IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 86-2448, 86-2449, 86-2496, 86-15039
87-1706, 87-1707

AGAPITA TRAJANO, ET AL., PETITIONERS-APPELLANTS

v.

FERRDINAND E. MARCOS, ET AL., DEFENDANTS-APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF HAWAII AND THE
NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

II-28

U.S Amicus Brief in Trajano

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This brief is filed in response to the Court's order of July 16, 1987 inviting the Department of Justice to express the views of the United States as amicus curiae in this case. 1/

1/ The Court's Order requested the government to address the following issues:

1. Do allegations of wrongful death, wrongful arrest or torture committed by a foreign governmental official against a foreign national in a foreign nation plead a cause of action cognizable in the United States District Court under 28 U.S.C. § 1350?

2. May the federal courts hear these consolidated cases, despite the "act of state" doctrine, either because wrongful death, wrongful arrest or torture cannot be "acts of state" as a matter of law, or because the "balance of relevant considerations" favors a hearing? See Banco

(Continued)

STATEMENT OF THE CASE

Plaintiffs (with two apparent exceptions) are all aliens, resident either in the United States or in the Philippines. Defendants are also all aliens. 2/ Plaintiffs brought suit against defendants in the United States District Courts for the District of Hawaii (Trajano, Hilao, Sison) and the Northern District of California (Ortigas, Clemente), claiming that they (or their relatives) were unlawfully arrested, imprisoned, tortured and, in some cases, killed in the Philippines at defendants' direction. Plaintiffs contended that defendants' actions violated United States law, international law, and/or Philippine domestic law. Plaintiffs based jurisdiction upon the federal question statute (28 U.S.C. 1331), the alien diversity statute (28 U.S.C. 1332(a)(2)) and the Alien Tort Statute (28 U.S.C. 1350).

Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

3. Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States? See Republic of the Phillippines v. Marcos, Nos. 86-6091, 86-6093, slip op. at 32 (9th Cir. June 4, 1987).

2/ In addition to former President Marcos, the defendants include General Fabian Ver, a cousin of defendant Marcos and former Chief of Staff of the Philippine Armed Forces, and Imee Marcos-Manotoc, President Marcos' daughter and National Chairman of the Kabataag Baranggay. Trajano Compl. ¶¶ 5-7, ER A2-A3; Sison Compl. ¶¶ 6-7, ER A3; Hilao Compl. ¶¶ 10-11, ER A5; Clemente Compl. ¶ 3, ER 16.

Defendants moved to dismiss the complaints on the grounds of lack of subject matter jurisdiction, lack of personal jurisdiction, forum non conveniens, head of state immunity, insufficient service of process, statute of limitations, and the act of state and political question doctrines. Appellees' Brief, at 9. On July 18, 1986, the United States District Court for the District of Hawaii (Fong, J.) granted defendants' motions in Trajano, Hilao & Sison, concluding that: (1) plaintiffs' lacked a private cause of action insofar as they invoked 28 U.S.C. 1331; (2) jurisdiction did not lie under 28 U.S.C. 1332 because there was not complete diversity between plaintiffs and defendants; and (3) even assuming jurisdiction was present under 28 U.S.C. 1350, the act of state doctrine rendered the cases non-justiciable. Trajano ER A18-A33; Hilao ER A18-A31; Sison ER A25-A41. On January 22, 1987, the District Court for the Northern District of California (Williams, J.) granted defendants' motion in Ortigas and Clemente, largely agreeing with Judge Fong's reasoning. Ortigas & Clemente ER 72-76.

SUMMARY OF ARGUMENT

I. 28 U.S.C. 1350 does not give the district courts subject matter jurisdiction over a suit by a foreign national plaintiff against a foreign government official based on acts occurring in a foreign country.

Appellees argue that the constitutional basis of Section 1350 is the Alien Diversity Clause of Article III, which extends the "judicial Power" to controversies "between a State, or the

Citizens thereof, and foreign States, Citizens or Subjects," and that therefore Section 1350 confers jurisdiction only where the defendant is a citizen of the United States. We agree that if the Alien Diversity Clause were the sole constitutional basis for Section 1350, that conclusion would follow: the statute requires an alien plaintiff, and the Constitution would therefore require a United States citizen defendant. However, contemporaneous history suggests that Congress intended Section 1350 to reach some torts between aliens, which the statute may constitutionally do if it is based in part on the clause of Article III that extends the judicial power to cases "arising under th[e] Constitution, the Laws of the United States, and Treaties made * * * under their Authority."

Section 1350 does not, however, by any means reach all torts between aliens in violation of international law. The statute is limited by its terms to torts "committed in violation of the law of nations or a treaty of the United States"; when this phrase is read in light of the history of the statute, we think it clear that the statute does not reach every tortious violation of a treaty to which the United States is a party, or of a doctrine of international law, but only those violations that contravene treaties and international law insofar as they create rights and obligations that form a part of the law of the United States.

The "Law of Nations" Clause of Article I of the Constitution, which gives Congress the power to "define and

punish" offenses against the "Law of Nations," (Art. I, § 8, Cl. 10), reflects the assumption that the "law of nations" constitutes part of the law of this Nation only insofar as this Nation has, in one manner or another, assumed responsibility for its enforcement. For example, an important part of the law of nations is the protection of ambassadors: a federal statute embodying that principle expressly protects foreign ambassadors against tortious assaults while they are in the United States (18 U.S.C. 112); but neither that statute nor any other provision of U.S. law protects all ambassadors against all assaults anywhere in the world, even though the "law of nations" could be said to prohibit any such assault. Similarly, while many of the acts alleged in these cases are abhorrent, and while acts of these kinds (including torture) have been said to violate the law of nations, they do not violate the laws of this Nation when it is in no way involved: United States law does not protect foreign nationals against harsh treatment at the hands of officials of their own country.

II. Even if the statutory grant of jurisdiction in 28 U.S.C. 1350 did reach this case, plaintiffs' suits would have to be dismissed because they do not have a cause of action arising under federal law. First, Section 1350 itself is purely jurisdictional and does not create a cause of action. Second, the acts alleged do not violate any law or treaty of the United States that creates rights enforceable by private litigants in

American courts. Third, although the acts alleged violate international norms of behavior and may constitute violations of the law of nations by those involved, that alone does not create a cause of action under federal law where the acts did not in any way involve the United States, its territory or its citizens.

