

The Law of Nations in the District Courts: Federal Jurisdiction Over Tort Claims by Aliens Under 28 U.S.C. § 1350

INTRODUCTION

Since The Judiciary Act of 1789 the district courts of the United States have had original jurisdiction, under section 1350 of the Judicial Code, "of all causes where an alien sues for a tort only in violation of the laws of nations or a treaty of the United States."¹ But the courts have persistently refused to find jurisdiction under the statute, and a recent Second Circuit opinion,² upholding the dismissal of a claim brought under this section, declared that the law of nations "deals primarily with the relationship among nations rather than among individuals . . . [and] has been held not to be self executing so as to vest a plaintiff with individual legal rights."³

¹ Judiciary Act § 9, 1 Stat. 73, 77 (1789) Codified as § 1350 of Title 28, U.S.C., the act now reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States."

² *Dreyfus v. Von Finck*, 534 F.2d 24 (2nd Cir.), cert. denied, — U.S. —, 50 L. Ed. 2d 101; 97 S. Ct. 102 (1976).

³ *Id.* 534 F.2d at 31. The case arose upon the following facts. In 1938 Willy Dreyfus, a Jew and a resident of Germany, was forced by the German government to sell his interest in the banking firm of J. Dreyfus & Co. to August Von Finck and Merck, Finck & Co. for one and one-half million dollars below its actual value, and to emigrate to Switzerland. Following World War II an agreement for additional compensation was made between the parties but was allegedly repudiated by the defendants.

Dreyfus commenced an action in the Southern District of New York in 1973 by attaching certain of defendants' assets in New York City. The District Court dis-

This interpretation of the law of nations is consistent with prior decisions of American courts.⁴

An earlier Second Circuit decision⁵ labeled section 1350 "a kind of legal Lohengrin . . . although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."⁶ This article will attempt to show "whence it came" by discussing the history of the law of nations, especially the law of nations in 1789, as it related to individual rights, and analyzing briefly the development of the law of nations since 1789. And finally it will be considered whether, in light of recent theory concerning the place of the individual in international law, section 1350 can and should have any usefulness for future plaintiffs.

THE LAW OF NATIONS TO 1789

The roots of the law of nations may be traced back to the Roman concept of *jus gentium* which, in turn, had as its underlying principle the Greek concept of *jus naturale*, an external criterion of right conduct common to all peoples.⁷ The Roman concept, unlike the Greek, was a practical one used to distinguish between the citizens of Rome and those non-citizens subject to the control of the empire. *jus gentium*, the law

missed the complaint for failing to state a claim upon which relief could be granted. The plaintiff appealed and the Court of Appeals affirmed the dismissal, finding, in part, that neither the alleged seizure of plaintiff's property nor the allegedly wrongful repudiation of the 1948 settlement agreement constituted violations of the laws of nations.

⁴ See *Khedivial Line, S.A.E. v. Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960) (per curiam); *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1963); *Damaskinos v. Societa Navigacion Interamericana, S.A.*, Panama, 255 F. Supp. 919 (S.D.N.Y. 1966).

In only one case, *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961), did a court find that the individual plaintiff was able to state a claim under section 1350 for a violation of the law of nations and as will be discussed, *infra*, pp. 80-81, that decision is consistent with the American precedents.

⁵ *IIT v. Vencap, Ltd.*, 519 F.2d 1001 (2nd Cir. 1975).

⁶ *Id.* at 1015.

⁷ BUDDY, INTERNATIONAL LAW IN THE ENLIGHTENMENT, 1-4 (1975) [Hereinafter BUDDY].

common to all peoples, applied to Romans and non-Romans alike, but the Roman civil law applied only to citizens.⁸

From this background came the theory of natural law which was to peak in the eighteenth century.⁹ This new natural law was grounded on the theory that there are, in the very nature of things, universally acceptable principles of right and wrong.¹⁰ It differed from the older Roman concept in that the natural law was not that which could be empirically shown to be the law common to all peoples. Rather, eighteenth century notions of natural law placed a heavy emphasis on the "ought" of norms which could be regarded as correct, rather than the "is" of norms which were actually enforced. Indeed, under the natural law theory accepted in the eighteenth century, a law which was commonly enforced by all peoples could still have been considered a nullity since it violated the right and wrong inherent in the nature of things.¹¹

