 878. This evidence would seem to suggest, at a minimum, that the Paraguayan government was aware of Pena-Irala's actions and made no effort to punish him. If this does not rise to the level of "ratification" then one might construe *Filartiga* as holding that nothing short of affirmative, public approval of Pena-Irala's acts would have been so defined.

On remand,[162] the district court employed a three-step choice of law analysis. It first looked to international law, concluding that remedies for its violation were left to the laws of individual nations.[163] It then turned to U.S. law and found that "[b]y enacting Section 1350 Congress entrusted that task [of enforcement of the law of nations] to the federal courts and gave them power to choose and develop federal remedies to effectuate the purposes of the international law incorporated into United States common law."[164] Yet, because United States common law also includes principles of conflicts of law, the court finally turned to the laws of Paraguay "to the extent they do not inhibit the appropriate enforcement of the applicable international law or conflict with the public policy of the United States."[165] Based on this combination of international, U.S. and Paraguayan standards, the court awarded the Filartigas $385,364 in compensatory damages and $10 million in punitive damages.[166]

Courts since *Filartiga* have generally affirmed the key elements of the Second Circuit's holding:[167] that defendants in Section 1350 actions must be officials of a sovereign national government;[168] that the alleged violation must be condemned by international community consensus;[169] and that the defendants must have violated those rights

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162. Following the court of appeals' decision, Pena-Irala took no further part in the case and a default was entered against him on the issue of liability. 577 F.Supp. at 861.

163. *Id.* at 863. The court gave no reason for first looking to international law.

164. *Id.* at 863.

165. *Id.* at 864.

166. *Id.* at 865, 867.

167. The Supreme Court had an opportunity to affirm or reject *Filartiga* in *Amerada Hess Shipping Co. v. Argentine Republic*, 488 U.S. 428 (1989), but chose not to do so.

168. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791–95 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (Edwards, J., concurring); *id.* at 805–06 (Bork, J., concurring) (international law does not regulate the conduct of nonstate actors). *But cf.* Carmichael v. United Technologies Corp., 835 F.2d 109, 113–14 (5th Cir. 1988) (assuming, without deciding, that Alien Tort Statute confers subject matter jurisdiction "over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation.")

169. United States v. Covos, 872 F.2d 805, 808 (8th Cir. 1989) (stringent requirement that a norm command general assent of nations); M.C. Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (alien tort statute "applies only to shockingly egregious violations of universally recognized principles of international law"); Jones v. Petty Ray Geophysical Geosource, Inc., 722 F.Supp. 343, 348 (S.D. Tex. 1989) (no international consensus on government's duty to warn individuals of imminent political violence); *Forti I*, 672 F.Supp. at 1539–40 (international tort "must be one which is definable, obligatory (rather than hortatory), and universally condemned"); Von Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246, 258 (D.D.C. 1985), *vacated and dismissed on other grounds*, 736 F.Supp. 1 (D.D.C. 1990) (doctrine of diplomatic immunity well established in international law). Forti v. Suarez-Mason, 694 F.Supp. 707 (N.D. Cal. 1988) ("*Forti II*") contains an especially thorough discussion of the consensus requirement. In *Forti I*, the court dismissed the plaintiffs' claims for "disappearance" and "cruel and inhuman treatment" on the grounds that insufficient evidence had been presented of an international consensus. The plaintiffs moved for reconsideration of this ruling, submitting "numerous legal authorities" in support of their claim. 694 F.Supp. at 708. In *Forti II*, the court permitted the plaintiffs to assert a claim for disappearance, but reaffirmed its ruling on "cruel and inhuman

in the course of their official duties.[170] As the court in *Forti v. Suarez-Mason* concluded: "There appears to be a growing consensus that § 1350 provides a cause of action for certain international common law torts."[171] None of the post-*Filartiga* cases, however, discusses choice of law under the statute,[172] although all discuss the act of state doctrine.

B. *Applying an Integrated Conflicts Analysis to Alien Tort Claims*

Assuming that a court had upheld jurisdiction for human rights claims under the alien tort statute, it would turn next to act of state issues. Under the integrated conflicts approach, the first issue for the court would be whether Congress intended that a particular rule of decision apply. No specific intention appears in the text of the statute, although one might argue conjecturally that Congress hardly would bother to make a breach of international law a jurisdictional prerequisite if it intended that some other law govern the merits of the claim. A systematic review of the statute's origins is necessary if the "will of Congress" is to trump the many interests at play in the integrated analysis.