III. The complaints in these cases should be dismissed for the reasons stated above, without reaching the question whether the "act of state" doctrine would require dismissal. That doctrine says that a court in the United States may not adjudicate the validity or legality of the act of a foreign sovereign committed within its own territory, at least in the absence of sufficient countervailing reasons for the court to intrude. The difficult question in this case -- one on which past cases provide only limited guidance -- is whether the acts alleged should be thought to constitute acts of the sovereign for this purpose. That question is complicated by defendant Marcos's position as a former head of the government on the one hand, and the very barbarousness of certain of the alleged acts on the other. We do not think the court should reach that difficult question in a case where it may be unnecessary to do so. Rather, if the court does not affirm the dismissal of these cases on the ground that the district courts are without statutory jurisdiction or that plaintiffs do not have a cause of action, we suggest that the cases should be remanded to the district courts to consider the possible application of other doctrines, such as

forum non conveniens, political question, and abstention.

ARGUMENT

I. THE DISTRICT COURTS DO NOT HAVE JURISDICTION UNDER 28 U.S.C. 1350 OVER A SUIT BY ONE ALIEN AGAINST ANOTHER FOR A TORT COMMITTED IN A FOREIGN COUNTRY

Federal courts are courts of limited jurisdiction. The district courts have jurisdiction of these cases only if they fall within the scope of the jurisdictional grant from Congress, which in turn must be within the scope of the judicial power that may be conferred on the federal courts under Article III of the Constitution. In this case, the jurisdictional statute upon which appellants principally rely, and the statute upon which the court invited the United States to express its views, is the Alien Tort Statute, now codified at 28 U.S.C. 1350. 3/ That statute was first enacted as part of the Judiciary Act of 1789, 4/ but it was almost never invoked during the ensuing 180

3/ Jurisdiction does not lie under the alien diversity statute, 28 U.S.C. 1332(a)(2) and (3), because of the absence of complete diversity. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975); 13B C. Wright, A. Miller & E. Cooper, Federal Practice And Procedure § 3604, at 384-85 (2d ed. 1984); 1 J. Moore, et al., Moore's Federal Practice ¶ 0.75 [1.-2], at 709.5-709.7 (1986). The district courts properly rejected 28 U.S.C. 1331 as a basis of jurisdiction on the ground that appellants do not have a cause of action arising under federal law. See pages 20-31, infra.

4/ Act of Sept. 24, 1789, § 9, 1 Stat. 77. The present form of the statute, 28 U.S.C. 1350, provides as follows:

> 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

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years, which alone suggests that it should not, at this late date, be given the expansive interpretation plaintiffs urge. In any event, an examination of the Alien Tort Statute in light of its two possible constitutional bases, and of contemporaneous evidence of the purposes it was intended to serve, demonstrates that it does not reach these cases.

A. The District Courts Do Not Have Jurisdiction Of These Cases If Section 1350 Is Based On The Alien Diversity Clause Of Article III

Appellees argue that the constitutional basis of Section 1350 is the Alien Diversity Clause of Article III, which extends the judicial power to controversies "between a State, or the citizens thereof, and foreign States, Citizens or Subjects." Art. III, § 2, Cl. 1. If appellees are correct, then the district courts are without jurisdiction in these cases, because Section 1350 requires that the plaintiff be an alien and in these cases the defendants are aliens as well, and therefore are not of diverse citizenship.

Appellees rely (Br. 55-64) on the parallels between the "alien diversity" and "alien tort" provisions of the Judiciary Act of 1789 and the evidence of the Framers' concern that the United States might become embroiled in an international incident if it failed to provide a fair forum for an alien seeking redress against a United States citizen. 5/ That background does suggest

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nations or a treaty of the United States.

5/ See also Casto, The Federal Courts' Protective Jurisdiction (Continued)

that one purpose of the Alien Tort Statute was to be a "small claims" subset of "alien diversity" jurisdiction, giving aliens who sue in diversity cases involving tortious violations of international law a federal forum without regard to the $500 amount in controversy requirement that would otherwise apply. 6/

In our view, however, the Alien Tort Statute, which does not in terms require diversity of citizenship, does not rest solely on the Alien Diversity Clause of the Constitution, but may extend to certain cases "arising under" federal law even when there is no diversity. Elsewhere in the Constitution, in the "Law of Nations" Clause of Article I, Congress was explicitly given the power, which the national government lacked under the Articles of Confederation, "[t]o define and punish * * * Offences against the Law of Nations." Art. I, § 8, Cl. 10. This suggests that the use of the identical phrase "law of nations" in the contemporaneously enacted Alien Tort Statute was intended to give the federal courts subject matter jurisdiction insofar as a cause of action is afforded by federal law of the United States enacted

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Over Torts Committed In Violation Of The Law of Nations, 18 Conn. L. Rev. 467, 497-98 & nn. 166-168 (1986) [hereinafter Casto].

6/ The language "for a tort only" was enacted to make clear that the other aspects of the "law of nations" as then understood (such as the "law of merchants") were not imported wholesale into federal jurisdiction. See Randall, Federal Jurisdiction Over International Law Claims: Inquiries Into The Alien Tort Statute, 18 N.Y.U.J. Int'l. Law & Politics 1, 28-31 (1985) [hereinafter Randall]. See also Dickinson, The Law Of Nations As Part Of The National Law Of The United States, 101 U. Pa. L. Rev. 26, 26-27 (1952); Dickinson, The Law Of Nations As Part Of The National Law Of The United States, II, 101 U. Pa. L. Rev. 792 (1953).

pursuant to the Law of Nation Clause in order to "define and punish" violations of the law of nations that are the responsibility of the United States. 7/

As we explain below (see pages 15-18, infra), the purpose of vesting power in Congress to "define and punish * * * Offences against the Law of Nations" was to enable it to prevent the United States from becoming embroiled in a war or other dispute with a foreign nation that might be offended by a breach of the law of nations attributable to the United States or an individual under its jurisdiction. The individuals for whom the United States might be held responsible in this sense include not only United States citizens but also aliens who commit wrongs while physically present in the United States.

Indeed, both the Law of Nations Clause and the Alien Tort Statute were adopted against the backdrop of the 1784 Marbois affair. In that incident, the Chevalier de Longchamps, an alien, committed an assault and battery in Philadelphia upon the

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7/ A statute enacted pursuant to the Law of Nations Clause can derive from a principle of international law a set of rights and obligations that form part of the federal law of the United States. We do not mean to suggest that principles of international law may not be applied in United States courts unless they have first been affirmatively enacted into law by Congress. In some instances, a court may, where it is contemplated by or consistent with the Act of Congress conferring jurisdiction, borrow principles of international law as a federal rule of decision in a case otherwise properly pending before it. We do argue below (see pages 24-27, infra), however, that the courts may not undertake that function in the context of these caes without firm encouragement or guidance from Congress.

