State immunity — Jurisdictional immunity — Violations of international law—Whether foreign State entitled to immunity for acts contrary to international law — Foreign Sovereign Immunities Act 1976

Relationship of international law and municipal law—Customary international law—Enforcement by municipal courts—Alien Tort Statute 1789

War and armed conflict—Neutrality—Naval warfare—Attack on neutral ship on high seas—Absence of reasonable cause for suspicion—No attempt to investigate ship before attack—Ship outside exclusion zones established by parties to conflict — Whether attack violating international law

Sea—High seas—Freedom of passage—Neutral ship on high seas during armed conflict — Whether attack on ship contrary to international law — The law of the United States

AMERADA HESS SHIPPING CORPORATION *v.* ARGENTINE REPUBLIC

UNITED CARRIERS, INC. *v.* ARGENTINE REPUBLIC

United States District Court (Southern District, New York)

(Carter, *District Judge*)

5 *May* 1986

United States Court of Appeals (Second Circuit)

(Feinberg, *Chief Judge*; Oakes and Kearse, *Circuit Judges*)

11 *September* 1987

SUMMARY: *The facts:*—In June 1982, during an armed conflict between Argentina and the United Kingdom in the South Atlantic, the Liberian tanker *Hercules* was attacked by Argentine aircraft. As a result of the attack the *Hercules* sustained serious damage and had to be scuttled. At the time of the attack the *Hercules* was on the high seas, approximately 600 miles from the Argentine coast and outside the exclusion zones proclaimed by Argentina and the United Kingdom. The *Hercules* was owned by United Carriers, Inc. (''United''), and under charter to Amerada Hess Shipping Corporation (''Amerada''), both of which were Liberian corporations. The United States Maritime Administration had notified Argentina and the United Kingdom

that the *Hercules* would be traversing the South Atlantic. Liberia was neutral in the conflict between Argentina and the United Kingdom.

Amerada and United instituted proceedings against Argentina in the United States District Court under the Alien Tort Statute 1789, alleging that the attack on the *Hercules* had been a violation of international law for which Argentina had refused to pay compensation and in respect of which they had been unable to institute proceedings in the courts of Argentina. The plaintiffs alleged that the sinking of the *Hercules* was a violation of international law. They maintained that the District Court had jurisdiction under the Alien Tort Statute and under the customary international law principle of universal jurisdiction.

Held (by the District Court):—The complaint was dismissed for lack of jurisdiction.

(1) A foreign State was subject to the jurisdiction of the United States courts only in so far as one of the exceptions to State immunity set forth in the Foreign Sovereign Immunities Act 1976 was applicable. None of the exceptions in that Act applied to the facts of the present case (p. 5).

(2) The Alien Tort Statute did not provide an alternative basis for jurisdiction (pp. 6-7).

(3) The principle of universal jurisdiction under customary international law was concerned with criminal, not civil, jurisdiction (p. 7).

The plaintiffs appealed to the Court of Appeals.

Held (Circuit Judge Kearse dissenting):—The appeal was allowed and the case remanded for further proceedings.

(1) It was beyond doubt that the sinking of a neutral vessel in international waters, without proper cause for suspicion or investigation, was a violation of international law. Where the attacker refused to compensate the neutral, such action was analogous to piracy (p. 10).

(2) The Court had jurisdiction under the Alien Tort Statute. In construing the Statute, the Court had to have regard to international law as it stood today and not as it was in 1789. Under modern international law a State was not accorded immunity for violations of international law (pp. 11-12).

(3) The legislative history of the Foreign Sovereign Immunities Act 1976 showed that Congress had not intended to remove existing remedies for violations of international law under the Alien Tort Statute. The Act was intended to leave to the courts the decision whether international law accorded a State sovereign immunity in a particular case. In the present case, Argentina would not be entitled to immunity under international law (pp. 12-13).

Per Circuit Judge Kearse (dissenting):—The intention of Congress in enacting the Foreign Sovereign Immunities Act 1976 had been to provide an exclusive framework for the determination of questions of sovereign immunity. Under the Act there was no basis for holding that Argentina was not entitled to sovereign immunity (pp. 16-17).

