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THE ALIEN TORT STATUTE:
INTERNATIONAL LAW AS THE
RULE OF DECISION

INTRODUCTION

The international community has become increasingly sensitive to human rights violations. Manifestations of this sensitivity dating from the establishment of the United Nations through President Carter's human rights campaign indicate a keen awareness of the threat posed to all civilized nations by the "flagrant disregard of basic human rights." In the United States, 28 U.S.C. § 1350, the Alien Tort Statute, provides a jurisdictional mechanism through which federal district courts may uphold international standards of conduct. This statute permits district courts to adjudicate controversies brought by an alien for a tort that is committed in violation of inter-


2. One of the stated purposes for the creation of the United Nations was "promoting and encouraging respect for human rights." U.N. Charter art. 1, para. 3.

3. President Carter stated that "[a]ll the signatories of the United Nations Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim that mistreatment of its citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world." Address by President Carter, United Nations (Mar. 17, 1977), reprinted in 76 Dep't State Bull. 329, 332 (1977).

4. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980). Although the criteria for determining international law has remained constant, see note 7 infra, the willingness of courts to find violations under these criteria has increased. This reflects a rise in the standard of conduct imposed by civilized nations. Kaufman, A Legal Remedy for International Torture?, N.Y. Times, Nov. 9, 1980, § 6 (Magazine), at 44.


874
national law, even when neither party is a United States citizen and the tort occurred in a foreign country. Although the statute has rarely been invoked, it has recently been given fresh impetus in *Filartiga v. Pena-Irala*, in which the Second Circuit held that tortious harm resulting from torture satisfied the jurisdictional requirements. The *Filartiga* court, however, did not reach the issue of what law would govern a suit properly taken by a court under section 1350. The issue is difficult to resolve partially because numerous conflict of laws theories have been advanced for determining the selection of an appropriate rule of decision. Furthermore, in section 1350 cases, the traditional selection of the


8. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (plaintiff and defendant were from Paraguay and the alleged tortious act occurred in Paraguay); *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975) (plaintiff was from Luxembourg, defendant from the Bahamas, and the alleged tortious act took place in Luxembourg).

9. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789), no one seems to know [from] whence it came.”). The paucity of suits may be due to the statutory requirement that an allegation of a violation of international law be made at the jurisdictional threshold. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887-88 (2d Cir. 1980) (“Courts . . . accordingly, engaged in a more searching preliminary review of the merits than is required . . . under the more flexible ‘arising under’ formulation” appearing in other jurisdictional statutes); see Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F.L. Rev. 105, 108 (1979) [hereinafter cited as *A Legal Lohengrin*].

10. 630 F.2d 876 (2d Cir. 1980).

11. *Id.* at 878. The court held “that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.” *Id.*

12. *Id.* at 889. The court noted that “[s]hould the district court decide . . . to apply Paraguayan law, our courts will not have occasion to consider what law would govern a suit under the Alien Tort Statute where the challenged conduct is actionable under the law of the forum and the law of nations, but not the law of the jurisdiction in which the tort occurred.” *Id.*

13. *See* pt. II *infra*. Furthermore, “[t]he law on ‘choice of law’ in the various states and in the federal courts is a veritable jungle, which, if the law can be found
domestic law of an interested jurisdiction\textsuperscript{14} may not reflect the international community's interest in deterring egregious conduct.\textsuperscript{15}

This Note contends that international law should usually be the rule of decision selected in section 1350 cases. Part I will examine the jurisdictional requirements of section 1350, which suggest that international law is a proper rule of decision in cases brought under the statute. Part II will discuss the theoretical justification for selecting international law as a rule of decision in section 1350 cases under conflict of laws doctrines.

I. THE JURISDICTIONAL REQUIREMENTS OF SECTION 1350

The Alien Tort Statute, originally enacted as part of the Judiciary Act of 1789,\textsuperscript{16} provides that "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."\textsuperscript{17} Only two courts have taken jurisdiction under section 1350\textsuperscript{18} both because it is difficult to obtain personal jurisdiction over alien defendants\textsuperscript{19} and because alleged tortious conduct rarely violates international law.\textsuperscript{20} Moreover, because the phrase "committed in violation" is

out, leads not to a 'rule of action' but a reign of chaos dominated in each case by the judge's 'informed guess' as to what some other state than the one in which he sits would hold its law to be." In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 739 (C.D. Cal. 1975).