Secretary of the French legation (Mr. Marbois), also an alien. Respublica v. De Longchamps, 1 U.S (1 Dall.) 120 (Pa. Oyer & Terminer 1784). This affair was described by contemporaries as a violation of the "law of nations," with which Congress was virtually powerless to deal under the Articles of the Confederation. Casto, supra, at 491-493. Indeed, "the Marbois affair was a national sensation that attracted the concern of virtually every public figure in America" (id. at 492 & n.143). In light of this background, we believe it likely that Congress intended to encompass within Section 1350 certain suits between aliens -- at least where, as in the Marbois case, the acts at issue occurred within the legislative jurisdiction of the United States and under circumstances in which the United States might be viewed as responsible under international law. Because the Marbois incident iself would not have fallen within the jurisdictional reach of the Alien Tort Statute if that statute rests solely on the Alien Diversity Clause of Article III, we do not believe the Statute should be so construed. 8/

8/ The commentators have generally concluded that Section 1350 rests on the Federal Question Clause of Article III. See, e.g., 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3585, at 328-329 (1984); 1 J. Moore, et al., 1 Moore's Federal Practice ¶ 0.84, at 735 n.2 (2d ed. 1986); Casto, supra, at 471 n.27, 510-511; Randall, supra, at 52-59.

B. The District Courts Do Not Have Jurisdiction Of These Cases If Section 1350 Is Based On The Federal Question Clause Of Article III

Even if Section 1350 is based in part on Article III's extension of the judicial power to cases arising under federal law, so that alien diversity is not required, the instant cases do not fall within that statutory grant of jurisdiction. Congress intended in Section 1350 to confer jurisdiction over torts committed "in violation of the law of nations or a treaty of the United States" only insofar as the law of nations principle or the treaty provision is a part of federal law of the United States that regulates the alleged conduct and affords a cause of action. Compare Merrell Dow Pharmaceuticals Inc. v. Thompson, No. 85-619 (S.Ct. July 7, 1986). There is no evidence that Congress intended to grant the district courts jurisdiction over nondiversity cases such as the present ones, where the subject matter and the parties are foreign to the United States and are not governed by "the Laws of the United States."

1. To the extent that the Alien Tort Statute does not rest on alien diversity, it must rest on the power of Congress to vest the inferior federal courts with jurisdiction over cases "arising under * * * the Laws of the United States, and Treaties made * * * under their Authority." Art. III, § 2, Cl. 1. Section 1350 provides that the district courts shall have jurisdiction over any civil action by an alien for a tort "committed in violation of the law of nations or a treaty of the United

States." Appellants contend that the alleged acts of the defendants in the Philippines that are the subject of these cases violated the "law of nations" as expressed in various international declarations addressing the subject of human rights. See pages 22-24, 28-31, infra. But the Alien Tort Statute was not intended to confer jurisdiction on the courts of the United States to adjudicate any alleged violations of the "law of nations" that occur anywhere in the world, without regard to their nexus to the United States.

For example, an assault on a foreign ambassador may involve a violation of the law of nations. 9/ To ensure that the United States would adhere to this principle, the First Congress, pursuant to its power to "define and punish * * * Offenses against the Law of Nations," provided that an assault on a foreign ambassador within the United States was a criminal offense under the laws of the United States, 10/ and it remains

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9/ In the Eighteenth Century, it was thought that such an assault, even by a private citizen, in and of itself violated the law of nations. See Respublica v. De Longchamps, supra. Today, nations are obligated under international law to take "all appropriate steps to prevent any attack" on such a person (Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, TIAS 7502, Art. 29) and to make such attacks unlawful (Convention on Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, 28 U.S.T. 1978, TIAS 8532, Art. 2); but an assault by a private citizen would not, taken alone, violate the United States' obligations under these Conventions.

10/ See Act of Apr. 30, 1790, § 28, 1 Stat. 118:

[I]f any person shall violate any safe-conduct or

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so today. See 18 U.S.C. 112. We may assume for present purposes that a foreign ambassador injured by such an assault in the United States also could bring a civil cause of action under 28 U.S.C. 1350 against the tortfeasor to recover for the injuries sustained.

By contrast, an assault by a French citizen upon the British Ambassador in France -- while also properly considered a violation of the law of nations in a general sense -- would not be a criminal offense under the laws of the United States. We believe that a civil suit based on such conduct likewise would not be within the jurisdictional reach of 28 U.S.C. 1350, because it would not have been committed in violation of the "law of nations" insofar as it constitutes a part of the substantive law of the United States: U.S. law does not protect the British Ambassador against acts of French citizens in France. 11/

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passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court.

11/ The proposition that the principles of the law of nations must be incorporated into domestic law, whether by the legislature or the courts, in order to be enforced in the courts of a particular nation, was recognized by Blackstone. He referred to "the principal offences against the law of nations, as animadverted on as such by the municipal laws of England, [as] of three kinds: 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3. Piracy." 4 W. Blackstone, Commentaries *68, 72.

Similarly, although the conduct alleged in these cases is abhorrent and, in some respects (e.g., torture), may be said to violate the law of nations in a general sense, that conduct does not violate the laws of the United States that give domestic content to the law of nations, because those laws, even where they incorporate international law, do not govern acts committed by one alien against another alien within the territory of their own country. See L. Henkin, Foreign Affairs and the Constitution 223-24 (1972). Compare United States v. Palmer, 16 U.S. (3 Wheat.) 610, 630-634 (1818); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196-198 (1820).

2. The background of the Alien Tort Statute supports the conclusion that it does not grant jurisdiction over such suits. That background indicates that the Statute's scope is limited to torts (amounting to violations of either a treaty or the law of nations) committed by citizens of the United States or other persons subject to its jurisdiction, under circumstances in which the United States might be held accountable to the offended nation. 12/ These would principally include violations occurring within the United States and perhaps certain other violations, such as piracy on the high seas, committed outside of the United States but within the reach of its laws. 13/ Such torts would

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12/ Compare Restatement (Second) of Foreign Relations Law of the United States § 183 (1965).

13/ Compare O'Reilly de Camara v. Brooke, 209 U.S. 45 (1908); (Continued)

not, however, include violations, such as those claimed in these cases, committed by officials of a foreign sovereign within its territory and against its own nationals -- a context in which the United States bears no responsibility under the law of nations for either preventing the conduct or affording redress. Cf. 1 Op. A.G. 68, 70 (1797); Lauritzen v. Larsen, 345 U.S. 571, 577-578, 592-593 (1953).