1. The Statute in Historical Perspective

Because no legislative history of the First Judiciary Act survives, and scholarly commentary until recently has been scant,[173] the specific

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treatment" and held that the definitions of the right offered by the plaintiffs were too imprecise. *Id.* at 711–12.

170. *Forti I*, 672 F.Supp. at 1546 ("a police chief who tortures, or orders to be tortured, prisoners in his custody fulfills the requirement that his action be 'official' simply by virtue of his position and the circumstances of the act").

171. *Id.* at 1539. The only exception to this trend is Judge Bork's concurring opinion in *Tel-Oren*, which argues that neither the alien tort statute nor international law provides individuals with a cause of action. This opinion has been widely criticized by commentators and has not, as of this writing, found support in any subsequent cases. Anthony D'Amato, *What Does* Tel-Oren *Tell Lawyers?*, 79 AM. J. INT'L L. 92 (1985); Harvey, *supra* note 65; *Enforcing Customary International Law*, *supra* note 154; Small, *supra* note 58; Virgina A. Melvin, Tel-Oren v. Libyan Arab Republic*: Redefining the Alien Tort Claims Act*, 70 MINN. L. REV. 211 (1985); Wishnik, *supra* note 65.

Handel v. Artukovic, 601 F.Supp. 1421 (C.D. Cal. 1985), a case not premised on the alien tort statute, agrees with Judge Bork that customary international law does not grant rights of action to individuals. *See also* Linder v. Calero, 747 F.Supp. 1452 (S.D.Fla. 1990).

172. For scholarly comment on the choice of law issue, *see* Casto, *supra* note 148, at 473–88 (1986); Blum & Steinhardt, *supra* note 13, at 97–102 (1981); Gordon A. Christiansen, *The Use of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39, 46–49 (1981). International choice of law issues in settings other than § 1350 are discussed in Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165 (1988); Clyde H. Crockett, *Choice of Law Aspects of the Foreign Sovereign Immunities Act of 1976*, 14 LAW & POL'Y INT'L BUS. 1041 (1983).

173. Professor Goebel has attempted to reconstruct the Act's genesis by examining successive drafts and certain letters written by its authors, principally those written by Oliver Ellsworth.

origins of the alien tort statute are unclear. Judge Henry Friendly, in an oft-quoted phrase, described the statute as "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know from whence it came."[174] This sparse historical record might be explained by the enactment since 1789 of numerous federal laws which duplicate aspects of the alien tort statute. For example, the statute is no longer the sole method by which aliens may assert claims for violations of international law,[175] nor is it the only legislation whose scope is defined by reference to international law.[176] For whatever reason, there has been a dearth of claims under

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JULIUS GOEBEL, I HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS THROUGH 1801 457–508 (1971). The draft provision which later became the alien tort statute was originally produced by Ellsworth's committee, and apparently remained unaltered throughout floor debate in the Congress. *Id.* at 494–508. The provision receives less than a sentence's mention in Professor Goebel's lengthy treatment, *id.* at 473, and is not mentioned at all in Professor Warren's classic account of the Act. Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). Other works generally regarded as authoritative are similarly silent. *See, e.g.*, ERWIN SURRENCY, History of the Federal Courts (1987); Paul Bator, *Judiciary Act of 1789*, in 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1075 (1986); FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927).

174. *Vencap*, 519 F.2d at 1015.

175. General federal question jurisdiction under 28 U.S.C. § 1331 includes actions based on federal common law, Illinois v. Milwaukee, 406 U.S. 91, 100 (1972); Romero v. International Terminal Operating Co., 358 U.S. 354, 393 (1959), into which customary international law is incorporated. The Rapid, 12 U.S. (8 Cranch) 155, 162 (1814); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 228 (1796); Talbot v. Johnson, 3 U.S. (3 Dall.) 133, 161 (1795) (opinion of Iredell, J.); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1795) (opinion of Jay, C.J.); LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223 (1972) ("[i]ssues of international law that arise in the state courts, then, are federal questions and can be appealed to the Supreme Court; and the Supreme Court can determine and establish a single, uniform rule of customary international law for state as well as federal courts"); Michael Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional*, 80 NW. U. L. REV. 321, 343–48 (1985) (discussing textual and historical bases for considering international customary law as federal common law).

