

HUMAN RIGHTS SYMPOSIUM: FURTHER COMMENTARY

INTERNATIONAL HUMAN RIGHTS AND THE ALIEN TORT STATUTE: PAST AND FUTURE

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The last issue of the *Houston Journal of International Law* contained several articles, including one by this author, dealing with recent cases of domestic enforcement of international human rights.¹ One of the two cases in which interest was greatest was *Filartiga v. Pena-Irala*.² I submitted on various grounds that, *inter alia*, there were so many built-in restrictions in the relevant law (Alien Tort Statute)³ of this case that too much euphoria was not altogether sound or justified. Human rights activists, it was pointed out, might be reading too much into this ruling.

However, despite a conservative evaluation, it was also stressed that, in some ways, positive contribution in the domain of the domestic enforcement of international human rights in this country had taken place. In retrospect, this author is convinced that observation was both prudent and proper. As we shall see hereinafter, nothing is gained by being hyperbolic in a field which must, *ex hypothesi*, have teeth to be meaningful, and not be merely a perfect paper edifice impregnable to normal juridical scrutiny.

However, as it later turned out, Professor Paust, who wrote a commentary on the various articles published in the aforementioned issue,⁴ did not look too kindly on such conservative analysis. Consequently, the *Houston Journal of International Law* has been very kind in inviting

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1. Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13 (1981).

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

3. 28 U.S.C. § 1350 (1976).

4. See generally 4 HOUS. J. INT'L L. 1-156 (1981); See Paust, *Litigating Human Rights: A Commentary on the Comments*, *id.* at 81-100. In his commentary, Professor Paust focuses exclusively on some of my views regarding the *Filartiga* case. For my initial views, see Hassan, *supra* note 1.

this author, along with others, to reply to the comments of the Commentator.

Constraints of space alone will dictate that my observations remain brief. In any case, since the Commentator has focused mostly on matters pertaining to the position of human rights in international law when the Alien Tort Statute was enacted, and the bright prospects, according to him, of its use in the future, a re-examination of my submissions regarding the substance of the *Filartiga* ruling is not necessary.⁵ Nevertheless, by preface it may be mentioned that the controversy, as raised by the Commentator, particularly in response to some of the present author's views, was "needless" (originally Professor Paust's word). By being unduly assertive about the position of human rights in international law two hundred years ago, as the Commentator appears to be, we do no service to the cause professedly now being advanced. Similarly, the Commentator's *prophecy* that the ruling will prompt "foreign" "counsel" of some legendary "competence" to advise their "clients" to "follow" their brutish tormentors to the United States, is so conjectural as not to envisage perhaps any serious consideration of those who are meant to be benefited by this assertion.⁶ (The words enclosed in quotation marks are those of Professor Paust.)

The Commentator has chosen to criticize six points discussed in my article.⁷ In view of the tenor of the criticism, I am relieved that

5. Professor Paust did not comment very extensively on most of the substantive issues which I discussed. Some of these issues were also raised by the other writers. See generally 4 Hous. J. INT'L L. 1-156 (1981). Professor Bilder accurately summarized a few of these important issues when he said the following:

Filartiga has been hailed as a breakthrough by human rights advocates and is certainly an interesting and significant decision. . . . However . . . It leaves many questions unanswered, including the following: whether the courts will be willing to hold that practices other than such widely-abhorred practices as torture violate customary law (for example, would the court assert jurisdiction under the statute over a tort claim based on apartheid); the substantive law applicable to a civil suit of this type based on a tort in a foreign country; the application of the *forum conveniens* doctrine. I have some question whether United States courts will prove very receptive to the idea that they should furnish a forum for suits by foreigners to vindicate alleged violations of human rights abroad, or indeed whether this is an effective way of promoting human rights in other countries.

Bilder, *Integrating International Human Rights Law into Domestic Law—U.S. Experience*, *id.* at 6-7.

6. Paust, *supra* note 4, at 82. In his commentary, Professor Paust refers to himself as a "clean-up" commentator. *Id.* at 81. It is unfortunate that, in his "clean-up" operation, instead of being objective, Professor Paust has vigorously advocated only a particular view—that of the "activist". See *infra* note 7. This author respectfully submits that Professor Paust's presentation suffers from a total lack of balance.

7. There is clearly an ideological commitment in the commentary to stress that not only the decision in question is juridically correct, but also that it is essentially devoid of serious doubts, both *historically* as well as *prospectively*. It is interesting to note that Professor Covey T. Oliver predicted such tendencies of human rights "activists" (in courts) when he said the following:

only so few were taken, and not more from the many substantive issues I addressed. An analysis of these different points reveals that, essentially, thematically, the Commentator is focusing on four matters. His first points deal with the future use of *Filartiga*;⁸ secondly, he joins issue with me regarding the history and background of the Alien Tort Statute;⁹ thirdly, he violently disagrees with me regarding the position of the individual in human rights matters in classical international law;¹⁰ and fourthly, he has ideas which are at variance with my views concerning matters of immunity of sovereigns and of their acts before United States courts.¹¹

Having identified the field for the discussion to follow, let us proceed to revisit briefly the Alien Tort Statute utilized in the *Filartiga* decision. As a believer in the rights of mankind, not only in the United States, but *also elsewhere*, the doubts which I expressed earlier were

Obviously counsel owe a duty to cite all the authorities, doing their best to distinguish or reduce the impact of those against them. In this regard there is a vast difference between political rhetoric and advocacy in court. It would be interesting to know whether the district and circuit court judges in *Filartiga* and *Rodriguez-Fernandez* had the benefit of counter-brief *amici* by experts about international law not classifiable as human rights "activists," yet not anti-human rights. A major trouble with activism is that countervailing values tend to be short-changed by the activist-advocates.

Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts*, 4 HOUS. J. INT'L L. 59, 63 n.22 (1981).