While natural law theory was developing toward its eighteenth century zenith, the international political situation in Europe was also changing.¹² The Papacy, long the recognized sovereign power in Europe, was weakening. By the fourteenth century the sovereignty of several states had been sufficiently established that a theory of law regarding their relationships toward each other was required.¹³ The law of nations which emerged to meet this need relied heavily on the natural law theory which sought to define the law of individuals. The result was an overlap of the law of individuals and their relationship toward each other and the law of the interrelationship of nations. Theorists of the law of nations did not produce a clearly defined law of nations concerned only with nations as interacting entities; the new law dealt also with the rights asserted by individuals against sovereigns.

⁸ *Id.*

⁹ See generally, *id.*

¹⁰ Tucker, *Has the Individual Become the Subject of International Law?* 34 U. CINN. L.R. 341 (1965).

¹¹ *Id.*

¹² RUDDY, *supra* note 7, at 4-12.

¹³ *Id.*

Thus the classical writers¹⁹ and the leading international law writer of the Enlightenment, Emmerich de Vattel,¹⁵ postulated a natural law of nations which provided a certain basis for the subject's protection from his sovereign.

In *Le Droit de Gens* (*The Law of Nations*) Emmerich de Vattel revealed himself as effectively one of the French *philosophes* of the Enlightenment.¹⁶ He departed from his medieval predecessors by merging the doctrines of state sovereignty and natural law, previously representing opposing schools of thought.¹⁷ *Le Droit de Gens* quickly became the guide *par excellence* to international law and practice.¹⁸

Like the earlier publicists, Vattel found that individuals did have rights under the law of nations. He began by accepting the premise that men inherit from nature a perfect liberty and independence, which they enjoyed totally before the establishment of civil societies.¹⁹ This natural freedom is partially and voluntarily surrendered to the sovereign state.²⁰ But the nation itself retains the natural freedom which individual men previously enjoyed, unless it has surrendered them to another state.²¹ He went on to theorize that as men are subject to the natural law—and since their union in society does not exempt them from the obligations of the natural law—then the society itself, the nation, must remain subject to the natural law.²² The result is that the individual retains certain rights under natural law not only against his fellow men as individuals, but also against the society of men, the nation. Among such rights are the following: (1) The individual's natural right to liberty of conscience, (2) The indi-

¹⁴ Brownlie, *The Place of the Individual in International Law*, 50 VIRGINIA L.R. 435, 436 (1964).

¹⁵ *Infra*, pp. 74-75.

¹⁶ Parry, *foreword* to RUDDY, *supra* note 7 at xi.

¹⁷ RUDDY, *supra* note 7, at xiii.

¹⁸ *Id.*

¹⁹ VATTEL, *LE DROIT DU GENS* (translated) vi (1797).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 57.

vidual's right to indemnification from his sovereign for the value of property taken by the sovereign for use during time of war, and (3) The individual's right to emigrate. If the sovereign seeks to establish a state religion, for example, the law of nations requires that the sovereign respect the individual's "conscience right" by either allowing any group to practice the religion of their choice, or by allowing that group to separate from the society with their property and to form a new state.²³

In addition Vattel found that since the individual is born free, he has a natural right to decide to emigrate from his native country. This right to leave is not unlimited, the individual may not lawfully leave his country if to do so does harm to it.²⁴ However, "if the sovereign seeks to molest those who have a right to emigrate, he does them an injury; and the injured individuals may lawfully implore the protection of the power who is willing to receive them."²⁵

Finally the indemnification right involves property purposely taken, and not property accidentally destroyed in battle, by the sovereign or destroyed for any reason by the enemy.²⁶

Thus the eighteenth century publicists of international law found, in the natural law basis of the law of nations, rights of individuals against sovereigns. It was the natural law theories of these philosophers which shook the continent of Europe and laid the foundation for the American and French Revolutions.²⁷

Whether or not Vattel had a direct influence on the framers of the Constitution and the Judiciary Act of 1789 is impossible to determine. However, some of the existing documentary evidence from that period lends support to the proposi-

²³ *Id.* at 104.

²⁴ *Id.* at 107.

²⁵ *Id.* at 402, 403.

²⁶ RUDDY, *supra* note 7, at 33.