The judgments delivered in the Court of Appeals commence at p. 8. The following is the text of the judgment of District Judge Carter in the District Court:

[73] The Argentine Republic, defendant in these two related actions, has moved to dismiss both of the complaints for lack of subject-matter jurisdiction by virtue of the Foreign Sovereign Immunities Act ("FSIA"), Pub.L. No. 94–583, 90 Stat. 2891, *codified at* 28 U.S.C. §§ 1330, 1332(a)(2)–(4), 1391(f), 1441(d) and 1602–1611.

Plaintiff United Carriers, Inc. ("United Carriers"), a Liberian corporation, owned the Hercules, a crude oil tanker. Plaintiff Amerada Hess Shipping Corporation ("Amerada Hess"), also a Liberian corporation, time-chartered the vessel to transport Alaskan North Slope crude oil from Valdez, Alaska to a Hess oil refinery in the Virgin Islands. Because her width precluded passage through the locks of the Panama Canal, the Hercules sailed between these two points by travelling around the southern tip of South America at Cape Horn.

On April 2, 1982, the Argentine Republic invaded the islands known as the Falklands to the English-speaking world, and as the Malvinas to the Spanish-speaking. Great Britain defended its crown colony off of the eastern coast of Argentina, and war between the two nations ensued. Throughout that war, Liberia remained a neutral nation. The Hercules, however, could not remain wholly disengaged from the post-colonial struggle raging in the South Atlantic. On May 5, while voyaging from Val-

dez to St. Croix, she diverted her course upon the request of the Argentine Navy in order to search for survivors of the General Belgado, an Argentine Navy cruiser sunk by a British submarine. She was later released from this task and completed her voyage to St. Croix.

On May 25, 1982, the Hercules began its return voyage in ballast, or without cargo, to Valdez. Without provocation or warning, Argentine military aircraft began to bomb the neutral merchant vessel three separate times on June 8: once at 1350 Greenwich Mean Time ("G.M.T."), when she was located at 46 degrees 10 minutes South latitude, 49 degrees 30 minutes West longitude; at 1430 G.M.T. when she was at 45 degrees 16 minutes South latitude, 48 degrees 25 minutes West longitude; and at 1625 G.M.T. when she was at 46 degrees 8 minutes South latitude, 48 degrees 55 minutes West longitude. Unaccountably, a belated directive to change course or suffer attack was received by the Hercules after the third attack, between 1720 and 1800 G.M.T. The complaints allege that the air attacks took place outside of the war zones designated by both the Argentine Republic and Great Britain. The bombing and rocket attacks damaged the decks and hull of the Hercules and left her with an undetonated bomb lodged in her starboard side. Thus disabled, she reversed course and sailed towards Rio de Janeiro, Brazil, the nearest safe port of refuge. United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb and repair the Hercules. The tanker was scuttled 250 nautical miles off of the Brazilian coast.

Amerada Hess alleges that it has been unable to engage Argentine lawyers to pursue a claim for its losses in the Argentine Republic's courts. It attributes this failure to "the politically charged nature of the claim and knowledge that the claim is opposed by the Argentine Government." Verified Complaint of Amerada Hess, ¶ 44. Affidavits submitted in opposition to the motion to dismiss show that the attorneys for Amerada Hess have corresponded with two Argentinian lawyers who refused to press its claims in the Argentine courts. [74] Amerada Hess and United Carriers seek to obtain relief from this court, alleging jurisdiction pursuant to the Alien Tort Act, 28 U.S.C. § 1350. Amerada Hess also alleges jurisdiction "according to the principle of universal jurisdiction, recognized in customary international law." Verified Complaint of Amerada Hess, ¶ 5.