Similarly, Dean Christenson expresses doubt about the achievements supposedly made in the *Filartiga* decision:

Human rights advocates claim more than is necessary to help their cause in saying that Judge Kaufman's opinion, from the prestigious Second Circuit Court of Appeals, has established a seminal position for human rights in the domestic courts. They state an aspiration—that the human rights law contained in international covenants, even though not in force in the United States, is now part of federal common law and is thereby enforceable under federal jurisdiction.

Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39, 40 (1981).

Two students reflect an even more cautious attitude toward extending the *Filartiga* decision. See *Recent Cases: International Law—International Law (Jurisdiction)—Human Rights—Torture is a Tort in Violation of the Law of Nations, Giving Rise to Federal Jurisdiction Pursuant to 28 U.S.C. § 1350 Whenever an Alleged Torturer, Regardless of Nationality, Is Served with Process by an Alien within the Borders of the United States—Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), 49 U. CIN. L. REV. 880 (1980); Note, *Torture in Violation of International Law: Filartiga v. Pena-Irala*, 33 STAN. L. REV. 353 (1981). (Professor Paust labels the latter student piece "shoddy scholarship". Paust, *supra* note 4, at 99.) Because the latter student piece was cited by a federal judge in *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 549 (D.D.C. 1981), the Commentator remarks with anger and dismay that: "It is appalling that such a writing could be used to mislead a federal judge" Paust, *supra* note 4, at 99.

8. Paust, *supra* note 4, at 82 (Point A. *The Precedential Value of Filartiga*).

9. *Id.* at 83 (Point B. "*Torts, The Act, and Early Legal History*"), 88 (Point D. *Early Uses of Human Rights*).

10. *Id.* at 86 (Point C. *Individuals and Civil or Criminal Sanctions*), 88 (Point D., *supra* note 7), 90 (Point F. "*Torts, Crimes, and Duties*").

11. *Id.* at 89 (Point E. *The Myth of Foreign State Immunity, and the Need for "Consent"*).

with both reluctance and reservation. My position remains the same. However, after reading the views of Professors Bilder, Christenson, and Oliver in the *Houston Journal of International Law*, I am now more acutely conscious of my original misgivings which were, if anything, conservative.¹² For facility of appreciation, I will approach these issues chronologically. It will be seen that while the first and the fourth points look toward the future, the other two basically deal with the past. Accordingly, the latter two points will be examined first.

I. THE PAST

The two matters dealing with the past which need a comment concern the history of the Alien Tort Statute and the position of the individual in international law with respect to human rights matters.

A. Origin

The point about the origin of the statute is minor, and there is only a difference of degree in the emphasis given by the Commentator and by me to a lack of knowledge regarding its origin. In my article I stated that its origin was "obscure and unknown".¹³ Others, including a court, as I submitted in my prior article, also seem to think so. However, the Commentator, citing three opinions (one of 1795 and two of 1802)¹⁴ of Attorneys General, concludes that it is clear to him that the origin is not "completely unknown".¹⁵ Be that as it may, it is undeniable, as borne out by almost *the next two hundred years* of reported cases, that no one seriously considered this statute to be the kind of *magna carta* it is now being professed by some to be. Furthermore, the opinions referred to by the Commentator, juridically, at best, constitute *contemporanea exposita*.¹⁶ As such, they do give us an idea of the meaning and scope of this law. However, as they were, in fact, rendered subsequent to the passing of the Act, we have less than good grounds for asserting that we definitely *know* the *origins* of its

12. See, e.g., *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981). See generally Bilder, *supra* note 5; Christenson, *supra* note 7; Oliver, *supra* note 7.

13. Hassan, *supra* note 1, at 17.

14. 1 Op. Att'y Gen. 57 (1795); 1 Op. Att'y Gen. 106 (1802); 1 Op. Att'y Gen. 123 (1802).

15. Paust, *supra* note 4, at 85.

16. Precedents from laws of warfare, a fairly well recognized category of wrongs in the domain of international criminal law, must be carefully examined if they are to be used to buttress the proposition that, since an individual could become liable under *international norms* of criminal law for committing a particular act, he could also become liable for the commission of a *civil* wrong for the same *act*. Therefore, while examining such *contemporanea exposita*, it is well to remember that the first known case dealt with the seizure of slaves during wartime. *Bolchos v. Darrell*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

enactment.¹⁷

B. The Position of the Individual in International Law for Purposes of Liability

The next point, which Professor Paust chose to attack, deals with the matter of the individual and of his position in classical international law. My statement was to the effect that, procedurally, "an individual could neither sue nor be sued" under "international law" in 1789.¹⁸ This statement, as borne out by my footnotes, was supported by no less of an authority than Oppenheim.

As will be shortly explained, without bothering to correctly appreciate, even if with disagreement, what was elsewhere stated in my article, Professor Paust embarks upon ridiculing Oppenheim. He asserts that opinions of this nature, by "propounders" of "myths," are "fallacious" and "nonsense"¹⁹ (Professor Paust's words). It is not necessary for me to even rebut the claim that Oppenheim was a writer or propounder of myths, or that he is known for indulging in making fallacious and nonsensical assertions. However, such language in criticism is hardly conducive to a rational, academic discussion, and, in this author's opinion, leaves something to be desired. Moreover, such criticism resembles more a fanatical defense of religious dogma than the presentation of an objective view on legal matters of a historical nature.

To begin with, while discussing the question of domestic enforcement of human rights, at this point in time it is needless to argue emphatically that the position was essentially the same in the Eighteenth Century, as the Commentator appears to argue. Further, if a historical evaluation of this nature appears to conflict with the Commentator's opinion, it is hardly proper to assume his own position to be infallible and that of Oppenheim to be nonsensical. It is indeed the reason for the growth and glory of any legal system that, on many important issues, there remains a strong divergence of judicial and juristic opinion. It is not invariable that one view is necessarily so "right" that the other becomes "nonsense". Thus, nothing is gained by putting one's own

17. *Contemporanea exposita est [optima et] fortissima in lege*. 10 Co. Rep. 70, 77 Eng. Rep. 1027 (1614) (also cited in E. COKE, 2 INSTITUTES OF THE LAWS OF ENGLAND 11 (1642)). However, it is proper to stress that a statute is best explained by following the construction attributed to it by judges who lived at the time it was made, or soon thereafter. H. BROOM, MAXIMS, 682 (1850).