²⁷ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, (Farrand, ed. 1937); THE FEDERALIST (Cook, ed. 1961).

tion that the American approach to the law of nations under section 1350 contemplated actionable rights of individuals.²⁸

At one point the federal convention of 1787 which drafted the United States Constitution may have considered the rights of aliens under the law of nations. Document VII of the Committee of Detail includes a rough draft of section 2 of Article III which defines the powers of the federal judiciary: "the Judiciary [shall] have authority to hear and determine . . . by Way of Appeal . . . all cases in which foreigners may be interested in the Construction of any Treaty . . . or on the Law of Nations. . . ."²⁹

Hamilton, in defending the final draft of Article III on the judiciary argued that the provision for jurisdiction in cases between a "State or the Citizens thereof, and foreign States, Citizens, or Subjects" is crucial since the denial of justice to an alien is classed, under the law of nations, as among the just causes of war, and the ability to pull the United States into war should not be left to one of the states.³⁰ He went on to argue that this is obviously the case not only where questions of the law of nations are involved, but also where municipal law is involved, since the chance of a denial of justice is nearly as great in the latter case.³¹ Both of these sources indicate the supposition that individuals will be involved in cases arising under the law of nations. Although, as the Second Circuit has pointed out,³² the legislative history of the Judiciary Act is non-existent, it seems clear both from the historical background and from the contemporary theory of the law of nations in 1789 that the drafters of the Judiciary Act contemplated the use of the federal courts by individuals to enforce rights arising under international law. The word-

²⁸ THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 27, at 157. The proposed wording was not written into the final draft possibly because the rough draft found in Document VII seems to contemplate a federal judiciary with almost exclusively appellate jurisdiction, a proposition which was rejected.

²⁹ THE FEDERALIST, *supra* note 27, at 534-541.

³⁰ *Id.*

³¹ IIT v. Vencap, Ltd., *supra* note 5, at 1015.

³² Tucker, *supra* note 10, at 349.

ing of section 1350 should therefore not be considered a mistake. However, just as in 1789 the law of nations was caught up in the natural law theory of the eighteenth century, it quickly moved away from natural law as the positivist theory prevailed, and by the nineteenth century the law of nations had changed substantially from *le droit de gens* of Vattel.³³

DEVELOPMENTS SINCE 1789

Natural law theory in general declined following the revolutions of the eighteenth century. At least one influencing factor may have been the need to stabilize the governments created in revolution.³⁴ Natural law theory which held that law is derived from a source independent of the law making power of the state was inherently unsuitable to the task. Indeed, natural law theory was better suited as the weapon of those dissatisfied with the status quo, which the new governments now sought to maintain. To view the rights of individuals as derived from some source other than the law making power of the society meant that the law must necessarily be in a constant state of flux at least until the ideals of the rights of individuals under natural law could be achieved under the laws of society. The stability which the new governments of the nineteenth century sought could best be achieved by viewing the rights of individuals as determined by prescribed standards of law,³⁵ that is to say, the rights of individuals must be derived from the laws which are accepted and applied by society. This positivist view as applied to international law maintained that international law was composed of those principles which are accepted and applied by nations.³⁶

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 349-350.

³⁶ At the height of natural law theory in the eighteenth century the nations of Europe, far from abiding by the natural law, were living according to the rule of force. RUDDY, *supra* note 7, at 38-57. The rights of individuals went unrecognized, as did many of the rights of nations. Applying positivist theory to this situation it became clear that the individual did not have rights under the law of nations as it was practiced by states, despite the prior arguments of the natural law theorists. Lauterpacht, *The Subjects of the Laws of Nations*, 63 L.Q. Rev. 438, 439-444 (1947).

Since states did not recognize the rights of individuals in international law,³⁷ and since individuals had no procedural recourse against states,³⁸ except through the representation of their rights by their own sovereign, the positivists argued that the law of nations was the law of states in their relations toward each other and individuals had no place in this law.³⁹ The result was the denial of individual rights under international law.

The American courts have consistently followed the reasoning of the positivist school and have refused to apply international law to cases involving individuals.⁴⁰ The decision of the Court of Appeals for the Second Circuit in *Dreyfus v. Von Finck*⁴¹ and the cases cited in support of it⁴² are indicative of the American approach.

