wording of Article 1(4), the Protocol has no application to a war of national liberation unless the liberation movement undertakes to apply it and the 1949 Conventions; Article 96(3) was added for that purpose.

With respect to the views of Israel, as I told the Israeli representatives in 1977, I fully understand that, so long as the Palestinian problem is not resolved, Israel will not be able to become a party to the Protocol. The point I was making in the article is that the United States is not in the same situation as Israel and should neither view the Protocol through Israeli eyes nor conclude that it should reject the Protocol simply because Israel must do so. I cannot understand why Professor Rubin finds that repugnant.

While I believe that Protocol I is a treaty the United States would be well-advised to ratify, I attempted in my article to explain my reasons—and my disagreements with some of the views expressed by the Reagan administration—clearly and dispassionately, and I would hope that those who disagree with me would also try to be both clear and dispassionate.

TO THE EDITOR IN CHIEF:

The recent case of *Nelson v. Saudi Arabia*[1] marks the first time that a United States appellate court has asserted jurisdiction over a foreign sovereign for a tort committed wholly within that sovereign's territory. Does that mean the case was incorrectly decided?

Readers seeking a balanced view might have turned to the International Decisions section of this *Journal*. That section has customarily consisted of neutral reporting of important recent decisions, helping to serve the function of a "journal of record." Unfortunately, the write-up of the *Nelson* case that appeared in the July issue (85 AJIL at 577 (1991)) departs from this standard in important respects.

Its author, Matias A. Vega, is identified only as a member of the New York bar. For my part, I am the Nelsons' attorney and an editor of this *Journal*, as well as a member of the New York bar. My partisanship on this matter may thus be taken into account by the reader.

Mr. Vega's account, in text and extended footnotes, expresses a clear hostility toward every aspect of the decision reached by the Eleventh Circuit. The headnote characterizes the *Nelson* case as "sovereign immunity" and "exercise of police power." Sovereign immunity or lack thereof is of course what the case is about, so that much is fair. But it is emphatically not about the exercise of police power. The four men who picked up Scott Nelson at the hospital in which he was working, and who took him to a compound in downtown Riyadh, Saudi Arabia, were dressed in plain clothes and showed no badge, papers, or other authorization. At no time was Scott Nelson ever charged with a crime, brought before a magistrate or other official, tried, convicted, or sentenced. But he was tortured, crippled for life, and now suffers chronic post-traumatic stress.[2] The torture inflicted upon Mr. Nelson was not only a crime under Saudi law, but also a grave sin. According to the Koran, he who tortures another will himself be tortured by Allah in the afterlife.

[1] 923 F.2d 1528 (11th Cir. 1991), *reprinted in* 30 ILM 1171 (1991).

[2] Scott Nelson was found to have been tortured by Administrative Law Judge David P. Tennant, who qualified Mr. Nelson for disability benefits under the Social Security Act. *In the Case of* Scott J. Nelson, Dep't of Health and Human Services (Sept. 14, 1990). The independent Center for Victims of Torture found, in April 1990, that Mr. Nelson suffers from "catastrophic" post-traumatic stress disorder consistent with his reported history of torture in Saudi Arabia. *Case of* Scott J. Nelson, Summary of Barbara Chester, Ph.D., Center for Victims of Torture (Apr. 21, 1990).

Lawyers for Saudi Arabia, as well as the United States Department of State and the Department of Justice, which filed a Statement of Interest in the case urging the Eleventh Circuit to rehear the case en banc, tried repeatedly to characterize the torture as "police activity." Since police activity is quintessentially a sovereign function, they knew that if they could convince the court that Scott Nelson was a mere victim of police activity his case would be dismissed. Their mischaracterization tactic was not unfair to me, because I had an opportunity to refute it in my briefs and oral argument in court. But it is another matter when it is adopted in the *Journal*'s headnote and its account of the facts. The case note asserts that "the *Nelson* opinion is notable in that it permits the assertion of jurisdiction against a foreign state regarding the exercise of its police powers." Perhaps because of this characterization of the issue, the note writer ended his paragraph with the opinion that "[a] decision on whether to grant the petition [for rehearing] is pending." However, he will be interested to learn that the court of appeals en banc subsequently dismissed the petition for rehearing without dissent.

As a member of the New York bar, Mr. Vega should be sensitive to the procedural aspects of a case. The *Nelson* case was an appeal from a denial of subject matter jurisdiction. The writer should have known that "act of state" is an affirmative defense to a lawsuit and has no place in a challenge to the jurisdictional sufficiency. Yet he offers a discourse on the act of state doctrine. He speculates that "determining the motivations of police authorities" may be enough to invoke the act of state doctrine to change the result in the *Nelson* case. Hasn't he read the latest, definitive, unanimous decision of the Supreme Court on the act of state doctrine, *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*?[3] The Supreme Court has effectively dissolved the murk about "motivations" and "embarrassment" in lower-court opinions and scholarly literature. Nor does the author appear to be aware that the act of state doctrine is also part of international law. A threshold international question is whether a state has *acted*. Since Saudi Arabia expressly disavows torture and even criminalizes it, the act of torture cannot fairly be attributed to Saudi Arabia in advance of a claim on its part that it was an official act.[4]