Prior to the adoption of the Constitution, the national government was without power to punish or otherwise provide for the redress of violations of the law of nations within the United States. The Continental Congress could only pass resolutions urging the States to enact criminal laws punishing violations of the law of nations (such as violations of safe conduct or infringements of the rights of ambassadors) and "authoris[ing] suits to be instituted for damages by the party injured." 21 J. Cont. Cong. 1136-1137 (1781). See also 27 J. Cont. Cong. 478-479, 502-504, 564-565 (1784); 29 J. Cont. Cong. 655 (1785); 34 J. Cont. Cong. 109-111 (1788). The Framers of the Constitution concluded that such matters should not be left to the States, and they included among Congress's enumerated powers the power "To define and punish Piracies and Felonies committed on the High

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Moxon v. The Fanny, 17 Fed. Cas. 942, 947-948 (D. Pa. 1793); 26 Op. A.G. 250 (1907)(discussed at note 17, infra); cf. Bolchos v. Darrel, 3 Fed. Cas. 810 (D.S.C. 1795); 1 Op. A.G. 57 (1795); 1 Op. A.G. 68 (1797). See Casto, supra, at 483-484; Tel-Oren, 726 F.2d 774, 783-784 (D.C. Cir. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985).

Seas, and Offences against the Law of Nations." Art. I, § 8, Cl. 10. See The Federalist No. 3 (J. Jay), at 43 (Rossiter ed. 1961) ("Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner").

The Framers conferred this power on Congress in order to enable it to assure other nations that the United States would respect the law of nations. Thus, John Jay argued in The Federalist No. 3 that it was a matter "of high importance to the peace of America that she observe the laws of nations towards all these powers," and he concluded that this would be "more perfectly and punctually done by one national government" than by 13 separate States (id. at 43); see also id. at 44 ("the national government * * * will neither be induced to commit the wrong themselves, nor want power or inclination to prevent or punish its commission by others."). 14/ There is no evidence that the

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14/ See also id. at 44 (emphasis in original) ("So far, therefore, as either designed or accidental violations of treaties and of the law of nations afford just causes of war, they are less to be apprehended under one general government than under several lesser ones, and in that respect the former most favors the safety of the people."); The Federalist No. 42 (J. Madison), at 265 (The Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations."); The Federalist No. 80 (Hamilton), at 476 (explaining the purpose of Article III jurisdiction over cases involving aliens, especially cases those arising under treaties or the law of nations: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing (Continued)

Framers were concerned with punishing violations of the law of nations committed by other nations (or their nationals) against their own citizens within their own territories. Because the Alien Tort Statute was passed only two years after the Constitution was adopted and implements the Law of Nations Clause of the Constitution, the statute likewise should not be construed to confer jurisdiction on the federal courts over suits brought by aliens to obtain redress for torts committed in a foreign country that have no nexus to the United States. 15/

3. The limitation upon the jurisdictional reach of Section 1350 that is suggested by the Law of Nations Clause of Article I is supported by the text of the statute. The reference to a tort "committed in violation of * * * a treaty of the United States" presumably means a tort committed in violation of a specific treaty obligation undertaken by the United States to afford protection to a class of persons that includes the alien plaintiff. It cannot reasonably be read to refer to a violation of a treaty obligation undertaken by another nation (particularly the nation of which the alien plaintiff is a citizen), even if

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it.").

15/ Compare Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (acts of Congress ordinarily are construed to apply "only within the territorial jurisdiction of the United States"); Blackmer v. United States, 284 U.S. 421, 437 (1932) (same); American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (same). See Restatement (Second) of Foreign Relations Law of the United States §§ 10-35 (1965); Restatement (Second) of Foreign Relations Law of the United States (Revised) §§ 402-03 (Tent. Draft No. 6, 1985); id., § 403 (Tent. Draft No. 7, 1986).

the United States also happens to be a party to the same treaty. This construction suggests that the "in violation of the law of nations" component of the statute should be read in the same manner -- namely, as limited to violations of United States obligations under the law of nations to afford protection to aliens against certain torts committed by United States citizens or other persons subject to its jurisdiction.

In fact, the final phrase in 28 U.S.C. 1350 ("of the United States") can reasonably be read to modify both "treat[ies]" and "the law of nations," so that the statute by its terms confers jurisdiction only over suits for a tort "committed in violation of the law of nations * * * of the United States" -- i.e., in violation of duties under the law of nations as accepted and applied by the United States in the regulation of its domestic affairs and the affairs of its people. Cf. Lauritzen v. Larsen, 345 U.S. at 578. But even if the text of Section 1350 might literally be read to cover suits between aliens arising out of incidents entirely within the jurisdiction of a foreign country, such a "'surface literal meaning [of] a jurisdictional provision * * * would not be consistent with the "sense of the thing" and would confer upon [the] Court a jurisdiction beyond "what naturally and properly belongs to it."'" Heckler v. Edwards, 465 U.S. 870, 879 (1984) quoting Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 94 (1960) (Frankfurter, J., dissenting) (quoting American Security & Trust Co. v. District of Columbia, 224 U.S. 491, 495 (1912) (Holmes, J.)). Section 1350 therefore

does not provide jurisdiction over plaintiffs' claims in the present cases.

II. PLAINTIFFS DO NOT HAVE A CAUSE OF ACTION ARISING UNDER FEDERAL LAW FOR THE ALLEGED VIOLATIONS OF THE LAW OF NATIONS IN THE PHILIPPINES

If the court should conclude, contrary to our submission in Point I, that the district courts have jurisdiction under 28 U.S.C. 1350, these cases nevertheless should be dismissed because plaintiffs do not have a cause of action conferred by United States federal law to recover damages for torts allegedly committed by the defendants in the Philippines. 16/

Section 1350 does not, in and of itself, create a cause of action. The statute is purely jurisdictional. See Casto, supra, at 478-480 (any suggestion to the contrary is "simply frivolous"). 17/ Analogous federal jurisdictional statutes

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16/ It is irrelevant for present purposes whether plaintiffs might have causes of action under the laws of the Philippines (including any laws adopted by the Philippines Government that incorporate into Philippines law what that Government deems to be appropriate principles of international law). Even if Congress could under Article III extend the (non-diversity) jurisdiction of the federal courts to a case that would appear to be governed solely by the substantive law of a foreign country, the First Congress plainly did not do that in the Alien Tort Statute.

17/ A 1907 opinion by Attorney General Bonaparte stated that the Alien Tort Statute (along with the federal diversity statute) "provide a forum and a right of action." 26 Op. Atty. Gen. 250, 252-253 (1907). He did not elaborate upon or offer any basis for the latter point, which was not directly at issue, and, as noted above, federal jurisdictional statutes do not generally provide a cause of action. In addition, the conduct there at issue -- the diversion of water from the Rio Grande River by an irrigation company that injured downstream water users in Mexico -- occurred (Continued)

likewise do not create private rights of action. See e.g., Davis v. Passman, 442 U.S. 228, 236-244 (1979) (28 U.S.C. 1331); compare Handel v. Artukovic, 601 F. Supp. 1421, 1426-1427 (C.D. Cal. 1985). Indeed, in the case primarily relied upon by plaintiffs, the Second Circuit declined to construe Section 1350 as "granting new rights to aliens" (Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980)). 18/ See also Dreyfus v. Von

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in the United States (not, as here, in a foreign country); it was alleged to have violated a specific prohibition in a treaty between the United States and Mexico (not, as here, more general principles of international law that have not been formally incorporated into domestic law by Act of Congress or treaty); and the suggested right of action -- a suit by one private party against another for wrongful diversion of water -- was familiar to domestic law (unlike the instant suits against former officials of a foreign government). Cf. County of Oneida v. Oneida Indian Nations, 470 U.S. 226, 234-236 (1985).