While the view of international customary norms as "arising under" federal law for jurisdictional purposes is not without its critics, *see* Arthur Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1234–51 (1988); *Handel*, 601 F.Supp. at 1426–28, it does have the support of the American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111, reporters' note 4; the leading treatise on federal jurisdiction, 13B CHARLES WRIGHT, ARTHUR MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE § 3563 at 63 (2d ed. 1984); the United States Departments of Justice and State as *amici curiae* in *Filartiga*, Brief for United States as *Amicus Curiae* at 21 n.49, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980), *reprinted in* 19 I.L.M. 585, 606 n.49 (1980); and at least one federal district court, *Forti I*, 616 F.Supp. at 1544.

176. 10 U.S.C. § 821 (statutory grant of jurisdiction to courts martial does not deprive such courts of concurrent jurisdiction permitted by the law of war), *see also* Ex Parte Quirin, 317 U.S. 1, 27–28 (1942); Madsden v. Kinsella, 343 U.S. 341, 350–51 (1952); 15 U.S.C. §§ 606(b) (repealed 1947) and 713(b) (repealed 1945) (authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State"); 18 U.S.C. § 112 (amended 1972) (criminalizing assaults on foreign officials in violation of the law of nations); 18 U.S.C. § 1651 (criminalizing piracy "as defined by the law of nations"), *see also* United States v. Smith, 18 U.S. (5 Wheat.) 153, 157–63

the statute and a corresponding lack of judicial opinion on its scope and content.

Recently, however, scholars have traced the statute's origins to its drafters' desire that the new nation demonstrate its commitment to abide by the law of nations.[177] For the members of the First Congress and their contemporaries, obedience to the law of nations was an imperative of sovereignty, an affirmation that the United States had taken a secure place in the community of nations.[178] As early as 1779 the Continental Congress had resolved that "the law of nations must be strictly observed."[179] The First Congress also understood, as Professor D'Amato has observed, that transgressions of international law which today might elicit no more than a diplomatic protest in those

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(1820); 18 U.S.C. § 3058 (concerning enemy soldiers interned within the United States "in accordance with the law of nations"); 22 U.S.C. § 1623(a)(2) (Foreign Claims Settlement Commission to evaluate claims according to "the applicable principles of international law, justice and equity"); 22 U.S.C. § 1644b (claims of U.S. nationals against East Germany to be determined by applicable substantive law, "including international law"); 22 U.S.C. § 1645b (same provision, concerning claims against Vietnam); 28 U.S.C. § 2241(c)(4) (concerning issuance of writ of habeas corpus where alien prisoner claims some right, privilege, or immunity under the order of a foreign state, "the validity and effect of which depend upon the law of nations"); 28 U.S.C. § 1251(a)(2) (Supreme Court has original jurisdiction over actions against ambassadors and their servants which are "not inconsistent with the law of nations"); 50 U.S.C. § 1513(2) (restricting funds for testing of biological or chemical weapons if doing so would "violate international law"); Act of Apr. 19, 1860, ch. 34, § 1, 12 Stat. 838, 838–39 (referring to law of nations as rule of decision in deciding land title claim), *see also* United States v. Repentigny, 72 U.S. (5 Wall.) 211, 257–58 (1867); Act of June 15, 1917, Chap. 30, § 5, 40 Stat. 217, 221 (authorizing withholding of permission for certain ships to leave U.S. ports where granting permission would compromise U.S. neutrality under law of nations). *See generally* QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 179–87 (1922).

177. Most comprehensive are Burley, *supra* note 65, and Casto, *supra* note 148. Other sources with useful historical discussions are Randall, *supra* note 153; Louis Henkin, *International Law as Law of the United States*, 82 MICH. L. REV. 1555 (1984); and Edwin Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952).

178. THE DECLARATION OF INDEPENDENCE para. 23 (U.S. 1776) (new United States has power to do all "Acts and Things which Independent States may of right do"); THE FEDERALIST No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) ("[i]t is of high importance to the peace of America that she observe the laws of nations . . ."); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 ("the United States . . . by taking a place among the nations of the earth [became] amenable to the laws of nations"); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796); 1 Op. Att'y Gen. 26, 27 (1792); JAMES WILSON, *Of The Law of Nations (1790 - 1791)*, *in* THE WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804), *reprinted in* I THE WORKS OF JAMES WILSON 153 (Robert G. McCloskey ed., 1967) ("[i]t is of the highest, and, in free states, it is of the most general importance, that the sacred obligation of the law of nations should be accurately known and deeply felt."). Vattel, who greatly influenced the thinking of early American policymakers, *see* DANIEL G. LANG, FOREIGN POLICY IN THE EARLY REPUBLIC 13–33 (1985); Charles G. Fenwick, *The Authority of Vattel*, 7 AM. POL. SCI. REV. 395 (1913), held that "nations inherited from nature 'the same obligations and rights'" and that a "small republic" was "no less a sovereign state than the most powerful kingdom," *quoted in* JOHN B. MOORE, AMERICAN DIPLOMACY 131–32 (1905).