\textsuperscript{14} Few conflicts of law theories provide a mechanism through which international law may be selected as the rule that will resolve the dispute. See notes 55-66 infra and accompanying text.

\textsuperscript{15} See notes 67-74 infra and accompanying text.

\textsuperscript{16} Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

\textsuperscript{17} 28 U.S.C. § 1350 (1976) (emphasis added).


\textsuperscript{19} To subject a defendant to full personal liability, he must be physically present in the jurisdiction, Pennoyer v. Neff, 95 U.S. 714, 722 (1877), or he must have sufficient "minimum contacts" with the jurisdiction. International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945). \textit{See generally} M. Green, Basic Civil Procedure, ch. 2, § 4, at 32 (2d ed. 1979).

\textsuperscript{20} \textit{See}, e.g., Benjamins v. British European Airways, 572 F.2d 913, 916 (2d Cir. 1978) (airplane crash, even if accompanied by "willful negligence," does not violate international law), \textit{cert. denied}, 439 U.S. 1114 (1979); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015-16 (2d Cir. 1975) (fraud is not a violation of international law); Abidun v. Martin Oil Serv., Inc., 475 F.2d 142, 145 (7th Cir.) (breach of contract through fraud and deceit is not a violation of international law), \textit{cert. denied}, 414 U.S. 866 (1973); Khedivial Line, S.A.E. v. Seafarer's Int'l Union, 278 F.2d 49, 52 (2d Cir. 1960) (picketing to prevent the loading of a vessel not a violation of international law); Cohen v. Hartman, 490 F. Supp. 517, 519 (S.D. Fla. 1980) (neither conversion nor
ambiguous, courts differ in their interpretations of the jurisdictional requirement. This phrase appears to allow either an action for a domestic tort that has been committed through a breach of international law or for an international tort—tortious conduct that is itself an international law violation.

The court in *Abdul-Rahman Omar Adra v. Clift* interpreted section 1350 as granting a right of action for domestic tort suits when the suit has some connection with an international law violation. In *Abdul*, a Lebanese citizen sued his ex-wife for wrongful interference with child custody. His ex-wife had deprived him of custody by misrepresenting her child's identity on her passport and traveling with the child from country to country to elude him. The court, holding that passport fraud was a violation of international law and wrongful interference with child custody was a tort, took jurisdiction. Various courts and commentators have viewed the action brought in *Abdul* as one for a wrong under domestic law that rose to the level of an international law violation because it was accomplished in a manner that affected relations among nations. Although the defendant in *Abdul* did, indeed, falsify her passport, the court's adjudication of breach of fiduciary duty constitutes a violation of international law; *Valanga v. Metropolitan Life Ins. Co.* 259 F. Supp. 324, 328 (E.D. Pa. 1966) (no international law violation was found for a refusal to pay life insurance proceeds); *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 297 (E.D. Pa. 1963) (neither unseaworthiness nor negligence constitutes a tortious international law violation).

21. A statute is ambiguous when "the words used may refer to several objects and the manner of their use does not disclose the particular objects to which the words refer." 2 A. C. Sands, Sutherland's Statutes and Statutory Construction § 45.02, at 5 (rev. 3d ed. 1973).


26. *Id.* at 865. The court noted that "[a]n alien, understandably though unjustifiably, may prefer to bring an action for a tort in a federal court rather than in a local court, and Congress has authorized him to do so in this limited class of cases." *Id.* at 862-63.

27. 195 F. Supp. at 864.


29. *Id.* at 865.

the alleged wrongful interference with child custody did not address a right arising under this violation of international law.31 Rather, the court sought to remedy a wrong arising under domestic law—deprivation of child custody.32 It took jurisdiction simply because the tort was committed through a fortuitous breach of international law.33

Most courts that have considered exercising jurisdiction under section 1350, however, appear to construe the statute as granting a right of action for international tort violations.34 In Filartiga v. Pena-Irala, for example, Paraguayan citizens brought an action against a Paraguayan state official for torturing a relative to death. Finding that torture committed under color of official authority was violative of international law, and that such torture caused tortious harm, the court permitted the action under section 1350.35

In seeking to remedy torture, the Filartiga court properly construed the jurisdictional requirements of section 1350. Unlike Abdul, in which the ancillary relationship between the tort and international

31. That the suit is essentially of a domestic character is seen not only in the absence of analysis regarding passport violation damages, but also in the court's recognition and examination of traditional domestic policies, such as the interests of the child involved. 195 F. Supp. at 866. Suits involving familial matters are considered local disputes to be adjudicated by state courts. Thus, these matters are viewed as so localized that even federal courts are excluded from the domestic relations area. Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858); H. Clark, Law of Domestic Relations in the United States § 11.2, at 256 (1968).