18. Hassan, *supra* note 1, at 19. The "rebuttal," if it can be so called, of the Commentator on this issue is essentially irrelevant and misses the point. In his opinion, an individual could be sued or could sue under *this statute*. Paust, *supra* note 4, at 86-7 & n.31. This type of suit could only be brought by virtue of a *municipal law*.

19. Paust, *supra* note 4, at 86-7, 89.

point of view so assertively as to necessitate derogatively dubbing an authority of Oppenheim's stature as the Commentator has done.

When we actually analyze this point, it appears that, indeed, this was not merely Oppenheim's view. In stating: "[w]hy Oppenheim chose to ignore . . . is not known . . ." ²⁰ it is apparent that the Commentator is unaware that other jurists of great eminence also concurred with Oppenheim's position. The monumental treatise, which bears his name, was brought out by Oppenheim for the first two editions, namely 1905 and 1912. After his death in 1919, the subsequent editions, not to mention several impressions, came under the guidance and editorship of other "giants" on this subject. For example, the fourth edition was undertaken by Sir Arnold McNair in 1926, and the fifth edition onwards, by Sir Hirsh Lauterpacht (*i.e.*, from 1935). To castigate all such authors as "spewing" "fallacious myths" ²¹ (Professor Paust's words) is less than helpful for a dispassionate understanding of this subject.

Indeed, it was not necessary to adopt the position which the Commentator adopted. It was sufficient to state his contrary evaluation of what was, in his opinion, the law of the Eighteenth Century pertaining to the position of the individual. He further asserts that Oppenheim ignored "relevant trends". ²² Far from it. Given the space allocation of my prior article, I fully explained the trends, indeed, by quoting from Oppenheim. ²³ As such, I submit that it is a choice between stating, conservatively, an accurate description of what was the position of the individual in international law two hundred years ago, and making exaggerated and hyperbolic claims based on inept precedents from a field (international criminal law) wherein some authority did exist to prosecute offenders.

As I stated in my article, international law did place obligations on the individual in certain matters, *e.g.* piracy, treaties, and warfare. ²⁴ Gradually, this field of responsibility was widened with the growth of humanitarian laws in the third quarter of the last century. In this century, mostly as a result of the Hague Conferences of 1899 and 1907 and then of the creation of the League of Nations, more developments took place, particularly in the domains of warfare and minorities. But, undoubtedly, the zenith of such endeavors was reached with the events of World War II and the emergence of the Nuremberg Jurisprudence. In this evolution, two points which follow deserve notice:

20. *Id.* at 89.

21. *Id.* at 86.

22. *Id.* at 89.

23. Hassan, *supra* note 1, at 26-7.

24. *Id.*, *see e.g.*, 20, 32-3.

- (1) Most of these matters pertain to the laws of war.
- (2) But even in this respect, there is no unanimity of opinion that the individual, doctrinally, was properly made the incumbent of obligations and duties.²⁵

Indeed, it requires no emphasis to say that, even after 1945, it was not beyond controversy whether international law could *directly* make an individual subject to liability. The great jurist, Hans Kelsen, for example, maintained that to hold an *individual* responsible for unlawful warfare was an *extension of existing* international law.²⁶ Another contemporary author of prominence in the international criminal law field candidly acknowledged the following: "Perhaps the most significant, and *most controversial achievement* of Nuremberg was the application and *clarification of the doctrine of individual responsibility*."²⁷ Thus, it is submitted that, even in the international criminal field, the matter was considered at least *controversial* until the post-World War II era. And this submission is made with respect to a field which *did have both history and precedents in its support*. Indeed, in 1948, Kelsen argued that, since both the United Nations and the International Court of Justice totally excluded individuals, either as plaintiffs or defendants, even for *criminal* wrongs, only the State was answerable.²⁸

The post-Universal Declaration era need not be considered. I already submitted in my prior article that, as a result of numerous efforts at the international level, we now have a state of international law which recognizes the position of the individual for certain purposes.²⁹

The above resumé clearly indicates the evolutionary manner in which, at least in some areas, the individual has received recognition by

25. For a detailed, documented history of this development, see generally B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT (2 vols. 1980); see also M. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE, (1980).

26. Kelsen, *Collective and Individual Responsibility for Acts of State in International Law*, 1948 JEWISH Y.B. OF INT'L L. 226-39, cited in Ferencz, *War Crimes and the Viet Nam War*, 17 AM. U.L. REV. 408 (1968).

27. Ferencz, *supra* note 26. (Emphasis supplied).

28. Kelsen, *supra* note 26.

29. Hassan, *supra* note 1, at 21, 31. Nevertheless, some writers even now contend that it is "completely worthless" to talk about "international law" and "human rights"; see Professor J. S. Watson's observations in a panel discussion at the American Society of International Law meeting. *Inter alia* he said the following: "Since human rights are essentially domestic, and their protection is, after all, what governments are for, the human rights proponents must contend with the fact that international law, by its own terms, has excluded human rights from its bailiwick." Watson, *The Limited Utility of International Law in the Protection of Human Rights*, 74 AM. SOC'Y OF INT'L L. PROC. 1 (1980). In another article, Professor Watson said the following: "Advocacy [on the part of scholars in the area of human rights] has replaced serious study to such an extent that law and wishful thinking are inextricably [interwined]." Watson, *Legal Theory, Efficacy, and Validity of the Development of Human Rights Norms in International Law*, 1979 U. ILL. L. F. 609, 641. The result follows: "[f]lex lata and lex ferenda have thus become merged into an attractive, but futile, philanthropy." *Id.*

international law. But to contend, as the Commentator does, that Oppenheim was incorrect regarding the position of the individual two hundred years ago, or for that matter, even at the dawn of this century, is, for any objective reason, neither necessary nor proper and is indeed quite wrong. At best, the Commentator's view is a "minority" opinion of those jurists who want to believe, more than to be aware of, the relatively clear position of the law on this subject.³⁰