179. 14 J. CONT. CONG. 635 (Worthington C. Ford ed., 1909) (1779), *quoted in* Henkin, *supra* note 177, at 1557 n.8.

days frequently led to declarations of war.[180] Thus, U.S. adherence to the law of nations was both a sword and a shield: it affirmed the country's sovereign character while it minimized provocations that might lead to war.

From these general concerns, recent scholarship has developed three theories which purport to explain the origins of the alien tort statute. The data unearthed by Professors Casto and Burley is particularly substantial, and it is not my intention to add to that research here. Instead, a summary of each theory will demonstrate that regardless of their differences, each assumes that the Framers intended for international law to serve as the rule of decision in actions under the statute.

a. The "Denial of Justice" Theory[181]

i. The Historical Claim

The first approach may be referred to as the "denial of justice" theory. It holds that the Framers of the First Judiciary Act, wary of state courts' notorious bias against claims by aliens, sought to make a "neutral" federal forum available to litigants.[182] Alexander Hamilton warned in *The Federalist* No. 80 that state denial of justice to an alien was "classed among the just causes of war."[183] While the alienage and diversity provisions of the Judiciary Act also permitted alien plaintiffs

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180. Anthony D'Amato, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 64 (1988). The explanation for the sensitivity of nations to the illegal behavior of others may lie in the highly pragmatic nature of international law in the 18th century. To a much greater degree than today, rules of international law were an accurate reflection of international reality. Stephen Peter Rosen, *Alexander Hamilton and the Domestic Uses of International Law*, 5 DIPL. HIST. 183, 195–96 (1981). For example, American neutrality between France and Britain in the 1790s was not only a recognition that siding with one would certainly mean war with the other, but was also an attempt on the part of Alexander Hamilton, among others, to fulfill an obligation of neutrality imposed by the law of nations. Lang, *supra* note 178, at 86–90, 100–01. President Washington went so far as to suspend a cabinet meeting in April 1793 so that members might consult Vattel and other legal authorities in order to marshall their arguments for and against neutrality. *Id.* at 88.

181. These titles were coined by Professor Burley, *supra* note 65.

182. Burley, *supra* note 65, at 465–69; D'Amato, *supra* note 180; Casto, *supra* note 148, at 489–98; Randall, *supra* note 153 at 19–22; Scott A. Rosenberg, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 1018 (1982) [hereinafter *Protective Jurisdiction*].

183. THE FEDERALIST No. 80, at 476 (Alexander Hamilton)(Clinton Rossiter ed., 1961). Vattel also held this view, and was perhaps the source for Hamilton's statement. EMER DE VATTEL, II THE LAW OF NATIONS, ch. XVIII, § 350, at 230–31 (Carnegie ed. & Fenwick trans., 1916) (orig. pub. 1758), *quoted in* D'Amato, *supra* note 180, at 64.

to bring suit in federal court[184]—and, at least in theory, allowed them to assert violations of the law of nations—the $500 amount-in-controversy requirement all but precluded most tort actions.[185] Furthermore, the First Congress likely understood, as the Supreme Court held in 1809,[186] that the diversity clause did not permit suits between *two aliens*, but permitted only suits between an alien and a citizen.[187] According to the "denial of justice" theory, the alien tort statute filled this gap and brought to fruition Hamilton's belief that "the federal judiciary ought to have cognizance of *all* causes in which the citizens of other countries were concerned."[188]

ii. Implications for Choice of Law

The First Congress could hardly be certain that aliens would obtain justice if federal courts hearing their claims applied the substantive law of the various states in which they sat. Mere access to a federal forum, without the assurance of a uniform rule of decision, would mean that the federal system had assumed only partial control over this sensitive class of cases.[189] Given a sovereign's right under the law of nations to redress denials of justice, the First Congress surely intended to demonstrate that justice in fact had been rendered under that very same law.

One counterargument would suggest that if the Framers were concerned solely with just *results*—that is, with ensuring injured aliens prompt and adequate compensation—then actions based on state tort law would serve just as well as those based on the law of nations. Whether aliens suffered injury to person, property, or reputation, they

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184. The circuit courts were given jurisdiction

> concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

1 Stat. ch. 20. § 11, 73 (1789).

185. Casto, *supra* note 148, at 497 (tort judgments in the late 18th century rarely exceeded $500; while Oliver Ellsworth, principal drafter of the First Judiciary Act, was on the Connecticut bench, the largest tort award was $333).