32. 195 F. Supp. at 863 ("Plaintiff does not seek money damages; he seeks a judgment or decree for the return of his daughter to his custody.").

33. 195 F. Supp. at 863-65; see 4 Fordham Int'l L.J. 213, 215 (1980) (noting that the suit in Abdul was for wrongful interference with child custody and that the international law violation was ancillary).


35. 630 F.2d 876 (2d Cir. 1980).

36. Id. at 878. It was alleged that Joelito Filartiga, the decedent, was tortured to death by an inspector general of the Paraguayan police. Id. "He had been whipped, slashed and tortured with electrical devices." Kaufman. supra note 4, at 44 (tracing the development of torture from the rack and thumbscrew, through the "Spanish boot," to modern inflictors of pain).

law enabled the court to remedy a domestic tort,\(^\text{40}\) the tortious harm alleged in *Filartiga* stemmed directly from the international law violation.\(^\text{41}\) Although there is no legislative history from which to infer the intent of its drafters,\(^\text{42}\) two factors support the conclusion that the Founding Fathers intended to provide the federal district courts with original jurisdiction only over such international torts. First, it is most likely that the constitutional basis\(^\text{43}\) upon which the Founding Fathers relied was international law. Because the statute permits suits between two alien parties,\(^\text{44}\) the suit cannot be premised on diversity jurisdiction,\(^\text{45}\) and, therefore, the subject matter must be

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a federal question to satisfy Article III of the Constitution.\textsuperscript{46} International law has traditionally been deemed a part of the "Laws of the United States,"\textsuperscript{46} and, therefore, satisfies the requirements of Article III. The only constitutional basis for the Abdul court's reading of section 1350, on the other hand, is that wrongful interference with child custody is a federal common law violation, rather than a violation of state law. It is unlikely, however, that the Founding Fathers intended the tort requirement to be construed in this manner because a federal common law of United States torts was almost nonexistent that early in the nation's history.\textsuperscript{48} Second, historical sources from the period in which section 1350 was enacted indicate that the Founding Fathers intended to provide a forum in which individuals could vindicate rights arising under international law.\textsuperscript{49} For example, James Madison stated in \textit{The Federalist} that

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J. Moore, \textit{Federal Practice} ¶ 0.84, at 735 (2d ed. 1980). Federal district court jurisdiction falls into three general categories: (1) federal question jurisdiction under 28 U.S.C. § 1331 (1976), which is premised on questions arising under the Constitution, laws or treaties of the United States, and which requires a jurisdictional claim in excess of $10,000 when the suit is not against the United States or an agency or official thereof; (2) diversity of citizenship jurisdiction under 28 U.S.C. § 1332 (1976), which also requires a jurisdictional amount in excess of $10,000; and (3) special statutes, such as 28 U.S.C. § 1350 (1976), through which Congress has conferred jurisdiction without regard to jurisdictional amount. C. Wright, A. Miller, & E. Cooper, \textit{Federal Practice and Procedure} §§ 3561, 3601, 3568-3585 (1975).
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U.S. Const. art. III, § 2, cl. 1. "It is an ancient and a salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case." Dickinson, \textit{The Law of Nations as Part of the National Law of the United States} (pt. 1), 101 U. Pa. L. Rev. 26, 26 (1952) [hereinafter cited as Dickinson I]. The Supreme Court has stated that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." The Paquete Habana, 175 U.S. 677, 700 (1900); accord, United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); see J. Brierly, \textit{The Law of Nations} 86 (6th ed. 1963); Gavers, \textit{Contemporary Conflicts Law in American Perspective}, 131 Académie de Droit Internationale 75 (1970). \textit{But see} The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925) ("International practice is law only in so far as we adopt it, and like all common or statute law it bends to the will of the Congress.").
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Dickinson, \textit{The Law of Nations as Part of the National Law of the United States} (pt. 2), 101 U. Pa. L. Rev. 792, 816 (1953) ("[i]t is to be remembered that the law of states was an immature law when the Constitution was adopted"); see Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 101 (1901). The theory of federal common law jurisdiction in the federal courts was not advanced until 1799, 10 years after the passage of § 1350. \textit{See} Teton, \textit{The Story of Swift v. Tyson}, 35 Ill. L. Rev. 519, 520 (1941).
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Documents from the Federal Convention of 1787, including several state plans, contain passages supporting a foreign individual's ability to utilize United
the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. 50

Similarly, John Jay noted the importance of ensuring that international norms of conduct were observed. 51 Available evidence, therefore, suggests that section 1350 should not be construed to permit aliens entry into United States courts to litigate matters of essentially local concern. Only allegations of international law violations sounding in tort may properly be heard under the statute.