18/ In Filartiga, the Second Circuit held, in accordance with the United States' amicus submission, that "an act of torture committed by a state official against one held in detention violates * * * the law of nations" (630 F.2d at 880). The Second Circuit further held that federal jurisdiction could be exercised under Section 1350 over a suit brought by one Paraguayan national against another based on such torture in Paraguay. 630 F.2d at 884. In so ruling, the Second Circuit failed to consider whether plaintiffs had a private right of action, as such, under federal law. See id. at 887, 889. The United States, in its amicus submission, likewise did not address this issue in terms of whether the plaintiffs had an implied private right of action under federal law, but the United States did submit that the right under international law to be free from torture is "judicially enforceable" in a United States court. U.S. Mem. at 20-25. Although the United States adheres to the view it expressed in Filartiga that an act of torture committed under color of official authority violates principles of international law, on further consideration, we do not believe, for the reasons stated in the text herein, that the plaintiffs in Filartiga had a cause of action cognizable in federal court for a violation of those principles in Paraguay.

The United States' amicus submission in Filartiga also did (Continued)

Finck, 534 F.2d 24,28 (2d Cir.), cert. denied, 429 U.S. 835 (1976). Plaintiffs cite no other federal statute that confers a private right of action in circumstances such as these. Nor, finally should this court "imply" a private right of action, cognizable in the courts of the United States under 28 U.S.C. 1350, in favor of foreign national plaintiffs against officials of their own country, either under a "treaty of the United States" or under the "law of nations" insofar as it forms a part of the law of the United States.

A. No Treaty Gives Plaintiffs A Private Right Of Action

Plaintiffs do not have a private right of action based on any provision of a United States treaty. Treaties are compacts

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not specifically address the scope of a district court's jurisdiction under 28 U.S.C. 1350, as we have done in Point I of the brief. However, for the reasons stated in Point I, we disagree with the Second Circuit's view that 28 U.S.C. 1350 confers jurisdiction on the district courts over suits based on conduct that occurred in another country and involved only its nationals (and that therefore was not directly governed by the law of the United States), merely because the conduct allegedly violated general principles of the "law of nations" that purportedly applied in that other country. See 630 F.2d at 885-889. Even if Congress might constitutionally vest the federal courts with jurisdiction to entertain such suits (see Casto, supra, at 512-525; cf. Tel-Oren, 726 F.2d at 782-788 (Edwards, J. concurring)), there is no basis for believing that the First Congress contemplated such a novel and intrusive function for the United States courts when it enacted the Alien Tort Statute in 1789. The more recent Second Circuit ruling in Amerada Hess Shipping Corp. v. Argentine Republic, No. 86-7602, 7603 (Sept. 11, 1987), simply reiterated the Filartiga rationale that "[i]f an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction" (slip op. 5171); Amerada Hess therefore provides no additional support for jurisdiction here.

between nations that ordinarily do not confer judicially enforceable private rights in the absence of language clearly manifesting such an intent. Head Money Cases, 112 U.S. 580, 598-599 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). In any event, no treaty creates rights under United States law in favor of foreign nationals against officials of their own country acting within its territory.

The only formal treaty upon which plaintiffs rely is the United Nations Charter. The U.N. Charter provides that one of the "[p]urposes of the United Nations [is] * * * [t]o * * * promot[e] and encourag[e] respect for human rights and for fundamental freedoms." Art. 1, ¶ 3, 59 Stat. 1031, 1037. This general language, however, speaks to the member nations (see Art. 2, 59 Stat. 1037); it does not purport to create private rights of action (compare Cannon v. University of Chicago, 441 U.S. 677, 689-693 (1979)). And the courts have held that the U.N. Charter "do[es] not create rights enforceable by private litigants in American courts." Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373-375 & n.5 (7th Cir. 1985) (collecting authorities); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); People of Saipan v. Department of Interior, 502 F.2d 90, 101-103 (9th Cir. 1974) (Trask, J., concurring), 420 U.S. 1003 (1975); Sei Fujii v. State of California, 38 Cal.2d 718, 722-725, 242 P.2d 617, 620-622 (1952);

but see United States v. Tascannino, 500 F.2d 267, 277-279 (2d Cir. 1974).

The plaintiffs in these cases do not have an implied federal-law cause of action under the U.N. Charter for the additional reason that the acts of which they complain were not in violation of any obligations assumed by the United States when it became a party to the U.N. Charter. Adherence to the U.N. Charter did not extend the substantive law of the United States, including U.S. treaty obligations, into the territories of the other parties to the Charter. 19/ Nor can the Charter be construed to authorize or obligate a member to provide judicial redress for citizens of another member based on that member's violations of the Charter.

B. The Law Of Nations Does Not Give Plaintiffs A Private Right Of Action

Plaintiffs do not have a private right of action based on the "law of nations." None of the sources of international law cited by plaintiffs suggests a private right of action, let alone

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19/ Plaintiffs also cite: (1) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Gen. Ass. Res. 39/46, U.N. GAOR Supp. (No. 51) (A/39/51) 197 (1975); (2) the American Convention on Human Rights, OAS Treaty Series No. 36, at 1, OAS Off. Rec. BEA/Ser. 4/V/II 23, Doc. 21, Rev. 2 (Eng. Ed. 1975); (3) the International Convenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights, U.N. Gen. Ass. Res. 2200 (XXI) A, U.N. Doc. A/63/6 (Dec. 16, 1966). However, the United States is not a signatory to the first of these treaties and the Senate has not consented to the ratification of the other three; to the extent that they nevertheless form part of the law of nations, they are covered by the considerations in the next section.

one cognizable in the courts of a country that is a stranger to the conduct complained of.