186. *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).

187. Burley, *supra* note 65, at 474.

188. THE FEDERALIST No. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

189. *Protective Jurisdiction, supra* note 182, at 1019 ("the Continental Congress feared that remedies under state law were inadequate to redress violations of international law"), *cf.* WILLIAM W. CROSSKEY, I POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 646 (1953) (constitutional distribution of jurisdiction premised on view that "uniformity in American judicial decisions under the law of nations where foreigners were concerned, and, hence, control over the subject by the Supreme Court, were essential to the conduct of American foreign relations").

surely would receive adequate relief in actions at common law. The force of this argument is in part a reflection of the "denial of justice" theory's deficiencies. As the "duty" theory[190] demonstrates, the Framers were not only concerned with awarding adequate compensation, but were also eager to demonstrate the vitality of the law of nations under the new constitution and organic judicial statutes.[191]

The First Congress clearly understood how to grant aliens a federal forum in which to try common law damage claims. Section 9 of the Judiciary Act, for example, gave the district courts jurisdiction over all suits against consuls or vice-consuls, and Section 13 granted the Supreme Court jurisdiction over suits by and against ambassadors and other public ministers. That Congress did not grant blanket jurisdiction to alien plaintiffs (or even to aliens asserting tort claims), but instead restricted Section 9(b) to cases involving violations of the law of nations or treaties of the United States, suggests concern not only for compensation *per se* but also for compensation *according to the substantive law mentioned in the statute.* In John Jay's words, it was "of high importance to the peace of America that she *observe* the law of nations."[192]

Under the "denial of justice" theory, therefore, the statute is seen as having both procedural and substantive components, the former providing a neutral forum for alien plaintiffs and the latter ensuring that "[t]he 'law of nations' would serve as an impartial standard, acceptable to all nations."[193] Mere compensation under state law would not have fulfilled this second concern.

b. The "Ambassador Protection" Theory

i. The Historical Claim

The second theory posits that the statute was designed to protect the rights and physical integrity of foreign ambassadors.[194] It traces the Framers' concerns both to Blackstone's listing of infringement of ambassadorial rights as one of the three "principal offenses against the law of nations,"[195] and to the 1784 assault upon the French Consul General, M. Marbois, by an itinerant French nobleman.[196] Although

190. *See infra* text accompanying notes 211–223.
191. *See infra* text accompanying notes 211–221.
192. THE FEDERALIST No.3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (emphasis added).
193. D'Amato, *supra* note 180, at 66.
194. Burley, *supra* note 65, at 469–74.
195. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 881 (1769). The other two offenses were violations of safe conducts and piracy. *Id.*
196. Casto, *supra* note 148, at 491–94; Randall, *supra* note 153, at 24–28.

M. Marbois's assailant was prosecuted in the courts of Pennsylvania,[197] the incident provoked an outcry[198] and prompted the Continental Congress to pass resolutions praising the prosecution and apologizing to the French ambassador.[199] As a result, when the Constitutional Convention convened in 1787, "the issue of compliance with the law of nations was fresh on the minds of the delegates."[200] James Madison warned the Convention that few state or national means existed to prevent violations of the law of nations.[201] Edmond Randolph concurred: "If the rights of an ambassador be invaded by any citizen, it is only in a few States that any laws exist to punish the offender."[202] The Convention addressed these concerns in a number of ways—for example, by granting to Congress the authority to define and punish offenses against the law of nations,[203] and by vesting the Supreme Court with original jurisdiction over all cases involving ambassadors and other public ministers.[204] The "ambassador protection" theory views the alien tort statute as a further response to the Marbois affair and other similar incidents, since it provides civil remedies to ambassadors for injuries they may suffer as a result of conduct deemed criminal by the law of nations.

ii. The Implications for Choice of Law

The "ambassador protection" theory treats the statute as embodying a guarantee that the full panoply of ambassadorial rights will be respected and that damages will be awarded for their breach. While such guarantees conceivably could have been assembled piecemeal though various common law tort actions (assault, battery, trespass, defamation, etc.), eighteenth-century lawyers understood the international rights and privileges of ambassadors to be more than the sum of the protections offered by municipal law. Vattel observed that while states were obligated to protect all aliens from harm, "this attention is in a higher degree due to a foreign minister."[205] Those who insulted or injured foreign ministers could not be pardoned by the receiving sovereign, as such acts constituted "a crime of State, an offense against

197. Respublica v. De Longchamps, 1 U.S. (1 Dall.) 111 (Pa. Sup. Ct. 1784).

198. Casto, *supra* note 148, at 492 n.143 (detailing correspondence among prominent Americans decrying the assault and the resulting diplomatic fallout).