II. THE CHOICE OF LAW

The foregoing analysis resolves only the issue of whether a domestic or an international tort must be alleged to satisfy the section 1350 jurisdictional requirements. When a court properly takes jurisdiction over an international tort action pursuant to section 1350, it must reach the entirely distinct issue of determining the appropriate rule of law to be applied to the merits. 52 This involves a conflict of laws analysis 53 because the facts generally involve more than one state or nation interested in the outcome of the litigation. 54

50. The Federalist 532-33 (P. Ford ed. 1898); see Filartiga v. Pena-Irala, 630 F.2d 876, 886 (2d Cir. 1980) ("one of the principal defects of the Confederation that our Constitution was intended to remedy was the central government's inability to 'cause infractions of treaties or of the law of nations, to be punished.' " (quoting 1 Farrand, Records of the Federal Convention 19 (rev. ed. 1937) (notes of James Madison)).

51. The Federalist 13 (P. Ford ed. 1898). John Jay stated that "[i]t is of high importance to the peace of America that she observe the laws of nations." Id.


53. Conflict of laws is generally concerned "with the identification and systematic handling of situations in which the persons concerned and the interests and policies at stake have significant connections with more than one community." von Mehren, Comment, Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology, 88 Harv. L. Rev. 347, 349 (1974); see R. Leflar, American Conflicts Law § 2, at 3 (3d ed. 1977). See generally
The numerous choice of law theories advanced have been founded on the premise that the law chosen should be one that an interested jurisdiction would apply in a fully domestic situation. Under traditional analyses, a United States district court, as the forum, would decide whether to apply its own law or the law of another interested jurisdiction. Employing the rule of *lex loci delicti* in a section 1350 case, for example, a court would choose the law of the jurisdiction in which the international tort occurred. This rule, based on the concept that rights are territorial in nature and vest in individuals at the time the wrong occurs, was once favored because it was simple to

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54. See notes 8, 44 supra.

55. von Mehren, supra note 53, at 347 ("The many and varied theories and practices regarding the selection of the governing law in situations significantly involving more than one legal order traditionally have agreed on at least one proposition: the law to be applied should be that which one or more of the concerned legal orders would apply in a fully domestic situation.").


59. A. Ehrenzweig, Private International Law 54-55 (3d ed. 1974). The basis of the rule was that the cause of action is created in the state in which the tort occurred. Thus, "a state 'can' exercise 'legislative jurisdiction' with respect to all persons
apply and yielded predictable results.\footnote{60} It became unpopular during this century largely because, in certain cases, it led to the selection of laws of a jurisdiction that had no real interest in the suit.\footnote{61} A variety of more flexible approaches have risen to take its place,\footnote{62} the two most widely accepted of which are the “interest analysis” and “significant contacts” theories. Under the “interest analysis” approach, a court would select the law of the state with the strongest interest in seeing its law applied.\footnote{63} Similarly, under the “significant contacts” approach, the strength of the connection between the cause of action and the concerned jurisdictions would be analyzed to determine and things subject to its jurisdiction i.e., persons present or domiciled, things located, and acts done or other events occurring, within the territory of the state. Any interests ‘created’ by virtue of the ‘power’ based on such ‘legislative jurisdictions’ are entitled to recognition everywhere.” \textit{Id.} at 55 (footnote omitted). This rule became known as the “vested rights” doctrine. Cheatham, \textit{Some Developments in Conflict of Laws}, 17 Vand. L. Rev. 193, 197-98 (1963); O’Toole, \textit{supra} note 57, at 617. It was codified in the Restatement of Conflict of Laws § 377 (1934), that was, in large part, drafted by Professor Beale. \textit{See} R. Leflar, \textit{supra} note 53, § 1, at 1.