The evaluation given above is exhibited by many contemporary works of significance. Following is a succinct account provided by Professor I. Brownlie:

*The individual does not bear normal responsibility for breaches of obligations imposed by the customary law of nations because most of these obligations can only rest on states and governments, and, further, he cannot bring international claims. Yet there is no rule that the individual cannot have some degree of legal personality, and he has such personality for certain purposes. Thus the individual as such is responsible for crimes against peace and humanity and for war crimes. Treaties may confer procedural capacity on individuals before international tribunals.*³¹

It will thus be seen that not only Oppenheim, but also others, maintained (or still adhere to the "myth") that, to quote Brownlie, the "individual does not bear normal responsibility for breaches of obligations imposed by the customary law of nations".³² As already submitted, this position is still basically correct today, as indeed it was two hundred years ago.³³ The normal lack of responsibility of the individual under international law, of course, can be changed by international agreements. If a proliferation of international consensus emerges on a particular point, it is then arguable that a legal norm, of a customary nature, may come into existence. But in the absence of this consensus, it is futile to argue that international law, *stricti sensu*, applies to the individual.

To further stress that Oppenheim was not guilty of (or is not alone in) such "fallacious" assertions, that only through a state of consensus could the individual become involved in international law, I quote,

30. Could it be that Professor Paust has changed his views? As a member of the audience of the panel discussion (note 24) it is reported that he said the following: "While the first premise of 19th-century international law had been that states were actors, 20th-century realism had included individuals as part of the process." *Perspectives on Enforcement of Human Rights*, 74 AM. SOC'Y OF INT'L L. 26 (1980).

31. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 577 (3d ed. 1979). (Footnote omitted and emphasis supplied).

32. *Id.*

33. Hassan, *supra* note 1, at 20.

with advantage, a well-known United States authority who said the following:

For the purposes of this context . . . international law or the law of nations must be defined as law applicable to states in their mutual relations and to individuals in their relations with states. International law may also, under this hypothesis, be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern. *So long, however, as the international community is composed of states, it is only through an exercise of their will, as expressed through treaty or agreement or as laid down by an international authority deriving its power from states, that a rule of law becomes binding upon an individual.*³⁴

In simple terms, whatever position is taken by the individual must be under the aegis of the consensus of the States.³⁵

C. *Human Rights in Classical International Law*

The last point which needs to be considered in this historical survey deals with the position of human rights in international law in the Eighteenth Century. It is my opinion that, at that juncture in the evolution of this field, human rights were essentially no part of positive international law. In many ways, this proposition flows from what has been said above about the individual. If, *ex hypothesi*, international law did not really recognize the individual, then it would not *directly* address the matter of his rights. The Commentator correctly perceived this to be the case. Equally, since this proposition of mine was based on Oppenheim's observations, the Commentator, consistent with his allied comments, calls such notions "myths" and "nonsense". Since the essence of the theme of my submissions has already been covered above, it is unnecessary to go over it again. *Mutatis mutandis*, the same submissions are adopted here.

Nevertheless, to show that Oppenheim was not alone in such evaluations, reference may be made to other writers. Brierly, for example, said the following: "Under customary law no rule was clearer than that a state's treatment of its own nationals is a matter exclusively within the domestic jurisdiction of that state, i.e., is not controlled or regulated by international law."³⁶

34. P. JESSUP, *A MODERN LAW OF NATIONS* 17 (1948). (Emphasis added.)

35. Hassan, *supra* note 1, at 20, 29.

36. J. BRIERLY, *LAW OF NATIONS* 291 (6th ed. 1963); see also H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950). Of course, the major exceptions to this position were the rules applicable to the treatment of foreigners or large-scale atrocities against

It is thus clear that classical *international law* was not directly concerned with the human rights matters of nationals of a state. Indeed, Brierly says that "no rule was clearer".³⁷ Such is the categorical nature of this position. The *change*, such as it is, in the confines of international law, occurred by virtue of some of the events mentioned earlier and *particularly, by virtue of the events of World War II*. This evolution is amply described by the following words of a contemporary author:

The Second World War and the events leading up to it was the catalyst that produced the *revolutionary developments in the international law of human rights* that characterize the *middle twentieth century*. So potent was this catalyst that it produced not only an unprecedented growth in human rights law, but the *very theory of international law had to be adapted to the new circumstances*. *The individual now becomes a subject of international law* which henceforth would more properly be known as "world law."³⁸

Therefore, one cannot help but feel that, on account of an evangelistic zeal, the Commentator manifestly adopted a position which is totally baseless. It was also needless, since the current state of the law will not be seriously affected if we do not necessarily conclude that the position of the individual and human rights law was identical two hundred years ago. There may be truth in the proposition that man has descended from the anthropoid ape; but that is no reason to also assert that the anthropoid ape was identical to modern man.

Before concluding with the "past," one more comment. The Commentator is at pains to point out that, while the phrase "human rights" appears later, an earlier phrase, "rights of man," was used to cover the same subject.³⁹ The labor expended on this point was not of great use since I had directly acknowledged this fact.⁴⁰ The importance lies not in the phrase, but obviously in the *positivity* given to it by the norms of the law. As submitted above, it was long after the appearance of the phrases that such positivity came into being.

minorities. It is important to note that, in the latter case, the so-called humanitarian, interventions took place mostly against Turkey at the instance of the major European powers. The former types of claims were, in theory, of the national state of the foreigners and not of the individual.

37. *Id.*

38. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in R. LILLICH and F. NEUMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* 1, 5 (1979). (Emphasis added.)

39. Paust, *supra* note 4, at 88-9. The reference of the Commentator to the protection of human rights by domestic, constitutional law is patently irrelevant. The question is whether international law gave any such protection.