1. Plaintiffs argue that a "court created," "common law" of private tort remedies for violations of international law would be analogous to a Bivens remedy for tortious conduct in violation of the United States Constitution. 20/ See Sison Br. 42-45. But the two situations are quite different. The United States Constitution applies of its own force, and without possibility of legislative amendment, to restrain the actions of governmental officials in the United States. By contrast, the law of nations applies to matters within the jurisdiction of the United States only insofar as it is accepted into the laws of the United States (either by Congress or by a court acting pursuant to legislative authorization), and its content and application are at all times subject to the control of Congress pursuant to its power to "define and punish * * * Offences against the Law of Nations" (Art. I, § 8, Cl. 10). 21/ Compare United States v. Stanley,

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20/ See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

21/ Even under Bivens, a private right of action will not be found where there are "special factors counselling hesitation in the absence of affirmative action by Congress" (United States v. Stanley, No. 86-393 (S.Ct. June 25, 1987), slip op. 8-9; Bush v. Lucas, 462 U.S. 367, 374-380 (1983); Chappell v. Wallace, 462 U.S. 296, 298 (1983)). Especially where, as here, the United States courts are asked to perform the sensitive task of fashioning a damage remedy against officials of a foreign government, the primary role of the political Branches is a compelling factor counselling hesitation. See Tel-Oren, 726 F.2d at 801-808 (Bork, J., concurring); Casto, supra, at 482 ("A (Continued)

slip op. 9. Where Congress has enacted a law defining the law of nations in a particular setting, the question whether a private right of action should be recognized for a violation of the law of nations would presumably be controlled by Cort v. Ash, 422 U.S. 66 (1975), and its progeny. A private right of action will be recognized in those circumstances only if Congress affirmatively intended to confer one. See California v. Sierra Club, 451 U.S. 287, 293, 297 (1981); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 377-378 (1982); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985).

In the instant cases, plaintiffs do not rely upon, or cite, any Act of Congress that "defines" any substantive principles of international law to be part of United States law that governs the treatment of prisoners even within the United States (compare 42 U.S.C. 1997a(a)) -- and that might be the starting point for implying a private right of action under a federal statute. Nor is there any Act of Congress that purports to confer any rights under United States law (whether drawn from principles of international law or otherwise) on foreign nationals imprisoned in their own country. Accordingly, there is no basis whatever to conclude that Congress intended to confer on anyone a private

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unilateral judicial expansion of Bivens to the field of rights deemed by a court to be created by international law and treaties of the United States would stand the Constitution on its head."); compare Sanchez-Espinoza v. Reagan, 770 F.2d 202, 208-209 (D.C. Cir. 1985).

right of action based on a violation of any such principles. 22/ If these suits had been brought by United States citizens, in prison in this country, against their United States jailors, and if the court concluded that the conditions of the plaintiffs' confinement did not constitute cruel or unusual punishment under the Eighth Amendment and did not otherwise violate any provisions of federal law, it seems obvious that a federal court would not be free to fashion a private damage remedy in favor of the prisoner plaintiffs based solely on alleged violations of principles of "international law." A fortiori, a court in the United States has no authority to fashion a damage remedy under "international law" against officials of a foreign government for actions taken within its borders against its own citizens.

2. The traditional role of the "law of nations" is not the creation of private rights. As the Supreme Court said in Sabbatino, 376 U.S. at 422-423:

22/ By contrast, the classic violations of the law of nations that were recognized when the Alien Tort Statute was enacted -- violations of safe conducts and passports, infringements of the rights of ambassadors, and piracy (see note 11, supra) -- were specifically made criminal offenses under the laws of the United States in 1790 (Act of Apr. 30, 1790, §§ 8-12, 25-28, 1 Stat. 113-115, 117-118), and they remain so today (18 U.S.C. 112, 1651-1661). Especially in light of the ancient lineage of these offenses against the law of nations, it may be that a private right of action, cognizable under 28 U.S.C. 1350, could properly be implied under the federal statutory provisions that proscribe such conduct within the jurisdiction of the United States. See Tel-Oren, 726 F.2d at 813-815 (Bork, J., concurring).

> The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.

See also Canadian Transport Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980). While several documents on which appellants rely are of course concerned generally with the treatment of individuals, 23/ none purports to create a private damage remedy for a violation of the principles they declare 24/

23/ See J. Blum & R. Steinhardt, Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After Filartiga v. Pena-Irala, 22 Harv. J. Int'l Law 53, 64-97 (1981).

24/ Some of these documents are merely aspirational and contain only precatory language. See Tel-Oren, 726 F.2d at 818 (Bork, J., concurring), discussing (1) Universal Declaration of Human Rights, U.N. Gen. Ass. Res. 217(A)(III) (Dec. 10, 1948), 3 U.N. GAOR, U.N. Doc. 1/777 (1948); (2) International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights, U.N. Gen. Ass. Res. 2200(XXI)A, U.N. Doc. A/6316 (Dec. 16, 1966); and (3) American Convention on Human Rights, OAS Treaty Series No. 36, at 1, OAS Off. Rec. BEA/Ser. 4/V/II 23, Doc. 21, Rev. 2 (Eng. Ed. 1975). The other documents cited by plaintiffs that appear to fall in this category are (4) American Declaration of the Rights and Duties of Man, Art. 26, OAS Doc. No. 21 (Rev. 2) 15 (1975), OEA Serv. L./V/II 23; (5) Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations, U.N. Gen. Ass. Res. No. 2625 (XXV) (Oct. 24, 1970); and (6) Standard Minimum Rules for Treatment of Prisoners, U.N. Doc. E/3048 (1957).

Other of the documents cited by plaintiffs simply do not reflect, either explicitly or implicitly, an agreed-upon system of private "international tort" remedies: (1) U.N. Charter, 59 (Continued)

-- much less a remedy in the courts of a nation that is a stranger to the alleged wrong. 25/

For example, the most specific document cited by plaintiffs that addresses the subject of torture is the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Gen. Ass. Res. 39/46, U.N. GAOR Supp. (No. 51) (A/39/51) 197 (1975). As noted above (see note 19, supra), however, the United States is not a party to that Convention, which alone is a sufficient reason for a court in the United States to refrain from implying a private right of action to enforce its provisions. But even if the United States were a party to the Convention, it clearly would not provide an "international tort remedy" to the plaintiffs in these cases. First, the primary focus of the Convention is criminal (as

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Stat. 1031; (2) U.N. Declaration Against Torture, Gen. Ass. Res. 3059, 28 U.N. GAOR Supp. (No. 30) 74, U.N. Doc. A/9030 (1973); (3) U.N. Declaration on the Protection of All Persons From Being Subject to Torture, Gen. Ass. Res. 3452, Annex, Art. 2, 30 U.N. GAOR Supp.. (No. 31) 91, U.N. Doc. A/10034 (1975); (4) U.N. Resolution on Disappeared Persons, U.N. Gen. Ass. Res. 33/173 (1978); (5) U.N. Resolution on Torture and other Cruel, Inhuman and Degrading Treatment or Punbishment, U.N. Gen. Ass. Res. 35/178; and (6) U.N. Resolution on Code of Conduct for Law Enforcement Officials, U.N. Gen. Ass. Res. 35/170.