60. Cheatham, \textit{supra} note 59, at 197-98.

61. The major virtues of the rule—certainty and ease of application—led to rigid, mechanical applications that were widely criticized. \textit{See, e.g.,} Cheatham, \textit{supra} note 59, at 197-98; O’Toole, \textit{supra} note 57, at 614-16; Traynor, \textit{Is This Conflict Really Necessary?}, 37 Tex. L. Rev. 657, 669-73 (1959). In \textit{Babcock v. Jackson}, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), the court stated that “the vested rights doctrine has long since been discredited because it fails to take account of underlying policy considerations in evaluating the significance to be ascribed to the circumstance that an act had a foreign situs in determining the rights and liabilities which arise out of that act.” \textit{Id.} at 478, 191 N.E.2d at 281, 240 N.Y.S.2d at 746 (footnote omitted); \textit{accord}, Turcotte v. Ford Motor Co., 494 F.2d 173, 177 (1st Cir. 1974) (abandoned \textit{lex loci delicti} in favor of interest-weighing approach); McClure v. United States Lines Co., 368 F.2d 197, 202 (4th Cir. 1966) (abandoned \textit{lex loci delicti} in favor of the significant relationships doctrine); Roman v. Delta Air Lines, Inc., 441 F. Supp. 1160, 1166-67 (N.D. Ill. 1977) (recent cases abandoned \textit{lex loci delicti} in favor of significant contacts). In the Restatement (Second) of Conflict of Laws (1971), the rule was replaced by the “significant contacts” approach. \textit{Id.} § 145.


63. This approach to solving conflict of laws problems was formulated in a series of works by Brainerd Currie. B. Currie, \textit{Selected Essays on the Conflict of Laws} (1963); Currie, \textit{Full Faith and Credit, Chiefly to Judgments: A Role for Congress}, 1964 Sup. Ct. Rev. 89; Currie, \textit{The Disinterested Third State}, 28 Law & Contemp. Prob. 754 (1963). The basic tenet of Currie’s approach is that resolution of choice of
which jurisdiction's law should apply. These approaches are generally more flexible than the *lex loci delicti* rule because they permit a court to apply the domestic law of an interested jurisdiction even when it is not the law of the jurisdiction in which the act took place. As under the *lex loci delicti* rule, however, the selection of laws deemed available will be limited to those of specific jurisdictions and, therefore, the law chosen will be wholly domestic.

Law problems should involve reviewing the policies underlying each of the different laws involved and, consequently, the interest of each state in having its law applied to the particular issue involved. Currie, *Comments on Babcock v. Jackson*, 63 Colum. L. Rev. 1233, 1234-35 (1963); Currie, supra note 56, at 178; see Lando, *supra* note 56, at 508-09; McDougal, *supra* note 56, at 441-43; Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. Rev. 181, 181-84 (1977). This doctrine is sometimes referred to as "governmental-interest" analysis. McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory*, 51 Tul. L. Rev. 207, 208 (1977); Sedler, *supra*. Although instrumental in displacing the rigid *lex loci* rule, the doctrine has been criticized as authorizing an "ad hoc" approach to solving conflicts problems. 9 Vand. J. Transnat'l L. 641, 649 (1976); see Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. Chi. L. Rev. 463, 484 (1960); Reese, *supra* note 62, at 316-19; Reese, *Chief Judge Fuld and Choice of Law*, 71 Colum. L. Rev. 548, 557-61 (1971); Rheinstein, *Book Review*, 11 Am. J. Comp. L. 632, 632-68 (1962). The landmark decision using this approach is Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). In *Babcock*, residents of New York drove to Ontario, Canada where they were involved in an accident in which one of the passengers was seriously injured. The injured passenger brought suit against the driver's executrix. *Id.* at 476-77, 191 N.E.2d at 280, 240 N.Y.S.2d at 745. The issue was whether the guest statute of Ontario or New York should apply. The court held that New York's law should apply because of its interest in the suit. *Id.* at 483, 191 N.E.2d at 284-85, 240 N.Y.S.2d at 751-52.

64. The "significant contacts" approach was adopted in the Restatement (Second) of Conflict of Laws (1971). Section 145 provides that "(1) [t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which . . . has the most significant relationship to the occurrence and the parties . . . (2) Contacts to be taken into account . . . to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." These contacts are to be evaluated according to the particular issue involved. *See In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732, 740 (C.D. Cal. 1975); Wilcox v. Wilcox, 26 Wis. 2d 617, 634, 133 N.W.2d 408, 416-17 (1965); *Currie, Comments on Babcock v. Jackson*, 63 Colum. L. Rev. 1233, 1243 (1963); 12 Suffolk U.L. Rev. 1012, 1015-16 (1978). *See generally J. Martin*, *supra* note 53, ch. 2. It has been suggested that the interest analysis approach and the significant contacts approach are barely distinguishable. *See 9 Vand. J. Transnat'l L. 641, 645 n.32 (1976); 23 Vand. L. Rev. 420, 422 (1970).