DISCUSSION

Foreign sovereign immunity has a venerable history in this country's courts, dating back at least to Chief Justice Marshall's decision in *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812). The doctrine developed over the next century and a half in a world of broadened state activity and burgeoning international trade. By the middle of this century, two aspects of foreign sovereign immunity that deserve mention had evolved. The first was substantive: the doctrine of "restrictive" immunity, which accords a foreign sovereign immunity for its public acts (*jure imperii*) but not for its commercial, or quasi-private, activities. The second was procedural: usually, but not always, foreign nations would seek immunity from the State Department, which would submit "suggestions of immunity" to the courts where it determined that immunity was appropriate. *See Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487–88, 103 S.Ct. 1962, [1] 1968, 76 L.Ed.2d 81 (1983). Political pressures exerted by foreign nations not infrequently affected the State Department's determination, *id.*, leading to lack of uniformity and clarity in the doctrine. In 1976, Congress sought to codify the restrictive doctrine of foreign sovereign immunity and to place responsibility for making determinations of immunity squarely within the judiciary. H.Rep. No. 94–1487, 94th Cong., 2d Sess. 6–7 (1976), *reprinted at* 1976 U.S. Code Cong. & Ad.News 6604, 6605. Congress was emphatic that the FSIA be the sole means of assessing claims of immunity. That interest is apparent from the structure of the FSIA, which unequivocally states that:

[75] Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. A foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case. The legislative history strengthens this reading. The House report states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." H.Rep. No. 94–1487 at 12; 1976 U.S.Code Cong. & Ad.News at 6610. Almost without exception, courts interpreting the FSIA have assumed that the FSIA is the exclusive source of jurisdiction over foreign sovereigns, *Frolova v. U.S.S.R.*, 761 F.2d 370 (7th Cir.1985) (*per curiam*), even in the context of other jurisdictional grants. *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115 (2d Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 591, 83 L.Ed.2d 701 (1984) (admiralty); *Ruggiero v. Compania* [2] *Peruana de Vapores "Inca Capac Yupanqui"*, 639 F.2d 872 (2d Cir.1981) (diversity); *In Re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83–0345 (D.D.C. September 1, 1985) (Alien Tort Act); *Siderman v. Republic of Argentina*, No. CV 82–1772–RMT(MCx) (C.D.Cal. March 7, 1985) (Alien Tort Act). *But see Von Dardel v. U.S.S.R.*, 623 F.Supp. 246 (D.D.C. 1985) (FSIA does not effect *pro tanto* re- [3] peal of Alien Tort Act jurisdiction).

Plaintiffs' claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA. The only provision for tort claims, where the foreign sovereign has not waived immunity, requires that the "damage to or loss of property" occur "in the United States." [1] Interpretation of similar language in terms of the commercial activity exception in § 1605(a)(2) has been breathtakingly broad. *See Crimson Semiconductor, Inc. v. Electronum*, 629 F.Supp. 903 (S.D.N.Y.1986) (Carter, J.). Yet even that breadth is of no avail to these Liberian plaintiffs, who can claim no loss whatsoever occurring in the United States. In addition, one Court of Appeals has interpreted the legislative history of § 1605(a)(5) to require that the tortious act or omission itself occur in the United States. *Frolova v. U.S.S.R.*, *supra*, 761 F.2d at 379. While we need not adopt that reasoning, we note that it is further evidence that the facts underlying this case are well beyond the purview of the § 1605(a)(5) exception.

Plaintiffs argue that the Alien Tort Act provides the basis for jurisdiction that the FSIA denies. That statute gives the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In their view, when the First Congress adopted the Judiciary Act of 1789—of which the Alien Tort Act is a part—it intended to confer jurisdiction over suits such as the instant case to federal district courts. Neither the FSIA itself nor its legislative history mentions the Alien

1. 28 U.S.C. § 1605(a)(5). That subsection denies a foreign state immunity where:

> money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to—
>
> (A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
>
> (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

Tort Act. Since repeal by implication is disfavored, the cause of action created by the Alien Tort Act survives the passage of the FSIA.

Both the premises and the conclusion of this inventive argument must be rejected. First, we do not credit plaintiffs' contention that the Argentine Republic would not have enjoyed foreign sovereign immunity in an action such as this in 1789. Second, even if we accept plaintiffs' version of legal history, the language of the Alien Tort Act is silent as to foreign sovereign immunity. Therefore, the FSIA does not repeal the Alien Tort Act any more than it repeals any other jurisdictional act that by its terms may include actions brought against foreign sovereigns.