40. Hassan, *supra* note 1, at 21.

One word in parentheses about supporting references: The Commentator was either gracious or condescending in "forgiving" me for quoting Oppenheim with approval. But while reading Professor Paust's commentary, I could not help noticing that in the rebuttal of the points mentioned above, including the wholesale condemnation of Oppenheim, the most frequently cited authority by the Commentator was the Commentator himself.⁴¹ Out of the one hundred twenty-five footnoted references, many of which are to cases, about forty directly refer to the Commentator's own articles. While the author has greatly benefited from these citations, it is well to remember that the subject of the individual and human rights in international law has been of extreme and extensive concern to numerous writers. A reading of such literature will show the diverse approaches which can be adopted in this regard.⁴²

II. THE FUTURE

We can now move on to examine the rest of Professor Paust's criticism. As already submitted, it can be conveniently analyzed by seeing

41. To support the position that human rights formed part of classical, international law, the Commentator cites two of his papers. Paust, *supra* note 4, at 88 n.41. Many of Professor Paust's footnoted references are to three of his own papers: Paust, *International Law and Control of the Media: Terror, Repression, and The Alternatives*, 53 IND. L.J. 621 (1978); Paust, *Human Rights and The Ninth Amendment: A New Form of Guarantee*, 6 CORNELL L. REV. 231 (1975); Paust, *Human Rights: From Jurisprudential Inquiry to Effective Litigation* (Book Review) 56 N.Y.U.L. REV. 227 (1981). To support the statement that the position of the individual in our own era is not beyond controversy, *see, e.g.*, the report of Professor Waldock (Special Rapporteur of The International Law Commission). *Inter alia*, he said the following: "The *controversial nature of the question* whether or to what extent an individual may be regarded as a subject of international law *requires no emphasis*. . . ." (Emphasis supplied.) Third Report on the Law of Treaties, [1964] 2 Y.B. INT'L L. COMM'N 5, 45, U.N. Doc. A/CN.4/167, Add. 1-3.

42. The abundance of literature and views on such matters is amply exhibited by the following list:

Pre-United Nations Era: Brown, *The Individual and International Law*, 18 AM. J. INT'L L. 532 (1924); Eagleton, *The Individual and International Law*, 40 AM. SOC'Y INT'L L. PROC. 22 (1946); Eagleton, *Some Questions as to the Place of the Individual in the International Law of the Future*, 37 AM. J. INT'L L. 642 (1943); Dunn, *The International Rights of Individuals*, 35 AM. SOC'Y INT'L L. PROC. 14 (1941); Lord Porter and Others, *International Law and the Rights of the Individual*, 31 GROTIUS SOC. TRANSACTIONS 90 (1945); Scott, *The Individual, the State, the International Community*, 24 AM. SOC'Y INT'L L. PROC. 15 (1930); Hill, *The Individual in International Organization*, 28 AM. POL. SCI. REV. 276 (1934); Idelson, *The Law of Nations and the Individual*, 30 GROTIUS SOC. TRANSACTIONS 59 (1944).

Post-United Nations Era: Cowles, *The Impact of International Law on the Individual*, 46 AM. SOC'Y INT'L L. PROC. 71 (1952); P. CORBETT, THE INDIVIDUAL AND WORLD SOCIETY, (1953); P. REMEC, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW ACCORDING TO GROTIUS AND VATTTEL (1960); Green, *The Individual and His Status in International Law*, 1 INDIAN J.I.L. 415 (1961); Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q. REV. 438 (1947), 64 L.Q. REV. 97 (1948); Korowicz, *The Problem of the International Personality of Individuals*, 50 AM. J. INT'L L. 533 (1956); C. NORGARRD, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428 (1952).

There is also extensive literature in French, German, and Italian on this subject.

how the *Filartiga* decision can be utilized in the future. The heart of this debate centers around the *scope* of the law on which Judge Kaufman based his decision. We have to see if its scope is capable of, or permits, extensive use in times to come.

A. "Tort"

After a survey of existing precedents, I submitted the following: "Indeed, the very concept of tort in 'violation of the law of nations' is very limited, at best."⁴³ Furthermore, it was stated that a violation of international law, *ipso facto*, does not mean that a tort has been committed, just like a violation of domestic law does not invariably amount to a tort.⁴⁴ Consequently, I stated that the "tort" in question has to be a recognized one and also 'international' in character.⁴⁵

The Commentator voiced a contrary view. To begin with, he thinks that a tort, within the purview of this law, will be committed whenever a clear law is violated. *Inter alia*, he says that "a 'tort' obligation can rest ultimately upon general violations of law".⁴⁶ With respect, this is a totally absurd proposition of law. Indeed, even a brief look at any standard work on torts or jurisprudence will show that a tort does not result when *any law is violated*. A tort will only result *if*, for a *specific kind of breach*, the law *provides a remedy* from its normative content. The point is both elementary and basic. For example, Winfield, one of the foremost writers on torts, said the following: "Tortious liability arises from the *breach of a duty primarily fixed by the laws*; such duty is toward persons generally, and its breach is *redressable by an action* for unliquidated damages."⁴⁷ Similarly, Sir John Salmond, whom Prosser considered to be one of the greatest writers on the subject, said that a tort is: "[a] *civil wrong* for which the *remedy is a common law action* for unliquidated damages, and which is *not exclusively the breach of a contract or the breach of a trust or other merely equitable obligation*".⁴⁸ Miles, a leading historian of the common law, said the following:

To put it briefly, there is *no English Law of Tort*; there is *merely an English Law of Torts*, i.e., a list of acts and omissions which, in certain conditions, are actionable. Any attempt to generalize further, however interesting from a speculative

43. Hassan, *supra* note 1, at 18.

44. *Id.* at 31.

45. *Id.* at 17, 21, 31.