65. *See* notes 62-64 *supra* and accompanying text.

66. International law could theoretically be applied under these theories because it is a part of the legal system of all civilized nations. *See* note 47 *supra*. It is unlikely, however, that a state would apply international law as a rule of a decision in a wholly domestic case. Thus, international law is considered under these approaches.
The application of traditional conflict of laws theories to section 1350 international tort cases is undesirable because the interests of the international community will rarely be taken into consideration.\textsuperscript{67} Had the \textit{Abdul} court been correct in its construction of section 1350, allowing district courts jurisdiction over local torts,\textsuperscript{68} the application of traditional conflicts theories might sufficiently account for the interests of the jurisdictions involved. Section 1350, however, was enacted to protect the international community by upholding international values.\textsuperscript{69} The policy interest of the international community may, therefore, be inadequately reflected in the domestic laws of an interested jurisdiction. For example, if a French diplomat were taken hostage in Angola and later sued his captors under section 1350, alleging that such tortious conduct violated international law,\textsuperscript{70} the outcome of the suit would affect both domestic and international policy interests. The policies promoted by domestic laws permitting actions for false imprisonment and battery are, respectively, the protection of freedom from restraint of movement\textsuperscript{71} and freedom from intentional and unpermitted contact with one's person.\textsuperscript{72} In contrast, the interest of the international community is in safeguarding an international diplomatic system based upon trust and open communi-

\begin{footnotesize}
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\item See notes 55-66 supra and accompanying text.
\item See notes 25-33 supra and accompanying text.
\item See notes 49-51 supra and accompanying text.
\item Such a seizure would be in violation of international law. United States Diplomatic and Consular Staff in Tehran, United States v. Iran, I.C.J. (Order of Dec. 15, 1979) (the International Court of Justice unanimously ruled that the hostages taken by the Iranians in Tehran must be freed under principles of international law); Frend v. United States, 100 F.2d 691, 692-93 (D.C. Cir. 1938) (holding that the law of nations requires governments to take reasonable precautions to prevent intimidation, coercion, or harassment of diplomatic or consular representations of foreign governments), \textit{cert. denied}, 306 U.S. 640 (1939).
\item "To confine one intentionally, without lawful privilege and against his consent within a limited area for any appreciable time, however short, constitutes the tort of false imprisonment." 1 F. Harper & F. James, \textit{ supra} note 38, § 3.7, at 226 (footnote omitted); \textit{accord,} Restatement (Second) of Torts §§ 35, 36 (rev. ed. 1966); W. Prosser, \textit{ supra} note 38, § 11, at 42-43; see, e.g., Weisman v. LeLandais, 532 F.2d 305, 311 (2d Cir. 1976); Bryan v. Jones, 530 F.2d 1210, 1213 (5th Cir.), \textit{cert. denied}, 429 U.S. 865 (1976); Rawls v. Daughters of Charity of St. Vincent de Paul, Inc., 491 F.2d 141, 146-47 (5th Cir.), \textit{cert. denied}, 419 U.S. 1032 (1974); Blitz v. Boog, 328 F.2d 596, 598-99 (2d Cir.), \textit{cert. denied}, 379 U.S. 855 (1964).
\item Restatement (Second) of Torts § 13 (rev. ed. 1966); \textit{accord,} 1 F. Harper & F. James, \textit{ supra} note 38, § 3.3, at 215-20; W. Prosser, \textit{ supra} note 38, § 9, at 34-37.
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Because these policy interests differ, applying domestic law would not adequately promote the important policy interests reflected in section 1350 international tort suits.