No case law supports the assertion that a foreign sovereign state would not have enjoyed immunity in 1789. As evidence of their contention that a foreign sovereign would not be immune in the minds of the drafters of the Alien Tort Act, plaintiffs cite the fact that a sovereign would not enjoy sovereign immunity in its own prize courts. Nanda Affidavit at 5, Plaintiffs' Joint Exhibit 12. By analogy, they suggest, a foreign sovereign would not enjoy immunity in another nation's municipal courts. Contemporary legal theory recognizes that foreign sovereign immunity, based on comity, is a very different matter from the sovereign immunity accorded the state in its own courts, based on separation of powers. The analogy would fail today; there is no reason to assume that it would have succeeded in 1789. Moreover, if we are to adopt the iconoclastic view that the Alien Tort Act preserves the vulnerability to suit of foreign sovereigns extant at its passage, we need evidence more forceful than a hypothetical argument by analogy. Plaintiffs also base their historical argument on two scholarly pieces, G. Badr, *State Immunity: An Analytical and Prognostic View* (1984) and S. Sucharitkul, *State Immunities and Trading Activities in International Law* (1959), that discover the origin of nation-state—as opposed to personal—foreign sovereign immunity in *The Schooner Exchange*, decided in 1812. That inaccurate contention can quickly be [76] disproven by recourse to early court reports. *Nathan v. Virginia*, 1 Dall. (Pa.) 77, 1 L.Ed. 44 (1781) granted the state of Virginia foreign sovereign immunity in Pennsylvania's courts.

Even if foreign sovereign immunity would have been extended to a nation under the circumstances of this case in 1789, the FSIA's grant of immunity is not a repeal of the Alien Tort Act. The Alien Tort Act speaks in terms of plaintiffs and causes of action. It is utterly silent as to classes of defendants. We may assume, without recourse to legal history, that a foreign sovereign could be sued under the Alien Tort Act if one were to regard the statute in isolation. Yet the FSIA does not repeal the Alien Tort Act because it narrows the class of defendants. It does the same to many of the jurisdictional statutes in the United States Code. The FSIA could only be said to repeal the Alien Tort Act if the statute covered *only* claims against foreign sovereigns, an argument that the plaintiffs do not, because they cannot, make. Thus, it is irrelevant that repeal by implication is disfavored. The FSIA effects no repeal.

Plaintiffs next argue that foreign sovereign immunity is not absolute or requisite, and that the Argentine Republic's refusal to repay the plaintiffs is so manifest a violation of its obligation under international law that this country has a right to refuse it immunity. Let us assume that this argument is valid as a matter of international law. Nonetheless, that fact does not empower this court to create an *ad hoc* exception to a Congressional statute in order to hear this case. Federal courts, it bears mentioning at this juncture, are courts of limited jurisdiction. Perhaps Congress could empower federal courts to hear cases such as this; the court, however, is constrained by Congress's failure to do so.

Two district courts have already rejected arguments that the Alien Tort Act creates an implied exception to the FSIA. *Sider-*

[77] *man, supra; Korean Air Lines, supra.* In *Siderman,* the court dismissed an action brought against Argentina and one of its provinces for torture and the taking of property by the former military regime. The court reviewed the legal history of foreign sovereign immunity and concluded that the Alien Tort Act "does not provide an exemption to foreign sovereign immunity ...." *Siderman,* slip op. at 3. In *Korean Air Lines,* the court dismissed wrongful death claims brought against the Soviet Union for deaths resulting when a commercial airplane that had strayed into Soviet territory was shot down. Although the court relied on both the FSIA and the act of state doctrine,[2] it clearly found that the Alien Tort Act did not carve out an exception to the FSIA's requirements. "[T]o hold that the Alien Tort Claims Act gives a cause of action and subject matter jurisdiction where the FSIA forbids it would make a nullity of the Foreign Sovereign Immunities Act." *Korean Air Lines,* slip op. at 11.

Both *Siderman* and *Korean Air Lines* dismissed claims against foreign sovereigns for actions occurring within the foreign sovereigns' territory. Yet that fact, relevant to application of the act of state doctrine, is not relevant to the question of foreign sovereign immunity at issue here. In *Siderman, Korean Air Lines,* and the instant case, a violation of the law of nations is alleged. Where the tort is committed outside of the United States, the effect of the FSIA on the court's jurisdiction does not vary with the *locus delicti.* In addition, the Court of Appeals for the District of Columbia has assumed, albeit in dicta, that the standards of the FSIA apply to actions brought pursuant to the Alien Tort Act where the alleged tort has occurred outside of the foreign sovereign's territory. *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 776 n. 1 & 805 n. 13 (D.C.Cir.1984), *cert. denied,* —— U.S. ——, 105 S.Ct. 1354, 84 L.Ed.2d 377 (1985) (separate concurrences of Edwards, J. and Bork, J.).[4]