199. 27 J. Cont. Cong. 478–79 (1784); 28 J. Cont. Cong. 314–15 (1785).

200. Casto, *supra* note 148, at 493.

201. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 316 (1911), *cited in* Casto, *supra* note 148, at 494.

202. *Id.*

203. U.S. CONST. art I, § 8, cl. 10.

204. *Id.* art. III, § 2, cl. 2.

205. EMER DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, bk. IV, ch. VII, § 82, at 681 (Carnegie ed. & Fenwick trans., 1916) (orig. pub. 1758).

the law of nations."[206] Acts which were perfectly legal when directed toward ordinary citizens, and which were not subject to sanctions under municipal law, became *illegal* when committed against ambassadors or members of their staffs. According to Balckstone, "all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distreined or seised, shall be utterly null and void," and those perpetrating such actions "shall be deemed violaters of the laws of nations, and disturbers of the public repose."[207] Such a heightened sensitivity was warranted, as Alexander Hamilton wrote in *The Federalist* No. 81, where he wrote that "[p]ublic ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are . . . directly connected with the public peace."[208]

Thus, an alien tort statute which functioned only to transfer common law damage actions from state to federal court hardly would have reassured the French that M. Marbois would be accorded the full protection of the law of nations while stationed in the United States. In a letter to Jefferson regarding the Pennsylvania state court prosecution, James Monroe lamented that "all they [the French] have a right to expect is that he [the assailant] be punished agreeably to the laws of Pennsylvania . . . ."[209] A parallel civil action, also based on Pennsylvania law, would have been equally unacceptable. Perhaps Monroe was surprised when the court convicted the assailant of having committed "an atrocious violation of the law of nations" as incorporated into the common law of Pennsylvania.[210] Nevertheless, this welcome result should not have changed Monroe's or the other Framers' views on the need for a federal action which applied the law of nations. Even if every state court were to follow Pennsylvania's example in similar cases, the alien tort statute would serve little useful purpose if it did not at least *match* the state courts by following the law of nations as the rule of decision. It would have been an odd arrangement indeed for state courts to be the ones enforcing the law of nations in cases brought by foreign ambassadors, leaving the federal courts to follow traditional common law rules in identical cases.

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206. *Id.*

207. BLACKSTONE, *supra* note 195, at 70–71.

208. THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter, ed., 1961).

209. Letter from James Monroe to James Madison (Nov. 15, 1784), *reprinted in* 8 THE PAPERS OF JAMES MADISON 141 (Robert A. Rutland & William M.E. Rachal ed. 1973), *quoted in* Casto, *supra* note 148, at 493 n.146.

210. Respublica v. de Longchamps, 1 U.S. (1 Dall.) at 117.

c. The "Duty to Apply International Law" Theory

i. The Historical Claim

The third approach, by far the most analytically sound, finds the statute to be "a direct response to what the Founders understood to be the nation's *duty* to propagate and enforce those international law rules that directly regulated individual conduct."[211] Among the many weaknesses of the Articles of Confederation was their inability to give effect to the law of nations on a federal level or to compel states to do so in their courts.[212] The Continental Congress expressed its frustration in a 1781 resolution, issued three years prior to the Marbois affair, which urged state legislatures to "provide expeditious, exemplary and adequate punishment" for a number of infractions "against the law of nations." The resolution also exhorted the states to "authorise suits to be instituted by the party injured."[213] Although the states failed to respond, the First Judiciary Act implemented the resolution's agenda in its entirety. The "duty" theory explains the alien tort statute as fulfilling the resolution's call for civil remedies.[214]

The genesis of the 1781 resolution, and its adoption eight years later, lay in the twin concepts of "duty" and "honor." International law itself imposed a duty on the United States to protect aliens within its borders.[215] The Framers probably perceived this obligation as having both a pragmatic component (foreign merchants, for example, would be assured that the law of nations would govern their trade in the new republic)[216] and a moral one. The latter was derived from Vattel's conception of international law as a variation upon the moral law of nature applicable to individuals.[217] Jefferson echoed this theme when he wrote that the moral duties of individuals in the state of nature "accompany them into a state of society and the aggregate of the duties of all the individuals composing the society constitutes the duty of that society toward any other."[218] For the Framers, therefore,

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211. Burley, *supra* note 65, at 475. *See also* ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 124 (rev. ed. 1954) ("the new commonwealth, inspired, under the guidance of Benjamin Franklin, by ideas of cosmopolitan liberalism, exhibited from the beginning a particular propensity for international law.")