25/ See also Casto, supra at 475-76 ("Those who advocate the creation of a system of private tort remedies based solely on international law have adduced virtually no positive evidence supporting the existence of such a remedy."); Comment, Torture As A Tort In Violation of International Law: Filartiga v. Pena-Irala, 33 Stan. L. Rev. 353, 357-59 (1981)("to interpret international human rights law to create a federal private right of action overstates the level of agreement among nations on remedies for human rights violations.").

distinguished from remedial) jurisdiction over acts of torture. Arts. 4 & 5. Second, although the Convention states that "[e]ach State Party shall insure in its legal system that the victim of an act of torture obtains redress and * * * fair and adequate compensation," that language pertains to matters under "national law" within the jurisdiction of the "State Party" in which the acts were committed; the language is quite inconsistent with any notion that a prisoner wronged in his own state should have redress in the courts of another. Art. 14; see also Art. 12 (State to ensure prompt investigation "whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction."). Thus, to the extent the Convention is implicated here, it is directed to remedies that might be provided by the Government of the Philippines under its own law, not the fashioning of remedies by the courts of other nations under their laws (including the view embodied in the laws of those other nations regarding the appropriate principles of international law). 26/

26/ As Ambassador Richard Shifter stated after the Convention was adopted, "[i]n the final analysis * * *, it is the States members of the international community which are morally responsible for implementing the existing prohibition against torture and other forms of ill-treatment." Press Release, USUN 164-(84) (Dec. 10, 1984); U.N. Doc. A/39/PV. 93, at 12 (Dec. 12, 1984).

Similarly, the most specific of the U.N. General Assembly Resolutions cited by plaintiffs, the Declaration on the Protection of All Persons From Being Subject to Torture (see note 24, supra), declares torture and other cruel, inhuman or (Continued)

In sum, there is no support in domestic or international law for the implication by a court in the United States of a private damage remedy against the present or former official of a foreign government for torts allegedly committed against its citizens within its own territory. If the courts of the United States are to assume that extraordinany responsibility, the authority to do so must be expressly conferred by Congress. Compare Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490-491 (1983). 27/

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degrading treatment or punishment of prisoners to be "an offense to human dignity" worthy of "condemn[ation]" and suggests that "[e]ach State Party * * * ensure" legal remedies for such acts under "national law." This document obviously does not itself provide a private remedy where, as here, "national law" (the law of the United States) does not so provide. Nor does it contemplate that one nation will furnish a remedy for acts committed by or within the territory of another.

27/ Of course, in some contexts, where Congress has not passed a specific statute defining the law of nations applicable to a particular set of facts, a court, in a case otherwise properly pending before it, might fill this void by adopting relevant principles of international law as the most appropriate federal rule of decision. See, e.g., The Paquete Habana, 175 U.S. 677 (1900). But the Supreme Court has made clear that the courts may fashion "federal common law" only as a "'necessary expedient'" in a "'few and restricted' instances" (Milwaukee v. Illinois, 451 U.S. 304, 313-314 (1981)(citations omitted). This limited authority of the federal courts to fashion substantive federal common law in order to fill interstices in federal statutory law plainly does not permit a court to fashion remedies for torts committed by aliens against aliens in a foreign country, where even federal statutory law does not ordinarily apply. This case is therefore quite different from Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), where the Court found a congressional intention that the federal courts fashion a body of federal law to govern the interpretation of collective bargaining agreements governing labor relations in the United States -- relations that were already pervasively regulated by substantive federal law.

III. THE COURT SHOULD NOT IN ANY EVENT RESOLVE THE APPLICABILITY OF THE ACT OF STATE DOCTRINE

In addition to inquiring whether the plaintiffs have a cause of action cognizable under 28 U.S.C. 1350, the court's July 16, 1987 order inviting the United States to file a brief poses two additional questions, both of which relate to the possible application of the act of state doctrine to these cases. We shall first address the latter of these remaining questions.

1. Question 3 inquires: "Should the federal courts abstain from hearing these cases because of potential embarrassment to the United States? See Republic of the Philippines v. Marcos, Nos. 86-6091, 86-6093, slip op. at 32 (9th Cir. 1987)." It is the view of the Department of State that the entertainment of these suits would not embarrass the relations between the United States and the Government of the Philippines. Indeed, the Government of the Philippines has filed a brief amicus curiae arguing that these suits should be permitted to proceed in the district courts. 28/

At the page of the prior Marcos opinion cited in Question 3, the court stated that "[a]bsent express encouragement by the political branches of our government," it would be reluctant to embark upon an adjudication of the particular issues involved.

28/ The panel majority in Republic of the Philippines v. Marcos "wonder[ed] how the current Philippine government would react to a pronouncement by the courts of the United States that Mr. Marcos' actions were entirely legal and proper" (slip op. 30 n.14). In light of the amicus filings by the Government of the Philippines, we must assume that it understands the risk of an adverse judgment.

See Republic of the Philippines v. Marcos, slip op. 32. Since we do not believe that the district courts have jurisdiction or that plaintiffs have a cause of action under United States law (see pp. 7-31, supra), we are of course unable to give "express encouragement" to adjudication of these cases in federal court.

2. Question 2 posed by the July 16 order inquires: "May the federal courts hear these consolidated cases, despite the 'act of state' doctrine, either because wrongful death, wrongful arrest or torture cannot be 'acts of state' as a matter of law, or because the 'balance of relevant considerations' favors a hearing? See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)." The possible application of the act of state doctrine to these cases presents difficult questions. Because these cases are not cognizable under 28 U.S.C. 1350, we believe the court need not and should not seek to resolve the application of the act of state doctrine (or other doctrines that might warrant declining to adjudicate these cases), and we accordingly do not propose a definitive resolution of those issues here. However, we do offer the following comments:

a. The act of state doctrine is only one of several legal doctrines that might in appropriate circumstances warrant a United States court's declining to adjudicate a claim by foreign nationals against a former high official of their own government for acts committed in their own country. For example, the court in the prior Marcos case concluded that quite aside from the act

of state doctrine, 29/ the political question doctrine rendered it unlikely that the Republic of the Philippines would succeed on the merits of its claims (slip op. 37-40; cf. Tel-Oren, 726 F.2d at 801-803; id. at 823-827 (Robb, J., concurring)). A court also might consider the principle that the courts of one nation will not enforce the penal laws of another (see Sabbatino, 376 U.S. at 413-415); evidentiary privileges and official immunities recognized as a matter of foreign, international or United States law; and the appropriateness of dismissal on grounds of forum non conveniens (see Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), cert. denied, 469 U.S. 1106 (1985) 30/) or abstention (cf. Younger v. Harris, 401 U.S. 37 (1971); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)). We express no view here on the possible application of any of these doctrines to these cases or to others brought against Mr. Marcos.