The court has addressed plaintiffs' arguments in greater detail than they merit, given the clarity of the FSIA's language and the precedents that support this result. Such attention is warranted only because similar arguments have been accepted—incorrectly, we feel—in *Von Dardel v. U.S.S.R.,* 623 F.Supp. 246 (D.D.C.1985). In[5] *Von Dardel,* the court entered a default judgment against the Soviet Union in an action brought against it for the "unlawful seizure, imprisonment and possibly death" of Raoul Wallenberg, the heroic Swedish diplomat. In addition to waiver arguments inapplicable here, the court found that it had jurisdiction because the FSIA should not be read "to extend immunity to clear violations of universally recognized principles of international law." *Von Dardel,* 623 F.Supp. at 254. It based this interpre-[6] tation on language in FSIA's legislative history stating that the statute incorporated standards of international law. *Id.* at 253. With all respect, nothing in the FSIA or its legislative history supports that interpretation. The language cited by the *Von Dardel* court, H.Rep. No 94–1487 at 14, 1976 U.S.Code Cong. & Ad.News at 6613, says merely that Congress sought to adopt internationally accepted standards of foreign sovereign immunity, not that immunity would be waived for violations of international law.

Finally, we note that the principle of universal jurisdiction cited by Amerada Hess in its complaint does not provide a basis for jurisdiction in a civil case. That doctrine only provides for criminal jurisdiction. *See* Restatement (2d) Foreign Relations Law of the United States § 404 (Tent. Draft No. 2, 1981).

For all of these reasons, defendants' motions must be granted. Both complaints in these actions are dismissed.

IT IS SO ORDERED.

2. The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 401, 84 S.Ct. 923, 926, 11 L.Ed.2d 804 (1964). It is a judge-made prudential doctrine.[7]

[Report: 638 F Supp 73 (1986).]

Editorial Footnotes:

[1] See p. 548.
[2] 63 *I.L.R.* 540.
[3] 77 *I.L.R.* 258.
[4] 77 *I.L.R.* 192 at 205 and 234.
[5] 77 *I.L.R.* 258.
[6] *Ibid.* at p. 266.
[7] 35 *I.L.R.* 2.

The following is the text of the judgments delivered in the Court of Appeals:

FEINBERG, Chief Judge: [422]

This case presents the important question whether a federal district court has jurisdiction over a claim that a foreign sovereign, in violation of international law, attacked on the high seas a neutral ship engaged in the United States domestic trade. Amerada Hess Shipping Corporation (Amerada) and United Carriers, Inc. (United) appeal from a decision of the United States District Court for the Southern District of New York, Robert L. Carter, J., dismissing their complaint for lack of jurisdiction, 638 F.Supp. 73 (S.D.N.Y.1986). Ap- [1]
pellants argue that both the Alien Tort Statute, 28 U.S.C. § 1350, and the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602–1611, provide jurisdiction over their claims that the Republic of Argentina destroyed an oil tanker on the high seas in violation of international law. We conclude that the Alien Tort Statute does provide jurisdiction and that the FSIA does

[423] not bar it. Accordingly, we reverse and remand to the district court.

I. Background

Because the district court dismissed United's complaint for lack of jurisdiction, we must accept appellants' allegations as true. In 1977, Amerada entered a long-term time-charter agreement with United for use of the oil tanker HERCULES. Amerada used HERCULES to carry oil from Alaska, around the southern tip of South America, to its refinery in the United States Virgin Islands. This route took HERCULES near the area in the South Atlantic where, in April 1982, an armed conflict began between Argentina and the United Kingdom that became known in this country as the Falklands War.

On May 25, 1982, HERCULES embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like HERCULES) that would be traversing the South Atlantic, to ensure that these neutral vessels would not be attacked. The list included HERCULES.

By June 8, HERCULES was about 600 nautical miles off the Argentine coast and nearly 500 miles from the Falkland Islands, in international waters, well outside the "exclusion zones" declared by the warring parties. That afternoon, HERCULES was attacked without warning in three different strikes by Argentine aircraft using bombs and air-to-surface rockets.