The plaintiff in *Dreyfus*, a Jew and former German resident, alleged that he had been forced to emigrate to Switzerland from Germany in 1938, and sold his interest in a banking firm to the defendants under duress, at a loss of one and one-half million dollars.⁴³ The defendants' motion to dismiss was granted by the district court in a memorandum opinion dated January 2, 1975.⁴⁴ The dismissal was affirmed by the Circuit court⁴⁵ which held that an individual is not the subject of the law of nations⁴⁶ and that violations of international law do not occur when the aggrieved parties are nationals of the acting state.⁴⁷

³⁷ Lauterpacht, *supra* note 36, at 439-444.

³⁸ *Id.*

³⁹ Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 VIRGINIA J. INT. L. 1 (1970). The few instances in which American courts have applied international law to cases involving individuals have been in instances where Congressional legislation has specifically required such application. *Id.* at 17.

⁴⁰ *Supra*, note 2.

⁴¹ See cases cited, *supra* note 4.

⁴² See *supra*, note 2.

⁴³ *Dreyfus v. Von Finck*, 534 F.2d at 27.

⁴⁴ *Id.* at 24.

⁴⁵ *Id.* at 30.

⁴⁶ *Id.* at 31.

⁴⁷ *Pauling v. McElroy*, 164 F. Supp. 390 (D.D.C. 1958); *Damaskinos v. Societa Navigacion Interamericana, S.A.*, Panama, 255 F. Supp. 919 (S.D.N.Y. 1966) and *Valanga v. Metropolitan Life Ins. Co.*, 259 F. Supp. 324 (E.D. Pa. 1963).

The *Dreyfus* court relied on the reasoning in three earlier district court decisions⁴⁸ in holding that an individual is not the subject of the law of nations. One of these cases, *Pauling v. McElroy*,⁴⁹ held, without citing prior case law, that claimed violations of international law vest no rights in individual plaintiffs and may be asserted only by diplomatic negotiations between the sovereigns involved.⁵⁰ The other two cases cited rely on two prior district court decisions, *Lopes v. Reederei Richard Schroder*⁵¹ and *Abdul-Rahman Omar Adra v. Clift*.⁵²

In *Lopes* the Court was confronted with a claim by an alien longshoreman against an alien shipowner for injuries resulting from the unseaworthiness of the defendant's vessel.⁵³ The Court followed traditional positivist doctrine, defining the law of nations as "the body of rules and principles of action which are binding on civilized states in their relations with one another."⁵⁴

Unseaworthiness, however, is a doctrine unique to American courts, and does not come from the law of nations.⁵⁵ A violation of the law of nations would consist of "a violation by one or more individuals of those standards, rules or cus-

⁴⁸ 164 F. Supp. 390 (D.D.C. 1968).

⁴⁹ *Id.* at 393.

⁵⁰ 225 F. Supp. 292 (E.D. Pa. 1963).

⁵¹ 195 F. Supp. 857 (D. Md. 1961).

Damaskinos, supra, note 47 involved a claim by a seaman for injuries on board a ship owned by the American and Panamanian defendants. The court held, *inter alia*, that unseaworthiness of a vessel is not a violation of the law of nations, citing *Lopes, supra* note 50.

Valanga, supra note 47. Was an action by a Russian beneficiary of a life insurance policy against the insured, based on the insurers failure to pay under the policy. The insurer moved to dismiss for lack of subject matter jurisdiction and the court held, *inter alia*, that the suit was in contract not in tort as required by section 1350, and further, even if a tort, the action complained of was not a violation of the law of nations as contemplated by that section. *Id.* at 327. The court cited *Lopes* and *Adra, supra*, for the proposition that a violation within the meaning of section 1350 must be conduct which "transcends the violation of local norms . . . since it is injected with overtones which infringe upon the standards which nations have established to control their relationships with one another." *Id.* at 328.

⁵² *Lopes v. Reederei Richard Schroder*, 225 F. Supp. 292, 293 (E.D. Pa. 1963).

⁵³ *Id.* at 297, n.29.

⁵⁴ *Id.* at 295.