46. Paust, *supra* note 4, at 86.

47. P. WINFIELD, PROVINCE OF THE LAW OF TORT 32 (1931). (Emphasis supplied.)

48. J. SALMOND, LAW OF TORTS 13 (10th ed. 1945). (Emphasis supplied.)

standpoint, *would be profoundly unsafe as a practical guide.*"⁴⁹

It is easy to continue to multiply such evaluations of what a tort is in the common law. It is thus trite knowledge that any breach of an obligation will not constitute a tort.⁵⁰ As Miles put it, we have a *list* of torts which is the product of the history of common law and later judicial and statutory contributions.⁵¹

It is thus respectfully submitted that Professor Paust's critique on this point is utterly devoid of any proper comprehension of what a 'tort' is. Indeed, the point is so basic that, in my article I only stated generally that, jurisprudentially, a comparative review of the major legal systems would show that the maxim, *ubi jus, ubi remedium*, never finds an invariable support. The major legal systems only provide specific remedies, through different channels, for some *identified* wrongs. The Commentator, without ever appreciating the point, went ahead to make the absolutely incorrect observation that "tort" violations can rest upon general violations of law.

That as a juridical proposition, what the Commentator said is totally erroneous, can be seen further from the following words of Sir John Salmond. In his leading work on jurisprudence, while analyzing the *nature of tortious obligations*, he said the following:

The second *class* of obligations consists of those which may be termed delictal, or in the language of Roman law *obligations ex delicto*. By an obligation of this kind is meant the duty of making pecuniary satisfaction for that *species of wrong* which is known in English law as a *tort*.⁵²

Then, very importantly, he later said the following: "*Even a civil wrong is not a tort, unless the appropriate remedy for it is an action for damages.*"⁵³ Accordingly, it is submitted that the "clean-up" commentary by Professor Paust was without merit. Neither in domestic nor in international law can a tort arise simultaneously with a breach of normative law.

49. MILES, 2 DIGEST OF ENGLISH CIVIL LAW XIV, XV (1910), cited in W. PROSSER, LAW OF TORTS (4th ed. 1971). (Emphasis supplied.)

50. Tort law retains an evolutionary character. Consequently, categories of actionable wrongs can eventually broaden into torts. Authorities like Prosser suggest that it is not necessary for developing torts to be labeled or named. However, in order for a tort to exist and to be recognized as such, *the remedial action must find positive acknowledgement*. Conversely, every breach of an obligation does not mean that a tort has been committed. See generally W. PROSSER, *supra* note 49.

51. MILES, *supra* note 49.

52. J. SALMOND, JURISPRUDENCE 453 (12th ed. 1966). (Emphasis supplied.)

53. *Id.* (Emphasis supplied.)

B. Tort and Crime

I had, *inter alia*, submitted that while precedents from international criminal law were available, albeit in a limited way, it was not axiomatic that the same situations would give rise to a tort claim.⁵⁴ In other words, actions proscribed by criminal jurisprudence could not be automatically pressed into service to say that a tort has also been committed. Professor Paust candidly acknowledged that all this "makes no sense" to him.⁵⁵ The Commentator's assertion, like the previous one, clearly shows that his comprehension of the theory of tort law is either different from those of the experts of the field or just patently wrong. To make matters more confounded, there is his assertion that the "notion of 'tort' is actually an Anglo-American concept. . . ."⁵⁶ Such statements can only be made either in ignorance of other legal systems or by condescension. Let us proceed to analyze the situation.

Chronologically, we will take the historical point first. Irrespective of the label, and the fact that, not unnaturally, different legal systems use their own vocabulary, the *concept* of tort is quite different from what Professor Paust asserts. It is found in many legal systems and goes back far in history. As already quoted, Salmond said that the Romans called it *obligationes ex delicto*. Originally, its basis was revenge, but later, Roman law recognized the payment of compensation in lieu of the wrong. Civilian law, said to be derived from the XII Tables, was enlarged by praetorian reforms, with the result that the *list* of actionable delicts increased over the centuries.⁵⁷ Furthermore, as in modern law, it was always possible for the same action to be *categorized* both as a civil and as a criminal wrong. A superficial understanding of Roman law, therefore, might in some respects be misleading if for some *obligationes ex delicto*, we also notice an emphasis on penalty.⁵⁸ Gaius, the foremost classical civilian author, emphasized that a delict was a notion of civil liability.⁵⁹

Indeed, not only Roman law, but also even earlier systems, attempted to regulate vengeance by providing civil compensatory remedies for various wrongs. In this discussion, Dias, a contemporary legal philosopher from Cambridge, cites several ancient authorities to show

54. Hassan, *supra* note 1, at 31-3.

55. Paust, *supra* note 4, at 91.

56. *Id.* at 83.

57. *See, e.g.*, W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW, 318 (1957).

58. W. BUCKLAND AND A. MCNAIR, ROMAN LAW AND COMMON LAW 344-8 (1965). Thus, for *furtum*, the thief was not only liable for returning the property, but also for doubling or quadrupling the damages, depending upon whether the act was *manifestum* or *non manifestum*.

59. W. BUCKLAND, *supra* note 57; *See also* F. DE ZULUETTA, THE INSTITUTES OF GARIUS 196-8 (1953).

the social values which principles of tort law have historically attempted to meet.⁶⁰ Indeed, many sections of *The Hammurabi Code* contain direct provisions for *compensation* to the victim for various *specified wrongs*.⁶¹ It is, therefore, quite absurd to say that a "tort" is only a concept of Anglo-American law. I have not burdened this article with citations from the Islamic *Fiqh*, in which all of its classical schools have detailed lists of wrongs for which compensation can be obtained by victims. Accordingly, one is perhaps at a loss to understand the necessity of making exaggerated claims of a comparative nature for Anglo-American law only to show that a tort results in this system whenever an obligation is violated. As already submitted, that assertion too is completely unfounded.

From this historical aspect of the discussion, let us examine the distinction between "tort" and "crime," *i.e.*, the jurisprudence of one cannot be automatically used for the other. It is this conclusion which the Commentator said made no sense to him. Perhaps, if one starts with a vague notion that every breach of an obligation results in a tort, as the Commentator does, one could reach this type of confusion. However, as submitted above, a tort is not *any* violation, but a *specific* violation *recognized* by the law as *providing a remedy*. Also, as noted earlier, it is always possible for an act to be both a crime and a tort. But this would occur only if it has been recognized as such by either the courts or the law. Conversely, every crime is not a tort; which would be the conclusion if one agreed with the Commentator that "civil liability for criminal conduct" was recognized long ago.⁶² Indeed, this assertion by the Commentator begs the question without bothering to explain how this can happen.⁶³ The clear line of demarcation between crimes and torts is so elementary that one can once again simply examine any standard work on torts or jurisprudence.