212. Casto, *supra* note 148, at 490.

213. 21 J. CONT. CONG. 1136–37 (1781), *quoted in* Burley, *supra* note 65, at 476.

214. *Id.* at 477.

215. VATTEL, *supra* note 205, bk. II, ch. VI, § 72, at 136.

216. Burley, *supra* note 65, at 481.

217. Vattel did not view international law which derived from positive agreements between nations as part of the moral law of nature. *See* LANG, *supra* note 178, at 23–25.

218. Thomas Jefferson, *Opinion on the French Treaties*, 6 THE WRITINGS OF THOMAS JEFFERSON 219–20 (P. Ford ed. 1895), *quoted in* Burley, *supra* note 65, at 484.

the law of nations represented a combination of self-interest and moral imperative, which created an acute sense of national obligation to act in conformity with international norms.

Yet, for the Framers, adherence to the law of nations was not only an obligation; it was also an indelible badge of statehood.[219] Many statesmen of the period wrote of the U.S. commitment to the rule of law between nations in the same ringing tones in which they proclaimed their commitment to domestic constitutionalism.[220] Chief Justice John Jay summarized this sense of honor in a 1783 grand jury charge:

> As to the law of nations—they are those laws by which nations are bound to regulate their conduct towards each other, both in war and peace. Providence has been pleased to place the United States among the nations of the earth, and therefore, all those duties, as well as rights, which sprang from the relation of nation to nation, have devolved upon us.[221]

ii. Implications for Choice of Law

While the link between these sentiments and the meaning of the alien tort statute can only be inferential, it is by no means tenuous. James Wilson stated in one of his Lectures on Law that "[t]o every citizen of the United States, this law [of nations] is not only a rule of conduct but may be a rule of decision."[222] The "duty" theory would explain very little about the statute if actions thereunder were not a concrete manifestation of the desire to implement and act upon rules of international law. The Constitution already had permitted Congress

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219. In 1779 the Continental Congress passed a resolution asserting that "the power of executing the law of nations is essential to the sovereign supreme power of war and peace." 13 J. CONT. CONG 283 (1779).

220. *See* sources quoted in Burley, *supra* note 65, at 483. A representative statement is that of James Wilson, who later became a Supreme Court Justice, in his 1791 Lectures on Law. Speaking of whether American courts should follow the British example of applying the law of nations, Wilson wrote:

> If a similar conduct ought to be observed by those tribunals; what an immense improvement has taken place in the application and administration of the law of nations! Hitherto that great law has been applied and administered by the force or by the pleasure of the parties in controversy: in the United States it can now be applied and administered by impartial, independent, and efficient, though peaceful authority.
>
> This deduction, if properly founded, places the government of the United States in an aspect, new, indeed, but very conspicuous. It is vested with the exalted power of administering judicially the law of nations, which we have formerly seen to be the law of sovereigns.

WILSON, *supra* note 178, vol. I at 282.

221. Trial of Gideon Henfield (C.C.D. Pa. 1783), *reprinted in* FRANCIS WHARTON, STATE TRIALS 49, 52–53 (1849), *quoted in* Burley, *supra* note 65, at 483.

222. WILSON, *supra* note 178, vol. I, at 282.

to define and punish criminal acts in violation of the law of nations. In such prosecutions, the law of nations, as the substantive basis for the offense, clearly would serve as the rule of decision.[223] If the alien tort statute is seen as representing a commitment to that law above and beyond the imposition of criminal sanctions—which in itself is a substantial affirmation of national purpose—then the statute could not have been intended to accomplish *less* than do criminal prosecutions. The "duty" theory remains coherent only if the alien tort statute provides restitution to victims of international crimes based on the same rules of decision used to prosecute the criminals themselves.

2. Giving Effect to Congressional Intent

In sum, each of the three prevailing theories purporting to explain the origins of the alien tort statute requires that international law serve as the rule of decision. This does not mean that the nature of the plaintiff's remedy is also dictated by international norms; that determination will come later. We are concerned here only with the law imposing liability, since that is the law addressed by the act of state doctrine. A federal court conducting a common law choice of law analysis must give effect to this expression of congressional intent.