⁵⁵ *Id.* at 297.

toms (a) affecting the relationship between states or between an individual and a foreign state and (b) used by those states for their common good and/or in dealings inter se."⁵⁶

Using this reasoning, jurisdiction could be had under section 1350 on the facts found in *Abdul-Rahman Omar Adra v. Clift*.⁵⁷ The plaintiff in *Adra* brought his action against his former wife, a Lebanese citizen, who allegedly had taken their daughter, also a Lebanese citizen, to the United States on a falsely obtained Iranian passport to prevent the plaintiff from taking lawful custody of the child under Moslem law.⁵⁸ The conduct of the defendant was a violation of local norms thus giving rise to an actionable tort. Further, in obtaining the false passport the defendant was found to have violated the right of Lebanon to control the issuance of passports to its citizens.⁵⁹ Thus her conduct "transcended the violation of local norms . . . since it [was] injected with overtones which impinge upon the standards which nations have established to control their relationships with one another."⁶⁰ The rule set out in the *Adra* case indicates a two-tiered test. First, the conduct must violate the rights of the individual under local "norms"⁶¹ and second, the conduct must also violate the rights of a nation under the law of nations. But

⁵⁶ The *Adra* case is the only one in which a court found jurisdiction for the plaintiff on a claim of tort in violation of the law of nations.

⁵⁷ *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. at 860-862.

⁵⁸ *Id.* at 864-865.

⁵⁹ *Valanga v. Metropolitan Life Ins. Co.*, *supra* note 47, at 328, summarizing the *Adra* holding.

⁶⁰ The fact that *Valanga, Id.*, characterizes the conduct giving rise to jurisdiction under this section as a violation of local "norms" rather than local "law" indicates that conduct contrary to local custom or usage may also fall within the jurisdiction of section 1350, so long as it is also a violation of a nation's rights under the law of nations. It follows from this that under the *Adra-Valanga* approach the section is more than simply jurisdictional, it also creates substantive rights. But the effect is not to create substantive rights under the law of nations since the wrong committed to a nation by the conduct of the defendant is collateral to the wrong committed to the plaintiff. Instead the *Adra-Valanga* approach turns the violation of local "norms," i.e. custom or usage, into a violation of law, which it may not in fact have been under local "law."

⁶¹ *Supra* at pp. 79-80.

the plaintiff need not be a national of the wronged nation, nor must the wronged nation be a party to the action.

Although the *Adra* decision finds jurisdiction under section 1350, it is based on the positivist doctrine that individuals are not the subject of the law of nations and the reasoning of that case is weak. The defendant in *Adra* may indeed have violated the right of a sovereign state, but any harm to the plaintiff was purely coincidental and arose not from a violation of his rights under the law of nations, but rather under local "norms" if at all. The court interpreted section 1350 as having as a threshold requirement a violation of a sovereign's rights by the defendant for the plaintiff to have jurisdiction to remedy damages generally sounding in tort. As indicated above⁶² this was not the original theory behind section 1350, and as argued *infra*⁶³ it should not be the theory now.⁶⁴

⁶² *Infra* at p. 76.

⁶³ Besides holding that individuals do not have actionable rights under the law of nations the *Dreyfus* court also held that even if section 1350 allowed individuals to bring such claims, violations of international law do not occur when the aggrieved parties are nationals of the acting state. *Dreyfus v. Von Finck*, *supra* note 2 at 31. In support of this holding, the court relied on dicta in the dissent of Justice White in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, (1964, White, J. dissenting) (In distinguishing a line of cases in which courts had apparently held that an attitude of caution and self-restraint should be used in dealing with the laws of a foreign nation from the *Sabbatino* case which involved a claim of the violation of the law of nations, Justice White said that in these prior cases violations of international law were not present, since the parties were nationals of the acting state. He went on to argue that the act of state doctrine should not prevent adjudication where the acting state acted in violation of international law. 376 U.S. 441-443), and on the holding of the New York court in *Salimoff v. Standard Oil Co. of New York*, 262 N.Y. 220; 186 N.E. 679 (1933). In the latter case, the Soviet government confiscated all oil lands in Russia through nationalization and sold oil extracted therefrom to the defendants. The former owners, Russian nationals, brought an equitable action for an accounting on the theory that the seizures by the unrecognized Soviet government were merely thefts and title to the property and the right to its proceeds remained in the plaintiffs. The New York court held that the fact that the Soviet government was unrecognized by the United States made it no less a *de facto* government, and as a sovereign government it did no legal wrong according to the law of nations when it confiscated the oil of its own nationals. The result is that such a claim by individual plaintiffs against their sovereign must arise if at all under the laws of the sovereign nation, and not under international law. 262 N.Y. at 227. While this holding is consistent with general positivist theory, it is contrary to the natural law theory