Following these attacks, HERCULES, damaged but not destroyed, headed for safe refuge in the port of Rio de Janeiro, Brazil. Although HERCULES arrived safely in Brazil, her deck and hull had both suffered extensive damage, and a bomb that had penetrated her side remained undetonated in one of her tanks. Following an investigation by the Brazilian navy, United determined that it would be unreasonably hazardous to attempt removal of the undetonated bomb. Accordingly, on July 20, 1982, approximately 250 miles off the Brazilian coast, HERCULES was scuttled. United's loss on the sunken ship is claimed at $10,000,000 and Amerada's loss on the fuel that went down with the ship is claimed at $1,901,259.07.

Following a series of unsuccessful attempts to receive a hearing of their claims by the Argentine government or to retain Argentine attorneys to prosecute their claims in the courts of that country, appellants filed their suits in the district court. The district court found that a "foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case." 638 F.Supp. at 75. Concluding that [2] no FSIA exception covered these facts, the district court dismissed the suits for lack of jurisdiction. This consolidated appeal followed.

II. Violation of International Law

The facts alleged by appellants, if proven, would constitute a clear violation of international law. "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d [3] Cir.1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61, 5 L.Ed. 57 (1820)). Of course, the mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of international law. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975). "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation." *Filartiga*, 630 F.2d at 888. [4] In this case, treaties, case law and treatises establish that Argentina's conduct, as alleged by appellants, violates settled principles of international law.

International treaties and conventions dating at least as far back as the last century recognize the right of a neutral ship to free passage on the high seas. Broad international recognition of the rights of neutrals can be found in paragraph 3 of The Declaration of Paris of 1856: "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."

A more contemporary statement of the international concern and accord on this issue may be found in The Geneva Convention on the High Seas of 1958 (Convention on the High Seas), to which both Argentina and the United States were signatories. The Convention on the High Seas maps the general usage and practice of nations with regard to the rights of neutral ships in time of war. Article 22 of that treaty states that a warship encountering a foreign merchant vessel on the high seas may not board her without grounds for suspecting her of engaging in piracy, or the slave trade, or traveling under false colors. Even when there are grounds for such suspicion, the proper course is to investigate by sending an officer to inspect the ship's documents or even to board her, not to commence an attack. If such inspection fails to support the suspicions, the merchant vessel shall "be compensated for any loss or damage that may have been sustained." Article 23 of the Convention on the High Seas makes similar provisions for aircraft that have grounds to suspect a neutral vessel. Clearly, Argentina's alleged conduct in this case, bombing HERCULES and refusing compensation, violates the Convention on the High Seas. More recently, the Law of the Sea Convention of 1982 explicitly incorporated these provisions into its text. Argentina is a signatory to the Law of the Sea Convention and the United States has endorsed the relevant sections of it.

Other international accords adopted by the United States supporting a similar view of the rights of neutral ships include The London Naval Conference of 1909, the International Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention, 1907) and the Pan-American Convention Relating to Maritime Neutrality of 1928, to which Argentina was a signatory. No agreement has been called to our attention that would cast doubt on this line of authority. [424]

As to "judicial decisions recognizing and enforcing" the rights of neutral ships on the high seas, federal courts have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution. See, e.g., *Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 161, 1 L.Ed. 540 (1795); *The Lusitania*, 251 F. 715, 732–36 (S.D.N.Y.1918) (dictum); cf. The I'm Alone (Canada v. United States), 3 U.N. Rep.Int.Arb.Awards 1609 (1933). [5] Similarly, the academic literature on the rights of neutrals is of one voice with regard to a neutral's right of passage. See, e.g., Rappaport, "Freedom of the Seas," 2 Encyclopedia of Amer.For.Policy 387 (1978); Restatement of Foreign Relations Law of the United States (Revised) § 521 reporters' note 1, § 522 (Tent.Draft No. 6 1985).

In short, it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law. Indeed, the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas. Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law. See 4 W. Blackstone, Commentaries 68, 72. Argentina has cited no contrary authority. Accordingly, we turn to the jurisdictional ramifications of our holding that appellants have stated a claim of a violation of international law.

III. The Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of