VII. CONCLUSION

In recent years, courts and commentators have referred repeatedly to the confused state of the law surrounding the alien tort statute and act of state doctrine.[224] The intersection of the two only magnifies the problem. *Kirkpatrick* instructs courts that the act of state doctrine is a special choice of law rule, but this makes sense only with reference to outmoded conflicts rules rejected long ago by most jurisdictions. Upon further investigation, courts find that even when they use a *lex loci* approach, they must assume that act of state embodies policies of the Executive Branch which directly contradict the forum (and thus also executive) policies used in the so-called "escape hatch." The contradictions proliferate upon resort to the two most common excep-

223. *E.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820) (upholding right of Congress to define piracy in accordance with the law of nations, and affirming defendant's conviction under that definition).

224. *E.g.*, *Tel-Oren*, 726 F.2d at 775 (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations.'"); Bazyler, *supra* note 76, at 329 ("the decisions of these courts [concerning act of state doctrine] have created considerable confusion about the doctrine, and the confusion seems to be getting worse with each successive court opinion"); Dellapenna, *supra* note 47, at 276 ("[w]ith near judicial anarchy at the top, lower court decisions can be cited in support of each [act of state] theory found in the increasingly confused Supreme Court decisions").

tions to the doctrine. If courts turn instead to a modern conflicts theory, they find that act of state either duplicates entirely the forum policy component of the initial analysis, or, if it is folded into the initial analysis, retains no independent existence or meaning.

Finally, and perhaps most importantly, courts will find no case law discussion of the role the alien tort statute should play in an act of state analysis. In order to sustain jurisdiction, a court must find a consensus in the international community, joined by the United States, that certain human rights norms are binding law. Current act of state theory finds no place for this profound expression of forum policy—save as an "exception" which wholly ignores the separation of powers concerns supposedly justifying its existence. Courts also offered no reason why this policy cannot take its logical place either as the "escape hatch" in a *lex loci* analysis or as an element of a modern conflicts theory.

The goal of this article is to bring a measure of coherence and clarity to this tangled web. By performing an integrated conflicts analysis, courts can consider all the policies and interests that appear at various stages in the current approach without undertaking the impossible task of untangling the mechanical structures in which those policies are now embedded. In alien tort actions, the integrated approach takes as its touchstone the historical fact that the Framers of the First Judiciary Act enacted the statute to demonstrate their commitment to the rule of law among nations. In doing so, they assumed that that same law would serve as the rule of decision in actions under the statute.

If this wholesale rejection of the act of state doctrine seems either too bold or simply unwarranted, it may be useful to recall that the doctrine's origins lie as much in substantive international law as in the demarcation of domestic spheres of power. *Underhill*, the first act of state decision, is permeated with the positivism which underlay international law in the late nineteenth century. Though international law was not itself at issue in the case,[225] the Supreme Court would have committed a grave breach of international comity if it had permitted plaintiff Underhill to recover. *Sabbatino* refocused the act of state doctrine on domestic issues, but retained *Underhill*'s link to international law by asserting the consensus exception. Justice Harlan held that *if* an international rule were settled and noncontroversial, then a claim under that rule would be "meet for adjudication by

225. The plaintiff's claim in *Underhill* involved routine intentional torts under state or federal common law and did not implicate a violation of international law. The *Underhill* court stated, however, that "the courts of one country *will not* sit in judgment" on the acts of other sovereigns, thereby implying that it would have dismissed the claim on act of state grounds if a clear violation of international law were at issue.

domestic tribunals."[226] The difference in the two rulings can be explained by changes in international law itself, which no longer shielded government officials from all liability in the courts of other nations. After *Sabbatino* the law continued to evolve, and it now recognizes specific limitations on states' conduct toward their own citizens.

An alien tort action, which takes as its premise a well-established international rule, is the perfect vehicle with which to recapture the act of state doctrine's original symbiosis with international law. Much of the confusion surrounding the doctrine arises from the courts' failure to recognize its link to the substance of international law, and to allow the doctrine to evolve in tandem with that law. The consensus exception does this to a degree, but its failure to explain its relation to prior tiers of analysis and its incompatibility with modern conflicts rules make it disturbingly result-oriented. An integrated conflicts analysis, by contrast, permits courts to focus directly on international law and its status in the United States through the use of a widely accepted conflicts theory. In this way it remains true to *Underhill's* general solicitude toward international law, but it is able to discard the *particular* brand of international law, i.e., nineteenth-century positivism, that shaped that decision's approach to choice of law. Just as *Filartiga* ushered human rights law onto the jurisdictional stage of alien tort cases, an integrated approach applies that law to the merits of the action.

226. 376 U.S. at 429 n.26.