Salmond, succinctly made this point when he said the following:

60. R. DIAS, *JURISPRUDENCE* 173 & n.4 (3d ed. 1970).

61. *See, e.g., The Hammurabi Code*, § 53 (C. Edwards trans. 1971):

If a man has been too lazy to strengthen his dyke, and has not strengthened the dyke, and a breach has opened in the dyke, and the ground has been flooded with water; the man in whose dyke the breach has opened shall reimburse the corn he has destroyed.

See also id. § 55: "If a man has opened his irrigation ditch, and, through negligence, his neighbor's field is flooded with water, he shall measure back corn according to the yield of the district."

62. Paust, *supra* note 4, at 91.

63. Arguably, the Commentator cites only one "authority" in support of this assertion. *Id.* at 84 (*citing* 1 Op. Att'y Gen. 57, 59 (1795)). In light of what has been stated above, it is clear that if the Attorney General meant to say that "civil liability" arises from "criminal conduct" in every case, then he was *patently wrong*. However, for a more plausible construction of the remarks of the Attorney General, *see* the later discussion in the text above.

"A tort is a civil wrong; *crimes are wrongs, but are not in themselves torts*, though there is nothing to prevent the same act from belonging to both these classes at once."⁶⁴

We can finally quote Prosser, perhaps the leading United States authority on tort law in this century, to clearly summarize my position. Prosser stated the following:

A tort is not the same thing as a crime, although the two sometimes have many features in common. The distinction between them lies in the *interests affected and the remedy afforded by the law*. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. . . . The civil action for a tort, on the other hand, is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered, at the expense of the wrongdoer. . . . The same act may be both a crime against the state and a tort against an individual. In such a case, since the interests invaded are not the same, and the objects to be accomplished by the two suits are different, there may be both a civil tort action and a criminal prosecution for the same offense. . . . *But tort and criminal law have developed along different lines, with different ends in view, and so it does not necessarily follow that the term has the same meaning in both. Thus it is entirely possible that an act may be a tort, but not a crime of the same name, or that it may amount to the crime and not a tort.*⁶⁵

It is therefore clear that precedents of criminal jurisprudence would not be automatically applicable to situations wherein we want to argue for tortious liability. The two fields of law have their own principles for the determination of various matters which have to be separately examined to find appropriate answers in respect of the relevant inquiries.

C. *The Immunity of Acts of Sovereigns in their Respective Territories*

The Commentator's statement, that this too is a "myth," is totally wrong. Though he makes this assertion, he does not meet any of the points discussed in support of these well-accepted doctrines. The only defense he offers for his assertion is "present trends" (supported by his own papers).⁶⁶ It is thus not necessary to go deeply into this matter. The other writers mentioned this point in different forms, and Professor

64. J. SALMOND, *supra* note 52. (Emphasis added.)

65. W. PROSSER, *supra* note 49, at 7. (Footnotes omitted and emphasis supplied.)

66. Paust, *supra* note 4, at 90 & n.48.

Paust has not been able to find any rebuttal to the quintessence of cases like *Underhill* or *Sabbatino*.⁶⁷

In passing, two comments may be made. As it has been shown above, the Commentator appears to think that some things (at least), which are contrary to his views, somehow automatically assume the character of "myths". It was as true in his argument about the historical position of the individual in international law, as it is in such a contemporary matter as the deference given by United States courts (and, of course, by courts of other countries to the United States on a reciprocal basis) to acts within the territory of another sovereign. That such patent exaggeration does not advance the cause of human rights is obvious and should not, in my opinion, be adopted. Secondly, the Commentator has, while discussing some of these points, stressed the aid received by the doctrine of incorporation.⁶⁸ This emphasis was not really necessary to the discussion since I clearly acknowledged the existence of such aid.⁶⁹

D. *Against the Law of Nations*

The last point which needs a response is the Commentator's assertion that the "tort" in question need not be international in character, that it could be domestic.⁷⁰ Most of what was stated in Section A, above, is reiterated and adopted here. If a tort is a recognized remedy of law, it must be derived from the law which is supposedly violated. That much is quite clear in theory. In deference to some international wrongs which are violative of some fundamental human rights, I was prepared to accept that civil damages may be forthcoming for their violations. But, the *tort* has to be located within the purview of the law in question. At the same time, I also pointed out that, theoretically, by this process, one could not automatically convert every international penal wrong into a matter of civil liability.⁷¹

Apart from the theoretical objection articulated above, another federal case has apparently gone further and said that not only a violation of international law has to be shown, but also that the violated norm must envisage a domestic lawsuit.⁷² As previously noted, this is

67. Indeed, as submitted earlier, even the *Filartiga* court avoided dealing with the act of state question. Hassan, *supra* note 1, at 16. While discussing such matters, Professor Christenson asked the following question: "If the deference is mechanical, why should it matter whether the act is to take property or to torture a citizen of the other country?" Christenson, *supra* note 7, at 43.