THE INDIVIDUAL AS THE SUBJECT OF INTERNATIONAL LAW

It can no longer be said that sovereign states are the sole subjects of the law of nations. Since the late nineteenth century there have appeared a number of international bodies, subject to the law of nations, which are not sovereign states. Thus Lauterpacht describes the following instances in which a non-sovereign body was accorded international recognition:

Between the annexation of the Papal State by Italy in 1870 and the restoration of its temporal sovereignty in 1929, the Holy See concluded treaties and entertained diplomatic relations with most sovereign states.⁶⁵

The British Dominions, although part of the British Commonwealth of Nations which was represented in the international sphere by Great Britain alone, engaged in treaty making and diplomatic relations.⁶⁶

And more recently a large number of international public bodies, including the United Nations and its many affiliated agencies, have been recognized as international personalities for the purposes of international law.⁶⁷

of the law of nations, and is also contrary to the growing awareness of individual human rights under international law.

It is also interesting to note that even during the period of Positivist domination in international law theory in the nineteenth and early twentieth century one school which espoused the theory that intervention against another sovereign was legally permissible to protect the rights of nationals of that sovereign. See BROWN-LIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES*, 338-342 (1963); However misused in practice, the theory did imply that individuals have rights against their own sovereigns cognizable in some manner under international law.

⁶⁴ Lauterpacht, *supra* note 36, at 445.

⁶⁵ *Id.* at 445-46.

⁶⁶ *Id.* at 446-500.

⁶⁷ The Revised Convention of Mannheim for the Navigation of the Rhine, reprinted in *INTERNATIONAL GOVERNMENTAL ORGANIZATIONS—CONSTITUTIONAL DOCUMENTS* 159-75 (Peaslee, ed. 1956).

The convention sets out various regulations for the navigation of the Rhine and establishes Rhine navigation courts, which under Article 34, § 2 are competent to hear "civil cases for decision in summary legal proceedings about complaints:

(a) on account of payment of fees for pilots, crane, 'Wage' harbour and bulwark and of their amount,

(b) on account of congestion of the towing-path done by private persons,

(c) on account of damages which were caused by skippers and raftsmen to others on the way or during the landing,

This broadening to include non-sovereign bodies among those considered subject to the law of nations is paralleled by the recognition by treaty of the rights of individuals against sovereigns under international law. The individual was recognized as an entity under international law as early as 1815, by the Central Commission for the Navigation of the Rhine under the terms of the Final Act of Vienna,⁶⁸ and again by the European Commission of the Danube, created by the Treaty of Paris in 1856.⁶⁹ Later the Central American Court of Justice, created in 1907,⁷⁰ and the Mixed Arbitral Tribunals following World War I,⁷¹ recognized the right of individuals to bring claims against other governments without support of their own governments. These examples indicate a tendency to accept the standing of individuals to enforce their rights in international forums without the need for intervention on their behalf by their government. Developments since World War II reinforce this tendency.

(d) on account of damages in landed property when pulling craft to the charge of the owners of draught-horses.”

Article 37 further provides for appeals by individuals of decisions of the Rhine navigation courts.

⁶⁸ INTERNATIONAL GOVERNMENTAL ORGANIZATIONS-CONSTITUTIONAL DOCUMENTS 380-388 (Peaslee, ed. 1961), cited in Tucker, *supra* note 10, at 335.

⁶⁹ Convention for the Establishment of a Central American Court of Justice, 2 FOREIGN REL. U.S. 697 (1908). Article II of the Convention provided:

“This court shall take cognizance of the questions which individuals of one Central American country may raise against any of the other contracting Governments, because of the violations of treaties or conventions, and other cases of an international character; no matter whether their own Government supports said claim or not; and provided that the remedies which the laws of the respective country provide against such a violation shall have been exhausted or that denial of justice shall have been shown.”

⁷⁰ E.g. Agreement between the United States and Germany (for a mixed commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the treaty concluded by the two Governments on August 25, 1921). August 10, 1922, 42 Stat. 2200.

Article I of the Agreement provided:

“The commission shall pass upon the following categories of claims . . .

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914. . .”