Although international law, as a rule of decision, has had no clear role in the doctrine of conflict of laws, in section 1350 cases it provides a necessary alternative to traditionally selected domestic rules of decision. Professors von Mehren and Trautman, proffering a strong challenge to the proposition that domestic law must always be applied to resolve disputes in which more than one jurisdiction has an interest, provide a framework for the potential application of international law. The novelty of their approach is its abandonment of the doctrines through which the law of a specific jurisdiction is always selected. They suggest that when the policy interests of the multistate system are not adequately reflected by the laws of a single jurisdiction, it is necessary for a court to fashion a law. This "super-law," which need not be the domestic law of any concerned

73. Frend v. United States, 100 F.2d 691, 692-93 (D.C. Cir. 1938) (the inviolability of diplomatic representatives protects friendly international intercourse), cert. denied, 306 U.S. 640 (1939). The International Court of Justice has outlined relevant international policy interests in these situations declaring that "there is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies." United States Diplomatic and Consular Staff in Tehran, United States v. Iran, I.C.J., at 16 (Order of Dec. 15, 1979).

74. See A. von Mehren & D. Trautman, The Law of Multistate Problems 77 (1965) (when a true conflict exists, the policies underlying the laws of one interested jurisdiction must be promoted at the expense of those of another jurisdiction).


76. Professors von Mehren and Trautman believe that territorially based analyses of conflict of laws are based upon two faulty premises: first, that interests are expressed by physical location exclusively, and second, that the intensity of the physical connection indicates the degree of interest. A. von Mehren & D. Trautman, supra note 74, at 63.


78. This approach has roots in the writings of Professor Jitta, who stated that whenever "'a juridical relation may not belong to the active local life of a society but to the active, international . . . life', the law applied may be "'an independent provision which is derived from a consideration of the local public order and the universal public order.'" Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L.J. 655, 668 (1921) (translating D. Jitta, La Substance Des Obligations Dans Le Droit International Privé 23 (1906)).

79. Two examples of such situations are marriage validation statutes and the rule for proxy marriages. A. von Mehren & D. Trautman, supra note 74, at 229-30. This is because the application of domestic law could lead to the dissolution in state X of a marriage that was valid in state Y. Id.
jurisdiction,\textsuperscript{80} represents a "normal substantive . . . rule . . . , one widely shared in the legal world to which the concerned jurisdictions (including the forum) belong."\textsuperscript{81} In essence, the multistate community is treated as a separate and interested jurisdiction whose policies may differ from other jurisdictions interested in the resolution of the suit. Furthermore, although the von Mehren-Trautman theory weighs the interests of all concerned jurisdictions, its presumption is that the interest of the multistate system mandates the application of this superlaw as the rule of decision.\textsuperscript{82}

Although this consensus-oriented approach is directed primarily at interstate conflicts,\textsuperscript{83} it is well-suited to actions brought pursuant to section 1350 because the resolution of these actions affects the international order as well as individual interested nations. The problem in applying this theory, however, is that it is often difficult to fashion a "normal or usual rule" of international law.\textsuperscript{84} In multistate conflict cases, it may be possible to formulate a normal rule because states are united in their concern for promoting certain fundamental values, such as a republican form of government. In the international community, on the other hand, it is far more difficult to identify a common denominator of policy interests because different nations espouse radically different values.\textsuperscript{85} The difficulty lies in finding the consensus of opinion in the international community that defines international law.\textsuperscript{86} Although this problem may deter courts from adopting a

\begin{itemize}
\item \textsuperscript{80} Substantive rules for multistate problems are appropriate when the law of a single jurisdiction would be inadequate. Applying the rule, therefore, reflects the recognition that, on occasion, applying a law designed for fully domestic situations to a multistate situation creates serious problems. von Mehren, supra note 53, at 356-57. This approach requires the consideration in multistate situations of both domestic and multistate policy interests. A. von Mehren & D. Trautman, supra note 74, at 76. In recent years, this approach has become more prominent in Europe. von Mehren, supra note 53, at 348. Professor Cavers had rejected this approach because he believed that it left the court without guidelines and because it could lead to even greater confusion in the field of conflicts of law. Cavers, \textit{A Critique of the Choice-of-Law Problem}, 47 Harv. L. Rev. 173, 193 n.35 (1933).
\item \textsuperscript{81} Trautman, \textit{supra} note 77, at 105.
\item \textsuperscript{82} A court using this theory would consider "whether the policies of particular concerned jurisdictions with views departing from [the superlaw] are strong enough and relevant enough to justify application of their divergent views in the particular case." \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 106.
\item \textsuperscript{84} \textit{Id.} at 130.
\item \textsuperscript{85} \textit{Compare} U.S.S.R. Const. arts. 50-52 (severe limitations on freedoms of speech, press, and association) \textit{with} U.S. Const. amend. I (safeguards these freedoms without restriction).
\item \textsuperscript{86} Courts must engage in an arduous process for such a determination. Schmertz, \textit{supra} note 52, at 717-22; \textit{see} Filartiga v. Pena-Irala, 630 F.2d 876, 881-84 (2d Cir. 1980); ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). This protracted study is necessary because courts should apply international law only when
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consensus-oriented approach in cases brought under statutes other than section 1350, it is not an obstacle to fashioning an international rule of decision in section 1350 cases because a court may only take jurisdiction over a case if an international law violation is alleged at the outset of the trial. Thus, a determination whether there is sufficient agreement in the international community to fashion an international law will have been made at the jurisdictional threshold, and the elements of an international law violation will be at the court’s disposal.