Mr. Vega, like the attorneys for Saudi Arabia and the executive branch, believes that *Nelson* is "in marked contrast to the decision in *Arango v. Guzman Travel Advisors Corp.*"[5] and hence is an "apparent departure from precedent." To be sure, *Arango* is a relevant case, but the writer drastically misinterprets the case. The plaintiffs in *Arango* visited the Dominican Republic in response to tourist advertisements in the United States, but when they got there they were subjected to tortious mishandling by immigration officials. Those officials were looking for undesirable aliens, and the plaintiffs' names were on their list. On those facts, there was no connection between the tourist advertisements and the mishandling by immigration officials. For no matter what motivated the plaintiffs to visit the Dominican Republic, they were mishandled because their names were on a list. *Arango* is thus like two other relevant appellate decisions involving torts in foreign countries. In *Berkovitz v. Islamic Republic of Iran*,[6] an American citizen went to Iran to do a job, engaged in political activities, and was murdered in the course of those political activities. The court held: "Nothing about his murder, however, related to his job, except to the extent his job had brought him to Iran in the first place. This slight connection between the murder and the commercial activity will not

[3] 110 S.Ct. 701 (1990).

[4] It is unlikely that, upon remand, Saudi Arabia would raise the issue of the validity of the torture as an affirmative defense. To my knowledge, no state has ever admitted in any judicial proceeding that it has engaged in torture.

[5] 621 F.2d 1371 (5th Cir. 1980).

[6] 735 F.2d 329 (9th Cir. 1984).

suffice for purposes of subsection 1605(a)(2)."[7] And in *Gilson v. Republic of Ireland*,[8] the court said: "Section 1605's 'based upon' standard is satisfied if plaintiff can show a direct causal connection between his enticement in the United States and the misappropriations in Ireland giving rise to his claims for an accounting . . . ."[9] Since the plaintiff showed no such causal connection, the court did not assert jurisdiction over Ireland.

The *Nelson* case supplies the factual component that was missing from *Arango, Berkovitz*, and *Gilson*. Scott Nelson was hired in the United States to work as a monitoring systems engineer in King Faisal Specialist Hospital in Saudi Arabia. His job description required him to correct safety problems at the hospital. He spotted grease in certain oxygen supply valves that could endanger patients' lives, but his superiors at the hospital refused to do anything about his discovery. Mr. Nelson duly reported the situation to a visiting accrediting commission, to the severe embarrassment of the hospital administrators who, in retaliation, procured his torture. I argued to the court that, as far as a "nexus" is concerned, one could hardly imagine a closer causal connection than that presented by the *Nelson* case. In its opinion, the court held that Scott Nelson was injured for doing the very job he was hired in the United States to do.

The *Nelson* case, then, was a decision waiting to happen. It had been wholly prefigured by *Arango, Berkovitz*, and *Gilson*. It is a narrow case of statutory construction, whose importance may be more psychological than legal. Mr. Vega's account, however, makes the case factually into something it isn't, and then decries the presumed departure from precedent.

This situation should at least console those who fear that editors of this *Journal* exercise some sort of political control over what gets printed.

ANTHONY D'AMATO

Matias Vega replies:

I undertook two tasks in preparing the report on the *Nelson* case. First, I was to provide an accurate description of the facts in the case and the holding of the court on the important issues. The first six paragraphs fulfilled that goal; it is notable that counsel for the Nelsons makes no objection to the contents of those paragraphs. Second, I was to provide a brief critical analysis of the decision; that was done in the last four paragraphs of the review. It is a serious underestimation of the readers of this *Journal* to suggest that they are unable to ascertain when reporting ends and analysis begins.

It is incorrect to assert that in offering an analysis of the opinion I departed from accepted practice in the preparation of case reviews. One need only look at the review of the *Weltover* case, which immediately succeeds my review of the *Nelson* decision, in which Joseph D. Pizzurro, after setting forth the facts and the holding, criticizes the court for not distinguishing between separate entities of the Government of Argentina in its jurisdictional analysis. Counsel for the Nelsons is free to disagree with my analysis, but it is disingenuous to assert that in offering opinion and analysis I distorted the purpose of the International Decisions section.

I did not express "clear hostility toward every aspect of the decision." Lost in counsel's criticism is the fact that I concluded that at least one of the Nelsons' claims, that the hospital had a duty to warn Nelson that he was subject to arrest and torture in the ordinary course of performing his employment obligations, should survive the jurisdictional stage. That conclusion supported the decision of

[7] *Id.* at 332. The court is referring to 28 U.S.C. §1605(a)(2), a provision of the Foreign Sovereign Immunities Act of 1976.

[8] 682 F.2d 1022 (D.C. Cir. 1982).

[9] *Id.* at 1027 n.22. Mr. Vega does not cite either *Berkovitz* or *Gilson*.