68. Paust, *supra* note 4, at 83.

69. Hassan, *supra* note 1, at 37.

70. Paust, *supra* note 4, at 83.

71. Hassan, *supra* note 1, at 33, 34 n.80.

72. *Hanoch-Tel Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981).

the case of *Hanoch Tel-Oren v. Libyan Arab Republic*.⁷³ The court, indeed, as pointed out by at least one other writer in the *Houston Journal of International Law*, expressly stated that: "an action predicated on . . . general norms of international law must have as its basis a specific right to a private claim."⁷⁴

The Commentator, as already pointed out earlier, is manifestly angry at this ruling.⁷⁵ But that response is neither here nor there and shows the pitfalls of extravagant, though well-meaning, wishful thinking. Until a more authoritative ruling is rendered, one is quite justified in saying that at least the tort must be international in character in order to come within the purview of the Alien Tort Statute. Of course, since what is involved is an *interpretation* of a domestic statute, there could be a ruling in the future along those lines desired by the Commentator; but such an interpretation would have to be made against both the theory and the existing legal precedents of this subject. The biggest difficulty would be to hold an *individual* responsible, by a remedy of domestic tort law, for committing an international wrong. Whereas domestic law has no conception of the difficulty already discussed above on this point, the matter is, to say the least, controversial in the international field. Despite the Commentator's extravagant language regarding Oppenheim, the question of whether an international tort has been committed will have to be decided *each time* a particular wrong is advocated in order to come under this statute. Relevant international instruments will have to be carefully scrutinized to see if they clearly impose the *liability* sought to be established for the *individual*. Indeed, this was done by the *Filartiga* court. It is well to remember that, as recently as 1935, the British Government in an international case said the following: "International law is a law regulating the rights and duties of States *inter se* and *creating no rights and imposing no duties on individuals*—a view which the Permanent Court of International Justice appears to have definitely adopted."⁷⁶

In view of what has been presented above, we have now to see why, in the Attorney General's Opinion of 1795, the following was said:

There can be no doubt that the company or individuals who

73. *Id.* at 549 (footnote omitted). See also Schneebaum, *International Law as Guarantor of Judicially-Enforceable Rights: A Reply to Professor Oliver*, 4 HOUS. J. INT'L L. 72 (1981). (Emphasis supplied.)

74. *Id.*

75. Paust, *supra* note 4, at 99.

76. British Memorandum in the *Finnish Ships* case, 1932, cited in G. SCHWARZENBERGER, 1 A MANUAL OF INTERNATIONAL LAW 8 (4th ed. 1960). (Emphasis supplied.)

have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the law of nations, or a treaty of the United States.⁷⁷

It is respectfully submitted that the way the Commentator has read the Opinion is erroneous. If one were to say otherwise, one would have to argue that the Attorney General was not correct in asserting that, for *all types of international criminal wrongs, civil liability would arise*. Indeed, I forewarned against reading precedents from the international criminal field to support arguments in respect of torts under this statute.⁷⁸ The Commentator has done precisely this. But if one reads the Opinion in question correctly, it is possible to contend that, as its rubric indicates, it was only meant to apply for "Breach of Neutrality". I clearly emphasized, within the space available in my initial article, that laws of warfare, *inter alia*, did constitute a category for which *liability was available under international law*. That is precisely, it is submitted, what the Attorney General was saying in the Opinion from which the Commentator cited. But to argue from there that breaches of laws or warfare are similar to actions brought by an individual against his own government, as Professor Paust suggests, is, with great respect, utterly absurd.⁷⁹ Accordingly, it is submitted that nothing is gained by reading too much into precedents which have no application to situations now being observed by some to be within the purview of the Alien Tort Statute.⁸⁰ Thus, we can sum up this discussion by saying that stringent requirements would have to be met in order to have more torts recognized in this area.

III. CONCLUSION

In view of what has been discussed, it does not seem very likely that the Alien Tort Statute will be of great use in the future. Despite the Commentator's hope that "millions" will come into the United

77. 1 Op. Att'y Gen. at 59 (1795).

78. Hassan, *supra* note 1, at 32-3.

79. Indeed, in the opinion cited by the Commentator, Attorney General Bradford specifically ruled out taking cognizance of matters which occurred in a foreign country: "So far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States." *Supra* note 77, at 58.

80. Indeed, another leading textbook author, Schwarzenberger, of the University of London, maintains that international law would not deal with this matter at all: "If the tort has been committed against an object of international law—individuals, corporations, ships or aircraft—such acts are *prima facie* outside the purview of international law. . . ." G. SCHWARZENBERGER, *supra* note 76, at 164. This is, of course, the position at the other extreme. International law, ordinarily, would not deal with such matters.

States to "pursue" their tormentors, because of the advice of counsel of extraordinary and legendary "competence" (Professor Paust's words), the real chance of that happening is negligible. Moreover, philosophically, as I have argued elsewhere, there is something fundamentally wrong with a United States domestic court becoming a forum for litigation between citizens of foreign countries and their governments.⁸¹ In evaluating the *future* of the Alien Tort Statute, this author is surprised that the *Hanoch Tel-Oren* case was not cited by Professor Paust, since, unless reversed on appeal, it has definitely restricted the *Filartiga* decision.⁸² So, within a short period of time, it appears that the Statute has not resulted in the kind of panacea that human rights activists would have liked it to have become.⁸³

In conclusion, I admire the kind of single-minded devotion exhibited by writers such as the Commentator. Many of us share the same goals on an international plane. Still, law is different from rhetoric, and unless we make *real* progress by permissible means, it does not carry the matter further by indulging in hyperbole about isolated cases, like *Filartiga*, decided under obscure and unusual laws. To do so would be to exaggerate our successes in a crucial field where the only success is a *real* success, and not a perceived or manufactured one. However, Maneli, an Eastern European scholar, saw something in even pronouncements of such nature when he said the following:

Conventions, declarations, and rhetoric concerning human rights have proliferated enormously. Whether anyone's rights are actually respected more in the various states of our world is of course uncertain. Possibly the important fact is that nowadays everybody at least feels obliged to endorse these principles verbally. Even if this seeming adherence is a deliberate deception, such hypocrisy has to be taken into account because, as La Rochefoucauld observed, "hypocrisy is the tribute that vice pays to virtue."⁸⁴

81. Hassan, *Have Constitution, Will Travel*, 10 HUM. RTS. 40 (1982).

82. See, e.g., Schneebaum, *supra* note 74, at 72. Apparently, Professor Paust referred to this decision only reluctantly while discussing Schneebaum's paper. Paust, *supra* note 4, at 99.

83. Indeed, it is well to remember that the Second Circuit decision in *Filartiga* was rendered after the United States submitted a memorandum supporting the plaintiff's version that torture violates customary international law.

84. M. MANELI, JURIDICAL POSITIVISM AND HUMAN RIGHTS 223 (1981).