Concededly, the decision to apply international law in a specific case brought under section 1350 should reflect the possibility that the interest of a concerned jurisdiction is strong enough to override the interest of the international system to which the jurisdiction belongs. In most cases, however, international law should be chosen as the rule of decision because section 1350 cases present issues of vital interest to the international community. The practical effect of this choice is, in some cases, to impose liability on a defendant when the domestic law of the country that would be chosen under traditional

the community of nations supports the rule. R. Falk, The Role of Domestic Courts in the International Legal Order 10 (Lillich ed. 1964). International law is determined by consulting judicial decisions, custom and usage of nations, and the writings of jurists. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); accord, IIT v. Vencap, Ltd., 519 F.2d 1001, 1005 (2d Cir. 1975); Cohen v. Hartman, 490 F. Supp. 517, 519-20 (S.D. Fla. 1980); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292, 297 (E.D. Pa. 1963). The guidelines used for determining international law in United States courts are very similar to those employed by the International Court of Justice. The statute of the I.C.J. provides that “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Stat. I.C.J. art. 38.

87. International law must be determined at the trial level if the jurisdictional statute does not require its determination earlier. Thus, from the standpoint of administrability, it may not be practicable to employ international law as a rule of decision in cases brought under many jurisdictional statutes. See R. Leflar, supra note 53, § 105, at 208-10; A. von Mehren & D. Trautman, supra note 74, at 263.

88. 28 U.S.C. § 1350 (1976). Other statutes that similarly involve a determination of international law at the outset include 18 U.S.C. § 1651 (1976) (setting punishment for those who, on the high seas, commit "the crime of piracy as defined by the law of nations") and 28 U.S.C. § 1251(a)(2) (1976) (granting the Supreme Court original and exclusive jurisdiction over "[a]ll actions or proceedings against ambassadors or other public ministers of foreign states or their domestics or domestic servants, not inconsistent with the law of nations").

89. The statute creates an identity of substance and procedure in that the court makes a de facto judgment of the merits at the jurisdictional stage. A Legal Lohengrin, supra note 9, at 110.
territorial based theories would not find him liable. Nevertheless, it is not unfair to hold individuals to international standards of conduct. Because conduct that is determined to be in violation of international law is universally condemned, individuals should reasonably expect to be held accountable for egregious conduct that violates the norm. Thus, from the viewpoint of policy considerations, as well as practicality, international law is an appropriate rule of decision in section 1350 cases. Moreover, this conclusion is supported by the statute's inference that international law is the proper rule for redressing international law violations.

**Conclusion**

The potential application of international law as the rule of decision in section 1350 cases places a great responsibility upon United States courts. The effectiveness of section 1350 is based upon the respect afforded international law. If international law is to remain a respected reflection of the consensus of nations, courts must be careful to find violations of international law only when a clear consensus exists. Thus, the Alien Tort Statute should be used sparingly to make United States courts the protectors not of rights in a chaotic and unjust world but rather of firmly established international standards of conduct.

*Richard A. Conn, Jr.*

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90. Filartiga v. Pena-Irala, 630 F.2d 876, 889-90 (2d Cir. 1980) (noting the possibility of liability under international law when local law would not impose liability).
91. *Id.* at 881; see note 86 supra.
92. *The Law of Nations in the District Courts, supra* note 30, at 82-88. It is axiomatic that the law of nations applies to individuals as well as to states. *Dickinson I, supra* note 47, at 26, 35. "[I]t had been expounded as a universal law binding upon all mankind". *Id.* at 27. See generally Dumbould, *Hugo Grotius: The Father of International Law*, 1 J. of Pub. L. 117 (1952).
93. See notes 42-51 *supra* and accompanying text.