⁷¹ 6 F.R.D. 69, 110 (Int'l. Mil. Trib. 1946).

One important step in establishing the individual in international law was the decision of the Nuremberg Tribunal. There the judges discarded the traditional doctrine that only states could be liable under international law and held that individuals must also be held responsible for their actions: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."⁷² The principles upon which this holding was predicated were set out first in the Charter of the Tribunal itself,⁷³ after the acts of the defendants were actually performed. It would be difficult to rationalize the holding on positivist theory since liability was found for acts not previously considered crimes, under law never before enforced. A more realistic approach would be to view the finding as an application of natural law.⁷⁴ The Charter of the tribunal and its finding defined law as it ought to be, grounded on the right and wrong in the nature of things which is the natural law. Such an approach, as shown in the discussion of Vattel's theory,⁷⁵ is more conducive to the recognition of the rights and obligations of individuals as the subject of international law than is the positivist approach.

In addition to the Nuremberg court's finding of the liability of individuals in international law, the increased awareness of human rights since World War II indicates a growing acceptance of the individual as the subject of international law. The U.N. Charter provides that one of its purposes is to "achieve international cooperation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or

⁷² Charter of International Military Tribunal, 39 AM. J. INT'L. L. SUPP. 258 (1945) Article 6 of the Charter provided that "persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" was criminal under international law. *Id.* at 259-260.

⁷³ Tucker, *supra* note 10, at 357.

⁷⁴ *Supra* at pp. 73-74.

⁷⁵ U.N. CHARTER, art. 1; reprinted at 59 Stat. 1031, 1037.

religion.”⁷⁶ A more express recognition of the position of the individual under international law can be found in the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations. This document goes further than the Charter in that in it are listed specific human rights and fundamental freedoms which each individual has.⁷⁷ Among them are the rights to life, liberty and the security of person; freedom from slavery, torture, arbitrary arrest or detention; the right to a hearing and a presumption of innocence when charged with a crime; the right to freedom of movement in and between states; the right to own property and freedom from arbitrary deprivation of that property; the right to freedom of thought, opinion and peaceful assembly; the right to work and the right to education,⁷⁸ none of which can be deprived from the individual on the basis of distinctions such as “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁷⁹

Finally, The Convention for the Protection of Human Rights and Fundamental Freedoms,⁸⁰ signed in 1950 by thirteen European nations reiterated the provisions of the U.N.’s Universal Declaration of Human Rights and further established both a European Commission of Human Rights, to assist in the enforcement of those rights, and an European Court of Human Rights, the tribunal for claims under the convention.⁸¹

These developments in individual rights under the law of nations have been slow particularly when compared to their rapid disappearance in the early nineteenth century. While

⁷⁶ UNIVERSAL DECLARATION OF HUMAN RIGHTS reprinted at *ESSAYS ON HUMAN RIGHTS*, 195 (Keith, J., ed. 1968).

⁷⁷ *Ibid.*

⁷⁸ *Id.* at 196.

⁷⁹ Reprinted at 45 AM. J. INT’L. LAW SUPP. 24 (1951).

⁸⁰ However, the convention stopped short of allowing the individual claimant to bring his own action before the court. Article 48 of the Convention provides that either the European Commission for Human Rights; the state whose national was alleged to be a victim; the state referring the case to the court; or the defendant state is the only party allowed to bring a case before the court. *Id.* at 35.

⁸¹ Tucker, *supra* note 10, at 360-365.

individuals have had some limited success in international bodies⁸² and tribunals⁸³ this progress has not been paralleled in the United States. The continued denial in American Courts of the rights of individuals under international law indicates that the traditional positivist approach is well entrenched in those courts. But this is not to say that international law is beyond the scope of domestic courts.

NATIONAL TRIBUNALS AND INDIVIDUAL CLAIMS

International law has traditionally been considered within the competence of national tribunals.⁸⁴ Under the doctrine of incorporation in Anglo-American law the norms of international law were considered part of the common law.⁸⁵ This doctrine developed from the natural law theory which in application saw both domestic law and the law of nations as part of the same system.⁸⁶

The positivists, dominant by the end of the nineteenth century, held that international law was a source, rather than an integral part of the common law. Only those norms to which the nation had assented were to be considered the law of nations.⁸⁷ Despite these theoretical problems as to the proper role of the doctrines of international law in the decisions of the courts, the capacity of the national courts to determine questions of international law continued to be accepted.