29/ We read the prior Marcos decision to rest primarily on the predictive judgment, necessary in the context of a request for a preliminary injunction, that it was unlikely that plaintiffs would ultimately prevail on the merits. The court did not order the suit dismissed and did not purport to resolve all questions concerning the application of the act of state doctrine.

30/ See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 260 n.29(1981)) (the "need to apply foreign law" may "favor[] dismissal"); id. at 255 (United States courts are "fully justified" in distinguishing between "resident or citizen plaintiffs and foreign plaintiffs" with respect to the choice of forum); see also In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 809 F.2d 195 (2d Cir. 1987).

In its opinion in the prior Marcos case, the court identified a number of factors that, in its view, made it especially difficult to determine that adjudication of Mr. Marcos's liability to his own country and its people is an appropriate undertaking for the courts of the United States: Mr. Marcos's former status as head of state and the asserted breadth of his "dictatorial" powers (slip op. 12, 26-27, 29, 37-38, 39-40); the political differences between the current Government of the Philippines and the Marcos regime (id. at 30-31); the possible intrusion by the courts into our relations with the Government of the Philippines and other aspects of foreign relations that are properly the concern of the political branches (id. at 32-36); the need for a United States court to pass on a former head of state's claim of immunity under the constitution of his nation (id. at 36-37); and the need to decide novel and difficult questions of Philippine law and international law concerning the scope and propriety of the exercise of powers under a regime of martial law (id. at 36-39).

We do not believe that these considerations should be given expression solely, or even principally, through the act of state doctrine. As we explain below, although the act of state doctrine responds to some of these concerns, that doctrine actually has limited and rather precise contours, and it ordinarily does not require the dismissal of a suit merely because the suit touches

upon foreign relations concerns. 31/

b. The classic formulation of the act of state doctrine was set forth in Underhill v. Hernandez, 168 U.S. 250, 252 (1897):

> 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 done 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.

Although this quotation from Underhill suggests that the doctrine is absolute, the Supreme Court in subsequent cases has declined to lay down an "inflexible and all-encompassing" rule (Sabbatino, 376 U.S. at 428). See First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682 (1976). There accordingly are several distinct questions that must be addressed in determining whether the act of state doctrine applies in a particular case:

First, the conduct at issue must be the act of the sovereign. Dunhill, 425 U.S. at 694-695. The conduct must have been a "public act," involving an exercise of sovereign authority. As this court observed in its prior Marcos decision, "not everything a public official does is an official act; to the extent Mr. Marcos engaged in actions as a private citizen, he is

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31/ In Sabbatino, the effect of application of the act of state doctrine was not to require dismissal of the suit, but rather to apply the act of state as a rule of decision in the case.

subject to suit like anyone else." Republic of the Philippines v. Marcos, slip op. 26. When the government official involved is the former head of state and exercised allegedly dictatorial powers, this distinction may be difficult for a United States Court to draw.

Second, even if the conduct is attributable to the foreign government, it must be of the sort to which the act of state doctrine applies. In Dunhill, for example, four Justices concluded that the concept of an act of state does not apply to the repudiation by a foreign sovereign of an ordinary commercial debt. 425 U.S. at 695-706 (opinion of White, J.).

Third, even if the conduct was an act of state, that does not end the matter. In Sabbatino, the Court concluded that the expropriation at issue was an act of state whose validity would not be considered by United States courts, but it observed that "[t]he balance of relevant considerations" might permit a different result in other circumstances. 376 U.S. at 428.

c. The court asks in Question 2 of its July 16 order whether these suits can be entertained, despite the act of state doctrine, on the theory that "wrongful death, wrongful arrest or torture cannot be acts of state as a matter of law." In our view, characterizing the conduct at issue as "wrongful" does not necessarily remove it from the scope of the act of state doctrine; to the contrary, the very purpose of that doctrine is to prohibit a court of the United States from inquiring into

whether an official act was lawful. 32/ Cf. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 692-695 (1949). In Sabbatino, for example, it was alleged that the expropriation at issue was illegal as a matter of international law, but that did not render the expropriation any less an official act of the Cuban Government. Conversely, not every act undertaken by a public official under color of office is an "act of state." Determining whether the conduct alleged here constitutes acts of state would involve difficult evidentiary and other questions.

Question 2 posed by the court also inquires whether even if the conduct constitutes an act of state, the "balance of relevant considerations" (Sabbatino, 376 U.S. at 428) suggests that the suit should be entertained. Weighing in favor of a hearing in United States courts would be the fact that there may be a greater consensus among nations here than in Sabbatino that at least some of the conduct alleged (e.g., torture) violated international law. Compare 376 U.S. at 428. Weighing against such a hearing, however, would be the fact that the acts complained of in these cases were torts committed in a foreign country by some citizens of that country against other citizens of that country; unlike Sabbatino, First National City Bank, and

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32/ Although there may be cases where the pleadings demonstrate the need to adjudicate the lawfulness of a foreign sovereign act, the burden is normally on the defendant to establish that the challenged conduct in fact involved an act of state. Republic of the Philippines v. Marcos, 806 F.2d 344, 359 (2d Cir. 1986).

Dunhill, these cases involve no close relationship between the challenged conduct and any interests of the United States or its people as such: the defendants (and the then-Government of the Philippines) did not owe a duty to the United States as regards their observance of Philippine law or the principles of international law that may be deemed to have been applicable to the Philippines. It accordingly may be questioned whether the courts of the United States should be asked to hold the defendants accountable for alleged violations of Philippine law or international law (cf. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)) -- at least in the absence of an Act of Congress expressly authorizing the courts to undertake such a novel and sensitive task.

d. As can be seen, the act of state issues in this case are difficult and are closely related to the question whether a cause of action should be implied by the courts under the law of nations. See Tel-Oren, 726 F.2d at 801-808 (Bork, J., concurring). Because in our view the courts have no jurisdiction in these cases and the plaintiffs do not in any event have a cause of action under federal law, we urge the court not to reach the act of state issues in these cases at this time. Instead, if the court does not affirm the orders of dismissal on the ground that the district courts are without jurisdiction or that plaintiffs are without a cause of action, we suggest that the court vacate the judgments below and remand the cases to the

district courts for consideration of the possible applicability of other doctrines that may bear on their justiciability. Resolutions of those other issues might obviate or facilitate resolution of the act of state questions.

CONCLUSION

The judgments of the district courts should be affirmed.

Respectfully submitted.

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