But even assuming that a jurisdiction recognizes the rights of an individual against his or another sovereign or a third party under international law, should this type of claim be brought in a national court?

⁸² *Id.* at 358.

⁸³ See Lillich, *supra* note 39.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Falk, *The Role of Domestic Courts in the International Legal Order*, 39 INDIANA L.J. 429 (1964). This in itself is dangerous since it puts lower courts in the position of defining the "national good," a function which should reside in the executive branch.

There are disadvantages to the use of domestic courts in trying international law cases. It is possible that national courts might exhibit a tendency towards parochial bias. Thus local courts may try to avoid international issues if some aspect of municipal law may decide an issue, or they may even treat international law as secondary to both municipal law and national interests, refusing to apply it, either because of a belief that claims grounded in international law are frivolous, or because resolution of such issues would not be for the national good.⁸⁸ These problems can be solved by an awareness in each court of the significance of international law and a respect for its applicability in individual cases.

A particular problem in American courts has been the sovereign immunity doctrine and the act of state doctrine, which remove the authority of the court to deal with foreign governments in favor of the executive branch of the federal government.⁸⁹ But the doctrines of sovereign immunity and act of state seem to be gradually giving way to an increased appreciation for the proper role of the courts of the United States in trying cases under international law. Probably the most important step in this regard was the enactment of the Hickenlooper Amendment to the Foreign Assistance Act of 1964⁹⁰ which effectively reverses the presumption that the courts are precluded from hearing a case involving a foreign taking of property under the act of state doctrine. Under the amendment a court is prevented from hearing the case only if the executive actively intervenes in an individual case for reasons of national policy.⁹¹

⁸⁸ A Discussion of the doctrines of sovereign immunity and Act of State is beyond the scope of this article. However, they have been amply discussed elsewhere. See e.g., Lillich, *supra* note 39, at 18-37 and materials cited therein. See generally *Banco Nacional de Cuba v. Sabbatino*, *supra* note 63 at 439 (White, J., dissenting); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 96 S.Ct. 1854, 425 U.S. 682 (1976).

⁸⁹ 22 U.S.C. § 2370(e)(2).

⁹⁰ With this power still left in the hands of the executive the role of the national judiciary in deciding international questions remains improperly restricted according to Lillich, *supra*, note 39, at 35-37.

⁹¹ E.g., Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 48; *supra*, note 79 at 35.

Indeed, there are distinct advantages to the presence of international law cases in domestic courts. International tribunals are not often available to the individual plaintiff.⁹² Even when available, such courts can be both costly and cumbersome, so much so that even the sovereign states may hesitate to use them.⁹³ National courts are by comparison cheaper and less burdensome, if only in terms of the simplicity of the court's mechanisms for bringing an action. The presence of international law cases in domestic courts would also have a tendency to educate the public in the various nations about international law, and this communication would help foster the acceptance of international law and serve as a source of mutual constraint.⁹⁴

CONCLUSION

There is ample support for the proposition that claims by aliens under the law of nations should be allowed in federal courts under section 1350. The statute itself is rooted in the theory of natural law in which this nation was conceived. But in this century, with its gradual rebirth of respect for the individual's role at the international level, the courts of the United States still deny the individual the enforcement of his rights on the basis of the now outmoded positivist theory.

The individual's ability to pursue his rights whether in a domestic court or in an international tribunal along with the still hoped for enforcement of those same human rights on a broader scale by organizations such as the United Nations will eventually be a vital progressive step toward an orderly and just world.⁹⁵

⁹² Baxter, *Dedication to Hardy Cross Dillard: Introduction*, 11 VIRGINIA J. INT'L L. 293 (1971).

⁹³ Falk, *supra*, note 87, at 440-442.

⁹⁴ See Lillich, *supra* note 39, at 37 quoting Falk, *The Sabbatino Controversy in THE AFTERMATH OF SABBATINO* 51 (Tondel, ed. 1965).

⁹⁵ *Id.* at 49.

Whether it will be done by the courts, by the Congress, or even by a Constitutional amendment as has been suggested,⁹⁶ the courts of the United States should be open to these claims.

THOMAS P. CROTTY

⁹⁶ *Id.* at 49.